

STATE OF MICHIGAN
COURT OF APPEALS

AMY JANELL BARDEN,

Plaintiff/Counter-Defendant-
Appellee,

v

TIMOTHY JAMES BARDEN,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
November 20, 2012

No. 307477
Tuscola Circuit Court
LC No. 09-025644-DM

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce. We affirm.

I. FACTUAL BACKGROUND

The parties were married in 1989 and have three children, two of whom were minors at the time of trial. Plaintiff testified that she filed for divorce because of an incident involving defendant, who had been drinking, fighting with another individual while holding a gun, and who was criminally charged because of his behavior. Defendant admitted responsibility for the breakdown of the marriage.

During their marriage, defendant and plaintiff worked at Barden's Hardware. Defendant's father owned 50 percent of the real estate and 40 percent of the business, with defendant and plaintiff owning the remainder. Defendant's father explained that he had received no money from the store in the last 10 years, he only worked there occasionally, and he did not expect to receive any payment for his interest in the business.

Defendant reported an income of \$34,216 on the parties' 2007 joint tax return, and \$35,777 on the 2008 return. Even though plaintiff was working between 45 to 55 hours a week at Barden's Hardware, she did not draw a salary from the business. However, plaintiff testified that defendant's W-2s represented significantly less money than the parties were taking out of the business. She explained that they took approximately \$1,000 in cash from the business each week. In addition to that, further cash was taken from the store and kept in a safe at the marital home. The most plaintiff observed in the safe at one time was \$30,000. They also took numerous household items from Barden's Hardware, on an as needed basis. Defendant testified

that while he knew cash was being taken, he did not know the amount. Plaintiff believed that defendant's true salary was upwards of \$50,000. At the time of trial, defendant testified that he earned \$1,800 a month and that although he still took cash from the register, it was only \$50.

Also during the marriage, the parties entered into a land contract for the marital home with defendant's father. Eventually, defendant's father initiated foreclosure proceedings, he was the highest bidder at the auction, and he purchased the property for \$185,000. A licensed real estate broker, who was present at the auction, testified that the value of the property was closer to \$240,000, although it was not uncommon for properties sold at auction to sell for less than their worth. The real estate broker also testified that during the auction there was a recess, defendant talked to some of the bidders, and this seemed to affect the bidding. At the time of trial, defendant was living in the marital home and was only paying utilities, the gas bill, and the television bill.

The trial court awarded defendant all the interest and title in Barden's Hardware, which was evaluated at \$350,000, but gave plaintiff a lien on the business for any potential tax liability. Plaintiff was awarded the parties' rental property and \$5,000 in attorney fees. The remaining property was divided equally between the parties, with plaintiff retaining ownership of the parties' 2003 Cadillac Escalade and defendant retaining ownership of the parties' interest in motor vehicles and personal property in his possession. The court awarded plaintiff spousal support in the amount of \$1,000 a month while she had two minor children in the home, \$1,500 a month while she had one minor child in the home, and \$2,000 a month if no minor children were in the home. Defendant filed a motion for reconsideration of the spousal support award, attempting to supplement the record with a copy of his 2010 corporate tax return. The court denied his motion without a hearing. Defendant now appeals

II. SPOUSAL SUPPORT

A. Standards of Review

Defendant argues that the spousal support award was in error. "We review a trial court's findings of fact related to an award of spousal support for clear error." *Myland v Myland*, 290 Mich App 691, 694; 804 NW2d 124 (2010). "The findings are presumptively correct, and the burden is on the appellant to show clear error." *Olson v Olson*, 256 Mich App 619, 629; 671 NW2d 64 (2003). "A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made." *Id.* If this Court determines that the trial court's findings of fact are not clearly erroneous, we must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 629-630.

Moreover, "[i]t is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion." *Loutts v Loutts*, __ Mich App __; __ NW2d __ (Docket No. 297427, issued September 20, 2012) (slip op at 3). "We also review for an abuse of discretion a trial court's decision whether to impute income to a party." *Id.* "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.* (internal quotations and citation omitted).

B. Findings of Fact

Defendant contends that the trial court erred in failing to consider relevant factors and failing to make specific findings of fact. We disagree. Contrary to defendant's claim, the trial court did make specific findings of fact regarding relevant factors.

"The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). The factors a trial court should consider include:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id.* at 726-727 (internal citation omitted).]

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). A review of the record reveals that the trial court properly made specific findings of facts concerning relevant factors.

The trial court determined that the duration of the marriage was almost 22 years and that both parties were in good health. It noted that plaintiff was 42 years old and defendant was nine years older. Regarding the past conduct of the parties, the court recognized that defendant admitted he was at fault for the breakdown of the marriage and there was no indication that plaintiff was anything other than a good mother and spouse. Further, when looking at wrongful conduct, the court found that defendant negatively impacted the amount of money in the marital estate "through his size, his influence and his power over the people" at the auction of the martial home.

In regard to income and the parties ability to pay, the court noted that while defendant only reported an income of \$32,000 a year, there also was evidence that approximately \$1,000 in cash was taken from the store on a weekly basis. Thus, the trial court made the following findings of fact:

So does he have income? Sixty grand. Does she have income? Yeah. Nine bucks an hour working at the hardware store. Immediately the marriage starts failing, she goes out, gets a job eight bucks an hour, now nine, probably gone up a little bit. Why do I say that? Because I think, number one, that as far as spousal support, the Court takes into consideration that disparity, the disparity that exists because of her earning power and his earning power. So where does

that leave you in the law is that it's my job to make up the difference when parties separate, when they go about their way.

The court then went on to consider the needs of the parties. It found that defendant was living rent free, but plaintiff was renting a house and driving to and from work. The court stated that plaintiff's income was close to zero if taking into consideration her commute and rent. The court also considered how much defendant was paying in child support, and adjusted the spousal support award depending on how much child support defendant had to pay.

The trial court's findings were sufficiently specific, especially considering that the significance of each of these factors varies from case to case.¹ The court also made it clear that it was taking into consideration the equities and attempting to be fair to both parties.² We find no error in the trial court's findings.

C. Defendant's Ability to Pay

Defendant also asserts that there were no specific findings of fact regarding his ability to pay spousal support. He contends that the trial court mistakenly adopted plaintiff's expectations without recognizing that defendant's income was less than \$60,000, especially now that he hired an employee, and that with living expenses and child support, he could not afford to pay the court ordered spousal support. Defendant argues that his testimony that he only was making \$1,800 a month and Barden Hardware's 2010 corporate tax return, which was not in evidence when the court rendered its decision, supports his position.

But, defendant overlooks the trial court's statements and the evidence produced at trial that his actual income was significantly higher than what he reported on his W-2s. Plaintiff testified that the parties took approximately \$1,000 in cash each week for their checking account, additional cash that was kept in a home safe, and products from the business. Considering that defendant's income may actually be higher than \$60,000 when taking into account the unknown sums available to place in the parties' safe, the fact that defendant hired an employee to replace plaintiff, and may have more expenses such as child support, does not transform the trial court's

¹ In a supplemental brief, defendant requests a new trial in light of our Supreme Court's decision in *People v Likine*, __ Mich __; __ NW2d __ (Docket Nos. 141154, 141181, 141513, issued July 31, 2012). However, the Court specifically limited its opinion in *Likine* to felony nonsupport cases, stating: "To determine whether a defendant has established impossibility *in the context of a felony nonsupport case*, we provide, for illustrative purposes only, a nonexhaustive list of factors for courts to consider." *Likine*, __ Mich at __ (slip op p 31) (emphasis added). Since this is not a felony nonsupport case, *Likine* is inapposite.

² As discussed more fully in the context of defendant's ability to pay and the division of real property, we also find that "the dispositional ruling was fair and equitable in light of the facts." *Olson*, 256 Mich App at 629-630. While defendant contends that the court failed to consider the source and amount of property awarded to the parties, since the property was divided roughly equally, we find no error in the trial court's decision.

ruling into one that is erroneous. The trial court was entitled to find that defendant's testimony that his income was only \$1,800 a month was not credible. "Special deference is given to the trial court's findings when they are based on the credibility of the witnesses." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). Since "we will not second-guess the trial court's determination that defendant presented a less than credible accounting of his finances[.]" we find that the trial court did not clearly err. *Stallworth v Stallworth*, 275 Mich App 282, 286; 738 NW2d 264 (2007).

D. Division of Real Property

Defendant also argues that the division of real property was unequal, which compounded the inequity of the spousal support award. A review of the record and the trial court's findings does not support him.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). While most of the assets were divided equally, defendant received the sole rights to Barden's Hardware and plaintiff received the sole rights to the rental property. The rental property was valued at approximately \$60,000 and based upon the store's inventory and the evaluation, the trial court found that the going concern value of Barden's Hardware was approximately \$300,000. It also found that including the real estate value, the business was worth \$350,000.

Defendant asserts that the value of Barden Hardware was severely miscalculated when taking into account the potential tax liability. However, it is not a *per se* abuse of discretion for a trial court to decline to consider tax consequences in the distribution of marital assets. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). Moreover, as the trial court noted, it cannot speculate regarding the scope of any future tax collection, if any. This is especially so considering neither party provided clear testimony regarding their financial behavior toward the business. Furthermore, while Barden Hardware may be liable for taxes, the business has a much higher value than the rental property awarded to plaintiff. Therefore, defendant has not demonstrated that the trial court erred in its division of property or that it rendered the spousal award inequitable.

E. Barden's Hardware

Defendant claims that the trial court erred in considering Barden's Hardware as marital property and in failing to recognize that his father had partial ownership of business. In regard to the separate property allegation, two statutory exceptions allow the invasion of separate property "when one party demonstrates additional need" or "when one party significantly assists in the acquisition or growth of the other party's separate asset[.]" *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009) (internal quotations and citations omitted); see MCL 552.23; MCL 552.401. While defendant argues that plaintiff did not contribute significant assistance to the growth of the separate asset, the record demonstrates that she worked without compensation 45 to 55 hours a week in addition to raising the parties' three children. That is significant assistance. It is significant enough to make the business a marital asset subject to division.

Defendant also argues that the 40 percent interest owned by his father should have been factored into the property settlement. However, the record established that defendant's father did not take anything out of or put anything into the business for many years. Defendant's father clearly testified that he did not expect to receive anything for his interest in the business. Moreover, the testimony established that the parties ran the business exclusively and received all income from it. Thus, the trial court was not in error.

F. Tax Fraud

Lastly, defendant claims that the trial court erred in failing to recognize that both parties committed tax fraud. In particular, defendant relies on the clean hands doctrine to allege that plaintiff should not be permitted to benefit by receiving over half of the parties assets. However, plaintiff did not receive an inequitable amount of the assets. Furthermore, "[s]pousal support is to be based on what is just and reasonable under the circumstances of the case." *Korth*, 256 Mich App at 289. The circumstances of this case are that both parties engaged in the tax fraud. It would not be an equitable result to deny plaintiff spousal support and allow defendant to receive all the proceeds from Barden's Hardware since he was equally to blame for the fraud. Since we are not firmly convinced that the spousal support was inequitable, the trial court's decision regarding spousal support must be affirmed. *Berger*, 277 Mich App at 727.

II. MOTION FOR RECONSIDERATION

A. Standard of Review

Lastly, defendant argues the court erred in denying his motion for reconsideration without a hearing. We review the trial court's decision regarding a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

B. Analysis

MCR 2.119(F) states:

(2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.

(3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

As illustrated from the language of the rule, there is no requirement that the trial court hold a hearing on a motion for reconsideration. Further, the trial court did not abuse its discretion in denying the motion. Defendant argues that the trial court erred when it denied his

motion because the 2010 corporate tax return was a true and accurate account of his income in 2010. However, based upon the testimony presented at trial, the trial court ruled that defendant's income was far above what defendant had been reporting. In light of the admitted tax fraud, the court's decision not to credit a document claiming to be an accurate accounting of the business income was within the range of principled outcomes. *Woodington*, 288 Mich App at 355.³ Moreover, a trial court "does not err by declining to consider legal arguments raised for the first time in a motion for reconsideration[.]" *Pierron v Pierron*, 282 Mich App 222, 264; 765 NW2d 345 (2009), or in "denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order[.]" *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008) (internal quotations and citation omitted).⁴

III. CONCLUSION

The trial court did not err in its spousal support award. It also did not abuse its discretion in denying defendant's motion for reconsideration. We affirm.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

³ Defendant also cited MCR 2.611(A)(g) in his motion for reconsideration, presumably attempting to reference MCR 2.611(A)(1)(g). Our analysis applies equally to the arguments defendant raises based on MCR 2.611(A)(1)(g).

⁴ Additionally, as recognized in the context of valuation of an asset, "[t]he determination of the proper time for valuation of an asset is in the trial court's discretion." *Woodington*, 288 Mich App at 355.