

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN L. WITBECK,

Plaintiff-Appellant,

v

BARBARA J. WITBECK,

Defendant-Appellee.

UNPUBLISHED

March 21, 2013

No. 310464

Osceola Circuit Court

LC No. 11-012762-DM

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of divorce. Because we find no clearly erroneous findings of fact or abuses of discretion in the division of the marital property and the calculation of spousal support, we affirm.

Plaintiff and defendant were married for 26 years, and have two adult children and one minor child together. Plaintiff provided for the family financially through his job at UPS and his small wood-burning stove business, while defendant maintained the home and raised the children. Plaintiff filed for divorce, citing a breakdown of the marriage relationship. Defendant did not counter-file for divorce, but answered plaintiff's complaint and filed a petition for custody, support, parenting time, and spousal support.

At trial, plaintiff testified that in the years leading up to his filing for divorce he worked 65 hours a week at his job and his small business, and that he suffered from fatigue. He further testified that defendant had agreed to get a job once the parties' youngest child began school, but that defendant refused to get a job when the time came. Plaintiff also complained of a lack of affection and intimacy, and accused defendant of raiding business accounts and taking out a home equity line of credit while the divorce was pending.

Defendant testified that plaintiff's request for a divorce took her completely by surprise, and that plaintiff refused her request to attend marriage counseling. Defendant denied that the parties had had a specific agreement about her returning to work after their youngest child began school, and testified that she only withdrew funds from business accounts and took out the line of credit because plaintiff had moved his money to new accounts and had completely cut her off financially. Defendant further testified that her recent attempts to obtain employment had been largely fruitless.

The court found that both parties were equally at fault for the divorce, and found that while defendant's relative lack of earning potential favored her in the division of marital property, defendant's unwillingness to contribute financially to the marital relationship favored plaintiff. Accordingly, the court found that the marital property was to be split as equally as possible. The court also found that defendant was to have primary physical custody of the parties' minor child, and that defendant was entitled to child support from plaintiff. Finally, the court weighed the spousal support factors and found that they favored an order of spousal support by plaintiff. The court ordered plaintiff to make the mortgage payments on the marital home in lieu of spousal support until the home sold, and then to make monthly spousal support payments until 2023.

On appeal, plaintiff first argues that the trial court's division of the marital property was inequitable, and that the trial court improperly favored defendant.

When reviewing a divorce judgment we must first review the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). We give special deference to a trial court's findings when based on the credibility of the witnesses. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007). We will not reverse findings of fact, such as a trial court's valuations of particular marital assets, unless the findings are clearly erroneous. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if, after a review of the entire record, this Court "is left with a definite and firm conviction that a mistake has been committed." *Id.* If this Court upholds the trial court's findings of fact, it "must decide whether the dispositive ruling was fair and equitable in light of those facts." *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003) (quotation omitted). The trial court's dispositional ruling is discretionary, and this Court should affirm that ruling unless it is "left with the firm conviction that the division was inequitable." *Id.* (quotation omitted). We review issues of law de novo. *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010).

The trial court's determination regarding a fair and equitable property division in divorce cases requires that it consider many factors, including: (1) the length of the marriage; (2) the source of the property or the parties' contributions toward its acquisition; (3) the parties' ages; (4) the parties' health; (5) the parties' life status; (6) the parties' needs and circumstances; (7) the parties' earning abilities; (8) the parties' past relations and conduct; and (9) any other equitable circumstances or general principles of equity. *Sparks*, 440 Mich at 159-160. There may be additional factors that are relevant to a particular case. *Id.* at 160. The trial court's determination of which factors are relevant will vary depending upon the facts and circumstances of each case. *Id.* The trial court need not give each factor equal weight, unless the circumstances dictate otherwise. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999). However, the trial court must "not assign disproportionate weight to any one circumstance." *Sparks*, 440 Mich at 158. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. *McNamara v Horner*, 249 Mich App 177, 188; 642 N.W.2d 385 (2002).

In this case, the trial court weighed the relevant factors and determined that they supported dividing the marital property as equally as possible. Plaintiff contends that the division of marital property favored defendant by \$19,642. Plaintiff's calculations fail to address that \$12,000 of this disparity is accounted for by a right of personal debt collection that was

granted to defendant, but which plaintiff testified at trial was unlikely to ever be collected. Plaintiff's calculations also fail to account for \$10,000 in cash on hand awarded to him as well as the value of the wedding and diamond rings that defendant was to return to him. When these additional assets are considered, the property division does not favor defendant. On this record, we cannot conclude that the trial court clearly erred by favoring defendant in the division of marital property.

Plaintiff further argues that any disparity in the division of property was compounded by the trial court's decision to not charge defendant's account for the \$12,000 in funds she withdrew from the parties' business accounts, as well as the court's decision to divide the value of the marital home's wood burning stove, which the parties agreed would be paid off the top of the proceeds from the sale of the wood burning stove business. The trial court clearly found, however, that the parties frequently comingled business and personal accounts, and that defendant was forced to withdraw from those accounts after plaintiff cut her off financially. Under these circumstances, we cannot conclude it was clear error to allow defendant to retain those funds. Further, despite plaintiff's assertions to the contrary, no agreement to pay for the home's wood burning stove from the proceeds of the business sale was ever established on the record. Accordingly, the trial court did not err by simply dividing the proceeds of the stove sale between the parties.

Therefore, we conclude that the trial court's property division was not an abuse of discretion because the division of property was equitable and in accordance with the trial court's findings of fact.

Next plaintiff argues that the trial court erred by awarding defendant spousal support. Whether to award spousal support is in the trial court's discretion, and the "trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable." *Gates*, 256 Mich App at 432-433. The trial court has the authority to award spousal support to either party in a divorce proceeding. MCL 552.23. The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished, and spousal support is to be based on what is just and reasonable under the circumstances of the case. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). When considering an award of spousal support, trial courts are to weigh the following factors:

"(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." *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

The trial court specifically analyzed each factor and found that an award of spousal support from plaintiff to defendant was justified because although the marital property was divided equally, plaintiff was far better situated to support himself in the future than was

defendant. Plaintiff raises a number of objections to the award of spousal support. First, plaintiff argues that defendant never alleged that she had a need for spousal support as required by MCR 3.206(A)(6). That rule, however, requires that a party allege need for support in a complaint for divorce. However, defendant never filed a complaint for divorce. She answered plaintiff's complaint, and that answer included allegations of need.

Next, plaintiff alleges that the trial court failed to make a specific finding of need with regard to spousal support. This argument is directly contradicted by the trial court's opinion, which makes findings with regard to each of the requisite factors. Plaintiff also alleges that the trial court failed to take into account defendant's failure to return to the workforce after the parties' youngest child started school, but that allegation is also contradicted by the record. The trial court found no explicit agreement between the parties, only that plaintiff thought such an agreement existed and that until a couple of years before the divorce plaintiff did not ask defendant to get a job. As such, plaintiff's arguments concerning the adequacy of the judicial fact-finding are without merit.¹

Finally, plaintiff alleges that the court erred by ordering support that was beyond plaintiff's capacity to pay because the award of spousal support yields him a monthly deficit of more than \$600. However, the record demonstrates that the trial court's spousal support award also left defendant with a deficit of \$546 a month. On the basis of the trial court's calculations, both parties would no longer have a deficit after about four years, assuming the marital home is sold. The fact that plaintiff's deficit is slightly greater than defendant's is reasonable in light of the trial court's finding that plaintiff is better situated to support himself in the future than defendant. The trial court specifically found that neither party would be able to maintain the marital standard of living following the divorce. The goal of spousal support is "to balance the incomes and needs of the parties so that neither party will be impoverished as a result of the divorce." *Gates*, 256 Mich App at 436 (quotation marks and citation omitted). Had spousal support in a lesser amount been ordered, defendant's deficit would be even greater, and such a result would be inequitable in light of the fact that plaintiff is much better situated to support himself than defendant. Moreover, the trial court specifically informed the parties that the award of spousal support was modifiable in the event either party experienced a substantial change in income. Finally, plaintiff has not submitted any detailed showing of inability to pay. In light of these facts, we cannot conclude that the trial court's spousal support order was an abuse of discretion.

Therefore, we conclude that the spousal support factors supported an award of support from plaintiff to defendant, and the trial court did not abuse its discretion by ordering payment of spousal support.

¹ Plaintiff also alleges that need cannot be established because defendant will have roughly \$250,000 in liquid assets following the division of marital property. However, a party should not be required to dissipate their marital assets during the period of career rehabilitation. *Zecchin v Zecchin*, 149 Mich App, 723, 735; 386 NW2d 652 (1986).

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause