

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Marriage of

Debbie Dee CARD,
Petitioner-Appellant,
and

Erick Eugene CARD,
Respondent-Respondent.

Lincoln County Circuit Court
17DR04752; A166512

Christopher Casebeer, Judge pro tempore.

Submitted January 4, 2019.

Jody Meeker filed the brief for appellant.

No appearance for respondent.

Before Armstrong, Presiding Judge, and Tookey, Judge,
and Shorr, Judge.

SHORR, J.

Award of spousal support reversed and remanded; other-
wise affirmed.

SHORR, J.

In this domestic relations case, wife appeals from a dissolution judgment entered by the trial court, raising two assignments of error. She first contends that the court erred by awarding her only three months of temporary, predisolution spousal support rather than the five months that she had requested. Wife also contends that the trial court erred when it denied her request for spousal maintenance support. For the reasons explained below, we conclude that the trial court abused its discretion, and we reverse and remand.

Wife requests *de novo* review. We decline to exercise our discretion to review *de novo*, because wife has not demonstrated that this is an “exceptional case” warranting such review. See ORS 19.415(3)(b) (court has discretion to apply *de novo* review in equitable actions); ORAP 5.40(8)(c) (courts will exercise discretion to review *de novo* only in “exceptional cases”); see also ORAP 5.40(8)(a) (appellants seeking such review “shall concisely state the reasons why the court should do so”). Accordingly, we are bound by the trial court’s findings of fact if they are supported by evidence in the record. *Berg and Berg*, 250 Or App 1, 2, 279 P3d 286 (2012).

The parties were married for 35 years. At the time of trial, husband was 58 and wife was 56. Husband had worked as a millwright from 1984 to 2011, but he was injured on the job and has not worked since. Husband had a net monthly income in the form of Social Security disability payments of \$1,934, which exceeded his living expenses by approximately \$800. Husband also had two retirement accounts with a total value of approximately \$18,000. Husband had approximately \$75,000 in medical debt, which had been outstanding since 2013. At the time of trial, husband had not made payments on that debt, but he told the trial court that “a certain amount” had been excused.

Wife has no employment history, having been the primary caretaker of the couple’s children, who were adults at the time of trial, and a homemaker for the entirety of the marriage. Wife is currently the primary caretaker of the couple’s 10-year-old grandson, although husband is the

grandson's legal guardian. Wife has been diagnosed with a number of medical conditions, including high blood pressure, anxiety, and a mass in her brain that requires frequent monitoring. At the time of trial, wife received \$735 per month in Social Security benefits and \$160 per month in food stamps, for a total monthly income of \$895. Wife's uniform support declaration listed monthly expenses of \$1,590, which did not include her common expenses such as home repairs. Accordingly, the trial court found that wife's monthly expenses exceeded her income by approximately \$700.

The couple's largest marital asset at the time of trial was a property in Blodgett (the Blodgett property). Husband and wife had lived on the property for much of the marriage, and wife continued to live on the property after the couple separated. The couple had executed a new land-sale contract in 2015 for the purchase of the property, under which they promised to pay the owner \$72,000 in monthly installments of \$600. At the time of trial, the couple owed \$56,800 on the contract. At trial, the court found, based on testimony by a real estate expert, that the Blodgett property was worth approximately \$107,500, which led the court to find that the couple had approximately \$40,000 in equity in the property. However, the court also found that a potential buyer would be unable to secure financing to buy the property, due to the poor condition of the buildings and the remote location and difficult access.

Husband initially made the monthly payments on the contract following the couple's separation in February 2017, but he stopped making payments in May of that year, approximately four months before the dissolution trial. Wife was unable to make any payments during that time. At trial, the property owner testified that he would consider foreclosing on the property if monthly payments did not resume.

In the dissolution judgment, the trial court awarded wife the Blodgett property and required her to assume the balance owing on the land-sale contract. The court also assigned to wife any child support payments received for the parties' grandson. The court awarded to husband the entirety of his two retirement accounts and assigned to

him responsibility for his medical debt. The court ordered husband to pay wife \$600 per month for three months as “temporary spousal support”—rather than the five months requested by wife—to cover a portion of the payments owed on the land-sale contract. The court awarded less than the five months that wife had requested, because the court found that, although husband had the ability to pay the full amount, wife had benefited from living on the property during the couple’s separation. The court determined that it was appropriate to “offset” the “temporary support award” on that basis.

The trial court denied wife’s request for spousal maintenance support, concluding that it would not be just and equitable under the circumstances to award wife the Blodgett property and to require husband to make monthly support payments. In denying spousal support under ORS 107.105, the court acknowledged husband’s greater income. But the court concluded that “that’s offset by the fact that I’m giving the majority of all the assets to [wife],” and then stated that, “if [wife] can’t make the \$600 a month payment, she can liquidate the [Blodgett] property and [obtain] somewhere around the value that her expert testified to.” Wife appeals, assigning error to those rulings.¹

We review the trial court’s ultimate determination about a “just and equitable” amount of spousal support for abuse of discretion. *Bailey and Bailey*, 248 Or App 271, 275, 273 P3d 263 (2012). Courts have a “range of reasonable discretion to fashion an equitable outcome,” and we do not undertake to “micro-manag[e] trial court decisions that disentangle the economic affairs of divorcing spouses.” *Cullen and Cullen*, 223 Or App 183, 190, 194 P3d 866 (2008). “We will not disturb the trial court’s discretionary determination unless the trial court misapplied the statutory and equitable considerations required by ORS 107.105.” *Berg*, 250 Or App at 2. In other words, we will reverse and remand or modify a judgment if the court’s discretionary determination is not a “legally permissible one.” *Larkins and Larkins*, 275 Or App 89, 97-98, 364 P3d 1006 (2015). Moreover, the trial court’s findings must be supported by the record, and we therefore

¹ Husband appeared *pro se* at trial and does not appear on appeal.

review the court's findings for evidence on the record. *Berg*, 250 Or App at 2.

SPOUSAL MAINTENANCE SUPPORT

We begin with wife's argument that the trial court erred when it failed to award spousal maintenance support. Spousal maintenance support is "a contribution by one spouse to the support of the other for either a specified or an indefinite period." ORS 107.105(1)(d)(C). The amount and duration of spousal support "should be based on circumstances existing at the time of dissolution." *Abrams and Abrams*, 243 Or App 203, 208, 259 P3d 92 (2011). In long-term marriages like the one in this case, "the primary goal of spousal [maintenance] support is to provide a standard of living to both spouses that is roughly comparable to the one enjoyed during the marriage." *Id.* at 207. Maintenance support "allows one financially able spouse to contribute to the support of the other, depending on the financial needs and resources of each party." *Id.* "The parties should be separated on as equal a footing as possible." *Mitchell and Mitchell*, 271 Or App 800, 811, 353 P3d 28 (2015).

Factors that the trial court considers when deciding a just and equitable amount and duration of spousal maintenance support include, but are not limited to

"the duration of the marriage; the age of the parties; the physical, mental, and emotional health of the parties; the standard of living established during the marriage; the parties' relative income and earning capacity; a party's training, employment skills, and work experience; the financial needs and resources of each party; the tax consequences to each party; a party's custodial and child support responsibilities; and any other factors that the court deems just and equitable."

Id. (citing ORS 107.105(1)(d)(C)(i) - (xi)). No one factor is necessarily dispositive. *Powell and Powell*, 225 Or App 402, 407, 202 P3d 183 (2009). The court has discretion to consider the statutory factors in light of its factual findings and other financial provisions of the judgment. *Hughes-Kuda and Kuda*, 286 Or App 554, 558, 399 P3d 478 (2017).

A trial court's authority over dissolution cases is "solely statutory." *Baumgartner and Baumgartner*, 95 Or App 723, 726, 770 P2d 965 (1989). Although a court is authorized to divide the marital property between the parties under ORS 107.105(1), that statute generally "does not authorize a court to award property *as* spousal support." *Johnson and Price*, 280 Or App 71, 79, 380 P3d 983 (2016) (internal quotation marks omitted; emphasis added); *see also Brown and Albin*, 219 Or App 475, 480, 183 P3d 207 (2008) (stating same). An exception exists when the assets awarded in the property division may also generate new income that may be considered in determining future spousal support payments. *See Johnson*, 280 Or App at 79 (summarizing cases involving the exception). At the same time, "property division and support are related," and the spousal support award must be considered in light of the other provisions of the dissolution judgment, especially the property division and child support. *Haggerty and Haggerty*, 283 Or App 200, 204, 391 P3d 982 (2016).

Here, the trial court denied wife's request for spousal maintenance support despite acknowledging husband's greater income because, the court explained, the need for support was "offset" by the court's award of the Blodgett property to wife. The court stated that wife could sell the property and generate funds, if she could not afford the monthly payments. For the reasons explained below, we conclude that the failure to award spousal maintenance support under the facts of this case does not represent a choice among legally correct alternatives.

First, the Blodgett property was a marital asset at the time of the dissolution, and the trial court should have treated it solely as a "divisible asset in [the] dissolution proceeding" rather than as a form of support. *Brown*, 219 Or App at 480. As we have explained previously, "if a property interest 'is a part of the marital estate at the time of dissolution, its allocation to the parties is generally by its nature an award of *property*, not of support[,] even if its allocation is to enable the parties to achieve financial self-sufficiency.'" *Johnson*, 280 Or App at 79 (quoting *Dornbusch and Dornbusch*, 195 Or App 61, 68, 96 P3d 877 (2004)).

(emphasis in *Johnson*)). An award of property that, like the Blodgett property, does not produce regular income does not reduce the need for monthly support. Thus, to the extent that the trial court awarded wife the Blodgett property as a *substitute* for future spousal support, that was error.

The trial court also erred when it assumed that, by awarding wife the Blodgett property, she was receiving what the court alternately stated was “100 percent of [the couple’s] net worth” and “the lion share *** of all the assets.” The court’s finding that wife was receiving all or nearly all of the marital assets was the basis for its ultimate ruling denying support. The record does not support that finding, however.

Husband’s retirement accounts were a marital asset, and there is a rebuttable presumption that wife contributed equally to them. *Kunze and Kunze*, 337 Or 122, 134, 92 P3d 100 (2004); ORS 107.105(1)(f)(A) (“A retirement plan or pension or an interest therein shall be considered as [marital] property.”). At trial, husband made no effort to rebut the presumption of equal contribution, and the court did not independently find that the presumption had been rebutted. Nevertheless, the court awarded husband the entirety of both accounts. Husband’s retirement accounts were not an insubstantial portion of the couple’s total marital assets. Even assuming that the court was correct to award wife \$40,000 in equity in the Blodgett property, the \$18,000 in husband’s retirement accounts is a sizeable share of the combined value of the total marital assets. Thus, it is not factually correct to characterize the Blodgett property as “100 percent” of the couple’s net worth and, as discussed further below, it likely was not even the “lion’s share” of the couple’s assets, due to the fact that the couple was attempting to purchase the property pursuant to a land-sale contract.

The trial court overstated the value of the Blodgett property to wife at the time of dissolution. The court stated that, by awarding wife the Blodgett property, she had access to “some [\$]40,000 of equity.” The \$40,000 amount represented the difference between the outstanding balance on the land-sale contract at the time of trial and the estimated

value of the property according to wife's expert. But, under a land-sale contract like the one in this case, "title remains with the seller until the purchase price is paid in full," and, if the buyer defaults, the seller has the option to "declare the contract at an end, repossess the property, and retain any payments made to date." *Ochs v. Albin*, 137 Or App 213, 220, 903 P2d 906 (1995) (quoting *Bedortha v. Sunbridge Land Co., Inc.*, 312 Or 307, 311, 822 P2d 694 (1991)). The buyer's "equity" can be wiped out at any time by a default and does not represent equity that has fully vested with the purchaser. The parties were already several months in arrears at the time of dissolution, and the seller testified at trial that he would likely consider foreclosure in the event that payments did not resume in the near future. Wife had an extremely limited income, and her expenses exceeded her income. Further, the property would be difficult to sell because it was impossible to borrow against due to its poor condition and location. There was some possibility that wife would default on the land-sale contract and lose her equity in the property. Thus, wife's ability to actually use that potential equity was speculative on this record. Cf. *English and English*, 223 Or App 196, 211, 194 P3d 887 (2008) (noting that, with respect to certain marital assets, "any consideration of liquidity would be speculative").

To summarize, we defer to a trial court's discretion in determining the just and equitable amount of spousal maintenance support in a given case, and we do not reverse a trial court based on our own weighing of the factors. The trial court's discretion is limited, however, to choosing among the range of legally permissible outcomes based on findings supported in the record. Here, we conclude that the court abused its discretion when it entered a judgment that did not award wife spousal maintenance support based on the court's incorrect conclusion that the property was a substitute for spousal support and its unsupported finding that, by awarding wife the marital property, she was receiving all or nearly all of the marital assets.² The trial court did not

² Many of the statutory factors weigh in favor of awarding wife spousal maintenance support. See ORS 107.105(1)(d)(C). However, we do not undertake to reweigh those factors here, but remand this matter to the trial court for further proceedings in light of this opinion.

merely consider the spousal maintenance support award in the context of the property division and the entire dissolution judgment, but, rather, the court used the award of real property as an improper substitute for a spousal maintenance support award.

“TEMPORARY SUPPORT”

We turn to wife’s argument that the trial court erred when it ordered husband to pay wife “temporary support” of \$600 for three months rather than the five months that wife had requested.³ Wife requested temporary support when she filed her petition for dissolution of marriage in March 2017. Wife intended to use that money to make the monthly payments on the land-sale contract for the Blodgett property. Husband made the monthly payments in March, April, and May 2017, but he made no payments between May and the entry of judgment in November 2017. According to the testimony of the property’s seller, husband confided that he stopped making the monthly payments not out of necessity but because he hoped to pressure wife into settling their dissolution more quickly. Wife was unable to make the monthly payments herself, and so, at the time of trial, the land-sale contract was a number of months in arrears.

Under ORS 107.095(1)(f), a trial court may order one spouse to pay the other spouse for the “payment of installment liens and encumbrances” on the real or personal property of the parties from the time the petition for dissolution is filed until the court enters the general judgment of dissolution.⁴ Here, the court found that husband had the ability to make the requested payments, but the court awarded only three payments, because it found that wife “got the enjoyment and use of staying on the property,” which “had a value in and of itself.”

Under the circumstances of this case as summarized above, we conclude that the trial court’s ruling was

³ Husband paid wife \$800 toward those payments at the end of trial. Accordingly, the trial court entered a judgment ordering husband to pay the balance of the three ordered payments—\$1,000.

⁴ Under ORS 107.095(1)(f), the trial court “may provide” for “the temporary use, possession and control of the real or personal property of the parties or either of them and the payment of installment liens and encumbrances thereon.”

an abuse of discretion. Even assuming that there may have been some intrinsic value to wife in remaining on the Blodgett property during the separation and before the dissolution, wife's inability to make payments put wife at risk of foreclosure and loss of the property, including any equity, as discussed above. The court's failure to award the payments put the marital property at a greater risk of loss, which threatened the *status quo* that may be maintained by a "temporary support" order.

Further, because the trial court found that husband had the ability to make the monthly payments before dissolution, it was not just and equitable for the court to award wife only three of the five months in property payments that she requested on the basis that she had the benefit of continuing to live on the property. ORS 107.095(1)(f) anticipates that temporary payments may be necessary to pay for liens on property, in part, because one of the parties may continue to live on the marital property pending the dissolution judgment and not have the financial ability to maintain the *status quo*. That is, the statute anticipates the benefit that the court seemingly used as an "offset" against wife. See *Binnell and Binnell*, 153 Or App 204, 207, 956 P2d 1003 (1998) (stating that temporary support payments "are to provide assistance to a spouse and children while a dissolution is pending").

To summarize, under ORS 107.095(1)(f), a court may allow one party the "temporary use" of real property and also order the other party to pay for liens on the property until the entry of the general judgment. The trial court erred in offsetting wife's use of the property against husband's obligation to pay for the lien on the property.

Award of spousal support reversed and remanded; otherwise affirmed.