

FILED: May 16, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

KEITH RYDER BERG,
Petitioner-Respondent,

and

DEBRA LYNN BERG,
Respondent-Appellant.

Jackson County Circuit Court
052380D2

A146447

G. Philip Arnold, Judge.

Argued and submitted on February 03, 2012.

George W. Kelly argued the cause and filed the briefs for appellant.

Laura Graser argued the cause and filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

WOLLHEIM, J.

Affirmed.

1 WOLLHEIM, J.

2 In this appeal from a judgment dissolving the parties' 18-year marriage,
3 wife assigns error to the spousal support award of \$15,000 per month for five years,
4 contending that either the duration or the amount of support should be increased. Wife
5 also assigns error to the property division, contending that the trial court erred in treating
6 as a marital obligation indebtedness that the parties incurred for the remodel of their
7 kitchen after the filing of the petition for dissolution. We conclude that the trial court did
8 not err or abuse its discretion in either the spousal support award or the property division,
9 and affirm.

10 On appeal, wife does not seek *de novo* review of the spousal support award.
11 ORS 19.415(3)(b). She contends, however, that the award of support is not just and
12 equitable, as required by ORS 107.105(1)(d). The ultimate determination of what
13 amount and duration of support is just and equitable is discretionary. [Bailey and Bailey](#),
14 248 Or App 271, 275, 273 P3d 263 (2012). We will not disturb the trial court's
15 discretionary determination unless the trial court misapplied the statutory and equitable
16 considerations required by ORS 107.105. See [Kunze and Kunze](#), 337 Or 122, 136, 92
17 P3d 100 (2004) (applying standard in context of review of property division). Said
18 differently, the trial court's award will be upheld if, given the findings of the trial court
19 that are supported by the record, the court's determination that an award of support is
20 "just and equitable" represents a choice among legally correct alternatives. See [Gay and](#)
21 [Gay](#), ___ Or App ___, ___ P3d ___ (May 16, 2012) (applying review standard); [Shelton](#)
22 [and Shelton](#), 196 Or App 221, 233-34, 100 P3d 1101 (2004), [adh'd to on recons](#), 197 Or

1 App 391, 105 P3d 944 (2005) (applying review standard). The trial court's findings are
2 reviewed for evidence in the record. Porter and Griffin, 245 Or App 178, 182, 262 P3d
3 1169 (2011).

4 The parties were married in August 1992 and separated in 2005, when
5 husband filed for dissolution of the marriage. They had been married for 17 years at the
6 time of trial in May 2009. At the conclusion of trial, husband was age 67, and wife was
7 age 55. The parties each have children from other relationships, but there are no children
8 from the marriage.

9 Husband has been a dentist since 1968. Although he was 67 years old by
10 the end of the trial and testified that he could foresee slowing down in his practice, he has
11 no immediate plans to retire. The trial court found that husband's gross monthly income
12 is approximately \$42,000.

13 Wife began working as husband's office manager shortly after the parties
14 were married, and it is undisputed that she made significant contributions to the business
15 and made it more profitable. Wife was paid for her work and, beginning in 1995, the
16 parties drew equal incomes from the dental practice. Wife hopes to retrain as a massage
17 therapist, and the trial court found that she has a potential monthly earning capacity of
18 \$4,167.

19 In 2006, after the petition for dissolution had been filed, husband decided to
20 remodel the kitchen in the parties' home on Old Cherry Lane. He did so with wife's
21 consent, incurring additional debt for the remodel in the range of \$180,000 to \$190,000.
22 In part to pay for the remodel and in part to consolidate credit card debt, husband took out

1 a second mortgage on the Old Cherry Lane house, increasing the amount owed from
2 \$63,000 to \$253,000. At trial, the parties described different understandings of how that
3 debt would be borne. Wife testified that she went along with husband's plan to remodel
4 the house, which he would be living in, only on the condition that he would be solely
5 responsible for the cost. Husband testified that he did not remember specifically agreeing
6 to that arrangement. Rather, husband believed that the remodel expense would translate
7 into an identical increase in the value of the home and the parties' equity; thus, he might
8 have agreed with wife that the remodel expense would have no adverse financial impact
9 on her.

10 The parties owned considerable property at the time of dissolution, and, by
11 and large, the trial court split those assets equally, with each party receiving property
12 valued at approximately \$1.24 million. The issues on appeal concern only the award of
13 spousal support and the characterization and division of the debt for the remodeling of the
14 kitchen in the Old Cherry Lane house.

15 We first address the issue of spousal support. Wife initially requested a
16 combination of compensatory, maintenance, and transitional support, stepped down from
17 \$18,000 per month for three years to \$10,000 per month for three years and, finally, to
18 \$5,000 per month indefinitely. At trial, wife testified that, in the interests of becoming
19 financially independent and in lieu of indefinite support, wife would accept \$25,000 per
20 month for a period of three years, followed by \$20,000 per month for five years. In a
21 trial memorandum to the court, wife's counsel continued to suggest an award of indefinite
22 support as an alternative. The trial court awarded wife maintenance support of \$15,000

1 per month for five years.

2 In determining what amount of maintenance support is just and equitable,
3 the court considers the duration of the marriage, the ages of the parties, the physical and
4 emotional health of the parties, the standard of living during the marriage, the parties'
5 relative incomes and earning capacities, their training, employment skills, and work
6 experiences, their financial resources, the tax consequences, and the parties' needs. ORS
7 107.105(1)(d)(C). Wife contends that, considering the length of the marriage, the self-
8 indulgent lifestyle of the parties during the marriage, wife's high monthly expenses
9 (wife's uniform support affidavit listed monthly expenses of approximately \$35,000), and
10 husband's much greater earning capacity, a just and equitable support award must be
11 either indefinite in the amount of \$15,000 per month, or for a period of eight years at the
12 higher amounts requested by wife at trial, so that she could save for retirement.

13 Husband responds that, at trial, wife explicitly expressed a preference
14 against indefinite support and should not now be heard to contend otherwise. Further,
15 husband asserts that the parties' lifestyle during the marriage, although high, included the
16 accumulation of considerable debt for which husband remains responsible and that he
17 cannot afford to pay wife support that would maintain that lifestyle.

18 The trial court did not make any express findings with respect to spousal
19 support or give any explanation for the amount of spousal support or why it limited
20 support to 5 years. As for the amount, we can assume that the court found that \$15,000
21 per month in support, along with wife's anticipated earnings and the proceeds of the
22 considerable property awarded to her, would allow wife to maintain a comfortable life

1 style not overly disproportionate to that enjoyed during the marriage. That determination
2 is supported by the record.

3 As for the duration of the award, we agree with wife that, in a marriage of
4 this length involving a large disparity in earning capacities, one might expect an award of
5 longer duration. *See Cullen and Cullen*, 223 Or App 183, 190, 194 P3d 866 (2008) (in a
6 long-term marriage, the primary goal of maintenance support is to provide a standard of
7 living comparable to the one enjoyed during the marriage). However, as noted, the trial
8 court did not make any findings explaining its award of support. Given husband's age at
9 the end of the trial (67), his health (husband had had prostate surgery and had previously
10 suffered and recovered from a stroke), and the nature of his work, there is evidence from
11 which the trial court could have found that it was unlikely that husband would work past
12 the age of 72. Our role is not to second guess the trial court's reasoning or substitute our
13 judgment for that of the trial court. We cannot say that either the amount or duration of
14 the award determined by the trial court to be just and equitable was legally
15 impermissible, *i.e.*, was an abuse of discretion.

16 Our analysis is similar with respect to the property division. The dispute
17 centers on the extent to which the parties' additional indebtedness for the remodel of their
18 home should be treated as marital debt. After husband had filed the petition for
19 dissolution, the parties apparently agreed that, post-dissolution, he would continue to live
20 in the marital residence, which he had owned before the parties were married. As
21 previously noted, husband wished to make an extensive remodel of the home and he
22 gained wife's permission to incur debt for that purpose. In fact, wife participated in the

1 remodel, selecting carpet and paint. Husband took out a second mortgage on the Old
2 Cherry Lane house for the purpose of paying for the remodel and consolidating the
3 parties' credit card debt. At the time of trial, the outstanding balance on the second
4 mortgage was \$253,637.

5 The evidence shows that the parties had different understandings as to how
6 that additional indebtedness would be treated in the dissolution. Wife testified that she
7 gave her permission for the remodel only on the condition that husband alone would be
8 liable for the increased indebtedness due to the remodel, as the remodel would be for his
9 benefit exclusively, and that she did not believe she should share in the full amount of the
10 second mortgage. She believed that all but \$63,518 of the second mortgage is
11 attributable to the remodel.

12 Husband held a different view of the parties' understanding, testifying that,
13 although he believed that wife thought he would bear the entire responsibility for the
14 debt, he also understood that the increase in equity in the property after the remodel
15 would offset the additional indebtedness. In fact, although the remodel cost between
16 \$180,000 and \$190,000, it added only about \$40,000 to the value of the house. In
17 husband's view, the entire outstanding balance on the second mortgage is marital debt.
18 The trial court seems to have imposed a compromise solution. In determining the net
19 marital asset value of the Old Cherry Lane house for purposes of the property division,
20 the court reduced the market value by \$155,655 on account of the second mortgage.

21 On appeal, wife contends that the trial court's decision to allocate more than
22 \$63,518 as marital indebtedness due to the second mortgage on the Old Cherry Lane

1 property constitutes legal error, because the court has failed to enforce the parties' pre-
2 dissolution agreement. Leaving aside the question of whether the failure to enforce a
3 predissolution agreement as to marital debt under these circumstances could be legal
4 error, here, there is evidence from which the trial court could have found that the parties
5 were not actually in agreement and had different understandings of how the indebtedness
6 would be treated.

7 ORS 107.105(1)(f) requires that the division of marital property be "just
8 and proper in all the circumstances." As previously noted, the trial court awarded each
9 party property valued at approximately \$1.24 million. As with spousal support, the trial
10 court has discretion to determine the division of property in dissolution. *Kunze*, 337 Or at
11 136. Our review of that division is for whether the trial court properly exercised its
12 discretion, *i.e.*, chose a legally permissible division of property in light of the "just and
13 proper" standard. Viewed in light of the entire division of property, which, as noted,
14 included an equal division of the parties' substantial holdings,¹ we cannot say that the trial
15 court abused its discretion in determining that \$155,655 of the second mortgage was
16 marital debt.

17 Affirmed.

¹ The trial court equally divided the parties' assets having a net value of approximately \$2.48 million. Other substantial assets were ordered sold and the proceeds divided equally.