

STATE OF MICHIGAN
COURT OF APPEALS

KAREN F. SHAVER,

Plaintiff-Counterdefendant/
Appellee Cross-Appellant,

v

STEVEN VERLAND SHAVER,

Defendant-Counterplaintiff/
Appellant Cross-Appellee.

UNPUBLISHED

June 28, 2007

No. 265754

Iosco Circuit Court

LC No. 03-000457-DO

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant Steven Shaver appeals as of right the trial court's divorce judgment, and the order denying his motion for reconsideration. Plaintiff Karen Shaver cross-appeals the trial court's denial of attorney fees, the valuation of the Bay Party Store (a commercial property), and the amount of spousal support awarded. We affirm in both the principal appeal and in the cross-appeal.

I

Defendant contends that the trial court clearly erred in valuing the Laidlaw property and the parties' jewelry, and that an inequitable division of marital property thus resulted. Regarding the Laidlaw property, defendant asserts that the trial court erred in adding to the appraised value of the property. Regarding the jewelry, defendant asserts that the court refused to value the parties' jewelry. We conclude neither argument has merit.

This Court reviews the trial court's findings of fact, such as the court's valuations of particular marital assets, for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if, after review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* This Court accords special deference to a trial court's factual findings when based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If this Court upholds the trial court's factual findings, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

A divorce judgment must include a determination of the parties' property rights. MCR 3.211(B)(3); *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). The goal in distributing marital assets is an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). To reach an equitable division, the trial court should consider the length of the marriage, each party's contribution to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996). The determination of relevant factors will vary with the circumstances of each case, and no single factor should be given undue weight. The trial court must make specific findings regarding the factors it determines are relevant. *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992).

For purposes of dividing property, marital assets are typically valued at the time of trial or the time judgment is entered, although the court may, in its discretion, use a different date. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997).

A

The trial court concluded that the driveway and culvert that were added to the Laidlaw property at a cost of \$20,000 were added after the property was appraised for \$100,000 in 2003, and thus added \$20,000 to the appraised value of the property. The trial court valued the equity in the Laidlaw property at \$28,000, (\$120,000, less the \$92,000 land contract balance) and awarded it to defendant.

Defendant contends that the valuation of the Laidlaw property was improper, because the evidence established that the improvements to the property, especially the driveway, were completed before the October 21, 2003 appraisal, and therefore were included in the \$100,000 appraisal amount. He also contends that the court erred in using the cost of the improvements because plaintiff supplied no evidence that showed the improvements enhanced the value of the property by the same amount.

While defendant correctly observes that the court erred in stating that plaintiff testified regarding the improvements, defendant's own testimony at trial contradicts his arguments on appeal. Defendant testified at trial that there was a culvert installed in 2002, that rather than pay cash, he traded that project for floor coverings, and that it never had an exact market worth. However, defendant also testified that an additional culvert and driveway were added in August or September of 2004, and had an estimated value of \$20,000 -- \$12,000 for the driveway and \$8,000 for the culvert.

At the hearing on defendant's motion for reconsideration, defense counsel contended that defendant had previously testified that the culvert was added after the 2003 appraisal but that the driveway was added before, and therefore the property should have been valued at \$108,000. While the testimony may have been confused, defendant gave testimony that would support the court's findings. Defendant testified at trial that the culvert and driveway were added together in August or September of 2004, which is after the October 2003 appraisal was done. The 2003 appraisal of the Laidlaw property states under the category "Driveway" "Grass/Gravel." This

supports our reading of defendant's trial testimony as meaning that the driveway was installed after the appraisal, not before.

We conclude that the trial court did not clearly err in valuing the Laidlaw property.¹

B

Defendant contends that the lower court's distribution of the jewelry was unfair and inequitable, and that by refusing to value the jewelry, the court acted contrary to the record by implying that the jewelry has no value. Plaintiff asserts that the trial court properly awarded each party the jewelry in their personal possession because the appraisal values the jeweler testified to at trial were not appropriate – as the jeweler himself testified.

The record supports plaintiff. The jewelry's replacement value was appraised during the marriage at \$40,511.20. The jeweler who had performed the appraisals testified at trial that for divorce case purposes, estate values typically would be used to determine a fair price, not replacement values. Neither party had a current estate value appraisal done for the divorce proceedings, thus the trial court had no such values to review. While the court could have used the jeweler's approximation that the estate value is roughly one-half of the appraised value, it was not obliged to apply that blanket determination. Nor was the court obliged to order the jewelry sold and divided, where it was clear that both parties intended that plaintiff keep her jewelry.

Defendant argues that *Olson, supra*, supports that the trial court is obligated to sua sponte value and divide property, and that its failure to do so constitutes clear error. We disagree. *Olson* is distinguishable because in that case, the trial court had two conflicting expert evaluations to decide between. In this case, the lone jeweler testified that he did not have proper appraisal values of the jewelry. The three other cases defendant cites are also distinguishable. *Steckley v Steckley*, 185 Mich App 19, 23; 460 NW2d 255 (1990), involved two varying expert testimonies regarding plaintiff husband's interest in franchises. In *Lee v Lee*, 191 Mich App 73, 75-76; 477 NW2d 429 (1991), this Court held that the trial court erred by requiring parties to provide expert testimony of the value of their home under the threat of having it sold. Finally, in *Wiand v Wiand*, 178 Mich App 137, 145-146, 443 NW2d 464 (1989), this Court held that the trial court's estimation of the value of the defendant's assets, including interest in patents, formulas, and a company, was within its discretion. None of these cases support defendant's argument that the trial court was obligated, on its own, to value the jewelry.

II

Defendant also argues that the trial court clearly erred in awarding plaintiff spousal support. We disagree.

¹ Defendant's remaining arguments need not be addressed in light of his trial testimony.

This Court reviews the trial court's factual findings for clear error. *Beason, supra* at 805. If the trial court's findings are not clearly erroneous, this Court must decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks, supra*, 440 Mich at 151-152. The trial court's decision regarding spousal support must be affirmed unless this Court is firmly convinced that it was inequitable. *Id.* Spousal support is awarded in the trial court's discretion. *Gates, supra* at 432. The principal objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and spousal support is to be based on what is just and reasonable under the circumstances. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Factors that should be considered 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 the parties; 5) the parties' ages; 6) the abilities of the parties to pay spousal support; 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, supra* at 631. Under certain circumstances voluntarily unexercised ability to earn income may be considered. *Moore, supra* at 654.

A

Defendant contends that the trial court improperly imputed income to him, imputed too little income to plaintiff, and that plaintiff is capable of gainful employment. He also argues that because plaintiff received substantial liquid assets in the divorce settlement, and will receive social security benefits at the age of 62, she should receive short-term rehabilitative alimony at best.

Plaintiff asserts that she was properly awarded spousal support, and that the trial court did not impute income to defendant, but rather, concluded defendant's gross income was \$135,000 based on the testimony and tax returns defendant submitted. She further argues that defendant failed to proffer evidence that she was in good health and capable of gainful employment.

Defendant's arguments are unsupported by the record. The trial court considered the eleven factors set forth in *Olson, supra*, before determining the plaintiff receive \$2,500 per month in spousal support (\$30,000/year) with defendant's obligation to cease upon death or remarriage of the plaintiff.

The record establishes that the trial court did not impute income to defendant, but rather determined defendant's income from evidence presented at trial, including income tax returns. The court's imputation of a minimum wage annual salary to plaintiff was in keeping with her testimony regarding her poor health and limited work experience. Plaintiff testified that during the marriage she ran a daycare from home, volunteered at her children's school, and worked for defendant's Advanced Flooring company for the purpose of qualifying for social security, so that both she and defendant could retire early. Defendant presented no evidence to the contrary. He asserts on appeal that plaintiff worked for Advanced Flooring until the divorce proceedings, driving to various cities to pick up supplies. However, plaintiff testified that she stopped that work after her colon surgery (about 3 years before the instant trial). Defendant also failed to

offer proof contrary to what plaintiff presented regarding her health generally. Importantly, plaintiff was 58 years old at trial in 2005, while defendant was 49.

Under these circumstances we find no error in the trial court's spousal support award.

III

On cross-appeal, plaintiff asserts that the trial court abused its discretion in denying her attorney fees, where defendant's income exceeded six figures and plaintiff's income is low –and then only by way of imputation. We do not agree.

A trial court's decision regarding awarding attorney fees is reviewed for abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). Attorney fees in a divorce action are not recoverable as of right, but rather, are awarded where necessary to preserve a party's ability to carry on or defend an action. *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989); MCL 552.13(1).

We note preliminarily that both parties' briefs inadequately represent the record, which shows that plaintiff's counsel received attorney fees a number of times before trial, and never requested an award of attorney fees at trial or thereafter. Further, plaintiff's counsel prepared the proposed judgment of divorce, per the trial court's instructions, and it provided that each party was to pay its own attorney fees. The judgment entered by the trial court states that each party shall pay its own attorney fees. There is no indication in the record that plaintiff's counsel requested attorney fees at trial (or after trial, except \$500.00 for having to prepare a third motion to enforce spousal support and debt payment), nor is there documentation in the record of the balance owing for plaintiff's attorney fees and costs.

Plaintiff's framing of the issue as the trial court having "denied" her attorney fees is misleading. There was no such request. Plaintiff nowhere cites to the record to support that she sought attorney fees at trial and we found no such reference. Further, even if plaintiff had requested attorney fees at trial, the record is devoid of documentation of fees and costs outstanding as of the trial.

Under these circumstances, we conclude that the trial court did not abuse its discretion by ordering that each party pay his/her own attorney fees.

IV

Plaintiff also asserts on cross-appeal that the trial court erred in under-valuing the Bay Party Store. We disagree.

This Court reviews the trial court's findings of fact, such as the court's valuations of particular marital assets, for clear error. *Beason, supra* at 805. A finding is clearly erroneous if, after review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* For purposes of dividing property, marital assets are typically valued at the time of trial or the time judgment is entered, although the court may, in its discretion, use a different date. *Byington, supra* at 114 n 4.

Plaintiff asserts that the trial court erred by under-valuing the party store by subtracting \$137,000 from it – the worst-case-scenario cost of environmental liability, without testimony that the scenario was certain. Plaintiff proposes that this Court order the judgment amended to evenly distribute whatever sum is left between the two parties, if after the environmental clean-up takes place, costs to defendant are less than \$137,000.

Defendant argues that the trial court properly exercised its discretion in its valuation of the Bay Party Store by carefully weighing multiple factors, including expert testimony and the value to plaintiff of being unburdened of any responsibility for the environmental clean-up. Defendant also contends that plaintiff offered no testimony to dispute the figures that were provided by his expert witness.

The record supports defendant. Larry Engelhart, an employee of the State of Michigan Department of Environmental Quality, testified that there are underground gasoline storage tanks on the Bay Party Store property that create environmental liabilities for the owners, and that there had been five leaks on the property. Defendant's environmental consultant, geologist Larry Campbell, testified regarding his assessment of the potential liabilities of the leaking gas tanks. Campbell concluded that there was a gas plume going into Lake Huron that would require four years of monitoring, and estimated the initial cost of such monitoring to be around \$37,000. He estimated that if this monitoring shows that remediation is necessary, the costs will be around \$100,000, in addition to the initial \$37,000 monitoring fee. Campbell also testified that this \$137,000 figure would be the worst-case scenario, but that if the clean-up were performed by a larger consulting firm, that figure could double. Campbell explained that there are multiple ways to repair the problem, and depending on its gravity and what solution is decided on, it could take from one to seven years past the initial four-year monitoring period to do so.

Defendant is correct that plaintiff failed to provide any testimony to dispute the figures that his expert, Campbell, provided. Defendant is also correct that the trial court has discretion in making a valuation, and where such valuation is in the range testified by experts there is no clear error.² The trial court determined the actual value of the Bay Party Store to be \$113,000, and awarded it to defendant. The court came to this conclusion by subtracting the \$137,000 estimated cost of the environmental cleanup from the \$250,000 gross value of the property that estate appraiser Daniel Benjamin provided. The trial court specifically stated that plaintiff was free of any further responsibility for the environmental cleanup costs of the property.

Under these circumstances, we conclude that the trial court did not clearly err in valuing the Bay Party Store.

V

Plaintiff's final argument on cross-appeal is that the trial court's spousal support award is insufficient. She asserts that after a long-term marriage, her age being 58, and her health poor, her income (i.e., her imputed income and asset interest) will be less than half of defendant's.

² See *Sullivan v Sullivan*, 175 Mich App 508; 438 NW2d 309 (1989), and *Rickel v Rickel*, 177 Mich App 647; 442 NW2d 735 (1989).

This Court reviews the trial court's factual findings for clear error. *Beason, supra* at 805. If the trial court's findings are not clearly erroneous, this Court must decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks, supra*, 440 Mich at 151-152. The trial court's decision regarding spousal support must be affirmed unless this Court is firmly convinced that it was inequitable. *Id.*

Spousal support is awarded in the trial court's discretion. *Gates, supra* at 432. The principal objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and spousal support is to be based on what is just and reasonable under the circumstances. *Moore, supra* at 654. Factors that should be considered 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 the parties; 5) the parties' ages; 6) the abilities of the parties to pay spousal support; 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, supra* at 631. Under certain circumstances voluntarily unexercised ability to earn income may be considered. *Moore, supra* at 654.

As discussed *supra* in issue II, the trial court weighed eleven factors set forth in *Olson, supra*, in determining that plaintiff receive \$2,500 per month in spousal support (\$30,000/year). Defendant is correct that plaintiff did not offer any evidence regarding her living expenses at trial, and that plaintiff's appellate brief does not cite to the record. Nor does plaintiff's appellate brief offer any figures regarding her financial needs – she only asserts that the trial court's judgment is unfair.

Given plaintiff's failure to support her claim, we find no error in the trial court's award of spousal support.

We affirm both in the principal appeal and the cross-appeal.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray