

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN R. JUDGE,

Plaintiff-Appellee/
Cross-Appellant,

v

JOELLYN JUDGE,

Defendant-Appellant/
Cross-Appellee.

UNPUBLISHED

December 29, 1998

No. 202191

Eaton Circuit Court

LC No. 95-000007 DO

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce. The trial court awarded defendant \$299,000 from the marital estate, and awarded plaintiff \$281,600. The court also awarded defendant \$1,500 a month in periodic alimony for six years, and further ordered plaintiff to cover defendant's automobile expenses for two years and her health insurance for three years, and to pay \$10,000 toward defendant's attorney's fees. Defendant argues that the trial court's provision for alimony, and its division of the parties' marital assets, when considered together, constitute an inequitable disposition. On cross-appeal, plaintiff contests the trial court's order requiring him to contribute to payment of defendant's attorney's fees, and argues that the trial court erred in failing to provide that defendant's periodic alimony payments terminate upon defendant's death. We affirm.

I. Defendant's Issues

Defendant challenges the trial court's award of alimony as too low in light of the court's division of the marital assets, arguing that the court should have awarded her greater periodic sums, and on a long-term, if not permanent, basis. Conversely, defendant argues that her award of only slightly more than half of the marital estate is inequitable in light of her alimony award. We find no error in the court's judgment concerning either alimony or the division of the marital estate.

When apportioning a marital estate, the trial court's goal is to reach an equitable division in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Although there is no requirement that each spouse receive a mathematically equal share, the court must

provide a clear explanation for any significant departures from congruence. *Id.* at 114-115. “When dividing the estate, the court should consider the duration of the marriage, the contribution of each party 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.” *Id.* at 115. These factors are of varying significance depending on the facts of the case, and the factors need not be weighed equally if the circumstances suggest otherwise. *Id.*

A divorce court has the prerogative to award alimony, as provided by statute:

(1) Upon entry of a judgment of divorce . . . , if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . , the court may further award to either party the part of the real and personal estate of either party and alimony out of the estate real and personal, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. [MCL 552.23(1); MSA 25.103(1).]

The standard of review with regard to awards of alimony was set forth in *Ianitelli v Ianitelli*, 199 Mich App 641; 502 NW2d 691 (1993):

Although findings of fact in divorce cases are reviewed under a clearly erroneous standard, dispositional rulings such as whether and how much alimony to award are reviewed de novo. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. The ruling should be affirmed unless the appellate court is left with the firm conviction that the decision was inequitable. [*Id.* at 642 (internal quotation marks and citations omitted).]

When determining whether to award alimony to either party, the court should consider “the length of the marriage, the parties’ ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case.” *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). “The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party.” *Id.*

Defendant testified at trial that her monthly expenses totaled \$2,900 a month, but the trial court made a factual determination that her monthly expenses were \$2,400. The court considered defendant’s testimony that her living expenses included \$350 a month for clothes, \$200 a month for gifts for her children and grandchildren, and \$350 a month for groceries. The evidence of record leads us to conclude that the court did not clearly err in adjusting defendant’s representations downward by \$500 a month.

The parties had been married thirty-one years at the time of trial. The trial court did not choose to focus on the issue of fault regarding either party’s responsibility for the failure of the marriage. However, the trial court noted the great disparity between the parties’ earning capacity: plaintiff is a businessman earning between \$100,000 to \$150,000 a year, while defendant works less than half time at \$5 an hour. Defendant had since 1965 eschewed full-time outside employment in favor of being a

full-time wife and mother. Further, defendant has only the beginnings of a college education, which she wishes to continue with the goal of becoming financially independent. Defendant admits that there is no reason that she could not attempt to acquire full-time employment. Although defendant is middle aged, and thus stands to begin any new career path at the beginning when typically others her age, such as plaintiff, have progressed to the advanced stages of their careers, the trial court's award to defendant of the slightly greater portion of the marital assets, along with her six years of periodic alimony, fairly provides her with the opportunity develop job skills in order to become gainfully employed and financially self sufficient.

We note that defendant does not face the burden of making mortgage payments, the parties having paid cash for the condominium in which defendant now lives. Further, the judgment of divorce requires plaintiff to pay for defendant's car and car insurance for two years, and for defendant's medical, optical, and dental insurance for three years. Moreover, the trial court ordered plaintiff to pay \$10,000 for defendant's attorney's fees.

These considerations suggest that defendant should be able to maintain something close to the lifestyle to which she is accustomed while preparing to become self sufficient. Accordingly, we conclude that the trial court's decisions concerning alimony and division of the estate were fair and equitable.

II. Plaintiff's Issues

On cross-appeal, plaintiff argues that the trial court erred by failing to provide expressly that defendant's periodic alimony award would terminate upon her death. We disagree.

The circuit court has the authority to modify an alimony award upon a showing of changed circumstances. *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993), citing MCL 552.28; MSA 25.106. However, an exception exists for alimony in gross, which is non-modifiable absent a showing of fraud. *Id.* The statute provides as follows:

On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and subject to section 17, *the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance . . .*, and may make any judgment respecting any of the matters that the court might have made in the original action. [MCL 552.28; MSA 25.106 (emphasis added).]

“Alimony in gross is a sum certain and is payable either in one lump sum or in periodic payments of a definite amount over a specific period of time.” *Bonfiglio, supra* at 63. The trial court's statutory power to modify periodic alimony has superseded the common law rule that the death of either party necessarily abates alimony. *Flager v Flager*, 190 Mich App 35, 36; 475 NW2d 411 (1991).

In the instant case, the trial court stated clearly that only the monthly alimony payment is modifiable. The court recognized that the monthly payment would be terminable upon defendant's

remarriage. Similarly, although the court did not mention that the alimony was terminable upon defendant's death, such an occurrence would quite obviously constitute a change in circumstances on the basis of which plaintiff could petition the court to modify his obligation to continue the payments. Because that avenue remains available to plaintiff in the event of defendant's premature death, the trial court committed no error in declining expressly to provide for that possibility at this time.

Finally, plaintiff argues that the trial court abused its discretion by ordering him to pay \$10,000 toward defendant's attorney's fees. We disagree.

In a divorce action, a court may award a party "any sums necessary to enable the . . . party to carry on or defend the action, during its pendency." MCL 552.13(1); MSA 25.93(1). "An award of legal fees in a divorce action is authorized when it is necessary to enable the party to carry on or defend the suit." *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997), citing MCR 3.206(C)(2). Further, attorney's fees may be awarded when the party requesting payment has been forced to incur the fees as a result of the other party's unreasonable conduct during the course of the litigation. *Id.* "A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

In the instant case, as observed above, there is a great disparity in the respective parties' earning abilities. Defendant's present lack of marketable skills suggests that it is unlikely that she will succeed in obtaining a well-paying, full-time job in the immediate future. Although defendant received a slightly larger portion of the parties' marital assets, she would be required to invade those assets to pay her attorney at present. Defendant's present earnings and alimony income cannot be considered adequate to cover her living expenses, her plans to continue her education, *and* her attorney's fees. Accordingly, we hold that the trial court did not abuse its discretion in ordering plaintiff to pay \$10,000 toward defendant's attorney's fees.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell

/s/ William C. Whitbeck