STATE OF MICHIGAN

COURT OF APPEALS

SHARRY LYNN GUTHRIE,

Plaintiff-Appellee,

v

GARY LEE GUTHRIE,

Defendant-Appellant.

UNPUBLISHED
March 18, 1997

No. 194544
Oakland Circuit Court
LC No. 94-476645-DM

Before: Taylor, P.J., and McDonald and C. J. Sindt,* JJ.

PER CURIAM.

Defendant, Gary Lee Guthrie, appeals as of right from the circuit court's April 11, 1996, judgment of divorce. We affirm the lower court's rulings, but remand the case for correction of a mathematical error in the computation of the amount of child support to be paid by defendant.

On appeal, defendant first asserts that the lower court erred by refusing to consider evidence of fault with respect to the cause of the breakdown of the marriage in making its determination on property distribution and alimony. This is a question of law that is reviewed de novo on appeal. *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 294; 537 NW2d 258 (1995).

Although there is no specific formula for distributing marital assets or for determining whether alimony is awarded, certain factors have been identified for the trial court's consideration, including fault for the breakdown of the marriage, if any. *Sands v Sands*, 442 Mich 30, 35; 497 NW2d 493 (1993); *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993). In this case, by the time of trial, the issues left to be resolved by the trial court were narrow, concerning the amount of liquid assets that should go to plaintiff pursuant to a refinancing of the marital home, the amount of alimony plaintiff was to receive for an agreed-upon five years, and the amount of child support to be paid by each party. The parties had been through mediation and a Friend of the Court hearing, and the trial court was familiar with the case through several motions filed by the parties during the pendency of the proceedings.

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* Circuit judge, sitting on the Court of Appeals by assignment.

At the beginning of trial, the court stated that it would entertain no further arguments concerning fault, finding that the parties were equal on the issue. Defendant contends that this precluded him from effectively presenting his case and deprived the court of the ability to consider plaintiff's marital misconduct and culpability for the breakdown of the marriage. However, in actuality, the record demonstrates that defendant had ample opportunity to present evidence of fault.

The trial court stated that it found the parties to be equally at fault after rereading and examining the file. The file studied by the court contained defendant's briefs in support of and in opposition to the various motions filed by the parties, as well as defendant's trial brief, which listed a litany of defendant's fault contentions, focusing mainly on defendant's assertions that plaintiff had created severe financial difficulties for the family. In addition, defendant was allowed on cross-examination to testify about plaintiff's agreement to become employed if defendant would buy a home beyond the family's budget, and plaintiff's failure to perform her end of the bargain once the home was purchased. Therefore, taking into account the narrow issues to be decided by the court, the fact that the court was already familiar with the case and the contentions of the parties, and the evidence contained in the file and presented at trial regarding fault, the lower court did not commit error requiring reversal in its consideration of fault as a factor in property division and alimony.

Defendant next contends that the trial court abused its discretion in awarding physical custody of his minor children, Leslee and Stefanee, to plaintiff, because the court failed to make the appropriate findings of fact. We disagree.

Generally, in reviewing a custody order, the great weight of the evidence standard applies to the lower court's findings of fact, and the abuse of discretion standard applies to the trial court's decision regarding to whom custody is ultimately granted. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 879-890; 526 NW2d 889 (1994).

The determination of custody in a divorce action is governed by the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq*. The act mandates that custody disputes are to be resolved in the child's best interests and sets forth factors by which this determination must be made. MCL 722.23; MSA 25.312(3). Generally, a court must consider these factors and state findings and conclusions with respect to each one. *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). However, in this case, on April 13, 1995, an evidentiary hearing was heard before the Oakland County Friend of the Court concerning the issues of custody and visitation. Plaintiff and defendant stipulated that the recommendation of the referee conducting the hearing would be binding.

The Friend of the Court referee recommended that the parties be awarded joint legal custody of the minor children, with defendant being awarded physical custody of Jennifer, and plaintiff being awarded physical custody of Leslee and Stefanee. Although stipulations of law are not binding on courts, stipulations of fact are sacrosanct. *DeRush v DeRush*, 218 Mich App 638, 641; 554 NW2d 332 (1996). Therefore, the trial court did not err by failing to place its findings on the record, as the findings of fact had been stipulated to by the parties. In complying with the provisions of the stipulation, the trial court did not abuse its discretion in awarding physical custody of Leslee and Stafnee to plaintiff.

Finally, defendant contends that the trial court erred in its determination of child support by including overtime earnings in its calculation of his net income and by applying the split custody formula instead of the shared economic responsibility formula. We disagree.

A bifurcated standard of review is used for examining a lower court's award of child support; with findings of fact reviewed for clear error, and the lower court's ultimate disposition being subject to de novo review. *Edwards v Edwards*, 192 Mich App 559, 562; 481 NW2d 769 (1992).

In this case, the trial court did not err in its finding that defendant's net income should include overtime earnings. Although the amount of child support is to be determined by application of the child support formula developed by the state Friend of the Court Bureau in the Michigan Child Support Formula Manual, effective October 10, 1990, the trial court may deviate from the Friend of the Court support formula if it determines that application of the formula would be unjust or inappropriate. MCL 722.27(2); MSA 25.312(7)(2), MCL 552.16(2); MSA 25.96(2).

Here, the Friend of the Court recommended defendant pay child support in the amount of $131 a week for the minor children, Leslee and Stefanee. At trial, the court discussed the Friend of the Court recommendation with counsel, clarifying that the award of $131 dollars a week for two children was calculated on the basis of an annual income of $54,080. Extensive testimony was elicited at trial that defendant's salary for 1995 had been $82,000 due to excessive overtime. However, defendant further testified that his position had been recently involuntarily changed, and defendant produced a letter from his current supervisor stating that overtime in the future would not be significant.

Despite defendant's assertion that his future overtime earnings would be minimal, defendant admitted on cross-examination that since he began his new job on December 11, 1995, to the time of trial on February 26, 1996, he had worked overtime on two of the eleven Saturdays that had elapsed. On the basis of this testimony, the court, in rendering its decision, stated that it would add $6,980 as estimated overtime to the base salary of $54,080. The Michigan Child Support Formula Manual, § II(C), specifically states that overtime income should be included in the computation of a party's net income. In adding overtime earnings here, the trial court stated that, although it did not believe that it could look beyond the letter relative to the fact that overtime was going to be scarce, it nonetheless felt it necessary to note that, as a practical matter, defendant had "exercised a certain percentage of weekends already of doing overtime." We would not have reached a different result in the trial court's place.

However, the judgment of divorce incorrectly states that defendant must pay child support in the amount of $222 a week. This figure is based on an order that defendant pay $240 a week for Leslee and Stefanee, offset by the court's order that plaintiff pay $28 in child support for Jennifer. We remand to the trial court for entry of an order setting child support to be paid by defendant in the amount of $212 per week from the date of the order appealed, April 11, 1996.

Regarding defendant's assertion that the shared economic responsibility formula should have been used by the Friend of the Court instead of the split custody formula, defendant failed to properly preserve this issue for appellate review and, therefore, we will not address it here.

Affirmed, but remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt