STATE OF MICHIGAN

COURT OF APPEALS

RANDALL WAYNE DAVIS,

Plaintiff-Appellee,

v

SANDRA KAY DAVIS,

Defendant-Appellant.

UNPUBLISHED
November 23, 1999

No. 212274
Cass Circuit Court
LC No. 97-428 DM

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant, Sandra Kay Davis, appeals as of right from a judgment of divorce. We reverse and remand.

The parties were married in 1971 and had two children, born in 1978 and 1983. Plaintiff filed a complaint for divorce in 1997 and the trial court entered the judgment of divorce on May 20, 1998.[1] As part of the judgment, the court awarded defendant spousal support "in gross" (sometimes referred to herein as "alimony") of $300 per week, limited to three years or until defendant's death or remarriage. The judgment further provided that the parties had joint legal custody of the parties fifteen-year-old minor child, with plaintiff having physical custody. At the time of trial, the parties' nineteen-year-old adult child resided with plaintiff in the parties' marital home, attended Southwestern Community College on a full-time basis and was not employed.

In her first issue on appeal, defendant contends that the trial court erred in considering plaintiff's financial contribution to their adult child in deciding its award of alimony. We agree. Although findings of fact in divorce cases are reviewed under a clearly erroneous standard, dispositional rulings such as the award of alimony are reviewed de novo. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993). 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, and the trial court's ruling should be affirmed unless the appellate court is left with the firm conviction that the decision was inequitable. *Sparks, supra*, 440 Mich at 151-152. However, when a trial court's findings of fact are based on an erroneous view of the law, the clearly erroneous standard is inapplicable. *Beason v Beason*, 435 Mich 791, 805-806; 460 NW2d 207 (1990).

Questions of law are reviewed de novo. *People v Sierb*, 456 Mich 519, 522; 562 NW2d 781 (1998).

The trial court has discretion to award alimony under MCL 552.23(1); MSA 25.103(1), which provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody 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.
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> In determining whether to award alimony, the trial court should consider the following relevant factors: 1) the past relations and conduct of the parties; 2) the length of the marriage; 3) the ability of the parties to work; 4) the source and amount of property awarded to the parties; 5) the age of the parties; 6) the ability of the parties to pay alimony; 7) the present situation of the parties; 8) the needs of the parties; 9) the health of the parties; 10) the prior standard of living of the parties and whether either is responsible for the support of others; and 11) general principles of equity. *Lee v Lee*, 191 Mich App 73, 80; 477 NW2d 429 (1991); *Parrish v Parrish*, 138 Mich App 546, 554; 361 NW2d 366 (1984). See also *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992) (a trial court may award alimony "as it considers just and reasonable," after considering the ability of either party to pay, the character and situation of the parties and all other circumstances in the case). The trial court should make specific findings of fact as to each factor relevant to the case. *Ianitelli, supra* at 643.

During closing argument, plaintiff encouraged the trial court to fashion an alimony award which accounted for the support he provided to both children, including payment for the adult child's college expenses:

> Now, on the issue of alimony . . . He's said he had bills to pay, he has paid these bills, he has had two [d]aughters that he's basically cared for – hasn't gotten a dime in support with respect to either child – is paying for one child to go to college, the other child in school.
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> * * *
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> Now, we are here to seek and find the fairness of the Court and I would ask the Court to review and consider the matter, that there are two children that are gonna have to – one is gonna have to finish high school, one's gonna be finishing college, they're gonna

> be living with the Plaintiff – somebody's got to pay these bills and I don't think the Court can expect this man to be working 12 hours a day, seven days a week . . . .

After the trial, the court made specific findings as to each of the eleven relevant factors used to determine whether defendant was entitled to alimony. As to factor ten, the prior standard of living of the parties and whether either is responsible for the support of others, the court stated:

> I did take this into consideration in the determination of alimony. The Plaintiff is obligated, because he is the custodial parent, to provide support for his [minor daughter]. He is also providing support for another child, although he is not legally obligated to pay for college, is assisting in that endeavor.

Given these findings by the trial court, we conclude that the court erroneously considered plaintiff's voluntary support of the parties' adult child in awarding alimony. A trial court may not, as a matter of law, consider the support voluntarily provided by one party to an adult child when awarding alimony. *Lesko v Lesko*, 184 Mich App 395, 404-405; 457 NW2d 695 (1990). See, e.g., *Kilbride v Kilbride*, 172 Mich App 421, 431; 432 NW2d 324 (1988), in which this Court held that the trial court did not err when it failed to consider the defendant's voluntary payment of college expenses in setting alimony. If one party chooses to support an adult child living at home and attending college, the other party should not be penalized. *Fulton v Fulton*, 143 Mich App 187, 191; 371 NW2d 522 (1985). Here, the trial court effectively required defendant to support her adult child by reducing the alimony paid by plaintiff, and in so doing penalized defendant for plaintiff's voluntary payment of support and college expenses for their adult child.

Furthermore, we note that MCL 552.16a(2),(4); MSA 25.96a(2),(4) prohibits a court from ordering post-majority child support after a child reaches nineteen years and six months of age unless the parties agree to such an order. Here, MCL 552.16a(2), (4); MSA 25.96a(2), (4) prohibited the trial court from ordering post-majority support for the parties' adult child because that child was more than nineteen years and six months of age and neither party presented an agreement to provide post-majority child support. We will not allow a court "to order support for adult children through the back door by alimony where it cannot order it through the front door by child support." *Lesko, supra* at 405. Accordingly, we direct the trial court on remand to redetermine the alimony award without any consideration of plaintiff's decision to support the parties' adult child and assist in paying for the child's college education.

Next, defendant contends that the trial court erred in awarding her alimony of $300 per week for a maximum period of three years. We agree. As set forth above, the trial court erroneously considered plaintiff's support and payment of college expenses for the parties' adult child in determining the alimony award. In addition, the trial court's alimony award was neither fair nor equitable in light of the facts presented in this case. In the process of awarding alimony, the trial court must make an attempt to balance the incomes, needs and abilities of each party "in a manner that will not impoverish either party in the process." *Zecchin v Zecchin*, 149 Mich App 723, 735; 386 NW2d 652 (1986). Plaintiff earned approximately $137,000 in the year prior to trial, which is equivalent to a gross weekly income of approximately $2,634, while defendant earned a gross weekly income of approximately

$140. Given the parties' 26-year marriage and the enormous disparity in the parties' gross income, we find that the alimony award of $300 per week for three years is grossly insufficient. In reaching our conclusion, we observe that the trial court determined its alimony award without specific findings of fact as to either defendant's reasonable living expenses or the amount of plaintiff's income. Accordingly, we direct the trial court on remand to make additional findings of fact regarding defendant's reasonable living expenses and the amount of plaintiff's income to be considered in the alimony award.

Finally, defendant contends that she is entitled to an award of attorney fees in the amount of $3,000 for pursuing this appeal. This Court may award appellate attorney fees in a domestic relations action on appeal from an alimony award. *Wiley v Wiley*, 214 Mich App 614, 616; 543 NW2d 64 (1995). An award of attorney fees in a domestic relations action is authorized when necessary to enable the party to carry on or defend the action. MCL 552.13(1); MSA 25.93(1); MCR 3.206(C); *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). However, because the amount of alimony the trial court will award defendant wife on remand is unknown, we remand the issue of appellate attorney fees to the trial court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] We note that the judgment was not filed until May 21, 1998.