STATE OF MICHIGAN

COURT OF APPEALS

MURRAY B. DAVIS,

Plaintiff-Appellant,

v

MARSHA D. DAVIS,

Defendant-Appellee.

UNPUBLISHED
April 3, 1998

No. 197902
Oakland Circuit Court
LC No. 95-490113-DM

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

On August 21, 1996, the trial court entered an amended judgment granting the parties a divorce. On appeal, plaintiff challenges numerous portions of the judgment of divorce. We affirm in part, reverse in part, and remand.

Around the time that he filed for divorce in January 1995, plaintiff learned for the first time that he might not be the biological father of two of the three minor children who were born during the marriage. These children, born respectively in 1983 and 1984, had been raised by and considered by plaintiff to be his children from the time of their birth. Eventually, during the proceedings, the parties stipulated that he was not, in fact, the biological father of those two children. Rather, they were conceived by defendant during a long term, adulterous relationship. Because the parties stipulated and because the trial court acknowledged that plaintiff was not the biological father, paternity was uncontested at trial. In spite of the fact that plaintiff was not the biological father of the two children, he was ordered to pay one-half of the child support obligations to those children. The biological father was ordered to pay the remainder.

On appeal, plaintiff argues that it was improper for the trial court to order that he pay any portion of the child support obligations or health care expenses for the two children at issue. We are unable to give a definitive answer based on the record before us. Several times this Court has held that a non-biological parent may be considered as a parent or may be obligated to pay child support. The circumstances where we have done so vary.

In *Nygard v Nygard,* 156 Mich App 94; 401 NW2d 323 (1986), this Court determined that where the defendant married the plaintiff knowing that the child she was carrying was not his and where the defendant subsequently held himself out to be the parent of that child, he was estopped from denying his support obligations when the parties divorced. See also *Johnson v Johnson,* 93 Mich App 415; 286 NW2d 886 (1979). In *Atkinson v Atkinson,* 160 Mich App 601; 408 NW2d 516 (1987), the child was conceived and born during the marriage; the plaintiff and child acknowledged a close, father-son relationship; the plaintiff desired to have the relationship continue and to have the rights accorded to a father; and the plaintiff was willing to support the child. This Court held that under those circumstances, the plaintiff, who was not the biological father, would be considered a parent. *Id.* at 610.

> In other words, we recognize that a person who is not the biological father of a child may be considered a parent against his will, and consequently burdened with the responsibility of the support for the child. By the same token, in being treated as a parent, he may also receive the right of custody or visitation. It is the logical extension of *Johnson* to recognize that, under certain circumstances, a person who is not the biological father of a child may be considered a parent when he desires such recognition and is willing to support the child *as well as wants the reciprocal rights of custody or visitation.* [*Id.* (emphasis added).]

In *Johns v Johns,* 178 Mich App 101; 443 NW2d 446 (1989), the parties were involved in a heated, post-judgment, custody battle. This Court held that where the plaintiff held himself out for more than fifteen years to be the father of a child who was born during the marriage and was included in the judgment of divorce, he could not escape his support obligations even though he contested paternity after the divorce. This Court ruled that where the father had reared the child as his own, he was estopped to deny the child was his. *Id.* at 106. We also ruled that the judgment of divorce, where plaintiff was determined to be the father, was binding on the plaintiff in any future actions. *Id.* at 107.

Although the cited cases are not on point with the case at hand, they are instructive. Our courts have been fairly consistent in holding that where a father raises a child as his own during a marriage, he can be estopped from denying support to the child[1]. We have also tied the rights and privileges of parenthood to support responsibilities. See *Atkinson, supra.*

In this case, the children at issue were conceived during the marriage and were raised as defendant's own for approximately a decade. Plaintiff indicated that the children considered him to be their father. He perceived himself as their father and engaged in the responsibilities of a father during the parties' marriage. Moreover, there are indications in the record that plaintiff wished to have the privileges and rights normally afforded to a parent even after learning that the children were not his. The only *Atkinson* factor absent in this case is the willingness of defendant to take on the responsibility of paying child support. Plaintiff has continued, however, to ask in this court, as he did in the trial court, to maintain a relationship with the children, assuming that this is in the children's best interest. Where a non-biological parent wishes to have all the rights and privileges of a parent to children he raised as his own, we do not believe that he should be relieved of his responsibilities to those children.

Defendant claimed at oral argument that he did not wish to have the rights of a parent afforded to him. He claimed, as he had noted in his brief, that his status should be likened to that of a grandparent, having all of the privileges and none of the responsibility. We find this argument disingenuous, particularly in light of the fact that plaintiff requested joint legal custody of the children even after he knew that they were not his biological children. The trial court took into account that plaintiff sought joint legal custody when it determined that he should not escape total obligations to the children. We do not liken his status to that of a grandparent so as to relieve him of responsibility to children whom he raised as his own and with whom he wishes to maintain a relationship. We therefore conclude that this matter should be remanded to the trial court so that plaintiff can state unequivocally whether he desires the rights and privileges of a parent to these children. If he does not, he shall not be required to pay child support. In turn, he will not be granted the privileges of parenthood.

On appeal, plaintiff also challenges the trial court's ruling regarding the property distribution; the marital assets were split equally among the parties. Plaintiff argues that because he was not at fault in contributing to the breakdown of the marriage, the distribution should have been 70/30. We disagree.

The primary objective in distributing marital assets in a divorce proceeding is to achieve an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997), lv pending.

> 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, citing *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992).]

With regard to the issue of fault, the trial court has discretion to determine the "relative value to be given the fault element in a particular case and the extent to which particular actions are regarded as fault contributing" to the marital breakdown. *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995).

We are convinced that the trial court properly considered the element of fault in the marital breakdown, as well as the other relevant factors, prior to dividing the marital property. Because we agree with the trial court that both parties played a role in the deterioration of the marriage, we find that the trial court did not clearly err by ruling that fault would not alter the distribution of the property, and by dividing the property equally.

Plaintiff also argues that he should have received 100% of his company's stock because defendant did not contribute to the acquisition or organization of the business. We strongly disagree with defendant's argument that his business "became a reality solely based upon [his] efforts and hard work". In *Hanaway, supra*, company stock owned by the defendant was not included as a marital asset. The trial court excluded it, in part, because there was "no evidence that plaintiff contributed to its acquisition, improvement or accumulation." *Id.* at 290. This Court disagreed that plaintiff had made no contribution to the company's assets or appreciation:

> The trial testimony indicates that plaintiff administered the household physically and financially and cared for the children until late in the marriage, while defendant, the company president, devoted himself to the business, working long work weeks. The business clearly prospered during the marriage. . . . value of that interest necessarily reflected defendant's investment of time and effort in maintaining and increasing the business, an investment *that was facilitated by plaintiff's long-term commitment to remain at home to run the household and care for the children* [*Id.* at 293 (emphasis added).]

See also, *McNamara v McNamara*, 178 Mich App 382, 391; 443 NW2d 511 (1989), modified on other grounds 436 Mich 862 (1990), where this Court found that the plaintiff had contributed significantly to defendant's success by not pursuing her own career and by providing other necessary support while the defendant climbed "a professional and financial ladder."

In this case, while plaintiff may have organized and operated his business without the assistance of defendant, we agree with the trial court that her contributions at home and to the family made it possible for plaintiff to achieve his goal. Therefore, the trial court's decision to treat the stock from the company as a marital asset, and award defendant a portion of that asset, was proper.

Next, plaintiff contends that the joint marital debt should have included the family vehicle as well as a loan given to both parties by plaintiff's mother. Plaintiff maintains that both of these assets were used for family purposes and signed by both parties, and thus, they should be equally responsible for the debt.

We review the trial court's findings of fact for clear error. *Hanaway, supra* at 292. In this case, the trial court declined to include the loan with the remainder of the marital debt, finding that Gwendolyn Davis, defendant's mother, never expected the loan to be repaid. The trial court's finding in this regard was clearly erroneous. There was a promissory note evidencing the loan, which was signed by both parties. The loan was used by the parties for their home. At trial Gwendolyn Davis testified that she would like to have the funds repaid if possible. There was no testimony that the money was a gift or that Gwendolyn Davis had not contemplated being repaid when she made the loan. Although no demand was ever made on the note, we find that it was clear error for the court not to treat the loan as a marital debt where there was a signed, presumably valid promissory note[2].

We do not, however, find that the trial court clearly erred by excluding the balance of plaintiff's vehicle, a Ford Taurus, from the marital debt. Nothing in the record contradicts that plaintiff primarily utilized the car for travel to and from work, as well as for personal use. The debt was solely for his benefit. Moreover, in light of the court's division of the other marital assets, and the parties' financial situations, plaintiff was in a better position to make the payments. Accordingly, the trial court did not err in excluding the vehicle from the marital debts.

Next, plaintiff challenges the trial court's calculations of the amount of arrearage accumulated from a child support order. He insists that the court assessed an erroneous figure against him and neglected to credit his account for the amount in which he overpaid. Our review of the record reveals

no discernible error in the trial court's assessment of an arrearage in the amount of $3,553.20. In light of the trial court's order that plaintiff would only be responsible for half of the child support obligations, plaintiff was properly ordered to pay $1,776.60 in back child support. There was no abuse of discretion.

Next, plaintiff argues that the trial court erred by excluding evidence of an HLA blood test that conclusively established that he was not the biological father of the two younger children. He claims he was denied his due process right by the court's decision. We disagree.

"The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Storms v Storms*, 183 Mich App 132, 136; 454 NW2d 175 (1990). In this divorce action, prior to trial, defendant admitted that plaintiff was not the father of two of the children. When plaintiff requested to introduce the blood tests, the court denied the request, finding that the evidence was irrelevant because there was no dispute that he was not the biological father. The issue was already resolved and thus, we find that the trial court's decision to exclude evidence relating to it was proper because the evidence was not necessary to the ultimate determination in the case. Indeed, irrelevant evidence is generally excluded at trial. MRE 402; *Rodriquez v Solar of Michigan*, 191 Mich App 483, 487; 478 NW2d 914 (1991).

Finally, plaintiff argues that the trial court erred in compelling him to pay defendant's attorney fees for the time attributed to defending against issues relating to paternity and paternity blood testing. Plaintiff claims he filed each pleading in this matter in good faith. He further claims that an award of attorney fees amounts to a penalty for his pursuing a legitimate matter, which was made necessary by defendant's failure to initially disclose the paternity question. We disagree.

The decision to award attorney fees is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Attorney fees in divorce actions are not recoverable as of right; they are only recoverable where specifically authorized by a statute, court rule, or recognized exception. *Id.*; *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). MCR 3.206(C) and MCL 552.13(1); MSA 25.93 authorize an award of attorney fees in domestic actions where requested, and where necessary to permit the adverse party to defend the action, as long as the other party can afford to pay. In divorce actions, an award of legal fees is also authorized where the requesting party "has been forced to incur them as a result of the other party's unreasonable conduct in the course of litigation." *Id.*

On November 14, 1995, the trial court ordered that plaintiff was prohibited from placing paternity tests into evidence. Contrary to this order, plaintiff obtained blood tests for both himself and the children. He then sought to admit them at trial. We find that the trial court's award of attorney fees to defendant for defending against plaintiff's actions in this regard was not an abuse of discretion. The marital assets were minimum, defendant was not awarded any alimony, and plaintiff had the ability to pay the requested fees. More importantly, while we are sympathetic to plaintiff's situation as well as his anxiety and curiosity at determining whether he was the biological father of the children, violating a court order not to submit the children to blood testing, and submitting numerous pleadings on the issue, was

inappropriate. Furthermore, in light of the fact that defendant admitted that plaintiff was not the biological father, and the issue was not contested at trial, plaintiff's subsequent actions to raise the issue at trial were unnecessarily litigious. Therefore, we find that the trial court's decision to award attorney fees to defendant, limited to the amount spent in defending the paternity issue, and excluding costs for discovery, was not an abuse of discretion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer

[1] Plaintiff cites to *Tanielian v Brooks*, 202 Mich App 304; 508 NW2d 189 (1993). In *Tanielian*, the non-biological father learned after the judgment of divorce that he was not the biological father. The trial court terminated his parental rights and ordered that no support be paid. It appears that neither the mother nor the non-biological father appealed that decision, and thus we were not asked to decide whether the non-biological father should have been responsible for some or all of the support payments. Rather, the mother, plaintiff Tanielian, filed a paternity suit against the defendant, the biological father. The defendant filed a third party action against the non-biological father, claiming that he should pay support because he was an equitable father. This Court held the biological father could not escape his support obligations by trying to impose a support obligation on a third party, that being the non-biological parent, and that the defendant lacked standing to make such a claim. *Id.* at 304-305.

[2] On appeal, plaintiff claims that $7,000 is outstanding on this loan. On remand, the trial court should determine what amount is outstanding and add that to the marital debt of the parties.