

STATE OF MICHIGAN
COURT OF APPEALS

GEORGIA CAROL CARNEY,

Plaintiff-Appellee,

UNPUBLISHED
November 16, 1999

v

WILLIAM RILEY CARNEY,

Defendant-Appellant.

No. 218073
Wayne Circuit Court
LC No. 97-700880 DM

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from an order modifying a judgment of divorce. We affirm in part and remand for further proceedings.

I

First, defendant contends that the trial court erred in ordering a change in custody without first determining the best interest factors of the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.* We disagree. We review questions of law for clear error. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998).

The trial court accepted the parties' stipulation as to the change in custody without making any findings as to the best interests of the child. While a trial court is not bound by the parties' stipulations or agreements regarding child custody, the court is not precluded from accepting the parties' agreement and including it in the orders of the court. *Dick v Dick*, 210 Mich App 576, 584; 534 NW2d 185 (1995); *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994). Implicit in the trial court's acceptance of the parties' custody arrangement is the court's determination that the arrangement is in the child's best interest. *Dick, supra* at 584-585; *Koron, supra* at 191. Because the parties in this matter were in agreement regarding custody of the minor child, the trial court was not required to expressly articulate each of the best interest factors. See *Dick, supra* at 584-585; *Koron, supra* at 192. Defendant's contention that he would not have entered into the agreement had he known that plaintiff would renege on the proposed settlement is without merit. The record indicates that defendant

knew plaintiff had no intention of following through with the proposed settlement before the agreement regarding custody.

II

Defendant next argues that the trial court erred in calculating child support. We review a trial court's award of child support for an abuse of discretion. *Thames v Thames*, 191 Mich App 299, 306; 477 NW2d 496 (1991).

The friend of the court ("FOC") recommended that plaintiff pay defendant support in the amount of \$48 a week from August 22, 1997, the date of the judgment of divorce, to February 18, 1998, when plaintiff became unemployed. This recommendation coincided with the child support formula amount, based on the parties' 1997 income. Thereafter, the plaintiff was to pay \$30 a week support. Defendant objected to this determination, contending that support for 1998 should have been based on the parties' 1998 year-to-date income, which would result in weekly support of \$65, according to the FOC calculation. The referee did not give an explanation for his recommendation other than merely stating: "Support, based on the income of the parties' in 1997, should be \$48 a week." Likewise, the trial court heard testimony on the parties' income, but ultimately accepted the FOC's recommendation, without making specific findings.

A court shall order support in accordance with the child support formula unless its application would be unjust or unfair. MCL 552.16(2); MSA 25.96(2); MCL 722.27(2); MSA 25.312(7)(2); *Ghidotti v Barber*, 459 Mich 189, 200; 586 NW2d 883 (1998); *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). If a court deviates from the support formula, it *must* specify on the record how the order deviates and the reasons why application of the formula is unjust or unfair. *Id.* It is not apparent from the record whether the support order based on the parties 1997 income deviates from the child support guidelines. We therefore remand for the trial court's determination of whether the calculation of child support was in accordance with the child support formula, and if not, the reason for the deviation.¹ *Ghidotti, supra* at 204.

III

Next, defendant argues that the trial court abused its discretion in failing to set aside the alimony provision of the judgment of divorce based on mutual mistake or fraud. He contends that he was entitled to relief from judgment pursuant to MCR 2.612. We disagree. We review a trial court's denial of a motion for relief from judgment for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 642-643; 543 NW2d 75 (1995).

Defendant contends that, either through mutual mistake or through plaintiff's fraudulent statements, the parties calculated alimony on the basis that defendant earned \$50,000, although his income was only \$20,000. Defendant explains that he did not know how much money he made because plaintiff handled the parties' business accounting. However defendant signed joint tax returns and had access to the same information as plaintiff. Because it appears that defendant was ignorant of his income because of his own carelessness, relief from judgment pursuant to MCR 2.612(C)(1)(a) was properly denied. Error warranting reversal must be that of the trial court and not one to which an aggrieved party contributed by planned or neglectful omission of action on his part. *Smith v Musgrove*,

372 Mich 329, 337; 125 NW2d 869 (1964); *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

IV

Finally, defendant argues that the trial court abused its discretion in failing to grant his motion for reconsideration based on the fact that plaintiff refused to care for the minor child. We disagree. We review a trial court's denial of a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

In order to successfully move for reconsideration, a party "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F). Defendant has not shown such error. Defendant alleges that plaintiff must have been dishonest about her desire to provide proper care and custody for their minor son, but there is no evidence to support that allegation. At the time of the hearing, defendant admitted that the seventeen-year-old preferred to live with plaintiff. However, it merely appears that a change in circumstances may have occurred since the hearing.

The trial court's order is affirmed with regard to the change in custody and alimony. Regarding the issue of child support, the case is remanded for the trial court's determination of whether the support order was in accordance with the support guidelines, and if not, the basis for the deviation. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad

¹ It appears that the trial court's final support order directed plaintiff to pay \$48 a week child support, without a reduction to \$30 a week, as recommended by the FOC. If so, the issue on remand is whether the order was properly based on the parties' income for 1997.