STATE OF MICHIGAN

COURT OF APPEALS

DENNIS MICHAEL GUSMANO,

Plaintiff-Appellee,

v

KATHLEEN A. GUSMANO,

Defendant-Appellant.

UNPUBLISHED
September 22, 2011

No. 297211
Wayne Circuit Court
LC No. 08-123682-DM

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. We affirm in part, vacate in part, and remand for further proceedings.

Plaintiff is a certified mechanic. Defendant is an attorney who left full-time employment when the parties' child was born in 2000. In December 2008, defendant, who has medical problems relating to her jaw and her teeth, nerve damage in her face, and peripheral neuropathy in her feet, legs, and fingers, began receiving monthly social security disability (SSDI) payments. The judgment of divorce awarded the parties joint physical and legal custody of the child. The parties received equal parenting time, with plaintiff being responsible for child support to defendant. However, the judgment provided that the "child support payment will be offset by the minor child's receipt of payments from the Social Security Administration payable to the Defendant as Representative Payee." The judgment further incorporated the Uniform Child Support Order.

Defendant argues that the trial court erred by offsetting plaintiff's child support obligation by the amount of SSDI benefits received by the child as a result of defendant's disability. We review child support orders for an abuse of discretion. *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007). "Whether the trial court properly acted within the child support guidelines is a question of law that this Court reviews de novo." *Id*.

MCL 552.605(2) provides that "[e]xcept as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519." The statute permits deviation from the formula if the court determines that, on the facts of the case, application of the formula would be unjust or inappropriate and if the court sets forth in writing or on the record all of the following:

> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case. [MCL 552.605(2).]

"If the court deviates, it must make an adequate record regarding the mandatory statutory criteria for doing so." *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). See also *Holmes v Holmes*, 281 Mich App 575, 588; 760 NW2d 300 (2008).

The Michigan Child Support Formula (MCSF) Manual provides for a credit where the child receives SSDI benefits based on the support payer's disability:

> 3.07(A) Credit Social Security Retirement, Survivor's, or Disability Insurance benefits paid for the children *based on the support payer's earnings record against that parent's support obligation* as follows:
>
> (1) Determine the total child support obligation.
>
> (2) Determine the monthly benefit amount *that is attributable to the payer* and that the support recipient receives for the children and then subtract that amount from the total child support obligation.
>
> (a) If the children's payer-based benefit exceeds the total support amount, then no additional support amount should be ordered.
>
> (b) If the children's payer-based benefits are less than the payer's total support amount, then the difference between the benefits received for the children and the total support amount becomes the ordered obligation.
>
> 3.07(B) The following cases discuss how Social Security benefits affect support obligations: *Frens v Frens*, 191 Mich App 654 (1990) [sic: 1991]; *Jenerou v Jenerou*, 200 Mich App 265 (1993); *Paulson v Paulson*, 254 Mich App 568 (2002); and *Fisher v Fisher*, 276 Mich App 424 (2007). [2008 MCSF 3.07 (emphasis added).]

In *Frens v Frens*, 191 Mich App 654, 655; 478 NW2d 750 (1991), the child received SSDI benefits arising from the noncustodial parent's disability. This Court found compelling the

noncustodial parent's argument for granting him a credit against his child support payments and quoted with approval from *Andler v Andler*, 217 Kan 538, 542-543; 538 P2d 649 (1975):

> [T]he payments received by the appellee [custodial mother] are for the children as beneficiaries of an insurance policy. The premiums for such policy were paid by the appellant for the children's benefit. The purpose of Social Security is the same as that of an insurance policy with a private carrier, wherein a father insures against his possible future disability and loss of gainful employment by providing for the fulfillment of his moral and legal obligations to his children. This tragedy having occurred, the insurer has paid out benefits to the beneficiaries under its contract of insurance with the appellant, and the purpose has been accomplished. [*Frens*, 191 Mich App at 657, quoting from *Andler*, 217 Kan at 542-543.]

This Court concluded that the noncustodial parent was entitled to have the SSDI payment credited to the portion of the child support arrearage that accumulated after he became disabled. *Frens*, 191 Mich App at 658.

In *Jenerou v Jenerou*, 200 Mich App 265, 267; 503 NW2d 744 (1993), this Court concluded that the noncustodial parent was not entitled to a credit against his child support arrearages because the SSDI benefits were not paid to the custodial parent, "but directly to the daughter, who by then had reached the age of majority." This Court in *Jenerou* further stated:

> We are satisfied that a parent should not get credit against a child support arrearage merely because the child receives benefits from the federal government. The child does not receive the benefits because the federal government has decided to assume the parent's obligation to support the child, but only because the child is determined to be eligible for the benefits under federal law. See 42 USC 402(d).
>
> We believe that benefits paid to the child should be treated like any other change in circumstance, which might warrant a modification in the support order. Because social security disability benefits paid to the child can be considered by the court when determining the proper amount of support, see Michigan Support Guideline Manual (1989 rev), p 4, we are satisfied that disability benefits could also furnish adequate justification for modifying support orders in appropriate cases. [*Jenerou,* 200 Mich App at 267-268.]

In *Paulson v Paulson*, 254 Mich App 568, 573-574; 657 NW2d 559 (2002), this Court addressed a situation in which both parents received SSDI benefits:

> The guidelines do not account for the unique circumstance in which both parents receive social security disability payments and, because the custodial parent was first to receive her benefits, the child receives direct disability benefits based on the earnings record of the custodial parent rather than the noncustodial parent. Instead, the guidelines only account for a circumstance in which the child receives disability benefits based on the earnings record of the noncustodial

> parent. Because the circumstances presented in this case are not accounted for in the guidelines manual, the trial court correctly found that it would be appropriate to deviate from the child support formula.

This Court further found in *Paulson* that the trial court did not abuse its discretion in using the MCSF to calculate child support as though the noncustodial parent had first received disability benefits and the child's benefits derived from the noncustodial parent's earnings record. *Id*. at 574.

In *Fisher*, 276 Mich App at 427, this Court summarized the decision in *Frens* as holding "that Social Security benefits paid directly to a custodial parent, on behalf of a minor child and *as a result of the disability of the noncustodial parent*, may be credited against child support obligations that arise during the disability, but may not be applied to any prior arrearages." (Emphasis added.) Applying *Frens*, this Court concluded in *Fisher* that the noncustodial parent was entitled to a credit against his child support arrearages for the direct SSDI payments to the custodial parent on behalf of the parties' child. *Id*.

Here, the trial court granted plaintiff a credit for SSDI benefit payments received by the child as a result of defendant's disability. 2008 MCSF 3.07 does not, however, provide for a credit in that circumstance. The rationale adopted in *Frens*, 191 Mich App at 657, that SSDI is akin to an insurance policy for which the noncustodial parent has paid premiums, does not support granting a credit to plaintiff for benefits arising from the *defendant's* disability. Moreover, the trial court stated nothing in writing or on the record to suggest that it was exercising its discretion to deviate from the MCSF guidelines. The trial court did not determine from the facts of the case that application of the MCSF would be unjust or inappropriate, nor did the court set forth in writing or on the record the other findings and conclusions required by MCL 552.605(2).

We further note that 2008 MCSF 2.01(I) provides:

> Attribute all social security retirement, survivor's, or disability program dependent benefits based on the earnings record of a parent paid for the children-in-common with the other parent as the earning parent's income.

Here, the trial court did not indicate that such attribution was the basis for offsetting plaintiff's child support payments. The trial court should clarify on remand whether and to what extent its calculation of child support was based on 2008 MCSF 2.01(I).

Accordingly, we conclude that the trial court erred in ordering that plaintiff's child support obligation be offset by SSDI payments to the child arising from defendant's disability because the MCSF does not provide for a credit in this situation and the trial court did not follow the requirements in MCL 552.605(2) for deviating from the MCSF. On remand, the trial court may consider whether to deviate from the MCSF in compliance with the statutory requirements and should clarify whether and to what extent its child support calculation was based on attribution of the child's SSDI benefit payments as defendant's income under 2008 MCSF 2.01(I).

Defendant next argues that the trial court lacked authority to require that lump sum SSDI benefits paid to the parties' child be deposited into a joint account held by both parties to be used solely for the child's tutoring and college expenses. Review of this issue is barred by a stipulation of the parties. A party may not stipulate to a matter and then argue on appeal that the resulting action was error. *Holmes*, 281 Mich App at 588. The parties stipulated below to use the lump sum payment for the child's tutoring expenses and to save any remaining sum for college expenses. Although defendant later requested permission to use the lump sum for other types of expenses, she and her attorney had already agreed by that point to use the funds for tutoring and college expenses, and the trial court understandably did not wish to risk unraveling the parties' agreements on other issues at that time.

Moreover, to the extent that defendant did not agree to deposit the funds into a joint account, that issue is moot. "A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). This Court generally will not decide moot issues or declare legal principles that have no practical effect on a case. *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004). Here, although the judgment of divorce required a joint account, the funds were instead deposited into a "dedicated account" under defendant's name for the child. The trial court then ordered defendant to notify plaintiff within three days of making any tutoring payment and to provide monthly statements for the account to plaintiff. Thus, because a joint account was not opened and the trial court instead required defendant to provide plaintiff with monthly statements, the issue regarding the joint account does not rest upon existing facts or rights, and any declaration of legal principles on this issue would have no practical effect on this case. Therefore, to the extent that review of this issue is not barred by a stipulation, we nonetheless decline to reach the issue because it is moot.

Defendant next argues that the trial court abused its discretion by awarding grossly inadequate spousal support and by failing to indicate whether the award was in gross or periodic. "This Court reviews a trial court's award of spousal support for an abuse of discretion." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). A trial court's findings of fact with respect to such an award are reviewed for clear error. *Id*. We conclude that the trial court failed to make the requisite findings of fact regarding the factors relevant to its determination of spousal support. Further, we agree with defendant that the spousal support provision in the judgment of divorce is unclear regarding whether the alimony award is alimony in gross or periodic alimony.

"A trial court has discretion to award spousal support under MCL 552.23." *Myland v Myland*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292868, issued November 23, 2010), slip op p 2. "The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances of the case." *Woodington*, 288 Mich App at 356. Among the factors that a court should consider are:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties'

> health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003) (citations omitted).]

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). Here, the trial court did not state findings regarding the relevant factors. Moreover, given the trial court's failure to provide its analysis or reasoning, it is impossible to discern from the record whether, as defendant claims, the trial court treated defendant's SSDI lump sum payment as marital property.

Further, the spousal support provision of the judgment of divorce is ambiguous regarding whether it awards alimony in gross or periodic alimony. Alimony that is either a lump sum or a definite sum to be paid in installments is classified as alimony in gross. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). Alimony in gross is not modifiable because it is in the nature of a division of property. *Id*. Periodic alimony, on the other hand, is subject to modification and is designed to provide support and maintenance. *Friend v Friend*, 486 Mich 1035; 783 NW2d 122 (2010). The judgment of divorce here arguably provides a definite sum to be paid in installments by awarding $400 a month for 36 months for a total payment of $14,400. Further, the fact that no contingencies such as death or remarriage were included in the award suggests that it is alimony in gross. *Id*. The judgment of divorce also states, however, that the payments are income to defendant and a deduction for plaintiff, which "suggests that the award is periodic alimony because alimony in gross is not a taxable event to the payee." *Id*.

Accordingly, we vacate the spousal support provision of the judgment of divorce and remand to the trial court to make the requisite findings on the relevant factors and to clarify whether it is awarding alimony in gross or periodic alimony. *Friend*, 486 Mich at 1035; *Woodington*, 288 Mich App at 357.[1]

Defendant's final argument on appeal is that the trial court abused its discretion by refusing to award her attorney fees. A trial court's decision whether to award attorney fees is reviewed for an abuse of discretion. *Woodington*, 288 Mich App at 369. Any findings of fact on which the trial court based its decision are reviewed for clear error. *Id*. We conclude that because the trial court failed to provide any explanation or to state any findings regarding its denial of defendant's request for attorney fees, it is impossible to discern whether an abuse of discretion occurred. We thus vacate the trial court's decision on this issue and direct the trial court to make appropriate findings on remand regarding the attorney fee request.

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[1] Defendant states that the parties cannot afford to have the case remanded and that this Court should itself evaluate the factors. This Court, however, does not make findings of fact. Rather, this Court's role is to review the trial court's findings for clear error. *Woodington*, 288 Mich App at 355. If the parties cannot afford to litigate this case on remand, they are of course free to pursue a settlement or accommodation with one another regarding these issues.

"A court in a divorce action may award attorney fees to enable a party to carry on or defend the action." *Woodington*, 288 Mich App at 369. "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id*. at 370. The requesting party must allege facts sufficient to show that the party is unable to bear the expense of the action and that the other party is able to pay or that the fees were incurred because the other party refused to comply with a court order despite having the ability to comply. *Id*. See also MCR 3.206(C)(2). A party requesting attorney fees has the burden of establishing that the fees were incurred and that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005).

In *Reed*, 265 Mich App at 165, this Court held that the trial court had erred in awarding attorney fees without conducting a hearing or finding facts regarding the reasonableness of the fees incurred. "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Id*. at 166. In *Woodington*, 288 Mich App at 371, this Court noted that the trial court had failed to explain its decision to award less than half of the amount of attorney fees requested. "Without adequate findings of fact, there is no basis for determining whether the trial court's award represented an abuse of discretion." *Id*. This Court concluded that the error was not harmless because a question existed regarding whether the plaintiff would be required to invade assets needed for living expenses to pay her attorney fees. *Id*. at 371-372. This Court directed the trial court to make appropriate findings regarding the attorney fee award on remand. *Id*. at 372.

Similarly, the trial court here made no findings and offered no explanation regarding its decision to deny defendant's request for attorney fees. It is thus impossible to determine whether the trial court abused its discretion in denying the request. Given the evidence of defendant's fees and of the disparities in the parties' incomes, the trial court's failure to make adequate findings of fact and to explain its decision was not harmless. See *Woodington*, 288 Mich App at 371-372. Accordingly, we direct the trial court on remand to make appropriate findings of fact regarding this issue. *Id*. at 372.[2]

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

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

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[2] Defendant argues that, in addition to her inability to pay, plaintiff and his attorney engaged in misconduct that would also warrant an attorney fee award. In the trial court, however, defense counsel did not allege such misconduct as a basis for her attorney fee request. Moreover, defendant has submitted no evidence regarding what fees were incurred because of plaintiff and his attorney's alleged misconduct. Therefore, the trial court on remand should not consider the alleged misconduct as a basis to award attorney fees. *Reed*, 265 Mich App at 166.