

STATE OF MICHIGAN
COURT OF APPEALS

SARAH STROUD RAINEY,

Plaintiff/Appellant,
Cross-Appellee,

UNPUBLISHED
May 13, 1997

v

JOHN M. RAINEY,

Defendant/Appellee,
Cross-Appellant.

No. 185876
Wayne County
LC No. 93320638 DM

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiff, Sarah Stroud Rainey, appeals and defendant, John M. Rainey, cross-appeals as of right from the circuit court's judgment of divorce. We affirm in part, reverse in part and remand for further proceedings.

I

In her appellate brief, plaintiff argued that the trial court erred in its custody determination. However, at oral argument, plaintiff's counsel stipulated that custody was no longer an issue. Therefore, we decline to address the issue.

II

Next, plaintiff contends that the lower court erred in denying her request for alimony, either periodic or in gross. We consider a lower court's award of alimony under a bifurcated standard, with findings of fact reviewed for clear error and the alimony award subject to de novo review. *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993).

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

Although there is no specific formula for determining whether alimony should be awarded, a trial judge should consider certain factors including the length of the parties' marriage, the ability to pay alimony, the parties' past relations and conduct, their ages, needs, ability to work, health, and fault. *Id.* at 643. In weighing these factors, a trial court should make specific findings of fact as to the factors that are relevant to the particular case. *Id.*

Here, the trial court relied on the ability of the parties to pay, never addressing the other factors. In assessing plaintiff's annual income, the court erroneously determined that plaintiff had a trust worth \$350,000, and concluded that, if she properly invested this asset, plaintiff would have income equal to defendant's. The record shows that, although plaintiff was receiving yearly interest proceeds of approximately \$21,225 from a trust fund set up in her father's will, there was no provision for her to receive any of the corpus of the trust. Therefore, the lower court erred by failing to make findings of fact which we can identify on most of the relevant factors, and erroneously analyzed the parties' ability to pay. Therefore, we remand for further findings of fact and a new disposition if warranted.

III

Plaintiff next argues that defendant should have been required to share in private high school tuition payments for the children. We review a lower court's findings of fact in an award of child support for clear error. We review the ultimate disposition de novo. *Edwards v Edwards*, 192 Mich App 559, 562; 481 NW2d 769 (1992). We will not reverse the lower court's disposition unless convinced we would have reached a different result in the trial court's place. *Id.*

In making the determination as to the amount of child support, the lower court is to consider the needs of the child and the parents' ability to pay. *Hoke v Hoke*, 162 Mich App 201, 206; 412 NW2d 694 (1987). Here, the lower court found merely that the Grosse Pointe Public Schools spent \$8,300 per pupil per year, which is as much if not more than the private school, University of Liggett. It failed to make findings of fact with respect to the needs of the children and the parents' ability to pay the private school tuition. Therefore, we remand this issue to the trial court for further findings of fact. The trial court's decision was not necessarily wrong, but it cannot stand without proper findings of fact to support it.

IV

Plaintiff contends that the court's property disposition was neither fair nor equitable, as the court failed to determine what constituted the marital estate and therefore erroneously distributed the property. We review this issue under the same bifurcated standard as has been cited above. *Sparks v Sparks*, 440 Mich 141, 146; 485 NW2d 893 (1992). Using this standard, we find the lower court's ruling not to be fair and equitable.

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property by considering its source, who contributed and in what amounts to its acquisition, the length of the marriage, the needs of the parties, their earning ability and the cause of the divorce. *Sands v Sands*, 442 Mich 30, 35; 497 NW2d 493 (1993). In considering the source of the property for

property settlement distribution, MCL 552.401; MSA 25.136 states that the separate property of one party may be considered if the evidence shows that the other contributed to its acquisition, improvement, or accumulation. Therefore, before a trial court can determine an equitable property settlement, it must segregate the separate assets not subject to distribution. *Grotelueschen v Grotelueschen*, 113 Mich App 395, 402; 318 NW2d 227 (1982).

Here, the lower court failed to adequately determine what constituted the marital estate. Although the court termed several of plaintiff's assets as her sole and separate property, he included them in the final distribution of the marital estate. Moreover, he placed no findings of fact on the record indicating that defendant had contributed to the acquisition, improvement or accumulation of the property. Therefore, we remand for the judge to reanalyze the issue under the relevant facts and make new findings and a new disposition.

V

Plaintiff also asserts that, as fault is a factor to be considered in both alimony and property settlement determinations, the lower court erred by denying plaintiff's request to make an offer of proof relating to defendant's marital misconduct.

The decision to admit evidence is within the sound discretion of the trial court. MRE 103(a)(2). If the court determines that evidence is not admissible, the party seeking its admission must make an offer of proof. This provides the trial court with an adequate basis on which to make its ruling and this Court with the information to evaluate the claim of error. *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994); *Orlich v Buxton*, 22 Mich App 96, 100; 177 NW2d 184 (1970). A trial judge is rarely justified in refusing leave to make a separate record. Unless there is a compelling reason to deny, a request to make an offer of proof on a separate record should be granted. *Hileman v Indreica*, 385 Mich 1; 187 NW2d 411 (1971); *Detroit Bank & Trust Co v Dickson*, 78 Mich App 12, 19; 259 NW2d 228 (1977).

Here, during cross-examination of defendant, the court sustained an objection by defendant's counsel that testimony concerning defendant's alleged drug and alcohol abuse had been asked and answered. When plaintiff attempted to make an offer of proof, the court stated that it had already heard the same questions and answers during plaintiff's testimony and denied the offer. No compelling reason appears on the record for the trial judge's decision denying plaintiff's request. Therefore, we remand this issue to the trial court to allow plaintiff the opportunity to make an offer of proof.

VI

Plaintiff's final assertion is that the lower court erred by refusing to enter an anti-stalking injunction against defendant, yet entered a mutual spousal abuse injunction. There had been no evidence presented of abusive behavior by plaintiff. In reviewing the record, we agree that the lower court abused its discretion.

The Michigan Legislature has enacted anti-stalking statutes which provide that a person who engages in a course of conduct involving repeated, unconsented contact with a victim, after having been requested by the victim to discontinue the contact, is subject to criminal penalty. MCL 750.411h; MSA 28.643(8) and MCL 750.411i; MSA 28.643(9). An individual may petition the circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in the prohibited conduct. MCL 600.2950a; MSA 27A.2950(1). Pursuant to the guidelines of §2950a, if the court refuses to grant the personal protection order, it must state in writing and on the record the specific reasons for the refusal.

In this case, the lower court denied plaintiff's request for an anti-stalking injunction without stating its reasons on the record. Instead, it issued a standard mutual personal protection order under MCL 552.14; MSA 25.94, which may be issued after the filing of a complaint for a divorce. However, under MCR 3.207(D), this type of order may not be made mutual unless based on violence or threats of violence by both parties. As defendant concedes that plaintiff has neither threatened nor committed violence to defendant, the court erred in entering a mutual personal protection order under MCL 552.14; MSA 25.94. Therefore, we reverse the lower court's mutual personal protection order. We remand the issue of the anti-stalking injunction to the trial judge for further proceedings. If plaintiff's request is denied, the trial judge must state its reasons for the denial on the record.

VII

Defendant claims on cross-appeal that the trial court erred by failing to credit defendant with payments he made to University Liggett School for tuition and expenses pursuant to a temporary court order dated July 28, 1995. The order provided that sums defendant paid would be credited to him in the property distribution, either through negotiations or trial. We find no error in the court's ruling. The final judgment may modify a temporary order issued during the pendency of a divorce. MCR 3.207(C).

Having reviewed the court's dispositional ruling under the bifurcated standard, we do not find the court to have erred. *Sparks, supra*, 440 Mich 146. The judge ruled that, as plaintiff agreed to pay a portion of the tuition, defendant no longer was to be credited in the final disposition of property. As the lower court's finding of fact was not clearly erroneous, its ruling in this matter was fair and equitable.

We affirm as to the lower court's rulings respecting custody and its ruling denying defendant's request that he be credited for his voluntary payment of tuition. We reverse the issuance of a mutual personal protection order. On the remaining issues, we remand for further findings of fact and new dispositions based on those findings. We decline plaintiff's request to remand this matter to a different judge.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky