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TOMPKINS v. TOMPKINS

Court of Appeals of Michigan

April 22, 1997, Decided

No. 193777

Reporter
1997 Mich. App. LEXIS 2933 *; 1997 WL 33349407

ROBERT L. ***TOMPKINS***, Plaintiff-Appellant, v JUDITH M. ***TOMPKINS***, Defendant-Appellee.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Oakland Circuit Court. LC No. 90-388785.

Disposition: Affirmed.

Core Terms

trial court, alimony, parties, modification, proofs, alimony award, divorce, change of circumstances, argues, reopen, motion to modify, motion to reopen, circumstances, factors, discretion of the trial court, appellate court, adult daughter, new facts, retroactive, Appeals, revisit, modify, costs

Case Summary

Procedural Posture
Plaintiff husband appealed an order from the Oakland Circuit Court (Michigan), which ordered the husband to pay permanent monthly alimony to defendant wife following the grant of divorce.

Overview
On remand from an earlier appeal, the trial court was instructed to determine the amount of alimony to which the wife was entitled without considering the husband's support of the parties' adult daughters. The trial court then ordered the husband to pay the same amount of permanent monthly alimony it had previously ordered, and the husband appealed. The court held that: (1) the decision whether to reopen proofs in the divorce case was within the sound discretion of the trial court; (2) when the matter was remanded to the trial court, it possessed authority to take action that was consistent with the opinion of the appellate court; (3) the husband's attempt to use the remand to discover evidence of changed circumstances that would support a modification of alimony went beyond the scope of the remand; (4) the husband continued to have the right to bring a post-judgment motion to modify the alimony award upon a showing of changed circumstances; and (5) the alimony award was within the trial court's discretion and was based on what was just and reasonable under the circumstances of the case.

Outcome
The court affirmed the order requiring the husband to pay permanent monthly alimony to the wife following the grant of divorce.

LexisNexis® Headnotes

Civil Procedure > Appeals > Remands

Family Law > ... > Dissolution & Divorce > Jurisdiction > General Overview

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Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

HN1[] **Appeals, Remands**

The decision whether to reopen proofs in a divorce case is within the sound discretion of the trial court. When a matter is remanded by an appellate court to the trial court, the trial court possesses the authority to take action that is consistent with the opinion of the appellate court.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Evidence > Inferences & Presumptions > General Overview

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

HN2[] **Relief From Judgments, Altering & Amending Judgments**

The modification of an alimony award must be based on new facts or changed circumstances arising after the judgment of divorce. The party moving for modification has the burden of showing such new facts or changed circumstances.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

HN3[] **Relief From Judgments, Altering & Amending Judgments**

It is not necessary for an appellate court to review an issue on which no ruling was made by the trial court.

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN4[] **Obligations, Periodic Support**

The award of alimony is within a trial court's discretion and is to be based on what is just and reasonable under the circumstances of the case. Factors to be considered 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 support of others; (11) contributions of the parties to the joint estate; and (12) general principles of equity. In addition, the court may consider a party's fault in causing the divorce. The trial court should make specific findings of fact regarding those

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factors that are relevant to the particular case. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party.

Judges: Before: Doctoroff, P.J., and MJ Kelly and Young, JJ. Michael J. Kelly, J., dissenting.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the trial court's opinion and order on remand awarding defendant $ 750 per month in alimony. We affirm.

On remand, this Court instructed the trial court to determine the amount of alimony to which defendant is entitled without considering defendant's support of the parties' adult daughters. In this appeal, plaintiff first argues that the trial court erred in denying his motion to reopen proofs on the grounds that it would exceed the scope of remand. Plaintiff contends that his request would not go beyond this Court's order because the reopening of proofs would ensure that any remand decision regarding alimony would be based on both the present circumstances and those in effect at the time of the judgment of divorce. We disagree.

HN1[⬆] The decision whether to reopen proofs in a divorce case is within the sound discretion of the trial court. *Esslinger v Esslinger, 9 Mich App 11, 16; **[*2]** 155 NW2d 702 (1967)*. When a matter is remanded by an appellate court to the trial court, the trial court possesses the authority to take action that is consistent with the opinion of the appellate court. *Hadfield v Oakland Co Drain, 218 Mich App 351, 355; 554 NW2d 43 (1996)*; *Vanderwall v Midkiff, 186 Mich App 191, 196; 463 NW2d 219 (1990)*. We believe that plaintiff's motion was an attempt to use the remand to discover evidence of changed circumstances that would support a modification of alimony. Such proofs would be beyond the scope of remand. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion to reopen proofs.

Plaintiff next argues that, even if the trial court was prohibited from reopening proofs by this Court's remand order, the trial court had discretion to modify the award of alimony after it made its decision on the issue on remand. We disagree. ***HN2***[⬆] The modification of an alimony award must be based on new facts or changed circumstances arising after the judgment of divorce. *Ackerman v Ackerman, 197 Mich App 300, 301; 495 NW2d 173 (1992)*. The **[*3]** party moving for modification has the burden of showing such new facts or changed circumstances. *Id.* In the present case, the trial court denied plaintiff's motion for modification of the judgment pending its review of the alimony award on remand. Although plaintiff continues to have the right to bring a post-judgment motion in the trial court to modify the alimony award upon a showing of changed circumstances, he has not done so. ***HN3***[⬆] It is not necessary for this Court to review an issue on which no ruling was made. *Vugterveen v Olde Millpond, 210 Mich App 34, 38; 533 NW2d 320 (1995)*. Therefore, this claim is premature and will not be addressed.

Plaintiff next argues that the trial court erred when, on remand, it again awarded defendant permanent alimony of $ 750 per month. ***HN4***[⬆] The award of alimony is within the trial court's discretion and is to be based on what is just and reasonable under the circumstances of the case. *Thames v Thames, 191 Mich App 299, 307; 477 NW2d 496 (1991)*. Factors to be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties **[*4]** 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 support of others, (11) contributions of the parties to the joint estate, and

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(12) general principles of equity. In addition, the court may consider a party's fault in causing the divorce. *Id. at 308*. The trial court should make specific findings of fact regarding those factors that are relevant to the particular case. *Ianitelli v Ianitelli, 199 Mich App 641, 643; 502 NW2d 691 (1993)*. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Magee v Magee, 218 Mich App 158, 162; 553 NW2d 363 (1996)*.

Plaintiff argues that, because this Court expressly found that the trial court erred in considering defendant's support of the parties' adult daughters, the removal of that factor from consideration should have resulted in a lower amount **[*5]** of alimony awarded. We disagree. On remand, the trial court applied the factors required by *Thames, supra*, and determined that plaintiff should pay defendant alimony of $ 750 per month. We find that the court's findings of fact were not clearly erroneous. Because the award of alimony was also fair and equitable in light of the facts, plaintiff's argument has no merit.

Affirmed. Defendant being the prevailing party, she may tax costs pursuant to *MCR 7.219*.

/s/ Martin M. Doctoroff

/s/ Robert P. Young, Jr.

Dissent by: Michael J. Kelly

Dissent

MICHAEL J. KELLY, J. (dissenting).

I respectfully dissent. I believe the trial court's failure to address the circumstances supporting plaintiff's motion for modification of alimony was an abuse of discretion. It certainly would have been appropriate for the trial court to reopen proofs on remand but, more importantly, the court did not revisit the motion for modification after it's ruling on remand. The last three paragraphs of the court's January 26, 1996 order states as follows:

> In the alternative, plaintiff requests that the court allow plaintiff to seek retroactive modification of the judgment of divorce. The court will **[*6]** deny the request at this time pending the court's ruling on the alimony issue addressed by the Court of Appeals.
> Plaintiff's motion to reopen proofs is denied.
> It is so ordered.

The majority is persuaded that the plaintiff could have availed himself of the trial court's implied promise to revisit the modification issue without abandoning his appeal. Plaintiff's counsel answers that seeking such an alternative would have resulted in no relief and would have exposed him to assessment of costs. That is a reasonable surmise.

I would remand for hearing on the modification question to determine if a change in circumstances supports modification. If so, I believe such modification should be retroactive as to do otherwise would be inequitable.

/s/ Michael J. Kelly

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