

STATE OF MICHIGAN
COURT OF APPEALS

PERRY G. SHARROW,

Plaintiff/Counterdefendant-
Appellant,

v

DENISE C. DAVIS,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

July 22, 2003

Nos. 244043; 245117

St. Clair Circuit Court

LC No. 99-002478-DC

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

In Docket No. 244043, plaintiff appeals as of right from the trial court's order awarding the parties joint legal custody of their child, but awarding physical custody to defendant. In Docket No. 245117, plaintiff appeals by leave granted from the court's orders establishing child support and parenting time. We affirm.

Plaintiff first argues that the trial court failed to make sufficient findings in support of its determination that the child had an established custodial environment with defendant. We disagree.

Pursuant to MCR 3.210(D), a trial court's findings in a custody case must comply with MCR 2.517(A)(1), which provides that a "court shall find the facts specially, [and] state separately its conclusions of law" Nonetheless, the court need not "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued." *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981). While the trial court's findings that a custodial environment existed with defendant were brief, they were sufficient to satisfy MCR 2.517(A)(1).

Plaintiff also asserts that even if the findings complied with MCR 2.517(A)(1), nevertheless, the trial court erred in determining that an established custodial environment existed with defendant. Again, we disagree.

Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests. *Mogle v*

Scriver, 241 Mich App 192, 197; 614 NW2d 696 (2000). A “custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.” MCL 722.27(1)(c). “The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.” *Id.*

MCL 722.28 provides:

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

Thus, de novo review is precluded. *Fletcher v Fletcher*, 447 Mich 871, 882 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Under the applicable standard, findings of fact “should be affirmed unless the evidence ‘clearly preponderates in the opposite direction.’” *Id.* at 879 (Brickley, J.), 900 (Griffin, J.), quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959).

The evidence showed that the child lived with both parents from the time he was born in August 1997, until the parties separated in June 1999. He has lived with defendant since then, but has stayed with plaintiff periodically. During the first three months after the parties separated, defendant often returned to plaintiff’s home with the child, sometimes spending the night. Beginning in September 1999, after the parties’ relationship finally ended, the child spent most weekdays and one or two nights a week with plaintiff during the time of his seasonal four-month layoff, plus alternating weekends. This time was reduced when the child began attending school in January 2001. During the remaining eight months of the year, when plaintiff was working, the child was primarily in defendant’s care, although plaintiff had parenting time on alternating weekends and holidays, sometimes in the middle of the week, and for four or five nonconsecutive weeks during the summer. However, defendant was generally responsible for transporting the child, arranging for day care as needed, and providing him with most necessities. Further, while plaintiff met the child’s needs during his parenting time, he did little in terms of contributing to the child’s support while in defendant’s care, and also failed to promptly and reasonably reimburse defendant for his share of medical and child care expenses.

In light of the evidence presented, the trial court’s determination that an established custodial environment existed with defendant is not against the great weight of the evidence. Accordingly, plaintiff was required to show by clear and convincing evidence that a change in custody was in the child’s best interests. *Mogle, supra*; see also MCL 722.27(1)(c).

After considering the best interest factors set forth in MCL 722.23(a) – (l), the trial court found that the parties were equal with regard to factors (a), (c), (e), (f), (g), (h), (i), (k), and (l), and that factors (b), (d), and (j) each favored defendant. On appeal, plaintiff argues that the trial court’s findings that factors (d), (e) and (j) each favored defendant, and that the parties were equal with regard to factors (b) and (c), are against the great weight of the evidence. We disagree.

Although the trial court must consider and explicitly state its findings and conclusions regarding each best interest factor, it need not “comment upon every matter in evidence or declare acceptance or rejection of every proposition argued.” *Baker, supra* at 583; *LaFleche v Ybarra*, 242 Mich App 692, 700-701; 619 NW2d 738 (2000). We must affirm the trial court’s findings unless they are against the great weight of the evidence. MCL 722.28; *Fletcher, supra* at 879 (Brickley, J.), 900 (Griffin, J.). The trial court’s ultimate dispositional ruling—such as to whom custody is granted—is reviewed for a palpable abuse of discretion. *Id.* at 880-881 (Brickley, J.), 900 (Griffin, J.); see also *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

After reviewing the record, we conclude that the trial court’s findings, while terse, were sufficient under MCR 2.517(A)(1). Further, the court’s findings are not against the great weight of the evidence.

Concerning factor (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity), the evidence showed that the child had lived with defendant all of his life and that, although defendant had no ownership interest in her present home, defendant and her boyfriend were planning to purchase it and it was suitable for the child. Although there was evidence that defendant’s boyfriend had a criminal past and that his brother may be an alcoholic, the great weight of the evidence did not show that this rendered the child’s living situation with defendant either unstable or unsatisfactory. Further, there was evidence that plaintiff was sometimes petty and ill-tempered, that he tended to call the police during visitation disputes, that he was sometimes belligerent when drinking, that he insisted on having things his own way, and that he was not always fully truthful. The evidence is not sufficiently compelling to disturb the trial court’s finding that defendant prevailed with regard to factor (d).

Concerning factor (e) (the permanence, as a family unit, of the existing or proposed custodial home) the evidence showed that plaintiff and his children had lived together as a family unit for approximately the same time as defendant and her children. Also, since sometime in late 1999, defendant and her children had been living with her boyfriend and then, eventually, with his children. The stability of both defendant’s and plaintiff’s proposed custodial homes, as a family unit, was relatively equal. Thus, the trial court’s finding that the parties were equal with regard to this factor is not against the great weight of the evidence.

Concerning factor (j) (the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents), the evidence showed that there was some confusion over parenting time issues caused by different provisions contained in the parties’ September 1999 agreement, the December 1999 court order, and the January 2000, friend of the court (FOC) recommendation. Defendant attempted to work out agreements for situations not contemplated by the various documents, such as the child beginning school. Defendant was also willing to drive the child to see plaintiff, but plaintiff would not drop off the child with defendant when only her boyfriend was home. Plaintiff also tended to call the police when there was a visitation dispute. Plaintiff did not invite defendant’s other children to his home, whereas defendant would invite both plaintiff’s children and other paternal relatives to her home. As a whole, the trial

court's finding that defendant prevailed on this factor is not against the great weight of the evidence.

Concerning factor (b) (the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any), the evidence showed that both parties had the capacity and disposition to provide the child with love and affection, but that defendant was more available when plaintiff was working, because she worked at home. Both parents were willing and able to continue the child's education. Although plaintiff appeared to be more concerned with academic achievement than defendant, defendant found a sound preschool program that fit her needs, whereas plaintiff wanted defendant to drive the four-year-old child from Marine City to Algonac everyday to attend a more intensive program. With regard to religion, plaintiff never attended church and his older children were not baptized. Plaintiff felt they should experience many religions and choose one when they were older. Although defendant did not attend church regularly, she attended periodically and would take all of the children with her. Given this evidence, the trial court's finding that defendant prevailed on this factor is not against the great weight of the evidence.

Concerning factor (c) (the capacity and disposition of the parties involved to provide the child with food, clothing, medical care), the evidence showed that plaintiff had a greater income than defendant and owned his own home. Since the child's birth, however, defendant had been the principal provider of food, clothing, medical care and other necessities, even while the parties lived together. While plaintiff met the child's needs when the child was physically in his care, when the child was with defendant he provided very little financial support. When defendant quit her job, plaintiff never offered to provide medical coverage through his work, complaining that it would cost too much money. Plaintiff was unwilling to attend the child's doctor's appointments unless he could take the child by himself, and the few times he did take the child by himself he failed to timely notify defendant. Plaintiff was unwilling to reimburse defendant for uncovered medical expenses and child care expenses. The trial court's finding that the parties were equal with regard to this factor is not against the great weight of the evidence.

In sum, plaintiff has failed to show that the trial court's findings of fact were against the great weight of the evidence. Accordingly, plaintiff has also failed to show that the trial court abused its discretion by awarding physical custody of the child to defendant.

Next, plaintiff argues that the trial court erred in failing to appoint, call to testify, or consider the report of a psychologist who evaluated plaintiff. See MCL 722.27(1)(d). Because plaintiff did not raise this issue below, he must show a plain error affecting his substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). The record discloses that the doctor who evaluated plaintiff was listed on plaintiff's witness list, but plaintiff declined to call him to testify or offer his report into evidence. We are not persuaded that the trial court plainly erred by failing to sua sponte call the witness or consider his report. Thus, this unpreserved issue does not warrant appellate relief.

Plaintiff also argues that the trial court erred by allowing this case to linger for approximately three years, and by conducting the custody hearing on isolated dates spanning a period of approximately a year. We agree that the delay in resolving this case is contrary to the

spirit, if not the letter, of the applicable court rules and statutes that embody this state's public policy of encouraging the prompt resolution of custody disputes. See *Curylo v Curylo*, 104 Mich App 340, 347 n 1; 304 NW2d 575 (1981); see also MCL 722.26, MCL 722.28, and MCR 3.210(C). Nonetheless, we are not persuaded that this issue warrants appellate relief. Significantly, the record does not indicate that plaintiff ever asserted his right to a more prompt resolution of this matter in an appropriate motion in the trial court. Moreover, there is no showing that defendant was at fault in causing any delay and the relief requested by plaintiff, remand for a new trial, would only cause additional delays, contrary to the child's best interests. Although plaintiff also complains that he was prejudiced by the delays because the trial judge lost his notes, the record establishes that, by the last hearing, the judge had found all of his notes. Accordingly, we conclude that this issue does not warrant appellate relief.

Plaintiff next argues that the trial court erred by denying his motion for reconsideration of its custody decision. We disagree. A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

In his motion, plaintiff argued that defendant had perjured herself by testifying at the custody trial that she had already applied for a day care license. The record discloses, however, that defendant merely testified that she was "progressing" toward a license. Additionally, it is apparent that the trial court was fully aware that defendant was providing day care to unrelated children without a license. It is also clear that this issue had no bearing on the trial court's custody decision. Thus, plaintiff failed to show a palpable error by which the court and the parties were misled or that a different disposition of the motion would result from correction of the error, MCR 2.119(F)(3), and the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Next, plaintiff argues that the trial court erred by retroactively modifying his child support obligation to December 1999. We disagree. A trial court's decision to modify a child support order is reviewed for an abuse of discretion, but whether the court committed a statutory violation by ordering a retroactive modification is a question of law to be reviewed de novo. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000); *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002).

Generally, a child support order cannot be retroactively modified. See MCL 552.603(2); see also *Harvey v Harvey*, 237 Mich App 432, 437-438; 603 NW2d 302 (1999). This prohibition does not apply, however, to ex parte interim support orders or temporary support orders. MCL 552.603(3); *Proudfit v O'Neal*, 193 Mich App 608, 611; 484 NW2d 746 (1992); see also MCR 3.207(C)(2).

In this case, plaintiff requested child support in her countercomplaint filed in October 1999. The parties subsequently agreed to a temporary support order, which expressly stated that "all issues related to . . . child support . . . are preserved for [the] [e]videntiary hearing . . ." At the hearing, the parties agreed to refer the issue of child support to the FOC. Further, plaintiff's attorney did not object when the trial court agreed with defendant's attorney that its ruling on "those kinds of issues . . . would be retroactive." Although the issue was not finally resolved until November 2002, the trial court did not err in retroactively modifying plaintiff's interim

child support obligation to December 1999, when the trial court first referred defendant's petition for child support to the FOC.

Lastly, plaintiff argues that the trial court's visitation order was inconsistent with its ruling as to custody, and that the visitation should be more liberally permitted. We disagree. Pursuant to MCL 722.27a(1), "[p]arenting time shall be granted in accordance with the best interests of the child . . . in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." See also *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993).

In this case, the parties litigated various parenting time problems, including those that arose when child began attending school—an event not contemplated by the prior orders and agreements. The trial court was aware of the parties' prior practice during the period of plaintiff's seasonal layoff. Although the trial court's parenting time order did not comport with the parties' prior arrangement, it was not reasonable to expect that arrangement to continue once the child began attending school. Contrary to what plaintiff argues, the trial court did not fail to grant liberal parenting time. Indeed, the parenting time ordered is more liberal than the standard FOC schedule. Plaintiff has failed to show that the trial court abused its discretion in this regard.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage