

Court of Appeals, State of Michigan

ORDER

Michael Allen Williams v Lori Ann Williams

Docket No. 291669

LC No. 08-000483 DM

Deborah A. Servitto
Presiding Judge

Richard A. Bandstra

Jane E. Markey
Judges

The Court orders that the November 10, 2009 opinion is hereby AMENDED. The opinion contained the following clerical error in the second-to-the-last sentence of the opinion: "As the prevailing party, defendant may tax costs pursuant to MCR 7.219." The correct sentence is, "As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219."

In all other respects, the November 10, 2009 opinion remains unchanged.

[Faint signature of Deborah A. Servitto]
Presiding Judge



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 09 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL ALLEN WILLIAMS,

Plaintiff-Appellee,

v

LORI ANN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

November 10, 2009

No. 291669

Cass Circuit Court

LC No. 08-000483-DM

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right a divorce judgment wherein the trial court awarded the parties joint legal custody of their two minor children, awarded plaintiff physical custody, divided the marital property and debt, and denied defendant's request for spousal support and attorney fees. We affirm.

Defendant first contends that the trial court erred in awarding physical custody of the minor children to plaintiff. In reviewing a child custody decision, we review a trial court's findings of fact, including its application of the statutory best interest factors, to determine if they are against the great weight of the evidence, its discretionary decisions for an abuse of discretion, and questions of law for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 876-877, 879; 526 NW2d 889 (1994). Under the great weight of the evidence standard, the trial court's findings will be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* at 879. A trial court's entry of a custody order involves a discretionary decision that is reviewed for an abuse of discretion by this Court. *Id.* at 879-881. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A clear legal error occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Fletcher, supra* at 881.

Child custody disputes are governed by the Child Custody Act (CCA), MCL 722.21, *et seq.* *Harvey v Harvey*, 470 Mich 186, 191-192; 680 NW2d 835 (2004). A trial court has a duty to "ensure that the resolution of any custody dispute is in the best interests of the child." *Id.* at 192. A trial court cannot issue an initial custody order without first determining it is in the best interests of the child. *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005). In making this determination, the trial court must consider and state its findings and conclusions as to each

of the statutory best interest factors set forth in MCL 722.23. *Helms v Helms*, 185 Mich App 680, 683; 462 NW2d 812 (1990). These factors include:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (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.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (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.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

On appeal, defendant contends that the trial court abused its discretion in entering the custody order because several of its factual findings with respect to the best interest factors were against the great weight of the evidence. Defendant specifically challenges the trial court's findings with respect to factors (a), (b), (c), (d), (e) and (f).

The trial court weighed factor (a) equally between the parties, and we conclude that the trial court's findings were not against the great weight of the evidence. *Fletcher, supra* at 879. Plaintiff was involved with the children from the time of their birth, and witnesses who observed his interaction with them testified he was a good parent. Plaintiff remained actively involved in the children's schooling, helped coach their soccer teams, and brought them to counseling

sessions to help them adjust to the divorce. After conducting several therapy sessions, Dr. Marc Milhandler, PhD, a clinical psychologist, testified that the “overriding portion of plaintiff’s mental state is the welfare of his children.” In addition, the trial court met with the children in chambers and stated that the children loved and were affectionate toward both parents. While defendant was the children’s primary caregiver for the predominant part of their lives, beginning in 2007, defendant left the marital home and children on multiple occasions. The record does not “clearly preponderate in the opposite direction” of weighing this factor equally between both parties. *Fletcher, supra* at 878. Certainly, the record does not reflect that defendant’s love, affection, and emotional ties are greater than plaintiff’s where the children are concerned.

The trial court also weighed factor (b) in favor of plaintiff, and we conclude that the trial court’s findings were not against the great weight of the evidence. Record evidence shows that defendant’s commitment to the children and family unit conflicted with her relationship with an individual named Trevor Strain beginning in late 2007. Defendant brought stress and tension into the family unit by engaging in relationships with other men, and she was dishonest regarding her whereabouts and contacted friends to help her conceal her behavior. She also engaged in acrimonious behavior directed at plaintiff when, among other things, she took his pickup truck and cursed at him in the children’s presence; she failed to attend scheduled counseling sessions or obtain other counseling; and she violated a court order by allowing Strain to have contact with the children during her parenting time visits before attempting to conceal her actions by telling the parties’ son, a nine-year-old child, that she would go to jail if anyone learned of Strain’s presence. While plaintiff engaged in acrimonious behavior directed at defendant, as well, his commitment to the children before and during the divorce proceedings supports the trial court’s findings. Specifically with respect to the children’s education, in contrast to defendant’s unpredictable behavior, plaintiff was actively involved in the children’s education and he attended parent-teacher conferences for the parties’ son. In addition, the son’s principal testified that plaintiff always has his son prepared and ready to attend school and plaintiff testified as to the schedule he has in place to ensure that both children were ready for school every morning. In sum, the evidence does not “clearly preponderate in the opposite direction” of weighing this factor in favor of plaintiff. *Fletcher, supra* at 878.

The trial court also weighed factor (c) in favor of plaintiff. Defendant did not offer any evidence showing her efforts to obtain employment, and she quit her job at a golf course after making two child support payments, which plaintiff returned to her. According to defendant, she earned approximately \$3,506 in 2008. After defendant failed to pay court-ordered child support during the divorce proceedings, the trial court ordered a show cause hearing. In contrast, plaintiff is steadily employed, earning approximately \$54,000 a year and holds a secure position where his performance was described as excellent. In making our ruling, we note that it is unfair to unduly rely on one party’s superior earning ability, *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492, 500; 417 NW2d 542 (1987), in deciding this factor, but the trial court did not give undue reliance to plaintiff’s income. Rather, it focused on defendant’s complete lack of effort to try and provide for the children. In sum, the trial court’s findings with respect to this factor are not against the great weight of the evidence. *Fletcher, supra* at 879.

The trial court weighed factor (d) in favor of plaintiff, and we conclude that the trial court’s findings are not against the great weight of the evidence. *Id.* Beginning in 2007 defendant began taking extended trips away from the marital home and became involved in a

questionable relationship while plaintiff continually remained at the home and worked to provide for the family. With respect to the stable and satisfactory lifestyle plaintiff provides, plaintiff helped provide an environment of continuity in Dowagiac for the children, where they received an education and were involved in sports. He established a daily routine that accommodated the children's school schedules and his own work schedule. Defendant's unpredictable behavior during the time period leading to the divorce evidenced instability. On this record, the evidence does not "clearly preponderate in the opposite direction" of the trial court's finding in favor of plaintiff with respect to this factor. *Fletcher, supra* at 878.

With respect to factor (e), which was also found to favor plaintiff, our Supreme Court explained, "the focus of factor e is the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). In a footnote the Court stated, "[t]he stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions. Of course, every situation needs to be examined individually." *Id.*, n 9. Here, during the months before the divorce, defendant engaged in an unpredictable lifestyle where she would leave the marital home for extended periods of time. Defendant was dishonest and attempted to contact her friends to help conceal her lifestyle. There was no evidence introduced showing defendant's efforts to obtain employment, defendant did not follow-through with her scheduled counseling sessions or rescheduled parent-teacher conferences at her son's elementary school, and she quit her job at the golf course before the end of the golf season. In addition, defendant violated a court order and allowed Strain to have contact with the children during her parenting time, and she did not provide evidence as to her expected living arrangement or income for the future. Defendant's unpredictable behavior contrasts with plaintiff's consistent lifestyle where he has worked and provided for his family while remaining involved in the children's lives. In sum, the trial court's findings with respect to this factor were not against the great weight of the evidence. *Fletcher, supra* at 879.

Our Supreme Court has explained, "moral fitness" under factor (f) relates to "a person's fitness as a parent." *Fletcher, supra* at 886-887 (emphasis in original). In this case, the trial court indicated that it would not place any weight on this factor and reasoned that it had already considered the moral fitness of the parties in weighing the other factors. The trial court's findings were not against the great weight of the evidence. Both parties engaged in inappropriate behavior during the divorce proceedings and the children were exposed to some of this behavior. In addition, it was proper for the trial court to disregard defendant's relationship with Strain in applying this factor as the court weighed Strain's affect on defendant's parenting in its application of other best interest factors. See *Fletcher, supra* at 887.

In sum, the trial court weighed factor (a) equally, and weighed factors (b), (c), (d), and (e) in favor of plaintiff and the trial court did not place any weight on factor (f). The remainder of the factors were found to favor neither party or were inapplicable to this case. As discussed above, the trial court's findings with respect to the challenged factors were not against the great weight of the evidence, and we find that the trial court did not abuse its discretion in awarding physical custody of the minor children to plaintiff. *Fletcher, supra* at 879-881; *Berger, supra*.

Next, defendant contends that the trial court erred in denying her request for spousal support. This Court reviews a trial court's findings of fact related to an award of spousal support

for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). “A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made.” *Id.* at 654-655. The challenging party bears the burden of overcoming the presumption that the trial court’s factual findings are not correct. *Olson v Olson*, 256 Mich App 619, 629; 671 NW2d 64 (2003). “If a trial court’s factual findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts.” *Berger, supra* at 727. “The trial court’s dispositional ruling must be affirmed unless the appellate court is firmly convinced that it was inequitable.” *Id.*

Pursuant to MCL 552.23 a trial court has discretion to grant spousal support “if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage,” and “after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.” The primary purpose of spousal support is to “balance the incomes and needs of the parties in a way that will not impoverish either party” based on what is “just and reasonable under the circumstances of the case.” *Moore, supra* at 654. A trial court should take into account the following factors when deciding whether to award spousal support:

- (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, supra* at 631.]

“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). The failure to specifically state findings regarding each consideration, however, does not require reversal where this Court’s “review of the record indicates that we would not have reached a different result.” *Lee v Lee*, 191 Mich App 73, 80; 477 NW2d 429 (1991).

We find that the trial court failed to consider some of the relevant spousal support factors by failing to provide any meaningful analysis. The trial court should have considered all of the factors that were relevant to the instant case. *Korth, supra*. Nevertheless, we conclude that the trial court’s ultimate conclusion to deny spousal support in this case was fair and equitable on the record, and we would not have reached a different result. *Berger, supra* at 727; *Lee, supra*.

In this case, while defendant made significant contributions to the marriage, the trial court concluded that she engaged in conduct that led to the deterioration and eventual breakup of the marriage. The trial court’s finding in this regard was not clearly erroneous. Per the trial court’s judgment, defendant was awarded far less of the marital debt, and assets of \$5,000, 50 percent of plaintiff’s pension accumulated during the marriage, and the parties’ GMC Canyon pickup truck. She is also not the primary financial provider for the children. Further, defendant is 37 years of age and in good health. The record does not support that she cannot obtain employment. She failed to present any evidence showing her attempts to obtain employment,

and the record reflects that she quit her job at the golf course before the season even ended. Thereafter, she did not pay any court-ordered child support. This evidences a lack of desire to support herself, not an inability to do so. Although plaintiff earns a good salary as a teacher his financial condition is substantially burdened by the large amount of debt accumulated during the marriage, and he is primarily responsible for the support of the two minor children. Thus, while he has the ability to earn more than defendant, the facts and circumstances support the trial court's conclusion that, in his present situation, plaintiff is unable to pay spousal support.

In reaching our conclusion, we note that while defendant contends she needs alimony while transitioning to become self-sufficient, defendant did not introduce any evidence regarding her plans to become financially independent or obtain employment. Moreover, defendant testified that she had the ability to obtain the financial resources to buy plaintiff out of the marital home, which refutes her claim of need. And, the trial court did not foreclose spousal support; rather, it left the opportunity open for two years if defendant could demonstrate that such support was warranted. In sum, we find that the trial court's denial of defendant's request for spousal support was fair and equitable under the circumstances. *Berger, supra* at 727.

Next, defendant contends the trial court erred in denying her motion for attorney fees. This Court reviews a trial court's decision with respect attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "An abuse of discretion occurs when the [trial court's] decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Findings of fact in support of the award are reviewed for clear error, while questions of law are reviewed de novo. *Reed, supra*.

In a divorce action, all "[n]ecessary and reasonable attorney fees may be awarded to a party to carry on or defend" the action. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). A trial court may award attorney fees pursuant to MCR 3.206(C)(2)(a), if the party requesting the fees alleges sufficient facts to show that, "the party is unable to bear the expense of the action, and that the other party is able to pay." In this case, defendant failed to allege sufficient facts to show that she was unable to bear the expense of defending the divorce case where she did not present any evidence concerning the fees she sustained, and did not show that she was unable to obtain employment and pay those fees. Similarly, defendant failed to allege sufficient facts to show that plaintiff was able to pay attorney fees where he became responsible for most of the substantial amount of marital debt. On this record, we conclude that the trial court's denial of defendant's request for attorney fees did not fall outside "the principled range of outcomes" and therefore it was not an abuse of discretion. *Woodard, supra*.

Next, defendant contends that the trial court erred in valuing the marital residence and adjoining property using the state equalized value (SEV) when both she and plaintiff testified that the residence was worth more than the SEV value. This Court reviews a trial court's valuation of property for clear error. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

In determining the value of marital property a trial court may consider the SEV of the home and the testimony of the parties. *Lee, supra* at 75-76. Also, a trial court "may, but is not required to, accept either parties' valuation evidence." *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). And, a trial court has great latitude in arriving at a final value when

marital assets are valued between divergent estimates. *Id.* at 26. “[W]here a trial court’s valuation of a marital asset is within the range established by the proofs, no clear error is present.” *Jansen, supra*. In this case, plaintiff offered evidence of the SEV value of the marital home. Both parties offered testimony concerning their estimation of the home’s value, but neither party offered expert testimony. The trial court did not clearly err by deciding to adopt the SEV value for the marital residence because the trial court’s valuation of the home was within the range established by the evidence. *Jansen, supra; Pelton, supra*. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

We affirm.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Jane E. Markey