

STATE OF MICHIGAN  
COURT OF APPEALS

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BRIAN MALENFANT,

Plaintiff/Counter-Defendant-  
Appellant,

v

AMY MALENFANT,

Defendant/Counter-Plaintiff-  
Appellee.

UNPUBLISHED  
August 14, 2012

No. 308694  
Oakland Circuit Court  
Family Division  
LC No. 2011-782736-DM

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Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of divorce awarding primary physical custody of their two minor children to defendant, as well as certain property. We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

Plaintiff first argues that the trial court's award of primary physical custody to defendant must be reversed because an established custodial environment existed with both parents and defendant did not present clear and convincing evidence that a change was in the best interests of the children.

"All custody orders must be affirmed on appeal unless the circuit court's [factual] findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue." *Pierron v Pierron*, 282 Mich App 222, 242; 765 NW2d 345 (2009), citing MCL 722.28. Accordingly, a trial court's findings on the best interest factors are reviewed under the great weight of the evidence standard and are affirmed unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). And the trial court's custody decision, which constitutes a discretionary ruling, is affirmed unless there has been an abuse of discretion, i.e., a decision "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." *Id.*

Custody determinations are to be made in the best interests of the children. MCL 722.27(1)(a). The trial court determines the best interests of a child by weighing the 12 statutory best-interest factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631

NW2d 748 (2001). Before determining what is in the child's best interests and entering a custody order, the trial court must first consider the issue whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). Where an established custodial environment exists, a trial court may not change the custodial environment unless there is clear and convincing evidence that the change is in the best interests of the child. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 601-602; 770 NW2d 403 (2009). And if an established custodial environment does not exist, custody determinations are made upon a showing by a preponderance of the evidence that a particular placement is in the child's best interests. See *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981); *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993).

In this case, the trial court concluded that an established custodial environment existed with both parents. Therefore, as the trial court acknowledged, the established custodial environment could not be changed unless clear and convincing evidence established that the change was in the best interests of the children. See *Foskett v Foskett*, 247 Mich App 1, 6, 8; 634 NW2d 363 (2001). The clear and convincing evidence standard is the most demanding standard in civil cases. See *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Clear and convincing evidence is evidence that

produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [*Id.* at 227, quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987) (internal quotation marks omitted); see, also, *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009).]

Here, in making its determination regarding the best interests of the children, the trial court considered the 12 statutory factors and concluded that the parties were equal on ten of the factors. However, the court determined that factors c and f favored defendant, which plaintiff challenges on appeal. With regard to factor c, the court determined that defendant had more capacity and disposition "to provide the child[ren] with food, clothing, medical care or other remedial care . . . and other material needs." MCL 722.23(c). On appeal, plaintiff argues that this finding was against the great weight of the evidence because, while defendant was praised for being a stay at home mom, plaintiff was deemed "financially inadequate for his period as a stay at home dad." And, plaintiff argues, although he was criticized for having his children vaccinated against defendant's wishes, he had the right to do so in keeping with the public policy in favor of vaccinations.

Plaintiff's characterization of the trial court's findings is not quite complete. As the trial court held, the evidence established that plaintiff became a "stay at home dad" at times because he lost jobs with six different employers over the term of this four year marriage. That is, plaintiff had an unstable job history and had difficulty staying employed. Consequently, defendant, who had been a stay at home mom by choice, returned to the work force and secured employment that provided income and health care coverage for the family. The evidence also

showed that defendant continued to attend the children's doctor appointments, transport them to and from school, prepare their meals, and have a daily routine for the children. With regard to the issue of immunizations, the evidence showed that plaintiff was well aware of defendant's concerns about vaccinations and her reluctance to vaccinate; nevertheless, while defendant was on a prearranged weekend trip out of town, plaintiff had the children immunized. Defendant found out about the immunizations from one of the children, not plaintiff. In summary, the trial court's findings with regard to this best interest factor are affirmed because the evidence did not clearly preponderate in the opposite direction. See *Berger*, 277 Mich App at 705.

The trial court also concluded that the moral fitness factor, MCL 722.23(f), favored defendant because plaintiff had deceived defendant with regard to (1) how many times he had been married, (2) having a college degree, (3) having lost a job five weeks before telling defendant, and (4) having an extramarital affair. However, none of these considerations are relevant to the evaluation of factor (f). As our Supreme Court explained in *Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994):

Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult;" the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*.

Examples of such morally questionable conduct include "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id.* at 887 n 6.

The questionable conduct considered by the trial court in this case is not the type of conduct "that necessarily has a significant influence on how [plaintiff] will function *as a parent*." *Id.* at 887. The trial court's failure to apply the law constitutes legal error with regard to its evaluation of factor f. See *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). Upon a finding of error, we are required to remand to the trial court unless the error is harmless. *Fletcher*, 447 Mich at 882. Mindful that removal of children from an established custodial environment is not warranted except in the most compelling cases, *Baker*, 411 Mich at 576-577, we cannot conclude that the error was harmless in this case requiring clear and convincing evidence that a change in the custodial environment was in the best interests of the children. Accordingly, we remand this matter to the trial court for reevaluation and on remand the trial court should consider up-to-date information and any other changes in circumstances arising since the original custody order. See *Fletcher*, 447 Mich at 889; *Pierron*, 282 Mich App at 262.

Next, plaintiff argues that the trial court abused its discretion by awarding a Ford Escape to defendant and refusing to order defendant to pay plaintiff half the proceeds from their 2010 tax refund. We disagree.

“The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances.” *Berger*, 277 Mich App at 716-717. Several factors may be considered in dividing the marital estate, including the duration of the marriage, the contributions, life situation, necessities and circumstances of the parties, as well as their ages, health, earning abilities, and past relations and conduct. *Id.* at 717. General principles of equity and other relevant factors may also be considered. *Id.* Although the assets do not need to be split into exactly equal portions, “any significant departure from congruence must be clearly explained.” *Id.* This Court reviews a trial court’s findings of fact for clear error. *Id.* We then review “whether the trial court’s dispositional ruling was fair and equitable in light of those facts,” and “affirm[s] the lower court’s discretionary ruling unless it is left with the firm conviction that the division was inequitable.” *Id.* at 717-718.

Plaintiff argues that the Ford Escape was loaned to them by his parents who expected it to be returned; thus, the trial court’s conclusion that the vehicle was a marital asset was clearly erroneous and its award of the vehicle to defendant must be reversed. However, the evidence included that the vehicle was a gift to the parties from plaintiff’s parents, the vehicle was titled in plaintiff’s name, and defendant almost exclusively drove the vehicle. Although there was also testimony that the vehicle was merely on loan to the parties, we defer to the trial court’s credibility determinations. See *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). Thus, the trial court’s conclusion that the vehicle was a marital asset was not clearly erroneous. Further, we are not left with the firm conviction that the division was inequitable. The parties had two vehicles in their household and each party was awarded a vehicle.

Plaintiff also argues that he was entitled to half of the proceeds of a 2010 tax refund. However, the record evidence included that the tax return had to be amended and that a large portion of the tax refund had to be repaid to the IRS, with interest and penalties. Further, it was clear from the evidence that the funds were used to pay marital debt, including primarily past due child care. Under the circumstances, the distribution was fair and equitable.

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

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Mark J. Cavanagh