

STATE OF MICHIGAN
COURT OF APPEALS

ANN LEWIS,

Plaintiff-Appellee,

v

SCOTT LEWIS,

Defendant-Appellant.

UNPUBLISHED

January 27, 2005

No. 250532

Lenawee Circuit Court

LC No. 02-025703-DM

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce, and we affirm.

I. PARENTING TIME

Defendant contends that the trial court's parenting time order fails to comply with statutory requirements because it does not grant him parenting time in "a frequency, duration, and type reasonably calculated to promote a strong relationship," MCL 722.27a(1),¹ and also fails to grant him specific parenting time, contrary to MCL 722.27a(7).² The divorce judgment provides that "defendant shall have the right to have parenting time with the minor children at all times and places agreeable between the parties. If the parties cannot agree then either party may

¹ MCL 722.27a(1) provides:

Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. [MCL 722.27a(1).]

² "Parenting time shall be granted in specific terms if requested by either party at any time." MCL 722.27a(7).

petition the Court for a specific parenting time schedule after the parties have obtained their new residence.”

The issue of parenting time was complicated by the parties’ circumstances, because the parties’ living arrangements and employment situations were unsettled at the time of divorce and plaintiff was contemplating a return to California. Because the order permits defendant parenting time at all agreeable times and places, it grants defendant liberal parenting time. Although it provides that plaintiff must agree to the parenting time, the trial court considered evidence that plaintiff had not unduly hindered defendant’s parenting time. Furthermore, the judgment provides that either party could petition the court for specific parenting time if they could not agree.

Considered in the context of the parties’ unsettled living and employment situations, the trial court’s parenting time order satisfied the requirement of MCL 722.27a(1) that defendant be granted parenting time in a frequency, duration, and type reasonably calculated to promote a strong relationship with his daughters, as well the requirement of MCL 722.27a(7) that parenting time shall be granted in specific terms if requested by a party.³

II. CHANGE OF DOMICILE

Defendant maintains that the trial court erred in permitting plaintiff to change the children’s domicile to California. We review the trial court’s decision to allow a parent to remove a child from the state for an abuse of discretion. *Overall v Overall*, 203 Mich App 450, 458; 512 NW2d 851 (1994).⁴ The trial court’s findings of fact are reviewed under the great weight of the evidence standard. *Id.* at 454-455, citing MCL 722.28.⁵

In deciding to allow plaintiff to move the children’s domicile to California, the trial court evaluated each of the relevant factors in MCL 722.31(4).⁶ The evidence indicated that (1)

³ The record reflects that the trial court could not fashion a more specific grant of parenting time because defendant testified that he was unemployed, and applying for jobs all over the world. Furthermore, the court’s order left open the possibility of petitioning for a more specific grant of parenting time once the parties had established new domiciles, and also if the parties could not agree on a schedule between themselves. There is no evidence on the record that any such disagreement took place, nor is there any evidence that defendant has availed himself of the statutorily provided right to petition the trial court for specific parenting time “at any time.”

⁴ An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Brown v Loveman*, 260 Mich App 576, 600-601; 680 NW2d 432 (2004).

⁵ In *Overall* this Court stated that “while our review [of child custody decisions] is de novo, it is also limited by [MCL 722.28], which provides [that] ‘ . . . 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.’” *Overall*, *supra* at 454-455, quoting MCL 722.28.

⁶ MCL 722.31(4) provides:

(continued...)

plaintiff originally resided in California; (2) the parties met in California; (3) the children had previously lived in California; and (4) defendant lived in California before accepting a job in Michigan. The trial court found that plaintiff, who was awarded physical custody of the children, came to Michigan to try to preserve the marriage and therefore, that she should not be penalized for her efforts to salvage the marriage. It further found that plaintiff had established a support network in California, would be more comfortable there, and that these considerations are important to the children's quality of life. Additionally, the court found that plaintiff had been generous in providing parenting time and promoting a good relationship between the children and defendant, and was desirous of continuing such a relationship. After reviewing the record, it is apparent that the trial court considered each of the relevant factors, and therefore, we conclude that its findings are not against the great weight of the evidence. We further hold that the trial court did not abuse its discretion.⁷

III. CHILD SUPPORT

Defendant says that the trial court erred in its determination of child support. "The award of child support rests in the sound discretion of the trial court, and its exercise of discretion is presumed to be correct. . . . Although appellate review is de novo, the trial court's factual

(...continued)

Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

- (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
- (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
- (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
- (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
- (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.31(4).]

⁷ Defendant asserts that the trial court improperly relied on a Friend of the Court custody evaluation in determining parenting time and plaintiff's request for a change of domicile. Even if the custody evaluation was improperly received without the consent of the parties, see, e.g., *Shelters v Shelters*, 115 Mich App 63, 68; 320 NW2d 292 (1982); *Adams v Adams*, 100 Mich App 1, 15; 298 NW2d 871 (1980), it is apparent that the trial court did not rely on the evaluation in deciding the issues of parenting time and change of domicile, but rather relied on independent evidence received at the hearing and independently evaluated the evidence in arriving at its own decisions. Therefore, appellate relief is not warranted.

findings are reviewed for clear error.” *Thames v Thames*, 191 Mich App 299, 306-307; 477 NW2d 496 (1991).

The assessment of support and the support formula are based on the child’s needs and circumstances and each parent’s ability to pay. *Id.*; *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002); *Hoke v Hoke*, 162 Mich App 201, 206; 412 NW2d 694 (1987). And, in determining the contributions to support that divorced parents must make, the trial court must generally follow the formula developed by the Friend of the Court. MCL 552.605(2); *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003). Further, a court may deviate from the support formula only if application of the formula would be unjust or inappropriate, and the court specifies on the record its reasons for deviation. MCL 552.605(2); *Ghidotti v Barber*, 459 Mich 189, 196; 568 NW2d 883 (1998).

Although defendant asserts that the trial court failed to follow the child support formula without explaining its reasons for deviation, the record indicates that the trial court followed the Friend of the Court’s recommendation, which was based on the Friend of the Court formula. Therefore, the trial court was not required to make any findings concerning a deviation. Further, contrary to defendant’s assertions that the Friend of the Court failed to impute income to plaintiff, the Friend of the Court did in fact impute weekly income of \$310 to plaintiff.

Defendant also says, erroneously, that the trial court failed to consider his loss of employment. The trial court recognized defendant’s recent loss of employment, but concluded that defendant would secure appropriate employment almost immediately, a finding that was reasonable in light of the trial evidence concerning defendant’s qualifications and job search efforts. Nonetheless, in the event defendant did not find a job, the divorce judgment provides that he could petition for a change in the support amount without showing a change in circumstances. We hold that the trial court did not abuse its discretion.

We also reject defendant’s argument that the trial court should have reduced his support obligation retroactively, in accordance with the shared economic responsibility formula. “The economic sharing formula should only be applied to support orders entered concurrent with an initial custody/parenting time determination or to modifications of custody/parenting time based upon changed circumstances. It shall *not* be retroactively applied to existing orders.” Michigan Child Support Formula Manual, Thirteenth Edition (West, 2001), p 26.⁸ Furthermore, “[t]he formula should only be used if it can be determined from the specific terms of the custody/parenting time order that the children will be with that parent for at least [128 overnights annually].” *Id.* Although defendant asserts that the children had been sharing substantial amounts of time with each parent, he does not assert that the children were in his care for a minimum of 128 overnights annually, nor is it apparent from the terms of the trial court’s interim or final custody orders that the 128-overnight threshold was met. Additionally, the trial court’s earlier November 8, 2002, order contained a parenting time abatement provision, which already

⁸ Our Legislature mandates that a trial court must use the Michigan Child Support Manual to calculate support. *Eddie v Eddie*, 201 Mich App 509, 511; 506 NW2d 591 (1993), citing MCL 552.16(2).

accounted for the time the children spent with defendant. The child support manual indicates that parenting time abatement should not be used in conjunction with the economic sharing formula. *Id.* at 26-27.

For these reasons, we hold that the trial court did not err by failing to apply the economic sharing formula.

IV. SPOUSAL SUPPORT

Defendant maintains that the trial court erred in awarding plaintiff transitional temporary spousal support of \$1,000 a month for eighteen months. An award of spousal support is in the trial court's discretion and is to be based on what is just and reasonable under the circumstances of the case. *Thames, supra* at 307. We review an award of spousal support de novo, but must accept the trial court's factual findings unless they are clearly erroneous. *Id.* at 308. The burden is on the appellant to persuade this Court that a mistake was made. *Id.*

The primary objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Among the factors that should 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 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 v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

Here, the trial court considered the factors that were relevant to the parties' situation. We conclude that its findings are not clearly erroneous. Also, the trial court directed that the spousal support amount could be modified, depending on the outcome of the parties' job search. Considering the circumstances, we hold that the trial court did not abuse its discretion in its award of transitional temporary spousal support.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra