

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH W. CHARLES,

Plaintiff-Appellant,

v

AMANDA LYNN CHARLES,

Defendant-Appellee.

UNPUBLISHED

June 19, 2012

No. 307476

Otsego Circuit Court

Family Division

LC No. 10-013659-DM

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the November 15, 2011, judgment of divorce. The issues raised on appeal involve the custody of the parties' children as well as the trial court's finding that the parties' house was marital property. The court granted primary physical custody of the children to defendant and joint legal custody to both parties. The court also ordered defendant to move within 100 miles of the marital home. We affirm.

“This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.” *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We review a trial court's findings on the existence of an established custodial environment and on the statutory best interest factors under the great weight of the evidence standard. *Id.* Thus, we must affirm the findings unless the evidence clearly preponderates in the opposite direction. *Id.* We review a trial court's award of custody for an abuse of discretion. *Id.* Thus, we must affirm the award unless it was “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.*

On appeal, plaintiff argues that the trial court erred in finding that the children had an established custodial environment with defendant. He contends that, at a minimum, an established custodial environment existed with both parties. We disagree.

A custody dispute is to be resolved in the best interests of the child. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). A trial court determines the best interests of a child by weighing the 12 statutory best interest factors listed in MCL 722.23. *Id.* However, before a trial court may address the statutory best interest factors, it must determine whether the child has an established custodial environment. *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009). An established custodial environment exists

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. 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. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, that fosters a relationship between the custodian and child and is marked by security, stability, and permanence. *Berger*, 277 Mich App at 706.

Here, plaintiff makes much of the trial court's statement that "I do find the children for the last six months would have looked to their mother primarily for guidance, discipline, and the necessities of life." He contends that the court's use of the words "would have looked" indicates that the children did not *actually* look to defendant for guidance, discipline, and the necessities of life. This argument is without merit. The court's statement is indicative of a finding that the evidence showed that the children habitually looked to defendant for guidance, discipline, and the necessities of life during the previous six months. This finding is not against the great weight of the evidence. Although there was evidence that plaintiff had been actively involved in his children's lives, during the six months preceding the custody hearing the children lived with defendant in Fenton and was the children's primary caregiver during that time.

Plaintiff also argues that the court's findings with respect to the statutory best-interest factors, MCL 722.23, were not supported by the great weight of the evidence. We disagree.

The trial court has an obligation to resolve custody disputes in the best interests of the child based on the statutory best-interest factors. *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). The best-interest factors as set out in MCL 722.23:

(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.

Although the trial court must place its findings on the record for each factor, not every piece of evidence presented by the parties has to be included in the trial court's determination. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). A trial court's failure to discuss every piece of evidence is not suggestive of the evidence being overlooked. *Kessler*, 295 Mich App 54, 65; 811 NW2d 39 (2011). The trial court must merely place sufficient findings on the record so this Court can determine if the evidence preponderates in the other direction. *MacIntyre (On Remand)*, 267 Mich App at 452.

However, this Court will give deference to the trial court's findings because of the trial court's ability to determine credibility. *Kessler*, 295 Mich App at 64. The trial court also has discretion when determining what weight to give the evidence. *Id.* And, the trial court does not need to weigh the factors equally, but must make the determination in the best interests of the child(ren). *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

The trial court made specific findings in regards to each of best-interest factors. The trial court found that factors (a), (b), (d), (e), (f), (g), (h), and (j) favored neither party. The trial court found that factors (c) and (k) favored defendant. Plaintiff asserts that the trial court's findings for each factor was cursory and insufficient to support its conclusions. He does not, however, challenge the court's findings regarding factors (f) and (i). Also, he makes no mention of factor (g).

Although the trial court's findings were brief, the trial court articulated sufficient reasons to support its findings for each factor. With respect to plaintiff's great weight argument, he simply cites some contrary evidence and concludes that the court's findings were erroneous.

In regard to factor (a), the trial court determined that it was "strong both ways between both children and both parents" and was therefore equal for both parties. Plaintiff points to expert testimony provided by psychologist John Paul Jones, Ph.D. Specifically, he notes that Jones testified that the minor boy "feels safer at Dad's home," and "feels for whatever reason his mom . . . is less attentive to him." However, Jones also testified that the boy indicated he would like the time spent with his parents to be equal. While Jones's testimony could be cited as support for concluding that factor (a) favored plaintiff, that the court did not do so does not evidence error.

For factor (b), the trial court again indicated that the factor favored neither party and found that the parties agreed on religion. Plaintiff notes that defendant testified that their son has a stronger bond with plaintiff. But this does not go to the issue of her *capacity* and *disposition* to love the children. The same can be said of plaintiff's assertion that defendant has shown an inability to control the children when taking them to medical appointments.

In regard to factor (c), the trial court indicated that both parties appeared to be employed with decent incomes. The trial court also noted that although plaintiff was the primary source of income during the marriage, defendant had found gainful employment since the separation and was providing for the children. However, even though there was no child support order in place, the court noted that plaintiff had paid only \$300 in child support since defendant moved to Fenton. The court reasoned that was an indication of plaintiff's disposition to provide for the children. Plaintiff's assertion that the court's conclusion that this factor slightly favored defendant was against the great weight of the evidence is without merit.

Plaintiff asserts that the court's finding of equality with respect to factor (d) "simply flies in the face of the facts." For factor (d), the trial court spent some time discussing the marital environment and the breakdown of the marriage. The trial court determined that although plaintiff had some difficulties with his temper, he was seeking counseling and that it was reasonable for defendant to leave the Gaylord area. Plaintiff contends that the children loved their home in northern Michigan, that they did well in school, and that they enjoyed engaging in outdoor activities. The fact that the children have affection for this home does not preclude a finding that there is stability in the home they have with defendant.

Regarding factor (e), plaintiff maintains that defendant has lived in two homes since the parties split. He does not assert, however, that the Fenton home is inadequate or that it lacks a sense of permanence.

Regarding factor (h), the court stated, "There's been some suggestion [the minor boy] may not be doing as well in Fenton as he is here, but nothing that's significant." Plaintiff asserts that the children were doing well in school before the move and his son "greatly missed his Northern Michigan school." However, there is no evidence, or allegation, that defendant has made any questionable decisions regarding the children's schooling or that the Fenton schools are inadequate.

The trial court then discussed factor (j) and how the distance between plaintiff and defendant affected the parties' relationships with the children. The court noted that the biggest impediment to the children having a close relationship with their father was the distance between Gaylord and Fenton. The trial court did not specifically address which party was favored but the implication was that the distance, not the parties, was to blame for any impediments.

Finally, the trial court addressed factor (k), which deals with domestic violence. Although plaintiff claims that defendant fabricated the allegations so that she would be able to move with the children, the trial court indicated that it did not believe defendant was conspiring or lying. The trial court indicated that it believed plaintiff created threatening situations that were witnessed by the children. It was up to the trial court to determine the weight and credibility of the evidence presented. *Kessler*, 295 Mich App at 64. The trial court's determination was supported by evidence on the record and the trial court's decision was not against the great weight of the evidence.

Plaintiff also argues that the court erred by failing to hold a hearing before allowing defendant to move the children more than 100 miles away from him. Although the trial court had entered a temporary order allowing defendant to move with the children to Fenton because of defendant's allegations of domestic violence and the issuance of a personal protection order, during the custody trial the court ordered defendant to move within 100 miles of the marital residence. Therefore, the issue is moot. See *McCracken v Detroit*, 291 Mich App 522, 531; 806 NW2d 337 (2011).

Finally, plaintiff argues the trial court erred in determining that the house located at 5397 Whitehouse Trail was marital property.

When dividing property in a divorce proceeding the trial court must first classify the property as marital or separate property. *Woodington v Shokoohi*, 288 Mich App 352, 358; 792 NW2d 63 (2010). Marital property is that property which came to the parties because of the marriage. *Id.* Generally only marital property is subject to division while separate property is not. *Id.* A trial court's findings of fact with regard to whether property is a marital asset or separate property is reviewed for clear error. *Id.* at 357. This court gives special deference to a trial court's findings when based on the credibility of the witnesses. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007).

Although the trial court never expressly found that the house was marital property, the court's factual findings and its disposition ruling regarding the house make it clear that the trial court found the house to be marital property. The court stated in relevant part:

I've heard the testimony. The deed indicates that the property is owned by Joseph Charles and Amanda Charles, husband and wife; signed by Mr. Charles While there's been some discussion . . . a statement that Mr. Charles, Senior said to Ms. Charles and then that she responded to him, "Well, I don't want anything from it." I mean, that, in and of itself isn't binding on the Court. Mr. Charles afterwards chose to deed it to both parties and the Court is bound by that; although, still can take contributions into account.

It's clear that it came from Mr. Charles' family as well. Income tax returns were filed jointly. Presumably these were list tax and mortgage deductions, that they would treat that as joint property. Other gifts from Mr. Charles Senior were treated jointly, joint income presumably use for family expenses

Based on the evidence presented the trial court did not err in determining that the property was marital property. The parties married in 2006. According to plaintiff and his father, the house constituted an advance on plaintiff's inheritance from his father. Plaintiff and his father claimed that in 2008 defendant proclaimed no interest in the house in the event the parties' marriage did not last. According to plaintiff's father, in light of this proclamation he deeded the house to both plaintiff and defendant in 2008. Defendant testified, however, that she never disclaimed any interest and always thought the house was a gift to her and plaintiff from plaintiff's father. She explained that the house was deeded to both her and plaintiff and that she considered the home to belong to both her and plaintiff. In making its finding that the house was marital property, the trial court referred to plaintiff's claim that the house was part of his inheritance from his father and that defendant waived any interest in it, but found defendant's evidence that the parties treated the house as a marital asset to be more credible. Deferring to the court's assessment of witness credibility, we cannot conclude that the trial court clearly erred in characterizing the home as marital property.

Although not raised in the statement of questions presented,¹ and although plaintiff specifically states in his brief on appeal that "The only issue in dispute concerned the legal status of real property which had belonged to plaintiff's father's trust and had been conveyed to the parties in 2008," plaintiff cursorily contends that the court failed to elaborate its findings on the record regarding the factors set forth in *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992), when apportioning the marital estate.²

It has been repeatedly recognized that when a factor is relevant to the value of the property or the needs of the parties, a trial court is required to make a specific finding on the relevant factor. In a bench trial, a judge is required to make specific determinations of fact and separately state its conclusions of law. MCR 2.517(A)(1). Findings of fact are deemed to be sufficient even if brief, as long as they are definite and pertinent. MCR 2.517(A)(2). A trial court's findings of fact are deemed to be sufficient if "it appears that the trial court was well aware of the issues in the case and correctly applied the law." *Triple E Produce Corp v Mastronardi Prod, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). While the trial court should have addressed the relevant factors, it would appear that the trial court was adequately advised of the parties' relevant history, contributions to the marital estate, life status, and the issues involved. We find any failure of the trial court to specifically address the relevant factors

¹ Plaintiff failed to properly present this argument because it was not raised in the statement of questions presented for appeal. MCR 7.212(C)(5).

² The briefing related to the issue is inadequate. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

to be harmless error, particularly as defendant has failed to demonstrate that the property distribution was inequitable.

Affirmed.

/s/ Jane M. Beckering

/s/ E. Thomas Fitzgerald

/s/ Cynthia Diane Stephens