

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TERESA L. CURNES,  
Plaintiff-Appellee,

UNPUBLISHED  
September 13, 2002

v

JEFFREY J. CURNES,  
Defendant-Appellant.

No. 237528  
Genesee Circuit Court  
LC No. 99-210696-DM

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Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce granting sole physical and legal custody of their minor children to plaintiff. Defendant further appeals the amount of child support ordered by the trial court and the payment of spousal support to plaintiff. We affirm.

The parties were married after defendant completed his first year of college in 1987. Plaintiff was pregnant with their first child at the time. Defendant went on to attend and graduate from medical school after college. In July 1997, the parties moved from Iowa to Michigan for defendant's residency program. The following January, plaintiff gave birth to the parties' second child. After moving to Michigan the marriage began to gradually break down and plaintiff suspected defendant of having an affair. In January 1999, plaintiff moved back to Iowa with their two children and filed for divorce in Michigan one month later. At the time of the divorce the parties had been married for fourteen years.

While the children were in the physical custody of plaintiff, defendant was granted reasonable parenting time by the trial court. However, on August 15, 2001, defendant filed a petition to change physical custody of the children. Defendant stated that he took a job in Iowa to be closer to his children and alleged that they were suffering greatly in plaintiff's care. A trial was held and the court concluded that custody should remain with plaintiff because of the established custodial environment. The trial court further ordered defendant to pay spousal support and child support. The trial court declined to order joint custody given the parties' contentious relationship and the best interests of the children. Defendant's subsequent motion for reconsideration was denied.

## I. Child Custody

Defendant initially argues that the trial court erred by failing to consider joint legal and physical custody of the children. We disagree. “We review the trial court’s findings of fact to determine whether they are against the great weight of the evidence, the court’s discretionary rulings for a palpable abuse of discretion, and questions of law for clear legal error.” *Mogle v Sriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). A trial court’s factual findings will be affirmed on appeal “unless ‘the evidence clearly preponderates in the opposite direction.’” *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001), quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). An abuse of discretion occurs if the results of the trial court’s decision are so grossly violative of fact and logic that they evidence a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999). A trial court commits legal error occurs when it incorrectly applies or interprets the law. *Schoensee v Bennett*, 228 Mich App 305, 312; 577 NW2d 915 (1998).

A trial court must consider joint custody if it is requested by either parent. MCL 722.26a(1). However, the record reveals that during the trial defendant requested only sole custody. In his motion for reconsideration, defendant claimed that he “was of the opinion that in the event that the [c]ourt denied him full custody, that the [c]ourt would then consider joint custody.” According to MCL 722.26a(1):

In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. *In other cases the court may consider joint custody.* The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

- (a) The factors enumerated in [the Child Custody Act, MCL 722.23].
- (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.  
[Emphasis added.]

Because neither party requested joint custody of the children, the decision was within the trial court’s discretion. MCL 722.26a(1). Nevertheless, defendant’s contention that the trial court utterly failed to consider joint custody is a misrepresentation of the proceedings. A review of the record shows that the trial court actually declined to order joint custody due to the parties’ adverse relationship and the best interests of the children. Indeed, the trial court discussed the parties refusal to cooperate with each other and noted that they could not even look at each other during trial. During the hearing on defendant’s motion for reconsideration, the trial court again stated that this case clearly did not qualify for joint custody based upon the parties’ testimony and the court’s years of experience.

We also find that the trial court properly awarded custody to plaintiff. Before addressing the best interests of the children, a trial court must determine if a custodial environment exists. *Mogle, supra* at 197. A custodial environment 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. 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).]

The evidence in this case clearly supports the trial court's finding that a custodial environment existed with plaintiff. The children lived almost exclusively with plaintiff for the last three years and looked to her for their daily needs. Conversely, defendant had only sporadic parenting time with the children. "In determining whether a custodial environment exists, the court's concern is not with the reasons behind the custodial environment, but with the existence of such an environment." *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992). Because an established custodial environment existed with plaintiff, defendant had the burden of proving by clear and convincing evidence that awarding him custody would be in the children's best interest. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 24-25; 614 NW2d 183 (2000).

The trial court analyzed the best interest factors enumerated under MCL 722.23 and set forth its findings on the record. See *Mixon, supra* at 163. For the majority of the factors, the trial court either determined that the parties were equal or found in favor of plaintiff. Essentially, the trial court acknowledged the daily presence plaintiff played in the children's lives, the strong emotional ties between plaintiff and the children, the eldest child's progress in school, and the relative stability plaintiff provided. The only factor in which the trial court ruled against plaintiff concerned her inflexibility regarding visitation of the children by defendant. After a careful review of the record, we are not convinced that the trial court's findings on these factors were against the great weight of the evidence. *Foskett, supra* at 5. Nor are we convinced that defendant has shown by clear and convincing evidence that it is in the best interest of the children to change custody. MCL 722.27(1)(c). Accordingly, the trial court did not abuse its discretion in refusing to grant defendant custody or order joint custody of the children. *Foskett, supra* at 5.

## II. Child Support

Defendant also maintains that the trial court failed to comply with the Michigan Child Support Guidelines. We disagree. This Court reviews the modification of a child support order for an abuse of discretion. *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000). "The trial court's findings of fact are reviewed for clear error, but its ultimate decision is subject to review de novo." *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

A trial court may deviate from the Michigan Child Support Formula if it feels that the formula is unjust or inappropriate. *Id.* The trial court must state its rationale for any deviation from this formula on the record. *Id.* Defendant claims that the trial court failed to reduce his net income by the amount of spousal support he paid each week. The Michigan Child Support Formula Manual, thirteenth rev, p 14, lists spousal support as a legitimate deduction when

calculating child support.<sup>1</sup> The trial court did not explain on the record how it arrived at defendant's net weekly income from his gross income. However, the record reveals that the trial court correctly utilized the child support formula based on its calculation of the parties' adjusted net incomes. We note that defendant's calculations in his appellate exhibits are erroneous because he failed to deduct the spousal support payments "prior to the calculation and deduction of federal, state and local income taxes." Michigan Child Support Formula Manual, thirteenth rev, p 14. Moreover, the trial court added the spousal support payments to plaintiff's income and so we assume, absent proof to the contrary, that it subtracted these payments from defendant's income. The burden is upon defendant to establish clear error and without proof of such error we affirm the trial court's award. *Thames v Thames*, 191 Mich App 299, 307; 477 NW2d 496 (1991). We further note that defendant voluntarily reduced his income and that he was more than capable of making the child support payments as ordered by the trial court.

Defendant also opines that the trial court erroneously refused to consider his student loans when calculating child support. However, the Michigan Child Support Manual, thirteenth rev, p 14-15, does not include loans in its list of permissible deductions. Additionally, defendant fails to offer any support for his contention that student loans should be taken into account when calculating child support. See *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 536-537; 593 NW2d 190 (1999). Consequently, defendant's claim is meritless.

### III. Spousal Support

Defendant next contests the trial court's award of spousal support. Specifically, defendant alleges that the trial court failed to consider the required factors and that the circumstances did not justify the amount or duration of the award. We disagree. An award of spousal support is within the trial court's discretion. MCL 552.23; *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). "The main objective of alimony 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). A trial court's factual findings concerning spousal support are reviewed for clear error. *Id.* Absent clear error, we must determine if the award was fair and equitable under the circumstances. *Id.* at 655.

There are many factors a trial court should consider when determining whether to grant spousal support, including "the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health, and fault, if any." *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993). In the instant case, the trial court found that defendant did in fact have a relationship with another woman during the marriage and that this relationship seriously affected the parties' marriage. The trial court also found that spousal support was proper given defendant's superior earning potential and education. The trial court noted that plaintiff was thirty-five years of age, that she was just beginning college, and that she aspired to attend law school. The trial court further noted that during this relatively lengthy fourteen year marriage, the parties worked together with the ultimate goal of defendant becoming a physician. Having achieved this goal, the trial court determined that it would be

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<sup>1</sup> This manual was published by the Friend of the Court according to legislative mandate. See *Ghidotti v Barber*, 459 Mich 189, 196-197; 586 NW2d 883 (1998).

inequitable to deny spousal support and leave plaintiff effectively out of the job market with no pension or medical insurance. The trial court reaffirmed its decision that the spousal support award was fair and equitable during the hearing on defendant's motion for reconsideration. Based on this record, we conclude that the trial court did not err in awarding plaintiff \$500.00 a week in spousal support for eight years.

Affirmed.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Jane E. Markey