STATE OF MICHIGAN

COURT OF APPEALS

PAUL ROMAN QUESADA,

Plaintiff-Appellant,

v

MARY ELLEN QUESADA,

Defendant-Appellee.

UNPUBLISHED
January 14, 1997

No. 185134
Oakland Circuit Court
LC No. 91-410534

Before: Saad, P.J., and Griffin, and M. H. Cherry*, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of divorce granting defendant custody of the parties' two minor children. We affirm in part and remand for further proceedings.

I

On appeal, plaintiff first contends that the trial court erred in failing to adequately address plaintiff's claim that the temporary support order erroneously deviated from the child support formula developed by the state friend of the court bureau. We disagree.

In the lower court, plaintiff claimed his temporary support obligation was excessive because it was not calculated pursuant to the shared economic responsibility formula. However, according to the Michigan Child Support Formula Manual (1996 rev), p 23, the shared economic responsibility formula applies only where

> children share substantial amounts of time with each parent. . . . Substantial shared time with children translates into economic sharing beginning when the parent with the lesser amount of time with the children has the children in his/her care for a minimum of 128 overnights annually.

* Circuit judge, sitting on the Court of Appeals by assignment.

In the present case, the temporary support and custody order held plaintiff responsible for 104 overnight visits each year. The revised temporary custody order gave plaintiff custody on Friday, Saturday, and Sunday evenings for all but one weekend a month, or for 120 overnight stays each year. Thus, plaintiff did not have legal responsibility for the children for the minimum time required for the application of the shared economic formula. Furthermore, the Child Support Formula Manual clearly indicates that the shared economic responsibility formula should "not be retroactively applied to existing orders." See Child Support Formula Manual (rev 1996), p 24. Accordingly, the amount of temporary support owed by plaintiff need not be recalculated using the shared economic responsibility formula.

II

Next, plaintiff argues that the trial court erred in failing to articulate reasons for deviating from applicable friend of the court child support guidelines. We agree. Pursuant to MCL 552.16; MSA 25.96, the trial court must either use the child support formula devised by the state friend of the court bureau or articulate appropriate reasons for deviating from the child support formula. *Eddie v Eddie,* 201 Mich App 509, 513; 506 NW2d 591 (1993); *Thames v Thames,* 191 Mich App 299, 307; 477 NW2d 496 (1991).

Here, the trial court failed to indicate what criteria it used for ordering plaintiff to pay $200 a week in child support. Because the record contains conflicting information about plaintiff's actual income and potential earning capacity, we are unable to determine whether the final support order deviated from the child support formula developed by the friend of the court bureau. Thus, we remand with instructions for the trial court to articulate the criteria it used in establishing plaintiff's support obligation. Further, should the trial court not employ the applicable friend of the court formula, the trial court must articulate its reasons for concluding that the guidelines would be unjust under the circumstances of the present case.

Plaintiff also argues that the trial court abused its discretion in ordering him to pay all of the children's uninsured medical expenses. Again, we agree. This order was contrary to the guidelines provided by friend of the court bureau, which state:

> All uninsured health care expenses, other than ordinary expenditures on health care [which are added into the total support amount in the guidelines], should be apportioned between parents based on the ratio of their incomes, provided that the proportion paid by either party shall not be less than 10% or more than 90%." [Michigan Child Support Formula Manual (rev 1996), p 26.]

On remand, the trial court should address its order for the payment of uninsured medical expenses either by changing the order or stating why application of the guidelines is unjust.

III

Plaintiff further argues the trial court committed error requiring reversal in awarding custody of the parties' two minor children to defendant. Specifically, plaintiff claims that in evaluating the statutory

factors set forth in MCL 722.23; MSA 25.312(3)[1], the trial court committed clear legal error and made findings against the great weight of the evidence. We disagree.

A

We review a trial court's custody decisions to determine whether the trial court committed a palpable abuse of discretion, clearly erred on a major issue, or made factual findings that contravene the great weight of the evidence. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher,* 447 Mich 871, 876-877; 526 NW2d 889 (1994). A trial court's factual findings regarding the various statutory factors are upheld on appeal unless the evidence "clearly preponderates in the opposite direction." *Fletcher, supra* at 879; *Wiechmann v Wiechmann,* 212 Mich App 436, 439; 538 NW2d 57 (1995).

B

Plaintiff claims that the trial court considered several inappropriate factors when assessing factor (b). However, plaintiff cites no authority in support of its position. Therefore, the issue has been waived. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for a claim. *Goolsby v Detroit,* 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *Isagholian v Transamerica Ins Corp,* 208 Mich App 9, 14; 527 NW2d 13 (1994); *Patterson v Allegan Co Sheriff,* 199 Mich App 638, 640; 502 NW2d 368 (1993); cf. *Froling v Carpenter,* 203 Mich App 368, 373; 512 NW2d 6 (1993). Furthermore, after a thorough review of the record, we conclude that the evidence under this factor does not clearly preponderate in plaintiff's favor. We agree with the trial court that plaintiff's past behavior negatively impact on his ability to suitably rear and guide his children.

C

Plaintiff further argues that the trial court misinterpreted the elements of factor (c) and clearly erred in considering factors (c) and (d) simultaneously. However, plaintiff has waived this issue by, once again, failing to cite to authority to support his position. *Goolsby, supra* at 655, n 1; *Isagholian, supra* at 14; *Patterson, supra* at 640. Nevertheless, after reviewing its oral findings in context, we are convinced that the trial court was aware of the factual issues and correctly applied the law. See *In re Forfeiture of $19,250,* 209 Mich App 20, 28-29; 530 NW2d 759 (1995).

Plaintiff further contends that the trial court's findings regarding factor (c) are against the great weight of the evidence. We disagree. The trial court's finding is supported by plaintiff's testimony that, despite the fact that he lived with his mother and paid no rent, he was behind in his bills and ostensibly lacked the means to pay the court-ordered child support. Moreover, plaintiff testified that the current custody arrangement interfered with his earning ability. On the other hand, defendant testified that she was current with her bills despite plaintiff's arrearage in child support. Accordingly, the evidence regarding factor (c) does not preponderate in plaintiff's favor.

D

Regarding factor (d), plaintiff claims the trial court erred in failing to consider the quality of the environment plaintiff provided the children. However, the trial court is not obligated to comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *Fletcher,*

supra at 883. Moreover, our contextual review reveals that the trial court found that the children would be better served by maintaining their existing living and custody arrangement. This finding was not against the weight of the evidence. As the trial court noted, representatives at the children's school opined that the children were doing well in their current environment.

E

Next, plaintiff contends that the trial court considered irrelevant evidence in finding that factor (e) favored defendant. However, even if the trial court erred in considering the acceptability of the custodial home, the error, if any, is harmless because the evidence regarding this element does not clearly preponderate in plaintiff's favor.

F

Plaintiff also contends that the trial court committed clear legal error in deciding that factor (f) weighed in defendant's favor. Assuming arguendo that the trial court erroneously considered the personal relationships of people plaintiff used to baby-sit the children, the error, if any, was harmless. Even when we do not consider testimony regarding the living arrangement chosen by one of plaintiff's select baby-sitters, the evidence regarding factor (f) does not clearly preponderate in plaintiff's favor. Plaintiff's history of spousal abuse, the fact that he abused defendant in front of the children, his effort to hide income and delay the proceedings to reduce his child support obligation, and his failure to pay either his bills or the court-ordered child support sustain the trial court's finding that, unlike defendant, plaintiff's conduct raises questions about his fitness to provide for and properly raise the children. See *Fletcher, supra* at 886-887.

G

Plaintiff next avers that the trial court clearly erred in failing to consider statutory factor (g), the parties' mental and physical health. However, the trial court did consider this factor, albeit briefly, in expressly disagreeing with the court-appointed psychologist's custody recommendation. Therefore, after our thorough review of the record, we are convinced that the trial court was aware of the issues and correctly applied the law. See *Forfeiture of $19,250, supra* at 28-29.

H

Plaintiff further claims that the trial court committed clear legal error in analyzing irrelevant facts when considering factor (h). However, plaintiff has waived this issue by failing to cite authority to support this position. *Goolsby, supra* at 655, n 1; *Isagholian, supra* at 14; *Patterson, supra* at 640. Nonetheless, we conclude that the trial court's consideration of the children's exemplary school records, the fact that they have friends in their mother's community, and the strain the children would encounter if they were forced to change school districts are pertinent considerations under this factor. Moreover, the evidence regarding this factor does not clearly preponderate in plaintiff's favor.

I

Next, plaintiff argues that the trial court erred reversibly in failing to make a specific finding on factor (i), the reasonable preferences of the children. However, plaintiff neither raised this issue below nor cites any authority to support this proposition on appeal. Therefore, the issue is waived. Nevertheless, the trial court's apparent failure to directly solicit the children's preferences does not require reversal in this case because the error, if any, is harmless. Indeed, the children's preferences would not overcome the strength of the determinations regarding the other custody factors. *Treutle v Treutle*, 197 Mich App 690, 696; 495 NW2d 836 (1992). Furthermore, the court-appointed psychologist testified that she had interviewed the children regarding their preferences and concluded that each child wished to maintain the status quo, i.e., living with their mother during the week and with their father most weekends.

J

Plaintiff also claims that the trial court committed clear legal error in considering irrelevant factors in evaluating factor (j). However, plaintiff has, once again, failed to cite authority in support of this contention. Therefore, we consider the issue to have been waived. *Goolsby, supra* at 655, n 1; *Isagholian, supra* at 14; *Patterson, supra* at 640. Furthermore, we are not persuaded that the evidence regarding this factor clearly preponderates in plaintiff's favor.

K

Lastly, plaintiff argues that the trial court erred in evaluating statutory factor (k). This argument is meritless. Plaintiff has two convictions for spousal abuse. The only evidence suggesting that defendant had violent tendencies was plaintiff's own self-serving testimony that defendant hit him once. Therefore, the trial court did not clearly err in concluding that this factor favored defendant.

IV

Finally, plaintiff contends that the trial court abused its discretion in ordering plaintiff to pay all of defendant's attorney fees. We disagree. Necessary and reasonable attorney fees may be awarded to enable a party to carry on or defend a divorce action. MCL 552.13; MSA 25.93; *Thames, supra* at 310. Here, evidence adduced at trial reveals that defendant earned approximately $13,000 a year. On the other hand, plaintiff's annual earnings vacillated between $25,000 and $61,000, with plaintiff testifying that his average annual income was approximately $50,000. When this disparity in income is considered along with the trial court's finding that plaintiff filed needless motions to prolong the case and lower his child support obligation, we find no abuse of discretion in the trial court's decision to award defendant her reasonable attorney fees. The award of legal fees is especially authorized where, as here, the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

Affirmed in part and remanded for findings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry

[1] MCL 722.23; MSA 25.132(3) provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (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.