

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH LEE SEWELL,

Plaintiff-Appellee,

v

TRACEY BENNETT SEWELL,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 181919

Wayne Circuit Court

LC No. 94-412431

Before: Griffin, P.J., and T. G. Kavanagh* and D. B. Leiber,** JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce granting plaintiff custody of the parties' five children. We affirm but remand for entry of an order amending the amount defendant shall receive through plaintiff's pension.

I

On appeal, defendant first contends that the trial court committed error requiring reversal in awarding custody of the parties' five minor children to plaintiff. Specifically, defendant claims that, in evaluating the statutory factors set forth in MCL 722.23; MSA 25.312(3)¹, the trial court 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,

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

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

876-877; 526 NW2d 889 (1994); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995). 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); *Deel v Deel*, 113 Mich App 556, 559; 317 NW2d 685 (1982).

B

Defendant claims that the trial court clearly erred in finding that the evidence favored plaintiff on factor (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." We disagree. The evidence showed that, when the children were living with defendant before plaintiff was awarded temporary custody, plaintiff continued paying most of the mortgage and taxes on the marital home, assumed the parties' car and insurance payments, and gave defendant money to feed and clothe the children. Although this left defendant with few expenses, she was apparently unable to make due without supplementing her income by breeding bull mastiff dogs in her home. Not only did this turn the children's home, literally, into a doghouse where dog feces and urine littered the floor, but the dogs ruined furniture and some of the children's clothes. Furthermore, defendant allegedly began buying dog food with the money plaintiff gave her for child care expenses. Defendant failed to remove all the dogs despite evidence that the children sustained flea bites and the trial court's order requiring her to remove the dogs as a condition for regaining custody. Additionally, defendant forced her minor children to care for and clean up after the dogs during the twelve hours she was away from home each night, blamed the children for the existence of dog excrement in the house, and left the children in the sole care of her sixteen-year-old daughter. Plaintiff, on the other hand, has a steady job and was planning to purchase his own home with money being held in escrow pending the resolution of this lawsuit. Also, after plaintiff gained temporary custody, he ensured that the children ate, wore clean clothes which he laundered, and received medical attention for their flea bites. Furthermore, plaintiff provided adult supervision for his children while he was at work and continued to provide for his family during his separation from defendant. Under these circumstances, we conclude that the trial court's findings on this factor was not against the great weight of the evidence. *Fletcher, supra* at 876-877, 900.

C

Defendant also argues that the trial court found against the great weight of the evidence on factor (j), "the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the other parent or the child and the parents." Again, we disagree. While defendant had custody after the parties' separation, defendant forbade plaintiff from entering the house or seeing the children. In fact, the record shows that defendant repeatedly interfered with and prevented plaintiff from exercising regular visitation and would even cut short telephone calls between plaintiff and his children. Further, contrary to defendant's representations that plaintiff offered defendant no visitation opportunities after he assumed custody, the trial court provided a detailed visitation schedule as part of the interim custody order that transferred custody to plaintiff. Not only is

the record devoid of evidence that plaintiff interfered with this visitation schedule, but the record shows that defendant abused the visitation schedule by failing to comply with its terms and missing scheduled opportunities to visit her children. Further, contrary to the evidence that defendant interfered with plaintiff's attempts to visit his children, plaintiff testified that he was willing to foster a relationship between the children and the noncustodial parent. Accordingly, the trial court's finding as to factor (j) was not against the great weight of the evidence. *Id.*

D

Defendant next contends that the court erred reversibly in failing to make a factual determination concerning the existence of an established custodial environment. We disagree. In the findings of fact prepared by the trial court, the court concluded "by a standard of clear and convincing evidence that physical custody of the children be awarded to plaintiff." Because the trial court's conclusion is supported by the clear and overwhelming weight of the evidence, we conclude that the trial court's alleged failure to make a determination regarding an established custodial environment is harmless. *Fletcher, supra* at 882; see *Russow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Aside from the various factors negatively impacting on defendant's parenting skills, it is apparent from the court's findings that it was aware of current and prior custody arrangements and familiar with the effects each arrangement had on the children. Indeed, the court's opinion noted that the children resented having to care for the dogs, that one child kept running away from defendant, and that "the stress of Defendant's home conditions has eroded the children's sense of security and 'sanctuary' with their mother." Further, the trial court recognized that defendant provided the children an unsafe, unsanitary, and unsatisfactory living environment, that defendant thwarted opportunities to improve her unacceptable parenting skills, and that there "is no need or desire to maintain continuity of the former lifestyle."

E

Further, defendant claims generally that the trial court clearly erred in making findings on each of the remaining custody factors and claims that the trial court's decision to award custody of the parties' five children to plaintiff was not in the children's best interest. We disagree. After a thorough review, we are not convinced that the court's findings contravened the great weight of the evidence. *Fletcher, supra* at 876-877, 900. Furthermore, the evidence in support of the trial court's custody decision is overwhelming, and the court's findings are not impeached by defendant's unsupported claims, references to self-serving testimony, and argumentative refutations of the trial court's conclusions. Accordingly, we find no abuse of discretion in and agree with the trial court's determination that the children's best interests were served by awarding plaintiff their custody. *Id.* at 879-880, 900; *Deel, supra* at 559.

II

Next, defendant contends that the trial court abused its discretion in failing to award defendant attorney fees. We disagree. The decision whether to award attorney fees is reviewed on appeal for an

abuse of discretion. *Vollmer v Vollmer*, 187 Mich App 688, 690; 468 NW2d 236 (1991). Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, or judicial exception. *Brooks v Rose*, 191 Mich App 565, 574-575; 478 NW2d 731 (1991). However, a trial court has broad discretion to award attorney fees in this case where such fees are necessary to carry on or defend the action. *Id.*; *Vollmer, supra* at 690. Because there was no showing that defendant was unable to carry on or defend this action, *Vollmer, supra* at 690, or afford her attorney, *Keen v Keen*, 145 Mich App 824, 831; 378 NW2d 612 (1985), and because defendant was employed throughout the duration of the separation, had most of her bills covered plaintiff, and was awarded her fair share of the marital estate, the trial court did not abuse its discretion in refusing to award attorney fees to defendant. *Vollmer, supra* at 690.

III

Defendant also argues that the trial court's distribution of the marital estate, specifically the division of the proceeds of a prior personal injury lawsuit, was grossly unfair. We disagree. This Court first reviews the lower court's factual findings regarding the property settlement for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If the factual findings are not clearly erroneous, then this Court reviews the trial court's division of marital property de novo to determine whether it is fair and equitable in light of the facts. *Id.*

The division of the proceeds from plaintiff's accident settlement was fair and equitable. *Steckley v Steckley*, 185 Mich App 19, 23-24; 460 NW2d 255 (1990). Plaintiff, not defendant, is the party who was injured in the work-related accident for which he received a settlement. There was evidence that defendant did not care for plaintiff during his disability and her sole claim in the personal injury lawsuit was for loss of consortium. Also, plaintiff provided support for defendant and the children during their separation and was in the process of purchasing a home and furnishings for the children. As such, he had a greater claim to the proceeds, as he will continue to experience pain and suffering, has a greater need for the funds, and now must support a family of six. In contrast, defendant was given the marital home, her car and \$1,500 to repair it, is no longer financially responsible for supporting her five children, and is currently employed. Accordingly, in light of the circumstances, the property distribution settlement and the order awarding defendant \$7,500 of plaintiff's personal injury settlement was fair and equitable. See also *Wilson v Wilson*, 179 Mich App 519, 522; 446 NW2d 496 (1989).

IV

Defendant further contends that the trial court erred in issuing a Qualified Domestic Relations Order (QDRO) that inaccurately reflected the agreement reached at a settlement hearing. We agree. The trial court may not modify property divisions that the parties have reached by consent and finalized in writing or on the record. *Zeer v Zeer*, 179 Mich App 622, 624; 446 NW2d 328 (1989). The court must uphold such settlements and cannot set them aside absent fraud, duress, mutual mistake, or severe stress. *Hall v Hall*, 157 Mich App 239, 244; 403 NW2d 530 (1987). In the present case, plaintiff and defendant stipulated that defendant is entitled to half the pension plaintiff had accumulated until the divorce judgment was entered. Though the judgment referenced this agreement, it failed to account for

any accrual that may occur to said pension benefits over time. Plaintiff concedes that he never intended to curtail any increases in the value of defendant's share of the pension benefits. Accordingly, we remand this case with instructions to the trial court to reenter the QDRO in order to insure defendant's entitlement to any increase in the value of her portion of plaintiff's pension. See also *Bers v Bers*, 161 Mich App 457, 463-464; 411 NW2d 732 (1987).

V

Finally, defendant argues that the court improperly relied on evidence that was neither admitted at trial, nor viewed by defendant. We disagree. Pursuant to MCL 722.627(1)(g); MSA 25.248(7)(1)(g), all reports created by an agency in connection with a custody matter are confidential but may be disseminated to the court if it determines that the information is required to decide the issues before it. As such, contrary to defendant's assertions, the trial court properly reviewed the protective services and family first reports. Furthermore, we conclude that the court's findings are adequately supported by the evidence

Affirmed in part and remanded for amendment to and reentry of the Qualified Domestic Relations Order. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Thomas Giles Kavanagh
/s/ Dennis B. Leiber

¹ MCL 722.23; MSA 25.132(3) provides:

“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.