STATE OF MICHIGAN

COURT OF APPEALS

MARY ANNE HERP,

Plaintiff-Appellant,

v

ROGER ANTHONY HERP,

Defendant-Appellee.

UNPUBLISHED
June 2, 1998

No. 203024
Kent Circuit Court
LC No. 95-002293 DM

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce awarding permanent custody of the parties' three minor children to defendant, granting defendant a sole interest in the marital home subject to an equitable lien to plaintiff, and declining to order plaintiff to pay child support in lieu of awarding plaintiff half the value of defendant's business. We affirm.

To expedite the resolution of a child custody dispute by prompt and final adjudication, we affirm all orders and judgments of the lower court on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. MCL 722.28; MSA 25.312(8), *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). Plaintiff first argues that the Child Custody Act, MCL 722.21 *et seq*.; MSA 25.312(1) *et seq*., unfairly requires the trial court to determine whether an established custodial environment exists before applying the "best interest factors." Specifically, plaintiff refers to MCL 722.27(1)(c); MSA 25.312(7)(1)(c), which states in part that "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." Plaintiff argues that the requirement makes almost certain that the noncustodial parent is subjected to the clear and convincing burden of proof requirement.

Despite plaintiff's argument on appeal, we note that the trial court in this case required plaintiff to show only by a preponderance of the evidence that it was in the children's best interest to change their custodial environment from defendant to plaintiff. Thus, she was not subjected to the burden of

proving her position by clear and convincing evidence. Moreover, we are not

required to review this issue because plaintiff first raises it on appeal. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994). In any event, plaintiff does not claim that the trial court erroneously applied the provisions of the Child Custody Act; rather, she claims that the act as written unfairly burdens noncustodial parents in a custody dispute. The fact that a statute appears to be impolitic, unwise or unfair is insufficient to justify judicial construction. *City of Lansing v Lansing Twp*, 356 Mich 641, 648; 97 NW2d 804 (1959). The wisdom of the provision in question is a matter of legislative responsibility, with which this Court may not interfere. *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994). Instead, we must enforce the law as written. *Id.* Therefore, plaintiff has failed to present a proper issue for our review.

Plaintiff next argues that the trial court abused its discretion in failing to order a blood test to determine the paternity of one of the minor children. We disagree. Plaintiff alleged in her October 11, 1995, complaint, that the child was defendant's son. On November 14, 1996, the day the custody hearing began, plaintiff raised the paternity issue before the lower court. On December 19, 1996, the day before trial, plaintiff filed a motion for paternity testing, admitting that she had an extramarital relationship during her marriage to defendant and requesting that the parties and child submit to testing. In its opinion issued February 10, 1997, the trial court ruled that defendant is the child's biological father, and that plaintiff's request for paternity testing was made too late.

It is well established that in divorce actions the court may determine whether the husband is the father of the wife's child. MCL 552.16; MSA 25.96, *Atkinson v Atkinson*, 160 Mich App 601, 606; 408 NW2d 516 (1987). Although it is within the court's power in a divorce case to order an individual to submit to an HLA blood test in order to determine paternity of a child born during the marriage, *id.* at 607, a strong presumption of legitimacy attaches to children born during a marriage that may only be rebutted by clear and convincing evidence, *id*. at 605-606. Plaintiff has offered no explanation for her dilatory motion; therefore, we find that the trial court did not abuse its discretion in denying the request. See, e.g., *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996).

Plaintiff last argues that the trial court's distribution of the parties' property was disproportionate and unfair. Plaintiff correctly states that although the division of property need not be mathematically equal, any significant departure from congruence should be supported by a clear exposition of the court's rationale. *Byington v Byington*, 224 Mich App 103, 114-115; 568 NW2d 141 (1997). Our review of the record in this case reveals that in its disposition of property, the trial court properly considered the duration of the marriage, the contribution of each party to the marital estate, and each party's earning ability. *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). Because plaintiff brought a lot and proceeds from the sale of her home into the marriage, and defendant brought the marital home to the marriage free from debt, the trial court's finding that the current value of the marital home was a joint asset is not clearly erroneous. Further, because the court awarded plaintiff a portion of the income stream of defendant's business by ordering that plaintiff does not have to pay any child support, the court's

distribution of defendant's business was equitable. The trial court committed no clear error in its factual findings and its disposition of the parties' property was fair and equitable.

Affirmed.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra
/s/ Robert P. Young, Jr.