STATE OF MICHIGAN

COURT OF APPEALS

ANDREA ELIZABETH BENSON,

Plaintiff-Appellee,

v

MANFRED TREMAIN BENSON,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 207700
Oakland Circuit Court
LC No. 93-466720 DM

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the trial court's rulings as to the division of property, the award of alimony, and the custody of the two minor children. We reverse in part and remand.

Defendant first contends that the trial court erred in finding that the parties' antenuptial agreement, although valid, was unenforceable because it was vague and ambiguous. Antenuptial agreements are subject to the rules of construction applicable to contracts in general. *In re Hepinstall's Estate*, 323 Mich 322, 327-328; 35 NW2d 276 (1948). The initial question whether contractual language is ambiguous is a question of law. If the contractual language is clear and unambiguous, its meaning is a question of law. Where the contractual language is unclear or susceptible to multiple meanings, interpretation is a question of fact. Questions of law are reviewed de novo on appeal, while factual findings are reviewed under the clearly erroneous standard of review. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997).

Contracts are matters of agreement by the parties, and the function of the court is to determine what the agreement is and enforce it. *Eghotz v Creech*, 365 Mich 527, 530; 113 NW2d 815 (1962). Clear and unambiguous language may not be rewritten under the guise of interpretation; contract terms must be enforced as written, and unambiguous terms must be construed according to their plain and commonly understood meaning. *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). If the contract, although inartfully

worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

After reviewing the antenuptial agreement, we conclude that the trial court erred in finding that it is ambiguous. Pursuant to section one, each party "irrevocably and forever release[d], renounce[d] and waive[d] any and all marital property rights" in the then-owned property of the other, including income earned from that property and proceeds from the sale or reinvestment of that property. Sections five and six state that in exchange for the release and in the event of divorce, plaintiff is to be made the beneficiary of (1) all insurance then owned or thereafter acquired on defendant's life, and (2) one-half of all retirement benefits defendant accrued during the marriage. In addition, plaintiff is to retain all property that she brought to the marriage. These provisions are clear and unambiguous, and the trial court erred in holding otherwise.

The trial court apparently had the most difficulty with the meaning of the third paragraph of section six, which provides as follows:

> ANDREA further acknowledges that her waiver and release shall also apply to any additional investment by MANFERD subsequent to their marriage in such real estate or business interests to the extent that such additional investment in such real estate or business interests during any calendar year does not exceed fifteen (15%) percent of MANFERD's gross compensation for such calendar year.

This paragraph provides that plaintiff's release of her rights to the real estate and business interests owned by defendant at the time of the marriage extends to investments in such realty and/or business(es) made by defendant during the marriage to the extent that such additional investments made in any one year do not exceed fifteen percent of defendant's gross income for that year. The language is subject to but one interpretation, that is, that defendant could invest fifteen percent of his gross income per year in realty and business interests he owned at the time of the marriage. Accordingly, up to fifteen percent of defendant's income each year, which would otherwise be part of the marital estate, is to remain defendant's sole and separate property if invested in previously owned realty or business interests. This provision of the antenuptial agreement is clear and unambiguous, and the trial court erred in holding otherwise.

Defendant next contends that the trial court's distribution of the marital estate is inequitable. In reviewing a dispositional ruling in a divorce case, this Court first reviews the trial court's findings of fact for clear error and then decides whether the dispositional ruling is fair and equitable in light of the facts. Dispositional rulings will be affirmed unless this Court is left with the firm conviction that the distribution is inequitable. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

The trial court may distribute all property that has "come to either party by reason of the marriage." MCL 552.19; MSA 25.99. Once the court determines which assets are part of the marital estate, it must determine their values. For purposes of dividing property, marital assets are typically valued at the time of trial or at the time judgment is entered, though the court may, in its discretion, use a

different date. *Byington v Byington*, 224 Mich App 103, 114, n 4; 568 NW2d 141 (1997). Once the court determines the assets of the marital estate and the valuation of those assets, it must apportion those assets between the parties. The goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances. Each spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court. *Id*. at 114-115. Among the factors to be considered are the source of the property; the parties' contributions toward its acquisition and to the general marital estate; the duration of the marriage; the parties' needs and circumstances; the parties' ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; interruption of the career or education of either party; and general principles of equity. *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992); *Hanaway*, *supra* at 292-293. The determination of relevant factors will vary depending on the facts and circumstances of the case. *Sparks*, *supra* at 160.

The trial court did not make any specific findings as to which assets were part of the marital estate or the value of those assets. Nor did the trial court make specific findings as to any of the relevant factors other than the parties' ages and earning abilities.[1] Therefore, we remand to the trial court for specific findings as to the parties' assets and liabilities, taking into account the property exempt from the estate pursuant to the antenuptial agreement, and the value of the assets and amount of the liabilities, and to render an equitable division taking into account all relevant factors.[2]

Defendant next contends that the trial court erred in awarding plaintiff spousal support in the amount of $3,400 a month for three years. As with the property settlement, this Court first reviews the trial court's findings of fact for clear error and then decides whether the dispositional ruling was fair and equitable in light of the facts. Dispositional rulings will be affirmed unless this Court is left with the firm conviction that the distribution was inequitable. *Magee v Magee*, 218 Mich App 158, 161-162; 553 NW2d 363 (1996).

An award of alimony is within the trial court's discretion. *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161 (1992). A court may award alimony in a divorce action as it considers just and reasonable, after considering the ability of either party to pay, the character and situation of the parties, and all other circumstances of the case. *Id*. Factors to be considered are (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. In addition, the court may consider a party's fault in causing the divorce. *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

The main objective of alimony is to balance the incomes and needs of the parties in a way that would not impoverish either party. *Hanaway*, *supra* at 295. The trial court should make specific findings of fact regarding the factors relevant to the case. *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993).

In its original opinion, the trial court did not address the relevant factors. In its supplemental opinion, the trial court set forth the relevant factors but failed to make specific findings of fact regarding any one of those factors except to note the great disparity in the parties' incomes. The court indicated that alimony was necessary "to allow Plaintiff to become fully rehabilitated, educated and trained to obtain an income greater than $22,000 per year," but because there was no evidence that plaintiff was in need of rehabilitation or that she had any plans for further education or training, that finding is clearly erroneous. In light of this conclusion, together with the virtual absence of evidence regarding the relevant factors, we cannot find that the trial court's award was fair and equitable under the circumstances. Therefore, the case is remanded to the trial court to consider the applicable factors, taking into account both parties' circumstances after the distribution of the property. See *Hanaway, supra* at 297.

Defendant next argues that the trial court erred in failing to make a finding regarding whether an established custodial environment existed. Whether a custodial environment is established is a question of fact. Findings of fact in a child custody case are reviewed under the great weight of the evidence standard. Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Ireland v Smith*, 214 Mich App 235, 241-242; 542 NW2d 344 (1995), aff'd 451 Mich 457 (1996).

The trial court restricted its consideration of this issue to the parties' son Michael, because defendant testified that he was contesting custody of the boy only, and his attorney conceded that defendant's claim to custody of his daughter Kathleen was not supported by the evidence. 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." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). 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); MSA 25.312(7)(1)(c). Such an environment depends upon a custodial relationship of significant duration in which the child was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which relationship between the custodian and the child is marked by qualities of security, stability, and permanence. *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993).

The trial court found that the parties had not maintained an established custodial environment as to Michael. We conclude, however, that the trial court's findings on this issue were inadequate. In its opinions, the trial court neither acknowledged the above standard for determining whether an established custodial environment exists nor gave any indication that it applied that standard. We therefore direct the trial court on remand to determine whether an established custodial environment exists as to Michael.

Defendant further contends that the trial court erred in awarding plaintiff physical custody of the two children. The trial court found that plaintiff was the favored physical custodian based on its analysis

of factors a, e, i, k, and l of MCL 722.23; MSA 25.312(3). In addition, it found that neither party was favored under factors f and g. Defendant takes exception to these findings.

Findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. Discretionary rulings are reviewed under an abuse of discretion standard. Therefore, because the trial court's custody decision is a discretionary dispositional ruling, a custody award should be affirmed unless it constitutes an abuse of discretion. Finally, questions of law in custody decisions are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998).

Custody disputes are to be resolved in the child's best interests. To determine the best interests of the child, the trial court must consider and explicitly state its findings and conclusions with regard to each of the twelve factors set forth in § 3 of the Child Custody Act, MCL 722.23; MSA 25.312(3). On review, considerable deference is given to the superior vantage point of the trial court regarding issues of credibility and preferences under the statutory factors. *Thames*, *supra* at 305. Where no established custodial environment exists, the court must determine custody by a preponderance of the evidence standard. *Underwood v Underwood*, 163 Mich App 383, 390; 414 NW2d 171 (1987).

Factor a requires the trial court to consider "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a); MSA 25.312(3)(a). The trial court found that both parents love their children and each child is more closely bonded to the same-sex parent. The court found that factor a slightly favored the plaintiff because she "appears to exhibit affection towards both children to a greater degree than the father although the father exhibits greater affection to the son." There was no evidence presented regarding the parties' demonstrations of affection toward the children, and thus the trial court's finding is against the great weight of the evidence.

Factor e requires the trial court to consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e); MSA 25.312(3)(e). The trial court found that this factor favored plaintiff because she had been the primary caretaker of and homemaker for the children and "appears to possess all of the basic skills to maintain a permanent healthy environment for the children." Factor e "exclusively concerns whether the family unit will remain intact," *Fletcher v Fletcher*, 200 Mich App 505, 517; 504 NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871, 884-885 (1994) (*Fletcher I*), and focuses on "the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996) (*Ireland II*). In *Ireland II*, the Court explained that "[t]he stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions." *Id*. at 465, n 9. Acceptability of the custodial home is not a pertinent consideration. *Fletcher I*, *supra*. Because the trial court focused on plaintiff's ability to provide for the children, a fact addressed by factors b and c, rather than on the stability of the proposed family unit, the trial court committed clear legal error in its assessment of this factor.

Factor f requires the trial court to consider the parties' moral fitness. MCL 722.23(f); MSA 25.312(3)(f). This factor

> relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*.
>
> Extramarital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship. While such conduct certainly has a bearing on one's spousal fitness, it need not be probative of how one will interact with or raise a child. Because of its limited probative value and the significant potential for prejudicially ascribing disproportionate weight to that fact, extramarital conduct, in and of itself, may not be relevant to factor f. To the extent that one's marital misconduct actually does have an identifiable adverse effect on a particular person's ability or disposition to raise a child, those parental shortcomings often may be reflected in other relevant factors. [*Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (*Fletcher II*).]

Morally questionable conduct that is relevant to one's moral fitness as a parent includes "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Fletcher II, supra* at 887, n 6.

Extramarital affairs are generally only relevant to a parent's morality if the children knew about them. *Fletcher I, supra* at 514. The evidence showed that plaintiff had three affairs prior to the filing of the complaint and two afterward. However, there is no evidence that the children were aware of the affairs, except for the one with plaintiff's current boyfriend, and the record does not reveal how plaintiff explained his presence to the children. While plaintiff did leave the children in defendant's care while she was out with other men, there is no evidence that she otherwise neglected the children. The evidence also showed that defendant had several criminal convictions, albeit not of recent vintage, and admitted to having used marijuana in the more recent past. Despite the trial court's minor errors regarding the number of affairs that plaintiff had and the nature of one of defendant's convictions, its ultimate finding that factor f did not favor either party is not against the great weight of the evidence.

Factor g requires the trial court to consider the parties' mental and physical health. The trial court found that the parties were equal as neither "appear[ed] to have any major psychological or physical problems which would impede their ability to care for their children."[3] Plaintiff admitted that she was seeing a therapist for depression. One expert did not consider this to be a factor in Kathleen's treatment or to affect plaintiff's ability to be a parent. Two other experts had not been aware of plaintiff's treatment for depression and could not say if it would have any impact on the children without

further investigation. Plaintiff's treating psychologist testified that plaintiff used to have dysthymia but presently had an adjustment disorder; she did not know if the dysthymia had any impact on the children. A fourth expert stated that dysthymia could affect one's ability to parent, but did not testify that it had actually affected plaintiff's ability to parent her children. Because the evidence showed that plaintiff had a mental disorder but there was no evidence to show that it had any impact on her ability to raise the children, the trial court's finding is not against the great weight of the evidence.

Factor k requires the trial court to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k); MSA 25.312(3)(k). The trial court found that this factor favored plaintiff because defendant "has exhibited a temper in the past" and once threatened to kill plaintiff. Defendant contends that the trial court failed to consider his testimony that plaintiff criticized him about his weight, his appearance, and his family. Because defendant has not cited any authority in support of his position that insults constitute domestic violence,[4] he has not met his burden of showing that the trial court's finding as to factor k is against the great weight of the evidence or clearly erroneous.

Factor l requires the trial court to consider any other factor relevant to the case. MCL 722.23(l); MSA 25.312(3)(l). In this case, a relevant consideration would be whether the children should reside in the same household and the effect continued separation or joinder may have, if any. See *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). In most cases it will be in the best interests of each child to keep brothers and sisters together. However, if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control. *Id*. at 440.

The trial court did not consider this factor in its original opinion. In its supplemental opinion, it found that "there is a strong desirability in keeping the children together" given the bond between them, albeit in the context of discussing whether there was an established custodial environment. Two experts agreed that it was in Kathleen's best interest to reside with her mother; two agreed that it was in Michael's best interests to reside with his father; and only one stated unequivocally that the children should reside together because he thought such an arrangement would be in Kathleen's best interests, and because he did not know if separating the children would adversely affect them. Given the minimal evidence that supported keeping the children together, the greater evidence that it was in each child's best interests to remain with the same-sex parent, and the absence of evidence that the children had suffered any adverse consequences after a year apart, the trial court's finding that "there is a strong desirability in keeping the children together" is against the great weight of the evidence.

Upon a finding of error, the appropriate remedy is to remand the case to the trial court for reevaluation of its custody award unless the error is harmless. *Fletcher II*, *supra* at 889. Because the trial court erred in its evaluation of three of the five factors that led it to conclude that the evidence weighed in favor of plaintiff as the sole custodial parent, the error cannot be considered harmless. Therefore, the case is remanded to the trial court with instructions to consider up-to-date information, including the children's current and reasonable preferences, their living arrangements during the appeal, and any other changes in circumstances arising since the trial court's original custody order. See *id*.

In light of our disposition of the custody issue, we need not address defendant's remaining issue.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[1] The trial court found that plaintiff, age thirty-eight, earned approximately $22,000 a year, and defendant, age forty-eight, earned approximately $500,000 a year. Defendant testified that, despite his income in recent years, he expected to earn less in the future, although this testimony was not substantiated by any particular facts. The finding as to plaintiff's income appears to be erroneous because there was no testimony to support it, although the parties do not specifically challenge that finding. On remand, the trial court may consider current information regarding the parties' earning capacities and, if appropriate, modify its findings.

[2] We reject defendant's claim that his pensions were not subject to distribution as part of the marital estate. Vested pensions are, and unvested pensions may be, considered part of the marital estate subject to distribution as part of the property settlement. MCL 552.18(1), (2); MSA 25.98(1), (2). Plaintiff produced sufficient evidence through defendant's testimony to establish the value of those assets and thereby met her burden of proof for including them in the marital estate. *Magee v Magee*, 218 Mich App 158, 165; 553 NW2d 363 (1996). In any event, the antenuptial agreement specifically provided that plaintiff was entitled to one-half of all pension or retirement benefits defendant accrued during the marriage.

[3] The court noted the testimony of the various experts in psychology but did not specifically address plaintiff's treatment for depression. However, that alone does not, as defendant implies, lead to the conclusion that its finding is against the great weight of the evidence.

[4] Indeed, the only case specifically discussing factor k, *Hilliard v Schmidt*, ___ Mich App ___; ___ NW2d ___ (Docket No. 206028, issued 8/21/98), analyzed it in terms of physical abuse only. *Id*. at slip op p 5.