STATE OF MICHIGAN

COURT OF APPEALS

MARY URISKO, Plaintiff-Appellant/Cross-Appellee, v RICHARD F. X. URISKO, Defendant-Appellee/Cross-Appellant.	UNPUBLISHED November 12, 1999 No. 214266 Wayne Circuit Court Family Division LC No. 96-624312 DM
MARY URISKO, Plaintiff/Counterdefendant-Appellant, v RICHARD F. X. URISKO, Defendant/Counterplaintiff-Appellee.	No. 214902 Wayne Circuit Court Family Division LC No. 96-624312 DM

Before: Hoekstra, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

In Docket No. 214266, plaintiff, Mary Urisko, appeals as of right from a judgment of divorce, challenging the trial court's determination of custody. Defendant, Richard Urisko, has filed a cross-appeal challenging the trial court's property distribution and award of attorney fees to plaintiff. In Docket No. 214902, plaintiff appeals by leave granted from an order modifying the judgment of divorce to allow defendant to change the children's domicile. The appeals have been consolidated for this Court's consideration. We affirm.

Plaintiff first claims that the trial court erred in finding that no established custodial environment existed and therefore failing to require clear and convincing evidence that a change of custodial

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

environment was in the best interests of the children. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). The trial court's factual determination whether an established custodial environment existed will be reversed only if it was against the great weight of the evidence. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995); *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994); MCL 722.28; MSA 25.312(8). An established custodial environment exists where "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). Other factors include "[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship . . . ." *Id*.

We conclude that the court's finding that no established custodial environment existed was not against the great weight of the evidence. Defendant vacated the marital home approximately four months before the divorce trial began, pursuant to a court order awarding temporary custody of the children to plaintiff. Before this point, both parents occupied the marital home and were involved in their children's lives. Moreover, even after leaving the marital home, defendant remained actively involved with the children. The children did not look to one parent, alone, for guidance, discipline, the necessities of life, and parental comfort. Additionally, there was no expectation of permanence in the children's placement with plaintiff because of the upcoming custody trial. The children were keenly aware, even though defendant had moved from the marital home, that their custody was in dispute and that both parties were attempting to gain custody of them. Uncertainty created by an upcoming custody trial can prevent the development of an established custodial environment. *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993). Under these circumstances, the trial court's finding was not against the great weight of the evidence.

Plaintiff also argues that the trial court erred in awarding physical custody of the children to defendant. Again, we disagree. Custody disputes are to be resolved in the best interests of the children. *Id*. at 324. The factors the trial court must consider are set forth in MCL 722.23; MSA 25.312(3). According to MCL 722.28; MSA 25.312(8), we review the trial court's findings regarding each statutory best-interest factor to determine whether they are against the great weight of the evidence, and we review the trial court's discretionary ruling on which parent is awarded custody for an abuse of discretion. *Fletcher*, *supra* at 879-880. An abuse of discretion exists where the ruling was "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959); *Fletcher*, *supra* at 879-880. In this case, the trial court carefully considered the best-interest factors, and, after reviewing the voluminous record in this contentious divorce, we conclude that the court's findings were not against the great weight of the evidence because the evidence does not clearly preponderate toward the opposite findings. *Id*. at 879. Additionally, we conclude that its decision to award custody to defendant was not an abuse of discretion.

On cross-appeal, defendant claims that the trial court's property division was inequitable. We disagree. The goal in distributing marital assets in a divorce proceeding "is to reach an equitable division

in light of all the circumstances." *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The factors the court should consider include the following:

> (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).]

On appeal, we review the trial court's factual findings for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). "A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Id*. If the factual findings are upheld, the dispositional ruling dividing the marital estate "should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks*, *supra* at 152.

Defendant claims that the trial court should have found that plaintiff was at fault for the breakdown of the marital relationship. Fault is a valid consideration in matters of property division. *Sparks*, *supra* at 158. In this case, the trial court found that neither party was at fault for the breakdown of the marital relationship. After reviewing the record, we conclude that this finding was not clearly erroneous. In fact, substantial evidence indicated that defendant played a significant role in the breakdown of the marital relationship.

In light of the court's factual findings, we conclude that the division of the marital estate was not inequitable. The two main assets, the marital home and defendant's retirement plan, were divided equally between the parties. However, the trial court deducted certain liabilities from defendant's one-half share in the marital home. Those liabilities included plaintiff's one-half share in defendant's retirement plan, a second mortgage on the marital home which had been paid off by plaintiff, and an award of attorney fees to plaintiff. These setoffs extinguished defendant's share in the marital home, and the court awarded the home to plaintiff. Defendant was awarded the entire retirement plan because plaintiff's share was factored into the award of the home. We find nothing inequitable in this distribution of the marital assets.

In addition to the division of assets, each party was required to assume some of the parties' enormous financial debt. Defendant argues that he should not have been required to assume certain tax liabilities. However, the evidence indicated that these tax liabilities were a result of defendant's failure to file tax returns on *his* income for a three-year period. Plaintiff, after discovering that defendant had failed to file income tax returns, filed her own individual tax returns and paid the taxes, penalties, and interest due on her income for those three years. Under these circumstances, we conclude that it was not inequitable for the trial court to order defendant to be solely responsible for those debts. Defendant also claims that he should not have been required to pay two-thirds of the amount owed to a private school for the children's tuition. The trial court ordered defendant to assume two-thirds of this debt due to the disparity in the parties' incomes. The evidence indicated that defendant's income was almost

twice that of plaintiff. We conclude that, in light of the court's factual findings, it was not inequitable for the trial court to order defendant to pay two-thirds of this debt.

Defendant also claims that the trial court erred in awarding plaintiff $20,000 in attorney fees. "Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the trial court's decision absent an abuse of discretion." *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Attorney fees may also be awarded when they are incurred "as a result of the other party's unreasonable conduct in the course of the litigation." *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). In this case, the evidence indicated that defendant earned approximately twice as much as plaintiff and that both parties incurred massive legal fees. The trial court found that the disparity in the parties' incomes merited an award of attorney fees to plaintiff. The court awarded $20,000 in attorney fees, although plaintiff had asked the court to award substantially more than this amount. Moreover, the trial court found that plaintiff's legal costs were increased unnecessarily because defendant failed to timely comply with certain court orders and, while acting in propria persona, filed "numerous frivolous motions." Under these circumstances, we find no abuse of discretion in the court's award of attorney fees.

In her consolidated appeal, plaintiff argues that the trial court erred in allowing defendant to move the children to South Carolina with him. We review the trial court's decision whether to grant a motion for change of domicile for an abuse of discretion. *Overall v Overall*, 203 Mich App 450, 459; 512 NW2d 851 (1994). Michigan applies the *D'Onofrio* test, taken from *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), for determining whether to grant a motion for change of domicile. *Overall*, *supra* at 458. Under this test, the trial court must consider the following factors:

> (1) whether the prospective move has the capacity to improve the quality of life for both the custodial parent and the child; (2) whether the move is inspired by the custodial parent's desire to defeat or frustrate visitation by the noncustodial parent and whether the custodial parent is likely to comply with the substitute visitation orders where he or she is no longer subject to the jurisdiction of the courts of this state; (3) the extent to which the noncustodial parent, in resisting the move, is motivated by the desire to secure a financial advantage in respect of a continuing support obligation; and (4) the degree to which the court is satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed. [*Anderson v Anderson*, 170 Mich App 305, 309; 427 NW2d 627 (1988).]

The moving party has the burden of demonstrating that removal is warranted by a preponderance of the evidence. *Overall*, *supra* at 459.

In this case, the trial court's decision to allow defendant to take the children to South Carolina was not an abuse of discretion. Contrary to plaintiff's assertion, the record reflects that the trial court considered the appropriate factors in making its determination. The trial court concluded that the move to South Carolina would improve the general quality of life for defendant and the children. Plaintiff does

not dispute that defendant was offered employment in South Carolina that would generate a substantial increase in income. The trial court also concluded that the move was not intended to defeat or frustrate plaintiff's visitation. In fact, defendant agreed to remain subject to the court's jurisdiction and agreed to pay for a significant portion of the children's travel expenses for visitation with plaintiff, indicating that it was unlikely that defendant was attempting to frustrate visitation. Neither party challenges the court's holding that the third factor was not applicable because plaintiff was not resisting the move for financial advantage. Additionally, a visitation schedule was fashioned that allowed plaintiff a realistic opportunity of preserving and fostering a relationship with the children. We find no abuse of discretion in the trial court's ruling.

Plaintiff claims that the trial court should have held an evidentiary hearing before allowing the change of domicile. The trial court's decision whether to hold an evidentiary hearing on a motion for change of domicile is reviewed for an abuse of discretion. *Bielawski v Bielawski*, 137 Mich App 587, 592; 358 NW2d 383 (1984). The court should consider "whether there exist contested factual questions that must be resolved before a court can make an informed decision on whether or not to grant the motion." *Id*. Plaintiff claimed that a question existed whether defendant knew about the possibility of a job offer in South Carolina at the time of the original custody determination. However, such a question does not affect the application of the four *D'Onofrio* factors in this case. Additionally, because it was not raised before the trial court, we do not review plaintiff's claim that questions existed regarding the quality of the schools in the district to which defendant was moving the children. We find no abuse of discretion in the trial court's refusal to hold an evidentiary hearing.

Affirmed.

/s/ Peter D. O'Connell
/s/ Robert J. Danhof