STATE OF MICHIGAN

COURT OF APPEALS

JOANNE MARIE MILLER,

Plaintiff-Appellee,

v

DAVID MANNING MILLER,

Defendant-Appellant.

UNPUBLISHED
March 22, 2002

No. 231625
Genesee Circuit Court
LC No. 98-207245-DM

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, raising issues of custody, the minor child's surname, and property division. We affirm.

Defendant first argues that the trial court abused its discretion or committed clear legal error in awarding custody of the minor child to plaintiff, allowing the minor child to retain plaintiff 's last name, and requiring defendant to name the minor child as a beneficiary of his life insurance policy. We disagree. All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). Because a custody determination is a discretionary one, the trial court's custody decision in this case must be reviewed under the abuse of discretion standard. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994). As the *Fletcher* Court made clear, finding an abuse of discretion comes down to more than a disagreement in judicial opinions between a trial and appellate court. *Id.* at 879. In reviewing the findings of fact, this Court should defer to the trial court's credibility determinations. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

In deciding which party should have custody of the minor child, the trial court considered the statutory best interest factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The trial court weighed factor (a), the love, affection, and other emotional ties existing between the parties and the child, in plaintiff 's favor. MCL 722.23(a). The trial court acknowledged that both parties have great love and affection for the minor child and that defendant has been actively involved with the minor child. However, the trial court found that the emotional ties between mother and daughter exceed those between father and

daughter based on plaintiff's testimony and the trial court's interview with the minor child.[1] Defendant argues that the trial court failed to consider that defendant is retired and wishes to devote himself full-time to the minor child's care whereas plaintiff works full-time and overtime and does not cooperate with defendant. The trial did not err in finding that this factor weighed in favor of plaintiff because the finding was based on both the evidence presented and the minor child's interview. Additionally, this factor focuses on the ties already existing between the parties rather than the future capacity to create them. Therefore, the trial court's findings on this factor in plaintiff's favor were not against the great weight of evidence.

The trial court weighed factor (b), the capacity and disposition of the parties involved to give the child love, affection, guidance and to continue the education and raising of the child in his or her religion or creed, in plaintiff's favor. MCL 722.23(b). The trial court found that the parties were equally able to provide these elements with the exception that plaintiff is more able to raise the minor child in a religious creed. There was testimony by defendant that he engages in religious devotions at home, whereas plaintiff actively takes the minor child to church. Defendant testified that he would begin to go to church for the minor child, though he has no history of doing so. Therefore, the trial court's finding that this factor weighed slightly in favor of plaintiff was not against the great weight of evidence.

The trial court weighed 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, equally in favor of both parties. MCL 722.23(c). Defendant argues that the factor should have been weighed in his favor because he is retired and has better insight into the minor child's mental health. However, the trial court considered that, while both parties have cared for the minor child, plaintiff shows a greater disposition to take care of the minor child's every day needs. Having a disposition is distinguishable from having time. The trial court based this finding on the testimony of the parties showing that plaintiff has historically provided most of the minor child's care. Thus, this finding was not against the great weight of the evidence.

The trial court weighed factor (d), the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity, equally in favor of both parties. MCL 722.23(d). The trial court weighed this factor neutrally, pointing out that the minor child's environment in the marital home was neither stable nor satisfactory based on her having been abused by her half-brother, John. Defendant argues that removing John from the house would permit a more stable environment. However, this factor is, in large part, backward looking, asking whether the environment was stable. An argument that the environment will or could become stable is not relevant to this factor. The evidence of John's abuse of the minor child and violent acts amongst the family members show that the environment was not stable. Defendant has presented no evidence or argument that it was stable. Therefore, the trial court did not erroneously weigh this factor.

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[1] Neither party objected to the trial court's use of the in-camera interview for purposes other than the reasonable preference of the child.

The trial court weighed factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes, in favor of defendant. MCL 722.23(e). However, defendant argues that the trial court ignored the great weight of the evidence and should have found more strongly in defendant's favor. Defendant fails to present any facts in support of this argument. The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis of his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

The trial court weighed factor (f), the moral fitness of the parties involved, equally in favor of both parties. MCL 722.23(f). Defendant argues that it should have been weighed in his favor because of evidence that plaintiff raised John in a manner causing him to be a sexual predator against the minor child and idolize shooting and killing. However, under factor (f), the central concern is "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Fletcher, supra* at 887. Here, there was no evidence presented to show a lack of moral fitness demonstrated by plaintiff 's own conduct. Rather, the acts were solely attributable to John. Furthermore, defendant presented no evidence that plaintiff caused John's behavior, other than his own opinion, which the trial court was free to reject. Therefore, the trial court did not err in weighing this factor equally in favor of both parties.

The trial court weighed factor (g), the mental and physical health of the parties involved, equally in favor of both parties. MCL 722.23(g). Defendant argues that plaintiff has no understanding of the minor child's needs because plaintiff was sexually abused as a child and because plaintiff caused John to have problems. However, there was no evidence that either party had mental or physical limitations. Defendant's argument, again, is based on his opinions rather than facts actually presented.

The trial court did not weigh factor (h), the home, school, and community record of the child, in favor of either party. MCL 722.2(h). Defendant, however, argues that the trial court failed to consider "the coddling factor perpetrated by the mother," and that the minor child was afraid to sleep alone because of the sexual molestation by John. As stated above, there was no evidence presented that plaintiff "coddled" either John or the minor child. Additionally, the trial court considered the minor child's difficulty with sleeping, but also noted that the minor child otherwise appeared to be doing well in school and with the other people in her life. Therefore, the trial court did not err in weighing this factor equally.

The trial court weighed factor (i), reasonable preference of the child, in plaintiff 's favor. MCL 722.23(i). The trial court considered that the minor child was nearly ten years old at the time of the interview. According to the trial court, the minor child also appeared to be "weathering the situation fairly well and, though she loves both parents, her clear preference is to be with mother." Defendant argues that the evidence does not support the trial court's determination because the minor child was sexually molested by John. However, resolution of this factor simply requires a clear-cut determination of the minor child's preference and whether the preference is reasonable. The minor child indicated her preference to be with plaintiff, and the trial court's conclusion that it was reasonable despite the prior molestation finds support in the record. Therefore, the trial court did not err in weighing this factor in favor of plaintiff.

The trial court weighed factor (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, equally in favor of both parties. MCL 722.23(j). However, defendant argues that the trial court failed to consider "what [plaintiff] had done in regards to her son John. John saw his biological father for only four hours in his lifetime and was raised by his mother to become a sexual predator and terrorist who did poorly in school." However, this case is not about the custody of John, and conclusionary assertions without evidentiary support as to how plaintiff and a third-party get along do not assist the court in determining how these parties will cooperate regarding the minor child. Additionally, defendant argues that the minor child tells defendant that she hates him and cries when she has parenting time with him. Defendant did not, however, present any evidence to support this assertion at trial. On the other hand, there was evidence presented at trial that defendant spoke ill of plaintiff to the minor child. The trial court indicated that this evidence was credible, and the trial court is in a much better position than are we to determine credibility. Therefore, the trial court did not err in weighing this factor evenly, rather than in defendant's favor.

The trial court weighed factor (k), domestic violence, regardless of whether the violence was directed against or witnessed by the child, equally in favor of both parties. MCL 722.23(k). However, defendant argues that plaintiff 's condoning of John's threats to defendant should have been considered "but may be insufficient to take this factor out of the neutral stage." Based on the evidence showing that both parties engaged in physical violence toward each other, the trial court did not err in weighing this factor evenly.

The trial court also considered under factor (l), any other factor considered by the court to be relevant to a particular child custody dispute, the minor child's sexual abuse and found that, in order to prevent further abuse, the minor child should maintain a strong relationship with the mother and have significant time with her father to ensure her comfort and safety. The trial court recognized that it would provide further "micro-management" of the custody and parenting time arrangement. Defendant argues that the trial court should have awarded defendant custody based on this factor. Although the minor child's sexual abuse by her brother, who will also be living with plaintiff, should not be taken lightly, the trial court presented a well-reasoned approach to this factor. Additionally, it must be considered that the minor child stated a preference to live with her mother despite the history of abuse. Based on the analysis of the best interest factors, the trial court did not make erroneous findings of fact nor did it abuse its discretion in awarding custody to plaintiff based on the minor child's best interest. *Fletcher, supra.*

Defendant also argues that the trial court's preliminary order granting joint legal and physical custody shows that the trial court found defendant to be a suitable parent to have legal and physical custody. Defendant argues that this, along with the evidence presented at trial, shows that the trial court's final ruling was an abuse of discretion. However, the trial court's preliminary order entered prior to trial does not require the trial court to ultimately award defendant custody as it existed under the preliminary order.[2] The preliminary custodial arrangement was made prior to trial and was not based upon an evidentiary hearing nor upon an analysis of the best interest factors. Based on the best interest factors as found by the trial court after trial, the trial court's award of custody to plaintiff was not an abuse of discretion.

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[2] We note that defendant has not argued that the preliminary order required the trial court to utilize a particular burden of proof when determining the final custodial arrangement.

Defendant also argues that the trial court should have changed the minor child's name from Dubuis to Miller and should not have required defendant to irrevocably designate the minor child as a beneficiary of his life insurance policy. Specifically, defendant contends that the trial court erroneously found that he had his chance to have the minor child bear his name but chose not to and that his custom was not to have his name on his children's birth certificates. In support of this argument, defendant offers only his testimony which is conflicting with plaintiffs. This Court defers to the trial court's ability to decide the credibility of witnesses. *Mogle, supra.* Regardless, defendant has offered no persuasive reason for having the minor child bear his name. The minor child has used the name Dubuis since birth and will reside with her mother. There is no evidence that defendant considered having the minor child's name changed to Miller during any part of the parties' marriage. There is also no indication that the minor child wishes to change her last name other than defendant's own testimony. Based on these factors, the trial court did not err in finding that the minor child's best interest was to continue to use the last name Dubuis.

Although defendant wants the minor child to use his last name, he does not want her listed as a life insurance beneficiary because "[d]efendant has three other daughters, and several grandchildren . . . It makes no sense for the [c]ourt to . . . favor one daughter over three other daughters or over his grandchildren who are of school age." Defendant also argues that the trial court should not have so ordered because it was not included in the trial court's written opinion, but was ultimately in the judgment of divorce. Finally, defendant argues that plaintiff "makes twice the take-home pay of defendant" and is, therefore, able to support the minor child in the event of defendant's demise. Defendant offers no legal support for his argument that the minor child should not be a beneficiary or that the trial court's inclusion of life insurance in the final judgment, but not in its written opinion, is inappropriate. This Court need not discover or rationalize the basis for defendant's arguments. *Wilson, supra* at 243. The facts cited by defendant are not persuasive that the trial court's decision was so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. MCL 722.27(1)(c); *Fletcher, supra* at 879-880.

Defendant next argues that the trial court abused its discretion in dividing the marital property because it failed to consider several facts. We disagree. This Court's review of the trial court's factual findings is limited to clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). If the trial court's findings of fact are upheld, this Court must then decide whether the dispositional ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. "A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id*. at 152; *McNamara v Horner*, ___ Mich App ___; ___ NW2d ___ (Docket No. 216018, issued 1/11/02) slip op p 3;

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but any significant departure from congruence must be explained clearly by the trial court. *McNamara, supra; Byington, supra* at 114-115. The trial court must make specific findings regarding the

factors it determines to be relevant. *Sparks, supra* at 159. "Generally, marital assets are subject to division between the parties but the parties' separate assets may not be invaded." *McNamara, supra* at slip op p 3. Assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate, but the appreciation of a premarital asset during the marriage is subject to division as part of the marital estate unless the appreciation was wholly passive. *Id.*

Defendant argues that the trial court ignored the equity defendant had in the marital home prior to the marriage. In support of this assertion, defendant provided a document from National City indicating that the original balance on the property was $40,000 and the value in 1993 was $69,000.[3] Defendant, therefore, argues that he had $27,000 in equity at the time of the marriage. However, defendant testified that he paid $67,000 with $10,000 down for the house in 1980. Thus, value increased only $2,000 over thirteen years. The trial court noted that 1993 was two years after the parties married, and therefore, considered the premarital value to be $67,000. The trial court considered the evidence indicating that the failure of the property to increase in value was a result of the house having fallen into disrepair, prior to the parties' marriage. Defendant himself testified the parties contributed equally to the restoration of the house. The trial court cited *Reeves v Reeves*, 226 Mich App 490, 493-496; 575 NW2d 1 (1997), which indicates that the sharing and maintenance of a marital home affords both spouses an interest in the increase in value over the term of the marriage. Defendant also argues that the 1993 appraisal includes only the house and not the land, but only offers proof of an appraisal amount which does not specify exclusion of the land. At trial, defendant only offered his speculation that the property was worth more than the appraisal amount. Therefore, the trial court did not erroneously ignore defendant's premarital equity.

Defendant also argues that he put $28,000 into plaintiff's house[4] and paid $320 per month totaling $7,000 on the house. At trial, defendant testified that he derived this number from his memory and has no records to prove that he contributed this amount. Defendant testified that plaintiff did not give any of the proceeds from the sale of the house to defendant. However, plaintiff testified that she sold the house for $19,000 and gave $5,000 to defendant, which he used to pay debts and buy clothes for the children. Plaintiff also testified that she used some of the proceeds to pay bills and buy school clothes, groceries, and Christmas presents. Therefore, the evidence indicates that the proceeds of the sale were jointly consumed by the parties. Again, this Court gives deference to the trial court's ability to judge the credibility of the witnesses. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 25; 581 NW2d 11 (1998).

Defendant also argues that the house on Rosemary Street was paid for with joint funds. Plaintiff testified that she and defendant bought the house as an investment before they were married. This house was awarded to defendant. Therefore, any investment that defendant made in the house has been returned to him with the house itself.

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[3] However, the document is not dated. The trial court's opinion indicates that the date was July 1993. Defendant does not take issue with this date nor does his brief include the date when discussing this document.

[4] By this, defendant appears to mean the house on Packard street.

Defendant also argues that he should not be responsible for the PSP loan that plaintiff took out in the amount of $8,400 with a remaining balance of $3,500. The evidence shows that the money borrowed was used to pay for repairs to the house on Packard street. Plaintiff testified that the money was paid to her brother for work that he did on the house. This was the house that the parties lived in before their marriage and for a time thereafter. As the money was used to repair the house that was used as the marital home, it is equitable for defendant to share in the debt incurred. Additionally, as discussed above, the house was sold and the proceeds were consumed jointly. Therefore, defendant reaped the benefit of the repairs paid for with this money.

Defendant also argues that the trial court failed to address the issue of the National Bank Visa card. This is incorrect as the trial court ordered defendant to pay the debt. Defendant argues that because both parties' names were on the account, they should share the liability. However, defendant offers no evidence that plaintiff used the card. Plaintiff testified that, although her name was on the card, she never used the card and, in fact, never possessed the card.

Defendant also argues that the trial court failed to divide the personal property. However, defendant testified at trial that he and plaintiff could agree to divide up the household goods, furnishings, and personal property without the trial court getting involved. The trial court ordered the parties to divide the property evenly and refused to divide each item that the parties listed stating that the property "seem[s] easily divisible or petty." Defendant cannot now argue that the trial court committed reversible error by, in essence, accepting the position taken by defendant in that court. *Schulz v Northville Public Schools*, 247 Mich App 178, 181 n.1; 635 NW2d 508 (2001).

Defendant argues that he made considerably more money during the marriage and that the trial court failed to take this into account in dividing the marital properties. However, defendant offered no proof of the disparity in earnings and it is not evident from the trial court's opinion and order that the failure to mention this factor resulted in an inequitable distribution.

Defendant also argues that although plaintiff's earnings now exceed his earnings, plaintiff "dumped" debts on him after the trial court's opinion was entered but before the judgment of divorce was entered. Again, defendant does not set forth any specifics or evidence with respect to this assertion. Therefore, the trial court's findings of fact were not erroneous and its division of property was fair and equitable in light of the facts actually presented to the trial court.

Defendant finally argues that the trial court's delays in holding trial and failure to grant his motion for new trial prejudiced him in the outcome of this case. We disagree. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

Defendant argues that the trial court did not hear defendant's motions, which were filed prior to trial, but rather, promised to accelerate the trial date. Defendant also argues that because

the trial court did not issue an opinion until March 1, 2000, and the judgment was entered on June 22, 2000, the trial court was unable to recall the testimony when several months had passed from the time of trial. However, the lower court record does not show undue delay. Plaintiff filed a complaint for divorce on September 28, 1998. Trial was held in October 1999. The trial court entered the divorce judgment on June 22, 2000. Additionally, defendant's argument that the trial court decided the case erroneously because it "forgot" the trial testimony is foreclosed by the fact that a trial transcript was available to the court, thus eliminating the trial court's need to independently recall the trial testimony. Additionally, defendant fails to show how he was prejudiced in respect to the outcome of the case and only points out that he "readily concluded" at the conclusion of trial that the result would be different than the ultimate outcome. A review of the record shows that the trial court decided this case based on the testimony presented at trial. There is no indication that the time which elapsed from the inception to the conclusion of this case had any impact on the trial court's decision regardless of any discomfort that it caused defendant. Therefore, the trial court's delays and failure to grant defendant's motion for new trial did not amount to an abuse of discretion.

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray