

STATE OF MICHIGAN
COURT OF APPEALS

MARY ELIZABETH COLLETT-ZIMMER,

Plaintiff-Appellee/Cross-Appellant,

V

DENNIS SCOTT ZIMMER,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

August 20, 2002

No. 236743

Kent Circuit Court

LC No. 99-004500-DM

Before: Jansen, P.J., and Smolenski and Wilder, JJ

PER CURIAM.

In this divorce proceeding, defendant appeals from that part of the trial court's judgment of divorce awarding all of the equity in the marital residence to plaintiff while leaving defendant with sole responsibility for the parties' credit card and other miscellaneous debt. Plaintiff cross-appeals from a number of aspects of the trial court's order, most notably the award of sole legal custody of the parties' four children to defendant.¹ Plaintiff also cross-appeals the trial court's denial of spousal support, its imputation of income to her for child support calculation purposes, and other aspects of the court's property disposition. We reverse that part of the trial court's order imputing income to plaintiff and declining to calculate the portion of defendant's income that he did not report to the IRS. We also remand, for consideration, in light of the new income calculations, the child support award. In all other respects we affirm.

I. Facts and Proceedings

Plaintiff and defendant were married on May 27, 1978. During their marriage, the parties had four children: Matthew, born July 26, 1983; Nicholas, born June 23, 1986; Alexander, born September 23, 1990; and Courtney, born January 25, 1994. They separated on February 14, 1999, following a period of marital tension.

Throughout their marriage, the parties received financial assistance from plaintiff's mother and grandmother. From 1987 until 1997, plaintiff's mother gave the parties

¹ Plaintiff initially appealed the court's grant of sole physical custody to defendant as well. She abandoned this position at oral argument, however, and now seeks only joint legal custody of the minor children.

approximately \$230,000, some of which went toward defendant's business as a snack food route owner and distributor. From 1997 until at least the time of trial, plaintiff's mother gave them \$1,000 per month. She also contributed to Michigan Educational Trusts for the children and gave the parties five thousand of the six thousand dollars they paid for their lakeside mobile home. Plaintiff's grandmother also contributed monies that went toward the purchase of the marital home, including a \$15,000 loan, a \$10,000 gift (in stocks), and \$3,500 from a college account.

Early in their marriage the parties decided that it would be best for plaintiff to be a full-time mother to their young children. Prior to having children, she worked in the Meijer pharmacy and as a chair-side dental assistant. She continued her position as a dental assistant part-time until her pregnancy with their second child. Plaintiff was a full-time mother until approximately three years before the marriage ended. She then worked as a part-time salesperson at a women's clothing store. After beginning work at the women's clothing store, plaintiff began to change her manner of dress. Some of her new clothing choices included tight, midriff-baring tops and low cut pants (revealing her new navel ring). Plaintiff also underwent breast augmentation surgery, and on one occasion, her breasts became exposed when she leaned over. This incident occurred when she was picking up one of the minor children from school.

About the time plaintiff began working for the clothing store, she also began working for an escort service. As part of this job, plaintiff would go to a man's personal business, act as a shopper, and "talk dirty" to her customer. Plaintiff eventually stopped working at this job.

Defendant testified that plaintiff's new lifestyle, including her manner of dress and late-night partying, contributed to his decision to leave the marital home. He was also influenced by plaintiff's extramarital affair, in which she engaged just prior to the parties' separation. Plaintiff claimed that defendant's verbal abuse led to her affair and that problems with the parties sexual relationship also contributed to the breakdown of their marriage.

Approximately three months after defendant left the marital home, plaintiff filed a Complaint for Separate Maintenance. She later amended that complaint to request a judgment of divorce. By stipulation of the parties, the trial court ordered that the parties would have joint legal custody of the minor children. By the same order, the trial court directed that plaintiff would have physical custody of the children and that defendant would be granted parenting time as agreed by the parties, or alternatively, pursuant to a detailed schedule if the parties could not agree. Defendant was also ordered to pay child support. In 2000, Matthew, the parties' oldest child, went to live with defendant by agreement of the parties because he and plaintiff had increased tensions between them. Custody of the minor children and division of the parties' marital estate were the primary issues in the trial, which began in February 2001. Testimony showed that plaintiff's home was a stress-filled environment and that after the separation, her next-door neighbor, Marie Brinker, repeatedly heard plaintiff "howling" and "screaming" although the doors and windows were closed. Plaintiff testified that this behavior was caused by her "total[] devastat[ion]" over the divorce. Brinker also testified that she heard plaintiff coming to and leaving from the house late at night and early in the morning. Plaintiff stated that sometimes she shopped late at night, but that sometimes she would go out with friends and keep her pager on for her children to call if they needed her. Furthermore, plaintiff admitted that on a couple of occasions, she stayed out all night, although one instance was caused by her inability to drive in a snow storm that she encountered when she started to leave a hotel where she had spent

some time on her way home from a concert. She also stated that sometimes it was difficult for her to drive home due to a combination of alcohol consumption and irritable bowel syndrome.

Brinker also testified that she observed that the minor children were always very happy to see their father when he picked them up for parenting time, but were very sad on their return to plaintiff's home. Testimony revealed numerous occasions where plaintiff and the minor children had verbal altercations, and one incident ended in plaintiff breaking Matthew's door by putting a chair through it while trying to get the keys to his car. Plaintiff testified that the reason she had trouble getting the children to a medical appointment on one occasion was because she "was resting at the pool", she was "just totally stressed out and just felt totally fatigued", and that she had "spent the entire morning devoted to other people's activities."

While the divorce was pending, plaintiff arranged for the children to receive counseling. She also testified that she was extremely involved with their education and never missed a parent-teacher conference. Defendant, however, was not as involved in the school lives of his children and was not certain that the school had his address if he needed to be contacted. He did, however, testify that he discussed their homework with them, and both parties indicated that defendant was particularly involved in helping Alexander complete his assignments. Each party criticized the parenting style of the other at trial. Plaintiff generally felt that defendant is too indulgent and defendant felt that plaintiff is hot-tempered and too hard on the children.

Testimony concerning the marital estate showed that the value of the marital home was approximately \$250,000, but that the parties had only \$112,000 in equity as they owed approximately \$138,000 on the mortgage. The parties also had accumulated \$9,000 in credit card debt prior to their separation and had two Morgan Stanley Dean Witter investment accounts. The trailer on Big Star Lake was also part of the estate, as were various items such as a boat and ski-doo that the parties used while vacationing at the trailer.

In its written opinion, the trial court awarded both sole legal and physical custody of the children to defendant, finding that joint legal custody was not appropriate because the parties could not get along.² The court granted plaintiff parenting time and ordered plaintiff to pay child support based on an imputed income of \$400 per week. Also with regard to support, the trial court found that defendant's reported income was less than his actual income but that the evidence failed to disclose how much defendant failed to report, so it ordered that the support calculation would be based on defendant's most recent tax return. Additionally, the court awarded plaintiff all of the equity in the marital home and all of the debt related to it, but awarded defendant the parties' trailer on Big Star Lake, their boat, and ski-doo. The court also allocated any debt related to these items to defendant, as well as up to \$12,000 of the parties' credit card debt. The court divided the investment accounts equally between the parties. Additionally, the court denied spousal support, but reserved it indefinitely. This appeal followed.

² The court subsequently modified the Judgment of Divorce in an order dated August 28, 2001, granting plaintiff the right to access the school, medical, and dental records of the children and "to communicate with professionals involving those issues," without having joint legal custody. This provision of the order indicated that the parties agreed to these modifications.

II. Standard of Review

A. Property Division

We review the trial court's factual findings in this divorce action for clear error. *McNamara v Horner*, 249 Mich App 177, 182; 642 NW2d 385 (2002). Clear error exists where, after reviewing the whole record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 182-183. If we uphold the trial court's factual findings, we proceed to determine whether the dispositional ruling of the court was fair and equitable in light of its factual findings. *Id.* at 183. "A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id.*

B. Child Custody

MCL 722.23 requires the trial court to decide custody by considering the twelve factors listed in that statute. In reviewing the trial court's decision, we apply three distinct legal standards, according to the type of ruling we are reviewing. *Foskett v Foskett*, 247 Mich App 1, 4; 634 NW2d 363 (2001). We review findings of fact, including the court's final decision on each statutory factor, to determine whether they are against the great weight of the evidence. *Id.* at 5. We review discretionary rulings, such as the ultimate grant of custody, for abuse of discretion, *id.* at 5, and questions of law for clear legal error. *Id.* at 4-5.

C. Spousal Support

"We review the trial court's factual findings relating to the award or modification of [spousal support] for clear error." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655.

D. Child Support

We review a trial court's child support determination for abuse of discretion. *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000). However, we review the court's findings of fact for clear error. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

III. Analysis

A. Property Division

Defendant claims on appeal that it was inequitable to award plaintiff all of the equity in the marital residence while saddling defendant with most of the parties' marital debt. Plaintiff claims on cross-appeal that it was inequitable to award defendant the lake-side trailer when, as plaintiff's mother testified, it was purchased mainly with money supplied by plaintiff's mother and no special circumstances exist requiring that it be awarded to defendant. We affirm the trial court's ruling on both of these issues.

In dividing marital assets, the goal is to reach an equitable division in light of all of the circumstances. . . . While the division need not be mathematically equal, . . . an equitable distribution of marital assets means that they will be roughly

congruent . . . and any significant departures from congruence must be clearly explained by the trial court.” [*Id.* at 188 (citations omitted).]

Defendant’s primary argument is that the trial court disproportionately considered the financial contributions plaintiff’s mother made to the parties in deciding to award her all of the home equity. We disagree. Contributions of the parties to the marital estate is one of the factors the court is to consider when dividing marital assets. *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). The weight given to each of the *Sparks* factors does not need to be equal. *McNamara, supra* at 186. The trial court determined that factor (2)³ was most relevant to an equitable division of marital assets in instant matter, and this finding was not clearly erroneous.

Furthermore, defendant fails to recognize the significant debt that encumbered the marital residence at the time of the trial. Testimony showed that the equity was approximately \$112,000, but that the outstanding mortgage balance was \$138,000. Accordingly, the debt exceeded the equity by \$26,000, and defendant is free from any obligation on that debt. Additionally, the court opted not to impose a spousal support obligation on defendant, as will be discussed below. That decision demonstrates the court’s efforts to balance its disposition, while giving consideration to all of the circumstances.

Defendant also argues that plaintiff pays significantly less child support than the trial court ordered and less than he needs. Assuming this to be the case, the fact that defendant claims a need for additional child support does not establish that the court improperly divided the estate.

We also reject plaintiff’s cross-appeal on this issue. Although the testimony did show that plaintiff’s mother contributed toward the purchase of the trailer, testimony also showed that the funds did not come from plaintiff’s family. The trial court did not abuse its discretion by choosing to award this particular asset and the related property to defendant, particularly in light of testimony that showed that defendant and the children use the trailer for recreational purposes. Upon reviewing the record; we believe that the trial court made a proper distribution and explained its departure from congruence, as it was required to do. *McNamara, supra* at 188.

B. Child Custody

At oral argument plaintiff abandoned her claim that the trial court erred in granting sole physical custody of the children to defendant. Plaintiff’s remaining argument is that the trial

³ The factors identified by the *Sparks* court are as follows:

- (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 ability of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks, supra* at 159-160.]

The court is not limited to these factors, however, and should consider additional factors that are relevant. *Id.* at 160.

court's temporary order dated June 30, 1999, which was applicable while the divorce was pending, established a custodial environment in which the parties shared joint legal custody, and that the trial court erred in finding that there was clear and convincing evidence to award sole legal custody to defendant.⁴

MCL 722.26a provides in pertinent part:

. . . The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in [MCL 722.23]

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. [MCL 722.26a (1).]

Plaintiff does not contest the trial court's finding that the parties could not get along. In fact, plaintiff testified at trial that "I do not wish to have joint legal custody. We can't communicate well enough." The trial court held that it "would not hesitate to award joint legal custody absent the compelling evidence that plaintiff and defendant are simply unable to reasonably and appropriately communicate about anything of substance." On the record before us, we cannot say that the trial court abused its discretion by awarding sole legal custody to defendant. There was clear and convincing evidence that the parties would be unable to cooperate and generally agree on the children's welfare, such that joint legal custody would not be in the children's best interests. Furthermore, the evidence on the best interest factors supports the trial court's decision to award sole legal custody to defendant rather than plaintiff.

Plaintiff has challenged many of the trial court's findings on the twelve statutory factors, however, the trial court's findings are not against the great weight of the evidence. We specifically address here only plaintiff's claim that the trial court's findings on factors six and nine court improperly used information obtained from the minor children during their *in camera* interview, in violation of *Molloy v Molloy*, 247 Mich App 348; 637 NW2d 574 (2002), rev'd in part on other grounds 466 Mich 852; 643 NW2d 574 (2002).

Plaintiff argues that the record does not directly support the trial court's findings that the children were embarrassed by plaintiff's mode of dress, and that therefore the trial court must have inappropriately obtained this information from the children during their *in camera* interview. While plaintiff correctly asserts that this Court held in *Molloy* that the trial court cannot use *in camera* interviews to gain information on factors other than a child's custodial preference, plaintiff ignores the fact that she herself testified that at least one of the children expressed such embarrassment. Moreover, another witness who was acquainted with the parties also testified that plaintiff's appearance was embarrassing to the minor children. Therefore, the trial court's findings on factor six are supported by the record and not against the great weight of the evidence.

⁴ Plaintiff's argument does not apply to Matthew, since Matthew turned 18 on July 26, 2001.

As to the ninth factor, plaintiff argues that the trial court's indication that it considered "other relevant information provided . . . during these *in camera* interviews" shows that it exceeded the proper scope of the interview. However, this court noted in *Molloy* that while we require that these interviews be limited to reasonable questions to discover the preference of the child, a thorough examination is needed to ascertain the child's rationale for their preference, *id.* at 359, and that "the interview should not take place in a vacuum. Inquiry must be made in order to test the authenticity, the motives, and the consistency of the preference." *Id.* at 353. No support exists on the record for plaintiff's assertion that the "other relevant information" was not directly related to the court's inquiry into the "authenticity, the motives, and the consistency" of each child's preference. Consequently, we find that the trial court's finding on factor nine were not against the great weight of the evidence.

Because we conclude that none of the trial court's factual findings were against the great weight of the evidence, we also conclude that the record provided clear and convincing evidence that granting defendant sole legal custody was appropriate. Considering the trial court's findings as a whole, we find no abuse of discretion in the order granting defendant sole legal custody.

C. Spousal Support

Plaintiff cross-appeals from the trial court's decision not to award her spousal support. In its opinion, the court stated that "as a result of this opinion [plaintiff] will have an estate significantly larger than that of defendant and will no longer have the financial and other burdens associated with her custody of minor children." Plaintiff argues that the disparity in the incomes of the parties dictates that she receive spousal support, and that she should not be forced to support herself with the equity in her home while looking for a full-time job. We find the trial court's conclusion was not clearly erroneous.

"The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore, supra* at 654. The trial court made extensive factual findings throughout its opinion and devoted its discussion of spousal support to the most relevant factors in this case. When the totality of the parties' circumstances is considered, including the court's property division, it is evident that the court's ruling was fair and equitable.

D. Child Support

We agree that the trial court abused its discretion when it imputed \$400 monthly income to plaintiff, since the monthly amount was not based on objective criteria. *Ghidotti v Barber*, 459 Mich 189, 198-200; 586 NW2d 883 (1998). Instead, the trial court speculated that someone of plaintiff's "appearance, skill and training" could earn ten dollars an hour.

We also agree that the trial abused its discretion by failing to include defendant's unreported income in the child support calculation. By statute, child support calculations are based on the needs of the child and the actual resources of the parent. *Id.* at 198; MCL 552.519(3)(a)(vi). Here, the court found that the record did not "suggest" how much money defendant was failing to report to the IRS. Our review of the record shows that this finding is clearly erroneous because the testimony at trial does reflect approximately how much money defendant failed to report. Because the court's child support order was not based on either

plaintiff's or defendant's actual resources, the trial court abused its discretion in calculating child support.

IV. Conclusion

Affirmed in part and reversed and remanded for recalculation of both plaintiff's and defendant's income based on the existing record, and recalculation of child support in light of the recalculated incomes. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder