STATE OF MICHIGAN

COURT OF APPEALS

LATACHA COOK,

Plaintiff-Appellee,

V

ANTONY COOK,

Defendant-Appellant.

UNPUBLISHED
March 16, 2004

No. 243839
Wayne Circuit Court
LC No. 01-108719-DM

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm in part, reverse in part, and remand for correction of the real property distribution based upon the stipulation of the parties with consideration of the pre-marital contribution by the defendant in accordance with this opinion.

Defendant's first issue on appeal is that the trial court erred by granting plaintiff sole physical custody and joint legal custody with defendant of the parties' four minor children based upon a finding of facts unsupported by the record. Defendant argues that the trial court's findings of fact were erroneous because there was no testimony to support them. We disagree.

"'To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.'" *Harvey v Harvey*, 257 Mich App 278, 282-283; 668 NW2d 187 (2003), quoting MCL 722.28. There are several factors that must each be considered by the trial court in making a custody determination. *Bowers v Bowers*, 198 Mich App 320, 327-328; 497 NW2d 602 (1993); MCL 722.23. A trial court is required to consider each factor, and to explicitly state its findings for each one. *Bowers*, *supra*, 198 Mich App 328. The trial court's statement of its findings need not be overly detailed; indeed, it can be "terse," so long as it encompasses each of the factors. *Id.*

We have reviewed the record, and find ample testimony to support the trial court's findings of fact, and that the trial court properly considered each statutory factor and clearly expressed its findings for each one on the record. Defendant's position is apparently rooted in defendant's initial failure to obtain and review the transcripts from the first day of trial in this case. Accordingly, we conclude that defendant has not made a sufficient showing that the trial

court's decision was against the great weight of evidence, that it abused its discretion, or that it made a clear error of law.

Defendant's next issue on appeal is that the trial court erred in finding that an established custodial environment existed with plaintiff. We disagree.

"Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995); see also *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1995), aff'd, modified 451 Mich 457 (1996). "'The custodial environment of a child is established 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.'" *Ireland*, *supra* at 241, quoting MCL 722.27(1)(c).

Defendant argues that the trial court erred in ignoring a previous temporary custody order granting plaintiff and defendant joint legal and physical custody; however, previous orders of custody are irrelevant. *Hayes*, *supra* at 388. "In determining whether an established custodial environment exists, it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed." *Id.* The trial court cited testimony from the record that showed that the children looked to plaintiff for most of the things for which children depend upon parents. Accordingly, we conclude that the trial court did not err in its decision.

Defendant's next issue on appeal is that the trial court committed an error requiring reversal in not recording its *in camera* interview with the parties' three eldest children. Defendant cites this Court's decision in *Molloy v Molloy*, 247 Mich App 348, 351-352; 637 NW2d 803 (2001), aff'd in part, vacated in part 466 Mich 852 (2002), which mandated that all *in camera* interviews of children in custody cases be recorded and sealed for appellate review. However, our Supreme Court subsequently issued an order affirming that decision in part, and specifically vacating that portion of this Court's opinion holding that such *in camera* interviews be recorded. *Molloy v Molloy*, 466 Mich 852, 643 NW2d 574 (2002). In *Foskett v Foskett*, 247 Mich App 1, 10-12; 634 NW2d 363 (2001), this Court reversed the trial court's grant of custody where the findings of fact relating to the statutory best interest factors were based almost solely on an unrecorded *in camera* interview with the child in question. Here, however, the interview was but one piece of evidence among many others that the trial court considered in reaching its decision. Therefore, we conclude that the trial court was not mandated to record the *in camera* interview, and did not err in failing to do so.

Defendant's next issue on appeal is that the trial court erred in including the marital home in the marital estate when dividing property where defendant purchased the home prior to the marriage with separate funds. We agree.

Generally, the separate property of each spouse in a divorce remains that spouse's separate property, and the trial court cannot invade separate property for distribution in a divorce except under two statutory exceptions: (1) under MCL 552.23, "if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal

support out of the real and personal estate," and (2) under MCL 552.401, where "it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property." See *Reeves v Reeves*, 226 Mich App 490, 495-496; 575 NW2d 1 (1997). Both spouses have an interest in the increase in value of a marital home during the course of the marriage. *Korth v Korth*, 256 Mich App 286, 292-293; 662 NW2d 111 (2003), citing *Reeves*, *supra* at 495-496. However, where the marital home is purchased prior to the marriage by one of the parties using separate property, the down payment, equity built before the marriage, and any appreciation that occurred before the marriage is separate property of that party. *Korth*, *supra* at 293; *Reeves*, *supra* at 496. A trial court errs when it considers the entire equity of the marital home part of the marital estate in such a situation. *Reeves*, *supra* at 496.

In this case, the parties stipulated that defendant purchased the marital home in 1993, two years prior to the marriage, for $15,500 cash. In 1997, the parties mortgaged the house, with a balance at the time of trial of $35,898.12. The parties stipulated that the value of the home at the time of the trial was between $52,000 and $65,000.

The trial court, in its opinion, recognized that the house was purchased with separate funds, but stated that it would not consider this fact because of plaintiff's need to care for the children. However, the trial court awarded plaintiff $350 per week in child support payments from defendant. Furthermore, the trial court noted that both parties "have about the same earning potential." The record evidence shows comparable earnings and the trial court found only a two hundred dollar per week after tax disparity. The trial court noted that defendant made slightly more money than plaintiff at the time because he had been employed by DaimlerChrysler slightly longer (both parties were employed by DaimlerChrysler at the time and defendant worked more over-time) and that plaintiff would need more financial resources to support the children, but then immediately proceeded to hold that no spousal support would be ordered.

While it does not appear that the trial court made any errors in its factual findings, we agree with defendant that the trial court's division of property relating to the marital home is inequitable. The trial court explicitly refused to consider the value of that part of the home that represented property separate from the marital estate, as defined by *Reeves*, *supra*, and *Korth*, *supra*. No record evidence was provided by plaintiff concerning need for additional support such that the separate property of defendant should be invaded. It is unclear, then, how the trial court might equitably have reached the conclusion that the portion of the equity lawfully considered part of the marital estate is insufficient for plaintiff's support of the children, especially in light of the trial court's explicit finding that both parties are approximately equally situated financially, and in light of the trial court's award of approximately $1,400 per month for child support. However, in light of *Reeves*, *supra*, and *Korth*, *supra*, we do not agree with defendant that the entire equity value of the home should be considered his separate property.

Defendant's final issue on appeal is that the trial court erred in valuing the marital home at $70,000 where the parties stipulated its value to be between $52,000 and $65,000. We agree.

This Court has held that "stipulations of fact are binding, but stipulations of law are not binding." *Gates v Gates*, 256 Mich App 420, 426; 664 NW2d 231 (2003). In this case, the parties were not able to stipulate to an exact value of the marital home, as plaintiff contended that the property was worth $65,000, and defendant contended the property was worth $52,000;

however, the parties stipulated that to those figures as the range for the value of the home. The trial court assigned a value of $70,000, but it appears from its opinion that it had intended to base its valuation on the testimony of the parties, stating "it's the Court's recollection from my notes that that was the number given by the parties." However, our review of the record reveals no testimony that would support such a finding. Indeed the trial court acknowledged that the parties stipulated that the property was worth not less than $52,000 (defendant's value), but not more than $65,000 (plaintiff's value). Comparable property value estimates were stipulated into evidence. The trial court was bound by the stipulation to assign a value at or within the parties valuation. Accordingly, we agree with defendant that the trial court's valuation of the property is clearly erroneous.

We reverse the judgment of divorce to the extent that it includes the entire value of the marital home in the division of property, and to the extent that it valued the home at $70,000; we affirm the judgment of divorce as it relates to all other issues, including the custody of the parties' children. We remand this case to the trial court with instruction to amend the judgment valuing the home at a price consistent with the parties' stipulation, and to reconsider the award to plaintiff of her share of the equity of the home.As stated in *Reeves, supra* at 497, "After properly recognizing the parties' separate estates and the marital estate, the court may consider whether invasion of defendant's estate is necessary. Before the court may invade defendant's separate estate it must specifically find that one of the two statutory exceptions exists." In that regard the trial court may consider additional evidence on remand to determine if invasion of defendant's separate estate is necessary, articulate the basis upon which such invasion is necessary, and determine the appropriate amount. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Pat M. Donofrio