

STATE OF MICHIGAN
COURT OF APPEALS

MARSHA KIMBERLY POSTMA,
Plaintiff-Appellee,

UNPUBLISHED
August 24, 2004

v

RICHARD POSTMA,
Defendant-Appellant.

No. 253743
Van Buren Circuit Court
LC No. 02050550-DM

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from a divorce judgment awarding the parties joint custody of their minor child and providing for child support based on imputed income. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS

The parties married in 1997, and have one child, born in April 2000. Plaintiff suffers from an eating disorder for which she sought treatment during the marriage. In October 2002, plaintiff entered an inpatient treatment program in California, returning home in late October. Defendant took the parties' child and went to Thailand on November 3, 2002. At that time, he told plaintiff only that he was going on vacation; he did not tell her where he was going or when he would return.

Plaintiff filed for divorce from defendant on December 12, 2002. Plaintiff traveled to Thailand and returned to Michigan with the child in January 2003. Defendant returned in March 2003. The parties agreed to a property settlement, leaving custody and child support as the only issues for trial. At the conclusion of the trial, the trial court awarded the parties joint physical custody of the minor child. Based on testimony presented at a subsequent hearing to settle judgment, the trial court ordered defendant to pay child support based on imputed income.

II. CHILD CUSTODY

On appeal, defendant first argues that the trial court abused its discretion in not awarding him sole custody given plaintiff's mental and physical health issues. We disagree.

A. Standard of Review

The determination as to an award of custody is to be made in the child's best interest, as measured by the factors set forth in MCL 722.23; MSA 25.312(3). *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994); *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). In making a custody determination, the trial court must make findings of fact as to each of these factors. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The trial court is not required to give each factor equal weight; rather, the overwhelmingly predominant factor in each case is the welfare of the child. *Winn v Winn*, 234 Mich App 255, 263; 593 NW2d 662 (1995); *McCain, supra*, 130-131. The trial court's determination as to each factor is a finding of fact, which should be affirmed unless the evidence clearly preponderates otherwise. *Fletcher, supra*, 879. To whom custody is granted is a discretionary dispositional ruling, which should be affirmed unless it represents a palpable abuse of discretion. *Id.*, 879-880.

B. Analysis

Our review of the record indicates that the trial court carefully analyzed the evidence before it relative to all twelve statutory best interest factors in making its custody determination. Specifically, the trial court heard testimony as to the nature and extent of plaintiff's eating disorder and related difficulties, as well as to the improvement in plaintiff's condition and her dedication to treatment. Based on this testimony, the court found that factor (g) slightly favored defendant. However, the court also noted defendant's conduct and attitude relative to plaintiff's relationship with the child, finding "without question" that this factor [factor (j)] favored plaintiff. Additionally, the trial court found a slight edge to plaintiff as to religious upbringing [factor (b)], and a very slight edge to defendant as to financial capability to provide for the child [factor (c)]. However, the court indicated that its finding on these factors was not significant to its overall determination. The court found the remainder of the factors to be even or inapplicable.

Defendant does not dispute the court's finding as to the individual factors. Rather, defendant seems to argue that the trial court did not give sufficient weight to the mental and physical health factor in making its custody determination, asserting that his better physical and mental health entitles him to sole custody. Defendant offers no authority for the proposition that the trial court's favoring of him as to factor (g) must necessarily outweigh the court's finding in plaintiff's favor as to factor (j). Indeed, the law does not require such a result. *McCain, supra*, 130-131. Given our review of the record, we find that the trial court's findings of fact are not against the great weight of the evidence and that the trial court did not abuse its discretion in determining that it was in the best interest of the child to award the parties joint physical custody.

III. CHILD SUPPORT

Defendant also argues that the trial court erred in imputing income to him in making its support decision. We agree.

A. Standard of Review

An award of child support rests in the sound discretion of the trial court and the court's exercise of that discretion is presumed to be correct. The party appealing the award must show that the trial court abused its discretion in making the award. *Milligan v Milligan*, 197 Mich App 665, 667; 496 NW2d 394 (1992); *Thompson v Merritt*, 192 Mich App 412, 416; 481 NW3d 735

(1991). When determining the level of support to be provided by each parent, the trial court must apply the formula set forth in the Michigan Child Support Formula Manual. *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002). Imputation of income may be appropriate where a party has an unexercised ability to earn. *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987). The child support manual sets forth a series of factors to be considered in evaluating an unexercised ability to earn. These factors include prior employment experience, education level, availability of employment and the prevailing wage rates in the local geographic area, special skills and training and whether there is any evidence that the party is able to earn the imputed income. Michigan Child Support Formula Manual (West, 2001), p 8; *Ghidotti v Barber*, 459 Mich 189, 192; 568 NW2d 883 (1998). In *Ghidotti*, our Supreme Court held that when imputing income to a party, a trial court is required to evaluate the equitable factors in set forth in the manual, and to consider the actual ability and likelihood of earning the imputed income. *Id.*

B. Analysis

In making its support determination, the trial court found that defendant was working at a position below his potential and education level and had an unexercised ability to earn. The trial court thus imputed income to defendant of \$3,784.50 per month, or \$45,414 annually. It based this determination on testimony presented at a hearing on defendant's motion to settle judgment.

At that hearing, defendant testified that he was currently earning \$600 per week installing wood floors for his brother's company, and that the most money he had earned in any given year was that which he would make in 2003, which he expected to be approximately \$31,000. Defendant further testified that he had not declined any jobs that offered him more money than he was currently earning. He acknowledged that, in the fall of 1999, he worked as a part-time instructor teaching one course at each of three different local colleges, earning about \$2000 per course. Plaintiff and defendant both testified that defendant made less teaching during this one semester than he did working for the family business. Defendant taught English at a school in Thailand during his stay there. There was no indication as to his income in that position. Defendant does not have a teaching certificate and is not qualified to teach in public schools in Michigan. He holds a bachelor's degree in music with a minor in Latin, and his master's degree is pending completion of his thesis.

In the instant case, because defendant had yet to provide employment information when it made its recommendation, the friend of the court imputed income to defendant based on the salary for a secondary school teacher. The friend of the court did not evaluate the factors set forth in the manual for imputation of income. Nor did the trial court offer any analysis or evaluation of the equitable factors set forth in the manual before imputing income to defendant. Further, the trial court failed to assess defendant's actual ability and likelihood of earning the imputed income and provided no explanation for the amount of income imputed to defendant. Accordingly, we reverse the trial court's award of child support and remand this case for evaluation by the trial court of the factors set forth in the Michigan Child Support Formula Manual for imputing income to defendant at the stated level or alternatively, for a new calculation of support based on the parties' actual income.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette