STATE OF MICHIGAN

COURT OF APPEALS

CRAIG S. BIRCHFIELD,

Plaintiff-Appellant,

v

KIMBERLY R. BIRCHFIELD,

Defendant-Appellee.

UNPUBLISHED
November 2, 2004

No. 252344
Genesee Circuit Court
LC No. 01-229361-DM

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

In this divorce and custody action, plaintiff appeals as of right from an amended judgment of divorce which awarded the parties joint physical and legal custody of the parties' minor child, and the court's determination regarding distribution of plaintiff's pension and the equity in the marital home. We reverse and remand.

I. Basic Facts and Proceedings

For several years before they married, the parties resided together in the property that would become the marital home. In 1989, plaintiff purchased the property for $5,000 from the estate of a relative. To purchase the property, plaintiff borrowed $3,700 from his retirement pension account and received $1,300 from his mother, Jeannette Birchfield. In 1993, the parties married. One child was born to the marriage in December 1993. Over the years, plaintiff's mother contributed $5,900 in "loans" for improvements and repairs to the property that were not repaid. According to plaintiff, both he and his mother were listed as the owners on the deed of title, and defendant's name was never added to the deed. [1]

The parties separated in December 2000 and plaintiff filed for divorce from defendant on January 29, 2001. The trial court entered a temporary order, awarding joint physical and legal custody to the parties. The parties would alternate physical custody on a weekly basis. Pursuant to the temporary order, the party who had physical custody of the minor child during a specific

[1] At trial, defendant did not dispute plaintiff's or his mother's claims of legal title to the marital residence. We note, however, that plaintiff did not offer a deed or other documentary evidence to establish his mother's title to the disputed property.

week also had exclusive possession of the marital home. Between February 27, 2002 and June 21, 2002, seven evidentiary hearings were held on the issues of child custody, child support, and spousal support. On September 13, 2002, the trial court issued an opinion which awarded the parties joint physical and legal custody of the minor child. The court weighed factors (a), (b), (c), (d), (f), (h), (j), and (l) equally between the parties. Factors (g) and (k) were weighed in favor of defendant and factor (e) was weighed in favor of plaintiff. Defendant was awarded fifty-percent of plaintiff's pension that accrued during the marriage by the trial court. The trial court also awarded the marital home to plaintiff; however, he was required to pay defendant $17,500,[2] minus fifty percent of any taxes paid within sixty days or the home would be sold.

Plaintiff objected to the distribution formula regarding the marital home and subsequently filed various motions, including a motion for reconsideration. Plaintiff's mother also filed a complaint to intervene in the action. After conducting a hearing, the trial court on March 18, 2003, issued an amended opinion reaffirming its previous award of joint legal and physical custody and denying plaintiff's mother's motion to intervene. The trial court also affirmed its previous ruling that required plaintiff to pay defendant $17,500, minus fifty percent of any taxes paid within sixty days; however, the trial court rescinded its order that the house be sold if plaintiff failed to make the required payment and instead granted defendant an equitable lien on the property. The trial court's amended opinion instructed plaintiff to pay the $17,500 to defendant from his "one-half interest in the property," which would not affect his mother's share but "giving her no credit for the investments" she or plaintiff made, thus only "giving [the parties] credit for their equity in the property."

The trial court entered a judgment of divorce on April 25, 2003, which was inconsistent with the trial court's amended opinion, and another series of hearings was held to clarify the newest judgment. On June 17, 2003, the trial court issued another opinion affirming defendant's award of $17,500 minus half any taxes paid within sixty days of the judgment of the divorce (to be taken "out of the husband's interest in the house and does not speak to the mother's interest"), and affirming the dismissal of plaintiff's mother's motion to intervene. On July 9, 2003, the trial court entered its revised judgment of divorce. This judgment of divorce was challenged by plaintiff because of ministerial issues unrelated to this appeal. After another hearing, on November 3, 2003, the trial court amended and entered the judgment of divorce at issue in this appeal which ensued after plaintiff filed his claim of appeal on November 20, 2003.[3]

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[2] The trial court determined plaintiff was entitled to $17,500 on the basis of the following formula:

> [S]ubtracting from the $60,000.00 appraisal, the $5,000.00 original investment, approximately $7,000.00 of loans from his mother to make different improvements and $14,000.00 remaining on the mortgage leaving an equity of $34,000.00 divided by two is $17,500.00.

[3] An order staying the judgment regarding the property distribution was entered in the trial court on January 21, 2004.

II. Standards of Review

"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." MCL 722.28. Therefore, this Court reviews for clear legal error regarding the trial court's choice, interpretation, or application of the existing law. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). Findings of fact are reviewed pursuant to the great weight of the evidence standard. *Id*. at 5. This Court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id*., quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. *Foskett, supra* at 5.

An appellate court must first review the factual findings of the trial court for clear error regarding property division in a divorce judgment. *Sparks v Sparks*, 440 Mich 141, 151; 495 NW2d 893 (1992); *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). A finding is clearly erroneous if the appellate court, having reviewed all of the evidence, is left with a definite and firm conviction that a mistake has been made. *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003). If the findings of the trial court are not clearly erroneous, the appellate court must determine whether the dispositional ruling was fair and equitable under the circumstances. *Sparks, supra* at 151-152.

III. Analysis

Plaintiff first contends that the trial court reversibly erred in awarding joint legal and physical custody of the parties' minor child without first determining the existence of an established custodial environment. We disagree.

In any child custody dispute, a trial court must first determine whether an established custodial environment exists. *LaFleche, supra* at 695-696. Whether an established custodial environment exists is a question of fact, *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), and a trial court must make a specific finding regarding the existence of a custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). If an established custodial environment exists, the court may not change custody unless there is clear and convincing evidence that it is in the best interest of the child. *LaFleche, supra* at 696.

In the present case, we agree the trial court erred in failing to make a factual determination regarding the existence of an established custodial environment prior to elaborating upon the best interest factors. *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991). In this regard, the trial court's failure to first evaluate and rule on the existence of an established custodial environment is clear legal error on a major issue. *Id.* at 54. However, "[w]here a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Jack, supra* at 670, citing *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991).

From our review of the record, we are satisfied that there is sufficient information for us to find that an established custodial environment did not exist exclusively with either party. During the marriage, both parties provided guidance, discipline, the necessities of life, and parental comfort. The parties shared temporary custody during the proceedings, and as plaintiff concedes, the temporary custody order gave "custody" of the minor child to party who resided in the marital home as the parties moved in and out of the home pursuant to a week-on, week-off schedule. Thus, absent the existence of an established custodial environment, the preponderance of the evidence standard applies, and the trial court was free to award custody simply by determining the child's best interests. *Thames*, *supra* at 305, citing *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). The best interest of the child is determined by analyzing the statutory best interest factors enunciated in MCL 722.23. *Foskett*, *supra* at 9. The trial court must consider and state its findings and conclusions regarding each of these factors. *Id*. Brief, definite, and pertinent findings and conclusions are sufficient. *Id.* at 12.

Plaintiff contests the joint custody award and argues that the trial court's findings on the best interest factors were erroneous and against the great weight of the evidence. Plaintiff contends the trial court erred by awarding joint legal and physical custody, when no evidence was presented to demonstrate the parties' ability to cooperate and each party requested sole legal custody of the minor child. We agree, in part.

Under MCL 722.26a(1), when there are "custody disputes between parents, the parents shall be advised of joint custody." As defined in the statute, "'joint custody' means an order that specifies either that 'the child shall reside alternatively for specific periods with each of the parents,' or that 'the parents shall share decision-making authority as to the important decisions affecting the welfare of the child,' or both." *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994), quoting MCL 722.26a(7). When deciding whether to award joint custody**,** a trial court is required to consider whether it is in the best interest of the child, and whether "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." *Wilcox v Wilcox (On Remand)*, 108 Mich App 488, 495; 310 NW2d 434 (1981); see also MCL 722.26a(1)(b); *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999). However, "[i]f two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children." *Fisher v Fisher*, 118 Mich App 227, 233; 324 NW2d 582 (1982).

Contrary to plaintiff's argument, cooperation is only one factor for the court to consider in its decision to grant or deny joint custody. *Nielson v Nielson*, 163 Mich App 430, 434; 415 NW2d 430 (1987). However, from our review of the court's written opinion, we are unable to discern which other factors formed the basis for the trial court's ultimate conclusion that the parties should be awarded joint legal and physical custody of the child.

Both parties were seeking sole legal custody and opposed an award of joint custody. Nevertheless, the trial court failed to make explicit findings regarding whether joint custody and not sole custody, was in the minor child's best interests. Because the trial court's ultimate custody decision is insufficiently supported by its findings, we remand for further proceedings. When a trial court considers custody issues without regard to the factors enumerated in MCL

722.23 and fails to make reviewable factual findings, the proper remedy is to remand for a new child custody hearing. *Foskett*, *supra* at 12.[4]

Because we remand for the trial court to reevaluate and provide explicit fact findings regarding the best interest factors in support of its decision to award either sole custody or joint custody, *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996), we need not address plaintiff's claims that the trial court made findings and conclusions that were against the great weight of the evidence. We note, however, that while the parties devoted much evidence to the attribution of fault for the breakup of the marriage to the other party, the factors most overwhelmingly predominant in child custody cases is the welfare of the child. *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993).

Next, plaintiff contends the trial court erred when it ordered plaintiff to pay defendant $17,500 as her share of the equity in the marital home, and when it awarded fifty-percent of plaintiff's pension accrued during the marriage to defendant. We agree, in part.

MCL 552.1 *et seq.*, controls property distribution in a divorce. A determination of the property rights of the parties must be included in a judgment of divorce. MCR 3.211(B)(3); *Olson, supra* at 627. The goal of the trial court is to achieve a distribution that is fair and equitable under the given circumstances of the case. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). Factors to be considered in the distribution of marital assets include: (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, (8) past relations and conduct, and (9) general principles of equity. *Sparks, supra* at 159-160, citing *Perrin v Perrin*, 169 Mich App 18, 22; 425 NW2d 494 (1988). A trial court must make specific findings of fact regarding any of the factors relevant to a determination of the value of property or the needs of the parties. *Sparks, supra* at 159; *Olson*, *supra* at 622.

In the present case, we conclude that the court failed to adequately elaborate on all of the individual factors supporting its property award distribution. While the trial court properly recognized plaintiff's premarital contribution to the pension as a separate asset and only awarded defendant a share of plaintiff's pension benefits that "accrued between May 1, 1993 and the date of [the] Judgment," *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997), we conclude that the trial court's effort to award defendant a share of the equity in the marital home is clearly flawed. First, the trial court failed to make adequate findings regarding the specific nature of plaintiff's ownership interest in the property. Second, despite the fact that the amended judgment of divorce appears to acknowledge plaintiff's mother as having a one-half interest in the property, the trial court awarded defendant more than fifty percent of the total net equity in the marital home.

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[4] The trial court shall consider any new evidence relevant to this determination in addition to evidence already on the record.

If in fact plaintiff possesses only a one-half interest in the property, the trial court's award of $17,500 to defendant constitutes an unencumbered award of all most one-hundred percent of plaintiff's share of the net equity, while plaintiff remains responsible for the total outstanding mortgage balance. A trial court should clearly explain its rationale if a distribution of marital assets is significantly disparate. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994); *Knowles v Knowles*, 185 Mich App 497, 501; 562 NW2d 777 (1990). The trial court failed to clearly explain its rationale here, and remand is warranted. On remand to determine defendant's appropriate share in the equity of the marital home, the trial court shall determine inter alia (1) the precise nature of plaintiff's ownership interest in the property, (2) whether plaintiff's mother's contributions to the property constitute "loans" or contributions to equity appreciation as co-owner of the property, and (3) defendant's contribution, if any, to the appreciation of the property's value. Upon making its findings and determination of defendant's appropriate share of the equity in the marital home, the trial court may reconsider its award of fifty percent of plaintiff's pension accrued during the marriage if it determines such an award is not fair and equitable in view of its award pertaining to the marital home. *McNamara, supra* at 188.

IV. Conclusion

We reverse and remand for the trial court, within fifty-six days of the issuance of this opinion, to hold a hearing regarding custody and property consistent with the directives in this opinion.

The trial court shall make its findings on the record or by written opinion with seven days of completion of the hearing(s). The transcript of the proceedings shall be filed with the Clerk of the Court of Appeals within twenty-one days of the last hearing. Plaintiff's supplemental brief must be filed with this Court within twenty-one days of the filing of the transcript or the trial court's decision, whichever is later. Defendant shall file her brief in response within fourteen days after plaintiff's supplemental brief is filed. We retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens