STATE OF MICHIGAN

COURT OF APPEALS

JODI CLARA RANESES,

Plaintiff-Appellee,

v

RAMON CASTRO RANESES,

Defendant-Appellant.

UNPUBLISHED
December 8, 2005

No. 261468
Kalamazoo Circuit Court
LC No. 03-006853-DM

Before: Bandstra, PJ, and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right from a judgment of divorce. We affirm.

The parties married in June 1992, they have three minor children. During the marriage, plaintiff worked as a cardiac nurse until the birth of the parties' oldest child. She then stayed at home, as the parties had previously agreed, and bore primary responsibility for caring for the couple's three children. Defendant works full-time as a cardiologist, which places significant professional demands on his time.

The trial court granted plaintiff sole physical custody of the minor children and granted her request to move more than one hundred miles from the marital home in Kalamazoo. The trial court awarded plaintiff twenty-five percent of defendant's net salary after deduction of child support and twenty-five percent of all bonuses defendant received as spousal support, subject to review after five years; the trial court also awarded plaintiff $10,000 in attorney fees. In distributing the marital estate, the trial court determined that a portion of funds plaintiff inherited from her father was her separate property, but that property defendant's mother owned and that was included as part of the consideration for the parties' purchase of a condominium in northern Michigan, was not defendant's separate property.

Defendant argues that the trial court erred by allowing plaintiff to move with the children more than one hundred miles from their current home in Kalamazoo. The grant of a request for change of domicile is entrusted to the discretion of the trial judge, and the trial court's decision will be affirmed unless the court commits a palpable abuse of discretion. MCL 722.28; *Scott v Scott*, 124 Mich App 448, 450; 335 NW2d 68 (1983). MCL 722.31, which governs the legal residence change of a child in divorce proceedings, provides in pertinent part:

(1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

* * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with each child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
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> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Defendant argues that the trial court erred in its findings as to these factors. He argues further that, because any move would change the children's established custodial environment, the trial court was also required to evaluate whether the change in residence was in the best interest of the children, pursuant to the factors set forth in MCL 722.27. We disagree.

The trial court determined that the change in residence had the capacity to improve the quality of life for both plaintiff and her children. We emphasize that MCL 722.31 requires that the court evaluate whether a change in residence has the *capacity* to improve the quality of the children's lives; that is whether it has the *potential* to improve the quality of life for the children, not whether it would actually do so. *Phillips v Jordan,* 241 Mich App 17, 30; 614 NW2d 183 (2000). In this regard, the trial court heard testimony from plaintiff and plaintiff's sister as to the potential improvements in quality of life for plaintiff and the children were they allowed to

move, including the availability of and increased contact with family members and the availability of more suitable education and employment opportunities for plaintiff. Considering the evidence presented to the trial court, we find that the record supports the trial court's conclusion that the proposed move had the capacity to improve the quality of life for plaintiff and the children.

We also agree with the trial court that there was no indication that plaintiff's request to move was motivated by a desire to defeat defendant's parenting time; that the parenting time schedule provided defendant with significant opportunity for contact and, therefore, provided an adequate basis for preserving defendant's relationship with the children; that there was no indication that the proposed move or defendant's objection to it was motivated by any desire to secure financial advantage, and that there was no issue of domestic violence bearing on plaintiff's request. Thus, we conclude that the trial court did not abuse its discretion in granting plaintiff's request to change the children's residence by more than one hundred miles.

Defendant argues that the trial court erred in determining that the children's established custodial environment lay solely with plaintiff. We disagree. Whether an established custodial environment exists is a question of fact, which the trial court must address before it determines the child's best interest. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A custodial environment 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, "in which the relationship between the custodian and child is marked by security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). In determining that the children's established custodial environment was with plaintiff, the trial court noted plaintiff's day-to-day involvement in the children's lives as a stay-at-home parent, that plaintiff served as the primary parent for the children, and that defendant had not spent significant extended periods of time with the children due to the demands of his profession. Defendant acknowledges that the children regard plaintiff as their custodian. While testimony indicated that the children looked to defendant for help with major decisions and that, as the sole wage-earner, he provided for the family's material needs, defendant points to no testimony establishing that the children also looked to him for the day-to-day guidance, discipline and parental comfort. Thus, we conclude the trial court did not err in determining that the children's established custodial environment lay solely with plaintiff.

Defendant asserts further that the trial court erred in failing to include the children's schools and activities in Kalamazoo and their frequent contact with him as part of the established custodial environment and that when these aspects of the children's environment are considered, plaintiff's proposed move results in a change in the children's custodial environment, and thus, plaintiff was required to establish that such move was in the children's best interest under MCL 722.23. We disagree.

When considering a petition for change of residence, a court must consider and address the requirements of MCL 722.31. Where a change of residence will effect a change in the children's custodial environment, the court must also conduct a best interest analysis under MCL 722.23. *Brown v Loveman,* 260 Mich App 576, 590-591; 680 NW2d 432 (2004). This Court has noted that a parenting time schedule following a change in residence need not be equal to the prior schedule in all respects, *Mogle, supra at* 204, and that even an established custodial environment with both parents can be left undisturbed following a move, *Brown, supra* at 590.

As an initial matter, we note that defendant offers no authority for his assertion that the children's established custodial environment included their schools, activities, and then-current parenting time schedule with defendant, such that any change in these features of the children's lives would constitute a change in their established custodial relationship. Indeed, applicable case law patently counsels otherwise. According to defendant's position, any move resulting in a change in school districts or an alteration in parenting time schedules – be it less or more than one hundred miles – would disrupt the established custodial relationship and would necessitate a best interest evaluations. Such a result would be counter to numerous decisions of this Court, including *Brown, supra* at 594-595, *Mogle, supra* at 203-204, and *Scott, supra* at 450.

The trial court concluded that the parenting time that it would order "will adequately meet the needs of the father and the children to spend time with each other." We agree that there is no question that defendant and the children will be afforded a realistic opportunity for visitation that will provide an adequate basis for preserving and fostering the parent-child relationship between them. MCL 722.31(4)(c). As this Court noted in *Anderson v Anderson,* 170 Mich App 305, 311; 427 NW2d 627 (1988), it is possible that extended periods of visitation such as those afforded defendant under the current parenting time schedule will foster an even closer relationship between defendant and his children than the more frequent but shorter, weekly visitation he was provided by the prior schedule. Defendant does not assert that he has lost significant parenting time with the children; he does not make any comparison between the time afforded to him under the Judgment of Divorce and that which he exercised under the prior schedule, except to note that he no longer has his scheduled weeknight visitation. We note, however, that defendant has the option of spending time with the children during the school week at his request and on any days (other than holidays) during the school year when school is not in session. Thus, the trial court properly determined that a change in the children's residence would not result in a change in the children's established custodial environment, and there was no need for the trial court to consider whether a change in residence was in the children's best interest under MCL 722.21.

Defendant objects to the amount and duration of spousal support awarded to plaintiff. An award of spousal support is discretionary with the trial court and must be affirmed unless this Court is firmly convinced that it is inequitable. *Gates v Gates,* 256 Mich App 420, 432-433; 664 NW2d 231 (2003). The main objective of an award of spousal support is to balance the incomes and needs of the parties in a way which will not impoverish either party; support is to be based on what is just and reasonable under the circumstances of the case. *Moore v Moore,* 242 Mich App 652, 654; 619 NW2d 723 (2000). Among the factors which the trial court should consider are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay alimony; (7) the present situation of the

parties; (8) the needs of the parties; (9) the parties' health; (10) the prior standard of living of the parties and whether either is responsible for the support of others; (11) contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

The trial court noted that the parties had a twelve-year marriage in which both parties "lived extravagantly and seemed to enjoy the financial benefits of the husband's career." It further found that both parties had the ability to obtain satisfactory employment, with defendant having the far superior earning capacity; that plaintiff should be allowed a suitable period of time to move, allow the children to adjust and to seek advancement through more education; that defendant has significant ability to pay spousal support; that the parties' standard of living was "notably affluent and comfortable"; and that defendant's infidelity caused the breakup of the marriage. Based on these findings, the trial court ordered defendant to pay plaintiff's spousal support one-fourth of his net biweekly salary after deduction of child support and one-fourth of each bonus he receives.

We note that defendant agreed that an award of one quarter of his salary and expected bonuses was reasonable. Moreover, the trial court's spousal support award is reviewable after five years, the length of time plaintiff is expected to need to complete her degree and find reasonable employment. The trial court considered each of the factors pertinent to the instant case and based on that consideration, found as a factual matter that awarding plaintiff five years of spousal support was equitable. Given the parties' agreement at the outset of the marriage that defendant would provide the family's income while plaintiff stayed at home to raise the children, defendant's ability to pay, plaintiff's present needs and circumstances, the family's prior standard of living, defendant's infidelity and general principles of equity, we do not find that the trial court's award of spousal support constitutes an abuse of discretion.

Defendant next argues that the trial court erred in determining that a monetary inheritance plaintiff received from her father was her separate property, even though it had been commingled with marital property, while at the same time determining that property owned by defendant's mother, which was included as part of the consideration for the parties' purchase of a condominium in northern Michigan, was part of the marital estate.

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution in light of all of the circumstances. *Gates*, *supra* at 423. The trial court's first consideration is to determine which assets are marital assets and which are separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Generally, property that one party inherits during a marriage, but keeps separate from marital property, is considered to be separate property not subject to distribution. *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). We recognize that in certain circumstances the trial court has the discretion to include in the marital estate the property of one spouse acquired by gift or inheritance. *Id.* at 595, n 6; see, also, *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976). The "decision to include the inheritance in the valuation of the marital assets is discretionary and is dependent upon the particular circumstances of a given case." *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992).

The record indicates that plaintiff received an inheritance from her father, a portion of which was put in an investment account titled in defendant's name for convenience. Despite this apparent commingling, the amount of plaintiff's inheritance remained readily identifiable and the parties regarded it as plaintiff's inheritance, not as joint, marital property. So, the trial court did not abuse its discretion in declining to include this property in the marital estate. The trial court also did not abuse its discretion in determining that the land that defendant's mother included in the transaction for the parties' condominium was marital property. Testimony was clear that this property was treated as jointly held in that it was used in the purchase of the condominium, which the parties held by the entireties, was regarded as marital property, and used by the family during the marriage.

Finally, defendant challenges the trial court's award of attorney fees. A trial court has the discretion to award attorney fees as are necessary and reasonable, and a court's determination in this regard will not be reversed on appeal absent an abuse of that discretion. *Gates, supra* at 438. Attorney fees are not recoverable as of right in divorce actions, but rather they may be awarded only when a party needs financial assistance to prosecute or defend the suit. "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id.* This is particularly true where the other party enjoys a comparatively substantial income advantage over the party seeking attorney's fees. *Id*.

Plaintiff, having been a stay-at-home parent, had no income of her own to pay her attorney fees and is dependent on defendant and on assets awarded to her by the court for her support. It is clear from the record that defendant has a comparatively substantial income advantage over plaintiff and has the ability to pay plaintiff's attorney fees. Plaintiff testified that she had $10,000 in unpaid attorney fees at the time of trial. Considering plaintiff's lack of income, and the length and complexity of this case, the record supports the trial court's award of attorney fees to plaintiff.

Defendant also argues that there was insufficient evidence on the record to support the amount of fees awarded, and thus, that this matter should be remanded to the trial court for an evidentiary hearing as to the reasonable amount of plaintiff's fees. The determination whether an evidentiary hearing was necessary regarding the reasonableness of the requested fees is reviewed for an abuse of discretion. *46th Circuit Trial Court v Crawford County*, 266 Mich App 150, 171-172; 702 NW2d 588 (2005). Again, considering the length and complexity of the litigation, and given plaintiff's testimony as to the amount of her unpaid attorney fees at the time of trial, we conclude that the record before the trial court was sufficient to allow the trial court to determine that an award of $10,000 was reasonable without necessity of an evidentiary hearing.

Pursuant to MCR 3.206(C)(1), plaintiff asks this Court to award her attorney fees incurred in responding to defendant's appeal. Plaintiff asserts that without such an award, she will be required to invade the assets available for her support to pay the attorney fees incurred in responding to this appeal and that her relative ability to pay such fees has not changed since the trial court's award of fees below. Defendant does not challenge this assertion, nor does the record indicate that plaintiff's circumstances have changed since the trial court's order granting her attorney fees below. Therefore, here as in *Gates, supra* at 439, plaintiff "is unable to bear the expense of this action on appeal for the same reasons" that an award of fees below was proper.

Thus, plaintiff's request for attorney's fees incurred in responding to defendant's appeal is granted.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey