STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY ROBERT NIEMANN,

Plaintiff-Appellee,

v

JUDITH KAYE NIEMANN,

Defendant-Appellant.

UNPUBLISHED
November 30, 2006

No. 263134
Wayne Circuit Court
LC No. 04-412501-DM

Before: Kelly, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right several aspects of the judgment of divorce. We affirm in part, vacate in part, and remand.

I. Custody

Defendant first contends that the trial court erred in ordering the parties to (1) use a parenting time coordinator and (2) attend psychological counseling as a condition of maintaining joint custody.

In reviewing a custody decision, three standards of review apply:

> "The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." [*Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted).]

The trial court did not exceed its authority in ordering a parenting time coordinator and counseling to facilitate effective communication and cooperation between the parties. This is permitted by MCL 722.27(1)(d) and (e). Based on the parties' exhibited failure to behave in a mature and responsible manner and the evident impact of their behavior on the minor children, the trial court was justified in ordering the parties to use community resources to improve their

interaction. Contrary to defendant's assertion, the trial court's appointment of a parenting time coordinator does not constitute ordering "evaluative mediation," which is precluded without the parties' mutual consent. MCR 3.216(C)(2). Finally, although the trial court awarded joint custody "provided" that both parties attend counseling, the trial court's order did not improperly dictate that custody would *automatically* be changed if the condition was not satisfied. Accordingly, if the parties were to fail to attend counseling, the trial court would still be required to follow the proper statutory procedure before modifying the existing custody order. See *Vodvarka, supra* at 508-512.

II. Child Support

Defendant next contends that the trial court erred in applying the shared economic responsibilities formula and in improperly delaying entry of the child support order. We disagree.

"The award of child support rests in the sound discretion of the trial court. The court's exercise of that discretion is presumed to be correct." *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992). We review a trial court's factual findings for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). We review de novo the legal question of whether the shared economic responsibility formula was properly applied. *Gehrke v Gehrke*, 266 Mich App 391, 395; 702 NW2d 617 (2005).

The trial court did not err in applying the shared economic responsibility formula in calculating plaintiff's child support obligation. It is undisputed that plaintiff has the children overnight 154 nights each year, well in excess of the required minimum of 128 overnights to meet the threshold for application of the formula. 2004 MCSF 3.05(A). Rather, defendant contends that plaintiff has sufficient overnights only because defendant's midnight work schedule requires that plaintiff have the children overnight on Tuesdays and Thursdays. Defendant asserts that the formula "never envisioned using overnights for a case where children only sleep with one parent because the custodial parent works midnights to be able to be with her children during the day." However, the plain language of 2004 MCSF 3.05(A) simply requires 128 overnights. We apply the rule as written rather than attempt to guess what was "envisioned" when it was written. Furthermore, plaintiff testified that he provided the children with more than simply a bed during the overnights at issue; plaintiff provided the children with supervision, meals, and transportation, and satisfied other parental obligations when the children were in his care. Under these circumstances, we conclude that it was appropriate for the trial court to apply the shared economic responsibility formula.

Defendant further asserts that the trial court erred in applying the shared economic responsibility formula when the child support order was not entered concurrently with the initial custody determination. We disagree. The trial court reviewed the applicability of the shared economic responsibility formula when defendant objected to the Friend of the Court's recommendation that it be used. This initial determination was not a support order, but rather a preliminary ruling that the shared economic responsibility formula applied. Subsequently, the trial court entered the child support order concurrently with its final determination of custody. As such, application of the shared economic formula was consistent with the requirements of 2004 MCSF 3.05(D).

Defendant also takes issue with the trial court's entry of the child support order several months after defendant and the children vacated the marital home. The record demonstrates that the trial court did not abuse its discretion in this regard because the parties agreed that, during the time in question, plaintiff would take greater responsibility for marital expenses and debt in lieu of child support. The trial court, in its decision to apply the shared economic formula, noted "plaintiff has agreed to pay two-thirds (2/3) of the children's school expenses" and that the financial obligations incurred through the minor children's participation in hockey "activities are $425.00 per month and the plaintiff has agreed to pay those," resulting in plaintiff having "volunteered to pay for many more school expenses than the defendant." Accordingly, we conclude that the trial court properly exercised its discretion in determining the time for plaintiff to begin paying child support.

III. Division of Property

Finally, defendant contends that the trial court erred in dividing the marital property. "This Court reviews a property distribution in a divorce case by first reviewing the trial court's factual findings for clear error, and then determining whether the dispositional ruling was fair and equitable in light of the facts." *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003).

Defendant asserts that the trial court erred in awarding equity in the marital home in violation of the parties' settlement agreement. We agree. "It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the [agreement]." *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). Because the trial court was bound by the parties' agreement, it erred in ordering a division of equity in the marital home that was not in accord with this agreement. Therefore, the trial court's order in this regard is vacated. On remand, the trial court shall implement the parties' agreement with regard to the marital home.

Defendant also contends that the trial court erred in failing to award her an equivalent portion of an IRA valued at approximately $1,400[1], which, plaintiff testified, he used to pay for the children's hockey expenses. Defendant does not assert that the money was used for another purpose, nor does she contest the existence of the debt plaintiff claims to have paid. On this record, we find no clear error in the trial court's finding that the money was used to pay family debt. Because both parties benefited from the reduction of this debt, the distribution was equitable.

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[1] The parties did not reach an agreement regarding distribution of this asset.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Michael J. Talbot
/s/ Stephen L. Borrello