STATE OF MICHIGAN

COURT OF APPEALS

RANDALL ANTHONY SCOTTI, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED March 20, 2007
v	No. 266642 Oakland Circuit Court
JOY ELLEN SCOTTI, Defendant/Counter-Plaintiff-Appellee.	LC No. 2004-695786-DM

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. The trial court awarded the parties joint legal custody of their four children, and awarded physical custody of the children to defendant. Plaintiff raises issues on appeal concerning child custody, parenting time, attorney fees, and child support. We affirm.

Plaintiff challenges the trial court's custody decision, arguing that the court erred in determining that an established custodial environment existed with defendant. We disagree.

All custody orders must 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. The great weight of the evidence standard applies to all findings of fact, and a trial court's findings on matters such as the existence of an established custodial environment and the best interest factors should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 876-879 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Sinicropi v Mazurek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 268000, issued December 7, 2006), slip op at 3. The abuse of discretion standard applies to the trial court's discretionary rulings, such as to whom custody is granted. *Fletcher*, *supra* at 879-880 (Brickley J.), 900 (Griffin J.).

Custody disputes are to be resolved in the child's best interests, as measured by the best interest factors set forth in MCL 722.23. *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004); *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). But before a court makes a determination regarding the child's best interests, it must determine whether an established custodial environment exists with either parent. *Mogle v Schriver*, 241 Mich App

192, 197; 614 NW2d 696 (2000). Where there is an established custodial environment, a trial court may not modify a previous order and issue a new custody order that changes the custodial environment unless there is clear and convincing evidence that a change is in the best interests of the children. MCL 722.27(1)(c); *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). Where no established custodial environment exists, the child's best interests must be established by a preponderance of the evidence. *Id.*

Whether an established custodial environment exists is a question of fact. *Rittershaus v Rittershaus*, ___ Mich App ___; ___ NW2d ___ (Docket No. 269052, issued January 4, 2007), slip op at 6. An established custodial environment exists 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).

In this case, the evidence indicated that defendant had been a stay-at-home mother and had been the children's primary caretaker their entire lives. Plaintiff argues that an established custodial environment was not established solely with defendant because the parties shared custody of the children during the pendency of the divorce. Even then, however, it was defendant who prepared the children's food for plaintiff's parenting time, and defendant also secured housing for the children after the marital home was lost in a foreclosure sale.[1] The trial court's finding that an established custodial environment existed with defendant is not against the great weight of the evidence.

Plaintiff also argues that the trial court abused its discretion in awarding sole physical custody of the children to plaintiff.

Because an established custodial environment existed with defendant, the trial court could only change that environment upon a showing by clear and convincing evidence that a change was in the best interests of the children. MCL 722.27(1)(c); *LaFleche, supra*. The trial court considered each of the statutory best interest factors, MCL 722.23,[2] and evaluated each

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[1] The temporary custody order entered during the pendancy of the divorce proceedings required plaintiff to maintain the mortgage payments on the marital home, the only home the children had ever known; plaintiff admitted at trial that he failed to do so.

[2] MCL 722.23 identifies the "best interest" factors as:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

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factor to determine whether it was negative, favorable, or neutral to each party. It found that factors (a), (d), and (g), were each favorable to defendant, but that only factors (a) and (g) were favorable to plaintiff. The court did not find any factor negative with respect to defendant, but found that several factors, (b), (f), (j), (k), and (l), were negative with respect to plaintiff. The remaining factors were found to be either neutral or inapplicable. The court concluded that although the "results of these factors bodes poorly on both parties," they did not reflect as poorly on defendant.[3]

On appeal, plaintiff does not specifically challenge the trial court's findings with respect to any individual best interest factor, but merely argues that the trial court abused its discretion by awarding sole physical custody to plaintiff. We disagree. The trial court's decision to award defendant sole physical custody of the children is consistent with its evaluation of the best interest factors and did not amount to an abuse of discretion.

Plaintiff next argues that the trial court abused its discretion in setting his parenting time. Decisions about parenting time are reviewed de novo. *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004). An order regarding parenting time will not be reversed "unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed a clear legal error." *Id.* The trial court set parenting time "consistent with the historical lifestyle of the parties." Plaintiff was awarded parenting time on alternate weekends, every Wednesday evening, alternate holidays, his birthday, and Father's Day. The court's parenting time order was not a palpable abuse of discretion.

Plaintiff next argues that the trial court abused its discretion when it ordered him to pay defendant's attorney fees in the amount of $56,490. The trial court stated that this amount was to be "construed as being in lieu of additional support and non-dischargeable in bankruptcy." The trial court's grant or denial of attorney fees in a divorce action is reviewed for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

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(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
(f) The moral fitness of the parties involved.
(g) The mental and physical health of the parties involved.
(h) The home, school, and community record of the child.
(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

[3] We note that plaintiff had a history of violence; he pleaded no contest to domestic violence against a girlfriend in 1996, and pleaded no contest to disorderly conduct against defendant in 2001. In addition, plaintiff admitted at trial that during a confrontation with defendant's sister, he "lifted her underneath her throat and threw her down." He defended his violent behavior by claiming that defendant and the former girlfriend were emotionally unstable.

A party to a divorce action may be ordered to pay the other party's reasonable attorney fees if the record supports a finding that financial assistance is necessary to enable the other party to defend or prosecute the action. *Borowsky v Borowsky*, ___ Mich App ___; ___ NW2d ___ (Docket No. 262986, issued January 23, 2007), slip op at 11-12. Here the trial court indicated in its written opinion that plaintiff would be responsible for defendant's attorney fees.

Plaintiff does not argue that the amount awarded was unreasonable, or that defendant was able to pay her attorney fees without assistance. Instead, plaintiff argues that the fees were excessive as additional spousal support, and that it was an abuse of discretion to make the award non-dischargeable in bankruptcy. However, defendant testified that plaintiff had threatened to destroy the marital estate so that she would not benefit from it, and the trial court found her testimony credible. In addition, defense counsel explained the seemingly high costs during a motion hearing in the trial court:

> This is a matter that – it's ridiculous that it should have cost this much. The plaintiff cooperated virtually in no way, including discovery during it; Mr. Holtz was on the trial, was in the matter, he was on there, he was off there, he was on there; they never prepared a trial brief, they never prepared an arbitration brief; there were several days of arbitration, two of which Mr. Scotti [defendant] didn't bother to attend, one of which he went off to Florida with a gal he met on the internet and another time that Mr. Holtz withdrew for the reason that he just didn't show up. The whole thing was a charade and again, repeating the Court's comments, I think that Mr. Scotti [defendant] deliberately dragged this out, attempted to destroy everything they had.

The trial court apparently accepted this explanation,[4] because the court granted the entire fee amount requested, and ordered that it be non-dischargeable in bankruptcy. Given the facts and circumstances of this case, it was not unreasonable for the trial court to protect the award. *Krist v Krist*, 246 Mich App 59, 65-66; 631 NW2d 53 (2001). The court did not abuse its discretion.

Plaintiff also asserts that the award of attorney fees was improper because he could not afford to pay it, and that the trial court refused to consider evidence of his income and assets. We disagree. The record reflects that the trial court did consider plaintiff's evidence, but found that plaintiff was dishonest and that his evidence was suspect.[5] Furthermore, even accepting

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[4] Defense counsel's reference to "repeating the Court's comments" appears to refer to the court's statement in the Opinion and Order that "The Court found Plaintiff to be argumentative and combative throughout the trial and his deposition."

[5] For example, plaintiff claimed that the profitability of his landscaping business, Tru-Care, had declined precipitously. The trial court stated:

> Despite Plaintiff's "doom and gloom" regarding Tru-Care's future, Plaintiff rejected out of hand the suggestion he seek an alternative form of income. Unless Plaintiff is deliberately injuring the business, he is confident enough that it will yield greater return than him seeking a job and a regular paycheck. Further and

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plaintiff's figures as true, we are satisfied that he could afford to pay the award. We find no abuse of discretion.

Lastly, plaintiff argues that the trial court erred in determining his income for purposes of calculating child support. Child support orders are reviewed for an abuse of discretion. *Gehrke v Gehrke*, 266 Mich App 391, 395; 702 NW2d 617 (2005). The trial court is required to follow the formula set out in the Michigan Child Support Formula Manual (MCSF Manual). *Peterson v Peterson*, 272 Mich App 511, 516; ___ NW2d ___ (2006); MCL 552.605(2). "Whether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as a question of law." *Id.*

Plaintiff does not argue that the child support was improperly calculated, only that the court erred in determining his income for purposes of calculating that support. Child support is calculated on the basis of the parties' net income, which means "gross income minus all of the deductions allowed for the purposes of calculating child support," and is not necessarily the equivalent of a party's net taxable income. 2004 MCSF Manual, § 2.01(E). "Net income should be determined from actual tax returns whenever possible." 2004 MCSF Manual, § 2.02(A). Allowable deductions include alimony, taxes, FICA, mandatory withholdings, health or life insurance premiums, and other child support obligations. 2004 MCSF Manual, § 2.12.

In this case, the determination of plaintiff's income was difficult because plaintiff had not submitted proper evidence of his current income and also because the court found that plaintiff was not credible on the issue of his current earnings. The trial court relied on documents from 2002 and 2003 to determine plaintiff's income. According to a stipulated tax return, plaintiff's business, of which plaintiff was the sole shareholder, reported ordinary income of $89,609 in 2002. The trial court properly increased that amount by $31,063, the amount of a depreciation deduction, because tax deductions for the depreciation of corporate property generally are not a permitted deduction under the MCSF Manual guidelines. 2004 MCSF Manual § 2.11(7)(b). Thus, the court determined that plaintiff's income for 2002 was $120,672. The court also relied on a loan application that plaintiff signed in 2003, which listed his monthly income as $10,680, thereby reflecting a yearly income of $128,160.[6] The court then averaged the income determinations for 2002 and 2003 to determine plaintiff's income for purposes of calculating child support, that being $124,416.

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> again despite his dreary financial forecast, Plaintiff's plan for the Company's future is not for him to perform any of the actual landscape work for which the Company earns its money. Instead his claimed intent is to delegate the actual work to others, not from the job sites where he would presumably supervise the work but from his home/business where he plans also to care and watch over his children. The Court finds his plan unrealistic if not disingenuous. Consequently, his financial forecast is flawed if not insincere.

[6] Although plaintiff asserts that the trial court did not understand the difference between base income and net income, he does not offer any analysis of this issue.

Plaintiff argues that the trial court erred by rejecting more current information concerning his income. We disagree. The trial court relied on stipulated documents submitted by the parties. The court rejected plaintiff's proposed 2004 tax returns because they were not signed, had not been filed, were prepared the week of trial, and, unlike the other submitted documents, were not stipulated to by the parties. Additionally, the court determined that plaintiff was not credible on the issue of his current income. Under these circumstances, the trial court did not abuse its discretion in discrediting the proposed 2004 tax returns and relying on the stipulated documents to determine plaintiff's income.

Finally, there is no merit to plaintiff's claim that the trial court improperly denied him the benefit of tax exemptions for three of his children. The judgment of divorce clearly provides that plaintiff was awarded three exemptions.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter