STATE OF MICHIGAN

COURT OF APPEALS

JAMES RICHARD MATCZAK,

Plaintiff/Counter-Defendant-Appellant,

v

TRICIA ANNE MATCZAK,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
March 18, 2008

No. 278259
Oakland Circuit Court
Family Division
LC No. 2006-717763-DM

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment of divorce which granted full physical and legal custody to defendant and awarded defendant $35,000 in attorney fees. We vacate and remand.

Plaintiff first argues that the trial court erred in determining that an established custodial environment existed with both parties, as it should have concluded that an established custodial environment existed with plaintiff alone. We disagree.

Whether an established custodial environment exists is a question of fact. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). The great weight of the evidence standard applies to all findings of fact, and a trial court's findings regarding the existence of an established custodial environment should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

The first step in considering a custody issue is to determine whether an established custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Such a determination is necessary so that the court can apply the appropriate burden of proof. *Id.* Absent the existence of an established custodial environment, custody is determined by a preponderance of evidence standard. *Id.* If an established custodial environment exists, it must be established by clear and convincing evidence that a change in custody is in the best interests of the child. MCL 722.27(1)(c). The custodial environment of a child 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. *Id.* 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. *Id.* A child may have an established custodial environment in more than one home or with more than one parent. *Mogle, supra* at 197-198.

The parties began dating in 1997 and married in 1999. Three children were born of the marriage: Johnathon Matczak (DOB: 3/28/00), Jack Matczak (DOB: 12/15/03), and Sophia Matczak (DOB: 7/13/06). In February 2006, plaintiff filed for divorce. After the conclusion of the divorce trial, the trial court entered an opinion and order granting full physical and legal custody to defendant, and awarding attorney fees to defendant.

The trial court found that an established custodial environment existed with both parents. Concerning Johnathon and Jack, the court noted that the boys resided with both parents until May 2006, and are closely bonded with both parents. Regarding Sophia, the court noted that she has been in defendant's physical custody, but that, pursuant to a parenting time order, plaintiff was entitled to regular and frequent unsupervised parenting time.

Plaintiff contests the court's finding with respect to Jonathon and Jack, arguing that the temporary parenting time order, which was in effect during the eight months preceding the entry of the divorce judgment, placed Johnathon and Jack in plaintiff's physical custody for six nights of the week, thus forming an established custodial environment with plaintiff alone. However, the trial court was correct in considering not only the eight months preceding the entry of the divorce judgment, but the entirety of the children's custodial environment since birth. Taking such a big-picture approach was not only permissible, but sound, because such an approach gives a more accurate view of the custodial environment over the long term. *Breas v Breas*, 149 Mich App 103, 107; 385 NW2d 743 (1986) (approving of the trial court's consideration of "the total picture" of the custodial environment in analyzing the established custodial environment issue, rather than the custodial environment arising solely from the temporary custody order). This approach recognizes that an established custodial environment could have existed prior to the eight months preceding the divorce judgment. Indeed, the record supports a finding that, in the years preceding the custody determination, both parties provided Johnathon and Jack with discipline, the necessities of life, parental comfort, and guidance. Because the evidence does not clearly preponderate in the opposite direction, the trial court's finding regarding Johnathon and Jack was proper.

With respect to Sophia, she was only nine months old when the court made its custody determination. Although Sophia had been in the primary physical custody of defendant, the trial testimony indicated that she spent a fair amount of time with both parents, and both parents provided her with love and the necessities of life. Accordingly, because the evidence does not clearly preponderate in the opposite direction, the trial court's finding regarding Sophia is proper.

Next, plaintiff argues that the trial court erred with respect to its findings on various best interest factors and abused its discretion in granting defendant full physical and legal custody. We agree.

> We apply three standards of review in custody cases. 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. [Internal citations omitted; *Phillips*, *supra* at 20.]

Once a factual determination has been made by the court regarding the existence of an established custodial environment, the court must weigh the statutory best interest factors and make a factual finding regarding each of the factors. *Grew v Knox*, 265 Mich App 333, 337; 694 NW2d 722 (2005); MCL 722.23; MCL 722.27. The controlling consideration in child custody disputes between parents is the child's best interest. *Lombardo v Lombardo*, 202 Mich App 151, 159-160; 507 NW2d 788 (1993); MCL 722.25. "[T]he statutory best interest factors need *not* be given equal weight. Neither a trial court in making a decision, nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors." *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). The court shall not issue an order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. MCL 722.27(1)(c).

Here, the trial court considered the 12 best interest factors[1] and concluded that the parties were equal with respect to six factors, factors (a), (d), (e), (f), (g), and (k), and four factors favored defendant, factors (b), (c), (h), and (j). The remaining two factors, (i) and (l), were not credited to either party. For the reasons stated below, we conclude that the trial court erred in its findings with respect to factors (c), (f), (g), and (k), and abused its discretion in awarding defendant sole physical and legal custody.

Upon review of the trial court's opinion and order, we note that we are left with the distinct impression that the trial judge routinely engaged in something of a one-sided analysis that favored defendant. The judge consistently and significantly minimized defendant's culpable behavior while highlighting plaintiff's meaningfully less culpable behavior. An objective view of the facts simply does not warrant a finding that defendant should have full physical and legal custody.

Regarding factor (c), the capacity and disposition of the parties involved to provide the child with food, clothing, and medical care, the trial court erroneously credited this factor to defendant. In analyzing this factor, the court made note of the parties' salaries, the fact that the parties had significant marital debt, and that defendant's financial plan was, in the court's view, more reasonable than plaintiff's because plaintiff wished to keep the marital home rather than sell it. The problem with the court's analysis is that it made absolutely no mention of the fact that throughout the parties' marriage, plaintiff was the primary breadwinner and made significant contributions to the family. Plaintiff has been employed full-time for over 15 years in his own business, grossing $64,000 per year. When the parties began dating, defendant quit her job and

[1] The statutory best interest factors are enumerated in MCL 722.23.

did not work outside the home for the first four years of the marriage. In 2003, she began working at Starbucks part-time, grossing $11,000 per year. The record reflects that plaintiff has endeavored to provide his children with not only love, but with the material necessities of life, and has succeeded in doing so. Plaintiff has dedicated considerable time and effort toward this end, and there is nothing in the record to suggest that the children have ever been anything but well provided for. The court completely disregarded plaintiff's contribution in this regard. Plaintiff's significant efforts to provide his children with the necessities of life warrant a finding that factor (c) should have been equally credited to both parties.

We are mindful of the fact that defendant has made significant contributions herself. As a stay-at-home mother, defendant has provided the children with love, support, and guidance throughout their formative years. Further, when defendant started her part-time employment, she was able to secure health care benefits for the entire family. Nevertheless, plaintiff has made substantial contributions himself, none of which were even touched upon by the trial court in analyzing this factor. Apart from the obvious financial contributions, plaintiff alone took care of the children for three to four nights a week while defendant worked at Starbucks.

Next, the trial court erred in its findings regarding factor (f), the moral fitness of the parties involved. The court found that the parties were equal with respect to this factor, noting, "[n]o issues were presented regarding the moral fitness of the parties." Factor (f) "relates to the parent-child relationship and the effect that the conduct at issue may have on that relationship." *Hilliard v Schmidt*, 231 Mich App 316, 323-324; 586 NW2d 263 (1998). Morally questionable conduct that has relevance to one's fitness as a parent includes, but is not limited to, "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Fletcher v Fletcher*, 447 Mich 871, 887 n 6; 526 NW2d 889 (1994).

The court failed to consider very relevant evidence bearing upon factor (f). As captured on the DVD, defendant engaged in at least two episodes, at a minimum, of inappropriate, excessive discipline, and, at a maximum, felony child abuse.[2] Indeed, Child Protective Services (CPS) temporarily took custody of the parties' children, and defendant was charged with two counts of felony child abuse on the basis of the DVD incidents. Additionally, plaintiff testified that there have been other instances of physical abuse not caught on camera. Defendant's capacity to be excessively physical with her children affects her moral fitness to parent. Dr. Raymond Vasser, the only psychologist to testify regarding defendant's mental health, testified that defendant has substantial anger problems which can only be addressed via intense, ongoing therapy. Dr. Vasser also indicated that defendant's anger problems militate against placing Johnathon in her custody, as the two make for a volatile combination. Although this evidence

[2] The first incident on the DVD shows defendant screaming loudly at Johnathon after Johnathon refuses to wear a belt. Defendant screams at Johnathon, grabs him and shakes him repeatedly, throws him on the bed, screams at him and shakes him some more, then pushes him to the ground. Approximately three weeks later, the second incident occurred. The DVD shows defendant placing Johnathon on the bed, screaming at him and holding him down, slapping him, then throwing him down on the bed after he had attempted to get up.

bears strongly on the quality of defendant's relationship with her children, the court failed to take it into consideration.

Regarding plaintiff's moral fitness, no evidence was presented to justify a finding that plaintiff is no more morally fit than defendant. In fact, both defendant herself (in her email to the Dr. Phil show) and plaintiff's counselor described plaintiff as a "moral" man. The worst allegations against plaintiff regarding his parental fitness are that he allowed Johnathon to play video games that were too violent, and has, at times, minimized Johnathon's wrongful behavior. Even assuming that these allegations are true, they simply do not rise to the level of the questionable conduct exhibited by defendant.[3] Accordingly, factor (f) should have been credited to plaintiff.

Next, the court erred in equally crediting the parties with factor (g), the mental and physical health of the parties involved. In analyzing this factor, the court failed to consider the testimony and report of the only psychologist to testify regarding defendant's mental health, court-ordered psychologist Dr. Vasser. The doctor indicated that defendant suffered from histrionic personality disorder with narcissistic and mild borderline features. Dr. Vasser found that defendant's personality type could be described as self-centered, ego-centric, dramatic, hostile and aggressive in relationships, impulsive, attention-seeking, and not always able to experience genuine love and affection due to disappointments experienced early in life. Dr. Vasser concluded that defendant has a problem controlling her anger and would require intensive therapy. This testimony is consistent with plaintiff's, who indicated that defendant had major anger problems throughout their marriage and was unpredictably moody – at times going days without talking to plaintiff. Defendant's trouble with anger management is also evident from viewing the DVD, which depicts a woman in intense anger, which she was unable to control, and which she directs – both verbally and physically – toward Johnathon. Concerning plaintiff, Dr. Vasser indicated that he was "essentially free of debilitating psychological problems." Further, plaintiff's psychologist, Dr. Meredith Miller, testified that plaintiff has no mental health or anger management issues. Although plaintiff may at times have exhibited unhealthy emotions or behaviors, plaintiff's mental health issues do not rise to the level of defendant's. Accordingly, the trial court erred in not crediting plaintiff with factor (g).

Finally, the court erred in equally crediting both parties with factor (k), domestic violence, whether the violence was directed against or witnessed by the child. The court took note of the allegation that plaintiff pushed defendant during an encounter in 2000, and defendant's "inappropriate discipline" of Johnathon, concluding that the parties were equal with respect to domestic violence issues. Regarding the incident in 2000, plaintiff claimed that he was merely trying to get by defendant, who was blocking him from leaving the house. Defendant claims a different story – that plaintiff pushed her during an argument because he was upset with her. Assuming that defendant's version is correct, the record nonetheless reflects that defendant is more inclined to engage in domestic violence than plaintiff. Plaintiff testified that

[3] Additionally, there is evidence that defendant has violated court orders by utilizing a babysitter to watch Sophia, and by taking marital property from the marital home.

defendant has several times before pulled his hair and put him in a headlock. Furthermore, in addition to the two incidents on the DVD, plaintiff testified to other incidents where defendant has inappropriately struck Johnathon out of anger. The incidents against Johnathon were more numerous, more recent, more serious, and more detrimental to the children's welfare[4] than the fleeting spouse-on-spouse altercation in 2000 (which occurred before the children were born).

Notably, the record further reflects that the trial judge was quite displeased with plaintiff for his decision to place a hidden camera in the bedroom. The judge remarked multiple times about the surreptitious video camera, concluding, "[i]t is, however, unconscionable to install such a device in the marital bedroom. Parties are entitled to expect privacy in a bedroom where they sleep, dress, groom and engage in sexual relations." Such a conclusion, however, is misplaced because it does not take into account plaintiff's legitimate concerns regarding his children's safety amidst defendant's angry and physical outbursts. This appears to be another instance of the court unfairly minimizing defendant's culpable behavior while overemphasizing plaintiff's relatively less culpable behavior. Also noteworthy is the fact that nowhere in the court's 28-page opinion does it mention Dr. Vasser's testimony – which provided that defendant has substantial anger management issues and a personality disorder – or that defendant was charged with two felony counts of child abuse. Considering the totality of the facts, the trial court erred when it failed to find that factor (k) favored plaintiff.

In sum, the court's findings regarding factors (c), (f), (g), and (k), are in error because the evidence clearly preponderates in the opposite direction. Additionally, the court committed an abuse of discretion in ruling that defendant was entitled to full physical and legal custody. The lower court's custody determination is vacated and the court is directed to enter an order granting the parties joint physical and legal custody of the parties' three children.

Next, plaintiff argues that the trial court erred in awarding defendant $35,000 in attorney fees. We agree. A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003).

Generally, a party may not recover attorney fees, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception. *Featherston v Steinhoff*, 226 Mich App 584, 592-593; 575 NW2d 6 (1997). MCR 3.206(C) allows an award of attorney fees where the party requesting the fees alleges facts sufficient to show that the party is unable to bear the expense of the action and the other party is able to pay. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); MCR 3.206(C). The court in a domestic relations action may award reasonable attorney fees where necessary to enable a party to prosecute or defend the suit. *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993).

Utilizing the attorney fee itemization in defendant's counsel's affidavit, the trial court determined that defendant incurred $44,613.75 in attorney fees. The court then concluded that defendant was entitled to an attorney fee award of $35,000, on the basis that (1) defendant's salary is meager and exceeded by her expenses, thus rendering her "unable to bear the expense of

[4] During the second incident on the DVD, Jack walks in on defendant striking Johnathon.

this action," and (2) plaintiff's salary is adequate and he has "greater ability to pay the costs and attorney fees in connection with this matter."

However, plaintiff is correct in that a review of defendant's counsel's affidavit reveals that many of the fees are for work associated with the child abuse and neglect case brought by the state, not the divorce case.[5] The abuse and neglect case is indeed separate from the divorce case. As such, fees incurred by defendant in the abuse and neglect case should not have been involved in the instant attorney fee determination, like it appears they were. The instant attorney fee award is based on erroneous information and should not be upheld. *Featherston, supra* at 593 (an attorney fee award in a domestic matter is in error where the trial court includes in the award fees incurred from a separate matter). The case is remanded to the trial court with the direction that it reconsider the attorney fee award, making certain to only include attorney fees directly associated with the divorce case, not the child and abuse neglect case or any other matter.

Moreover, the trial court's analysis is deficient in a second manner. There is no dispute that the salary discrepancy between the parties is substantial; plaintiff grosses $64,000 annually while defendant only grosses $11,000. It is also reasonable to assume that defendant, who has expenses of $3,000 cannot bear the expense of her attorney fees. However, the trial court failed to make the requisite finding that plaintiff is able to bear the expense of $35,000 of defendant's attorney fees. To determine, like the trial court did, that plaintiff "has a greater ability" than defendant to pay defendant's attorney fees, is not to determine that plaintiff can actually bear the expense. The fact that plaintiff earns a decent wage, and one that is a good deal more than defendant's, does not necessitate a finding that he can bear the expense of defendant's attorney fees. While the court's opinion and order states that defendant's monthly expenses are $3,000, it mentions absolutely nothing of plaintiff's expenses, which trial testimony revealed are substantial and far exceed defendant's.[6] For example, plaintiff's monthly expenses, to name a few, include: $3,472 in mortgage payments,[7] $1,800 in credit card payments (which includes plaintiff's own attorney fees), $1,412.54 in child support, and $600 in spousal support. Also, in addition to being responsible for one half of the parties' $55,000 marital debt, plaintiff has another $45,000 in personal debt. It may very well be that after considering all aspects of plaintiff's financial situation, the proper determination is that plaintiff should be required to pay

---

[5] The trial court does not explain why it did not award defendant the entire amount of attorney fees that she requested. There is nothing on the record or in the court's written opinion to suggest that the court recognized that some of the claimed fees included fees from the abuse and neglect case, and reduced her fees accordingly. If in fact the court did recognize the error and already reduced defendant's fees accordingly, it must clearly state such on remand.

[6] On June 1, 2007, plaintiff filed for chapter 13 bankruptcy.

[7] The judgment of divorce ordered the parties to sell the marital home, which had two mortgages, one for $380,000, the second for $70,000. It is not clear, to date, whether the house has been sold. Upon sale of the house, the parties are to split the proceeds after paying the two mortgages and the $55,000 of marital debt. Defendant was awarded the first $22,000 from plaintiff's share of the proceeds to compensate her for her interest in plaintiff's computer retail business.

a portion of defendant's attorney fees. However, before the court can arrive at such a finding, it must consider plaintiff's ability to pay in light of his expenses – a finding which was never made on the record or in the court's opinion and order. A remand is in order so that the trial court can (1) exclude from the attorney fee award any fees not directly associated with the divorce (or clearly state that it had already done so below), and (2) examine plaintiff's expenses and determine whether he is in fact able to bear any portion of defendant's attorney fees.

Finally, plaintiff argues that the remanded proceedings should be held before a different judge because the instant trial judge is biased against him and in favor of defendant. Because plaintiff did not file a motion to disqualify within 14 days after the trial court's opinion and order was issued, the issue is unpreserved. MCR 2.003(C)(1).

Therefore, we (1) vacate the trial court's custody determination and remand so that the lower court can enter an order granting the parties joint physical and legal custody of the parties' three children,[8] and (2) vacate the attorney fee award and remand the attorney fee issue so that the lower court can (a) exclude from the attorney fee award any fees not directly associated with the divorce (or clearly state that it had already done so below), and (b) examine plaintiff's expenses and determine whether he is in fact able to bear any portion of defendant's attorney fees. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

[8] To the extent that the custody determination affects plaintiff's monthly child support obligation, or any other obligation, the lower court is directed to make the appropriate changes in order to reflect the new custody arrangement.