STATE OF MICHIGAN

COURT OF APPEALS

RONALD WINFRED TOLBERT II, Plaintiff-Appellant,	UNPUBLISHED December 18, 2008
v	No. 284517 Genesee Circuit Court Family Division
AUTUMN RAE TOLBERT, Defendant-Appellee.	LC No. 07-272254-DM

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of divorce. On appeal, plaintiff argues that the trial court erred in awarding the parties joint custody of their children and erred in its division of marital assets. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Facts

The parties were married October 1, 2005. Their biological son was born January 25, 2003. Plaintiff adopted defendant's older son on December 8, 2006. The older son was born on August 19, 2000. The parties were separated in January of 2007, when plaintiff moved out of the marital home. Plaintiff filed for divorce on January 10, 2007.

II. Established Custodial Environment

Defendant first argues that the trial court erred when it concluded that there was no "established custodial environment" with either party. We disagree. Whether an established custodial environment exists is a question of fact that this Court should affirm unless the trial court's finding is against the great weight of the evidence. MCL 722.28; *Rittershaus v Rittershaus*, 273 Mich App 462, 470; 730 NW2d 262 (2007). A trial court's finding of fact is against the great weight of the evidence when the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

MCL 722.27(1)(c) provides:

> 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered.

An established custodial environment "is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger*, *supra* at 706. If there exists an established custodial environment, a party seeking a change of custody is required to show by clear and convincing evidence that it is in the child's best interests. *Id*. at 710; MCL 722.27(1)(c). The trial court in this case concluded that neither party had an established custodial environment.

Both parties currently live at their respective parents' homes, although defendant moved three times in the year following the separation. Both parties have apparently stable employment and make enough money to provide basic necessities for the children. While the parties have a parenting time agreement under which the children spend time with both parents, in the four months preceding trial, defendant only had parenting time on the weekends. The trial court concluded from this fact that plaintiff had established a more stable environment. However, the court concluded that this stability was somewhat artificial because plaintiff had originally removed the children from the marital home, changed their school registration, and restricted defendant's access to the children for three weeks until the parties reached a parenting time agreement.

The children have been bouncing between the parties for the entire post-separation period, with a notable lack of cooperation and communication from the parties. The post-separation period has been marked by considerable instability. Therefore, the evidence supports the trial court's conclusion that there was no established custodial environment.

III. Joint Physical Custody and Best Interest Factors

Plaintiff next challenges the trial court's award of joint physical custody. Plaintiff argues that the trial court erred in its consideration of multiple statutory factors used to make the custody determination. We will consider the factors in turn.

MCL 722.26a requires the trial court to "determine whether joint custody is in the best interest of the child by considering" a list of factors. MCL 722.26a(1). The court's decision regarding a custody award is reviewed for an abuse of discretion. *Berger*, *supra* at 705. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion." *Id*. Underlying findings of fact by the trial court shall be affirmed on appeal unless they are against the great weight of the evidence. *Id*. A finding of fact is against the great weight of the evidence when the evidence clearly preponderates in the opposite direction. *Id*. Questions of law are reviewed for clear legal error. *Id*. at 706.

Plaintiff first argues that the trial court erred in its consideration of MCL 722.26a(1)(b): "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." Plaintiff argues that the parties' difficulty with

cooperation renders joint custody an untenable solution. In fact, the trial court did not make a specific finding with regard to this issue, although its discussion evinces an awareness of the factor. If the parties are incapable of cooperation, joint custody is not an option. *Wright v Wright*, 279 Mich App 291, 299-300; ___ NW2d ___ (2008).

The parties have had considerable difficulty with communication and cooperation during the post-separation period. In order to avoid conflict, the parties exchange the children at a police station. Plaintiff refuses to take defendant's telephone calls because he feels that "all [he] get[s] back on the other end is negativity." Defendant contends that she is willing to communicate but that plaintiff "has made it impossible." Defendant feels that plaintiff is trying to alienate her from the children. The court stated in its opinion: "The boys need both parents and both parents need to come to grips with that fact. Should either parent work to undermine the [c]ourt's determination, they shall do so at their peril in terms of continued joint custody." The court's conclusion that, while the problems of communication are relevant, the best interests of the children trump these difficulties does not, as plaintiff suggests, indicate that the court failed to consider this factor. The court, while recognizing the difficulties, did not determine that the parties are incapable of cooperation. This factor, however, must be weighed against the "best interest" factors of MCL 722.23 in the court's final discretionary decision, which we will discuss *infra*. MCL 722.23a(1).

Plaintiff next challenges the court's factual findings on a variety of the best interest factors:

Factor (b) concerns "[t]he 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." MCL 722.23(b). The trial court found this factor to be equal between the parties, stating that both parties had "expressed their interest in religion and desire to continue programs in which the children are involved." Plaintiff argues that because defendant has not been involved in the children's school affairs since the separation, this factor should favor him.

The trial court correctly noted that both parties have a desire to provide a good education and religious upbringing for the children. The instability of the year following the parties' separation notwithstanding, there is no evidence that defendant does not have the "capacity and disposition" to provide these for the children. *Wright, supra*, at 300-301 (where father was only acting as though he were interested in children). In fact, it appears that defendant was the primary parent in charge of these concerns during the marriage. Thus, the trial court's finding was not against the great weight of the evidence.

Factor (c) concerns "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care." MCL 722.23(c). The trial court found the parties equal with regard to this factor. Plaintiff argues that because defendant has not provided post-separation financial support for the children and has had multiple jobs recently, this factor should favor him.

Both parties have had multiple jobs in the period since separation, but appear to have stable employment now. Both parties live with their parents. While plaintiff may currently make slightly more money than defendant, this difference is accounted for by the trial court's

child support order. There is no evidence that either party lacks the "capacity and disposition" to provide basic care for the children. The trial court's finding was not against the great weight of the evidence.

Factor (d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court found this factor to be equal between the parties because, while the current environment is stable, the stability is "maintained on an artificial basis to the extent [p]laintiff and his family are blocking [d]efendant's access to her children." Plaintiff argues that the trial court erred in concluding that plaintiff is creating instability in the children's lives and maintains that defendant has demonstrated an inability to provide a stable environment for the children.

Plaintiff took the children from the marital home because he thought defendant was creating an unstable environment for the children. He blocked access to the children for three weeks until the parties could reach a parenting time agreement . Defendant alleges that plaintiff still attempts to maintain control over the children. The latest parenting time agreement gives defendant parenting time on the weekends only. There remains considerable lack of cooperation regarding parenting time and a lack of communication regarding the children. The trial court's conclusion that this is a "stable, satisfactory environment" is not supported by the evidence. Moreover, this situation has only existed for a year. The court's further conclusion that this "stable" environment was artificially created by plaintiff's actions is inapposite given our conclusion that this was not a stable environment. Nevertheless, the evidence does support the court's final conclusion that factor (d) does not favor either party. The past year has been marked mostly by instability.

Plaintiff also argues that defendant's behavior during the end of the marriage and the separation period is evidence that she cannot provide a stable environment for the children. We observe that factor (d) concerns the stability of the children's environment leading up to the custody determination and is not a prediction of future stability, which is covered by factors (b) and (c). This argument is unavailing.

Factor (e) concerns "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court found this factor to be equal between the parties, noting, "Each continues to find their way in establishing their homes." Plaintiff argues that this factor should favor him because his parent's home provides a clean, spacious, stable environment for the children. The adequacy of plaintiff's parents' house is irrelevant to the permanence of either home environment, especially because the adequacy of defendant's parents' house has not been impugned. See *Fletcher v Fletcher*, 447 Mich 871, 884; 526 NW2d 889 (1994) (distinguishing between acceptability and permanence of custodial homes). There is no evidence upon which to conclude that the trial court's finding was against the great weight of the evidence.

Factor (f) concerns "[t]he moral fitness of the parties involved." The trial court found this factor to be equal between the parties because "neither [party] has acted overtly to the detriment of the children." Plaintiff argues that defendant committed numerous acts of bad judgment that detrimentally affected the children. We note that: "[Moral fitness] . . . relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child

relationship and the effect that the conduct at issue will have on that relationship." *Fletcher*, *supra* at 886-887.

Much of plaintiff's argument relates to questions of credibility. It is the trial court's responsibility to resolve questions of credibility and this Court should not lightly call that into question. *Wright*, *supra* at 299. Plaintiff argues primarily that defendant engaged in extramarital affairs, introduced the children to her boyfriends, and socialized late into the night and came home drunk. Defendant rebutted each of these contentions and the trial court was in the best position to make a determination regarding the parties' credibility and the weight of the evidence. Moreover, there was no specific evidence of conduct by defendant that was directly detrimental to her fitness as a parent.

Plaintiff also argues that defendant demonstrated moral unfitness by engaging in a heated conflict with plaintiff's father in front of the children. During an argument (one of many) about the exchange of the children, defendant kicked plaintiff's father's van, shouted obscenities, and hit him on the shoulder in the presence of the children. Unfortunately, conflict between the parties with respect to the exchange of children seems to be commonplace. One instance of defendant becoming verbally and physically aggressive, does not call into question her moral fitness as a parent, generally. The trial court's finding that factor (f) was equal between the parties was not against the great weight of the evidence.

Factor (h) concerns "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court found that this factor favored defendant because "she was more active with school projects, homework, and school functions." Plaintiff argues that because defendant admitted that she was not involved with the children's schoolwork in the post-separation period, this factor should favor him.

The evidence reveals that defendant was primarily responsible for support and involvement in the children's activities during the marriage but that plaintiff has taken the majority of these responsibilities in the meantime. The court's simple statement that defendant has been more involved is inaccurate without clarification. What is more important is that both parties have demonstrated, at least, "a sincere interest in each child's well-being at home, in school, and in the child's other activities." *Wright*, *supra* at 302-303. This factor does not clearly favor either party and the trial court's conclusion that the factor favored defendant was against the great weight of the evidence.

Factor (j) concerns "[t]he 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." MCL 722.23(j). The trial court found that this factor "heavily favor[ed]" defendant because of plaintiff's attitude and conduct toward defendant since the separation. Plaintiff argues that the trial court ignored the motivation for plaintiff's actions and ignored the evidence that defendant failed to contain her own anger in front of the children during the incident with Tolbert. Plaintiff contends that this factor does not favor either party.

The parties have a considerable amount of animosity between them and are not capable of easily cooperating and communicating. The trial court focused on the fact that plaintiff took the children without consulting defendant and he "assumed a superior posture to [defendant] through the trial." The trial court is in a better position to judge the attitude and behavior of the

parties toward one another. *Wright*, *supra* at 299. Plaintiff did take the children and prevent them from freely seeing defendant. While other evidence showed a mutually destructive relationship between the parties, the evidence did not clearly preponderate against the trial court's finding.

Plaintiff also contends that the trial court erred in concluding that factor (k) was inapplicable to this case. Factor (k) concerns domestic violence. MCL 722.23(k). The scant evidence of the confrontation between defendant and plaintiff's father does not reveal that it was an incidence of domestic violence. The trial court did not err in judging this factor to be inapplicable.

The trial court awarded joint custody despite the fact that the factors analysis slightly favored defendant. We disagree on the extent to which the factors favor defendant because factor (h) favored each party equally, but this slight difference does not render the trial court's discretionary custody determination "palpably and grossly violative of fact and logic." *Berger*, *supra*, 277 Mich App 705. In fact, the Child Custody Act, MCL 722.21 *et seq*., "is intended to promote the best interests of the children, and it is to be liberally construed." *Id.*; MCL 722.26(1). The trial court's determination that "the boys need both parents and both parents need to come to grips with that fact" comports with the goals of the Child Custody Act.

There only remains the question of whether the best interest factors should have been outweighed by MCL 722.26a(1)(b), the cooperation and communication of the parties. Here, again, the trial court relies on the interests of the children to determine that the past cooperation problems of the parents should not preclude these children from having two custodial parents. Both parents have expressed that they are willing to make an effort to cooperate and communicate. Moreover, the trial court warned the parents that their future custodial rights are dependant on their ability to follow through on that effort. The trial court's ultimate custodial determination is a discretionary ruling, considering all the factors. The trial court did not abuse its discretion.

IV. Division of Marital Property

Plaintiff finally argues that the division of marital property was inequitable and based on erroneous findings of fact. We agree.

Findings of fact by the trial court underlying the division of property and the existence of a valid agreement are reviewed for clear error. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006); *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007). A finding is clearly erroneous if the reviewing court is left with a firm and definite conviction that a mistake was made. *Johnson*, *supra* at 11. This Court must decide if the trial court's dispositional ruling was fair and equitable in light of the findings of facts. *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999). The trial court's ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that it was inequitable. *Id.*

During the separation, plaintiff withdrew $6,000 from a savings account in his name to pay off credit card debt in his name. Plaintiff argues that the court erroneously concluded that the credit card debt was personal debt but the savings account was a marital asset, ordering

plaintiff to reimburse defendant $3,000. Plaintiff testified the he paid the debts "because [he] didn't want that debt to go to anybody." Defendant testified that her paychecks went into the savings account but that she was "never allowed to have access to the credit card and never made any purchases on the credit card." This is a credibility contest between the parties. This Court must defer to the trial court's credibility determination and weighing of the evidence. *Johnson*, *supra* at 11. The court's conclusion that the savings account was a marital asset but that the credit card was a personal debt was not clearly erroneous because it was supported by defendant's testimony.

Plaintiff next argues that he should not be required to pay the towing expenses for an automobile that was abandoned by defendant. In fact, the court made no specific ruling on this point; the court merely awarded the car to plaintiff. There was very little evidence regarding the circumstances surrounding this car. Defendant claims plaintiff could have taken the car anytime; plaintiff states that he was never informed of this fact and it was subsequently impounded. Both marital cars were owned by plaintiff before the marriage. Defendant testified that during the marriage she was the primary driver of the second car, which was not impounded. Both cars were awarded to plaintiff. The cost of obtaining the impounded car was estimated to be $275. The division of property should be equitable, but it need not be equal. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). In the face of this conflicting evidence, there is no basis for concluding that the court's determination to award plaintiff both cars, but without consideration for their impound status, was inequitable.

Plaintiff next argues that because defendant failed to make back mortgage payments on the marital home, as ordered by the court, she should bear the financial responsibility of the subsequent foreclosure. Plaintiff wanted to sell the house after he moved out but defendant resisted. Defendant did not appear at a motion hearing on this question and the court ordered her to make over $6,000 in back mortgage payments on the house. She did not make these payments and the house was subsequently foreclosed upon and sold. Defendant testified only that she did not know about the order. The trial court did not address its previous order in its opinion, stating only, "The [marital] home shall remain a joint asset to the extent a proprietary interest remains. Plaintiff and [d]efendant will equally share any debt associated with the foreclosure and post-foreclosure proceedings."

We agree with plaintiff that the trial court erred in concluding that both parties should bear the "debt associated with the foreclosure and post-foreclosure proceedings." Plaintiff tried to resolve this issue earlier in the proceedings and was thwarted by defendant's inaction, a fact that is clearly demonstrated by the court's order to her to make the payments. The court ignored this fact in its property division. Fault is a relevant factor in the equitable division of marital property. *McDougal v McDougal*, 451 Mich 80, 89-90; 545 NW2d 357 (1996). The trial court erred in failing to consider defendant's fault on the issue of foreclosure debt.

Plaintiff also argues that defendant should not have been awarded 50 percent of his 401(k) because some of the funds might have been earned before the marriage. However, plaintiff specifically stipulated at trial that the entirety of this account accrued during the marriage. There is no other evidence to the contrary. This argument is without merit.

Finally, plaintiff also claims that defendant should pay for the Qualified Domestic Relations Order, for purposes of dividing the 401(k). Plaintiff does not actually make any

argument regarding why defendant should pay this fee. While the court does not explain its decision to order plaintiff to make this payment, there is no basis for concluding that it was erroneous.

On remand, the trial court should consider defendant's failure to make the back mortgage payments, as ordered by the court, in its allocation of the debt associated with the foreclosure of the marital home.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly