

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN HEYZA,

Plaintiff/Counter-Defendant-
Appellant,

v

PATRICIA ANN HEYZA,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
February 24, 2009

No. 282790
Wayne Circuit Court
LC No. 06-604638-DM

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. Plaintiff challenges the trial court's decision to award defendant primary physical custody of the parties' minor children instead of awarding joint physical custody. He also challenges the trial court's property division, and awards of child and spousal support. We reverse and remand for further proceedings, with respect to the trial court's award of retroactive spousal support for 2007 only, and affirm in all other respects.

I

The parties married in 1995. They have three minor children. Plaintiff originally filed for divorce in 2002, but the parties later reconciled, and plaintiff's complaint was dismissed. Plaintiff later filed for divorce in February 2006. The parties continued to reside together throughout the proceedings, including during the lengthy and contentious trial. Plaintiff sought joint legal and physical custody of the children. The trial court awarded the parties joint legal custody, but awarded primary physical custody to defendant.

II

Plaintiff first argues that the trial court erred by refusing to award joint physical custody of the children. He argues that the trial court erred in several of its findings regarding the statutory best interest factors, MCL 722.23(a) – (l), and abused its discretion in awarding primary physical custody of the children to defendant.

1. This Court applies three standards of appellate review in appeals from custody rulings. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). A trial court's findings of fact regarding the existence of an established custodial environment, and regarding each custody factor, are reviewed under the great weight of the evidence standard. *Id.* We review the trial court's ultimate custody decision. *Id.* Questions of law are reviewed for clear legal error. *Id.*

If the court finds that an established custodial environment exists, it may not change that environment unless it finds clear and convincing evidence that a change in custody is in the child's best interests. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526; 752 NW2d 47 (2008). In this case, the trial court found that there was an established custodial environment with both parents. Therefore, defendant was obligated to show, by clear and convincing evidence, that awarding her primary physical custody of the children was in their best interests. The children's best interests are to be evaluated in light of the statutory best interest factors set forth in MCL 722.23(a) – (l).

Plaintiff argues that the trial court erred in finding that best interest factors (b), (d), and (h) favored defendant, and in finding that neither party prevailed with respect to best interest factors (c), (g), and (j).

With respect to factor (b) (capacity of the parents to provide the children with love and guidance, and to foster their religious upbringing), we disagree with plaintiff's argument that the trial court erred by failing to give sufficient weight to Dr. Swerdlow-Freed's report. This Court affords deference to the trial court's weighing of evidence, and to evaluation of the witnesses' credibility, in light of the trial court's superior position to consider these matters. *MacIntyre v MacIntyre*, 267 Mich App 449, 459; 705 NW2d 144 (2005); *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 28; 581 NW2d 11 (1998). Accordingly, the trial court was not obligated to blanketly accept Dr. Swerdlow-Freed's report, or to give greater credence to plaintiff's testimony than to defendant's.

Plaintiff also challenges the trial court's finding that defendant played a greater role than plaintiff in fostering the children's religious upbringing. The evidence showed that defendant enrolled the children in catechism, made arrangements for sacrament preparation, and took them to church. Although plaintiff refuted defendant's testimony that she took the children to church weekly, we conclude that the trial court's finding with regard to this matter is not against the great weight of the evidence.

However, we agree with plaintiff that the trial court's finding that plaintiff "tries to be a friend to the girls more than a parent and places the need for the children's affection over the need to discipline" is against the great weight of the evidence. Defendant did not offer evidence that plaintiff consistently emphasized friendship and affection, over discipline and guidance. Although there was evidence regarding plaintiff's involvement in the children's sports activities, and that he enjoyed taking them to family events and on his Comerica Park errands, this evidence did not establish that he did so at the expense of appropriate discipline. Moreover, the evidence showed that a large part of defendant's involvement with the children surrounded their dance classes.

We also agree with plaintiff that the trial court gave undue weight to evidence that plaintiff intended to rely on babysitters to supervise his children, on weekday mornings, and on evenings when he delivers baseball equipment. In *Ireland v Smith*, 451 Mich 457, 467-468; 547 NW2d 686 (1996), our Supreme Court held that a parent's plan to rely on daycare is not, in itself, sufficient to weigh the best interest factors against that parent. The Court did not categorically reject consideration of childcare plans, commenting that a parent's "unwise choice in this regard would reflect poorly on the parent's judgment." *Id.* at 468. But the Court concluded that the trial court "must look at each situation [to] determine what is in the best interests of the child." *Id.*

The evidence here indicated that plaintiff intended to rely on his mother or sister to come to his home on mornings when he had physical custody, to supervise the children's school preparations. Plaintiff also presented evidence that his part-time employer was able to use other drivers for late-night delivery jobs, when the children were in his care. With a shared physical custody arrangement, approximately half of plaintiff's delivery jobs would occur when the children were with defendant. This evidence does not suggest that plaintiff would make poor or unwise choices regarding childcare. For these reasons, we conclude that the trial court's finding that best interest factor (b) favored defendant is against the great weight of the evidence.

With respect factor (c) (capacity to provide for the children's material and medical needs), plaintiff argues that the trial court erred in finding that the parties were equal. He argues that defendant's "extraordinary" financial irresponsibility will probably lead her to file for bankruptcy, and interfere with her ability to provide for the children's basic needs. Plaintiff presented substantial evidence that defendant accumulated high credit card balances, failed to keep up with payments, and attempted to conceal the dunning notices that she received from creditors and debt collectors. On the other hand, defendant testified that she was required to resort to credit cards because plaintiff stopped providing money for necessary expenses. The trial court did not find that defendant's credit card problems resulted from selfish or irresponsible purchases. The court also emphasized that defendant took the greater share of responsibility for some important family matters, such as meal preparation, laundry, daily schedules, and routines.

The trial court found that both parties had "negative habits" that could affect the children's medical needs, because defendant smoked in the house, and plaintiff drank in their presence. There was evidence that defendant's smoking could be harmful to Sydney, who had a respiratory condition. Defendant testified that plaintiff frequently abused alcohol, which led to aggressive and abusive behavior, but plaintiff denied this, and insisted that his alcohol consumption was moderate. The trial court did not make any findings regarding the extent or nature of plaintiff's alcohol use, nor expressly find that it adversely affected his behavior. Thus, it appears that the court implicitly discounted defendant's testimony regarding plaintiff's alleged abuse.

In any event, the trial court's conclusion regarding factor (c) (that the evidence does not clearly weigh in either party's favor) is not against the great weight of the evidence. On the one hand, plaintiff demonstrated financial responsibility by paying for the family's principal expenses (although defendant argued that he spitefully withheld money from her, and left her no alternative but to resort to credit). On the other hand, defendant oversaw most of the children's daily needs.

Further, the parties' testimony is sharply divided with respect to how their personal habits affected the children's health. Despite some disagreements, however, both parties demonstrated at least adequate responsibility for providing the children with medical, dental, and mental health care. In light of the foregoing evidence, the trial court's finding that the parties were equal with respect to factor (c), is not against the great weight of the evidence.

Plaintiff argues that the trial court erred in finding that factor (d) (the length of time the children have lived in a stable environment) favored defendant. Plaintiff argues that there was substantial evidence that defendant would not be able to keep the marital home, and points to evidence that the court later ordered her to vacate the home as of May 1, 2008, and that foreclosure proceedings have begun. But logically, plaintiff may not rely on events that occurred after the trial court's custody decision, to establish that the decision was erroneous when made. Furthermore, plaintiff's admitted skepticism regarding his own ability to prevent the loss of the home, undermines his argument that this factor should have been decided in his favor. Accordingly, we conclude that the trial court's conclusion that factor (d) favored defendant is not against the great weight of the evidence.

Plaintiff also argues that the trial court erred in finding that both parties were equal with respect to factor (g) (physical and mental health), and asserts that it gave insufficient weight to defendant's apparent suicide note. However, the parties disputed the timing and circumstances surrounding the note, and there was no evidence that defendant actually attempted suicide. Where a trial court resolves disputed facts, we give its conclusions deference. *See, e.g., Fletcher, supra* at 28. Moreover, there was no other evidence suggesting that defendant was at serious or substantial risk of attempting suicide. Accordingly, we find that the trial court's finding that the parties were equal with respect to factor (g) was not against the great weight of the evidence.

Plaintiff argues that factor (h) (school and community record) did not favor defendant, as the trial court concluded, because she continuously interfered with his efforts to participate in the children's homework. Plaintiff relies on the Custody Evaluation, in which Dr. Swerdlow-Freed reported that all three children informed him that both parents help them with their homework. However, defendant denied locking the children's homework in the car. Thus, there was a factual dispute, and we owe deference to the trial court's resolution of it. Defendant also testified that, historically, she was the parent who attended parent-teacher conferences, and she played the greater role in managing school and extra-curricular affairs. Because this factor depended mainly on the trial court's weighing of evidence and evaluation of witness credibility, *Fletcher, supra* at 28, we find that the court's findings are not against the great weight of the evidence.

Finally, plaintiff argues that the trial court should have weighed factor (j) (willingness and ability of parties to facilitate and encourage a close relationship with the other parent) in his favor. The court found that this factor did not favor either party. Considering the overwhelming evidence of the parties' mutual antipathy, we conclude that this finding is not against the great weight of the evidence.

Although the trial court erred in a small number of its findings regarding parental roles in maintaining discipline and reliance on babysitters, we conclude that these errors did not affect its decision to award primary physical custody of the children to defendant, rather than awarding the parties joint physical custody. Considering the trial court's findings of fact that are not against

the great weight of the evidence, we conclude that the trial court did not abuse its discretion in awarding primary physical custody of the children to defendant.

MCL 722.26a provides, in pertinent part:

(1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. . . . The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in section 3.

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

The parties must be able to agree on such basic decisions including health care, education, and religion, along with matters of daily decision-making and discipline. *Fisher v Fisher*, 118 Mich App 227, 232; 324 NW2d 582 (1982).

In this case, the trial court found:

[A]s to the day-to-day decisions [the parties] are unable to communicate or cooperate[] with each other. There was ample testimony of how they were unable to communicate or agree on activities the girls would participate in such as dance classes, dance competition and even which soccer team they could play on. They disagree and have fought over the rules on bedtime, allowing children to sleep with parents, routines for hygiene, and homework. While the children need both parent[s'] love and continue[d] involvement in their lives[,] they need more stability and consistency in their daily routines[,] especially during the school year.

The record amply supports these findings. Alternating residences on a weekly basis between parents who harbor the degree of hostility toward each other as these parties, was not a viable option, and would inevitably have given rise to a host of disputes and other problems. The trial court did not abuse its discretion in awarding primary physical custody to defendant, finding that the parties' animosity toward each other precluded a joint physical custody arrangement.

Plaintiff did not seek primary physical custody in the trial court, and does not do so on appeal. In sum, under the circumstances described herein, and because shared physical custody was not a viable option, the trial court did not abuse its discretion in determining that the children's best interests would be served by awarding primary physical custody to defendant. Accordingly, we affirm the trial court's custody decision.

III

Plaintiff next argues that the trial court erred by failing to award him the full portion of his equity in the marital home when it gave him a \$1,300 credit toward his share of the home equity debt.

In reviewing a trial court's property division, we review the court's findings of fact for clear error, and review its dispositional rulings to determine whether the ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

Plaintiff argues that the trial court's ruling on this issue is inequitable, because it deprives him of his full share of the equity. He argues that he is entitled to \$11,100 in equity after the amount of the first mortgage is subtracted from the appraised value of the home, and accordingly, the trial court should have subtracted the \$7,000 that represents his share of the home equity loan debt, from \$11,100, leaving him with \$4,100 in equity. We conclude that plaintiff's argument is flawed, because plaintiff's claim that his equity value is \$11,100 is based on the fiction that the property is encumbered only by the first mortgage. The trial court correctly determined the remaining equity in the home by subtracting the entire amount of secured debt from the appraised value of the home, leaving each party with \$1,300 in equity. The trial court's finding that the equity value of the home was \$2,600, is not clearly erroneous. *Sparks, supra* at 151-152.

Plaintiff asserts that defendant's failure to refinance the home and make payments toward the home equity loan debt have resulted in the initiation of foreclosure proceedings. He therefore argues that this case should be remanded to the trial court for full reconsideration of the property division in light of these subsequent events and defendant's culpability. We disagree. The trial court was required to equitably distribute the marital property based on the circumstances as they existed at that time. It would be improper to allow plaintiff to rely on subsequent events to argue that the trial court's property distribution was inequitable, since the subsequent events were not before the trial court at the time it made its decision. On appeal, we are confined to decide the case based on the record on appeal, which consists of materials that were before the trial court. See generally MCR 7.210(A)(1).

IV

Defendant next argues that the trial court's award of spousal support was inequitable and improperly made retroactive. We agree in part. The same standard of review applicable to the division of marital property, applies to awards of spousal support. *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008). Thus, the trial court's factual findings are reviewed for clear error. *Id.* If the court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id.*

Defendant argues that the trial court erred in adjusting the lump-sum spousal support award from \$2,500 to \$3,000 after he pointed out in his post-judgment motion that the monthly amount of support should be reduced from \$250 to \$208.33. However, the trial court stated that its original intent was to order monthly spousal support of \$250, for an annual sum of \$3,000. It clarified that the \$2,500 amount was intended as an award of spousal support for "part of 2007."

Thus, it appears that the trial court intended to order ten months of retroactive spousal support for 2007. The trial court was authorized to correct a clerical error in its judgment. MCR 2.613(A)(1).

However, the trial court did not make any findings of fact to support its ten-month retroactive spousal support award. The record does not reveal the factual basis for this decision, considering that the parties lived together during most of 2007, with plaintiff paying most of the household costs. Without findings of fact explaining the basis for the retroactive award of support, we cannot conclude that this portion of the award is fair and equitable. Accordingly, we remand for reconsideration of the retroactive award, and for findings of fact explaining the court's decision to award retroactive spousal support for ten months.

Plaintiff additionally argues that the trial court's awards of spousal support and child support were improperly calculated, because the calculations did not reflect that defendant was not paying income taxes on her earnings.

The trial court imputed income to defendant of \$25,480 a year based on the volume of her babysitting and daycare services. Although there was evidence that defendant failed to report much of her income, the trial court found that defendant's income was not exempt from income taxes. We agree with the trial court that absent any basis for concluding that defendant had a legal right to forego reporting her income and paying taxes on her income, there was no basis for adjusting the spousal and child support awards on account of defendant's anticipated failure to pay taxes on future earnings. Accordingly, we find no error.

VI

Plaintiff lastly argues that the trial judge should have been disqualified because of bias, and that this case should be assigned to a different judge on remand. In reviewing a motion to disqualify a judge, this Court reviews the trial court's findings of fact for an abuse of discretion, and reviews the court's application of those facts to the relevant law de novo. *Olson v Olson*, 256 Mich App 619, 638; 671 NW2d 64 (2003).

Similarly, in *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004), this Court stated:

The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case. . . . We may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.

. . . We will not remand to a different judge merely because the judge came to the wrong legal conclusion. Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying. Rather, plaintiff must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views.

MCR 2.003(B)(1) provides that a judge is disqualified when “[t]he judge is personally biased or prejudiced for or against a party or attorney.” Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). The mere fact that a judge rules against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 554; 730 NW2d 481 (2007).

Plaintiff argues that the trial court was biased against him because it required his attorney to submit a proposed judgment within seven days after the court issued its decision, contrary to MCR 3.211(F)(1), which allows a party 21 days to submit a judgment after the trial court renders a decision in a domestic relations action. Plaintiff also asserts that the court failed to return two trial exhibits. Additionally, plaintiff asserts that the court retaliated against him for filing a post-judgment motion by increasing the annual amount of spousal support instead of lowering his monthly payment. He also argues that the court’s factual findings were one-sided and unfair.

Plaintiff’s allegations do not establish actual bias. Even if the court erred in requiring plaintiff’s counsel to submit a proposed judgment under the seven-day rule, MCR 2.602(B)(3), instead of applying MCR 3.211(F)(1), there is no indication that this decision was the result of bias. An erroneous legal ruling does not establish judicial bias. *Ypsilanti Fire Marshall, supra* at 554. Further, there is no indication that the court possessed the requested exhibits and refused to return them. Rather, the court denied possessing them.

Plaintiff’s remaining allegations involve alleged legal error, which is not a proper basis for establishing judicial bias. *Ypsilanti Fire Marshall, supra* at 554. Indeed, the trial court’s original award of spousal support was inherently inconsistent, requiring that plaintiff pay \$2,500 a year, but at a rate of \$250 a month. The court corrected this discrepancy when it was brought to its attention on plaintiff’s motion, by retaining the \$250 monthly amount, and adjusting the yearly amount to \$3,000, which the court explained was its original intent. The adjustment was necessary to correct an obvious clerical error, and there is no indication that the court was intending to penalize plaintiff or was biased against him. Lastly, the trial court’s factual findings were not so one-sided as to demonstrate actual bias.

Accordingly, plaintiff has failed to establish grounds either to disqualify the trial judge or to reassign this case to a different judge on remand.

In sum, we reverse and remand for further proceedings in connection with the trial court’s award of retroactive spousal support for 2007, only. We affirm in all other respects.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because neither side prevailed in full, neither side shall tax costs.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Jane E. Markey