STATE OF MICHIGAN

COURT OF APPEALS

JESSE L. JIMENEZ

Plaintiff-Appellee,

v

DEBORAH JEAN JIMENEZ (BERRY),

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 190805
LC No. 93 66481 DM

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant Deborah Jean Jimenez appeals as of right a judgment entered on November 14, 1995, awarding physical custody of the parties' minor children to plaintiff Jesse L. Jimenez and dividing the marital estate. We reverse the custody and property settlement provisions of the judgment of divorce and remand for further proceedings with respect to the custody of the minor children, Ritchie and Marcie, and the property division.

The parties were married approximately twenty-two years, and have three children, two sons and one daughter: Corey, born August 12, 1976, Ritchie, born December 1, 1979, and Marcie, born October 15, 1981. Plaintiff filed for divorce on August 30, 1993, allegedly after he discovered that defendant was having an affair. Both parties sought custody of the children. Defendant moved out of the marital home on December 31, 1993, after the Friend of the Court recommended that temporary custody be awarded to plaintiff. The court held an evidentiary hearing on June 29, 1994, and on December 30, 1994, the court issued its written opinion. After reviewing the child custody factors, the court found none in favor of defendant, some in favor of plaintiff and some equal. The court awarded physical custody to plaintiff and divided the property.

I. CUSTODY

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues that the trial court failed to arrive at conclusions for the statutory best interest factors b, e, and k, legally misanalyzed factors a, b, d and j, and that its findings for plaintiff on factors a, b, and h were against the great weight of the evidence. Defendant seeks a remand before a different judge.

> The standard of review in a child custody case is set forth by statute:
>
> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. [MCL 722.28; MSA 25.312(8).]

A reviewing court should not substitute its judgment on questions of fact unless they "clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 899 (1994); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), modified 451 Mich 457 (1996). The custody determination is a discretionary ruling which is reviewed for a palpable abuse of discretion. *Fletcher*, 447 Mich at 880. The lower court is given great deference because it is in a superior position to make an accurate decision regarding the children's best interest in the custody arrangement. *Id.*, at 889-890. Clear legal error occurs when a trial court incorrectly chooses, interprets or applies the law. *Id.*, at 881; *Ireland*, 214 Mich App at 243.

Custody disputes are to be resolved in the child's best interest, as measured by factors a through l of the Child Custody Act set forth in MCL 722.23; MSA 25.312(3). The factors are:

> (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.
>
> (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.

Defendant first contends the trial court failed to draw conclusions on some of the factors. A trial court's exercise of discretion is limited to the statutory best interest factors and failure to consider a statutory factor requires remand. *Fletcher*, 447 Mich at 881; *Wolfe v Howatt*, 119 Mich App 109, 110; 326 NW2d 442 (1982). The trial court is required to "find the facts specially" and state "[b]rief, definite, and pertinent findings and conclusions on contested matters." MCR 3.210(D); MCR 2.517 (1) and (2), cited by *Fletcher*, 447 Mich at 883. This does not mean that a trial court must recite or comment upon all the evidence considered, or accept or reject every proposition argued. *Id.* However, a conclusion on each factor is necessary for a proper resolution by this Court and it requires weighing the factor for one party or the other or weighing it equally, not merely mentioning it. *Wolfe*, 119 Mich App at 110-111.

Contrary to defendant's contention, we conclude that the trial court properly stated a conclusion on factor b:

b. The parties appear equal in their capacity and disposition to provide the children with love, affection and guidance as they have both done so in the past. Although it appears that the mother was the primary person guiding the children in their school work and activities, since the filing of this action and her relationship with her male friend, that good aspect of her personality appears to have been completely destroyed.

The court stated its conclusion first -- that the parties were equal -- then set forth its reasoning following that conclusion. Therefore, the trial court did not fail to draw a conclusion on this factor. Whether the court's conclusion was against the great weight of the evidence is discussed below.

We agree with defendant that the court failed to draw a conclusion with respect to factors e and k. Regarding factor e (permanence of existing or proposed custodial home), the trial court stated:

> e. The permanence, as a family unit of the existing or proposed custodial home. The Plaintiff/Father has been living with the children for almost a year without the Defendant/Mother's presence in the home. It is expected that the children will continue to live with their father.

This finding merely indicates that the court expected that the status quo would continue. Factor e "exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other." *Ireland*, 214 Mich App 246, citing *Fletcher v Fletcher*, 200 Mich App 505, 517; 504 NW2d 684 (1993), aff'd 447 Mich 884-885 (1994). In its modification of *Ireland*, the Supreme Court stated that the focus should be "the child's prospects for a stable family environment." *Ireland*, 451 Mich at 465. Thus, the trial court's finding about where the children were living and will continue to live is not the same as drawing a conclusion on whether either the existing or proposed custodial home was likely to serve as a "permanent 'family unit.'" *Id.* at n 8. The court committed clear legal error by failing to state a conclusion based on the appropriate considerations for this factor.

With respect to factor k (domestic violence), defendant correctly contends that the trial court failed to make any finding whatsoever. Rather, for its analysis of k, the trial court set forth an analysis of "any other factor considered by the Court," which was actually an analysis under factor l. MCL 722.23(k) and (l); MSA 25.312(3)(k) and (l). The trial court's 1994 opinion did not precede the statute's 1993 amendment adding the domestic violence factor.

Furthermore, this is not a case in which factor k was not pertinent. The record showed that defendant and defense witnesses contended that plaintiff had physically assaulted defendant, threatened her, and thrown a shoe at Ritchie, breaking a glass portion of a cabinet. Before the court issued its written opinion, defendant requested a restraining order because plaintiff had threatened to kill her and had purchased a $250,000 life insurance policy on her life. Thus, because there was evidence of domestic violence on the record and the trial court was bound to consider it, the court committed clear legal error by failing to make findings on this factor.

Next, defendant contends that the trial court legally misanalyzed factors b, d, f, and j. We agree.

With respect to factor b (capacity and disposition to give love, affection, guidance and to continue education and religion), the trial court found:

> b. The parties appear equal in their capacity and disposition to provide the children with love, affection and guidance as they have both done so in the past. Although

> it appears that the mother was the primary person guiding the children in their school work and activities, *since the filing of this action and her relationship with her male friend, that good aspect of her personality appears to have been completely destroyed.* (Emphasis added).

The trial court's analysis fails to mention the parties' capacity and disposition to continue the education and raising of the child in his or her religion, despite substantial evidence that favored defendant on this aspect of the factor. For example, plaintiff's sister-in-law testified that when the children made their first holy communion, plaintiff complained "because he had to go and sit through this stupid thing that he didn't want his kids to be involved in anyways [sic]." Defendant testified that she arranged for transportation of the children to religious education classes because plaintiff would not transport them, and that plaintiff didn't want the children praying before meals. The defense also presented testimony indicating that defendant, but not plaintiff, regularly attended mass and that plaintiff interfered with her efforts to have the children attend. Thus, the trial court committed clear legal error by failing to address the capacity and disposition of the parties with respect to continuation of religious training.

In addition to the court's failure to discuss the religious training aspect of factor b, we note that the court's statement that the "good aspect" of defendant's personality, e.g., her "guiding the children in their school work and activities," appears to have been "completely destroyed" is unsupported by the record. Although defendant had less time with the children after she left the marital home and was working longer hours, the record indicates that defendant continued to have both the capacity and the disposition to give love, affection and guidance. The deposition testimony of Victoria Waite, a teacher consulted at Ritchie's junior high school, was admitted into evidence. It indicated that defendant continued to be involved in Ritchie's education and that she notified Waite of defendant's change in address so that Waite could contact her. The record also indicates that defendant was in contact with Marcie's school. When she got a call that Marcie was skipping school, she went to the house to investigate. When she got a call from a grocery store that Ritchie shop-lifted, she, as well as plaintiff, went to the store and spoke with the security guard. With plaintiff's agreement, she moved back into the marital home in April, 1994, to be with the children. The arrangement lasted two weeks. Within three hours after she moved back, plaintiff asked her to have sex, and she refused. He told her he would have her thrown out, and successfully brought a motion for exclusive use of the home. Thus, in light of the evidence that plaintiff routinely referred to his children, two of whom are learning disabled, as "dumbshit" and "asshole", that he allowed Corey's girlfriend to sleep over, that he allowed Corey, his girlfriend and Ritchie to go camping unsupervised, and that he did not show affection or engage in activities with the children, we question whether the court's conclusion that the parties were equal on this factor was against the great weight of the evidence. However, inasmuch the court committed clear legal error in failing to consider the religious training aspect of factor b, and reevaluation of that factor is required, it is unnecessary for us to decide this issue.

With respect to factor d, defendant correctly contends that the court's finding is completely irrelevant to the proper analysis of this factor. This statutory factor requires consideration of the length

of time the children have lived in a stable satisfactory environment, and the desirability of maintaining continuity. The court stated:

> d. The Defendant/Wife has removed herself from the marital home and that move on her part was very upsetting to the children of the parties.

The proper focus for this factor is the children's environment, not whose fault it was that the family unit that existed before the parties separated was no longer intact. Thus, "[f]actor d calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ('the desirability of maintaining continuity')" to be considered. *Ireland*, 451 Mich at 465 n 9. The court's findings indicate that it focused on who was to blame for the disruption of the previous environment that existed before defendant's departure. The focus should have been on the current environment, e.g. the one that existed with plaintiff at the time of the evidentiary hearing. To the extent that the court failed to consider whether the current environment was stable and satisfactory and whether it was desirable to maintain it, the court committed clear legal error.

The court also committed clear legal error in its analysis of factor f (moral fitness). The trial court found:

> f. The moral fitness of the parties involved. During the trial it came in that not only had the Defendant/Wife been guilty of very serious misconduct, but possibly the Plaintiff/Husband had been also, [at] some time in the past. However, in weighing the type of misconduct that occurred, the misconduct of Defendant/Wife far outweighs that of whatever misconduct the Plaintiff may have had, if any, with another female.

In evaluating this factor, the trial court looked solely to who had what affair and whose affair was qualitatively worse. This was clear legal error. In the words of the Michigan Supreme Court, moral fitness is not an assessment of "who is the morally superior adult," but is a question that relates to the person's fitness as a parent. *Fletcher*, 447 Mich at 887. Questionable conduct is relevant to factor f "only if it is of a type which necessarily has a significant influence on how one will function as a parent." *Id.* Furthermore, assessment of moral fitness includes more than just extra-marital conduct, for example, verbal abuse. *Fletcher*, 447 Mich at 887, n 6. The trial court's analysis, which limited its inquiry to extramarital conduct without regard to parenting ability, was erroneous.

With respect to factor j (facilitating a relationship), defendant contends that the court's analysis has to do with factor i (children's preference). The trial court stated:

> j. The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship is rather difficult to evaluate in this case. As this divorce case has progressed, it appears that the children, and particularly again, the

> boys, have their minds made up that they wish to live with their father and cannot forgive their mother for her indiscretion, (or so it appears to the Court).

We recognize that neither a parent nor a court can force a child, particularly a teenager, to build a relationship with a parent. However, the children's willingness to have a relationship is not the same as the parent's "willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent . . . ." MCL 722.23(k); MSA 25.312(3)(k). If the children are in fact unwilling to have a relationship with defendant, this at most indicates that plaintiff's ability to encourage a relationship may be thwarted by the children. The children's unwillingness to have a relationship with defendant is not a basis for weighing this factor in favor of plaintiff. To the extent that the court did so, it committed clear legal error. On remand, the court shall consider the evidence concerning each parent's behavior as it demonstrates a willingness and ability to encourage and facilitate a relationship with the other parent.

Defendant claims that the court's decisions on factors a and h were against the great weight of the evidence. With regard to factor a (existing love, affection and emotional ties), the court stated:

> a. The love, affection and emotional ties existing between the competing parties and the minor children appears [sic] to be stronger with the Plaintiff. Since the Defendant/Mother's involvement with another man, the children have disattached themselves from their mother and appear to show all of their love and affection toward their father.

Defendant contends that there is no evidence of any ties that plaintiff had with the children. However, the evidence supported the court's conclusion that the children "disattached" themselves from defendant. Defendant testified that after she moved out, "the kids started pulling away from me. They said that I moved out, and I didn't care about them, I didn't love them anymore." We are not persuaded that the evidence clearly preponderates against the trial court's finding that the existing ties were stronger with plaintiff.

We are also not persuaded that the court's finding with respect to factor h (home, school, and community record) was against the great weight of the evidence. The court found:

> The children have been upset in their lives and have displayed this in their school work, particularly the two boys. It appears that both parties have attempted to work with school authorities to improve the situation. The children were borderline in their school activities before the parties separated and this separation has continued now for almost a year, which has done nothing but exacerbate the difficulties that particularly the boys have had with their schoolwork, and school attendance. If all things were equal, the Court feels that maybe the mother would be the better qualified to help the children with their schoolwork and attendance, however, the Court feels that she has lost the confidence of her children to permit her to help them.

Although the evidence indicates that Corey and Ritchie's home, school and community records were in need of improvement, the court's apparent finding that this factor did not favor either party was not against the great weight of the evidence.

In summary, we conclude that the trial court properly came to a conclusion on factor b, but improperly failed to reach a conclusion on factor e and failed to consider factor k. The trial court committed legal error in its analysis of factor b, d, f and j. The court's findings on factors a and h were not against the great weight of the evidence.

Upon a finding of error in a custody case, this Court should remand the case for reevaluation unless the error was harmless. *Fletcher,* 447 Mich at 882, 889. The fact that this Court cannot review either factor e or k because the trial court failed to draw a conclusion or consider the factor at all, standing alone, is sufficient for remand. *Wolfe,* 119 Mich App at 110. On remand, the court should review the entire question of custody, reconsider the facts adduced in the evidentiary hearing in light of this opinion, and conduct whatever proceedings are necessary. *Fletcher,* 447 Mich at 889; *Ireland,* 451 Mich at 469.

Defendant also argues that she was effectively prevented from putting on her complete case because the court did not allow her to present a witness who would have corroborated defendant's testimony that plaintiff had abused her and the children. This issue is moot, given the conclusion that this case should be remanded, as stated above. If defendant continues to believe that the witness' testimony would be relevant to the court as it reconsiders the custody issue, defendant will have the opportunity to raise that issue before the court on remand.

II. PROPERTY DISTRIBUTION

Defendant also challenges the property division, arguing that the trial court improperly awarded the bulk of the marital estate to plaintiff merely because defendant had an affair.

Property dispositions should be affirmed unless this Court is left with the firm conviction that the distribution was inequitable. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995). This Court reviews the findings of fact for clear error and then decides whether the ruling was fair and equitable in light of the facts. *Id*.

The objective of a property settlement is to reach a fair and equitable distribution of property in light of all the circumstances. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987). Although the division of property is not governed by set rules, equitable factors to be considered include: (1) the source of the property; (2) the parties' contributions toward its acquisition, as well as to the general marital estate; (3) the duration of the marriage; (4) the needs and circumstances of the parties; (5) their ages, health, life status, and earning abilities; (6) the cause of the divorce, as well as past relations and conduct between the parties; (7) the interruption of the personal career or education of either party; and (8) general principles of equity. *Hanaway,* 208 Mich App at 292-293.

Recently, the Michigan Supreme Court confirmed that the role "fault" should play is as "an element in the search for an equitable division -- it is not a punitive basis for an inequitable division." *McDougal McDougal*, 451 Mich 80, 90; ___ NW2d ___ (1996). Although a division need not be mathematically equal, *Impullitti v Impullitti*, 163 Mich App 507, 513; 415 NW2d 261 (1987), an equitable distribution is "[rough] congruence" and any significant departure from that goal should be supported by a clear exposition of the court's rationale. *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990).

On December 30, 1994, the court divided the marital assets without setting forth any reasoning until a later hearing. Plaintiff received the home and its contents, his personal property, the 1986 automobile, his boat and trailer, his coin and card collections, tools, $11,000 of his $16,000 deferred compensation fund, the proceeds from his lawsuit against the State of Michigan, and "whatever other items he presently has in his possession or that the wife might have in her possession, but properly belongs to the husband." Defendant was awarded her 1989 automobile, camper and trailer, a hot-tub, hunting equipment, a life insurance policy worth $1,300, a 1986 Ford van, a fifty percent interest in plaintiff's pension, and $5,000 from plaintiff's deferred compensation fund. Each party was to carry their own indebtedness.

Nearly one year later, the trial court modified its decision at an evidentiary hearing on November 15, 1995. The court found that plaintiff deserved credit for being the primary supporter of the children and that defendant's support payments were in arrears $7,100, though the court admitted that technically, an order requiring support was not in place. The court also found that the parties were more in debt than when trial was heard and that plaintiff had been paying on a credit card account. The court held that each party was responsible for half the debt, or $5,124, and then forgave defendant's $7,100 arrearage and took back the $5,000 deferred compensation from her.

Defendant argued that the credit card debt was largely family obligations and expenses for remodeling the home, which had been awarded to plaintiff. Defendant testified that plaintiff had assets worth $100,000 and she was the one who had nothing and had to start over. The court took a brief recess, came back on the bench, and stated:

> I want to say this, in view of the statement that Mrs. Jimenez made about what happened here and about this case, the Court, in analyzing the merits and equities of the parties, took into account who accumulated this wealth and the reasons for the divorce.
>
> I -- the Court found that there was fault on both sides, but really found that there was serious fault on behalf of Mrs. Jimenez, and that's the reason that the Court favors, in its decision, the equities of the property settlement towards Mr. Jimenez as well as the custody in the desire of the children too [sic].

From the record, the apparent inequitable distribution of the marital assets suggests that the court considered defendant's affair as a primary factor in the property division and may have punished defendant.

In any event, there are insufficient findings for this Court to review for clear error. Compare *Beaty v Beaty,* 167 Mich App 553, 559-560; 423 NW2d 262 (1988) (affirming distribution because it was possible to determine it was equitable even without specific dollar value). The trial court placed few values on the assets, as described above. The trial court did not make a ruling on the value of the marital home, but simply awarded it to plaintiff, despite the fact that its value was disputed at trial. Therefore, because this Court cannot review the equities without additional factual findings about the values of the items awarded, the property distribution aspect of the divorce judgment is also remanded for further consideration and findings.

III. REMAND TO A DIFFERENT JUDGE

Defendant requests that this Court remand to a different judge. Because the court's findings and statements demonstrate an appearance of bias against defendant because of her affair, we agree with defendant that the proceedings on remand should be held before a different judge.

As a general rule, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Ireland,* 214 Mich App at 250. The test is not merely whether actual bias exists, but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the affected party. *Id.*

The record shows that the court appears to have punished defendant for her affair at the risk of jeopardizing the children's best interest.

The court's opinion demonstrates the "significant potential for prejudicially ascribing disproportionate weight" to defendant's affair. First, the court stated in its opening paragraph that "[s]ome time before [plaintiff's] filing, the Defendant/Wife had left the home, her husband and children, and had taken up an illicit relationship with a man who, she stated at the time of trial, was no longer in the picture." Defendant correctly points out that no evidence supports that defendant left the home before plaintiff filed for divorce. The evidence was disputed whether defendant's affair began in July, at a time before plaintiff filed for divorce in August, but plaintiff did not testify that defendant had left the home before that time. Thus, there is no evidence supporting the court's introductory statement.

Second, in analyzing the statutory factors, the trial court frequently referred to defendant's affair (factor a ("involvement with another man"); factor b ("her relationship with her male friend"); factor f ("not only had Defendant/Wife been guilty of very serious misconduct . . . far outweighs that of whatever misconduct the Plaintiff may have had, if any, with another female"); factor j ("cannot forgive their mother for her indiscretion").

Finally, the court's improper emphasis on defendant's infidelity is shown by its statement at the hearing on November 13, 1995:

> I--the Court found that there was fault on both sides, but really found that there was serious fault on behalf of Mrs. Jimenez, and that's the reason that the Court favors, in its decision, the equities of the property settlement towards Mr. Jimenez *as well as the custody in the desire of the children too. The Court interviewed the children, and that's where they wanted to be* [sic].

Thus, because of the "serious fault" of defendant, the children's preferences, rather than their best interests, appeared to have determined the custodial placement.

Because the court's opinion and statements create an appearance of bias, we remand for further proceedings on the issue of custody and the property division before a different judge.

The property settlement and custody provisions of the judgment of divorce are reversed and the case is remanded for further proceedings consistent with this opinion.

/s/ Maureen Pulte Reilly
/s/ Helene N. White
/s/ Philip D. Schaefer