STATE OF MICHIGAN

COURT OF APPEALS

SYLVIA F. WEAVER,

Plaintiff-Appellee,

v

EARL WEAVER, JR.,

Defendant-Appellant.

UNPUBLISHED
March 21, 1997

No. 192619
Midland Circuit Court
LC No. 93-001788-DM

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right the child custody and property division sections of a judgment of divorce. We affirm.

On appeal, defendant first contends that the trial court clearly erred in favoring neither party on the issue whether an established custodial environment existed for the parties' son, Adam. We disagree. In original actions where, as here, a temporary custody order exists, the trial court must determine whether an established custodial environment exists. *Bowers v Bowers*, 190 Mich App 51, 53; 475 NW2d 394 (1991). MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides that:

> [t]he 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 permanency of the relationship shall also be considered.

See also *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987). Whether a custodial environment exists is a factual question, *Baker, supra*; *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995), that we review under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), aff'd in part and modified 451 Mich 457 (1996). A trial court's factual findings regarding the various statutory factors are upheld on appeal unless the evidence "clearly

preponderates in the opposite direction." *Fletcher, supra* at 879; *Wiechmann v Wiechmann*, 212 Mich App 436, 439; 538 NW2d 57 (1995).

Before the parties separated, defendant was able to stay at home and care for Adam during the day and after school. Thus, it appears that defendant spent significant time with Adam, especially before Adam began school. However, there is also testimony that plaintiff, a teacher at Adam's school, dressed Adam daily, prepared most of his meals, and often telephoned defendant to ensure that Adam got off to school. Furthermore, there is testimony that plaintiff spent time with Adam during the school day, stayed home from work when Adam was sick, took Adam home from school with her almost every day, and accompanied Adam to most of the extracurricular activities he attended. Testimony indicates that defendant rarely, if ever, attended these activities with Adam. Additionally, plaintiff was granted temporary custody of Adam during the pendency of these proceedings. Under these circumstances, we conclude that the trial court's finding that there was no established custodial environment does not contravene the great weight of the evidence.

To the extent defendant contests the trial courts determinations regarding the remaining custody factors outlined in MCL 722.23; MSA 25.312(3), we consider the issue waived for failure to raise it in the statement of questions presented. MCR 7.212(C)(4); *People v Yarger*, 193 Mich App 532, 540, n 3; 485 NW2d 119 (1992); *People v Wilkins*, 184 Mich App 443, 451, n 4; 459 NW2d 57 (1990). Nevertheless, after a thorough review, we conclude that, in deciding to award custody to plaintiff, the trial court did not commit a palpable abuse of discretion, clearly err on a major issue, or make factual findings that contravene the great weight of the evidence. MCL 722.28; MSA 25.312(8); *Fletcher, supra*.

Next, defendant contends that, in attempting to reach an equal property division, the trial court incorrectly valued some assets credited to defendant and, thus, inequitably divided the parties' marital property. We disagree. The objective in a property settlement is to arrive at a division that is fair and equitable. *Steckley v Steckley*, 185 Mich App 19, 23-24; 460 NW2d 255 (1990). On appeal, this Court first reviews the lower court's factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Lacking clear factual error, we review the trial court's property division to determine if it is fair and equitable in light of the factual findings. *Sparks, supra* at 151-152; *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993). Asset valuation is a matter within the trial court's discretion. See *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993).

After thoroughly reviewing the record in this case, we hold that the division of the marital estate is fair and equitable in light of its factual findings. Although defendant contests the equality of the property division, we note that property divisions may be unequal, so long as they are equitable. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994); *Pelton v Pelton*, 167 Mich App 22, 26; 421 NW2d 560 (1988). Indeed, no mathematical formula governs property divisions. *Demman v Demman*, 195 Mich App 109, 114; 489 NW2d 161 (1992); *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986). Thus, even if defendant is correct in concluding that the trial court's asset appraisal skewed the distribution's equality, the alleged miscalculations are harmless in light

of our holding that the property division is not inequitable. See *Demman, supra* at 114.

Nevertheless, defendant's claim that the insurance proceeds credited him were used to pay off a loan and buy another vehicle is contradicted by plaintiff's trial testimony. In crediting the insurance proceeds to defendant, it appears that the trial court resolved the conflict in plaintiff's favor. Indeed, the trial court stated that it was unpersuaded of any connection between the insurance proceeds and the new car defendant purchased. Additionally, the trial court appraised the value of the mobile home lot just above what defendant said he paid for it. Defendant's claim that the property partially belongs to his brother was impeached on cross-examination when defendant admitted that his brother paid nothing for the property and only participated by attending the closing to put the property in his name. Furthermore, despite being called to do so, defendant submitted no documentation that this property was either mortgaged or purchased with funds not properly considered marital property. Under these circumstances, and realizing that the trial court is in a superior position to assess witness credibility, we find no clear error in the trial court's factual determinations.

Finally, defendant claims that the trial court abused its discretion in ordering defendant to pay plaintiff attorney fees. We disagree. Necessary and reasonable attorney fees may be awarded to enable a party to carry on or defend a divorce action. MCL 552.13; MSA 25.93; *Thames v Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991). In the present case, there is sufficient evidence that plaintiff needed financial assistance to prosecute this divorce action. Indeed, the attorney fees she sustained totaled to over half her annual salary. Further, the trial court found that some of plaintiff's fees were inspired by defendant's "obstructionist and unreasonable" conduct. This finding is not unreasonable in light of the fact that defendant stalked and harassed plaintiff and her attorney to the point that plaintiff pursued a restraining order. Although defendant complains that he had no chance to contest the itemized fees listed on plaintiff's affidavit, the trial court explicitly offered defendant an opportunity for an evidentiary hearing on this issue. Defendant never scheduled such a hearing.

Affirmed.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra