

STATE OF MICHIGAN
COURT OF APPEALS

MARCIA D. BAILEY,

Plaintiff-Appellant,

v

WAYNE DALE BAILEY,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 200865
Oakland Circuit Court
LC No. 94-478188-DM

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the child custody and property division provisions of the parties' judgment of divorce. We affirm.

Plaintiff and defendant were married on March 14, 1987, and had three children: Michael, born October 8, 1987, Melissa, born April 4, 1989, and Nicholas, born April 11, 1992. The marriage was plaintiff's third and defendant's first. They lived in Auburn Hills, where defendant began working for Electronic Data Systems in 1989; plaintiff did not work outside the home for most of the marriage.

Plaintiff's mother died in January 1993. According to defendant, plaintiff's personality changed after the death, and she became irritable and withdrawn. At the same time, plaintiff began what she described as a "financial, emotional, and economic" relationship with William Sill, who had been plaintiff's father-in-law during one of her prior marriages. Sill lived in East Lansing, and in 1994 plaintiff moved with the children to that city. There, plaintiff rented a home that Sill had purchased for her. Plaintiff filed a complaint for separate maintenance on June 9, 1994, and defendant filed a counter-complaint for divorce on July 6, 1994. Plaintiff and the children returned to Auburn Hills the following fall, when it became apparent that the commute made visitation for defendant's family difficult.

On appeal, plaintiff first argues that the trial court erred in awarding sole physical custody of the children to defendant. When reviewing a child custody matter, this Court must affirm the trial court unless its factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear legal error on a major issue.

Fletcher v Fletcher, 447 Mich 871, 877-878; 526 NW2d 889 (1994); *York v Morofsky*, ___ Mich App ___ (Docket No. 188845, issued 9/12/97), slip op p 1.

MCL 722.23; MSA 25.312(23) provides:

As used in this act, “best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

In this case, the trial court found in favor of defendant with regard to factors (d), (e), and (l), and found all the other factors to be either equal or inapplicable. Plaintiff argues that the trial court

should have found that the parties were equal with regard to factors (d), (e) and (l), and should have found in favor of plaintiff with regard to factor (b). Plaintiff also argues that the trial court erred in refusing to interview the children to determine their preferences under factor (i), and in failing to award joint physical custody.

Plaintiff first contends that the trial court erred in weighing factor (d) -- the length of time the children have lived in a stable, satisfactory environment, and the desirability of maintaining continuity -- in favor of defendant. We disagree.

The evidence showed that plaintiff's personality changed after the death of her mother, and that this change led to a disruptive environment for the children. Plaintiff told the children that they should hate their paternal grandmother, and she removed all pictures of defendant's family from the house. Defendant testified to several incidents when he came home to find that plaintiff had broken things in the house. On separate occasions, defendant found a hole in the wall, and one in the bathroom door. The children told him that plaintiff had caused them. On another occasion, plaintiff cut the cords to the television and VCR because she believed that the children were watching too much television. Plaintiff also broke the door frame forcing the door open, and broke two telephones in two days. A Friend of the Court investigator concluded that plaintiff had an "uncontrollable temper" based on these incidents, and that plaintiff appeared to be hostile toward defendant's family.

There was also evidence to support the trial court's conclusion that plaintiff's relationship with Sill was disruptive. The relationship resulted in plaintiff first moving the children to East Lansing, then back to Auburn Hills, then making frequent trips between the two cities. Plaintiff characterized her relationship with Sill as "financial, emotional, and economic," and both she and Sill testified that they had ceased all contact in November 1995. However, other testimony indicated that Sill continued to pay for plaintiff's legal fees and that plaintiff had a credit card in Sill's name. Although there was conflicting evidence regarding whether or not plaintiff planned to continue her relationship with Sill, the trial court's findings were not against the great weight of the evidence with regard to the stability of the environment plaintiff provided the children.

Plaintiff next argues that the trial court erred in finding in favor of defendant on factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes. We conclude that the trial court's findings were not against the great weight of the evidence. The trial court based its decision on the fact that defendant appeared to be more likely to remain in the same area so that the children would be near their friends and their school, and on the fact that defendant had more clearly established future plans. This was consistent with the evidence. Plaintiff testified that she had a full-time position as a receptionist with a law office, and that if she were not awarded the marital home, she might be able to afford to live in Detroit. Defendant, on the other hand, indicated that he had no plans to move out of the immediate area. He testified that, if awarded custody, his mother would care for the children while he worked. Although the trial court ordered the sale of the marital home, it is clear that defendant was more likely to remain in the local community where the children could maintain their ties to their schools and their friends. Therefore, the facts did not clearly preponderate against the trial court's finding in favor of defendant on factor (e).

Next, plaintiff argues that the trial court erred in finding that defendant was favored on factor (l), any other factor deemed relevant. The court found:

The Court has also reviewed and considered the written report and recommendation of Jack P. Haynes, Licensed Psychologist, relating to the custody issue. Mr. Haynes recommended that physical custody be awarded to Defendant.

While this Court feels strongly that both parents equally love their children and genuinely wish to do everything possible to promote the best interests of the children the Court finds, based on evidence that Defendant's life style and emotional traits are more stable than the Plaintiffs [sic].

Plaintiff argues that the trial court's reliance on Haynes' report was erroneous because it contradicted the court's findings that the mental and physical health of the parties was equal, and it amounted to double-weighting factors (d) and (g). We agree with plaintiff that the court's reliance on the psychologist's report reiterated some of its findings regarding the stability of the custodial home. However, the best interest factors have some natural overlap, and it is not necessarily error for the court to consider a particular fact under more than one factor. *Carson v Carson*, 156 Mich App 291, 299; 401 NW2d 632 (1986). Further, the court's broad discretion in child custody matters enables it to explore every aspect of the litigants' circumstances so that its custody determination will reflect the child's best interests. *Berman v Berman*, 84 Mich App 740, 745; 270 NW2d 680 (1978). Reversal is not required on this ground.

Plaintiff also argues that the trial court erred in finding that the parties were equal with regard to factor (b), the capacity and disposition to give the child love, affection and guidance and continuation of education and religion. At trial, plaintiff presented the testimony of several friends and neighbors who attested to the fact that she was a good mother. Some of the same witnesses testified that defendant was also an attentive and loving parent; only one witness testified that defendant was cold and "stand-offish" with the children. Additionally, plaintiff admitted that defendant had become more attentive to the children since the divorce action began. On this record, we find that the trial court's finding that the parties were equal with regard to factor (b) was not against the great weight of the evidence.

Plaintiff further argues that the trial court erred in failing to consider factor (i), the reasonable preference of the children. Although we have found no explanation in the record for the trial court's conclusion that the children were too young to express a preference regarding custody, it is apparent from the record that an interview with one or more of the children would not have affected the court's decision. We therefore decline to reverse or remand on this ground.

Plaintiff claims that the trial court erred in denying joint physical custody pursuant to MCL 722.26a; MSA 25.312(6a)(1). We disagree. When parents are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to decide against a joint custody award. See *Fisher v Fisher*, 118 Mich App 227, 233; 324 NW2d 582 (1982). On this record, we cannot say that the trial court's findings were against the great weight of the evidence, or that the court committed a palpable abuse of discretion in declining to

award joint custody. Defendant testified that he had obtained a prescription for antibiotics for Melissa and later learned that plaintiff had previously obtained the same medication for Melissa at a different pharmacy without notifying him. He also testified that plaintiff would not discuss her concerns regarding Nicholas's medication, and would not tell him how Nicholas's tooth had been injured. Cherub Beard, a registered nurse assigned to follow-up after Nicholas fell from a second story window and fractured his skull, testified that she had spoken with plaintiff to make arrangements for a visit, but was later unable to contact plaintiff. Defendant telephoned later to ask why nobody had come to see Nicholas. This evidence supports the trial court's finding that the parties were unable to cooperate on important decisions regarding the welfare of the children.

Plaintiff's remaining arguments concern the trial court's failure to order the return of the marital home down payment which had been supplied by her parents, and in its disposition of the marital property and debts. In reviewing a property distribution in a divorce, this Court must first review the trial court's findings of fact under the clearly erroneous standard. *McMichael v McMichael*, 217 Mich App 723, 728; 552 NW2d 688 (1996). If the findings are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.* The ruling should be affirmed unless this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

The judgment of divorce provided that the parties would sell the marital home, and the proceeds would be disbursed first to pay the mortgage balance and associated real estate closing costs, then to pay credit card debts, and finally, to the parties equally. Plaintiff first contends that the trial court's requirement that the parties' credit card debts be paid immediately with the proceeds of the sale of the marital home was not fair and equitable under the circumstances because she will not be able to purchase a new home unless she can keep her share of the proceeds and pay her share of the parties' debts in installments. We find no abuse of discretion. The record supports the trial court's decision to divide the debt obligation equally between the parties and it was not unreasonable to order the parties to satisfy their existing debt obligations before assuming further indebtedness. Further, the record indicates that the parties' equity in the marital home is nearly equal to their debt obligation. Thus, neither party will be able to purchase a new home upon the sale of the marital home, and we cannot say that the court's disposition was inequitable or unfair under the circumstances.

In a related argument, plaintiff claims that the trial court abused its discretion in valuing the parties' credit card debt as of the date of trial, rather than the date of the complaint. The determination of a valuation date of a marital asset is committed to the trial court's sound discretion. *Thompson v Thompson*, 189 Mich App 197, 199; 472 NW2d 51 (1991). Plaintiff and defendant were both living in the marital home from shortly after the complaint was filed until the judgment was entered. It is reasonable to believe that the debts incurred during that time were at least in part the result of joint household expenses. The trial court did not abuse its discretion in valuing the parties' credit card debts as of the time the judgment was entered.

Finally, plaintiff argues that the trial court erred in finding that the money her parents gave the parties for a down payment on the marital home was a gift, rather than a loan. Very little evidence was presented to support either position. Because this Court may not interfere with the trial court's role of

determining the weight and credibility of the evidence, *Barringer v Barringer*, 191 Mich App 639, 642; 479 NW2d 3 (1991), we cannot say that the court's finding was clearly erroneous.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ David H. Sawyer

/s/ Janet T. Neff