STATE OF MICHIGAN

COURT OF APPEALS

RODNEY A. HATHAWAY,

Plaintiff-Appellee,

v

LUCINDA J. POSTON-HATHAWAY,

Defendant-Appellant.

UNPUBLISHED
April 14, 1998

No. 203582
Monroe Circuit Court
LC No. 95-022338-DM

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce awarding sole physical and legal custody of the parties' minor children to plaintiff, and granting plaintiff a fifty-six percent share of the marital assets. We affirm in part, reverse in part, and remand for further proceedings.

The parties, both of whom are optometrists, married in 1978. They have two children, a daughter born in 1984 and a son born in 1988. The parties began to experience marital problems and sometime early in 1995 sought the services of a marriage counselor. According to plaintiff, the marriage continued to deteriorate throughout the summer of 1995. Plaintiff filed for divorce on November 30, 1995. At trial, defendant acknowledged that she had a romantic relationship with her dance instructor prior to plaintiff's filing for divorce but testified that their sexual relationship did not begin until December 1995, after plaintiff had filed for divorce.[1] The day before the divorce trial began, defendant purchased a house approximately six or seven doors away from the parties' marital home. She assumed occupancy of the house just prior to the conclusion of the divorce trial. Plaintiff and the children continued to live in the marital home.

Defendant first argues that the trial court committed clear legal error in failing to determine whether a custodial environment had been established prior to awarding custody to plaintiff. We agree. Whether an established custodial environment exists is a question of fact, which the trial court must address before it determines the child's best interest. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). A custodial environment 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. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987). A custodial environment can be established as a result of a temporary or permanent custody order, in violation of a custody order, in the absence of a custody order, or pursuant to an order which was later reversed. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). The circuit court must make a specific finding regarding the existence of a custodial environment. If it fails to do so, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own finding by de novo review. *Underwood v Underwood*, 163 Mich App 383, 389; 414 NW2d 171 (1987).

In the present action, a temporary custody order granting joint legal and physical custody of the children to both parties was signed December 5, 1995. Both parties were to remain in the marital home, with plaintiff having primary responsibility for the children every Wednesday, Thursday, Friday, and Saturday, and defendant having primary responsibility every Sunday, Monday, and Tuesday. The parties abided by the order throughout the pendency of the divorce. The two children were interviewed by the friend of the court referee, the court-appointed psychologist, and the court itself. While their exact comments were kept confidential, the court did indicate that the children got along well with both parents and very much wanted to be with both parents. The court further noted that the children would be unhappy if their relationship with defendant were somehow cut off and inferred that the daughter may have expressed a preference to be with defendant.

Nonetheless, in making its final custody determination, the circuit court did not first determine whether a custodial environment had been established. Failure to determine whether an established custodial environment exists prior to awarding custody constitutes clear legal error on a major issue, see *Bowers v Bowers*, 198 Mich App 320, 323; 497 NW2d 602 (1993), particularly since whether an established custodial environment exists determines the standard of proof courts are to apply to custody determinations. When a custody determination would change the established custodial environment, MCL 722.27(1)(c); MSA 25.312(7)(1)(c) requires that the change be shown to be in the child's best interest by clear and convincing evidence. *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992). Upon a finding of error, appellate courts should remand to the trial court unless the error was harmless. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994). Therefore, we remand this case to the circuit court for a determination of whether an established custodial environment existed prior to the entry of the judgment of divorce. If an established custodial environment is found to have existed, this environment can be changed only upon a showing, by clear and convincing evidence, that the change is in the best interests of the children. MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

Defendant further argues that the circuit court overly emphasized her relationship with her dance instructor, giving improper weight to this factor in determining the best interests of the children. Custody disputes are to be resolved in the children's best interest, as measured by the factors set forth in MCL 722.23; MSA 25.312(3). Specifically, defendant maintains that the circuit court erred in evaluating statutory best interest factors b, d, e, and l, because the court's analysis under these factors was permeated by its consideration of the relationship. We agree with defendant that the circuit court erred in considering her relationship throughout its analysis of the best interest factors. Because we find that this error was not harmless, our appropriate response is to remand to the circuit court to reevaluate the best interest factors and the appropriate custodial arrangement. See *Fletcher, supra* at 888-889.

Because it will be germane to the circuit court's reevalution on remand, we do note that the court mentioned defendant's extramarital relationship throughout its analysis despite the court's recognition of opinions reversing trial courts for overemphasizing extramarital relationships in determining custody. We remind the court, as it plainly was aware, that this overemphasis is inappropriate. In an opinion mentioned by the circuit court, *Truitt v Truitt*, 172 Mich App 38; 431 NW2d 454 (1988), this Court reversed the trial court's custody determination because, among other things, the court based its findings on best interest factors d and e on its conclusions about one party's extramarital relationships. As the panel noted, "A trial judge must consider, evaluate, and determine each of these factors individually to determine the best interests of the child." *Id.* at 47. Moreover, in its reevaluation of factor f, the moral fitness of the parties, the circuit court "must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship." *Fletcher, supra* at 887. Even when evaluating factor f, extramarital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship. *Id.* "[T]o punish infidelity at the risk of jeopardizing a child's best interest simply contravenes the overriding purpose of the Child Custody Act." *Id.* at 888.

Finally, we make no comment on defendant's contention that a proper analysis of the best interest factors would favor a grant of custody to her. Although we recognize that the circuit court was not required to accept their recommendations, we do note that both the court-appointed psychologist and the friend of the court recommended that the joint custody arrangement established during the pendency of the divorce proceedings was in the best interests of the minor children and should be continued.

Defendant next argues that the trial court improperly valued defendant's business. We disagree. When reviewing dispositional rulings, we must first review the circuit court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If the findings of fact are upheld, we must then decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.* at 151-152. The circuit court's ruling should be affirmed unless we are left with the firm conviction that the division was inequitable. *Id.* In the present case, the circuit court did not commit clear error in valuing defendant's business. Defendant herself represented her business to be valued at $41,000 when she signed a loan application. Furthermore, the trial court's evaluation of $41,000 was within the range of figures given by the parties' experts. As such, the valuation was not clearly erroneous. *Rickel v Rickel*, 177 Mich App 647, 650; 442 NW2d 735 (1989).

Next, defendant contends that the circuit court improperly distributed the proceeds twice from a single bank account. We agree. Defendant maintained two checking accounts, one denominated the "household account" and one denominated the "business account." Defendant paid household expenses out of the household account and deposited moneys in the business account for the purpose of paying taxes. Plaintiff's expert included the balance in the business account, which at the time of the valuation was approximately $20,000, to arrive at the figure of $42,000 as the value of defendant's business. Plaintiff's expert was unaware at the time of his evaluation that this same account was listed separately as a marital asset. Defendant's expert also agreed that the asset, as an account or as part of defendant's business, should not be counted twice.

The court valued defendant's business at $41,000, which valuation was based, in part, on the money in the business account, and ordered that the value be split on a 56/44 percent basis, with plaintiff receiving the greater amount -- $22,960. Because plaintiff was awarded a percentage of the value of defendant's business, which included the money in the account, he cannot also again be awarded a portion of the account as part of the marital estate. As such, the circuit court erred in distributing this account twice.

Defendant next argues that the division of the marital estate on a 56/44 percent basis, with the greater amount awarded to plaintiff, was inequitable. Again, we agree. Absent a binding agreement, the goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Each spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court. *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990).

> Although divisions of property are not governed by any set rules, certain principles nonetheless apply. Among the equitable factors to be considered are the source of the property; the parties' contributions toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity. [*Hanaway v Hanaway*, 208 Mich App 278, 292-293; 527 NW2d 792 (1995).]

Fault is a factor to be considered, but it is not the only factor. *Sparks v Sparks*, 440 Mich 141, 158; 485 NW2d 893 (1992). "[T]he trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Id.* "[W]here any of the factors . . . are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors." *Id.* at 159.

In the present case, the circuit court determined that the majority of the marital estate was to be split between the parties on a 56/44 percent basis, with plaintiff receiving the greater amount. In reaching its decision, the court found that "fault is primarily in the wife's conduct" and that, while plaintiff

may have been insensitive and not as interested in the marriage as in other things, the court could not "find anything significant there." "[T]he division of the assets . . . ought to be 56 percent to the husband, 46 [sic] percent to the wife because there is substantial marital fault." The court failed to address any of the other factors. "Marital misconduct is only one factor among many and should not be dispositive." *Sparks*, *supra* at 163. Moreover, in the present case, defendant maintained and the evidence tended to show that the sexual relationship with her dance instructor did not begin until after plaintiff had filed for divorce. It is improper to hold divorcing parties to a standard of morality or behavior appropriate for marital partners. *Knowles*, *supra* at 500. We find that the division of the marital estate was inequitable because it was based entirely on the issue of the alleged marital misconduct of defendant, and the circuit court erred in failing to address the other delineated factors in dividing the marital estate.

Finally, defendant argues that this matter should be assigned to a new judge on remand. A motion to disqualify a judge must first be decided by the challenged judge. *Homestead Devpt Co v Holly Twp*, 178 Mich App 239, 248; 443 NW2d 385 (1989). An appellant may not seek disqualification of a judge for the first time on appeal. *Id.* Defendant did not preserve this issue for appellate review, and we decline to address it.

Affirmed in part, reversed in part. We remand to the circuit court for reevaluation of its custody award and division of the marital assets. On remand, the circuit court should consider up-to-date information, including the children's current and reasonable preferences and any other changes in circumstances arising since the original custody order. *Fletcher*, *supra* at 889. This Court does not retain jurisdiction.

/s/ Henry William Saad
/s/ Myron H. Wahls
/s/ Hilda R. Gage

[1] Defendant and her dance instructor have since married.