STATE OF MICHIGAN

COURT OF APPEALS

LISA ANN DETTLOFF,

Plaintiff-Appellee,

V

DENNIS MICHAEL DETTLOFF,

Defendant-Appellant.

UNPUBLISHED
December 21, 2006

No. 268551
Presque Isle Circuit Court
LC No. 03-082567-DM

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. On appeal, defendant challenges the trial court's refusal to enforce the agreement concerning the parties' marital home, its decision to award short-term spousal support to plaintiff, and its decision awarding plaintiff primary physical custody of the parties' minor children. We affirm in part, reverse in part, and remand for further proceedings.

The parties were married on September 25, 1998. Two children were born during the course of the marriage, Bailey (d/o/b 2/25/99) and Blaine (d/o/b (5/25/00), and plaintiff has two other minor children from a previous marriage. Plaintiff initiated divorce proceedings through counsel on September 17, 2003. Defendant filed an answer to the complaint, also through counsel, on October 7, 2003. During a November, 2003 attempt at reconciliation, *and while the divorce proceedings were still pending*, the parties, without consulting their counsel, signed an agreement that provided:

> In the event of the current and/or future separation and divorce, I Lisa Ann Dettloff, agree to forfeit any and all compensation that I am legally entitled to regarding our residence pertaining to all buildings and property located at 19754 Evergreen Road in Presque Isle Township.

The agreement pertained to the marital home, which had been owned by the defendant well prior to the marriage. The record also established that defendant had made substantial improvements to the home both prior to and during the marriage, and that the deed to the home was in defendant's name only.

After the reconciliation failed, defendant filed a motion to enforce the agreement which plaintiff opposed. While agreeing that she signed the agreement understanding that her agreement to forfeit any claim in the marital home "was a condition precedent to reconciliation," plaintiff nevertheless asserted in opposition to defendant's motion to enforce the agreement that because the agreement did not constitute a comprehensive settlement regarding issues pending in the divorce proceeding, it was unenforceable. Plaintiff alternatively asserted that she signed the agreement under duress. The trial court denied enforcement of the agreement in part on the basis that it constituted an "end run" around trial counsel, and in part on the basis that because the agreement purported to resolve a dispute only as to one item of property, the agreement did not constitute a comprehensive settlement which was sufficiently negotiated by the parties to warrant enforcement. The trial court did not rule on plaintiff's assertion that she signed the agreement under duress.

The matter proceeded to trial. Plaintiff was subsequently awarded a portion of the equity increase of the home, as well as various personal property and spousal support for a period of six months. As custody of the minor children was at issue, a hearing was also conducted to determine the best interests of the children. The parties were ultimately given joint custody of the minor children, with primary physical custody being vested in plaintiff.

Defendant first argues that the trial court erred by refusing to enforce the parties' agreement concerning the marital home. We agree. As we noted in *Lentz v Lentz*, 271 Mich App 465, 472-473; 721 NW2d 861 (2006), our Supreme Court explained in *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005), that:

> A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.* Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that " '[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' " [Emphasis in original]

Moreover, "[a]bsent fraud, coercion, or duress, the adults in [a] marriage have the right and the freedom to decide what is a fair and appropriate division of the marital assets, and our courts should not rewrite such agreements." *Lentz*, *supra* at 472.

> In order to establish the existence of duress, plaintiff must show the existence of coercion that is "illegal in nature, manifestly unjust, or purposely oppressive." Stott Realty Co v Detroit Sav Bank**,** 274 Mich 80, 84; 264 NW 297 (1936) In order to void a contract on the basis of economic duress, the wrongful act or threat must deprive the victim of his unfettered will. Further, the party threatened must not have an adequate legal remedy available**.** *Hungerman v McCord Gasket Corp***,** 189 Mich App 675, 677; 473 N.W.2d 720 (1991), citing *Barnett v International Tennis Corp,* 80 Mich App 396, 406; 263 NW2d 908 (1978).

As in *Lentz*, in the instant case plaintiff signed this postnuptial agreement in anticipation of "the separation or divorce." See *Lentz*, *supra* at 471. We find unpersuasive plaintiff's contention and the trial court's finding that there were insufficient and incomplete negotiations to permit enforcement of the agreement. The agreement is unambiguous on its face, and we enforce unambiguous contracts as written. *Id* at 472, citing *Rory*. In addition, courts will generally not inquire into the adequacy of consideration, see *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 596; 669 NW2d 304 (2003), rev'd in part on other grounds 469 Mich 1003 (2004), and we see no basis to do so on the facts of this case. Additionally, plaintiff's emotional distress concerning the divorce and the conditions under which defendant would agree to attempt to reconcile are insufficient as a matter of law to establish duress which would vitiate the unambiguous contract agreed to by the parties.[1]

Defendant next argues that the trial court erred in awarding plaintiff spousal support. We disagree.

"A divorce court has the discretion to award [spousal support] as it considers just and reasonable." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996); see also *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). "The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Magee*, *supra* at 162. "Relevant factors for the court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case." *Id.*

Plaintiff sought spousal support so that she could return to school and obtain a degree. Contrary to what defendant asserts, plaintiff testified that she took classes during the marriage. Although plaintiff indicated she no longer intended to pursue a bachelor's degree, she did intend to pursue a nursing degree in order to increase her earning potential and enable her to purchase a home. Under these circumstances, the trial court did not abuse its discretion in awarding plaintiff spousal support for a period of six months.

Next, defendant challenges the trial court's custody decision. In this regard, defendant first argues that the trial court erred in finding that the children did not have an established custodial environment with either party rather than finding that the custodial environment was with him. We conclude, however, that this issue was waived.

At the custody hearing, defendant's attorney specifically stated, "Our argument today is going to be that there is not an established custodial environment." The trial court found that an established custodial environment did not exist with either parent, consistent with what defendant argued. A party may not seek redress on appeal by taking a position contrary to that argued in the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

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[1] While the trial court did not make findings on whether plaintiff established duress sufficient to set aside the agreement, all the facts necessary for this court to resolve this question of law are presented in the record. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Moreover, defendant gave this argument only cursory treatment, with no citation to supporting authority. Therefore, we consider this issue waived and decline to consider it further. See *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

Defendant also argues that the trial court erred in determining that the best interests of the minor children supported placing primary physical custody of the children with plaintiff. MCL 722.27(1) mandates that custody disputes be resolved in the best interests of the children. MCL 722.23 states:

> 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.

MCL 722.28 provides that a trial court's custody decision "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. De novo review is precluded. *Fletcher v Fletcher*, 447 Mich 871, 882 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Under the great weight of the evidence standard, the trial court's findings of fact "should be affirmed unless the evidence 'clearly preponderates in the opposite direction.'" *Id*. at 879 (Brickley, J.), 900 (Griffin, J.), quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). The court's discretionary dispositional rulings, such as "[t]o whom custody is granted," are reviewed for a palpable abuse of discretion. *Fletcher*, *supra* at 880-881 (Brickley, J.), 900 (Griffin, J.).

Regarding factor (a), the evidence indicated that while defendant loves the children and they love him, the children had stronger emotional ties with plaintiff because she has been their primary caregiver since birth. Additionally, the children have a strong bond with plaintiff's two children from a prior marriage. Blaine had a hard time visiting defendant after the separation, and would hide from defendant. The trial court's finding that this factor slightly favored plaintiff is not against the great weight of the evidence.

As to factor (b), the parties appeared equally capable of giving the children love, affection, and guidance. But the evidence indicated that only plaintiff attended church with the children during the marriage. Plaintiff also enrolled the children in Sunday school. Defendant only began attending church after the parties separated. The trial court's determination that this factor slightly favored plaintiff is not against the great weight of the evidence.

The trial court found that factors (c) and (d) both favored defendant, but defendant maintains that the court should have found that these factors favored him overwhelmingly. Regarding factor (c), although defendant clearly has greater financial capacity to meet the children's material needs, the disparity can be leveled with appropriate child support. Moreover, the trial court considered plaintiff's money management skills in making a determination on this factor.

We agree that factor (d) favored defendant, given that plaintiff had moved frequently and had been involved in several relationships since the parties separated. Although the parties had spent equal amounts of time with the children since the separation, the children had lived with plaintiff and their two older siblings since birth. The trial court appropriately considered the desirability of the children maintaining their relationship with their siblings in ruling that factor (d) slightly favored defendant. We find no error in the trial court's findings with respect to factors (c) and (d).

The trial court found that the parties were equal with respect to factors (e), (f), and (g). We find ample support in the record for these findings. Contrary to what defendant argues, the trial court did not err by failing to consider plaintiff's past romantic partners in its evaluation of factor (e), given that none of them were part of plaintiff's proposed custodial home. Regarding factor (f), we acknowledge that the evidence showed that plaintiff was involved in three relationships in two years, including one very poor choice, and apparently signed defendant's name to a credit card application during the marriage. But the evidence also showed that defendant has a history of drug and alcohol abuse, which he failed to fully acknowledge or

address. Moreover, defendant grew and stored marijuana in the marital home, and participated in a marijuana-growing venture with two other people.

Concerning factor (g), the mental and physical health of the parties involved, there was no evidence concerning the parties' physical health, and we agree with the trial court that defendant failed to show that plaintiff suffered from any mental health problems. The trial court did not err in finding that the parties were equal with respect to factors (e), (f), and (g).

Regarding factor (h), plaintiff took care of the children's home, school, and community needs until the separation, although the parties appear to have shared these tasks since the separation. Plaintiff, however, lives near town where the children can be close to school, community activities, and plaintiff's work, while defendant lives approximately 20 to 25 minutes outside of town. The trial court's determination that this factor slightly favored plaintiff is not against the great weight of the evidence.

Factor (i), was found to be equal, given that the children did not testify during the hearing. The trial court found that, due to the children's young age, no weight would be placed upon what the reasonable preferences of the children might be. We agree this factor is not applicable because of the children's ages.

Regarding factor (j), the trial court noted that both parties had continuing problems with the day care provision of the court's interim order. Plaintiff was also reticent to share information with defendant. The trial court, however, was more concerned that defendant seemed obsessed with plaintiff's daily routines, kept records of her comings and goings, and tape-recorded their conversations, which generated hostility between the parties. The trial court's determination that this factor slightly favored plaintiff is not against the great weight of the evidence.

Defendant argues that the trial court should have weighed factor (k) in his favor because plaintiff used to become physically violent against him and has also struck the children. The trial court found that there was arguing between the parties, but did not find that it amounted to domestic violence. Further, while plaintiff sometimes physically disciplined the children, the trial court found that plaintiff's discipline methods did not rise to the level of domestic violence. The trial court's finding that this factor did not favor either party is not against the great weight of the evidence. Similarly, the trial court's finding that factor (l), any other factor, did not favor either party is not against the great weight of the evidence.

In light of its findings regarding the best interest factors, the trial court did not abuse its discretion in awarding physical custody of the children to plaintiff.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder