STATE OF MICHIGAN

COURT OF APPEALS

GAYLE CHRISTINE BYERS, Plaintiff-Appellee,	UNPUBLISHED May 5, 2011
V	No. 300027 Kalamazoo Circuit Court
BRIAN JAY BYERS, Defendant-Appellant.	LC No. 2009-007323-DM

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. CHILD CUSTODY

Defendant argues that the trial court erred by failing to consider joint custody. We review this unpreserved constitutional claim for plain error affecting his substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Defendant argues that the trial court erred by failing to award him joint custody of the children. If a party requests joint custody, then the trial court is obligated to consider it. MCL 722.26a(1); *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006). Because defendant, who had been granted supervised visitation pursuant to a temporary custody order, did not request joint custody, the trial court was not required to consider awarding defendant joint custody. Nonetheless, the trial court did order joint legal custody with plaintiff and defendant. Thus, defendant's argument that the trial court erred by failing to consider joint custody is misplaced.

Defendant also contends that the trial court erred by awarding plaintiff physical custody of the children without making factual findings regarding the best interests of the children under MCL 722.23. We review a trial court's entry of a custody order for an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 879-881; 526 NW2d 889 (1994). An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

In his answer to the complaint, defendant requested a custodial arrangement reflecting the best interests of the children. A review of the trial transcript reveals that defendant's intent at the time of the hearing was not to obtain physical custody of the children but, rather, to be granted unsupervised visitation with the children. Indeed, defense counsel acknowledged during closing statements at trial that defendant is "in denial about his alcoholism. . . . If the court would order unsupervised, I think regular attendance at AA/NA whatever, proof of it, would totally be appropriate. . . . So, your Honor, supervised, I think no. . . . I think this court has experienced enough that it can still protect the children."

Child custody disputes are governed by the Child Custody ACT (CCA), MCL 722.21 *et seq*. *Harvey v Harvey*, 470 Mich 186, 191-192; 680 NW2d 835 (2004). A trial court has a duty to "ensure that the resolution of any custody dispute is in the best interests of the child." *Id*. at 92. Stipulated agreements regarding custody do not relieve the trial court of its affirmative duty under the CCA, as "[t]he trial court cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000).

Although we are convinced after a thorough review of the record that the trial court properly determined that it was in the best interests of the children that plaintiff be awarded physical custody, the trial court is obligated to weigh the statutory best interest factors found in MCL 722.23 and make findings and conclusions regarding each factor. *Grew v Knox*, 265 Mich App 333, 337; 694 722 (2005). The trial court's failure to evaluate and explicitly state findings as to each of the statutory best interest factors requires us to reverse and remand for a new child custody hearing. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008).

II. PARENTING TIME

Defendant also argues that the trial court erred in awarding him parenting time in accordance with the standard parenting time outlined in the Kalamazoo County Parenting Time Handbook. "Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008). "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*. at 705. "Special deference is given to the trial court's findings when they are based on the credibility of the witnesses." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

Defendant asserts that the trial court did not consider the children's best interests as evidenced by its failure to state findings related to each best interest factor. MCL 722.27a provides in pertinent part:

> (1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency,

duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

Before deciding a parenting time dispute the trial court must, at a minimum, evaluate the best interest factors enumerated in MCL 722.23 and the parenting time factors in MCL 722.27a(6) and make findings of fact that relate to the contested issues. *Shade v Wright*, ___ Mich App ___; ___ NW2d ___ (2010), slip op p 8. However, where a modification in parenting time does not effectuate a change in physical custody, the trial court need not make express findings. It is sufficient if it is clear from the record that the trial court considered the children's best interests. *Id*. at 8.

In this case, under the temporary custody order, defendant was only allowed limited supervised visitation. In awarding him standard unsupervised visitation in the judgment of divorce, the trial court stated that it did not believe defendant was a danger to the children, that defendant was a good father, and that the children loved him. The court also cautioned defendant that it would reinstate supervised visitation if defendant violated any of the parenting time conditions. Although the trial court made no express reference to the children's best interests, its statements reflected that it determined that expanding defendant's parenting time and allowing unsupervised visitation was in the children's best interests.

Defendant also argues that the trial court's parenting time order was not reasonably calculated to promote a strong relationship with his children. We disagree. Defendant cites to plaintiff's failures in allowing him to fully exercise his parenting time before trial, but defendant was not without fault. Further, defendant and his attorney admitted that defendant was not the picture of mental health during most of the divorce action's pendency. While defendant characterizes the trial court's decision as relegating him to being a weekend father, it was actually an expansion of his parenting time in duration, frequency, and type. Moreover, the trial court provided for a review of its decision before the new school year started. Overall, we find that the trial court's findings were not against the great weight of the evidence and its parenting time decision did not constitute an abuse of discretion.

III. IMPUTATION OF INCOME

Defendant argues that the trial court erred in imputing $52,000 in annual income to him. We review for an abuse of discretion a trial court's decision to impute income. *Berger*, 277 Mich App at 723, 725. We review for clear error the trial court's findings underlying its child support award determination. *Id*. at 723. "A finding is clearly erroneous is this Court, on all the evidence, is left with a definite and firm conviction that a mistake was made; the appellant bears the burden of showing that a mistake was made." *Id*.

In calculating child support under the Michigan Child Support Formula, a trial court has the discretion to impute income to a parent, usually when there is a voluntary reduction of income or a voluntary unexercised ability to earn. *Berger*, 277 Mich App at 725. In determining whether to impute income, a court should consider: (1) prior employment experience and history, (2) education level and special skills or training, (3) physical and mental disabilities, (4) availability for work, (5) availability of employment and prevailing wage rates in the local area, (6) the presence of the parties' children in the person's home and its impact on earnings, (7)

personal history, (8) whether there is any evidence that the person is able to earn the imputed income, and (9) whether there is evidence of a significant reduction in income compared to the period that preceded the filing of the divorce action. 2008 MCSF 2.01(G)(2).

In imputing income for purposes of child and spousal support, defendant asserts that the trial court did not also take into consideration the parties' half-interest in the marital home, the debts associated with their vehicles, and the bad debts associated with plaintiff's spending. While the parties had financial assistance with the purchase of the marital home, there are costs associated with the maintenance of a 5,000 square foot home. Also, the evidence of overdrafts and insufficient funds dated to after the parties' separation, which did not reflect on defendant's income during the majority of the marriage. Further, while the parties' vehicles had outstanding loan balances, there was no evidence that the monthly payments were not timely. Thus, we find that the trial court did not clearly err in considering the above factors in imputing income to defendant.

Furthermore, the evidence showed that the parties' lifestyle, despite their debts, indicated that defendant earned more than he claimed. The parties' 2008 tax return reflected a business income of over $22,000 and they stipulated to an annual income for defendant of just over $20,000 for interim support purposes. However, the annual payments for plaintiff's Suburban, the family's health insurance, and real estate taxes totaled over $31,000. Additionally, the parties paid a nanny between $140 and $280 a week for five years, as well as expenses associated with the children and marital home. Moreover, while there was no testimony regarding a specific sum, defendant was permitted to keep the rents from his mother's various rental properties, estimated to be between 25 and 30 properties, a source of income that was to continue for the foreseeable future. If defendant retained rents from only 15 properties at a modest $300 per month, he would have earned $54,000 a year. Accordingly, on the record before this Court we cannot conclude that the trial court abused its discretion in imputing an annual income of $52,000 to defendant for child and spousal support purposes.[1]

IV. PROPERTY DIVISION

In *Berger*, 277 Mich App at 717-718, this Court summarized the standard for reviewing a trial court's decision distributing property in a divorce action as follows:

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[1] Defendant also argues that the amount of child support he was ordered to pay was miscalculated based on the number of overnights he would have under standard parenting time. Defendant did not present this issue in the statement of questions presented. We need not consider an issue that is not set forth in the statement of questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nonetheless, we note that the lower court record contains an October 8, 2010, order providing for the reinstatement of *supervised* parenting time.

> On appeal, this Court must first review the trial court's findings of fact for clear error. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made. The trial court's factual findings are accorded substantial deference. If the trial court's findings of fact are upheld, this Court must decide whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable. [Citations omitted.]

As the *Berger* Court stated, *Id*. at 716-717:

> The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. Trial courts may consider the following factors in dividing the marital estate: (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. The trial court must consider all relevant factors but "not assign disproportionate weight to any one circumstance." [Citations omitted.]

Where any of these 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." *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992).

In this case, contrary to plaintiff's assertion, there was no evidence that the debt subject to division was anything but marital. The only evidence of the parties' debt was presented in a trial exhibit prepared by defendant. The trial court made no specific findings of fact and did not address any of the property division factors; it simply disposed of the debt by assigning it to the party in whose name it was. Yet, the testimony indicated that four credit card accounts were joint, and several of the accounts did not have outstanding balances listed. Based on the record before us, we are unable to determine whether the property division was equitable. Therefore, we remand in order for the trial court to clarify the basis for its decision and more specifically detail the accounts and amounts allocated to each party, taking further evidence as it deems necessary.

Next, defendant argues that the trial court's decision to award plaintiff $15,000 for her equal share of the marital property that remained in the marital home, which defendant occupied, was clearly erroneous because there was no evidence to support it. We disagree. Plaintiff testified that the parties received approximately $90,000 for the replacement cost of personal items lost in a fire at the home approximately five years earlier. The trial court noted plaintiff's counsel's position that the items had a 50% depreciation in value in that time frame. The court, found however, that the personal property had depreciated more than 50% in five years and

estimated that the personal property had a current value of $30,000. The court also noted that it "was eluded that most of the items were left [when plaintiff vacated the premises] and that very few things were taken." The court then stated:

> That each – and each maintain the items that they have in their possession. All the items she has, she gets to keep. All the items he has, he gets to keep, but he owes her another $15,000 reflective of the extras that he received from the marital home.

On this record, the trial court did not clearly err in awarding plaintiff $15,000 for her half-interest in the personal property left in the marital home.

Defendant argues that the trial court's valuation of the Concord and Iowa rental properties was clearly erroneous. A trial court's findings of the value of marital assets in a divorce are reviewed for clear error. *Woodington*, 288 Mich App at 355. The parties owned an interest in the properties for which defendant's mother paid and defendant executed notes in favor of her secured by the real estate. The trial court did not find as credible defendant and his mother's contention that defendant was obligated to repay her. Even accepting as genuine the supporting documentation regarding the Concord property, which the trial court rejected, defendant had not made a payment on the debt in over nine years, and there was no evidence that defendant's mother ever attempted to collect. If fact, she admitted that she had not calculated the amount defendant owed until trial. Thus, the trial court's credibility determinations aside, the evidence indicated that defendant's mother did not intend for or expect repayment. Therefore, the trial court did not clearly err in finding that plaintiff's interest in the Concord property was valued at $34,000, which was plaintiff's half of the parties' half of the value of the property.

The trial court also declined to consider any indebtedness as affecting the Iowa property's value. There was no evidence that defendant made any payments on the note executed in 2003. Thus, we find that deference should be given the trial court's determination that the Iowa note did not affect the property's value. MCR 2.613(C). Defendant also asserts that he received a loan through Fifth Third Bank, which placed a lien on the Iowa property. However, the commercial loan statement defendant presented did not state that it was secured by the Iowa property. Therefore, it did not support defendant's claim of a bank lien. Accordingly, we find that the trial court did not clearly err in finding that plaintiff's interest in the Iowa property was valued at $14,500, which was approximately one-half of the value of the property.

Finally, defendant has abandoned any claim of error regarding the marital home's value because he failed to brief it. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004).

V. CONTEMPT ORDER

Defendant argues that the trial court plainly erred in summarily finding him in contempt during a February 26, 2010, status conference for speaking to his attorney. A trial court has the power to find a person in contempt of court for "[d]isorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority." MCL 600.1701(a).

Contempt is a willful act that tends to impair the authority of the court. *Pontiac v Grimaldi*, 153 Mich App 212, 215; 395 NW2d 47 (1986). MCL 600.1711(1) provides, "When any contempt is committed in the immediate view and presence of the court, the court may punish it summarily by fine, or imprisonment, or both." "Such direct contempt occurs when all the facts necessary to find the contempt are within the personal knowledge of the judge. *In re Contempt of Robertson*, 209 Mich App 433, 438; 531 NW2d 763 (1995). The record clearly reveals that defendant was found in contempt for his behavior in the courtroom only.

Defendant spoke in court after the trial court instructed him not to say another word. Whether defendant's words were properly categorized as a "vocal outburst" and the willfulness of his actions are difficult to determine from the written record. We are unable to discern defendant's tone, inflection, or possible gestures. Therefore, we cannot say that the trial court committed plain error when it found defendant in contempt. MCL 600.1701(a). Defendant also argues that the trial court denied him due process by failing to give him an opportunity to present a defense before sentencing. Summary punishment for contempt committed in immediate view and presence of the court satisfies due process. *In re Contempt of Warriner*, 113 Mich App 549, 554; 317 NW2d 681 (1982). It is permissible "where immediate corrective action is necessary, to vindicate its dignity and authority by punishing summarily any lawyer, litigant, witness, or other person who, in the judge's presence in open court, willfully and contumaciously obstructs the administration of justice." *In re Meizlish*, 72 Mich App 732, 740; 250 NW2d 525 (1976) (citation omitted). It is apparent from the record that the trial court believed immediate corrective action was necessary to impress on defendant that it meant what it said. Again, the willful and contumacious nature of defendant's behavior is difficult to discern from the record. Therefore, the trial court did not plainly err in summarily convicting and punishing defendant. Accordingly, defendant was not entitled to additional procedural safeguards.

VI. TRIAL DATE

Lastly, defendant argues that the trial court erred in giving the parties two weeks' notice of the trial assignment where it had not entered a scheduling order or held a pretrial conference. Because defendant did not object below on the same grounds as on appeal, we review for plain error affecting his substantial rights. On its own motion, a trial court can expedite a trial. MCR 2.501(B). Generally, parties must be given 28 days notice for trial assignments unless "the court directs otherwise for good cause." MCR 2.501(C).

Defendant argues that there was no good cause for only giving two weeks' notice of the trial assignment, particularly where no scheduling or pretrial orders had been entered giving the parties guidance regarding discovery. He asserts that the age of the case alone was insufficient to establish good cause. The argument has no merit. The parties had substantial custody-related issues that required frequent court intervention. Also, defendant demonstrated erratic behavior that was apparent to the trial court. Although defense counsel complained that he had not had an opportunity to complete discovery on debt related issues, the trial court stated that it would allow time to take additional testimony as needed in regard to issues for which defendant had yet to obtain discovery. Under these circumstances, the trial court did not plainly err in finding there was good cause to expedite trial.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello