STATE OF MICHIGAN

COURT OF APPEALS

JEFFERY EARL ANDERSON, Plaintiff-Appellant,	UNPUBLISHED February 24, 2015
v	No. 321880 Ottawa Circuit Court
SVITLANA ANDERSON, Defendant-Appellee.	LC No. 11-071347-DM

Before: RIORDAN, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Plaintiff, Jeffery Earl Anderson, appeals as of right in this divorce action that resulted in the dissolution of his marriage to defendant, Svitlana Anderson. The trial court granted sole legal and physical custody of the parties' minor daughter (born in 2010) to defendant. The trial court also ordered plaintiff to pay child support, calculated with an imputed income of $70,900. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. CUSTODY

A. STANDARD OF REVIEW

Plaintiff first contends that the trial court erred in awarding sole custody of the parties' daughter to defendant. As we recognized in *McIntosh v McIntosh,* 282 Mich App 471, 474-475; 768 NW2d 325 (2009):

> We apply three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. This Court defers to the trial court's determinations of credibility. Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. Third, discretionary rulings are reviewed for an abuse of discretion. [Quotation marks omitted; see also *Berger v Berger*, 277 Mich App 700, 705-706; 747 NW2d 336 (2008).]

B. ANALYSIS

Plaintiff claims that the trial court's finding there was no established custodial environment is against the great weight of the evidence. Even assuming plaintiff is correct, and that a clear and convincing standard should have been applied rather than a preponderance of the evidence standard, reversal is not warranted.

Plaintiff claims that the trial court's findings on the various best interest factors in MCL 722.23 were against the great weight of the evidence. First, plaintiff challenges factor (b), which provides: "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." MCL 722.23(3)(b). The trial court found this factor favored defendant because plaintiff lacked the disposition to give their daughter love, affection, and guidance. The court noted that plaintiff would leave his daughter with third parties to pursue his own interests and to pursue career opportunities out of state. The court found that defendant's disposition was "to prioritize his own needs, desires, and plans over opportunities to provide love, affection, and guidance for his child."

The record supports the court's findings. The financial business that defendant was involved with—DMI Financial—was based in Illinois, and a new construction job he took also had out-of-state locations. Defendant went on numerous out-of-state wrestling trips, and sometimes missed parenting time with the minor child because of these travels. Defendant's brother would watch the minor, a day or two, when plaintiff was out of town on wrestling trips. The brother's girlfriend, the neighbors, cousins, and plaintiff's parents also watched the minor while plaintiff was away. While plaintiff highlights evidence regarding his disposition to love and care for the minor, the trial court did not credit such evidence, as was the court's prerogative. See *Berger*, 277 Mich App at 705 ("This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors.").[1] As such, the trial court's finding on this factor was not against the great weight of the evidence.

Defendant next challenges factor (c), which is: "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." MCL 722.23(c). The trial court found that the parties were equal for this factor. Although defendant was unemployed, she testified that with child support and assistance from family and friends, she is able to provide for all their daughter's needs. Plaintiff highlights no evidence that their daughter lacked any material goods while in defendant's care. The trial court was not in error on this factor.

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[1] While plaintiff also cites to defendant's lack of religion, defendant testified that she would encourage the minor's faith. The trial court did not appear to give this issue significant weight, and it was a finding within the trial court's discretion. "[Plaintiff's] arguments do not overcome the deference due the trial court in making such determinations." *Berger*, 277 Mich App at 711.

Next, is factor (d): "The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court found that defendant was slightly favored for this factor because plaintiff and his relatives seemed to use the marital home as a temporary abode mainly for parenting time, and plaintiff's business and his employment primarily appeared to be in Illinois. The evidence supports the trial court's finding. Plaintiff's brother and nephew periodically lived in the marital home when the brother had custody of his minor child, plaintiff's nephew. Plaintiff's other brother and his daughters also stayed in the house periodically. According to plaintiff, the home was in a state of disrepair and would soon be put up for sale. There also was significant testimony that plaintiff's place of business was in Illinois, and that he traveled out of the country for wrestling matches. In contrast, no one other than defendant and the child lived in her home or spent the night on a regular basis. Under these circumstances, the evidence did not clearly preponderate against the trial court's finding. *Id.*[2]

Factor (e) is: "The permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court found this factor favored defendant because plaintiff used the marital home as a base to exercise parenting time and because a fluctuating group of people used the home. "The stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions. Of course, every situation needs to be examined individually." *Ireland v Smith*, 451 Mich 457, 465 n 9; 547 NW2d 686 (1996). Although plaintiff's brother and nephew lived in the marital home, their presence was sporadic, and occurred when the brother had custody of the nephew. In addition, another one of plaintiff's brothers and his daughters were frequent visitors on the weekends, but not permanent residents. Because there was a constant change in the people who were living at the marital home, the evidence did not clearly preponderate against the trial court's finding. *Ireland*, 451 Mich at 465 n 9.

Factor (f) concerns: "The moral fitness of the parties involved." MCL 722.23(f). "[T]he question under factor f is *not* who is the morally superior adult; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (emphasis in original). The trial court found that this factor favored defendant. It found that, although defendant had a conviction for retail fraud, plaintiff had made conflicting statements to the federal government and to the court, and made every effort to prevent the court from determining his true economic status. According to the trial court, plaintiff's "cavalier attitude" regarding providing information to it to determine appropriate child support showed an "amoral prioritization of [his] own needs and desires above the needs of his child."

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[2] We reject plaintiff's attempt to conflate factor (d) with the established custodial finding. The inquiry of how long a child has lived in a stable, satisfactory environment is different than determining with whom an established custodial environment exists. See, e.g., *Berger*, 277 Mich App at 708-710.

Plaintiff's testimony about his economic status was less than forthcoming. When asked if he was disclosing all of the income he made for the year, he claimed that he could not recall, and was less than certain. He failed to disclose his complete 2012 tax return. He also pleaded the "Fifth" when asked if he was an authorized user on the DMI Financial account with Citizens First Bank. As the trial court found, plaintiff's obliqueness regarding his financial situation impacted the trial court's ability to accurately calculate child support payments. While plaintiff places great weight on defendant's conviction for retail fraud, the trial court took that into consideration. The court simply weighed it differently than plaintiff would prefer, which is not error. *Berger* 277 Mich App at 705. Based on this evidence, we do not find that the evidence clearly preponderates against the trial court's finding. *Id*.[3]

Factor (g) is: "The mental and physical health of the parties involved." MCL 722.23(g). The trial court found this factor favored defendant because plaintiff suffered from dyslexia, adult ADD, arthritis, and possible depression. Defendant detailed how plaintiff's depression and mood swings affected those around him. Defendant had no apparent physical or mental problems. Thus, the trial court did not err in finding that this factor favored defendant.

Factor (j) is: "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." The trial court found this factor favored defendant because plaintiff had a "decided lack of respect" for defendant, for defense counsel, and for the oath he took before the trial court. The court found that defendant colored his testimony to cast himself in a favorable light. The court concluded plaintiff would ignore the minor child's maternal relationship or attempt to put himself in a better light than defendant in their child's eyes.

Because a trial court is in the best position to observe the witnesses who appear before it, MCR 2.613(C), the trial court's finding was not against the great weight of the evidence. *Berger*, 277 Mich App at 705. Nor does defendant's conduct change this analysis. Defendant obtained a personal protection order against plaintiff, based on her claims of domestic abuse. Defendant also denied that she took all of the things plaintiff alleged were missing from the marital home. She explained that she removed the minor's possessions because she believed the child would be staying with her. Therefore, the trial court's finding was not against the great weight of the evidence.

C. HARMLESS ERROR

In a child custody case, "upon a finding of error an appellate court should remand the case for reevaluation, unless the error was harmless." *Fletcher*, 447 Mich at 889. Here, even if the trial court erred in its established custodial environment finding, any error was harmless as

[3] While plaintiff also cites to the fact that defendant came to the marital house and took all of plaintiff's possessions, defendant denied taking some of the alleged missing items but admitted that she took others because she thought the minor would be living with her. As for the escort service ads, plaintiff attached these to his motion for a new trial, after the trial court had rendered its decision.

there was clear and convincing evidence that awarding custody to defendant was in the minor's best interests. As discussed *supra*, the trial court properly weighed several best interest factors in favor of defendant. Because defendant was favored on all the relevant best interest factors where the parties were not equal (seven out of nine), there was clear and convincing evidence that a change in the custodial environment was in the daughter's best interests. Accordingly, we affirm the trial court's award of sole custody to defendant.

II. IMPUTED INCOME

A. STANDARD OF REVIEW

Plaintiff next contends that the trial court erred when it imputed an income of $70,900 to him.

"[W]e review a trial court's discretionary rulings, such as the decision to impute income to a party, for an abuse of discretion." *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). "An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes." *Id.*

B. ANALYSIS

To determine the appropriate amount of child support, a trial court must follow the Michigan Child Support Formula (MCSF), or provide reasons for failing to do so. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). The first step in determining a child support award is to determine each parent's net income by considering all sources of income. *Id.* This calculation is not limited to a parent's actual income; it can include imputed income based on "the parent's unexercised ability to pay when supported by adequate fact-finding that the parent has an actual ability and likelihood of earning the imputed income." *Id.* at 285. "When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the potential income that parent could earn, subject to that parent's actual ability." 2013 MCSF 2.01(G). A trial court should rely on the following relevant factors when calculating the amount of potential income:

> (2) Use relevant factors both to determine whether the parent in question has an actual ability to earn and a reasonable likelihood of earning the potential income. To figure the amount of potential income that parent could earn, consider the following:
>
> > (a) Prior employment experience and history, including reasons for any termination or changes in employment.
> >
> > (b) Educational level and any special skills or training.
> >
> > (c) Physical and mental disabilities that may affect a parent's ability to obtain or maintain gainful employment.
> >
> > (d) Availability for work (exclude periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.).

(e) Availability of opportunities to work in the local geographical area.

(f) The prevailing wage rates in the local geographical area.

(g) Diligence exercised in seeking appropriate employment.

(h) Evidence that the parent in question is able to earn the imputed income.

(i) Personal history, including present marital status and present means of support.

(j) The presence of the parties' children in the parent's home and its impact on that parent's earnings.

(k) Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification. [2013 MCSF 2.01(G)(2).]

"These factors generally ensure that adequate fact-finding supports the conclusion that the parent to whom income is imputed has an actual ability and likelihood of earning the imputed income." *Clarke v Clarke*, 297 Mich App 172, 184; 823 NW2d 318 (2012). "The requirement that the trial court evaluate criteria . . . is essential to ensure that any imputation of income is based on an actual ability and likelihood of earning the imputed income. Any other rule would be pure speculation and a clear violation of the requirement that child support be based upon the actual resources of the parents." *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998).

The trial court did not reference the factors listed above. While its findings may have paralleled some of the factors, the court made no mention of several relevant factors. The record does not show that it considered whether plaintiff's mental disabilities—his ADD and dyslexia—could affect his ability to obtain employment. 2013 MCSF 2.01(G)(2)(c).[4] The trial court also did not consider plaintiff's asserted diligence, such as filling out 200 job applications, in seeking appropriate employment. 2013 MCSF 2.01(G)(2)(g). Further, the trial court did not consider whether plaintiff's conviction for domestic violence would affect his chances of obtaining employment. 2013 MCSF 2.01(G)(2)(h) and (i). Thus, we are left to speculate whether the trial court's ultimate conclusion would be the same if it had considered all relevant factors listed in 2013 MCSF 2.01(G)(2).

[4] While the trial court referred to plaintiff assuming managerial and decision-making roles in prior businesses despite his dyslexia, the court also stated: "Not surprisingly, all of these businesses failed, leaving the Plaintiff with several claims against him totaling several hundred thousand dollars." Thus, the trial court's statements regarding defendant's alleged disabilities are, at most, ambiguous.

Therefore, we remand for the trial court to consider the relevant factors. The trial court should provide its findings regarding defendant's alleged learning disabilities, criminal record, and diligence. Neither party is permitted to expand the record on remand. The trial court is restricted to consider only evidence present in the existing record. The trial court only need articulate the impact, if any, these factors have on its decision to impute plaintiff income.

III. CONCLUSION

Any error in the established custodial environment finding was harmless in light of the clear and convincing evidence that defendant mother's sole custody of the minor is in the minor's best interest. Nor do we find the trial court's best interests findings were against the great weight of the evidence. However, the trial court imputed income to plaintiff without analyzing all relevant factors. The trial court should do so on remand. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

Court of Appeals, State of Michigan

ORDER

Jeffery Earl Anderson v Svitlana Anderson

Docket No. 321880

LC No. 11-071347-DM

Michael J. Riordan
Presiding Judge

Jane E. Markey

Kurtis T. Wilder
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand the case to the trial court to reconsider plaintiff's imputed income for child support purposes. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 24 2015
Date

Chief Clerk