STATE OF MICHIGAN

COURT OF APPEALS

SARA VILCANS, Plaintiff-Appellant,	UNPUBLISHED April 30, 2013
v	No. 313007 Kent Circuit Court
CRAIG VILCANS, Defendant-Appellee.	LC No. 10-012043-DM

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiff Sara Vilcans appeals as of right the September 28, 2012, judgment of divorce that resolved, among other matters, defendant Craig Vilcans's motion for additional parenting time with the parties' minor children, as well as a dispute between the parties regarding their respective retirement accounts. We affirm because the judgment of divorce did not alter the minor children's established custodial environment and the trial court did not abuse its discretion in choosing a valuation date for the parties' retirement accounts.

I. FACTS

Plaintiff-mother and defendant-father were married on September 25, 2004, and had two minor children together. In November of 2010, plaintiff filed for divorce. The trial court entered a temporary order in December of 2010 regarding parenting time. Under the temporary order, plaintiff received physical custody of the children, and defendant received reasonable parenting time, including alternate weekends from Friday evening until Sunday evening, as well as one overnight visit each week.

Following a three-day trial, the trial court entered a judgment of divorce in September of 2012. The trial court found that the children had an established custodial environment with plaintiff, and granted her physical custody of the children. Next, the trial court awarded defendant an increase in parenting time from what he received under the temporary order. Under the judgment of divorce, defendant received alternate weekends from Friday evening until Monday morning, as well as his one weekly overnight visit on Tuesday evening. In addition, the trial court awarded defendant an additional weekly overnight visit on Wednesday evening during the summer months.

In addition to the parenting time and custody issues, the judgment of divorce resolved several property issues. Pertinent to this appeal, the judgment of divorce divided the parties' retirement accounts and used the date of trial as the date of valuation for the accounts. Using the retirement account statements that were closest in time to the date of trial, the trial court ordered plaintiff, whose retirement account was more valuable, to transfer $19,499 to defendant by a Qualified Domestic Relations Order.

II. PARENTING TIME

Plaintiff challenges the trial court's parenting time order. "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).

MCL 722.27a governs parenting time decisions, and provides, in pertinent part:

> 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. [MCL 722.27a(1).]

"The child's best interests govern a court's decision regarding parenting time." *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010)(citing MCL 722.27a(1)). "[T]he focus of parenting time is to foster a strong relationship between the child and the child's parents." *Id.* at 29.

Plaintiff argues that the trial court's parenting time order, which increased defendant's parenting time, modified the children's established custodial environment. She contends that the trial court committed clear legal error by modifying the established custodial environment without requiring defendant to prove, by clear and convincing evidence, that the modification was in the best interests of the children. "[I]f a requested modification in parenting time amounts to a change in the established custodial environment, it should not be granted unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child." *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004).

We find that the trial court's award of parenting time did not modify the children's established custodial environment. Under the judgment of divorce, the trial court awarded defendant an additional 26 Sunday overnights during the year, plus an extra 12-14 overnight visits during the week in the summer. Overall, during the school year, defendant had five overnight visits during a 14-day period, and he received seven overnight visits during a 14-day period in the summer months.

Although defendant received an increase in parenting time from that received in the temporary order, we decline to find that the increase was so significant that it modified the established custodial environment. The increase did not "change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort . . . ." See *Pierron v*

Pierron, 486 Mich 81, 86; 782 NW2d 480 (2010). Defendant received at most 38-40 additional overnight visits per year, and we find that this increase was not significant enough to change the established custodial environment. Cf. *Brown*, 260 Mich App at 596-597 (finding that a change in three months of parenting time, or roughly 90 overnight visits, did alter the established custodial environment). Despite the increase in parenting time for defendant, the fact remained that the children lived with plaintiff for most of the time during a majority of the year.

Thus, contrary to plaintiff's contentions, this case is distinguishable from our holding in *Powery v Wells*, 278 Mich App 526; 752 NW2d 47 (2008). In *Powery*, the plaintiff sought to move herself and the child nearly 100 miles. *Id.* at 527. At the time, the plaintiff and the defendant lived in the same city, and were "equally active in their daughter's life." *Id.* at 528. The proposed move would have forced the child to live with either the plaintiff or the defendant during the week, and with the other parent during the weekend, thereby reducing one parent to a "'weekend' parent." *Id.* Such a change modified the child's established custodial environment. *Id.* Unlike *Powery*, the parties in the instant case were not made equal parents by the trial court's parenting time decision. Rather, the children still spent a majority of their time with plaintiff, and the parties were only equal parents for a few weeks during the summer. The trial court's parenting time order did not modify the children's established custodial environment.[1]

Plaintiff also argues that the trial court's parenting time order modified the established custodial environment based on an analysis of the waking hours the children would spend with each parent. Plaintiff presents graphs and charts to illustrate her factual assertions, which are based on her unsupported allegations of the parties' work schedules and the children's school schedules. Although plaintiff presents a novel argument, we decline to consider it, because the charts and graphs, and more importantly the numbers used therein, were not introduced before the trial court for its consideration. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Nor do we believe such facts would have required a different result. Plaintiff does not claim that either party's work hours significantly changed from the time the temporary custody order was entered with plaintiff's consent. Regardless of the work hours, the fact remains that the only change during the non-summer months was that defendant was permitted to have the children every other weekend until Monday morning instead of Sunday evening.

[1] Plaintiff also argues that this Court's decision in *Kolb v Garn*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 287534), supports her position. We are not bound by this unpublished decision. MCR 7.215(C)(1). Moreover, the facts in *Kolb* are distinguishable. In *Kolb*, we found that the trial court's decision to increase the plaintiff's parenting time from two overnight visits in a 14-day time period to seven overnight visits in a 14-day time period modified the established custodial environment. *Kolb*, unpub op at 1, 3. The trial court's decision to award equal parenting time modified the established custodial environment. *Id.* at 3-4. Here, by contrast, the parties did not receive equal parenting time; therefore, we find that the children's established custodial environment was not modified.

We also reject plaintiff's challenges to the trial court's findings of fact regarding parenting time. The trial court found that the children were "thriving when with either parent," and that there was no evidence that the parenting time order would harm the children. Plaintiff argues that the trial court's findings in this regard were against the great weight of the evidence because she presented evidence to the contrary at trial. However, the trial court found that plaintiff's testimony in this regard lacked credibility. We defer to the trial court's assessment of witness credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

Plaintiff also challenges the trial court's factual findings under one of the best interest factors found in MCL 722.23, factor (g), the mental and physical health of the parties. The trial court was not required to consider these factors because its parenting time decision did not modify parenting time in a way that changed custody. *Shade*, 291 Mich App at 32. Nevertheless, we must agree that the trial court's findings on factor (g) are somewhat confusing. The trial court noted that plaintiff alleged that defendant suffered from depression. It then noted that in pleadings and pretrial statements, plaintiff listed defendant's health as "good." After setting forth these facts, the trial court found that factor (g) favored *defendant*. Given the trial court's puzzling decision to weigh this factor in favor of defendant after noting that there was conflicting evidence as to whether defendant suffered from depression, it appears as though the trial court's finding on this factor was against the great weight of the evidence. See *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

However, this erroneous finding had no effect on the trial court's finding that the children were thriving with either parent, or its finding that there was no evidence the children would be harmed by a modest increase in parenting time with defendant. Indeed, the trial court did not refer to its findings regarding factor (g) when it reached its decision regarding parenting time. Instead, the trial court's opinion focused on the best interests of the children, and found that the children's best interests were served by a parenting time schedule that gave them more time with defendant. "[T]he best interests of the children govern this and all other custody issues." *Berger*, 277 Mich App at 716. Thus, in spite of the trial court's apparently erroneous findings under MCL 722.23(g), plaintiff fails to demonstrate that the trial court's decision to award additional parenting time to defendant was a palpable abuse of discretion. See *id.* at 705. Accordingly, we affirm the trial court's parenting time decision. *Id.* at 716.

III. RETIREMENT ACCOUNTS

Plaintiff argues that the trial court failed to make an equitable division of the parties' retirement accounts because the date of valuation chosen by the trial court did not consider that defendant ceased making contributions to his retirement account before trial. The trial court chose the date of trial as the date of valuation for the retirement accounts. Plaintiff argues that the retirement accounts should have been valued at the date of the parties' separation in May of 2010, because both parties were making regular contributions to their respective retirement accounts at that time. "The determination of the proper time for valuation of an asset is in the trial court's discretion." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable division of property in light of all the circumstances." *Berger*, 277 Mich App at 716-717. An

equitable division need not be mathematically equal, but it must be fair under the circumstances. *McDougal v McDougal*, 451 Mich 80, 88; 545 NW2d 357 (1996). With regard to the valuation date of a particular asset, such as a retirement account, the trial court has discretion to ensure that the asset is divided in an equitable manner, but the general rule for the division of marital assets is that the assets are to be valued at the time of trial or at the time the judgment of divorce is entered. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). The trial court may deviate from this general rule to ensure an equitable division of marital property. *Id.* For instance, where one party alters his or her actions during the pendency of divorce proceedings in order to affect the value of a marital asset, the trial court may consider an earlier date for purposes of calculating the value of that asset. See *id.*

Plaintiff does not demonstrate that the trial court's decision to choose the date of trial as the valuation date for the parties' retirement accounts was an abuse of discretion. Although plaintiff argues that May of 2010 was the date of valuation that the trial court should have used, she did not present any evidence as to the value of defendant's retirement account on this date. She presented documentary evidence at trial concerning the value of her own account as of June 30, 2010,[2] but there is no record of the value of defendant's retirement account at this time. Accordingly, the trial court did not abuse its discretion when plaintiff failed to present information that would have allowed the trial court to choose an earlier date for valuation. See *Woodington*, 288 Mich App at 355; *Byington*, 224 Mich App at 114 n 4.

Moreover, we find plaintiff's arguments on this matter unpersuasive. She argues that the date chosen by the trial court was inequitable because defendant reduced his contributions after the parties separated, and that he ceased making contributions entirely at one point. This argument misconstrues the facts. The record reveals that at the time the parties separated in May of 2010, defendant was contributing 11 percent of his income to his retirement account. In August of 2010, defendant then reduced his contribution rate to 9 percent. In September of 2010, defendant reduced his contribution rate to one percent. In December of 2010, shortly after defendant reduced his contribution to one percent, plaintiff ceased making contributions to her retirement account entirely. Contrary to plaintiff's assertions, defendant never ceased making contributions to his retirement account. Rather, he continued contributing to his account at approximately the same rate until September of 2010, when he drastically reduced his contributions to one percent of his income. The only party who ceased making contributions entirely was plaintiff. Although defendant presumably benefited from receiving a division of plaintiff's retirement account for the time between September of 2010 and December of 2010 when he contributed only one percent and she contributed a higher percentage, plaintiff also benefited from such a division because defendant contributed one percent to his own account for several months during which plaintiff contributed nothing to her account. Accordingly, the date chosen by the trial court was not an abuse of discretion. See *Woodington*, 288 Mich App at 355; *Byington*, 224 Mich App at 114 n 4.

[2] Plaintiff does not explain why the value of her account in June of 2010 should be used when she contends that the equitable date for determining the value of the accounts was May of 2010.

Alternatively, plaintiff argues that if the trial court's chosen date of valuation for the parties' retirement accounts is not an abuse of discretion, this Court should grant her relief because the trial court should have divided money in a separate bank account that belonged to defendant. Plaintiff is not entitled to relief because she does not allege the amount of money in the account at the time of divorce, nor does the record reveal how much money was in the account at the time of the divorce. *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009) ("A party may not leave it to this Court to search for the factual basis to sustain or reject its position, but must support its position with specific references to the record."). Moreover, we find her arguments meritless because the only amount to which she cites is a $4,200 bonus check that defendant deposited into his separate bank account in 2010. Later, however, $2,000 was transferred from the separate account to the parties' joint checking account. We also note that plaintiff used $2,400 from the parties' joint checking account to pay her own credit card bill after the parties separated. Therefore, on this record, there is nothing to suggest that the property division in this case was not "roughly congruent" and therefore was an inequitable distribution. See *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro