S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PATRICK JAMES WILK, Plaintiff-Appellee,	UNPUBLISHED August 16, 2007
v	No. 276078 Gratiot Circuit Court
CAMILLE RENEE WILK, Defendant-Appellant.	LC No. 05-009480-DM

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm.

I Custody

A. Established Custodial Environment

The litigants were married in 1989 and had four children, two boys and two girls. Plaintiff filed for divorce in 2005. The parties eventually agreed on who would maintain custody of the girls, while physical custody of the boys would be contested at trial. The trial court awarded physical custody of the boys to plaintiff. Defendant argues that the trial court erred in not finding that she had an established custodial environment in regard to the boys. We disagree.

Whether a custodial environment exists is a question of fact. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). A trial court's findings of fact in a child custody case must be reviewed under the great weight of evidence standard. *Rittershaus v Rittershaus*, 273 Mich App 462, 472; 730 NW2d 262 (2007). Under that standard, an appellate court may not substitute its judgment on questions of fact unless the evidence clearly preponderated in the opposite direction. *Id*. at 464, 475. "The court should review 'the record in order to determine whether the verdict is so contrary to the great weight of the evidence as to disclose an unwarranted finding, or whether the verdict is so plainly a miscarriage of justice as to call for a new trial . . . .'" *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994), quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959).

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." MCL 722.27(1)(c). "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." *Id*. An established custodial environment "depend[s] . . . upon a custodial relationship of a significant duration in which [the child is] provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

In this case, the trial court found that no established custodial environment existed with defendant, stating as follows:

> With regard to custody, the Court is required to analyze the evidence in light of the Child Custody Act of 1970, MCL 772.21. First of all, this action was filed on October 4, 2005, but the parties continued living together until about Octo— November 15, 2005. Defendant then moved into her parents' home in Breckenridge with Chelsea and the two boys, while Mallory remained with the Plaintiff. The Defendant stayed with her parents until September of 2006, when she moved into a rental home in Wheeler. The parties have been separated for less than a year, and the Defendant has moved the two boys twice within the past year, so there is not an established custodial environment.

We conclude that the trial court's finding that no established custodial environment existed with defendant does not clearly preponderate in the opposite direction. Initially, we reject defendant's argument that the trial court should have made an express factual finding on the record whether the children naturally looked to her for guidance, discipline, the necessities of life, and parental comfort. "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over-elaboration of detail or particularization of facts." MCR 2.517(A)(2). "[A] trial court is not required to comment upon every matter in evidence or declare acceptance or rejection of every proposition argued." *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993).

Here, the trial court accurately noted that defendant twice relocated the boys during the proceedings, and consequently found that there was no established custodial environment. The court's conclusion was adequate under the court rule. In its opinion, the trial court also noted that defendant, three of her four children, and for a period of several months, defendant's brother and his four children, all resided in the home of defendant's parents. Four boys shared one bedroom, plaintiff slept in the family room on a sofa, and Chelsea slept in the beauty shop attached to the house. The trial court characterized the environment as cramped and questioned why defendant, who received $1,446 in monthly child support in addition to her own wages, failed for eight months to find more suitable housing. Simply stated, the physical environment was not marked by qualities of security, stability and permanence that tend to indicate an established custodial relationship. Further, additional facts exist to adequately support the trial court's conclusion that no custodial environment existed with defendant. Despite defendant's sole custody of the boys during this proceeding, the record reflects that plaintiff was more involved with the boys' lives at school, their sports activities, and their leisure time.

B. Best Interests

Defendant next claims the evidence does not support the trial court's findings in regard to the children's best interests under the Child Custody Act. We disagree. "[A]ll orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. A custody award is a discretionary ruling and therefore "should be affirmed unless it represents an abuse of discretion." *Fletcher*, *supra* at 880. This exercise of discretion is limited by the court's findings on the best interest factors, each of which can only be set aside if it is against the great weight of the evidence. *Id*. at 881.

When making a custody determination, the court must examine the evidence in light of the best interest of the child factors set forth by MCL 722.23. Defendant challenges the trial court's findings and conclusions regarding the following factors:

> (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 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.
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> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
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> * * *
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> (f) The moral fitness of the parties involved.
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> (g) The mental and physical health of the parties.
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> (h) The home, school, and community record of the child.
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> * * *
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> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.23.]

The trial court must evaluate each of the best interests factors to determine the best interests of the child before deciding a custody dispute and a conclusion on each factor must be stated. *Wolfe v Howatt*, 119 Mich App 109, 110-111; 326 NW2d 442 (1982). "To reach a conclusion requires weighing the factor for one party or the other or weighing it equally." *Id*. at 111. "It does not mean merely mentioning it." *Id*. The trial court's findings as to each factor should be affirmed on appeal unless the evidence clearly preponderates in the opposite direction. *Hilliard v Hilliard*, 231 Mich App 316, 321; 586 NW2d 263 (1998).

The trial court's findings with respect to factor B were not against the great weight of the evidence. The trial court found that both parents love their children. Defendant was a stay-at-

home parent. Plaintiff worked long days (often in excess of ten hours per day), and was often absent due to military commitments. However, plaintiff remained active in the children's lives, coaching sports teams, helping with the children's homework, and helping his children with their 4-H activities. Defendant admitted plaintiff's participation.

Further, once the parties separated and the boys lived with defendant, plaintiff stayed involved in their lives. He attended a school open house, could describe in detail the children's school arrangements and name several teachers, took the boys to football practice, and kept them involved in 4-H. He testified that although he had to work early in the mornings, he prepared the boys for school the night before on the evenings he spent with them. Meanwhile, however, defendant's participation in the boys' lives dwindled substantially. Although the testimony indicated she did keep in contact with some teachers at the boys' school, at trial she could not name the boys' teachers with any certainty. She admitted she did not attend the open house and admitted she did not attend the boys' football practices and games.

Defendant testified that plaintiff was "quite proud" of her status as a stay-home mother. However, she also admitted that it was always the "plan" that "when [plaintiff] was done with his education and the kids' schedules lightened up, I would do something" for employment. Likewise, plaintiff testified that he encouraged defendant to work throughout the marriage. When defendant did seek employment, she was separated from several positions due to circumstances plaintiff asserts were questionable—specifically, that defendant lost her jobs for various forms of dishonesty. Plaintiff, on the other hand, has been gainfully employed as a supervisor at General Motors (GM) since his honorable discharge from military service. He maintained his commitments to the military. These factors, combined with his involvement with the boys' activities, set a good example for the children. In contrast, defendant's failed outside commitments and her refusal to follow doctor's orders for her health conditions, did not set a positive example.

Finally, although defendant points out she was the party who kept the boys involved in church activities, she also admitted that she did not take the boys to church often. She stated that she had the pastor come to their home, but it appears this was more for her moral support, and not for the education of the boys. Defendant admitted that the pastor did not provide religious instruction, but rather "subliminally" and "subconsciously" instructed the boys. It was not against the great weight of the evidence for the trial court to find that factor B favored plaintiff.

Next, the trial court properly favored plaintiff with respect to the capacity and disposition of the parties to provide the children with food, clothing, and medical care, factor C. First, the trial court reasonably concluded that plaintiff had a better ability to manage money. Defendant was the sole individual responsible for paying bills during the marriage. Plaintiff explained that this was the arrangement because defendant had worked in a bank and was familiar with finances, while he had operated mainly on cash because of his years in military service. The evidence does not demonstrate that defendant objected to this arrangement. When plaintiff assumed these duties in 2005, after being asked to do so by defendant after she broke her arm, he discovered for the first time that defendant had mismanaged the family funds resulting in a large amount of debt and several accounts subject to extremely high interest rates. Upon being granted responsibility for the finances, plaintiff immediately arranged for a debt consolidation program that significantly lowered the interest rate for several of the bills and put the parties in a better position to regain their financial footing.

The trial court also found that upon moving in with her parents, defendant subjected Chelsea and the boys to extremely crowded conditions—i.e., ten individuals in a two bedroom home. Despite her receiving $1,446 in monthly child support, her own wages, and not contributing to the marital debt during this time, defendant failed for eight months to find more suitable housing. Plaintiff lived in the marital home, where the family lived comfortably for many years. Based on plaintiff's proven ability to manage money and provide for the children, it was not against the great weight of the evidence for the trial court to conclude that this factor favored plaintiff.

The trial court's finding on the next factor, D, regarding the length of time the children have lived in a stable, satisfactory environment, was supported by the fact that the children had spent the majority of their youth in the home in which plaintiff resided during the separation. This home is situated across the street from their grandparents' home and is in the Alma community where the boys have attended school since the parents moved to Michigan. Plaintiff testified he intended to remain in this home with the boys. Defendant, on the other hand, recently purchased a home in Wheeler, and testified that she wished for the children to attend Breckenridge schools. Because the facts show that living with plaintiff would permit the boys to stay in Alma with their friends, current school, 4-H facilities, and their paternal grandparents, the trial court's finding that this factor favored plaintiff was not against the great weight of the evidence.

Next, with respect to factor F, the moral fitness of both parties, it was not against the great weight of the evidence for the trial court to conclude that the parties were equal as to this factor. It was not an abuse of discretion for the trial court to conclude that none of the relevant allegations were proven in light of the lack of available extraneous evidence to confirm or deny the parties' assertions. Based on the available evidence, a finding that the parties were equal as to this factor was well-founded.

Additionally, it was not against the great weight of the evidence for the trial court to find that factor G, regarding the mental and physical health of the parties, favored plaintiff. Defendant testified she had Stargardt's disease and took Premarin for a hormone problem, Prozac for chronic fatigue syndrome, and Synthroid for thyroid problems. She also testified that she recently underwent bariatric surgery, but admitted that she did not closely follow her doctor's instructions for taking care of herself. Finally, defendant's testimony that after having an argument with plaintiff she went out drinking on a weekend when the children were in her care, was, as the trial court noted, an indication that she "just can't cope with the pressures of her life" and lacked an ability "to handle things emotionally."

Next, regarding factor H, the home, school, and community record of the children, it was not against the great weight of the evidence for the trial court to favor plaintiff. As defendant admitted, plaintiff was substantially involved as a parent with the boys, including coaching and helping them with homework. Furthermore, as discussed earlier, plaintiff had substantial knowledge of the boys' school situations, attended the school open house, was directly involved in the boys' 4-H activities, and attended the boys' football games. Plaintiff also testified to participating in many physical activities with the boys, while defendant did not testify to similar activities.

Finally, with respect to factor K, domestic violence, the trial court's conclusion that the parties were equal was supported by the great weight of the evidence. As discussed above, defendant alleged that plaintiff threw Chelsea's head into a wall, but plaintiff denies this. Likewise, plaintiff claimed that defendant slapped and hit him, but no additional witnesses or other supporting evidence tends to support a conclusion that these instances occurred. It was not an abuse of discretion for the trial court to conclude that domestic violence was not part of this marriage. In light of the foregoing, the trial court's findings with respect to the best interest factors were properly supported by the evidence.

II Property Division

Defendant next argues that the property division was inequitable. We disagree. The standard of review for a division of marital property is de novo. *Reeves v Reeves*, 226 Mich App 490, 501; 575 NW2d 1 (1997). Findings of fact are reviewed for clear error, and "where they are upheld, we determine whether the dispositional rulings were fair and equitable in light of those facts." *Id*. "[B]ecause dispositional rulings are discretionary, they should be affirmed unless we are left with the firm conviction that the division is inequitable." *Id*.

"The goal of a court when apportioning a marital estate is to equitably divide it in light of all the circumstances." *Reed v Reed*, 265 Mich App 131, 152; 693 NW2d 825 (2005). A court "need not achieve mathematical equality." *Id*. In determining an appropriate division of property in a divorce, a court should consider: "(1) [the] duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." *Dart v Dart*, 460 Mich 573, 583; 597 NW2d 82 (1999) (citation omitted). "[T]here will be many cases where some, or even most, of the factors will be irrelevant." *Gates v Gates*, 256 Mich App 420, 424; 664 NW2d 231 (2003). "But where any of the factors delineated . . . 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*.

Defendant cites two reasons the property division was allegedly inequitable. First, defendant argues that the trial court should have found the value of the marital home was $175,000. However, although defendant testified that the value of the marital home was $175,000, this estimate was based on an alleged appraisal that was performed in relation to a mortgage application two years prior to trial. The appraisal itself was not offered into evidence, and no testimony was provided regarding its accuracy or the methods used by the appraiser in ascertaining the value of the home. On the other hand, the appraisal offered by defendant indicating the marital home was worth $140,000 was actually offered into evidence, apparently in its entirety. Defendant testified the appraiser performed a walk-through of the home, taking measurements and photographs. Finally, this appraisal was performed less than a week before trial. In light of the foregoing, we find find no clear error with the trial court's conclusion that the value of the marital home was $140,000, not $175,000.

Second, defendant argues that this case should be remanded to the trial court to determine whether plaintiff has a military pension. However aside from the mention of a possible military pension in the answer to the complaint, defendant made no effort to establish whether one actually existed. This is in spite of the fact extensive testimony was taken with respect to

plaintiff's GM pension. Thus, no evidence on the record substantiates defendant's claim that a military pension existed. Accordingly, the record does not suggest that a material issue of fact exists such that a remand would be proper.

Although plaintiff received the house, valued at $140,000, and his GM 401(k), worth about $12,000, and the personal property in the house, the trial court also assigned plaintiff all of the marital debt, determined to be $171,387.00. Defendant does not object to the trial court's calculation of marital debt, nor does she argue that the value of the personal property was so great it made the award inequitable. Defendant herself received all her personal property and none of the marital debt. Although an award must be equitable, a court "need not achieve mathematical equality." *Reed*, *supra* at 152. Because plaintiff assumed the substantial marital debt, the marital estate was not inequitable.

III Attorney Fees

Defendant argues the trial court erred by not awarding reasonable attorney fees to her because she will have to invade her assets or borrow from family to satisfy attorney fees when she is relying on the same assets for her support. We disagree with the defendant that the trial court's refusal to award attorney fees was improper. We review a trial court's grant or denial of a request for attorney fees under MCR 3.206(C) for whether the trial court abused its discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997).

Attorney fees are not recoverable as of right in divorce actions. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Any "award of attorney fees in a divorce action is within the trial court's discretion." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Reasonable attorney fees may be awarded pursuant to MCR 3.206(C). *Id*. MCR 3.206(C) states, in pertinent part:

> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Here, the trial court did not abuse its discretion in refusing to award defendant attorney fees. Contrary to the court rule, although she requested attorney fees, defendant failed to allege any facts demonstrating that she is unable to bear the expense of the action or that plaintiff is able to pay. Thus, defendant did not meet the burden she was required to establish pursuant to court rule. Furthermore, unlike in *Maake*, *supra*, upon which defendant heavily relies, defendant was awarded a significant amount of alimony – totaling $30,000 over five years. Also, defendant will not bear the expense of raising the boys. Thus, defendant's financial situation is

not comparable to the plaintiff's situation in *Maake*. Based on the foregoing, the trial court did not abuse its discretion in refusing to award defendant attorney fees.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra