STATE OF MICHIGAN

COURT OF APPEALS

JULIE ANN DESJARDINS, Plaintiff-Appellee,	UNPUBLISHED March 4, 2014
v	No. 317145 Lenawee Circuit Court Family Division
JOHN DION DESJARDINS, Defendant-Appellant.	LC No. 11-036909-DM

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant, John DesJardins, appeals as of right the judgment of divorce and trial court order awarding plaintiff, Julie DesJardins, sole physical and legal custody over the parties' two minor children, as well as $1,000 a month in spousal support. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The parties were married in 2002 and had two children together. They were both real estate agents and worked together as a team at Real Estate One in Lenawee County. They developed a large client base, and plaintiff estimated that in 2006 they were grossing $200,000 annually. However, their marriage started to unravel and they began experiencing financial difficulties in 2007. At the end of 2007, plaintiff claimed that defendant informed his then wife that he wanted her to stay home with the kids, which she did. Defendant continued to earn money, in part, through the contacts Julie Ann DesJardins had cultivated.

Unfortunately, with the economic turbulence of 2008, the parties' personal relationship and finances deteriorated even further. They filed for bankruptcy in 2008. In 2010, defendant formed Down River Property Experts, L.L.C., which was a company focused on rental property management, although he still sold houses. He estimated that his monthly net income was $6,000.

The parties separated in May 2011, and plaintiff no longer received any income from defendant. On July 26, 2011, plaintiff filed a complaint for divorce. At the time of trial, plaintiff claimed that she was living off of the $948 a month in child support payments, she used food stamps for groceries, and that she did not have any bank accounts. She was still unemployed

because she feared the IRS would garnish her wages to account for approximately $30,000 of the parties' tax debt, and that she needed to maintain her state health insurance.

At the close of proofs, the trial court ordered that plaintiff was to have sole legal and physical custody of the children. The trial court also ordered defendant to pay plaintiff spousal support for five years at $1,000 a month. The court provided no findings or explanation of this ruling. A judgment of divorce and stipulated order were entered, whereby defendant was awarded the parties' two homes, but agreed to assume the parties IRS debt and to pay plaintiff a one-time payment of $6,500.

However, defendant filed a motion for reconsideration of the trial court's ruling regarding custody and spousal support, claiming that the trial court neither provided a factual basis for its ruling nor adhered to the statutory requirements. The trial court then purported to place its findings regarding custody and spousal support on the record. Defendant now appeals on several grounds.

II. CUSTODY

A. STANDARD OF REVIEW

Defendant argues that the trial court erred in its custody determination. As this Court stated 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.]

A trial court's finding of an established custodial environment, and the best interests factors under MCL 722.23, will be affirmed unless the evidence clearly preponderates in the opposing direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

B. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant first contends that the trial court failed to make the requisite finding regarding the children's established custodial environment. We agree.

"The Child Custody Act, MCL 722.21 *et seq.*, governs child custody disputes" and is "intended to promote the best interests of children, and it is to be liberally construed." *Berger*, 277 Mich App at 705. A threshold issue in custody cases is the existence of an established custodial environment. "The established custodial environment is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for

guidance, discipline, the necessities of life, and parental comfort.'" *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010), quoting MCL 722.27(1)(c). "It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger*, 277 Mich App at 706. Consistent with our caselaw and "the plain language of MCL 722.27, a trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011) (emphasis in original).

In the instant case, the trial court failed to make any findings regarding the established custodial environment. In fact, the trial court did not even reference it at the reconsideration hearing. Thus, we agree with defendant that the trial court clearly erred in failing to make the threshold finding of the existence of an established custodial environment. Furthermore, this failure was "not harmless because the trial court's determination regarding whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the children." *Kessler*, 295 Mich App at 62; *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001).[1] Therefore, "we decline to decide whether the children had an established custodial environment with plaintiff alone because that is a question of fact for the trial court, and we do not engage in review de novo of custody orders." *Kessler*, 295 Mich App at 62 (citations omitted).

Accordingly, we remand for the trial court to determine whether an established custodial environment exists, and if so, whether it was with one parent, both, or neither. *Foskett*, 247 Mich App at 6-7.

C. BEST INTERESTS FACTORS

Defendant next contends that the trial court failed to make specific findings regarding the best interest factors pursuant to MCL 722.23. In rendering a custody determination, a trial court generally is required to evaluate the best interests of the children under the statutorily enumerated factors. *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). The best interest factors, enumerated in MCL 722.23, are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

[1] "If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child. . . . This higher standard also applies when there is an established custodial environment with both parents." *Foskett*, 247 Mich at 6. However, "if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests." *Id.* 6-7.

(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.

Moreover, "a trial court must consider all the factors delineated in M.C.L. § 722.23(a)-(*l*)" and "must consider and explicitly state its findings and conclusions with respect to each of these factors." *Foskett*, 247 Mich App at 9.

In the instant case, the trial court recognized that MCL 722.23 "sets forth the factors when making a decision regarding custody" and that its findings were based on "the best interest factors set forth . . . in the statute[.]" Furthermore, the trial court commented on some of the best interests factors, although it referenced the topic of each factor rather than the associated letter. Yet, it is unclear from the record whether the trial court understood the purpose of analyzing such factors. While the court made general comments pertaining to the factors, it did not display an awareness that its role was to weigh each factor in order to decide, based on the factors, a custody determination that was in the children's best interests. See MCL 722.23 (the "'best

interests of the child' means the sum total of the [listed] factors to be considered, evaluated, and determined by the court[.]"). The court failed to articulate any overarching conclusion that, based on the best interest factors, sole custody with plaintiff was in the children's best interest.[2]

Even more problematic is the trial court's failure to come to a conclusion regarding many of the factors, including: (d) the length of time the child has lived in a stable and satisfactory environment and the desirability of its continuance; (e) the permanence, as a family unit, of an existing or proposed custodial home; and (j) the willingness and ability of each parent to facilitate a relationship between the children and the other parent. While the trial court commented on some of these factors, it failed to make a finding whether they favored one party, neither, or both.[3] Thus, we are left with inadequate findings to determine whether the trial court's ultimate ruling was in error.

Moreover, in regard to factor (i), the reasonable preference of the child, the court stated that "in my court, children don't make custody decisions. I do. . . . And I don't want your children ever saying that they made a decision that they later regretted or that later they realized hurt the other parent." However, it is not within the trial court's authority to dispense with a best interest factor merely because it disagrees with the Legislature's determination that it should be considered in the best interest analysis. Instead, the trial court may decline to disclose the preference on the record, or determine that no preference exists. See *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993) rev'd in part on other grounds 447 Mich 871 (1994) ("As a general rule, a trial court must state on the record whether children were able to express a reasonable preference and whether their preferences were considered by the court, but need not violate their confidence by disclosing their choices.").

Therefore, we remand with instructions for the trial court to make a finding regarding the established custodial environment, determine the proper burden of proof, weigh the best interest factors of MCL 722.23, and make a custody determination in light of the children's best interests.[4]

D. JOINT LEGAL CUSTODY

Defendant next asserts that the trial court failed to make sufficient findings on the record regarding its decision to award plaintiff sole legal custody. We again agree.

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[2] Although, we recognize that the court was unable to make this finding properly, as it had failed to make the threshold finding regarding the established custodial environment and the associated burden of proof.

[3] In regard to factor (d), the trial court stated: "The length in time and suitability of the environment. You can both provide it." Yet, factor (d) is the length of time the child *has* lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

[4] Because we are remanding for reconsideration of the best interest factors, we decline to address defendant's argument regarding some of the factors as that challenge may be rendered moot after remand.

Pursuant to MCL 722.26a(1), parents involved in custody disputes "shall be advised of joint custody" and "[a]t the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. . . . The court shall determine whether joint custody is in the best interest of the child by considering" various factors, including the best interest factors of MCL 722.23, and whether the parents are able to cooperate and agree on important decisions affecting the children's welfare.

Defendant correctly asserts that the trial court erred under MCL 722.26a(1). Both parties requested joint legal custody. "Because [both parties] requested joint custody, the trial court had to consider whether a joint custody award was in the best interests of the child, applying the statutory factors as set forth in M.C.L. § 722.23; MSA 25.312(3), and *state on the record* the reasons for denying [the parties'] request." *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999) (emphasis in original); MCL 722.26a(1)(a). As noted above, the trial court failed to adequately address the best interest factors found in MCL 722.23. Thus, the trial court committed clear legal error when awarding sole legal custody to plaintiff. *Mixon*, 237 Mich App at 162.[5]

Because the trial court failed to make findings regarding the best interests factors pursuant to MCL 722.23, which is required under MCL 722.26a(1)(a), reversal is warranted.

III. SPOUSAL SUPPORT

A. STANDARD OF REVIEW

Lastly, defendant argues that the trial court failed to disclose on the record how it calculated the $1,000 spousal support award and the amount selected amounted to an abuse of discretion. We review a trial court's spousal support award for an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 25; 826 NW2d 152 (2012). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.* at 26. "We review a trial court's findings of fact related to an award of spousal support for clear error." *Myland v Myland*, 290 Mich App 691, 694; 804 NW2d 124 (2010). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted). If the trial court did not clearly err in its factual findings, then we must decide whether the dispositional ruling was fair and equitable in light of the facts. *Id.* In other words, we will affirm the trial court's dispositional ruling unless we are firmly convinced that it was inequitable. *Berger*, 277 Mich App at 727.

B. ANALYSIS

MCL 552.23 provides that a trial court has the discretion to award spousal support. *Myland*, 290 Mich App at 695. The purpose of such an award is to "balance the incomes and needs of the parties in a way that will not impoverish either party on the basis of what is just and

[5] We also bring to the trial court's attention that even plaintiff testified that she was requesting joint legal custody.

reasonable under the circumstances of the case." *Id.* (quotation marks and citation omitted). In deciding whether to award spousal support, the trial court should consider the following factors:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id.* (quotation marks and citation omitted).]

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Loutts*, 298 Mich App at 32 (quotation marks and citation omitted). However, courts should not adhere to a strict mathematical formula, as spousal support instead is derived from equitable considerations. *Myland*, 290 Mich App at 696.

Defendant first contends that the trial court failed to provide a factual basis to support its award. This argument is meritless. The trial court recognized that the parties were in their early 40s and that the marriage had lasted approximately nine years. The court also remarked that defendant attended some college but that plaintiff only had a high school diploma. While the trial court found that neither party was at fault, it also found that the past relationship and conduct of the parties could be summarized as "[t]his was a tough marriage . . . at best." The court noted that both parties initially had a real estate license and "at the onset of their marriage, [plaintiff] was the primary earner" but that "the script of their life changed that, and she stayed home with the children" while defendant continued to pursue business relations. It further found that while plaintiff did not obtain employment after the separation, that was because she feared any money would be garnished to satisfy the IRS debt that she believed belonged to defendant.

The court observed that the marital real estate was sold and the debt was split equally. The court further noted that defendant was paying $948 in child support and had assumed responsibility for the IRS debt that amounted to approximately $30,000. In regard to defendant's ability to pay, the court found that "defendant is the primary and was the primary earner at the time of the breakdown of this marriage and that his overall income will support an award of $1,000 per month, taking into consideration that he does have an obligation to pay support for the minor children." The court also indicated that it was considering the situation of the parties, the needs of the parties, the disparity of income, that plaintiff had earned the right to support, the prior standard of living, and general principles of equity.

Thus, the trial court weighed the factors that were relevant, *Myland*, 290 Mich at 695, and concluded that equity favored a $1,000 award for a period of three years. Yet, defendant avers that a $1,000 a month award was in error because the trial court failed to recognize that his expenses surpassed his income. Based on defendant's exhibits at trial, the trial court projected

his income for the year would be $79,000 to 80,000, to which defendant replied: "That's what it looks to be." Thus, there was no dispute concerning defendant's income, which he conceded was approximately $80,000.[6]

Moreover, the trial court found that defendant's overall income would support an award of $1,000 a month. Defendant's argument regarding his expenses overlooks that he received the two jointly owned properties in exchange for the IRS debt and a one-time payment of $6,500. He also fails to account for the fact that plaintiff was not awarded any interest in his real estate business. Moreover, the evidence at trial revealed a significant income disparity, as the trial court acknowledged. Plaintiff testified that she relied on $948 that she received for child support for rent, utilities, cable, gasoline, and expenses for the children. She paid for groceries with food stamps, and had no bank accounts or other significant assets to her name. Thus, as the trial court acknowledged, there was a significant disparity in the parties' income. Defendant also fails to account for the fact that the income disparity was at least partially a result of plaintiff staying at home to raise the parties' two children.

Therefore, given that plaintiff did not receive any equity in the two jointly owned homes or any interest in the real estate business, and defendant had an estimated yearly income of $80,000 with plaintiff only relying on child support and government aid, the trial court did not err in awarding plaintiff $1,000 a month in spousal support. We are not firmly convinced that the spousal support award is inequitable. *Berger*, 277 Mich App at 726.

However, defendant also challenges the duration of the spousal support award. With respect to the length of time of the spousal support, the trial court found:

> . . . I am moved, however, that I ordered [spousal support] for a period of five years, and as I look at the distribution here and now knowing there was an offset with the IRS debt and the exchange of properties and debt in the amount of . . . sixty-five hundred dollars, that reconsideration was warranted with the duration of spousal support.
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> . . . I believe [plaintiff] should go back to work. I believe she wishes an education. She ought to do that forthwith. And it is for that reason that I will prescribe an order of support at a rate of $1,000 per month for a period of three years and not five years. I believe this is dictated by the prior standard of living of the parties and the general principles of equity. And at that time defendant's obligation for support will still be in place. And plaintiff, by that time, will have, if she still considers and desires, have an opportunity to further secure education in the area of trade, nursing, whatever it is that she desires. And if not, that would be her choice too, but she would have three years to make that determination.

[6] Defendant testified that he informed the Friend of the Court that his income was approximately $6,000 a month.

> And I think that under circumstances and after reconsideration that is an appropriate determination.

Thus, the trial court made sufficient factual findings in support of the duration of its award. The court considered the fact that plaintiff was not employed and wanted to obtain further education so was requesting spousal support for a sufficient period of time to establish herself. The finding that three years was sufficient time in which plaintiff could achieve this goal was not erroneous. Furthermore, the court considered the standard of living and other assets of the parties. It is undisputed that plaintiff was no longer involved in the real estate business as she had stayed home to raise the parties' children. In light of the foregoing, we reject defendant's contention that the trial court failed to provide a sufficient basis for the duration of the spousal support award.

Lastly, defendant contends that the trial court's failure to impute income to plaintiff constituted an abuse of discretion, as plaintiff failed to make sufficient efforts to gain employment in light of her skills, prior experience, and time schedule. One consideration of a spousal support award is the ability of parties to work. *Myland*, 290 Mich App at 695. Moreover, the voluntary reduction of income may be considered in determining the proper amount of spousal support. *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). If a court finds that a party has voluntarily reduced her income, the court may impute additional income if equity so requires. *Id.*

The record does not support defendant's argument that the trial court should have imputed income to plaintiff. Plaintiff, 41 years old at the time of trial, testified that she had her GED and no college degree, and that her real estate license expired and she lacked the funds to renew and maintain it. She further testified that she helped build the real estate business with defendant and he profited from the contacts she had cultivated. When the parties separated, plaintiff claimed that defendant shut her out of the business, leaving her with no source of income. She also claimed that after the separation, she did not seek employment in order to avoid the IRS garnishing her wages, and that she was afraid of losing her state health insurance if she obtained employment. Thus, the trial court concluded that while "there were opportunities that she may have worked . . . under the current circumstances and the ages of her children, it was logical that she did not."

Considering this evidence, we cannot say the trial court abused its discretion in failing to impute income to plaintiff. As the purpose of spousal support is to balance the incomes and needs of the parties so as not to impoverish either party, the trial court's ruling was not in error. *Moore*, 242 Mich App at 654.

IV. CONCLUSION

Because the trial court failed to render a finding regarding the established custodial environment or conduct a proper analysis of the best interest factors, remanding is warranted. However, the trial court did not err in its spousal support award nor was it inequitable. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan