STATE OF MICHIGAN

COURT OF APPEALS

RONALD RAY SMITH, Plaintiff-Appellee,	UNPUBLISHED November 27, 2012
v	No. 309094 Branch Circuit Court
SUSAN ELAINE SMITH, Defendant-Appellant.	LC No. 10-030205-DM

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce which, among other things, awarded plaintiff sole legal and physical custody of the parties' minor daughter. We affirm all of the trial court's rulings challenged on appeal except the ruling regarding the non-modifiable spousal support. On that issue we reverse and remand for the trial court to amend the judgment to provide that spousal support is modifiable.

Defendant first challenges the trial court's custody decision. Specifically, defendant argues that the trial court's analysis of the statutory best interest factors set out in MCL 722.23 is flawed because the court failed to adequately consider the parties' total history, and instead focused on the recent period when defendant had mental health issues. Defendant asserts that the trial court found in favor of plaintiff on factors (a), (b), (d), and (h) because of her mental illness, and argues that the mental health breakdown occupied one year of their daughter's life and should not outweigh defendant's care of their daughter during the 11 years preceding the mental health breakdown.

"We apply three standards of review in custody cases." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "The great weight of the evidence standard applies to all findings of fact." *Id*. A trial court's findings regarding each custody factor in MCL 722.23 "should be affirmed unless the evidence clearly preponderates in the opposite direction." *Id*. "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id*. "Questions of law are reviewed for clear legal error," which occurs when a trial court "incorrectly chooses, interprets, or applies the law." *Id*.

Here, the trial court found that the parties were equal with regard to all of the factors listed in MCL 722.23, except factors (a), (b), (d), (g), and (h), which it found favored plaintiff.

MCL 722.23(a) concerns "[t]he love, affection, and other emotional ties existing between the parties involved and the child." Evidence was presented that love, affection, and other emotional ties exist between both parties and the child. It is undisputed that the child and defendant had a close relationship until defendant's health started declining and her mental health began to rapidly deteriorate. The evidence showed that defendant's physical health issues had a significant impact on the child, causing the child to become fearful of defendant, anxious before visits, and was upset and had trouble sleeping following visits. The evidence also showed that their relationship became strained as a result of defendant's mental health problems, and had not yet been repaired at the time of trial, despite defendant's progress toward a healthier life. Because of this plaintiff essentially had to assume the role of primary caretaker for the child and, as a result, their relationship deepened during the time since defendant's mental breakdown. The trial court's finding that factor (a) favored plaintiff is not against the great weight of the evidence, because the evidence does not clearly preponderate in the other direction.

MCL 722.23(b) concerns "[t]he 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." According to the evidence, before defendant's mental breakdown she had the capacity and disposition to give the child love, affection, and guidance, but that, during and after the breakdown, she was unable to care for herself, let alone provide love, affection, and guidance to the child. Defendant admitted that she frequently became angry at the child and oftentimes felt very overwhelmed. When questioned by the trial court concerning her capability to parent a teenager, defendant testified that she was a much stronger person than she was a year and a half earlier, and that she would implement specific rules and consequences to deal with challenging behavior.

The evidence also revealed that plaintiff had assumed the role of primary caretaker for the child since defendant's mental breakdown. In performing this role plaintiff was protective of the child's physical and mental health, demonstrated by the fact that he cleaned up defendant's medical waste for fear that the child would contract a medical condition and he took the child out of the home during defendant's suicide attempts, assisted her in sleeping by herself, and had her transferred to a different school system when she was bullied. The trial court's finding that factor (b) favors plaintiff is not against the great weight of the evidence, because the evidence does not clearly preponderate in the other direction

MCL 722.23(d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." Evidence presented showed that defendant had a new home in Coldwater and that plaintiff remained in the marital home, which was in foreclosure at the time of trial. The evidence also showed that although defendant normally provided care for the child, plaintiff had assumed the role of primary caretaker in recent years due to defendant's physical and mental health issues. Defendant's mental health problems contributed to an unstable, unsatisfactory environment that lacked continuity. Defendant was in and out of the hospital over the past several years, sometimes for weeks at a time. When defendant was in the home, she did not participate in the family, and instead stayed in bed. The evidence also showed that defendant left her medical waste around the home despite plaintiff's insistence that she clean it up to protect the child. The trial court's finding that factor (d) favors plaintiff is not against the great weight of the evidence, because the evidence does not clearly preponderate in the other direction.

Finally, MCL 722.23(h) concerns "[t]he home, school, and community record of the child." Although the evidence showed that both parties were involved in the child's schooling and other activities, it also revealed that plaintiff was responsible for maintaining the child's home, school, and community record since defendant's physical health decline and mental breakdown in recent years. Specifically, the evidence showed that plaintiff assisted the child with her homework and was responsible for switching the child's school because she was being bullied. Conversely, defendant was unable to assist the child with her homework and was not involved in the child's school transfer. The trial court's finding that factor (h) favors plaintiff is not against the great weight of the evidence, because the evidence does not clearly preponderate in the other direction.

Contrary to defendant's contention, the record reveals that the trial court repeatedly acknowledged and took into consideration defendant's history of caring for and raising the child from birth through age 11. However, the trial court also considered the recent history of the parties, and determined that defendant's recent physical and mental health were of major significance in determining the child's best interests. While defendant's care of the child for the first 11 years of her life should not be minimized, the more recent history of the parties supports the trial court's findings that factors (a), (b), (d), (g), and (h) favor plaintiff.

Defendant also argues that the trial court erred in awarding plaintiff sole legal custody of the child where there was no evidence that the parties had difficulty agreeing on major decisions impacting the child's welfare. As defendant's argument suggests, joint legal custody refers to an order of the court specifying "[t]hat the parents shall share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b). In determining whether joint custody is in the best interests of the child, the trial court must consider the best interest factors set out in MCL 722.23, as well as "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(a)-(b).

The trial court found that the parties were at an impasse and were unable to resolve disputes or speak rationally to conclude family issues. That finding is not against the great weight of the evidence. Despite defendant's testimony and argument on appeal that she desires and is capable of being involved in major life decisions for the child, the record reveals that defendant has not shown that she is able to cooperate concerning important decisions affecting the child's welfare. MCL 722.26a(1)(b). The evidence, considered in conjunction with the factors set forth in MCL 722.23, supports the trial court's determination that it is in the child's best interest for plaintiff to have sole legal custody at this time. In sum, the trial court's decision to award plaintiff sole legal and physical custody does not constitute an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009); *Phillips*, 241 Mich App at 20.

Defendant next challenges the trial court's decision awarding her one hour a week of supervised parenting time, with increased parenting time to be phased in as appropriate. We "must affirm the trial court unless its findings of fact . . . [are] 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 722.28.

MCL 722.27a(1) provides that parenting time shall be granted in accordance with the best interests of the child, and that 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. Further, 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. *Id*. MCL 722.27a(6)(i) provides that the trial court may consider any relevant factors when determining the frequency, duration, and type of parenting time to be granted.

The record shows that the trial court's award of one hour a week of supervised parenting time was not an abuse of discretion under the circumstances, and that all parties anticipate increased parenting time in the future, to be phased in as the child becomes more comfortable with defendant and as their relationship strengthens over time. The Friend of the Court recommendation supported the trial court's order, as it indicated that any type of parenting time plan would have to be done in "baby steps" and it will be "a long road ahead in securing any form of lengthy supervised visits, let alone unsupervised ones[.]" It is evident that under the circumstances of this case, the "phase-in" approach ordered by the trial court is in the child's best interests. MCL 722.27a(1). Accordingly, we affirm the award of parenting time.[1]

Defendant next challenges the trial court's division of marital property. Specifically, defendant argues that the trial court improperly failed to divide plaintiff's military pension and professor retirement account and erred in not conducting an analysis of the factors set out in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). "In a divorce action, we review for clear error a trial court's factual findings related to the division of marital property." *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Id*. "If the findings of fact are upheld, . . . [we] must decide whether the dispositive ruling was fair and equitable in light of those facts." *Sparks*, 440 Mich at 151-152. "[T]he ruling should be affirmed unless . . . [we are] left with the firm conviction that the division was inequitable." *Id*. at 152.

"[A]ssets earned by a spouse during the marriage . . . are properly considered part of the marital estate." *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). "Generally, marital assets are subject to division between the parties[.]" *Id*.

> In reaching an equitable division of the marital estate, the trial court is to consider the following factors whenever they are relevant to the circumstances of the particular case:
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> > (1) 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

[1] The parties agree that the child support issue is moot because of subsequent events that led to a recalculation of the amount.

> conduct of the parties, and (9) general principles of equity. [*Sparks*, [440 Mich] at 159-160.] [*Id*. at 185.]

"Because of the wide array of factual circumstances involved in a divorce proceeding, the determination of relevant factors varies depending on the case." *McNamara*, 249 Mich App at 185. "[T]here is no rigid framework for applying the relevant factors." *Id*. at 185-186. However, "where any of these factors are relevant to the value of the property or to the needs of the parties, the trial court must make specific findings of fact regarding those factors." *Id*. at 186. "In so doing, the trial court must not assign disproportionate weight to any one circumstance." *Id*.

Here, the trial court awarded plaintiff his full military pension and professor retirement account in light of the fact that plaintiff also assumed $15,000 in credit card debt and $5,000 in vehicle debt, and in light of the fact that defendant put approximately $35,000 in veterans' benefits toward her house. The trial court did not explicitly include an analysis of the *Sparks* factors in making its ruling, aside from the *Sparks* factor of general principles of equity. *Sparks*, 440 Mich at 159-160. In *Sparks*, our Supreme Court recognized the broad discretion a trial court is given in fashioning its rulings, and stated that "the factors to be considered will not always be equal. Indeed, there will be many cases where some, or even most of the factors will be irrelevant." *Id*. at 158-159. The Court instructed that it is only where a factor is relevant that the trial court is required to make specific findings of fact regarding it. *Id*. at 159.

In this case, despite the trial court's lack of in-depth analysis of the *Sparks* factors in relation to the property division, it is apparent that the court properly focused on fashioning a property division that was equitable under the circumstances. The court's analysis did include consideration of the parties' age, life status, and earning abilities without specifically mentioning that these were *Sparks* factors. In doing so the court focused on the equities of the case and weighed the fact that plaintiff had assumed $15,000 in credit card debt and $5,000 in vehicle debt against the fact that defendant received $35,000 in veterans' benefits that she put toward a house in which plaintiff would share no equity in determining that it would be inequitable for defendant to share in plaintiff's $1,522 monthly military pension amount. It is also notable that defendant did not seek spousal support due to the fact that she was receiving $2,774 a month in veterans' disability benefits. The trial court also focused on the fact that plaintiff withdrew his professor retirement funds and used the $4,000 to pay for living expenses for the parties and their child during the pendency of the divorce in determining that it would be inequitable for defendant to share in that amount. In sum, the trial court's findings of fact are supported in the record and are not clearly erroneous. *Cunningham*, 289 Mich App at 200. Although more extensive factual findings regarding, or specific mention of, the *Sparks* factors may have been preferable, it is apparent that the trial court focused on the relevant evidence and equities of the case in dividing the marital property and that its dispositive rulings are fair and equitable in light of the facts of the case. *Sparks*, 440 Mich at 151-152. Because we are not left with the firm conviction that the division was inequitable, we affirm the trial court's property division. *Id*. at 152.

Plaintiff and defendant agree, as they must, that the trial court erred in ruling that spousal support would no longer modifiable and would be forever barred if defendant's Veterans' Affairs (VA) benefit is not reduced by more than 50 percent at the five-year review. "An award of

spousal support is subject to modification on a showing of changed circumstances." *Koy v Koy*, 274 Mich App 653, 661; 735 NW2d 665 (2007); MCL 552.28. The parties did not make any agreement relative to spousal support. Instead, spousal support was decided by the trial court, and thus is always subject to possible modification. *Staple v Staple*, 241 Mich App 562, 568, 581; 616 NW2d 219 (2000). Accordingly, the trial court erred in ruling that spousal support would no longer be modifiable and forever barred if defendant's VA benefit is not reduced by more than 50 percent at the five-year review. Accordingly, we reverse in part this provision of the judgment and remand for amendment of the spousal support provision to make it modifiable.

Defendant next argues that the trial court erred in maintaining the status quo on her life insurance policy. Specifically, defendant argues that leaving the life insurance policy in status quo leaves plaintiff as the primary beneficiary, inconsistent with her desire for her two children to be co-beneficiaries. MCL 552.101(2)-(3) provide that "[e]ach judgment of divorce . . . shall determine all rights of the wife [and husband] in and to the proceeds of any policy or contract of life insurance . . . ." Further, a trial court may order maintenance of the status quo in a divorce action. See, e.g., *Webb v Webb*, 375 Mich 624, 627; 134 NW2d 673 (1965); *Irvin v Irvin*, 93 Mich App 770, 772; 286 NW2d 920 (1979). Contrary to defendant's argument, plaintiff is no longer the primary beneficiary on the insurance policy pursuant to the terms of the divorce judgment. MCL 552.101. Thus, the parties' two children are now primary beneficiaries by operation of the judgment. The status quo order accommodates the desire of both parties to have their daughters be beneficiaries of the life insurance policy, while also protecting against scenarios under which the policy may not be paid, e.g., defendant's suicide or defendant's nonpayment of the policy. Further, the status quo order accomplishes the primary concern of both parties, which is that the policy be maintained so that their minor child can obtain coverage when she reaches 18 years of age. The trial court's finding that maintaining the life insurance policy would permit the parties' minor child to obtain coverage when she reaches 18 years of age is not clearly erroneous, *Cunningham*, 289 Mich App at 200, and its dispositive ruling maintaining the status quo on the life insurance policy is fair and equitable in light of the facts, *Sparks*, 440 Mich at 151-152. Accordingly, we affirm that decision.

Affirmed in part, reversed in part, and remanded for amendment of the spousal support provision to make it modifiable consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray