STATE OF MICHIGAN

COURT OF APPEALS

PAULA RAE WILLIAMSON DEBOE, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED September 18, 2003
v	No. 246083 Jackson Circuit Court
SCOTT FRANKLIN DEBOE, Defendant-Appellant/Cross-Appellee.	LC No. 02-001873-DM

PAULA RAE WILLIAMSON DEBOE, Plaintiff-Appellant,	
v	No. 246410 Jackson Circuit Court
SCOTT FRANKLIN DEBOE, Defendant-Appellee.	LC No. 02-001873-DM

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In Docket No. 246083, defendant appeals as of right from a judgment of divorce, raising several issues with respect to the trial court's decision awarding plaintiff physical custody of the parties' two children, and also challenging its division of certain marital property. Plaintiff has filed a cross-appeal, raising issues concerning the amount of court-ordered child support and the parenting time awarded to defendant. In Docket No. 246410, plaintiff appeals by leave granted from an order supplementing the divorce judgment with regard to defendant's child care obligation. We affirm in part, reverse in part, and remand.

I

Defendant contests the trial court's custody decision, arguing that the court improperly relied upon information that was not presented as evidence, that it improperly determined that no established custodial environment existed, and that it therefore applied the wrong evidentiary standard when awarding plaintiff physical custody. "All custody orders must be affirmed on

appeal unless the trial court's findings 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." *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999), citing MCL 722.28.

We agree that the trial court committed a clear legal error when it relied on information that was not part of the record. "The trial court's ultimate findings relative to custody must be based upon competent evidence adduced at the hearing." *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989), citing *Nichols v Nichols*, 106 Mich App 584, 591; 308 NW2d 291 (1981). See also *Shelters v Shelters*, 115 Mich App 63, 67; 320 NW2d 292 (1982), where this Court held that the findings of a trial court in a custody matter must be based upon competent evidence adduced at the custody hearing. While a trial court may consider information, such as a friend of the court report, which is not admitted as evidence, it may consider the information only as background. *Id.*; *Duperon, supra* at 79. The ultimate findings must be based upon competent evidence of record. *Id.*

In denying defendant's request for joint physical custody, the trial court stated:

> My primary concern is establishing a stable and consistent routine for the children. I am concerned that with the young ages of these children, 2 and 5 years old, that they should have a clear, stable environment. *It is my understanding from reading and other cases, that most child development experts recommend that younger children should have a primary caregiver. For example, the publications of the Jackson County Association for Infant Mental Health recommends that for children ages 19 to 36 months, there should be more than 1 bi-weekly overnight only in exceptional situations. The suggestions of the Jackson County Association for Infant Mental Health are drawn from information from the Michigan Children's Charter. Of course, the current schedule already exceeds those guidelines, but the father's proposed* [joint custody] *schedule would be exceeding it even more. Regular, frequent contact is encouraged but extended time is discouraged. Although I believe some extended time for vacations is appropriate, I do not find that it is in a 2-year-old's best interest to establish a schedule where they alternate so frequently.* Although I attempted in the property division aspects of this case to divide the marital property almost equally, my role as the judge is not to try and divide the children equally even if both parents are good parents. The best interests of the children prevail over a parent's desire to have 50% of their child's time.
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> It is a closer question with a 5-year-old, but that would create another issue of splitting the children. I find that is contrary to their best interests. As I stated on the record, if these children were 10 and 13, I would view this case differently, but at this time, for the reasons stated above, I find it is in the children's best interest that there be primary physical custody with the mother and joint legal custody. [Emphasis added.]

It is apparent that the focal point of the trial court's custody decision was its perception that young children such as those involved in this case (ages two and five) need a stable

environment, which cannot be attained by joint custody and the frequent changes involved with such a situation. Moreover, this understanding was derived "from reading and other cases," in particular two specific documents not introduced into evidence, which indicate that young children should have one primary care giver.

From a review of the court's oral ruling and written opinion, it appears that the trial court's ultimate conclusion that plaintiff have physical custody of the children was based not on its findings under factors (a) and (b), but instead on its "primary concern" as to the age of the children and the effect a joint physical custody schedule and environment would have on young children. We therefore conclude that the court's ultimate custody decision was not based on competent evidence adduced at trial, as the evidence the court relied upon for its findings as to the impact joint custody has on young children was not a part of the record. This prevented defendant from rebutting or otherwise challenging these studies, and the court's belief that they were accurate. Plaintiff's inability to challenge this material precluded him from addressing what turned out to be the primary concern of the court. Moreover, as noted, the ages of the children were of great significance to the trial court, so much so that it indicated that it may have reached another result if the children were older. In *Berman v Berman*, 84 Mich App 740, 745; 270 NW2d 680 (1978), this Court recognized that, while the age of a child may be considered when determining custody, age itself cannot control a decision. The trial court's ruling suggests that joint physical custody would never be appropriate where children are very young, a generalization that is not supported by any evidence in this record. It was a clear legal error for the trial court to decide the issue of joint physical custody based on information that was not part of the record. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).[1]

We further conclude that the trial court's factual finding, that no established custodial environment existed, is against the great weight of the evidence. Whether an established custodial environment exists is a question of fact for the trial court. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). MCL 722.27(1)(c) provides, in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> (c) . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child 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.

[1] This is not to say that the trial court's concerns were incorrect. Rather, they were improper because they were based on evidence that neither party introduced into evidence.

> The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered. [Emphasis added.]

An established custodial environment can exist with both parents and in more than one home. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000), citing *Duperon*, *supra* at 80. In *Jack*, the record established that *the children* looked to both parents to provide them with "guidance, discipline, the necessities of life, and parental comfort." *Id.* at 671. Thus, an established custodial environment existed with both parents. *Id.* "[T]he fact that the children's primary residence remained in [the] defendant's home after the parties separated did not extinguish the custodial environment that existed with [the] plaintiff." *Id.*

In *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001), this Court held that the trial court erred by failing to find an established custodial environment with both parents. In *Foskett*, the trial court reached its determination that no custodial environment existed after noting that *the children* looked to both their mother and father, with the same frequency, for guidance, discipline, and the necessities of life. *Id.* at 7-8. This Court stated:

> Because the existence of a custodial environment is a factual inquiry, the great weight of the evidence standard applies. The appropriate inquiry, therefore, is whether the evidence on which the trial court determined that neither parent established a custodial environment "clearly preponderates in the opposite direction." . . . thus rendering the trial court's ultimate decision regarding custody an abuse of discretion. [*Id.* at 8 (citations omitted).]

The Court held that a finding of no established custodial environment was against the great weight of the evidence which, in turn, rendered the custody decision an abuse of discretion. *Id.* This Court emphasized that, where an established custodial environment exists, any change in custody may occur only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child. *Id.* at 6. It also noted that "[t]his higher standard [] applies when there is an established custodial environment with both parents." *Id.*, citing *Jack*, *supra* at 668.

In this case, the trial court made two errors in determining that no established custodial environment existed. First, in its oral opinion, the court noted that although "this case has not been pending too long," it still did not "think that since custody has been an issue for I thought most of this case, that is an established custodial environment." The court also opined that *neither party* could look at the situation existing under the temporary order as permanent. The court's reliance on the fact that custody was an issue was in error. Although we have held that a court can consider the upheaval involved in repeated changes of physical custody which precede a final decision, see *Hayes*, *supra* at 388, citing *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993), there was no evidence cited by the trial court that the *children* experienced any upheaval or uncertainty because of the pending divorce. Although the parents may have been uncertain about the final resolution, "the focus is on the circumstances surrounding the care of the children in the time preceding trial. . ." *Hayes*, *supra* at 388.

Second, the evidence clearly preponderated in favor of a finding that an established custodial environment existed with both parents. *Jack*, *supra*. The evidence revealed that

plaintiff worked part time after the birth of the parties' first child and continued to work part time until November 2001. After that, she worked full time. While plaintiff testified that she was the primary caregiver for the children and while, pursuant to a temporary order, she had physical custody, defendant had the children every other weekend, every Tuesday for an overnight visit, and every other Thursday evening. He also watched the children for periods when plaintiff was traveling on business. Before defendant moved out of the marital home, which occurred after plaintiff filed for divorce, he routinely woke the children, fed them, got them ready for school, and transported them to school after plaintiff left for work. Importantly, it is undisputed that this practice continued after defendant moved out of the house. It stopped only after plaintiff moved for exclusive use of the marital home and a temporary order of parenting time was entered. Plaintiff acknowledged defendant's participation in the children's morning routine before and after the separation. The evidence also revealed that, before the parties separated, defendant played with the children while plaintiff prepared the evening meal. A former day-care provider testified that defendant dropped off and picked up the parties' older child when she was enrolled in day care. The provider often saw both defendant and plaintiff outside playing with his children in the evenings. She testified that both parties were wonderful parents and had a wonderful bond with the children. At the time of trial, both parties had relocated to separate residences in Kalamazoo and were providing for the children. Plaintiff admitted that, when she relocated from Jackson to Kalamazoo, defendant also moved to Kalamazoo to be near the children.

Defendant testified that, in his apartment, the children have their own bedroom, beds, toys, and videos. During his parenting time, defendant works with the older child on school work. He was in contact with her Kindergarten teacher through email, and he prepared meals for the children. The testimony also revealed that plaintiff provided daily care for the children, took the children to church, and volunteered at day care.

Given the facts elicited, the trial court erred in determining that no established custodial environment existed. Indeed, the trial court made no reference to any of these facts, all of which addresses the environment of the children, both physically and psychologically. *Bowers, supra* at 325. The evidence indicated that the children looked to both parents, over an appreciable time, for guidance, discipline, the necessities of life, and parental comfort. The trial court's erroneous factual finding to the contrary resulted in the custody decision being made without the appropriate evidentiary standard being applied, i.e., clear and convincing evidence. The custody decision was therefore an abuse of discretion. *Foskett, supra* at 8.

On remand, the trial court shall reconsider the custody issue on the basis of the evidence that was properly presented to it and apply the appropriate evidentiary standard when deciding the issue of joint custody. It should also consider up-to-date information. *Greer v Alexander*, 248 Mich App 259, 266-267; 639 NW2d 39 (2001).

II

Defendant also argues that the trial court's factual findings with respect to several of the best interest factors[2] are against the great weight of the evidence. Although reversal is already required as to custody, we address this issue as it will almost certainly arise in remand.

Defendant first contends that best interest factors (a) and (b) were improperly found to favor plaintiff. MCL 722.23(a) requires the court to consider the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(b) instructs courts to consider the "capacity and disposition of the parties involved to give the child love, affection, and to continue the education and raising of the child in his or her religion or creed, if any." Regarding these factors, the trial court stated:

> In this case, the parties have both worked during the time they had young children although the mother for several years worked part-time. Based on her part-time employment and the more time that she has spent in nurturing the children when they were young and they are now only 2 and 5 years old, I find that the mother has shown a greater capacity and disposition to give the children, love, affection, and guidance, and as a result of that there are probably stronger emotional ties between the children and her. I do not question that the father has the capacity and disposition to give the children love and affection and that there may also be strong ties between the children and the father. However, I do believe the mother prevails on factors (a) and (b).

With respect to factor (a), the testimony showed that both parents were bonded with the children. However, there was also testimony that plaintiff spent more time with the children in their infancy. Defendant's mother testified that plaintiff provided more care for the children when they were infants. The youngest child was only two years old at the time of the custody hearing. Plaintiff further testified that she loved the children "immensely." And, there was testimony that, while defendant's emotional ties to the children were strengthened after the divorce proceedings began, plaintiff's emotional ties were continual from the time of birth. Defendant obviously participated in the care of his children and even relocated to Kalamazoo to be near them. However, the trial court weighed the evidence, heard the testimony, and its decision is entitled to deference with respect to credibility determinations and preferences under the statutory factors. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). In *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 28; 581 NW2d 11 (1998), this Court acknowledged that trial courts are in a superior position to make accurate decisions concerning custody. "Although not infallible, trial court's are more experienced and better situated to weigh evidence and assess credibility." *Id.* Here, the trial court's determination that factor (a) favored plaintiff is not against the clear weight of the evidence.

With respect to factor (b), there was comparable evidence concerning the parties' capacity for love and affection. However, there was disputed evidence with respect to defendant's involvement in the day care or schooling of the children. Moreover, the evidence

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[2] MCL 722.26a requires a trial court to consider the best interest factors when deciding an issue of joint custody.

was clear that plaintiff initiated and maintained the children's religious education. While the parties were married, she joined a church and requested that defendant attend with her and the children. After moving to Kalamazoo, plaintiff continued to attend church with the children. There was no evidence that defendant took any initiative to take the children to church or to maintain their religious education. Giving deference to the trial court's superior vantage point with respect to credibility and weighing the evidence, it cannot be said that its conclusion with respect to factor (b) is against the great weight of the evidence. *Fletcher, supra* at 28; *Thames, supra* at 305.

Defendant also argues that the trial court erred in weighing factors (d) and (j) equally to both parties. MCL 722.23(d) assesses the length of time that the children have lived in a stable, satisfactory environment and the desirability of maintaining that stability. The trial court's finding of equality on this factor is not against the great weight of the evidence. Plaintiff lived in the marital home with the children until she moved to Kalamazoo in August 2000. Plaintiff testified that she consulted defendant about the move and that it improved the quality of life for her and the children. While defendant disputes that he was consulted about the move, there was no showing of instability with respect to the children's living situation. They moved once with their mother. Defendant also moved. Both parties obtained apartments and established appropriate living arrangements. Neither party favored the other with respect to stability of a home during the pendency of the divorce.

Finally, MCL 722.23(j) assesses the willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. In arguing that this factor favored him, defendant ignores significant evidence. Plaintiff testified that defendant was not consistent and that he tried to manipulate or change arrangements after agreeing to them. Defendant admitted that he tried to change visiting arrangements to his advantage. He also admitted that he asked the parties' five-year-old child to participate in deciding whether to see plaintiff on one occasion. In addition, the testimony revealed that, when defendant sought additional parenting time, plaintiff offered him an extra evening during the week. Plaintiff acknowledged that defendant loved the children. She testified that she was not trying to restrict his access to the children and that she would try to be flexible. She sometimes allowed defendant to stay with the children when she traveled on business. The evidence simply does not support defendant's claim that plaintiff was unwilling to foster a relationship between himself and the children. The trial court's refusal to find that factor (j) favored defendant is not against the great weight of the evidence.

III

Defendant next challenges the trial court's decision to include in the marital estate the appreciation in the value of a rental house that he inherited before the parties married. In reviewing a trial court's property division in a divorce case, this Court reviews the trial court's findings of fact under the clearly erroneous standard. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003).

The trial court's finding of fact, that the appreciation of the value of the rental property was a marital asset, is not clearly erroneous. Where a non-owner spouse contributes to the acquisition, improvement, or accumulation of property, the separate asset may be invaded during a property division. *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003). See also

Dart v Dart, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999), wherein the Court recognized that "in certain situations, a spouse's separate assets, or the appreciation in their value during the marriage may be included in the marital estate." For example, where one spouse actively manages an asset during the marriage, the marital estate includes the appreciation in value of the asset. *Id.*, citing *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997). In *Hanaway v Hanaway*, 208 Mich App 278, 292-294; 527 NW2d 792 (1995), this Court determined that the increased value of the husband's interest in his family company necessarily reflected his investment of time and effort, which investment was facilitated by the wife's long-term commitment to the home and children.

In this case, the appreciation of the property at issue was not purely passive. Defendant actively managed the rental property and made improvements to it. Plaintiff's contributions during the marriage, including watching the children while he made improvements, enabled defendant to maintain and improve the property. The appreciation in the value of the property that occurred between the beginning and the end of the marriage was part of the marital estate to be divided. *Reeves, supra* at 496.

IV

Defendant additionally challenges the trial court's division of plaintiff's 401K plan. He argues that the division effectively required him to pay $1,250 toward plaintiff's attorney fees even though the trial court ruled that no attorney fees would be awarded. Regardless of any facial merit that argument may have, the judgment, as entered by the trial court and signed by the parties, incorporated a specific agreement between the parties with respect to the 401K plan. Property settlement provisions that are incorporated in a divorce judgment are typically final and cannot be modified. *Quade v Quade (On Remand)*, 238 Mich App 222, 226; 604 NW2d 778 (1999). "Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiations and agreement of the parties." *Id.*; see also *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). In this case, defendant never objected when the trial court announced the manner in which it planned to value and divide plaintiff's 401K plan. More importantly, the parties subsequently entered into an agreement with respect to the division of plaintiff's 401K plan. The agreement was merged into the judgment of divorce. We uphold the parties' agreement with respect to the retirement fund. *Id.*

V

On cross-appeal in Docket No. 246083, plaintiff argues that the trial court abused its discretion when it ordered defendant to pay child support in an amount that is fifteen percent less than the child support guidelines formula amount. Although this issue may be moot if the court's custody decision is modified on remand, we nevertheless review the issue in the event plaintiff retains primary custody.

A party appealing a child support order bears the burden of showing a clear abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). A trial court may

deviate from the support guidelines formula if it articulates the amount of support under the formula guidelines, how the ordered support deviates from the guidelines, and the reasons for the deviation. MCL 552.16; MCL 552.605(a), (b) and (d).[3] The criteria for deviating from the formula is mandatory. *Burba v Burba (After Remand)*, 461 Mich 637; 610 NW2d 873 (2000). In its written opinion, the trial court specifically indicated that its support order would deviate from the formula amount by fifteen percent. The court indicated that it felt the child support formula amount would be unjust or inappropriate in this case because defendant had significant parenting time and would be providing more meals for the children than some parents who benefit from the shared economic responsibility calculation. The trial court found an inequity in requiring defendant to pay the unadjusted guideline amount that is usually charged to non-custodial parents who see their children infrequently or every other weekend only. The guidelines amount was clearly set forth in the judgment and the amount of the deviation was reiterated. Because the mandatory criteria were set forth in writing by the trial court, we reject plaintiff's argument that the trial court failed to follow MCL 552.605 when deviating from the formula guidelines.

We further reject plaintiff's alternative argument that the reasons for deviation were improper or inappropriate. First, plaintiff's argument may be deemed abandoned because no authority is cited to support the position advocated. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). More importantly, however, plaintiff bears the burden of showing that the support order was a clear abuse of discretion. *Kosch, supra.* "An abuse of discretion occurs if the results of the trial court's decision are so grossly violative of fact and logic that they evidence a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Paulson v Paulson*, 254 Mich App 568, 575; 657 NW2d 559 (2002). Plaintiff has not met her burden. The trial court's reasons for adjusting the formula amount were not grossly violative of fact or logic based on the circumstances presented.

VI

Plaintiff also argues on cross appeal that the trial court erred when it ordered parenting time in excess of that set forth in the temporary order. We disagree.

Plaintiff first argues that the parties agreed to the amount of parenting time set forth in the temporary order and, therefore, the trial court was restricted by the parenting time schedule in the temporary order. This argument is unsupported by the record. Parenting time was a contested issue from the beginning of the divorce proceedings. Defendant objected to the temporary order and requested additional parenting time. He later moved for additional parenting time. At trial, he requested joint physical custody and informed the trial court that parenting time was a contested issue. In her trial brief, plaintiff recognized that parenting time was a contested issue to be decided by the trial court. MCR 2.507(H) indicates that an agreement is binding if made in open court or in writing. There was no such agreement in this case. We note that the temporary

[3] MCL 552.605(c) is inapplicable to this case. It requires that the trial court set forth the "value of property or other support awarded instead of the payment of child support, if applicable."

order itself was effective only "until further order of the court." The final judgment was a further order of the court, which rendered the temporary order ineffective.

Plaintiff next argues that the excess parenting time that was ordered was an abuse of discretion. "The controlling factor in determining visitation rights is the best interests of the child." *Thames, supra* at 305-306. MCL 722.27(1)(a) provides:

> Parenting time shall be granted in accordance with the best interest 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.

In this case, the trial court retained the parenting time schedule set forth in the temporary order and included specific other terms that gave defendant some additional parenting time during the summer, alternate spring breaks, and plaintiff's business trips. The record does not support plaintiff's contention that the trial court was confused or that the order was ambiguous and subject to interpretation. "All custody orders must be affirmed on appeal unless the trial court's findings 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." *Mixon, supra*. Plaintiff has not demonstrated any abuse of discretion in the limited, additional parenting time ordered.

VII

Finally, in Docket No. 246410, plaintiff argues that the successor trial judge improperly signed an order supplementing the divorce judgment without a hearing or stipulation, and further, that the supplemental order improperly altered the child support award. Neither argument has any merit.

MCR 2.602 does not require a trial court to hold a hearing or obtain a stipulation from the parties when an order is submitted under the "seven-day rule" of MCR 2.602(B)(3). The supplemental order at issue here was the product of a hearing held on December 31, 2002, and was submitted under MCR 2.602(B)(3).

In addition, the supplemental order did not alter, amend or change the judgment of divorce with respect to the child support amount. The supplemental order changed the child care amount that defendant was required to pay for the minor children. The change, in turn, altered defendant's bimonthly combined obligation. The supplemental order noted the changes and indicated how the new bimonthly amount was calculated. The supplemental order did nothing more than that which was contemplated by the parties and the trial court at the December 31, 2002, hearing. It did not affect the child support formula amount, the deviation in the formula amount, and the reasons for the deviation. Further, it did not eliminate the trial court's previous compliance with MCL 552.605.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray