

STATE OF MICHIGAN
COURT OF APPEALS

DENISE D. LaCASSE,

Plaintiff-Appellee,

v

RICHARD G. LaCASSE,

Defendant-Appellant.

UNPUBLISHED

December 1, 1998

No. 207639

Ingham Circuit Court

LC No. 95-086704 DM

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce that, *inter alia*, awarded plaintiff sole physical and legal custody of the parties' two minor children. We affirm.

On appeal, defendant challenges the trial court's custody award, claiming that the court's findings of fact on the statutory best interest factors, MCL 722.23; MSA 25.312(3), are against the great weight of the evidence and that the court erred in awarding sole physical and legal custody of the minor children to plaintiff. We disagree.

After carefully reviewing the record, we conclude that the trial court did not err in awarding plaintiff sole physical and legal custody of the children. The record indicates that the trial court carefully considered the factors relative to the best interests of the children set forth in MCL 722.23; MSA 25.312(3). The trial court's findings of fact with respect to each of the factors in question are not contrary to the great weight of the evidence, nor does the trial court's ruling regarding the ultimate custody decision constitute an abuse of discretion. See *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994); *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

We also hold that the trial court did not err in determining that the minor children, then three and five years of age, were of insufficient age to express a reasonable preference. Such a

determination was within the trial court's discretion, *Dempsey v Dempsey*, 96 Mich App 276, 283; 292 NW2d 549 (1980), modified in part on other grounds 409 Mich 495 (1990), and we are not convinced that the trial court abused its discretion.

We reject defendant's claim that the trial court, without first holding an evidentiary hearing, erred in entering the October 31, 1995, order that awarded temporary physical and legal custody of the children to plaintiff. In light of the unique circumstances existing at the time of the order, this action was authorized by MCL 722.27(1)(f); MSA 25.312(7)(1)(f), which provides that, for the best interests of the children, the court may "[t]ake any other action considered to be necessary in a particular child custody dispute." Further, even if we were to conclude that the trial court erred, it would not compel us to reverse the trial court's final order awarding sole physical and legal custody to plaintiff because an evidentiary hearing was eventually held and, as explained above, the trial court properly considered the best interest factors and determined in its discretion that plaintiff should be awarded sole custody. Cf. *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991).

Next, defendant claims that the trial court abused its discretion in admitting the expert testimony of Dr. Hobbs. We disagree. Dr. Hobbs' testimony clearly satisfied the requirements of MRE 702. Moreover, to the extent that it is recognized at all in Michigan, cf. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 671 (1997), we have substantial doubt that the analysis contained in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), regarding the admissibility of "novel scientific evidence," has any application here. Any objection defendant had to Dr. Hobbs' testimony went to its weight, not its admissibility. In any event, we would also find that any error in the admission of Dr. Hobbs' testimony was harmless in light of the abundance of other evidence supporting the trial court's decision to award custody to plaintiff.

We also reject defendant's claim that the trial court, in its dispositional ruling, made findings of fact not supported by the evidence and that the property division was otherwise inequitable. This Court reviews the trial court's factual findings for clear error and will affirm the trial court's dispositive ruling unless we are left with the firm conviction that the division was inequitable. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Having reviewed the record, we conclude that defendant has failed to establish that the trial court's factual findings, including its finding as to the valuation of defendant's pension, were clearly erroneous. Nor are we convinced that the property division was inequitable.

Lastly, we find no abuse of discretion in the trial court's decision to award plaintiff \$30,000 in attorney fees. See *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997); *Jansen v Jansen*, 205 Mich App 169, 173; 517 NW2d 275 (1994). Contrary to defendant's claim that there was "no showing that plaintiff required the award of fees to carry on her prosecution of the divorce," plaintiff specifically testified at trial that she "would not [have been] able to proceed if it were not for the generosity of [her] attorneys." She also testified that she was not in a position to pay her attorney fees.

Thus, plaintiff established that an award of attorney fees was necessary to allow her to carry on this divorce action. Under these circumstances, an award of attorney fees was authorized. See MCR 3.206(C)(2).

Affirmed.

/s/ Helene N. White

/s/ Stephen J. Markman

/s/ Robert P. Young, Jr.