

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY A. POTTS,

Plaintiff-Appellant/Cross-Appellee,

v

TONI L. POTTS,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

November 19, 2009

No. 289992

Bay Circuit Court

LC No. 07-007022-DM

Before: Saad, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff, Jeffrey Potts, appeals and defendant, Toni Potts, cross-appeals the trial court's judgment of divorce. Specifically, Jeffrey Potts takes issue with the trial court's property distribution, award of attorney fees, and award of spousal support and Toni Potts challenges the trial court's custody rulings. For the reasons set forth below, we affirm.

I. Property Distribution, Attorney Fees and Spousal Support

A. Toni Potts's 401(k)

Jeffrey Potts complains that the trial court unfairly declined to distribute or offset the amount of Toni Potts's 401k.¹ The record reflects that Toni Potts liquidated her 401k, valued at \$27,000, during the divorce proceedings. Jeffrey Potts is correct that Toni Potts did so in violation of the trial court's *ex parte* order that forbade the parties from invading the marital

¹ "This Court reviews a property distribution in a divorce case by first reviewing the trial court's factual findings for clear error, and then determining whether the dispositional ruling was fair and equitable in light of the facts." *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made, giving due regard to the trial court's special opportunity to observe the witnesses." *Smith v Smith*, 278 Mich App 198, 204; 748 NW2d 258 (2008).

estate. Nonetheless, under the circumstances in this case, the court's "dispositional ruling was fair and equitable in light of the facts." *Olson, supra* at 622.

Toni Potts testified that, until the trial court ordered Jeffrey Potts to pay her \$75 per week in May 2007, Jeffrey Potts provided no money to Toni Potts after he filed for divorce on January 12, 2007, and the record reflects that Toni Potts had no income of her own during that time. Toni Potts further testified that she attempted to use money from her joint accounts with Jeffrey Potts at Edward Jones, but he had not deposited money in their checking or savings account since mid-2006 and, after she took out \$3,500 to pay her divorce lawyer, Jeffrey Potts removed all of the money from their joint account, leaving her no access to cash. At trial, Jeffrey Potts admitted that he moved the money to an account at Chemical Bank. Toni Potts testified that their Edward Jones financial advisor told her she had no access to any money through Edward Jones. Accordingly, Toni Potts believed she had no option but to use the money in her 401k account, and she incurred significant penalties for removing the funds. Toni Potts testified that, in addition to litigation costs, she used the money for gas and for items for the children that Jeffrey Potts did not cover, including birthday party gifts, movie tickets, prescription co-pays, field trip expenses, book fair money, and other items. The record also reflects that, before the trial court curtailed the children's extracurricular activities, Jeffrey Potts had agreed to pay for them, but failed to do so for several months. Toni Potts testified that she had to pay for the children's dance and gymnastics classes, trips, competitions and costumes on her own.

Though Toni Potts should have asked the trial court to allow her access to some of the Edward Jones accounts or should have asked the court to order Jeffrey Potts to pay for all or more of the children's expenses, in light of evidence that Toni Potts had no access to money for any purpose, including to retain an attorney, and evidence that Jeffrey Potts also liquidated the joint account in an apparent effort to keep the money away from Toni Potts, the trial court reasonably decided not to reduce Toni Potts's property distribution on this basis. Jeffrey Potts should not be heard to complain that Toni Potts wrongly used her retirement money when his removal of money from their joint account necessitated her conduct. Moreover, though Jeffrey Potts argues that Toni Potts used the money for litigation costs, Jeffrey Potts ignores that he earned approximately \$22,000 per month during the divorce and could pay for his litigation costs with that money. And, while the trial court ultimately ordered Jeffrey Potts to pay costs for Toni Potts's trial attorney, Matthew Reyes, evidence showed that Toni Potts used the 401k money for previous attorneys and potential experts. In light of all the circumstances, the trial court's decision was equitable.

B. Jeffrey Potts's Business

Jeffrey Potts also complains that the trial court erroneously valued his business at \$75,000 when Toni Potts failed to present expert testimony with regard to that value. Toni Potts specifically testified that she had no money to pay her trial attorney and that Matthew Reyes agreed to represent her, but could not himself pay for any expert witnesses. Jeffrey Potts is correct that the only evidence Toni Potts introduced at trial to show the value of Jeffrey Potts's medical practice were documents showing the assets and liabilities of the business, a list showing the balances of his business accounts, and the tax returns showing profits made from certain business equipment. While a business appraiser perhaps would have given a more detailed opinion about the current and future value of the business concern, the trial court was nonetheless required to value the business based on evidence presented at trial. *Olson, supra* at

627-628. Indeed, it is clear error for a trial court to fail to place a value of a piece of marital property. *Id.* As Toni Potts notes on appeal, Jeffrey Potts could have countered her evidence with expert testimony that her evidence of value or method of valuation were lacking or inaccurate, but he chose to present no evidence on the issue. Further, Jeffrey Potts does not set forth any argument or evidence to show that the court's estimated value is out of line with its actual value. "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Accordingly, and based on the evidence presented at trial, the court's valuation was not clearly erroneous.

C. Credit Card Debt

With regard to the trial court's order that Jeffrey Potts must pay \$40,000 toward Toni Potts's credit card bills, this decision was fair and equitable. Again, ample evidence established that Jeffrey Potts was earning \$22,000 per month during the divorce and Toni Potts had no employment income and no access to the parties' bank accounts. Jeffrey Potts began to pay Toni Potts \$75 per week in May 2007 but, as Toni Potts stated at trial, this did not even cover the amount she needed to put gas in her vehicle. While Jeffrey Potts maintains that, because he was paying for household expenses, there was no need for Toni Potts to spend any money, it was clearly unfair for Jeffrey Potts to expect Toni Potts to have no personal spending money during the 22 months of divorce proceedings. Further, Toni Potts testified that Jeffrey Potts paid only the bare minimum of household expenses during the litigation. Toni Potts further stated that she found it necessary to buy clothes for the children, and had to spend money for the children's prescriptions, dental work, and for her own necessary items and services like haircuts and counseling. She also noted that some of the credit card debt was incurred before Jeffrey Potts filed for divorce, and was incurred during the time that Jeffrey Potts was attending medical school. Jeffrey Potts did not rebut that evidence.

Jeffrey Potts argues that, while Toni Potts testified that 90 percent of the credit card debt was used for purchases for the children, Toni Potts failed to present sufficient evidence to establish this at trial. However, in addition to her own testimony, Toni Potts turned over to Jeffrey Potts's counsel a significant number of receipts she claims proves she primarily charged items for the children. Though she gave the attorney those receipts during the course of trial, Jeffrey Potts's attorney said he could not sort them out sufficiently for them to be useful to his case. Arguably, Toni Potts should have turned over the receipts far earlier in the litigation. At the same time, however, Jeffrey Potts does not take the position that Toni Potts wrongfully withheld the receipts during discovery. Moreover, at the end of trial, the court offered the parties additional time to reopen the proofs on this issue and to present additional evidence and arguments to the court. Jeffrey Potts declined to do so.

We further note that, while Jeffrey Potts complains that the amount of credit card debt was not established with sufficient evidence, he does not challenge the trial court's assertion that both parties agreed that the debt was actually in excess of \$40,000. Accordingly, to the extent he argues that the total was too high, he has waived this issue. Furthermore, we reject Jeffrey Potts's claims that the court should have required Toni Potts to prove she will use the money to pay off her credit cards and that the court should have allowed him to negotiate with the credit card companies to lower the ultimate bill. The credit cards are in Toni Potts's name and, if she fails to pay them off with money designated for that purpose, she will be suffer the

consequences. Also, because the cards are in her name, only she can negotiate with the companies to forgive some of the debt.

D. Attorney Fees

Jeffrey Potts challenges the trial court's order that he pay Toni Potts's trial counsel \$14,000 for his attorney fees.² Jeffrey Potts's primary argument is that the fees are too high because his counsel charged him less and two lawyers worked on Toni Potts's case. As set forth above, Toni Potts had no income to pay for her attorney, while Jeffrey Potts could easily afford his own counsel. The fees charged for Toni Potts's defense were not unreasonable in light of the amount of work that was necessary for trial counsel to review the record, complete discovery, and take the case through trial. Though Jeffrey Potts contends that Toni Potts could pay her lawyers with money from the spousal support award, the trial court based its award of spousal support on factors other than Toni Potts's attorney fees, including her needs and income level. The two issues involved different legal and factual considerations and it was not an abuse of discretion for the trial court to make the award to Toni Potts.

E. Spousal Support

Jeffrey Potts contends that the trial court should not have awarded Toni Potts \$4,200 per month in spousal support.³ Again, the award of spousal support "must be affirmed unless the appellate court is firmly convinced that it was inequitable." *Gates, supra* at 433. We are not convinced that the award is inequitable.

² With regard to the award of attorney fees in a divorce case, this Court reviews a trial court's findings of fact for clear error, *Stallworth v Stallworth*, 275 Mich App 282; 738 NW2d 264 (2007), and the trial court's decision to award fees for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). An abuse of discretion occurs if the trial court's decision falls outside a principled range of outcomes. *Jamil v Jahan*, 280 Mich App 92, 100; 760 NW2d 266 (2008).

³ On the issue of spousal support, as this Court recently explained in *Koy v Koy*, 274 Mich App 653, 660-661; 735 NW2d 665 (2007), "[i]t is within the discretion of the trial court to award spousal support when just and reasonable, on the basis of such factors as 'the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case.' *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996)." The Court also explained in *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008):

The trial court's factual findings are reviewed for clear error. *Id.* at 629; *Gates, supra* at 432. If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Gates, supra* at 433; *Olson, supra* at 629-630. The trial court's dispositional ruling must be affirmed unless the appellate court is firmly convinced that it was inequitable. *Olson, supra* at 630; *Gates, supra* at 433.

Jeffrey Potts claims that Toni Potts need only “refresh” her computer skills in order to get a job to support herself. However, testimony established that Toni Potts has been out of the work force for nine years. While she obtained several computer certifications when she worked, it is undisputed that all of her certifications are for programs and applications that are no longer used in business. Toni Potts also offered unchallenged testimony that she has applied for dozens of jobs at Michigan businesses and at schools so that she could teach business, but she has not received any job offers. She also testified that she applied for jobs at different retail stores, but was not hired. Jeffrey Potts did not counter her testimony with any evidence that jobs are available for candidates with Toni Potts’s qualifications and work experience, nor did he show that Toni Potts has failed to make an adequate effort to find employment. In contrast, it is undisputed that Jeffrey Potts earns between \$260,000 and \$270,000 per year.

The parties were married for 15 years, and Toni Potts worked for much of that time. She also supported the family when Jeffrey Potts went to medical school. Jeffrey Potts complains that Toni Potts’s counsel suggested that Toni Potts may be unable to work because of her psychological problems. Dr. Tracey Allen testified that, if Toni Potts suffered from psychological problems for most of her life, she nonetheless could have been a good student and employee. However, Jeffrey Potts conceded at trial that Toni Potts’s psychological problems likely stem from a string of miscarriages she had some time before the divorce. Accordingly, if Toni Potts does suffer from some mental impairment that began in recent months, there is no evidence to gauge her ability to maintain steady employment. Moreover, Jeffrey Potts makes the inconsistent argument that Toni Potts’s mental condition renders her unable to make decisions and fully care for her children, but that she should be able to support herself financially. Under the facts of the case, the court’s award of spousal support was fair and equitable.⁴

II. Custody Order

A. Established Custodial Environment

Toni Potts raises several arguments with regard to the trial court’s grant of physical custody and primary legal custody of the children to Jeffrey Potts. When resolving a custody dispute between parents, a trial court must first determine if there is an established custodial environment. *McIntosh v McIntosh*, 282 Mich App 471, 477 n 2; 768 NW2d 325 (2009). Pursuant to MCL 722.28:

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on

⁴ Jeffrey Potts also makes various arguments about the spousal support prognosticators used in Bay County. However, he cites no case law to support the notion that the trial court was required to follow any recommendations made by such systems. On the contrary, the trial court correctly considered the factors set forth in our case law to decide the issue. *Magee, supra* at 162. Jeffrey Potts also contends that Toni Potts should have been required to present a budget to justify the monthly amount. Again, however, Jeffrey Potts does not provide any legal authority to establish that this was required.

appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

Accordingly, a trial court's finding on the existence of an established custodial environment must be affirmed unless it is against the great weight of the evidence. *Berger v Berger*, 277 Mich App 700; 747 NW2d 336 (2008).

Toni Potts's argument on the trial court's finding of an established custodial environment is moot. Though the trial court made the decision that a custodial environment exists with both parties, it further observed that, in order to change that custodial environment, it must find reason to do so by clear and convincing evidence. While Toni Potts complains that the trial court erred because Jeffrey Potts did not have a custodial environment with the children, regardless of the trial court's finding on this issue, the court only granted custody to Jeffrey Potts after it found clear and convincing evidence to do so. Accordingly, we decline to grant Toni Potts relief on this issue.

B. Dr. Tracey Allen's Report

Toni Potts complains that the trial court should not have considered Dr. Allen's written report because it was not entered into evidence. Again, this issue is moot. Though the trial court specifically acknowledged that it considered Dr. Allen's report, Dr. Allen testified for more than three hours at trial and gave detailed information about all of her findings. Indeed, we found no reference to the report in the trial court's opinion that was not fully examined during the trial. Accordingly, Dr. Allen's opinions, conclusions, and analyses were validly before the trial court in the form of her testimony and Toni Potts's argument is without merit.

C. Factual Findings

1. Past Behavior

Toni Potts claims that the trial court's factual findings in its custody decision were against the great weight of the evidence. She claims that it was unfair for the trial court to consider her past behavior in overscheduling the children when it decided that Jeffrey Potts should have legal authority to make decisions about the children's extracurricular activities. According to Toni Potts, the court ignored her testimony "that the children were no longer overscheduled and that she understood the trial court's position on that matter and had no plans to revisit that activity."

As Jeffrey Potts notes, the trial court based its decision primarily on Toni Potts's psychological problems, which she does not dispute on appeal. Further, the court thoroughly analyzed each statutory factor in making its custody determination. But the trial court also had good reason to question Toni Potts's understanding of how much harm the children suffered as a result of overscheduling. Even as Sydney and Jessica were failing in school, Toni Potts did not recognize that they needed time to complete their homework in the evenings after school. The trial court also had reason to question Toni Potts's commitment to keeping their after-school schedules reasonable. Indeed, after the trial court specifically ordered that Sydney and Jessica could only participate in two hours of dance and gymnastics per week, in addition to Girl Scouts

and religion classes, Toni Potts violated the order and continued to take them to their previously-scheduled classes and competitions. While Toni Potts denied that she would overschedule the children in the future, ample other evidence supported the trial court's decision.

2. Karen Blood's Testimony

Toni Potts argues that the trial court failed to acknowledge that Karen Blood was a biased witness. Blood testified that she saw Toni Potts drive erratically in the parking lot with her van door open, while Jessica was standing up and holding on to keep herself from falling out. Toni Potts points out that Blood is one of Jeffrey Potts's patients and that Blood and her husband are friends with Jeffrey Potts. Toni Potts ignores that her own testimony did not entirely refute Blood's story. Indeed, Toni Potts herself testified that Jessica was standing up in the van and that Sydney may have been standing also. With regard to the open van door, she merely testified, "I'm almost confident that my doors were shut." It is unremarkable that the trial court concluded that there was some merit to Blood's version of events.

In any case, it was for the trial court to decide what weight to give each witness's testimony. *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008). Moreover, "[t]his Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Accordingly, we reject Toni Potts's argument that the court should not have given any consideration to Blood's testimony.

3. Toni Potts's Confrontation with Jessica's Teacher

Toni Potts complains that Jeffrey Potts gave misleading testimony about her outburst in Jessica's first-grade classroom. Jeffrey Potts testified that Toni Potts was removed from the school after she yelled at the teacher. However, the teacher and principal testified that Toni Potts left the school voluntarily. Toni Potts's assertions are factually correct. However, her argument nonetheless lacks merit. The trial court did not cite Toni Potts's failure to leave the school voluntarily as a basis for its custody decision. Indeed, Toni Potts does not argue that the trial court made a finding on this issue that was against the great weight of the evidence. Instead, she takes issue with the final decision because Jeffrey Potts presented misleading testimony at trial. Again, however, it was for the trial court to determine the weight of the evidence and the credibility of the witnesses and, absent some reliance by the trial court on clearly erroneous information, this issue is of no consequence. *Wright, supra* at 299. Moreover, the trial court based its decision on a thorough analysis of the best interest factors and Toni Potts makes no argument that its decision on those factors was a result of clear legal error or an abuse of discretion.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra