

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COLLEEN DENISE DIERICKS,

Plaintiff-Appellant,

v

DALE CHARLES DIERICKS,

Defendant-Appellee.

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UNPUBLISHED

May 2, 1997

No. 189515

Macomb Circuit Court

LC No. 87-001454-DM

Before: Young, P.J., and Markey and D.A. Teeple,\* JJ.

PER CURIAM.

In this custody dispute, plaintiff appeals by right the order changing physical custody from her to defendant, her ex-husband. We affirm.

Under their judgment of divorce, the parties had joint legal custody of their minor daughter (born in 1986); plaintiff Colleen Diericks had sole physical custody. Subsequently, defendant Dale Diericks sought sole physical custody of the child based on plaintiff's inability to provide a suitable home. After an evidentiary hearing, the Friend of the Court (FOC) referee held that, although an established custodial environment existed with plaintiff, defendant proved by clear and convincing evidence that a change was warranted. Plaintiff objected to the referee's report and the case went to the circuit court. In its comprehensive opinion, the circuit court found that defendant proved by clear and convincing evidence that a change of custody was in the child's best interests after analyzing the factors contained in the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.* Plaintiff then moved for a new trial or other relief; the circuit court denied her motions.

On appeal, plaintiff claims that the court committed error requiring reversal in modifying custody. We disagree. A trial court may modify a prior custody determination provided that it is in the best interests of the child. MCL 722.27(1)(c); MSA 25.312(7)(c). If an established custodial environment exists, where the child over an appreciable time naturally looks to the custodian in that

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\* Circuit judge, sitting on the Court of Appeals by assignment.

environment for guidance, discipline, the necessities of life and parental comfort, a trial court only may change custody where clear and convincing evidence supports that the modification is in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(c). As part of its modification of custody determination, a trial court reviews the eleven statutory best interest factors contained in MCL 722.23; MSA 25.312(3).

First, plaintiff challenges the trial court's decision on factor (i), the "reasonable preference of the child . . . ." MCL 722.23(i); MSA 25.312(3)(i). Specifically, plaintiff contends that the trial court erred by deferring to the FOC referee's finding on factor (i) without conducting an in camera hearing to determine the minor child's preference.

The failure of a trial judge to speak with the child, or at least to set out reasons for not speaking with the child, to ascertain the child's reasonable preference, generally requires remand. *Stevens v Stevens*, 86 Mich App 258, 264; 273 NW2d 490 (1978). Absent agreement by the parties, a FOC report may not be used as evidence on a motion to change custody. *Mann v Mann*, 190 Mich App 526, 529; 476 NW2d 439 (1991). The record reflects that the trial court did not interview the minor child, but instead deferred to the FOC's findings, which did not contain the minor child's preference. Further, no record evidence shows that the parties agreed to use the FOC referee's report as evidence. Therefore, the trial court's failure to interview the child to ascertain her reasonable preference, coupled with the fact that the trial court deferred to the FOC referee's findings, generally would require a remand under *Stevens*.

The court's error on factor (i) was harmless, however. A child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child. *Treutle v Treutle*, 197 Mich App 690, 694-696; 495 NW2d 836 (1992). Because the court found that factors (b), (c), (d) and (l) favored defendant; that factor (h) favored plaintiff; and that the parties were equal with regard to factors (a), (e), (f), (g), (j), and (k); the court's error with regard to factor (i) was harmless.

Next, plaintiff argues that the trial court erred in analyzing four factors: (b), (e), (f) and (l). The first factor is: "(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." MCL 722.23(b); MSA 25.312(3)(b). Plaintiff argues that the trial court erred by finding in favor of defendant on this factor. Plaintiff contends that the trial court's finding of an established custodial environment with plaintiff necessitates a finding for plaintiff on this factor. We disagree. Plaintiff cites no authority for her contention. We will not search for authority to sustain a party's argument. *American Transmissions, Inc v Attorney General*, 216 Mich App 119, 121; 548 NW2d 665 (1996).

Plaintiff also argues that the trial court committed an error of law when it considered under factor (b) the minor child's unmet optical and dental needs. Specifically, plaintiff contends that the trial court should have examined her alleged neglect of the minor child's medical needs under factor (c), which addresses the capacity and disposition of the parties to provide the child with medical care. MCL 722.23(c); MSA 25.312(3)(c). We disagree. The trial court used plaintiff's failure to meet the

optical and dental needs of her children to bolster its conclusion that plaintiff was deficient in parenting and problem-solving skills, which were proper considerations under factor (b).

Plaintiff also argues that the trial court's finding that testimony was offered by "several witnesses" that established the minor child lived in an "unfavorable custodial environment" was based upon only the Protective Service Worker's testimony. Plaintiff merely is speculating that the trial court's statement was based upon only the Protective Service Worker's testimony. Further, ample evidence on the record supports the trial court's finding.

Concluding her argument on factor (b), plaintiff contends that the court erred by failing to enunciate defendant's "more favorable circumstances" when it found in favor of defendant. We disagree. The trial court noted that testimony from various witnesses indicated that plaintiff was deficient in parenting skills; this implies that defendant was not deficient in parenting skills and supports the court's finding that defendant had more favorable circumstances.

The second factor at issue provides: "(e) The permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e); MSA 25.312(3)(e). The trial court found in favor of defendant on this factor. Plaintiff contends that the trial court's findings on factor (e) -- that she lived in a trailer, that numerous individuals spent the night at her home and that she had a live-in boyfriend -- went to the "acceptability" of her home rather than the "permanence" of the proposed custodial home. We disagree. The focus of factor (e) is the child's prospect for a stable family environment. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). The stability of a child's home can be undermined by frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions of the custodial parent or other potential disruptions. *Id.* at 465 n 9. Considering that plaintiff had three men sleeping in the home at one point, had several people living at her home at various times, had a live-in boyfriend, had moved approximately four times since 1987 and had several loud parties where people screamed, the trial court rightly found in favor of defendant on this factor.

The next factor at issue is: "(f) The moral fitness of the parties involved." MCL 722.23(f); MSA 25.312(3)(f). The trial court found that this factor did not weigh in favor of either plaintiff or defendant. Plaintiff argues that the trial court erred in considering that she was morally unfit and, further, that the trial court should have considered defendant's immoral conduct. We disagree. Factor (f), like all other statutory factors, relates to a person's fitness as a parent. *Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994). To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. *Id.* at 887. Thus, factor (f) concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. *Id.* Questionable conduct is relevant to factor (f) only if it necessarily has a significant influence on how one will function as a parent. *Id.*

Plaintiff denied that numerous people spent the night at her home, that she had daily parties and that she was residing with a male before her divorce. Accordingly, plaintiff argues that the trial court erred in concluding that she was morally unfit. The record contradicts plaintiff's denials and supports

the trial court's findings. We defer to the trial court's findings regarding the credibility of witnesses. *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990).

Plaintiff also refers to three instances of defendant's conduct that she contends prove that he is morally unfit. The examples cited by plaintiff have no bearing on how defendant will function as a parent because these alleged incidents occurred several years before trial. Thus, the trial court correctly refrained from considering this testimony.

Plaintiff also argues that this factor must weigh in her favor because a psychologist testified that defendant may have sexually abused the child. These allegations were not substantiated. Moreover, another psychologist testified that plaintiff fabricated the allegations of sexual abuse. Because of the conflicting testimony, this question is resolved on the basis of witness credibility. Again, we defer to the trial court's findings regarding the credibility of witnesses. *Stanton, supra*. The evidence supports the trial court's finding that the parties are equal with regard to this factor.

Finally, the following factor is at issue: "(l) Any other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(1); MSA 25.312(3)(1). The trial court found this factor weighed in favor of defendant. Plaintiff argues that the trial court improperly considered that plaintiff examined the minor child's vagina when she returned from visits with defendant. Plaintiff claims that her motivation merely was to protect the minor child from sexual abuse by defendant. Although plaintiff may have had pure intentions when she conducted the vaginal examinations, the examinations had an adverse affect on the minor child. The trial court correctly noted this in its findings. Further, the trial court considered that the minor child obtained and fired a loaded gun while plaintiff's father was babysitting and that plaintiff's father continued to babysit and to keep loaded guns in the home. Therefore, the evidence supports the court's finding that this factor weighed in defendant's favor.

Having reviewed the trial court's findings regarding the best interest factors enumerated in MCL 722.23; MSA 25.312(3), we conclude that clear and convincing evidence supported the trial court's decision to modify custody in defendant's favor.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.

/s/ Jane E. Markey

/s/ Donald A. Teeple