STATE OF MICHIGAN

COURT OF APPEALS

REBECCA JOHNSON,

Plaintiff-Appellee,

v

THOMAS JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 17, 1997

No. 193190
Lenawee Circuit
LC No. 88-010184-DM

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right the order of the Lenawee Circuit Court denying his petition for change of custody and granting plaintiff's petition for change of domicile. We affirm.

I

Plaintiff and defendant were married in August 1984. Their son, Dustin Thomas Johnson, was born on September 7, 1985. The parties separated in 1987, and their divorce was finalized on March 13, 1990. Defendant asserts that the divorce was prompted by plaintiff's extramarital affair with James Canales. While plaintiff acknowledges the affair, she asserts that defendant's unkind treatment of her, rather than the affair, was the cause of the divorce. The judgment of divorce awarded the parties joint custody of Dustin, and awarded physical custody to plaintiff. Defendant was awarded the marital home in Tecumseh, Michigan.

Defendant continued to reside in the marital home after the divorce, and married his current wife, Trina Johnson, in January 1991. Defendant and Trina have a daughter together, and defendant adopted Trina's son from a prior relationship.

Plaintiff has moved approximately seven times since the divorce. After the divorce, plaintiff was briefly married to Canales, but filed for divorce within one year of the marriage. Her divorce from Canales was not finalized until September 1995. Soon after plaintiff left Canales, she began a relationship with Michael Hernandez. Plaintiff and Hernandez had a daughter, Alexandria, born in October 1994. Plaintiff married Michael Hernandez after her divorce from Canales became final in

September 1995. Thereafter, Hernandez, who has a business degree from Central Michigan University, accepted a job as a manager at the Circle K Corporation in Arizona after being unable to find satisfactory employment in Michigan. Plaintiff filed a petition for change of domicile so that she and Dustin could join Hernandez in Arizona. Defendant subsequently filed a petition for change of custody. After an evidentiary hearing, the trial court granted plaintiff's petition to change domicile, and denied defendant's petition to change custody.

II

When reviewing child custody cases, this Court must apply three different standards of review to three distinct types of findings. *Hayes v Hayes*, 209 Mich App 385, 389; 532 NW2d 190 (1995). Findings of fact are reviewed under the great weight standard, discretionary rulings are reviewed for an abuse of discretion, and questions of law are reviewed for clear error. *Id.* In other words, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; MSA 25.312(8). Under the great weight of the evidence standard, the trial court's findings of fact should be affirmed unless the evidence "clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994).

III

Defendant first argues that the trial court committed a clear legal error by basing its decision to deny his petition for change of custody on only one of the factors set forth in MCL 722.23; MSA 25.312(3) to determine the best interests of the child. Defendant further argues that the trial court's findings with respect to factors (b), (c), (d), (e), (f), (g), and (j), were against the great weight of the evidence. We disagree.

A

The first step in considering a petition for change of custody is to determine whether an established custodial environment exists. *Hayes*, *supra*, at 387. Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of the statutory criteria found in MCL 722.27(1)(c); MSA 25.312(7)(1)(c):

> 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.

The trial court found that there is an established custodial environment with plaintiff and defendant does not challenge that finding on appeal.

B

Once the court determines that an established custodial environment exists, the court is prohibited from changing custody unless clear and convincing evidence demonstrates that a change in custody would be in the child's best interests. *Id.; Ireland v Smith*, 214 Mich App 235, 243; 542 NW2d 344 (1995), *affirmed and modified* 451 Mich 457; 547 NW2d 686 (1996). The court's determination regarding the best interest of the child is made by weighing the twelve statutory factors set forth in MCL 722.23; MSA 25.312(3). *Ireland, supra*, 214 Mich 243.

The twelve factors set forth in MCL 722.23; MSA 25.312 (3) are:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(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.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child had lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

With respect to factor (b), the trial judge stated:

> And I don't see much difference here. I don't think either party's particularly interested in religion, although there's some lip service being paid for it, but I frankly don't give any points there. Anything in that regard is such -- of such recent history that I can't say that it isn't simply to impress the Court at this hearing.

The trial court repeatedly stated throughout the proceedings that it was clear that both parties loved Dustin. Defendant argues, however, that he should have been favored with respect to the religion aspect of factor (b). Defendant testified that he took Dustin to Sunday school at a Baptist church every week "unless there's a family function going on where a church doesn't -- where that might interfere with our family function." Defendant then explained that he and his wife did not attend the church because they did not like some of the things that were said during the services. The custody recommendation prepared by social worker Mary Ann McRobert indicated that neither plaintiff nor defendant spoke of any religious beliefs. Plaintiff did not testify as to her religious practices, if any. We do not believe the trial court's finding was against the great weight of the evidence.

2

With respect to factor (c), the trial court found:

> There was a time when the Defendant withheld support, but, frankly, in all honesty, I think that that's probably equal. Plaintiff has done much for this child, and I think it's probably equal. If anything, I think she gets a little extra edge on that. But it's not that significant.

Both plaintiff and defendant have been employed and have provided for Dustin's material needs. Defendant acknowledged that he was jailed on one occasion for failure to pay child support. Based on this evidence, it is clear that the trial court's finding was not against the great weight of the evidence.

3

With respect to factor (d), the trial court found:

> Plaintiff has changed her residences. She's changed her spouses and her significant others, but she has always been there for this child, and this child knows that she's always been there. I would have to give very slight preference to the Plaintiff in this regard, but it's very, very slight.

The evidence indicated that defendant had been married to his current wife for five years at the time of the hearing, and had continued to live in the marital home. By contrast, plaintiff moved seven times and had recently married her third husband. However, as noted by the trial court, plaintiff's moves were often necessitated by her financial condition after her divorce from defendant. Significantly,

one of the moves was necessitated because of defendant's failure to pay child support. The evidence further indicated that, despite plaintiff's moves, she continued to provide for Dustin's needs, and has always had physical custody of Dustin. Based on this evidence, we can not say that the trial court's finding with respect to factor (d) was against the great weight of the evidence.

4

With respect to factor (e), the trial court stated that, although it could not say what would occur in the future, each family unit appeared to be strong. Therefore the trial court found that factor (e) favored neither party. Both parties were remarried and had other children with their respective spouses. There was no evidence to indicate that either plaintiff's or defendant's marriage was not intact. Accordingly, we cannot conclude that the trial court's finding was against the great weight of the evidence.

5

With respect to factor (f), the court found that the moral fitness of the parties was "approximately equal." The proper inquiry under factor (f) is not whether one parent is morally superior to another, but concerns "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Fletcher, supra,* at 887. Therefore, questionable conduct is relevant only if it is a type of conduct that necessarily has a significant influence on how one will function as a parent. *Id*. Extramarital conduct, in and of itself, may not be relevant to factor (f). *Id*.

In the instant case, the trial court specifically noted that, although plaintiff had a extramarital affair with Canales, as soon as defendant learned of the affair, he began seeing Canales' wife. Furthermore, plaintiff immediately moved out of Canales' house and filed for divorce when she learned certain information about Canales which led her to believe that his home was not an appropriate environment for Dustin. There were no reports of drug or alcohol abuse in either family. Based on this evidence, the trial court's finding that the moral fitness of the parties was "approximately equal" was not against the great weight of the evidence.

6

With respect to factor (g), the trial court found that the mental and physical health of the parties was equal. Although plaintiff was diagnosed with cervical cancer approximately a year and a half before the custody hearing, she testified that her treatment was completed and that she was in excellent health. Although defendant asserts that he should be favored with respect to factor (g) because the results of a psychological test indicated that plaintiff had "a lack of personal insight, an exaggerated concern with social image, rigid psychological adjustments, and a poor ability to adapt to even mildly stressful situations," a second report questioned the validity of the test results because of the conditions under which the test was administered. We do not believe the evidence preponderates in favor of defendant with respect to factor (g).

7

With respect to factor (j), the trial court found:

> And I have to believe this favors immensely the Plaintiff for the reasons that I've mentioned earlier. I think that Defendant has so much hate for the Plaintiff, that he isn't controlling, hasn't really, I think, tried to control. That he just does everything to undermine the Plaintiff's relationship with the child and it just is not good.

Both plaintiff and defendant testified that, while they dislike each other, neither would let their feelings for the other interfere with Dustin's relationship with the other parent. However, while defendant and Trina Johnson testified that they try not to speak badly about plaintiff in front of Dustin, they also testified that he has overheard them doing so on more than one occasion. Plaintiff also admitted to calling defendant a "loser" in front of Dustin. Plaintiff testified to several instances in which defendant has used the custody situation in an attempt to hurt her. Finally, a custody report prepared by a social worker concluded that defendant has called plaintiff names and acted very disrespectfully toward her in front of Dustin, and that defendant's anger toward plaintiff has hurt Dustin. Based on our review of the record, we do not believe that the trial court's finding with respect to factor (j) was against the great weight of the evidence.

8

Defendant next argues that the trial court committed a clear legal error by failing to state its conclusion with respect to factor (h), the home, school, and community record of the child. We disagree.

Generally, the trial court must state a conclusion as to each factor. *Wolfe v Howatt*, 119 Mich App 109, 110-111; 326 NW2d 442 (1982). Reaching a conclusion as to a factor requires weighing the factor for one party or the other, or weighing it equally, but does not mean merely mentioning the factor. *Id.* at 111. In the instant case, the trial court stated, "the child just has an excellent scholastic record. Doing very well. He's not a straight A student, but he's close to it." The trial judge failed to state which, if either, party, the factor favored. However, we do not believe that remand for the trial court's statement of a conclusion on factor (h) is required.

Plaintiff testified that she has been to all of Dustin's parent-teacher conferences, and that she helps him with his homework regularly. Both plaintiff and defendant indicated that they encouraged, and were involved in, Dustin's sporting events. Although the trial judge did not state his conclusion as to factor (h), the evidence supports a finding either that the parties were equal with respect to factor (h), or that plaintiff should have been slightly favored. Furthermore, the trial judge's subsequent statement that "[t]he only factor that I find that favors the father is the child's preference to live with the father," indicates that the trial judge concluded that factor (h) was either equal, or favored plaintiff.

9

Defendant next argues that the trial court failed to give proper weight to factor (i), the reasonable preference of the child. With respect to factor (i), the trial court stated:

> The only factor that I find that favors the father is the child's preference to live with the father. And I'm not saying that this is meager or unimportant because it is certainly very, very important. But I don't think that this ten year old child will ever be able to stand up to his father, and in doing so, standing up to him. If he doesn't stand up, to his father, I think he'll lose all contact with the mother eventually. I don't want that to happen.

The 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, 694-695; 495 NW2d 836 (1992). In the instant case, it is clear that the trial judge considered Dustin's preference when determining whether a change in custody was in Dustin's best interest. Although factor (i) clearly favored defendant, factor (j) clearly favored plaintiff. The remaining factors were found to have been equal, or to have slightly favored plaintiff. Under these circumstances, we can not say that factor (i) was not given its proper weight in the custody determination.

IV

Defendant next argues that the trial court erred by failing to consider the proper factors before granting plaintiff's petition to change Dustin's domicile to Arizona. We disagree.

We review a trial court's decision to grant or deny a petition for change of domicile for an abuse of discretion. *Overall v Overall*, 203 Mich App 450, 458-459; 512 NW2d 851 (1994).

When determining a petition for change of domicile, the court must consider the following factors:

> 1) whether the prospective move has the capacity to improve the quality of life for both the custodial parent and the child; 2) whether the move is inspired by the custodial parent's desire to defeat or frustrate visitation by the noncustodial parent and whether the custodial parent is likely to comply with the substitute visitation orders where he or she is no longer subject to the jurisdiction of the courts of this state, 3) the extent to which the noncustodial parent, in resisting the move, is motivated by the desire to secure a financial advantage in respect of a continuing support obligation, and 4) the degree to which the court is satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed. [*Anderson v Anderson*, 170 Mich App 305, 309; 427 NW2d 627 (1988).] To support a petition for change of domicile, the moving party need only show that the change is warranted by a preponderance of the evidence. *Id.*

In the instant case, there is no indication in the record that the trial court considered the third factor set forth in *Anderson*. However, there was no evidence indicating that the move to Arizona would have any effect on defendant's support obligation. Therefore, it does not appear that the third factor had any application to the instant case. Furthermore, there was no indication that the trial court believed that defendant was resisting the move for any improper purpose. Accordingly, we conclude that the trial court did not err by failing to consider the third factor on the record.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey