STATE OF MICHIGAN

COURT OF APPEALS

DEBRA L. BENSCHOTER,

Plaintiff-Appellant,

v

NICK A. BENSCHOTER,

Defendant-Appellee.

UNPUBLISHED
December 2, 1997

No. 203671
Lenawee Circuit Court
LC No. 95-017204 DM

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

PER CURIAM.

Plaintiff appeals as of right from the trial court's entry of a judgment of divorce granting physical custody of the parties' minor son, Zachary (born 11/28/92), to defendant. We affirm.

Plaintiff raises two issues on appeal. First, plaintiff argues that the trial court erred in finding that neither party established a custodial environment for Zachary during the pendency of the divorce. We disagree.

The evidence presented at trial did not establish that Zachary looked exclusively to either party for guidance, discipline, the necessities of life, and parental comfort. *Weichmann v Weichmann*, 212 Mich App 436, 439; 538 NW2d 57 (1995); *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). Plaintiff testified that Zachary lived with her while she and defendant were separated and that she had taken care of all his physical needs since birth. She also testified that she disciplined Zachary and was teaching him about religion, the alphabet, and shapes. Plaintiff stated that at the time of the divorce trial she and Zachary lived in a small apartment but that Zachary had his own room. Several independent witnesses testified at trial that plaintiff had a healthy and loving relationship with Zachary and that she was able to discipline him.

On the other hand, defendant stated that he had fed, changed, rocked, read to, and otherwise cared for Zachary when defendant was not at work since the time of Zachary's birth. Defendant also testified that during the course of the marriage he disciplined not only Zachary but plaintiff's two sons from her previous marriages. Defendant stated that plaintiff frequently called him at work to come home and discipline the children because she was unable to do so. Two independent witnesses testified that

they had often seen defendant playing with Zachary. Considering this evidence, the trial court did not commit clear legal error in finding that neither party had established a custodial environment.

Plaintiff next contends that the trial court's findings on most of the twelve "best interest of the child" factors set forth at MCL 722.23; MSA 25.312(5) were against the great weight of the evidence. Again, we disagree.

First, plaintiff argues that the trial court's finding as to factor (b), "[t]he 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," were against the great weight of the evidence. The trial court found that both parties were equally able to provide love and guidance to Zachary. Plaintiff argues that the trial court should have found her more capable of providing love and guidance because she had spent much time teaching Zachary and taking him to church. *Wellman v Wellman,* 203 Mich App 277, 283; 512 NW2d 68 (1994); *Bowers, supra* at 329. The evidence presented at trial, however, clearly showed that both parties loved Zachary and spent as much time with him as they could. Both parties also enjoyed reading to Zachary and teaching him things. Further, the evidence at trial supported the trial court's finding that plaintiff was "posturing" to get custody of Zachary by becoming involved in the United Methodist Church. Defendant testified that plaintiff seldom went to church until she filed for divorce. The pastor of the Methodist church located in the town where the parties lived during the marriage testified that she did not recall seeing plaintiff attend services until the fall of 1995, approximately the same time plaintiff filed for divorce. We hold that the trial court's finding on factor (b) was not against the great weight of the evidence.

Next, plaintiff contends that the trial court's finding on factor (c), "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . and other material needs," was against the great weight of the evidence because the evidence adduced at trial showed that plaintiff had provided for Zachary's physical needs since birth by feeding him, washing his clothes, teaching him, and taking him to the doctor. *Wellman, supra* at 283; *Bowers, supra* at 329-330. We find no error. The evidence at trial clearly showed that defendant was better able to provide for Zachary's needs. Plaintiff's employment history was sporadic and she took much time off because of her physical ailments. Plaintiff and the doctor who performed the custodial evaluation also testified that plaintiff had been in counseling for most of her life because she had been severely abused as a child. Plaintiff also allowed her two sons from her previous marriages to live with her second husband but did not pay support for them. We hold that the trial court's finding on factor (c) was not against the great weight of the evidence.

Plaintiff also argues that the trial court erred in finding that defendant could provide Zachary with a more stable and permanent home, with closer ties to family, than could plaintiff, pursuant to factors (d) and (e). *Ireland v Smith,* 451 Mich 457, 464-466; 547 NW2d 686 (1996); *Wellman, supra* at 283; *Harper v Harper,* 199 Mich App 409, 416-417; 502 NW2d 731 (1993). Again, we disagree. Although plaintiff testified extensively at trial about her close relationship with Zachary and her work in caring for him, she also testified that she had moved several times before the divorce trial. Plaintiff moved from the marital home in Morenci to her grandfather's home in Bangor and then into her own apartment in Middleville between May and July of 1996, taking Zachary with her. Moreover it was

defendant, rather than plaintiff, who made the payments to maintain occupancy of the marital home, even though plaintiff lived in the marital home from September of 1995, when she filed for divorce, until May of 1996. Defendant testified that he planned to keep Zachary in the marital home in Morenci, which was close to defendant's family. He also testified that he planned to involve Zachary in bowling, gymnastics, and tee-ball; planned to enroll him in preschool; and planned to keep him in the same day care center plaintiff had used during the marriage. Moreover, plaintiff's inability to provide a stable home life was illustrated by her inability to control the outbursts of her eldest son, who suffered from Tourette's syndrome and attention deficit disorder, without defendant's help. We hold that the trial court's findings as to factors (d) and (e) were not against the great weight of the evidence.

Next, plaintiff contends that the trial court erred in finding that neither party appeared morally unfit to care for Zachary, pursuant to factor (f). *Fletcher v Fletcher*, 447 Mich 871, 885; 526 NW2d 889 (1994); *Barringer v Barringer*, 191 Mich App 639, 642; 479 NW2d 3 (1991). We disagree. Although plaintiff testified extensively that defendant physically and verbally abused her and all three of her children, she offered very little independent evidence to support her testimony. Defendant, on the other hand, testified that he "never ever laid a hand" on plaintiff. He pointed out that plaintiff had never filed a police report against him for abuse and had never sought medical help for physical abuse, although she had not hesitated to call the police or go to the doctor for other matters. We defer to the ability of the trial court to determine the credibility of conflicting witnesses. *Barringer, supra* at 642. The trial court's finding on factor (f) was not against the great weight of the evidence.

Plaintiff also argues that the trial court erred in finding that defendant was in better physical and emotional health than plaintiff, pursuant to factor (g), in spite of all the testimony presented regarding defendant's drinking problem. *Wellman, supra* at 283-284; *Glover v McRipley*, 159 Mich App 130, 140-141; 406 NW2d 246 (1987). We disagree. Only two witnesses, plaintiff and defendant's stepmother, testified that they saw defendant regularly abuse alcohol; the rest of the witnesses who had seen defendant drink testified that they had seen him drink at most on a handful of occasions. Defendant was tested for his propensity to abuse alcohol, and the test results showed that defendant did not have an addictive personality. Defendant's driving record contained no alcohol-related offenses. Moreover, plaintiff had also accused her previous two husbands of being abusive, addictive men. In contrast to the lack of support for plaintiff's accusations that defendant was an alcoholic, plaintiff herself testified to her many medical problems. Plaintiff testified that she had carpal tunnel syndrome, irritable bowel syndrome and other digestive problems, and that she had had a melanoma removed from her forehead in 1994. Plaintiff had also had her gallbladder removed. Her illnesses interfered with her ability to work. In addition, plaintiff ran up huge medical bills during the marriage, amounting to over $20,000 in both 1995 and 1996. We hold that the trial court's finding on factor (g) was not against the great weight of the evidence.

Plaintiff also disputes the trial court's ruling that no negative evidence had been presented to allow it to rule on the effect Zachary's home, school, and community record should have on its custody award, pursuant to factor (h). Plaintiff contends that the evidence presented at trial preponderated in favor of her receiving custody because she spent much time teaching Zachary. *Baker v Baker*, 411 Mich 567, 582-583; 309 NW2d 532 (1981). The claim is without merit. The evidence presented

regarding Zachary's home and community activities favored both parties. Plaintiff testified that she had taught Zachary about religion, the alphabet, and the different shapes, and that she planned to enroll him in preschool. The effect of plaintiff's teaching was confirmed by plaintiff's expert witness, who stated that Zachary was brighter than most boys his age because of the intellectually stimulating contact provided by plaintiff. Plaintiff conceded, however, that defendant had also taught and read to Zachary. Defendant confirmed this, and added that he planned to involve Zachary in sports and to enroll him in preschool. The trial court's finding on factor (h) was not against the great weight of the evidence.

Finally, plaintiff contends that the trial court's finding that defendant did not abuse plaintiff and her children, pursuant to factor (k), is against the great weight of the evidence. *Ireland, supra* at 459-460 n 1. We disagree, having already found that the evidence regarding defendant's alleged abuse was, at best, conflicting. *Barringer, supra* at 642. The trial court's findings of fact on all of the best interest factors were not against the great weight of the evidence.

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff