STATE OF MICHIGAN

COURT OF APPEALS

ROBB MACKENZIE,

Plaintiff-Appellant,

v

CALLIE CRAM,

Defendant-Appellee.

UNPUBLISHED
July 10, 1998

No. 206807
Baraga Circuit Court
LC No. 96-004266 DZ

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting legal and physical custody of the parties' minor child to defendant. The trial court ruled that this disposition was in the best interests of the child as determined by the twelve factors listed in MCL 722.23; MSA 25.312(3), a section of the Child Custody Act of 1970, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq*. We affirm.

I. Plaintiff's Challenges to the Trial Court's Order

Plaintiff does not challenge the trial court's ruling on any particular factor or factors within MCL 722.23; MSA 25.312(3). Instead, he simply alleges that "[w]hen the evidence is considered as a whole, it is clear that the [trial court] made erroneous findings of fact, abused its discretion in applying those facts, and/or committed clear legal error in applying the factors set forth in the child custody act."[1] However, we infer five arguments from facts that plaintiff detailed in his brief. First, plaintiff's emphasis on defendant's alleged psychological problems indicates that he challenges the trial court's findings on factor (g). Second, plaintiff's mention of defendant's alleged violence toward plaintiff and his mother indicates that he challenges the trial court's findings on factor (k). Third and fourth, plaintiff's allegation that defendant screams at the child, and further, disparages him and his family in front of the child indicates that he challenges the trial court's findings on factors (b) and (j). Fifth, plaintiff's allegations that defendant lies and swears indicates that he challenges the trial court's findings on factor (f). As to the trial court's findings on the remaining factors, plaintiff lays out no information in his brief on appeal that would suggest that he challenges them.[2] Thus, we discuss only factors (b), (f), (g), (j), and (k).

II. Standard of Review

The Child Custody Act of 1970 codifies the standard by which we review a child custody appeal:

> [A]ll 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)]

The Michigan Supreme Court has verified this legislatively prescribed standard. *Fletcher v Fletcher*, 447 Mich 877, 882; 526 NW2d 889 (1994).

III. Factor (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.

Factor (b) concerns the capacity and disposition of the parties to give the child love, affection, guidance, education, and religious training. Plaintiff presented evidence that defendant screams and swears in front of the child. However, the testimony established that most of this screaming and swearing was directed at plaintiff and not at the child. Moreover, defendant admitted to having occasional outbursts of anger during which she used profanity toward plaintiff, but she indicated that the outbursts occurred during times of stress, such as when she was studying for a graduate school examination, had recently suffered a stillbirth, and was receiving no help from plaintiff in getting the child to bed. The Court indicated in *Feldman v Feldman*, 55 Mich App 147, 150-151; 222 NW2d 2 (1974), that profanity directed at one's spouse during times of marital discord is not particularly damaging to the profanity-using party in a child custody proceeding. Further, defendant's parents testified that defendant does not swear in the child's presence, a coworker described defendant as caring, patient, and empathetic with children and a psychologist appointed by the trial court to assess the involved parties testified to the affection existing between defendant and her child.

In sum, the parties each presented a different picture of defendant regarding her capacity and disposition for love and affection. We have indicated in numerous opinions that the trial court is to determine issues of credibility in child custody cases. *Harper v Harper*, 199 Mich App 409, 414; 502 NW2d 731 (1993); *Barringer v Barringer*, 191 Mich App 639, 642; 479 NW2d 3 (1991). Thus, it was not against the great weight of the evidence for the trial court to find that the parties were equal in their *disposition* to provide the child with love and affection.

As to religion, the parties testified to taking their child to church with fairly equal frequency. However, plaintiff's testimony was not clear as to whether he was Baptist, Catholic, or Lutheran, whereas defendant testified that she has always been Lutheran. It was therefore not against the great weight of the evidence for the trial court to find that defendant had the greater capacity and disposition

to raise the child in a religion. The trial court's ultimate favoring of defendant on factor (b) was not against the great weight of the evidence.

IV. Factor (f): The Moral Fitness of the Parties Involved.

Factor (f) concerns the moral fitness of the parties. The Michigan Supreme Court has held that questionable conduct illustrative of moral fitness is relevant only as it affects one's ability to be a proper *parent*, not spouse. *Fletcher*, *supra* at 887 (holding that extramarital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship). Plaintiff attempted to portray defendant as untruthful, but there was no testimony that defendant had ever lied with the child's knowledge or to the detriment of the child, and therefore the testimony regarding defendant's alleged untruthfulness is irrelevant to the custody decision.

As previously indicated, plaintiff presented evidence that defendant swears. Verbal abuse is relevant to moral fitness only if it occurs in front of the child or if the child knows about it. *Fletcher, supra* at 887. Although a number of plaintiff's witnesses testified that defendant swore in the child's presence, defendant's father testified that defendant had never sworn in his and the child's presence. Again, it is up to the trial court to determine issues of credibility, *Harper*, *supra* at 414, and it was not against the great weight of the evidence for the trial court to find the parties equal as to their moral fitness.

V. Factor (g): The Mental and Physical Health of the Parties Involved.

Factor (g) deals with the mental and physical health of the parties. Plaintiff contends that defendant is mentally ill, and several of plaintiff's witnesses testified to defendant's alleged mental and emotional problems. However, the court-appointed psychologist did not find evidence of mental illness during his evaluation of defendant. Although defendant admits to having been depressed in the past, she currently takes an antidepressant to prevent a recurrence. Contrary to plaintiff's allegations, she testified that she takes her medication regularly. Indeed, plaintiff admitted that defendant was "fine" and "a good person" when taking her medication. Defendant alleged that her depression is under control. Furthermore, there were no allegations that she suffers from any meaningful physical health problems, whereas plaintiff suffers from hypoglycemia, which has occasionally debilitated him in the past. Therefore, it was not against the great weight of the evidence for the trial court to find the parties equal regarding factor (g).

VI. Factor (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.

Factor (j) concerns the willingness and ability of each party to encourage a close relationship between the child and the child's other parent. There was evidence that each party has interfered or threatened to interfere with the other party's relationship with the child. However, neither party alleged that the other had refused to comply with court-ordered drop-offs and pick-ups of the child in an attempt to keep the child away from the other parent. Further, although some defense witnesses

testified that defendant verbally denigrated plaintiff in front of the child, defendant's father testified that he had never heard such denigration during drop-offs or pick-ups of the child. Given the conflicting testimony, the evidence did not clearly preponderate in favor of plaintiff on factor (g), and it was therefore not against the great weight of the evidence for the trial court to weigh the parties equally on this factor.

VII. Factor (k): Domestic Violence, Regardless of Whether the Violence was Directed Against or Witnessed by the Child.

Factor (k) concerns domestic violence. There was testimony that defendant had once knocked plaintiff's glasses off his face and that defendant had shoved plaintiff's mother, although defendant's mother disputed the shoving incident. There was also testimony that plaintiff had expelled defendant from their shared home on numerous occasions and that plaintiff threatened to shoot defendant and her parents. Given that the testimony showed violence or threatened violence on the part of plaintiff *and* defendant, it was not against the great weight of the evidence for the trial court to find the parties equal on factor (k).

VIII. Conclusion

In summary, the trial court's rulings on those factors plaintiff implicitly challenged – (b), (f), (g), (j) and (k) – were not against the great weight of the evidence. Therefore, we concur with the trial court that defendant is favored as to factors (a) and (b), that factor (i) remains irrelevant, and that the parties remain equal regarding factors (c), (d), (e), (f), and (g), and (h). Since two of the factors favor defendant and none of the factors favor plaintiff, the trial court's decision to award custody to defendant did not constitute a palpable abuse of discretion requiring reversal.

Affirmed.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] We reject plaintiff's assertion that we review this appeal de novo. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994) expressly precludes de novo review of custody cases by appellate courts.

[2] Plaintiff mentions defendant's alleged historical inability to hold a steady job; this appears to speak to factor (c). However, read in context, this allegation appears to pertain not to defendant's earning ability but rather to her mental health.