STATE OF MICHIGAN

COURT OF APPEALS

ALEXANDER SELVAGGIO,

Plaintiff-Appellant,

v

DEBORAH L. COLE-ADAMS,

Defendant-Appellee.

UNPUBLISHED
October 27, 1998

No. 204580
Macomb Circuit Court
LC No. 90-000338-DM

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald,* JJ.

PER CURIAM.

This child custody case is before us on remand from the Supreme Court as on leave granted.[1] Plaintiff challenges the trial court's award to plaintiff of sole legal custody of the parties' minor son, and the denial of his motion for physical custody. Defendant cross-appeals, arguing that the trial court abused its discretion in denying her request for attorney fees. We affirm in part, and remand for further proceedings.

I

The parties lived together for approximately two years in plaintiff's home in St. Clair Shores, during which time their minor child, Alexander (Alex), was born in May 1989. Plaintiff acknowledged paternity at Alex's birth. Defendant moved out with then six-month old Alex in late November 1989, and moved in with her mother, in Roseville, for approximately six months. In May of 1990, defendant moved to a rented flat in East Detroit, and in May of 1992, when Alex was three years old, defendant bought and moved to a house in Roseville. In May 1994, defendant and Alex moved to Brighton, Michigan, after defendant married Paul Adams. At the time of trial in 1995, plaintiff still lived in his St. Clair Shores home.

Plaintiff is vice-president/treasurer and part owner of a family business he and his two brothers manage, and has a bachelor's degree in business administration. Defendant worked full-time from the time Alex was six or seven weeks old until September 1994, when she began working three days a

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

week after she moved to Brighton. Defendant has several years of college. Defendant is a Jehovah's Witness, as is her husband.

Plaintiff began paying defendant $100 a week for child support in December 1989, the month after defendant moved out of his home. In January 1990, plaintiff filed a complaint for permanent custody, alleging that defendant had denied him extended visitation. In March of 1990, a temporary custody, support and visitation order was entered awarding defendant temporary custody and plaintiff temporary visitation alternate Fridays from 4:00 p.m. to Saturday at noon, and alternate Sundays from noon to 8:00 p.m. In January 1991, plaintiff filed a motion to extend visitation, and the court ordered additional visitation every Wednesday and every Thursday from 6:30 a.m. to 4:00 p.m. A series of motions followed.[2]

In May 1991, plaintiff filed a motion to permit the testimony of Duane Magnani at the upcoming Friend of the Court (FOC) evidentiary hearing regarding custody, visitation and support, asserting that Magnani would testify "regarding the potential negative effect on the minor child should he be placed exclusively" in defendant's custody, and that Magnani's testimony would focus on the Child Custody Act's best interest factors. The trial judge who presided over this matter during the first few years, Judge Balkwill, issued an opinion and order in August 1991 granting plaintiff's motion to allow the parties to make an evidentiary record, followed by fact findings as to the best interests of the child. Judge Balkwill noted that the referee or the Court could then make the constitutionally mandated balancing of First Amendment rights against the state's compelling interest in maintaining the welfare of the child, that the inquiry itself places no impermissible constitutional burden on defendant, and that it would not be possible to balance the compelling interest in the welfare of the child against the constitutionally protected religious practices unless an evidentiary record is created.

Another series of motions followed,[3] culminating in a consent order regarding custody entered on November 20, 1991, awarding the parties joint legal custody and defendant physical custody of Alex until age eighteen. Under the consent order, plaintiff continued to have visitation every Wednesday and Thursday and was granted additional visitation Wednesday nights during the weeks plaintiff did not have weekend visitation; continued to have visitation on alternating weekends from Friday at 4:00 p.m. until Sunday at 8:00 p.m.; and was awarded three weeks of summer visitation; alternating visitation on enumerated holidays,[4] Father's day, and alternating visitation on Alex's birthday. The consent order further provided in pertinent part:

> IT IS FURTHER ORDERED that the parties herein will share equally, and cooperate with each other regarding the issues of the education of the minor child, ALEXANDER JOSEPH COLE-SELVAGGIO, the medical treatment of the minor child, ALEXANDER JOSEPH COLE-SELVAGGIO, the religious training and education of the minor child, ALEXANDER JOSEPH COLE-SELVAGGIO, until said child attains the age of 18 or further Order of this Court. They each shall discuss these crucial issues with each other and at all times shall have the best interests of the minor child, ALEXANDER JOSEPH COLE-SELVAGGIO, as their focus. Further, each party herein shall have equal access to the medical, dental and school records of the minor child, ALEXANDER JOSEPH COLE-SELVAGGIO.

* * *

> IT IS FURTHER ORDERED that the parties further agree and promise that they shall not engage in negative commentary to the minor child, ALEXANDER JOSEPH COLE-SELVAGGIO, about the other. Further, this agreement addresses areas of personal relationships and religious preferences.

The record establishes that conflicts regarding visitation continued after the entry of the consent order and that defendant opposed plaintiff's efforts to have Alex involved in pre-school activities during plaintiff's visitation days. In October 1992, plaintiff filed a motion for modification of the visitation order to enforce the order and for make-up visitation, alleging that defendant violated the visitation order and disparaged him to Alex. Defendant's answer denied that she had denied plaintiff visitation and alleged that plaintiff disparaged her. On December 9, 1992, the court entered an opinion and order granting plaintiff an evidentiary hearing, after plaintiff filed objections to the FOC recommendation. However, it appears from the record that the evidentiary hearing did not begin until February 27, 1995.

In February 1993, when Alex was between 3½and four years old, defendant filed a motion to remove Alex from a pre-nursery school program, in which plaintiff had enrolled Alex on the weekdays that plaintiff had visitation under the consent order, Wednesdays and Thursdays, at plaintiff's expense. The program met for two hours on Wednesday and two hours on Thursday.[5] The court ordered that Alex could attend the program.

The following school year, 1993-1994, plaintiff enrolled Alex in the Liggett pre-school program during the days plaintiff had visitation, at his expense. Defendant unsuccessfully opposed Alex's attending the program in another court proceeding.

In November 1993, plaintiff filed a motion for enforcement of visitation. The court awarded plaintiff visitation the second week of the Christmas school holidays and ordered that the parties split Easter.

On May 1, 1994, defendant married Paul Adams, an elder in defendant's church, and defendant and Alex moved to Adams' home in Brighton, where Adams and his eleven year old son lived. Alex turned five one week after the wedding.

Later that month, plaintiff filed a motion to maintain the educational status quo, i.e., to allow Alex to attend a Liggett summer-camp program during plaintiff's three weeks of summer visitation with Alex, at plaintiff's expense, and for psychological evaluations. The summer camp program met for half-days three days a week. Defendant opposed plaintiff's motion. We gather from the trial transcript that Alex did not attend this summer program.

In August 1994, plaintiff filed a petition for change of custody requesting legal and physical custody of Alex. Plaintiff's petition alleged that, before knowing of defendant's marriage and move to Brighton, plaintiff had enrolled Alex in Liggett's kindergarten, and that based on the changed

circumstance that defendant had moved to Brighton, plaintiff should be awarded custody of Alex Monday through Thursday in order that he be able to continue his education at Liggett. The trial court denied plaintiff's motion pending an evidentiary hearing, and ordered plaintiff to pay defendant's attorney fees of $800.

In August, 1994, the trial court appointed Dr. Barbara Fisher to conduct psychological evaluations of the parties and Alex.

In September 1994, plaintiff filed an emergency motion for a temporary change in custody, alleging abuse and cruelty on defendant's part based on persons associated with defendant telling Alex disparaging things about plaintiff, and for appointment of a guardian ad litem (GAL). The trial court referred the matter to the FOC for an evidentiary hearing.

On September 13, 1994, defendant filed a petition for sole legal custody of Alex.

In November 1994, the trial court appointed Edward Greenup as GAL, and re-referred Alex to the court-appointed psychologist, Dr. Fisher, for an evaluation regarding the issue of change of custody. The court ordered that the cost of the GAL be shared between the parties.

In December 1994, defendant filed a motion to dismiss plaintiff's petition for change of custody or, alternatively, to exclude testimony regarding her religion. The hearing on defendant's motion began on February 27, 1995.[6] After hearing some testimony, the trial court denied defendant's motion, allowing plaintiff to amend his petition, and ordered that testimony continue.

GAL Greenup's report and recommendation to the trial court dated February 23, 1995 set forth his recommendations under the statutory best interest factors, MCL 722.23; MSA 25.312(3), and concluded that the parties were equal on factors (a), (d), (e), (f), (g), and (h), and that plaintiff was favored under factors (b), (c), (i), and (j). He recommended that plaintiff be granted physical custody.

Dr. Fisher concluded that plaintiff was favored on the same four factors as Greenup, in addition to a fifth factor, (h), and that the parties were equal on the remaining five factors.[7] Dr. Fisher recommended that plaintiff be granted physical custody and that the parties share legal custody.

After plaintiff rested in July 1995, defendant moved to dismiss plaintiff's (amended) petition for change of custody. The trial court denied defendant's motion.

The trial court in its opinion and order concluded that the parties were equal on eight factors and that defendant was favored on factor (d), the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The trial court deemed factor (k) inapplicable, and did not address factor (l). The trial court then found that there was an established custodial environment with defendant, that plaintiff failed to show by even a preponderance of the evidence that a change in custody was warranted, and concluded that defendant would retain physical custody of Alex. The trial court also determined that there was clear and convincing evidence that a change from joint legal custody to sole legal custody was warranted "due

to the parties' conflicting religious views and the effect of their religious beliefs on child-rearing preferences," and awarded defendant sole legal custody of Alex.

II

Plaintiff challenges the trial court's determination that an established custodial environment existed only with defendant and the trial court's findings under best interest factors (d), (e), and (h).

We review the trial court's findings of fact under the great weight of the evidence standard, discretionary rulings under an abuse of discretion standard, and questions of law for clear error. *Ireland v Smith*, 451 Mich 457, 463 n 6; 547 NW2d 686 (1996); MCL 722.28; MSA 25.312(5).

Under MCL 722.27(1)(c); MSA 25.312(7)(1)(c), a custodial environment 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. Such an environment depends on a custodial relationship of a significant duration in which the child was provided parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both a physical and psychological sense in which the relationship is marked by qualities of security, stability and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship is also considered. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Baker*, *supra* at 579-580. An established custodial environment thus has two key elements: physical residence and psychological attachment. *Baker*, *supra* at 579-580. An established custodial environment may exist in more than one home. *Duperon v Duperon*, 175 Mich App 77, 81; 437 NW2d 318 (1989). If the court finds an established custodial environment, the statute requires that the party seeking a change in custody show by clear and convincing evidence that the change is in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993). A finding of equality or near equality on all the relevant factors will not necessarily prevent a party from satisfying the burden of proof; the overriding concern is for the court to consider all the relevant factors and criteria in light of the best interests of the child. *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995).

A

Plaintiff argues that the trial court erred in failing to consider the long-term and continuing community contacts between Alex and him in its findings regarding an established custodial environment and best interest factors (d), (e), and (h). We conclude that the trial court did not err in finding an established custodial environment with defendant, or in its assessment of factors (d) and (e). Regarding factor (h), we agree that the great weight of the evidence favored plaintiff, although the advantage was marginal.

The trial court found that an established custodial environment existed with defendant in Brighton based primarily on the fact that Alex had been living with defendant, her husband, and step-son for over a year:

The Court turns its attention to Alex's physical custody. . . .

> Consistent with the findings and conclusions set forth in Section III, the Court finds a [sic] existing custodial environment exists for Alex in Brighton, Michigan. Alex has lived as a member of a family unit with defendant, her husband Paul Adams, and Adams' son in Brighton, Michigan for over a year, and has successfully attended public school there. The evidence, including evidence that defendant periodically utilizes latch-key or a baby-sitter, does not suggest that Alex's Brighton home lacks security, stability and permanence. Treutle v Treutle, 197 Mich App 690, 694; 495 NW2d 836 (1992), lv den 442 Mich 882 (1993). The fact that 6 year old Alex may look to both plaintiff and defendant to meet his important needs does not, under the circumstances as presented, warrant a finding that an established custodial environment also exists with plaintiff.

While there was evidence that Alex looks to plaintiff as well as defendant to satisfy his needs, and is comfortable in plaintiff's home, the court did not err in finding an established custodial environment with defendant given that Alex has lived with plaintiff continuously, albeit with substantial visitation with defendant.

B

Plaintiff also challenges the trial court's findings under best interest factors (d), (e), and (h). The trial court found that factor (d) favored defendant, and that the parties were equal on factors (e) and (h):

> (d) The length of time Alex has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> Alex has lived in Brighton, Michigan since May 1994 with defendant, her husband Paul Adams, and Adams' 12 year old son Jason. Plaintiff enjoys liberal visitation. Plaintiff's religious preferences aside, Alex's living environment for the last 16 months with defendant, Adams, and Jason is stable and satisfactory, and enjoys a desirability of maintaining continuity. Factor d weighs in favor of defendant.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> Plaintiff and defendant share an equal permanence, as family units, of existing and/or proposed custodial homes. Defendant's 1994 marriage to Paul Adams, and resulting cohabitation with Adams, his son, and Alex as a family unit in Brighton, Michigan, evinces a permanence of a custodial home with defendant notwithstanding defendant's prior residential changes while unmarried. Nothing in the record suggests a lack of permanence, as a family unit, to a custodial home with defendant. Factor e favors neither party.
>
> * * *
>
> (h) The home, school, and community record of the child.

> Alex presents a favorable home, school, and community record despite the parties' inability to cooperate with each other. To the extent Alex has missed school on days of holiday celebration in accordance with defendant's religious beliefs, the Court is not inclined to find this religious preference for Alex, while in defendant's custody, evinces less than a favorable school record. Fisher, supra. Other unexplained absences (see Plaintiff's Exhibit 30) are too few in number to warrant finding Alex's home, school and community record weighs for or against either party. Factor h weighs in favor of neither party.

Factor (d) calls for a factual inquiry into how long the child has been in a stable, satisfactory environment, and then states a value: "the desirability of maintaining continuity." *Ireland, supra* at 465 n 8.

We conclude that the trial court's finding that defendant was favored under factor (d) is adequately supported by the evidence. While plaintiff provides an excellent and stable home environment, the court legitimately observed that Alex's primary residence for the preceding 16 months had been with defendant and her new family in Brighton.

We also conclude that the record does not support plaintiff's argument that the trial court's finding that the parties were equal on factor (e) was against the great weight of the evidence. In *Ireland, supra* at 465, the Supreme Court noted that factors (d) and (e) are "phrased somewhat awkwardly, and there clearly is a degree of overlap between them. However, we are satisfied that the focus of factor e is the child's prospects for a stable family environment." The *Ireland* Court further noted that, taken literally, factor (e) appears to direct an inquiry into the extent to which a "home" will serve as a permanent "family unit."

There was no evidence presented to indicate lack of permanence in defendant's family unit with Alex, Adams, and Adams' son in Brighton. Although plaintiff argues that Alex no longer has defendant's undivided attention because defendant has married and now has a step-son, this is not indicative of a lack of permanence and, further, it is not unlikely that plaintiff will become involved in relationships with others, and that Alex may have to adjust to new persons in his life on plaintiff's side. Both experts testified that the parties were equal on this factor. We find no error regarding factor (e).

We do, however, agree that the trial court's finding that the parties were equal on factor (h) was against the great weight of the evidence. This factor clearly favored plaintiff, although the advantage is marginal. Evidence presented at trial established that plaintiff enrolled Alex in and frequently attended a number of school and community activities, including Gymboree at age two, community swimming and soccer lessons over several years, several pre-school programs and summer camp, and plaintiff participated in Alex's school and classroom activities to a greater extent than defendant did, even after defendant and Alex moved to Brighton. Alex's kindergarten teacher in Hartland, Terry Mason, testified that plaintiff's involvement and participation in Alex's school activities was above average, while defendant, who also helped in Alex's classroom, but to a lesser extent, was average.

II

Plaintiff argues that the trial court's finding of Alex's stated preference, best interest factor (i), was against the great weight of the evidence.

In child custody disputes, a court may conduct an in-camera interview of the child in order to assess the child's preference. *Impullitti v Impullitti*, 163 Mich App 507, 510; 415 NW2d 261 (1987). The court must declare on the record whether the child was capable of expressing a reasonable preference and whether the child's preference was afforded any weight by the court. *Fletcher, supra* at 871. However, the court need not disclose the child's preference to the parties if such declaration would be detrimental to the child and to the relationship he has with his parents. *Id.*

The trial court's opinion stated regarding factor (i):

> Alex has expressed a preference to live with plaintiff, per Dr. Fisher, and with defendant, per Dr. Carpenter. Alex's in camera statement of preference has been considered by the Court in reaching a final determination of custody.

The trial court did not address GAL Greenup's testimony that Alex expressed a preference to live with plaintiff. Given that we do not know what the trial court's finding was on this factor, we cannot conclude that it was against the great weight of the evidence. However, because the trial court apparently did not take GAL Greenup's testimony regarding Alex's preference into account, and we do not know what preference, if any, Alex expressed to the court, or his articulated reasons for any preference expressed, we order that on remand the trial court revisit this factor and make a sealed record of the court's conversations with Alex.

III

We address plaintiff's remaining challenges together. Plaintiff asserts that the trial court erred in failing to evaluate and weigh the parties' custodial practices and alternatives pursuant to the best interest test, in failing to find that Alex suffered substantive harm from defendant's child-rearing practices, and in finding the parties equal under factor (j), (the parties' willingness to cooperate with each other to facilitate and encourage a parent-child relationship with the other parent.) After a thorough review of the testimony and the court's findings, we find it necessary to remand.

The court-appointed expert, Dr. Fisher, and plaintiff's expert, Dr. Doyal, testified that Alex reported to them that two persons associated with defendant told Alex that his father was a bad person. GAL Greenup testified that Alex told him several times that two persons at Kingdom Hall, whom Alex named to Greenup, whispered to him that his father is bad and his father's home is bad. Greenup testified that Alex told him three times that he was afraid of demons and that there were demons in plaintiff's house because Jehovah is coming and his dad will not be saved and will be killed. Greenup's report and recommendation regarding factor (j) stated:

> I believe that both parties in their heart have the willingness and ability to encourage a close and continuing parent/child relationship between the child and other parent. But I

> also feel that there are outside forces and individuals at the present time that have caused some serious concerns in Alex that can affect the parent/child relationship between Alex and his father. I believe that there is no reciprical [sic] problem affecting the close relationship between Alex and his mother while he is with father. This factor would weigh in favor of plaintiff.

Dr. Fisher testified that Alexander told her several times that he was afraid that his father was going to die because people told him that and he was afraid for his father. Dr. Fisher's addendum report dated May 18, 1995, concluded that Alexander's fear was being generated in defendant's environment:

> This is a factor of major concern to this examiner. In the investigation of this examiner, it has been learned that by the time of a certain age, particularly close to the age of Alex at this point in time, that he must renounce all outsiders to the religion of his mother and further, that there is considerable pressure placed upon the child to do this. Alex has informed this examiner on a number of occasions that he was told by members of his mother's religious group, that his father would die unless he renounced him. Alex has arrived at the office of this examiner, upset and withdrawn only to inform [sic] that he was under pressure again, whether that was not to see this examiner, who is bad for him, or his father who is bad for him. Apparently this takes place through a process of 'whispering' whether that be his stepfather, Paul [Alex's step-brother] and/or someone named, [sic] Todd Sellars. As a result he finds his mother's home confusing and his father's home more stable. Alex feels continually pulled while at his mother's home and the result has, in the opinion of this examiner, been quite devastating for him.
>
> This factor weighs heavily in favor of the father.

Defendant's expert, Dr. Carpenter,[8] testified regarding this issue:

> *Q.* What, if anything, did he tell you about his father?
>
> *A.* He expressed love for his father also. And said he had fun with his father, enjoyed seeing him. It was very positive [sic] both parents.
>
> *Q.* Okay. Did he tell you anything else about his father?
>
> *A.* Well under questioning he did. Do you want to go into some of that?
>
> *Q.* Yes.
>
> *A.* Well I had been told that his father had indicated that people from the church, that is Jehovah's Witnesses, had said bad things about his father. So I asked him about this and he said that it was not true but he had to say it because his father would yell at him if he didn't.

Q. Did you understand, Dr. Carpenter, what the boy meant when he said his father would yell at him?

A. Well I assumed I did. I didn't really probe deeply into it at the time.

Q. In other words, you didn't pursue it any further or did you pursue it any further?

A. Not then. But I have seen him since and I have pursued it a little bit further.

Q. Well can we move to that when we move to your next sessions?

A. Yes.

* * *

Q. And can you tell us about that visit?

A. Well we played a game, a psychological game, and we talked a little bit. We did talk about his father yelling at him. And I asked him why this upset him so much and he was pretty vague in his answer, he didn't really say. And I suggested that he should probably tell his father how he felt, but he didn't make too much response to that either.

Plaintiff's expert, Dr. Doyal,[9] testified that he administered an individual intelligence test to Alex in September 1994, and that he scored in the top four or five percent of his age peers. Alex told him that Todd Sellers told him bad things about his father, and when Dr. Doyal asked him why that was said, Alex responded that he did not know. Alex also told him that he did not believe it. Dr. Doyal testified that he found Alex credible and did not think he was making this up. Dr. Doyal further testified that Alex exhibited signs of anxiety, and that a child's anxiety would be increased by hearing what Todd Sellers told Alex. He further testified that plaintiff had come to him in December 1991 because of his concern over Alex's health and welfare and that he had met with plaintiff twelve times, until January 13, 1995. Dr. Doyal testified regarding plaintiff that in his thirty years of practice, plaintiff was "on a very short list of the most competent parents I've ever met," because plaintiff is

> . . . unusually nurturing. He devotes more time to his son, in sharing a variety of activities with his son, he has the advantage of his employment that he's able to do this, and he allocates that time to his son. Over the course of three years or so, I have observed genuine concern and upset where he feels that he may be distanced from his son. And he's an effective father, parent. He's a very effective child manager.

Dr. Doyal also testified that he was not qualified to provide a custody evaluation since he did not interview defendant.

Fisher, Greenup and Doyal testified that Alex exhibited symptoms of anxiety and fear connected with demons and his fear that his father would die and not be saved. Greenup testified that, 1 ½ weeks before he testified, Alex told him that he had cried at night at his father's because of

the demons, and that the fact that Alex's fears and anxieties were still continuing at the time of trial strengthened his recommendation that plaintiff be awarded physical custody.

Dr. Fisher testified that when she tested Alex in November 1994, she saw a great deal of depression in his drawings, and that she observed symptoms of anxiety in Alex and that he was anxious when he came with his mother. Dr. Fisher also testified that as recently as April 1995, when she interviewed Alex, he told her that he was afraid his father would die because people told him that and that he was afraid for his father. Dr. Fisher testified that she was extremely concerned that Alex did not have playmates his own age at defendant's home and that such was having and would continue to have an adverse impact on Alex. Dr. Fisher further testified that defendant's home environment was not fostering a relationship with plaintiff, while plaintiff was, and that defendant's environment "appears as if it is the opposite to the extreme." Dr. Fisher continued:

> *Q.* You're of the opinion that what is going on is causing a breakdown in the relationship between Alex and his father?
>
> *A.* It is my opinion that what is going on and taking place in the household when Alex is with his mother is very seriously causing a breakdown in the relationship with his father and the only reason that the relationship with his father is being maintained is because they have a very close and loving relationship, but that eventually Alex is going to become more and more torn, and if things progress the way they are going, and again this is my opinion, he will have to make a decision in the future between one or the other, simply because there is not reciprocity that is being—that is taking place.

Dr. Fisher also testified that defendant's view that Alex should not associate or become very close with plaintiff was creating ambivalence in Alex because he loves both his parents, that Alex's fears of his father dying and of his dying with his father if he does not abide by the rules and regulations he is supposed to abide by are not age appropriate for Alex, that Alex has "all the earmarkings of a traumatized child, very fear based, very depressed," and that she is concerned with Alex's future prospects if something is not done. Dr. Fisher testified that she would not expect Alex to be traumatized if plaintiff were granted physical custody with reasonable visitation to the mother because plaintiff

> . . . would provide the child with activities that are comparable to other five year olds, that he would not be ostracized, that the father would favor reciprocity with the mother, make sure that the child had a close relationship with the mother, maintain that close relationship, that the father would ensure the child's medical needs, that the father would ensure that the child would have all of the privileges of other children his age, at any development time in his life.
>
> *Q.* Let me ask if the status quo that which is today were to be maintained, do that until the child is at the age, let's say 15, could make a free choice as to what he wants to do?

A. I don't believe he would know about any of his choices because of trauma. He would be unaware as to what his needs would be, his wants, his desires or his opinion.

Q. Is that in his best interest?

A. No.

Dr. Carpenter, defendant's expert, who had four meetings with Alex, during several of which Alex was sleeping, testified that Alex exhibited some anxiety but that he was not a depressed or traumatized child and was within normal psychological limits.

The trial court's opinion and order states:

> The distinction between the parties' capacity and disposition to provide for Alex, and their unwavering and divergent religious view as to how Alex's important needs should be met, is illustrated in the Guardian Ad Litem's February 24, 1995 Report recommending to the Court that factors b and c weigh in favor of plaintiff. After stating the parties agree 6 year old Alex is neither a practicing Catholic nor Jehovah's Witness, the Guardian sets forth the parties' differing child-rearing preferences: plaintiff permits Alex's celebration of recognized Christian holidays, birthdays, and the like, defendant does not; defendant believes Alex should attend Jehovah's Witness functions ranging from 5-7 hours per week, plaintiff feels Alex's time could be "better spent in a more constructive manner"; plaintiff believes Alex may begin dating "when most young adults beginning [sic] dating" and " in accordance with the normal standard of most parents", defendant would not permit Alex to have an analogous blood transfusion, plaintiff has no medical restrictions. . . . The guardian Ad Litem then concludes plaintiff "is better able to provide the guidance that is necessary for Alex to experience an <u>average normal childhood</u>", and that it is not in Alex's best interests "to have <u>any</u> restriction placed upon his health care." . . . .
>
> The issue posed by an analysis of factors b and c is not which parent has the greater capacity and disposition to provide a more "normal" upbringing for their child consistent with the parent's respective religious beliefs and the Court's preference for one of those beliefs, but whether either parent has a greater capacity and disposition to meet the child's important needs.
>
> > "'The refusal to intervene in the absence of a showing of harm to the child reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another.' (citation omitted)." <u>Fisher,</u> <u>supra,</u> at 234.
>
> To find that plaintiff has a greater capacity and disposition to meet Alex's needs due to a preference against the Jehovah's Witness religion as practiced by defendant …

would constitute an impermissible intrusion upon First Amendment rights absent evidence of harm to Alex. Id.

With such stated, the Court finds that any harm or anxiety suffered by Alex is not the result of the Jehovah's Witness religion practiced by defendant, but the parties' shared intolerance of the other's child-rearing views as communicated to Alex. Consistent with the Court's finding that plaintiff and defendant each have strong love, afffection, and other emotional ties with Alex, Dr. Fisher's, Dr. Guy Doyal's, Dr. Patricia Carpenter's, and Teacher Theresa Mason's differing opinions regarding the source and level of Alex's anxiety, and the Court's own interview with Alex, it is readily apparent to the Court that any psychological problems being experienced by Alex are not the result of a religious practice, but the parties' open hostility toward the other's child-rearing preferences. Each parent has the constitutional right to pursue their own religious activities and involve Alex in those activities during the time Alex is in their physical custody, whether as the custodial parent or during legal visitation periods. Fisher, supra, at 234. Without mutual understanding, tolerance, and cooperation between the parties as to each other's child-rearing preferences, and communication of such a relationship to Alex, Alex will continue to experience anxiety whether his legal custody is awarded to plaintiff or defendant. . . .

The trial court's opinion and order states regarding factor (j):

Evidence was submitted that a member of defendant's congregation has made disparaging remarks to Alex about plaintiff because plaintiff is not of the Jehovah's Witness religion. Plaintiff has also proffered evidence indicating defendant's religious beliefs would include 'hating' those who are not of her own faith. See Plaintiff's Exhibit 8. Dr. Fisher's assessment that Alex will be unable to continue a relationship with plaintiff if Alex adopts the Jehovah's Witness religion is indeed troubling.

Evidence was also placed before the Court indicating plaintiff told Alex to tell others, although untrue, that people from defendant's church were saying bad things about plaintiff. See Dr. Carpenter Transcript, July 14, 1995, at 11. Alex would allegedly be yelled at by plaintiff if Alex did not comply with plaintiff's request. Id.

The situation is best described by Drs. Fisher and Carpenter:

> 'Alexander is a bright five year old boy with two very loving and caring parents who want to ensure that his welfare is taken care of. In their attempt to accomplish this task, the parents of Alexander tend to be overzealous and intolerant of each other.' Dr. Fisher's report, Plaintiff's Exhibit 26, at 9-10.
>
> 'Well I had a strong feeling the first time I saw him that [Alex] was very torn between his parents and that he deeply cared for both and that he was having a hard time with this, and I was concerned about it.' Dr. Carpenter's testimony, July 14, 1995 Transcript, at 18.

Neither party has demonstrated a willingness or ability to facilitate and encourage a close relationship between Alex and the other party. Factor j favors neither party.

We first note that the trial court's opinion properly sets forth the best interest test as the applicable standard.[10] While at various times during trial and in its opinion the court did allude to being unable to favor one party's practices over another's, we do not conclude from these statements that the court equated child-rearing practices with religious preference, thereby disregarding its obligation to make a secular determination under the best interest standard. Rather, the court apparently concluded that while defendant's religious beliefs caused her to choose to raise Alex in a manner that is different from an "average normal" upbringing, the specifics of that upbringing did not render it better or worse than the upbringing favored by plaintiff. We do not disagree with this conclusion. The court found that any harm suffered by Alex was not due to the religious observances of defendant, but the parties' shared intolerance.

Our problem is not with the standard applied by the court but with the court's failure to adequately address the issue of Alex's mental health. The court made no specific findings regarding whether Alex was, in fact, suffering the harm and anxiety identified and described by several of the experts and the GAL. It is unclear whether the court found, based on Dr. Carpenter's testimony, that at plaintiff's direction, Alex was fabricating the accounts of persons telling him that his father is bad and is going to die and the resultant distress, as related by Dr. Doyal and Dr. Fisher, and if so, whether the court discussed the matter with Alex, and why the court came to that conclusion; or if the court found that Alex was being told frightening things about his father but the court discounted the claims of harm. Based on our review of the record, we conclude the court failed to make crucial findings and conclusions relating to the important issue of Alex's mental health. It is not enough to say that any harm is the result of the parties' mutual intolerance. If Alex is being told that his father is a bad person and is going to die and it is causing him psychological harm, the court must deal with the matter directly.

We also find unclear the court's reasoning regarding the change in legal custody from joint to sole custody in defendant. While the court noted the parties' inability to agree, the court also recognized that an award of sole legal custody to either party will not eliminate the parties' intolerance. While it is true that joint legal custody contemplates the ability to cooperate and generally agree on

education, medical, and religious issues affecting the child's welfare, it is not clear in the instant case that Alex would be better off if defendant were not required to consult plaintiff regarding these matters.

We remand to the trial court to readdress the issues of Alex's preference (making a sealed record of its discussions with Alex), Alex's mental health, and whether a sole legal custody arrangement will yield enough gains with respect to lessening conflict to justify the diminishment of plaintiff's input and involvement. On remand, the court shall consider up-to-date information and shall conduct whatever proceedings are necessary to enable the court to make an accurate and informed decision concerning a custody arrangement that is in Alex's best interest. *Ireland, supra* at 468-469.

VI

On cross-appeal, defendant argues that she should have been awarded attorney fees. We disagree.

We review the trial court's determination to deny attorney fees under MCR 3.206 for abuse of discretion. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Because defendant has cited no testimony that she was unable to bear the expense of the action, the trial court did not abuse its discretion in denying fees. MCR 3.206(C)(2). Nor did the trial court clearly err in finding that plaintiff's claim was not frivolous or without a basis in fact or law. MCR 2.114(E); *Taylor v Lenawee Co Bd of Rd Comm'rs*, 216 Mich App 435, 444; 549 NW2d 80 (1996). We affirm the trial court's denial of defendant's request for attorney fees.

Affirmed in part and remand for further proceedings. We retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ John W. Fitzgerald

[1] Plaintiff sought leave to appeal the trial court's order denying his motion for change in custody and granting defendant sole legal custody of their minor child. This Court denied plaintiff's application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded to this Court for review as on leave granted.

[2] We do not set forth every motion contained in the court record.

[3] In July 1991, plaintiff filed a motion for specific summer visitation, which was granted. Visitation problems continued and, in October 1991, the Friend of the Court recommended that plaintiff be granted holiday visitation and alternating visitation on certain holidays. Defendant objected to the recommended order. In November 1991, plaintiff filed an emergency motion for defendant's failure to comply with the visitation order.

[4] Thanksgiving Day, Christmas Eve, Christmas Day, New Years Day, Easter, Memorial Day, July 4th and Labor Day.

[5] Defendant argued that plaintiff enrolled the child unilaterally and that Alex was not ready for preschool. Plaintiff denied enrolling the child unilaterally and argued that, under the consent order, he and defendant shared decisions regarding education equally.

[6] Plaintiff's counsel stated in response to defendant's motion in limine, that Judge Balkwill had decided to admit testimony regarding defendant's religion in an opinion, that he had a copy of the opinion, and:

> It is relevant because we are not trying to preclude Mrs. Adams from believing whatever she wants. We're not infringing upon her first amendment rights. She has already admitted that little Alex is not a Jehovah Witness and we're asking that those beliefs and practices that affect the best interest of that child come forward before the Court so the Court is aware of that so when the Court makes a determination as to what is in the child's best interest, it will have all the facts and circumstances in front of it.

The trial court allowed plaintiff to amend his petition for change of custody, but ruled that the hearing would continue. The trial court indicated several times that it would not base its judgment on defendant's religious practice, that defendant was entitled to believe what she wanted, and that the court needed "to determine whether or not the lifestyle is going to affect the child."

[7] Both considered factor (k), domestic violence, inapplicable, and neither addressed factor (l).

[8] Dr. Carpenter did not meet or interview plaintiff and did not observe Alex interact with plaintiff.

[9] Dr. Doyal did not meet or interview defendant or her husband and did not observe Alex interact with them.

[10] In presiding over the case pretrial, Judge Balkwill addressed the court's appropriate role with respect to the religious aspects of the case:

> . . . . Plaintiff argues inquiry into the effect of religious beliefs upon a minor child is legitimate in custody actions. . . .
>
> Defendant argues that inquiry into defendant's religious beliefs would violate the First Amendment to the United States Constitution. Defendant asserts courts must be neutral as to religion in custody disputes so that religion must play no role in the custody decision. Although defendant agrees the well being of a child may be considered where it is 'threatened,' she asserts the mere fact that the parent is in a religion does not justify such an inquiry. Defendant asserts there is no evidence she is anything but an exemplary parent.

Although the question posed is of constitutional dimension, the Court need not till new soil. In a custody action, the Court is to consider the best interests of the child pursuant to the factors contained in MCL 722.23. These factors indicate the Court should consider diverse circumstances impacting the child, including religion. See MCL 722.23(b). It is true the Court must balance the compelling state interest as to the welfare of the minor children against the legitimate exercise of religious freedom. See Fisher v Fisher, 118 Mich App 227; 324 NW2d 582 (1982). In Fisher, the Court was required to consider the impact of religious beliefs on the minor child because the religious beliefs of one party would adversely impact on the child. The Court of Appeals noted a court must maintain its constitutionally mandated neutrality with respect to the merits of the religious beliefs of the parties. Once the purely secular decision of custody is made, the Court may not interfere with the religious practices of either the custodial or noncustodial parent unless, of course, those practices threaten the children's well being. 118 Mich App at p. 234. The Michigan Supreme Court also held religious consideration may be included in determining the best interests of a child. In the matter of Barlow, 404 Mich 216, 238-239; 273 NW2d 35 (1978). However, the Court cautioned that a preference that an infant child be raised in the mother's own faith should not be given controlling weight in deciding whether to terminate the natural father's parental rights, all other things being equal. Id. The weight of authority in other jurisdictions appears to be that religious factors are considered when they adversely impact upon the child's temporal welfare. See Child Custody and Visitation-Religion, 22 ALR4th 971.

On balance, the Court is satisfied that the appropriate approach to be applied when a party asserts the other party's religious beliefs will adversely impact on the child is to allow the parties to make an evidentiary record followed by fact findings as to the best interests of the child. The referee or the Court can then make the constitutionally mandated balancing of First Amendment rights against the state's compelling interest in maintaining the welfare of children. **The inquiry itself places no impermissible constitutional burden upon defendant.** It will not be possible to balance the compelling interest in the welfare of the child against the constitutionally protective [sic, protected] religious practices unless an evidentiary record is created.