

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

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JEFFREY LYNN BIRD,

Plaintiff-Appellant,

v

LISA MARIE BIRD,

Defendant-Appellee.

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UNPUBLISHED

December 8, 1998

No. 207224

Lenawee Circuit Court

LC No. 96-018114 DM

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Plaintiff Jeffrey Lynn Bird appeals as of right from a judgment of divorce challenging (1) the trial court's award of physical custody of the parties' minor child, Nicole Amber Bird, to defendant Lisa Marie Bird and (2) the trial court's property distribution. We affirm.

I. Basic Facts And Procedural History

Plaintiff and defendant were married in May of 1991, and had one minor child together, Nicole Amber Bird. Defendant had three children by three different men when she married plaintiff. All three of defendant's children lived with plaintiff, defendant and Nicole Amber Bird.

During the marriage, plaintiff apparently had problems with defendant's children. In July of 1996, defendant left plaintiff, apparently because she did not want him abusing her children. Defendant and the children moved in with Pete Sharp, a/k/a Duane Sharp. In exchange for living in Sharp's house, defendant watches Sharp's children while Sharp is at work.

In August of 1996, plaintiff filed a complaint for divorce requesting a grant of a judgment of divorce, custody of Nicole Amber Bird or, in the alternative, an order permitting plaintiff parenting time with Nicole Amber Bird. In September of 1996, the trial court entered an order adopting the Friend of the Court recommendations. This order granted joint legal custody to the parties with physical custody to defendant, ordered plaintiff to pay \$117 per week in child support and ordered agreeable visiting times. In October of 1996, plaintiff and defendant stipulated to an order that granted plaintiff visiting

times with Nicole Amber Bird on alternating weekends from Saturday at 9:00 a.m. to Sunday at 7:00 p.m.

Following a bench trial, the trial court ruled that an established custodial environment existed with defendant. The trial court also ruled that, considering the best interests of the child, there existed no clear and convincing evidence to warrant a change in the established custodial environment. The judgment of divorce awarded each party the personal property that he or she had in his or her own possession. The judgment of divorce also awarded each party the automobile that was in his or her name or possession and held the other harmless from any indebtedness on it. The judgment of divorce also awarded plaintiff the marital home in Clinton, Michigan, and provided that plaintiff assume any indebtedness for it. The judgment of divorce held defendant responsible for any debts relating to her children who were not of the marriage and held plaintiff responsible for all other debts incurred during the marriage.

## II. Standard Of Review

“Whether a custodial environment is established is a question of fact.” *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1995), affirmed as modified on other grounds 451 Mich 457 (1996). We review findings of fact in a child custody case under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Ireland, supra*, 214 Mich App 242. Under that standard, we will sustain the trial court’s factual findings unless the evidence clearly preponderates in the opposite direction. *Id.* We review questions of law in a custody case for “clear legal error,” MCL 722.28; MSA 25.312(8). When the trial court incorrectly chooses, interprets or applies the law, it commits legal error that this Court is bound to correct.

## III. Established Custodial Environment

Plaintiff argues that the trial court’s finding that an established custodial environment existed with defendant was against the great weight of the evidence and clear legal error because the trial court focused on the situation before the parties separated and not the situation after the parties separated. We disagree.

When determining the custody of a child, the trial court must first determine whether an established custodial environment exists as provided for 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 age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

The trial court’s focus when determining whether a custodial environment exists is on the circumstances surrounding the care of the child in the time preceding trial. *Hayes v Hayes*, 209 Mich App 385, 388;

532 NW2d 190 (1995). The trial court's determination depends on a custodial relationship of a significant duration in which the child:

was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence. [*Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).]

Here, the trial court found that a custodial environment had been established with defendant. The trial court stated that throughout the time that plaintiff and defendant lived together, Nicole Amber Bird looked to defendant for guidance, comfort, necessities and discipline. Contrary to plaintiff's argument on appeal that the trial court focused exclusively on the relationship between defendant and Nicole Amber Bird before the break up of plaintiff and defendant's marriage, the trial court stated that the custodial environment *previously created* with defendant continued after the parties separated.

We hold that the trial court's findings were not against the great weight of the evidence. The evidence adduced at trial established that defendant provided Nicole Amber Bird with the parental care, discipline, love, guidance and attention appropriate to her age and individual needs both before and after plaintiff and defendant separated. *Id.* The trial court was correct in looking to the custodial relationship between defendant and Nicole Amber Bird before the parties separated because that relationship did not change, but continued after the parties separated and defendant and the children moved out of plaintiff's home. Accordingly, we hold that the trial court's ruling that an established custodial environment existed for Nicole with defendant was not against the great weight of the evidence nor was it clear legal error.

#### IV. Change In Established Custodial Environment

Plaintiff argues that the trial court erred in concluding that a change in the established custodial environment was not warranted. We again disagree. Because there was an established custodial environment in this case, the trial court was prohibited from changing custody unless clear and convincing evidence demonstrated that a change in custody was in the child's best interest. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Baker, supra*, 411 Mich 577; *Ireland, supra*, 214 Mich 241.

In determining the child's best interest, the trial court is guided by the twelve statutory factors as provided for in MCL 722.23; MSA 25.312(3). The trial court found that factors (a), (b), (d), (e), (f), (g), (h), and (i) were neutral. The trial court found in favor of defendant on factors (c), (j) and (k). On appeal, plaintiff only disputes the trial court's findings with respect to factors (e), (f), (h), and (i).

Plaintiff argues the trial court erred in applying factor (e) because the trial court considered the reason that defendant left plaintiff's home when considering "[t]he permanence, as a family unit, of the existing or proposed custodial home." The trial court ruled that this factor was neutral. Factor (e) regards the permanence, not the acceptability, of an existing or proposed custodial home. *Ireland v Smith*, 451 Mich 457, 464; 547 NW2d 686 (1996).

We hold the trial court's finding that factor (e) was neutral was not against the great weight of the evidence. Plaintiff did offer evidence that he still lived in the trailer where Nicole Amber Bird grew up. However, defendant lived in Madison since August, 1996, and Nicole Amber Bird lived with defendant since the parties separated. Defendant's other children, with whom Nicole Amber Bird apparently has good relationships, also lived with defendant. Defendant and the children live with Duane Sharp who is the father of defendant's oldest son, Jason. Defendant works during the day at Madison Market and another person babysits Nicole Amber Bird while defendant works. Defendant is home from work when the children arrive home from school. In exchange for living in Sharp's house, defendant watches Sharp's children while Sharp is at work. Defendant had been watching Sharp's children for three years prior to leaving plaintiff. The arrangement seems to be working out well. Moreover, it is generally in the best interests of the child to keep brothers and sisters together. *Weichmann v Weichmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995). Nicole Amber Bird's counselor testified that she has a strong attachment to her siblings, as she has been raised with them since she was born and that they have good relationships. Accordingly, we hold that the trial court's findings were not against the great weight of the evidence and the trial court did not commit clear legal error by relying solely on the reason defendant left plaintiff's home as plaintiff argues on appeal.

Plaintiff also argues that the trial court erred in applying factor (f), "[t]he moral fitness of the parties involved," because defendant's "history of short-term involvement with abusive men that result in the birth of a child" is conduct which significantly influences how defendant will act as a parent. "Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*." *Fletcher v Fletcher*, 447 Mich 871, 886-887 (Brickley, J., joined by Cavanagh, C.J., and Boyle, J.), 890 (Mallett, J., concurring in Justice Brickley's opinion "except with respect to the standard of review."); 526 NW2d 889 (1994) (emphasis in original). When determining parental fitness, the trial court must examine the parent-child relationship and the effect that the conduct at issue will have on that relationship. *Id.* at 887 (Brickley, J.). The determination concerns the parties' relative fitness to provide for their child, given the moral disposition of each party. *Id.*

Defendant's questionable conduct in her relationships with men is conduct that has a significant influence on how she will function as a parent. *Id.* However, defendant has been in counseling for this behavior. Moreover, there was testimony regarding plaintiff's questionable conduct that also significantly influenced how he will function as a parent. *Id.* Accordingly, we hold that the trial court's conclusion that the parties were equal on this factor was not against the great weight of the evidence.

Plaintiff also argues that the trial court erred in finding that the parties were equal with regard to factor (h) as plaintiff has made great strides since the separation. Plaintiff is correct in his assertion that he increased his involvement with Nicole Amber Bird's schooling since the separation. However, defendant was also continually involved, and her involvement did not decrease since the separation. Accordingly, we hold that the trial court's conclusion that the parties were equal with regard to this factor was not against the great weight of the evidence.

Plaintiff argues that the trial court erred in not considering Nicole Amber Bird's preference under factor (i). We have reviewed the suppressed transcript of the trial court's interview with Nicole

Amber Bird and find that the trial court's conclusion that she was not of sufficient age or maturity to express a reasonable preference was not against the great weight of the evidence.

Finally, plaintiff argues that the trial court erred in not relying on the custody evaluation because it was highly relevant evidence. A trial court is not required to recite all the evidence considered in a custody case. *Fletcher, supra* at 883 (Brickley, J.). The trial court did not discuss how it considered the custody evaluation in its determination of the twelve statutory factors. However, it is clear from the trial court's comments that it was aware of the custody evaluation and considered the evaluation in some manner. Moreover, the trial court placed a thorough analysis of its balancing of the factors on the record. *Id.* Plaintiff failed to present clear and convincing evidence that the established custodial environment should be changed. We hold that the trial court's conclusion was not against the great weight of the evidence.

## VI. Property Distribution

Plaintiff argues that the trial court erred in holding plaintiff responsible for all of the marital debt, except for any medical debts for defendant's children other than Nicole Amber Bird. However, plaintiff does not indicate what the parties' debts are. In addition, the testimony at trial seemed to be inconclusive of what debts the parties actually had.

"The objective of a property division is to reach an equitable distribution of property in light of all the circumstances." *Lesko v Lesko*, 184 Mich App 395, 400; 457 NW2d 695 (1990). The division need not be equal, but it must be equitable. *Id.* "The court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's needs, fault or past misconduct, and any other equitable circumstance." *Id.*

At trial, plaintiff presented evidence of a \$486.94 outstanding bill from Herrick Hospital. Defendant did not know what the bill was for but agreed that, if it were attributable to her or her children other than Nicole Amber Bird, then she would be responsible for it. Defendant was unaware of any other outstanding debts. At the time of trial, defendant had paid all of the medical bills of which she was aware, and she had paid her car loan. Defendant testified that she only had day to day expenses, such as groceries.

Defendant testified that, during the marriage, plaintiff would often use money that was for groceries or the rent on himself. Defendant testified that plaintiff had promised to give her \$150 to help pay for the children's school clothes. Instead of giving defendant the money, plaintiff spent the money on a scope for his hunting gun or bow. In 1994, plaintiff spent \$500 the couple had saved for Christmas on a gun for himself. Apparently, plaintiff's mother had to buy the children presents because plaintiff had spent the couple's money on his gun. In addition, when plaintiff and defendant were about to be evicted from the trailer park, plaintiff spent the rent money on hunting and fishing equipment and ornaments for his truck. Considering all of these factors, we hold that the trial court's ruling on property disposition was fair and equitable.

Affirmed.

/s/ Jane E. Markey  
/s/ David H. Sawyer  
/s/ William C. Whitbeck