STATE OF MICHIGAN

COURT OF APPEALS

JOHN JOSEPH TIERNEY,

Plaintiff-Appellant,

v

KIMBERLY MARIE TIERNEY,

Defendant-Appellee.

UNPUBLISHED
March 9, 1999

No. 209677
Genesee Circuit Court
LC No. 95-179853 DM

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of divorce that awarded the parties joint legal custody of their children, Meghan Marie Tierney and Ryan Austin Tierney, and awarded physical custody of the children to defendant. We affirm.

The parties were married on June 21, 1992, and soon produced two children, Meghan, born on March 12, 1993, and Ryan, born on October 29, 1994. During this time, plaintiff was an osteopathic medicine resident in Boston for one year; he and his family then moved to the Flint area in June 1993 for a four-year residency program. Plaintiff's family is from Boston, where plaintiff intended to begin a fellowship program as soon as his residency was completed in July 1997. At the time of the custody determination, defendant did not express any plans to leave Michigan, although her extended family was in Florida.[1] Defendant had found a job as a pharmaceutical salesperson with Smith-Klein-Beecham in the Flint area and was a top sales representative, although she was fired when she violated company policy by doing laundry during a workday. She was then hired as a sales representative at another company in December 1996. During the marriage, plaintiff generally worked long hours, while defendant would get the children up in the morning and fix them dinner at night. She also hired and trained the children's nannies, since both parents worked full-time.

In February 1995, as a result of the constant arguing, the parties decided to live in separate areas of the house, then later decided also to become financially separate. During this time, defendant met another man. In July 1995, defendant moved out of the family home; she testified that she did not begin a romantic relationship with this man until after this time. Plaintiff also had romantic relationships during the parties' separation. Both parties stated that the children were too young to understand the

nature of their parents' relationships. However, plaintiff was angry about defendant's affair with another man, and after she asked for a divorce, he occasionally said negative things about her to the children. Plaintiff also enrolled Meghan in a Montessori preschool without discussing the matter with defendant.

Although both parties' families were Catholic and Meghan was baptized in the Catholic church, neither party attended church at the beginning of their marriage. After Meghan was born, they began to attend church again, but their attendance was generally limited to special occasions. However, after the divorce was filed, plaintiff began to attend the Catholic church on a weekly basis. Defendant attended the nondenominational Unity Church. She stated that she did not consider taking the children to her new church to be "switching" their religion, because the children had not, in her opinion, ever practiced Catholicism.

Both parties appear by every measure to be good parents, and while each party and several witnesses expressed reasons why the children would be better off with one parent or the other, there were no issues that suggested that one party was clearly the better parent. The trial court found that no established custodial environment existed for the children. However, the trial court determined that defendant had been the primary caregiver when the parties had lived together because she bore the majority of the responsibilities for the children. The trial court determined that all of the statutory factors were substantially equal, except for factors "(d) [t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity"; "(j) [t]he 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"; and "(l) [a]ny other factor considered by the court to be relevant to a particular child custody dispute," all of which the court found in favor of defendant. MCL 722.23; MSA 25.312(3). Based on these findings, the court awarded legal custody to the parties jointly, but awarded primary physical custody to defendant, with plaintiff to have summer and other visitation with the children.

Plaintiff first challenges the trial court's finding that there was no established custodial environment, arguing that the children had an established custodial environment in the joint legal and physical custody arrangement to which the parties agreed pursuant to their separation in 1995, whereby each party had physical custody of the children on a "week-on/week-off" basis. Whether an established custodial environment exists is a question of fact that this Court reviews under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

The first step in a custody decision is to determine whether an established custodial environment exists for a child. *Hayes*, *supra* at 387. The Child Custody Act provides, in pertinent part, that

> [t]he 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. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

If a custodial environment does not exist, then the custody determination is made upon a showing by a preponderance of the evidence that a particular placement is in the child's best interests. *Bowers, supra*. If there is an established custodial environment, the trial court may not make a change in custody without clear and convincing evidence that the change is in the best interests of the child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Bowers, supra*. The proper burden of proof must be determined before the court can analyze the child's best interests.

Here, the trial court found that there was no established custodial environment, primarily because the parties had agreed to share physical custody of the children on a fifty-fifty, weekly basis, a situation that lasted for approximately two years before the custody hearing. The trial court, we emphasize, was not precluded from finding an established custodial environment in such an arrangement. *Nielsen v Nielsen*, 163 Mich App 430, 433-34; 415 NW2d 6 (1987). Nor is such an arrangement necessarily disfavored. However, "where there are repeated changes in physical custody and uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded." *Bowers, supra* at 326. Here, the young children were shuttled weekly to a different home for two years, where they were subjected to different routines and caregivers. Evidence showed that the children's behavior suffered because of the hectic custody schedule and the conflict among routines in each household. Thus, in contrast to the joint custody agreement that produced stability in *Nielsen, supra*, the arrangement in this case did not create a relationship with either one party or both parties "marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-80; 309 NW2d 532 (1981). Consequently, we do not believe that the trial court here improperly ignored the great weight of the evidence in determining that no established custodial environment existed. We emphasize though, in agreement with *Nielsen,* that a joint physical custody arrangement may "represent an enlightened approach" to a difficult situation in the right circumstances, *id.*, at 433-34, and that such an arrangement may constitute an "established custodial environment" where it in fact produces a stable and secure environment for the children.

Next, plaintiff challenges the trial court's findings of fact pertaining to the statutory "best interests" factors, arguing that certain findings were against the great weight of the evidence. We will affirm such findings unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 879. The Child Custody Act and MCR 2.517 provide that a trial court must make specific findings of fact on each of twelve "best interests" factors that are to be used to determine custody in the best interest of the child. MCL 722.23; MSA 25.312(3); *Fletcher, supra* at 880-81.

First, plaintiff contests the court's finding that factor "(b) [t]he capacity and disposition of the parties involved to give the child[ren] love, affection, and guidance and to continue the education and raising of the child[ren] in [their] religion or creed, if any," MCL 722.23; MSA 25.312(3), was equal between the parties. The trial court found that the children did not have an established religion or creed. However, plaintiff contends that the trial court erroneously focused its analysis on whether the children, who were toddlers at the time of trial, had adopted a certain religion, instead of correctly focusing on the parents' religious beliefs and practices, as well as the historical Catholic affiliations of the parties' families. Plaintiff contends that the trial court should have found him better able to continue the

children's religious education in Catholicism since he practiced this religion while defendant attended a non-denominational church.

The trial court was not required to use a particular analysis in determining the children's religious affiliation. While inquiry into the parties' religious affiliations is obviously germane to the issue whether the children have a religious identity, it is not the only relevant inquiry. The trial court must also look to the religion the parties and children actually practiced during the marriage, if any, as well as to all other relevant facts. See *Ireland v Smith*, 451 Mich 457, 466; 547 NW2d 686 (1996) (when determining the best interests of children in a custody dispute, "the circuit judge is to give careful consideration to the whole situation"); *Carson v Carson*, 156 Mich App 291, 296-98; 401 NW2d 632 (1986). Therefore, here, the trial court properly looked to other evidence concerning the family's actual religious practices in making its determination that the children did not have a definite religious affiliation. While both parties were raised Catholic, they did not attend church before or at the beginning of their marriage, and later their attendance was sporadic at best. Although both children were baptized as Catholics, neither parent took the children regularly to Catholic church or involved them in Catholic church activities. After the parties' separation, plaintiff began attending the Catholic church on a regular basis. Defendant began regularly attending the Unity Church, a non-denominational church. In light of the foregoing, the trial court's finding that the children did not have a definite religious affiliation was not against the great weight of the evidence, which showed that the parties had not seriously involved themselves or the children in Catholicism during the marriage. Moreover, in light of the parties' dual efforts to expose the children to religious practice and belief in God, the trial court's finding that both parties were equally suited to give the children religious training is not against the great weight of the evidence.

Second, plaintiff contests the trial court finding that the parties were equal under factor (c), which concerns "[t]he 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." MCL 722.23; MSA 25.312(3). Plaintiff argues that although each party has a high income potential, he is better suited to provide financially for the children, because the evidence showed that defendant once lost a high-paying job because she violated company policy, failed to make several payments to the children's nanny, refused to pay for Meghan's pre-school and the children's activities, and refused to honor her obligation to pay for the upkeep of the family home. The trial court acknowledged that there was some testimony as to "who didn't pay what bill, or why this bill wasn't paid, or this bill was paid late," but stated that an occasional lapse on the part of either party was understandable, considering the stress caused by the breakup of the marriage.

Under factor (c), a trial court may look disfavorably upon a parent's exercise of poor financial judgment that adversely affects his or her children. See *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 27-8; 581 NW2d 11 (1998). However, a trial court should not give undue weight to a party's superior economic condition when assessing this factor. *Dempsey v Dempsey*, 409 Mich 495, 497-98; 296 NW2d 813 (1980). Here, both parties were equipped to provide the children financial stability. Although evidence showed that defendant was fired from a high-paying job as a sales representative for a pharmaceuticals company because she violated company policy in 1996, there was

no indication that the children were adversely affected by her termination and she currently has a good job. Although some evidence suggested that defendant may have been remiss in paying plaintiff sums of money she owed for child care expenses and other expenditures related to the maintenance of the marital home during the period of their separation, there is no indication that the children were adversely affected by the inevitable financial disputes that arise between divorcing parties. There was also no indication that the parties had agreed to share either the expenses for the home in which plaintiff continued to live or for the pre-school in which plaintiff enrolled Meghan. Finally, evidence showed that defendant stopped taking Meghan bowling because the child did not enjoy the sport, but then enrolled her in swimming and involved both children with a camping club. There was no evidence that defendant was either financially unprepared or unwilling to provide for the children. Thus, in our judgment, the trial court's finding that the parties were equal under best interest factor (c) was not against the great weight of the evidence.

Third, plaintiff argues that the trial court's finding that the parties were equal under best interest factor (e), which concerns "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23; MSA 25.312(3), was against the great weight of the evidence because he had the superior ability to provide the children with a permanent custodial home in Massachusetts, where they would have access to his large, supportive extended family, in contrast to defendant's home in Michigan without family nearby.

Acceptability of the proposed custodial home is not pertinent to the analysis under factor (e), *Fletcher v Fletcher*, 447 Mich 871, 885; 526 NW2d 889 (1994); thus we focus only on the "child's prospects for a stable family environment." *Ireland, supra* at 465. The Supreme Court has stated:

> The stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions. Of course, every situation needs to be examined individually. [*Ireland, supra* at 465 n 9.]

The evidence showed that defendant intended to reside in Michigan with the children, where they had lived for the majority of their lives, and were served by a regular, established secondary caregiver. Plaintiff proposed to take the children to Massachusetts with him, where he had supportive extended family, but did not appear to have clear plans for a permanent home. It was unclear from the testimony whether plaintiff intended to move in with his parents permanently or only temporarily when he took the children to Massachusetts. Although both parties had romantic attachments while they were still married, both parties testified that the children were not yet capable of discerning the nature of adult romantic relationships and neither party had immediate plans to incorporate a domestic partner into their living arrangements. In addition, the parties accused each other of abusing prescription drugs, but there was no evidence to substantiate either claim or show that the drugs may impact negatively on either parties' ability to provide a stable family environment. Overall, it appears that the parties can fairly equally provide the children with a permanent and stable home,[2] and thus, we do not find that this determination was against the great weight of the evidence.

Fourth, plaintiff challenges the trial court's finding that the parties were equally morally fit to have custody of the children under factor "(f) [t]he moral fitness of the parties involved." MCL 722.23; MSA 25.312(3). Plaintiff does not contend that the bare fact of defendant's extramarital affair indicates that she was an unfit parent, since both parties are equally guilty. Instead, plaintiff argues that defendant's handling of her extramarital affair and alleged drug use cast "shadows on [defendant]'s maturity, judgment and moral example."

As explained by our Supreme Court, marital infidelity, standing alone, is not an indication of parental unfitness:

> Factor f (moral fitness) . . . relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*. [*Fletcher, supra* at 886-87 (footnote omitted).]

Morally questionable conduct that has relevance to one's fitness as a parent includes, but is not limited to, "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id.* at 887 n 6. In this case, each party had affairs and exposed the children to their romantic partners. However, the evidence showed that the children were unaware of the true nature of their parent's relationships with the other parties. Thus, the trial court's finding that the parties were equally morally fit is not against the great weight of the evidence. Further, while other evidence suggested that defendant may have at one time used prescription drugs illegally, and that plaintiff brought home samples of prescription medications, there is no evidence that such drug use affected either parties' parenting

Fifth, plaintiff challenges the trial court's finding in defendant's favor as to factor "(j) [t]he 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." MCL 722.23; MSA 25.312(3). Evidence of a party's lingering hostility towards an estranged spouse, as well as an unwillingness to seek the other parent's input before making decisions related to a child, will support an adverse finding under factor (j). See *Fletcher, supra* at 28-9. Here, the trial court found that defendant was more willing and able to foster a close personal relationship between the children and plaintiff than vice versa. In our judgment, the evidence adequately supported defendant's allegation that plaintiff occasionally belittled her in front of the children and sometimes demonstrated considerable hostility toward her. Moreover, defendant testified that plaintiff enrolled Meghan in Montessori preschool without first consulting her. Therefore, we affirm the trial court's findings under factor (j).

Sixth, plaintiff contends that the trial court's finding on factor (l), which authorizes the trial court to weigh in the best interests determination "[a]ny other factor considered by the court to be relevant to

a particular child custody dispute," MCL 722.23; MSA 25.312(3), is against the great weight of the evidence. Under this factor, the trial court found that defendant was the children's primary caretaker before the separation. Plaintiff's first contends that the trial court improperly focused on a "snapshot in time" when making its finding under factor (l) because it looked further back in time than June 1, 1995, when the parties entered into their joint custody separation agreement. In essence, plaintiff argues that the trial court was required to focus solely on the period of time immediately after the parties' separation in making its best interests determination. However, this is incorrect. The trial court was required to examine "the whole situation" in determining the custody issue. *Ireland, supra* at 466. Therefore, the trial court did not err in looking, in part, to the parties' willingness to assume caretaking responsibilities prior to the parties' separation agreement.

Plaintiff next contends that trial court's findings on this factor were against the great weight of the evidence and that it, in essence, found that the children indeed had a primary custodial environment with defendant, thus contradicting its original finding that no established custodial environment existed and forcing plaintiff to meet a higher burden of proof. In our judgment, evidence showed that before and after the parties' separation in this case, plaintiff's work schedule was very busy and variable. When the parties lived together, it fell to defendant, notwithstanding her own full-time job, to fix the children's meals, attend to their daily needs, and hire and train the children's nannies. Thus, the trial court's finding that defendant acted as the children's primary caregiver prior to the separation is not against the great weight of the evidence. Further, contrary to the thrust of plaintiff's argument, we do not believe that the trial court gave preemptive weight to its finding under factor (l) or that plaintiff was "punished" for his commitment to his medical training. When the trial court initially found that no established custodial environment existed, it specifically stated that the parties were required to show by a preponderance of the evidence that a particular placement was in the children's best interests. We find no indication that the trial court misallocated the burden of proof upon making its finding under factor (l).

Seventh, plaintiff contends that the trial court effectively punished him for challenging defendant's custody of the children primarily because he harbored a great deal of anger over defendant's extramarital affair, not because he had reason to believe that defendant was an unfit parent. While the trial court did offer several editorial comments concerning his assessment of plaintiff's motivations, we do not agree that these comments evidenced any punitive or otherwise improper consideration on its part.

Based on the analysis above, we conclude that the trial court's ultimate findings of fact on the disputed "best interests" factors were not against the great weight of the evidence. We find that the trial court's custody decision did not constitute an abuse of discretion. Although the trial court was required to make a difficult decision because both parties appeared to be excellent parents, the result in this case is not "grossly violative of fact and logic, such that it evidences a perversity of will, a defiance of judgment, or exercise of passion or bias". See *Fletcher, supra* at 879-80 (Brickley, J), 900 (Griffin, J). Accordingly, we affirm the custody provisions of the judgment of divorce.

Finally, plaintiff argues that the trial court abused its discretion by ordering a fifty percent abatement in his weekly child support payments for the period of summertime visitation. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992). Plaintiff argues that this arrangement is

inequitable because he will be responsible for the children's day care and living costs during the summer months, while defendant will not be required to pay for the children's expenses during the summer, but will still receive some support payments.[3] Defendant has physical custody of the children for a major portion of the year. In our judgment, it is unrealistic to assume that the costs associated with physically caring for two children will be avoided entirely each summer when the children go to Massachusetts to stay with plaintiff. The fifty percent parenting time abatement insures that plaintiff will not be forced to pay full child support for periods of time during which the children stay with him, but also that he will still contribute to defendant's ongoing efforts to feed, clothe, and care for the children during the majority of the year. Thus, we affirm the child support provisions of the judgment of divorce.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

[1] We note that the parties stipulated to amend the judgment of divorce in August 1998 to allow defendant to move to Atlanta, Georgia to accept a promotion to management in her job.

[2] We note that defendant's home stability may have been somewhat superior to that of plaintiff, since he planned to move to Massachusetts and did not appear to have clear plans for a permanent home in Massachusetts. However, the trial court considered this evidence in defendant's favor under factor "(d) [t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23; MSA 25.312(3).

[3] We note that, after plaintiff filed this appeal, the parties stipulated to a modification of the judgment of divorce that obligates them to share child care costs equally, without reference to which party has actual physical custody of the children. In addition, the Michigan Child Support Formula Manual (1998), § IV, pp 27-28, states that the parenting time abatement should not be applied to the child care portion of the support order. Thus, we look only to living expenses in connection with the support abatement issue.