STATE OF MICHIGAN

COURT OF APPEALS

JOHN LOUIS KRIEGER,

Plaintiff-Appellant,

v

KAREN MARILYN KRIEGER,

Defendant-Appellee.

UNPUBLISHED
March 26, 1999

No. 210139
Midland Circuit Court
LC No. 96-005471 DM

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from a divorce judgment, challenging the trial court's award of physical custody of the parties' minor children to defendant. We affirm but remand.

I

The parties met in 1980, when defendant was in medical school, which she had begun in 1979. Plaintiff is a graduate of a fine arts school and was initially employed in automotive design and then was self-employed as an artist. The parties married in 1982, and had four children, Carolyn, Katherine, Andrew, and Mary, all of whom were minors at the time of trial in 1997. This was plaintiff's first marriage and defendant's third marriage. Plaintiff worked at home. Defendant took an eight-month maternity leave from medical school when the parties' first child, Carolyn, was born in May 1983, after which plaintiff cared for Carolyn at the family home in Plymouth. The family moved to Ada when defendant graduated from medical school in December 1984, so that defendant could pursue an internship and residency. The parties' second child, Katherine (Katie), was born in August 1985, at which time defendant took a four or five-month maternity leave. Defendant then returned to medicine and plaintiff cared for the two minor children. Defendant finished her internship in May 1986, and began a psychiatric residency the next month. In December 1986, defendant reduced her participation in the residency program to part-time. The parties' third child, Andrew, was born in August 1987, and in December of that year defendant left medicine and began staying at home with the three children.

Apparently the parties' relationship deteriorated when defendant abandoned her hospital residency. Plaintiff continued to work at home and defendant started a daycare business out of the home, which operated from 1988 through 1992 but was unsuccessful. Defendant also bred dogs.

In 1992, the family moved back to Plymouth, and defendant resumed her medical residency for two months, but then dropped out. Defendant left the Plymouth home with the children in November 1992, to go to her mother and stepfather's home. Soon after this incident, plaintiff filed for divorce in Wayne County. Defendant and the children returned to the family home. In connection with the 1992 divorce action, Dr. Walter Ambinder, a psychologist and lawyer, was appointed by the court to perform independent psychological examinations of the parties and children. Dr. Ambinder recommended that the parties have joint physical and legal custody on a week on, week off basis, and noted in his 1993 report that the children had positive feelings for plaintiff and wanted him to participate in their lives, but unanimously expressed wanting to live with defendant. Dr. Ambinder, a rebuttal witness at the instant trial, testified that he noted in 1993 that the children were told what to say and think, that their responses to his inquiries were so similar and that they used language so sophisticated for their age, that he concluded that they had been programmed. The parties later dropped the divorce proceeding and attempted several reconciliations.

In November 1993, the family moved to Midland in order to be closer to defendant's family. The parties' fourth child, Mary, was born in January 1994. Defendant worked outside the home as a nurse, having reactivated her nursing license, and continued breeding dogs and started another daycare business. She allowed her medical license to lapse.

Marital problems continued and plaintiff filed the instant complaint for divorce in May 1996, seeking custody of the children. A temporary order entered in July 1996 provided for joint legal and physical custody. In late 1996, the parties entered into a modified "nesting" arrangement pursuant to which each had exclusive parenting time every other weekend, during which the other would leave the home. The order provided for the appointment of an independent psychologist and for an evaluation by the Friend of the Court.

The independent psychologists, Clawar and Rivlin of the Walden Counseling & Therapy Center in Pennsylvania, issued a report concluding that defendant had alienated the children from plaintiff by brainwashing them, and recommending that plaintiff have sole custody. They concluded that the parties were equal on five of the statutory best interest factors, that plaintiff was favored on six factors, (d), (f), (g), (j), (k), and (l), and that defendant was favored on one factor, (h).

The Friend of the Court evaluator, Alan Zoltowski, testified that plaintiff should be awarded full custody of the children with limited visitation to defendant. He testified that he concluded that defendant consciously alienated and brainwashed the children against plaintiff. Regarding the statutory best interest factors, Zoltowski concluded that the parties were equal on eight factors, that plaintiff was favored on three factors, (f), (g), and (j), and that defendant was favored on one factor, (h).

Trial in the instant case began in April 1997 and, after seven days, was adjourned in order to allow defendant to retain an expert to perform a custody evaluation. Trial resumed in July 1997. Dr.

Richard Gardner testified for the defense that he prepared a report and concluded that defendant was not engaging in parental alienation, that defendant should be awarded custody of the four children, and that the problems between the children and plaintiff were a result of plaintiff's own neglect and abuse, and plaintiff's being schizophrenic, paranoid, delusional and psychotic. Dr. Gardner testified that he concluded that defendant was favored under all of the statutory best interest factors.

The trial court awarded the parties joint legal custody and defendant physical custody. The trial court found that there was an established custodial environment with defendant, but stated that regardless of whether that was or was not the case, its final custody determination would not change. The trial court concluded that the parties were equal on eight of the statutory best interest factors, that defendant was favored on three factors, (a), (b), and (j), and that plaintiff was not favored on any factor. The court determined that factor (l) was not applicable.

II

In reviewing a child custody matter, we must affirm the decision of the trial court unless its factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear legal error regarding a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). This Court should affirm a trial court's factual findings unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 879.

We first note that this acrimonious case presents troubling circumstances, primarily marked deleterious effects on the children.[1] The testimony at the lengthy trial presented a rather clear picture that for a significant period of time preceding the trial, apparently four years, there was ongoing conflict, tension, and altercations between the parties, and between defendant and the children on one side, and plaintiff on the other. There was substantial evidence that defendant had for some time severely alienated the children from their father,[2] and inappropriately involved the children in conflicts that should have been confined to the parties alone.[3] The testimony was clear that at the time the independent evaluations were performed for the instant trial, the three oldest children expressed alarmingly and strictly negative views of plaintiff[4] and plaintiff's family,[5] while noting that defendant had virtually no negative qualities. There was also substantial evidence that the children deliberately, and apparently with defendant's tacit or express approval, sabotaged plaintiff's visitation time by acting up, challenging and disrespecting him, and otherwise causing problems.[6] At the same time, all the experts testified that both parents contributed to the problems. Zoltowski testified, "Mother is to blame for it by alienating these children from their father. Father has allowed it to go on. He's to blame for allowing it to occur the last four years." Zoltowski, Rivlin and Ambinder noted that plaintiff had a history of passivity and acquiescing to defendant that was problematic and had to be improved,[7] while noting that defendant's conduct was conscious and egregious. With all that said, it is nevertheless clear from the record, and undisputed, that the children uniformly expressed a very strong preference to live with defendant.

III

Plaintiff first's argument is that the trial court's finding that an established custodial environment existed with defendant was against the great weight of the evidence.

The existence of an established custodial environment is a question of fact for the trial court to resolve on the basis of statutory criteria. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). The statute provides:

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

The requisite custodial environment will depend on a "custodial relationship of a significant duration in which [a 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). If the court finds an established custodial environment, clear and convincing evidence is required to change custody; if not, a change in custody may be made if supported by a preponderance of the evidence. *Hayes, supra* at 387.

While there is some force to plaintiff's argument that the trial court erred in concluding that there was an established custodial environment with defendant because the children did not **naturally** look to defendant, to the exclusion of plaintiff, for guidance, discipline, the necessities of life and comfort, but only because of defendant's successful campaign to alienate the children from plaintiff, we agree with the trial court that the standard employed did not determine the outcome in the instant case.

Plaintiff next argues that the trial court's findings on four of the best interest factors, (a), (b), (i) and (j) of MCL 722.23; MSA 25.312(3), were against the great weight of the evidence. Although plaintiff correctly observes that both independent experts concluded that the parties were equal on these factors, the evidence did not clearly preponderate against the trial court's findings that defendant was favored under factors (a), (b), and (i). *Fletcher, supra* at 879.

Regarding factor (a), the love, affection and other emotional ties existing between the parties involved and the children, the evidence at trial was clear that defendant's relationship with the children was close, warm, and loving; and, there is no dispute that at the time of trial the emotional ties between plaintiff and the children were extremely strained. Under these circumstances, we cannot conclude that the trial court's finding in defendant's favor was against the great weight of the evidence.

Regarding factor (b), the capacity and disposition of the parties involved to give the children love, affection, and guidance and continuation of the education and raising of the children in their religion

or creed, if any, there was testimony that plaintiff was less warm and verbal than defendant, did not communicate as much with the children as defendant, and was not always readily able to empathize with the children. The evidence was clear that defendant was much more involved in the children's school activities than plaintiff. Although there was evidence that plaintiff was not always informed of the children's school activities, all of the children's teachers called at trial testified that defendant regularly attended the children's functions and involved herself in the school, while they rarely saw or were contacted by plaintiff. Under these circumstances, the trial court's finding in defendant's favor was not against the great weight of the evidence.

Regarding factor (i), the reasonable preference of the child, the record is clear that the children unanimously expressed a preference to live with defendant. The trial court's finding in defendant's favor was not against the great weight of the evidence.

However, the great weight of the evidence favored plaintiff under 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." There was substantial evidence that defendant over a period of several years alienated the children from plaintiff and plaintiff's family, spoke derisively of plaintiff to the children, and condoned or encouraged the children to make plaintiff's visitation time with them difficult and unpleasant. Although Dr. Ambinder testified that in 1993 he believed that each party had spoken negatively about the other to the children, and defendant testified at trial that she wanted the children to have a relationship with their father, this evidence was scant in comparison to the substantial evidence that defendant was not only unwilling or unable, or both, to facilitate and encourage a close and continuing relationship with plaintiff, but actively sought to alienate the children from plaintiff. The trial court's finding that the parties were equal on this factor was against the great weight of the evidence.

Plaintiff also argues that the trial court's determination that defendant's alienation of the children was not relevant to its analysis of factors (a) and (i) was error. Plaintiff contends that the trial court improperly ignored Zoltowski's testimony that factors (a), (i), and (j) are interconnected, and that because defendant did not facilitate a relationship between the children and plaintiff [factor (j)], factors (a) and (i) (the love, affection and other emotional ties existing between the parties involved and the child, and the reasonable preference of the child, respectively), were affected.

Although we agree with plaintiff that a parent's deliberate and successful alienation of a child from the other parent would influence the child's preference regarding custody, and the love, affection and other emotional ties between the other parent and the child, we cannot say, and plaintiff has presented no authority to support that, the trial court was obliged to so conclude, and weigh the factors equally, in this case. While it is clear that defendant had negatively affected the children's feeling for plaintiff, there was also evidence that defendant had a warmer, closer relationship with the children and that the children expressed clear preferences for defendant when Ambinder did his first evaluation. A court could deal with this type of circumstance by opting to give factor (j) greater weight than the other factors, or could consider the circumstances under factor (l), "any other factor considered by the court to be relevant." We find no error in the courts weighing of factors (a), (b) and (i).

Plaintiff further argues that the court gave inadequate weight to the experts' testimony. Bearing in mind that it was for the trial court to determine the weight to be accorded the expert testimony, *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995), we nevertheless agree that the trial court gave inadequate weight to the import of the experts' testimony in declining to order counseling. While we do not substitute our judgment for the trial court's judgment that some of the experts appeared one-sided and lacking in objectivity, even taking this into account the great weight of the evidence established that defendant consciously alienated the children from plaintiff and that the situation was not healthy for the children.

It is against this very troubling backdrop that we conclude the award of custody to defendant should be affirmed. In light of the level of negativity the children exhibited toward plaintiff, and the children's intense emotional attachment to defendant, who by all accounts is an excellent mother other than with respect to her conduct regarding plaintiff, we affirm the trial court's custody award because it is questionable whether an award to plaintiff would have any significant chance of succeeding.[8]

Thus, we do not disturb the trial court's ultimate determination to award physical custody to defendant. However, we find it necessary to remand for the imposition of conditions and controls. The court should require as a condition of custody that the parties (not necessarily together) and children receive ongoing counseling.[9] This condition should be imposed without regard to the parties' ability to agree upon a counselor or counselors, or the terms of the counseling.[10] Further, plaintiff's visitation should be adequate to facilitate the repair of his relationship with the children, consistent with the parties' counseling.

Affirmed, but remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White

[1] Zoltowski testified while discussing factor (d), the length of time the child has lived in a stable, satisfactory environment, that "Both parents are in the home and the children are doing poorly." Dr. Ambinder testified after having read the experts' evaluations and viewed Dr. Gardner's videotapes that the children were doing much worse than they were in 1993, noting that in 1993 the children expressed positive feelings for plaintiff and a desire to see him. Rivlin testified that Andrew was suffering from depression and that Katie was full of rage and anger. See also ns 2, 3 and 5, *infra*.

[2] Rivlin testified that "all the children are imbued with that notion that they can only love one parent without receiving the nonacceptance, the lack of love from their mother as a punitive measure. At trial, a letter from Carolyn to her mother was introduced that supports Rivlin's testimony. The letter stated:

Dear Mom, 10/11 [1996]

The night went okay. I decided to pack Mary's clothes first so that dad couldn't. I put them in the bottom of my backpack, but then dad wanted to 'see' what I'd packed for her, so he swiched [sic] them all for better clothes. **Never to fear, though, as soon as he was out of sight, I repacked the clothes I'd got first.**

We left around 7:15 or so, and went to get gas, pop, and gum. Then dad had to get some dipers [sic] and snaks [sic] from Meijer, and we had a 'blast' exploding our pops in the car. Shake it, screw off the top, and watch it fizz!!! **We figured if you can't trash the house, trash the car!** There is also a good collection of gum, gum wrapers [sic], spit balls, food crumbs, and spilled pop in there.

I think I've figured out why dad likes to go up here instead of staying at home. Here, his Mommy waits on him hand and foot. There is no cleaning, no cooking, no laundry, and you've got 3 adults to help gang up on the kids instead of just 1.

I realy [sic] hate it here. Didn't you hear him say that he would give us some warning if he decided to go somewhere **if we would go without so much fuss**? I distinctly remember making that agreement and having a lot of reasurance [sic] because of it. I guess it just teaches me that I can't trust him.

Well, one day he's going to learn that he can't run away to his parent's [sic] house every time a responsibilty [sic] is throw [sic] on his sholders [sic].

I miss you sooooooooo much, and I'll be soooooo happy when we leave. It's like he's sending us to the torcher [sic] chamber and saying, 'Have a nice time!' It doesn't work. **I'll make a big stink about leaving Sunday night.** Please tell me about this special arangement [sic] for holidays if it's not one of his fantisy [sic] 'court orders' again.

Love ya, Carolyn [with drawing of a mouth and a heart with an arrow through it.] [Emphasis added.]

Another example is the comments Andrew scribbled on a note that plaintiff had left for defendant. Plaintiff's note stated:

7/1/96

Karen

You need to tell me if you are not having dinner at the agreed to time. I have not seen my [word crossed out and not legible] in days and need to know where they are. As I've requested repeatedly in the past

John

On the note Andrew wrote "butt" over the word that had been crossed out and wrote these remarks on the note: "Do you write in pig-latten [sic]?""Were [sic] did you learn english?" "Ya know why ya haven't seen your butt? Cause it's in place of your head!" "Eat your butt [illegible] we all ready [sic] ate! Yumm!"

Rivlin also testified that Andrew told her that he is mean to plaintiff and that, when she asked Andrew whether he felt okay about mistreating his father, Andrew responded that his father deserves it and that his mother means so much to him that his father should let him go.

Rivlin also testified that in one of the sessions in which she saw defendant and the children:

> . . . rather than defend the father, Mrs. Krieger became part of the negative part of the criticisms. She listened, and even though the children were extremely derogatory, rather than say something positive, she entered into the conversation and helped the children expand upon what they were already discussing in terms of the criticisms and the negativity.

[3] Rivlin testified that she noted from interviewing Carolyn that

> She is imbued with marital history. She went back into historical information, stating that her mother had wanted to get back with dad. She also said—stated that her mother hadn't believed that the father would be able to provide adequate care for the children and subsequently that's why she quit her job.
>
> Karen [sic Carolyn] felt that her mother had moved back to Midland, as her mother had stated in her interviews, so that the maternal grandmother could help with the child rearing, rather than the father, because he was deficient in that area.

Rivlin further testified that Carolyn told her she and her mother were very close, that her mother confides in her from time to time and had said to Carolyn: "How could I marry this guy and get myself into this?" Carolyn reported to Rivlin that when she asked her mother "Well, why did you?" her mother responded that the reason was to have children. Rivlin further noted that Carolyn had "a plethora of legal knowledge" of the initial divorce filing.

See also, n 4, infra.

[4] For example, Rivlin testified that Carolyn told her that her mother ran the washer empty after her father washed his clothes. Carolyn told Rivlin that her father "smells funny" and Katie told Rivlin that her father is unclean and that "things can happen when you're unclean." Carolyn also told Rivlin that her mother served her father smaller portions and different food than the children receive, and that it was because the family did not have finances to feed everyone sufficiently, that the children "get better stuff because we're growing children," and that plaintiff was not paying for the food. Plaintiff had reported both of these situations to Rivlin. Rivlin also testified that Carolyn confirmed another complaint of plaintiff's, that when he tries to go in the children's rooms they tell him to get out.

Zoltowski testified that the children told him that they sabotage the parenting time they spend with their father by putting up a "big stink" when they have to go with him, hiding, and, according to Katie, breaking the rules but not getting caught.

[5] Rivlin testified:

> Each of the children have a lot of negatives about the father's side of the family. I was really kind of taken aback because Katie described her grandmother as being very kissy and very sassy, that she gets smothered with kisses when they go there, and I understand some kids just don't like that, but this was an extreme reaction to a grandparent's, you know, demonstration of affection, but this was characterized as something that was bad, something to be criticized.
>
> And, um, she sits in judgment, as an adult would, in terms of dialogue. She said that her grandmother can only discuss the weather and pine needles. She told me that an uncle is a smoker, that he has a sagging face. She said that there was another relative who didn't have a brilliant career. This is unusual, unusual choice of words from a child of her age . . .
>
> And, um, she said that her grandfather was a real jerk. . . .
>
> All the kids state that they would prefer contact with the maternal side of the family.

Rivlin also testified that the children told her that they were disrespectful to their paternal grandparents, that that was okay and that their mother does not care.

[6] See ns 2 and 4, *supra*.

[7] Zoltowski testified at trial, however, that plaintiff had greatly improved his ability to assert himself by the time of trial. Plaintiff had apparently been in parent-training counseling.

[8] This is in accord with Dr. Ambinder's testimony, which differed from Rivlin's and Zoltowski's, that although he believed that the children had been programmed, he also believed that it would be a mistake to take the mother from the children, and that the same result could be accomplished by assuring that plaintiff had more time with the children.

[9] Zoltowski testified that the family needed therapy in order to move on and that defendant's behavior indicated she had psychological problems. Rivlin testified that the children should have therapy, by a therapist who is experienced in custody matters and in parental alienation. Rivlin also recommended therapy for the parties. Dr. Ambinder testified that Zoltowski's observations were congruent with his and that they both felt defendant would benefit from therapy, and that counseling for the children was essential.

[10] The trial court expressed the view that counseling was strongly advised but declined to order that it take place, instead inviting the parties' input.