STATE OF MICHIGAN

COURT OF APPEALS

SHANNON I. SCHUITEBOER,

Plaintiff-Appellee,

v

JOHN J. SCHUITEBOER,

Defendant-Appellant.

UNPUBLISHED
October 3, 2000

No. 224020
Allegan Circuit Court
LC No. 99-024136-DM

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court order awarding sole physical custody of the parties' minor child to plaintiff and awarding defendant parenting time. We affirm.

Defendant first argues that the trial court committed an abuse of discretion by not issuing an opinion on his motion for reconsideration. We disagree.

Plaintiff filed the complaint for divorce on February 11, 1999. On that same date, she filed an ex parte motion regarding custody, child support and parenting time. On February 18, 1999, the circuit court entered an ex parte order granting plaintiff temporary physical custody of the parties' minor child, establishing defendant's child support obligation, and awarding plaintiff exclusive use of the marital home. On March 3, 1999, plaintiff served defendant with the complaint and the ex parte order, and defendant filed objections to that order on March 17, 1999. The court held a hearing regarding defendant's objections on April 16, 1999, but denied defendant's request for relief.

Defendant then filed a motion requesting the court to reconsider its decision regarding defendant's objections to the ex parte order. Our review of the record reveals that defendant filed the motion for reconsideration with the circuit court on July 6, 1999. However, because the parties could not agree on proposed language, the order denying defendant's objections to the ex parte order was not filed with the circuit court until July 8, 1999. Therefore, defendant improperly filed the motion for reconsideration, two days before the order concerned was actually filed. Because defendant's motion was improperly filed, we disagree that the circuit court abused its discretion in failing to rule on that motion.

Defendant next argues that the trial court's factual findings regarding the statutory "best interest" factors were against the great weight of the evidence. We disagree. Custody disputes are to be resolved in the child's best interest, as measured by the factors set forth in MCL 722.23; MSA 25.312(3). *Deel v Deel*, 113 Mich App 556, 559; 317 NW2d 685 (1982). The great weight of the evidence standard applies to all findings of fact, including the trial court's finding as to each custody factor, and those findings should be affirmed unless the evidence clearly preponderates in the other direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

The trial court in a custody suit must consider and explicitly state its findings and conclusions regarding each of the twelve statutory "best interest" factors. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). In the present case, the trial court considered each factor, and determined that awarding plaintiff sole physical custody was in the best interest of the parties' minor child, Cody. The trial court determined that neither party should be accorded a preference on seven of the twelve best interest factors, and determined that four factors favored plaintiff. Defendant contends that the trial court's findings with regard to factors (a), (c), (d), (f) and (j) were against the great weight of the evidence, and argues that the trial court should have awarded him sole physical custody of the minor child, or alternatively should have ordered joint physical custody to both parties. We find defendant's contention to be without merit.

Under factor (a), the court must consider "the love, affection and other emotional ties existing between the parties involved and the child." In the present case, the court found that this factor favored plaintiff because she had been the child's exclusive caregiver for the first six weeks after his birth, and that she had continued to serve as the child's primary caregiver from the time of the parties' separation through the pendency of the divorce.

We believe that the evidence supports the trial court's finding that plaintiff served as the child's exclusive caregiver for the first six weeks after his birth. Plaintiff testified that she stayed home during this time period, and that Cody was her responsibility. Plaintiff testified that she changed Cody's diapers and fed him in the middle of the night, while defendant was "uninvolved" in caring for the child. Given this testimony, it was reasonable for the court to conclude that plaintiff served as the child's exclusive caregiver for the first six weeks after his birth.

The court also noted that plaintiff continued to act as Cody's primary caregiver after she returned to work and throughout the pendency of the divorce action. We believe that this finding was supported by the evidence. Plaintiff testified that, before the parties separated, defendant was responsible for taking Cody to day care on the mornings that plaintiff left early for work. However, plaintiff claimed that defendant often failed to feed Cody and failed to change his diapers, before taking him to day care. In contrast, defendant testified that he cared for Cody when plaintiff left early for work, approximately three to five days a week, and that he changed Cody's diapers, dressed him and fed him, before taking him to day care. Although the parties presented contradictory testimony, due deference should be given to the trial court to judge the credibility of the witnesses who appeared before it. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). Finally, after the parties separated, Cody lived with plaintiff in the marital home and she provided for his day to day care. This evidence supports the trial court's finding that plaintiff was Cody's primary caregiver following her

return to work. Because the court's findings were supported by the evidence, we will not disturb its decision to accord plaintiff a preference under factor (a).

Under factor (c), the court must consider the "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." The court found that this factor favored plaintiff, based on the fact that she had been responsible for setting up Cody's medical appointments and making sure that those appointments were kept. Also, the court found that this factor favored plaintiff because her debt was significantly less than defendant's, and because her credit permitted the parties to finance the marital home. These findings were not against the great weight of the evidence.

First, plaintiff testified that defendant did not assist in taking the child to medical appointments. Rather, plaintiff's father accompanied her when she took the child to the doctor. This testimony supports the circuit court's factual finding that plaintiff was responsible for setting up Cody's medical appointments and making sure that those appointments were kept. Second, plaintiff testified that she borrowed approximately $4,800 from her parents in order to make the down payment on the marital home. She testified that the home was financed in her name alone because of defendant's poor credit history. The Allegan County Friend of the Court (FOC) investigator also testified that defendant owed approximately $15,000 in credit card debt, while plaintiff testified that she owed approximately $2,800 in credit card debt. Thus, the evidence supports the trial court's decision that factor (c) favored plaintiff because of plaintiff's acquisition of the marital home, her responsibility for Cody's medical care, and defendant's extensive credit card debt.

Defendant argues that the trial court should have included the mortgage indebtedness on the marital home in its analysis of this factor. Because plaintiff owed approximately $60,000 on the marital home and because the trial court awarded the home to plaintiff, defendant argues that plaintiff's total indebtedness exceeded $60,000, while his indebtedness only equaled $15,000. Accordingly, defendant argues that the trial court should have found that factor (c) favored him, because he actually owed less money than plaintiff. In its opinion, the trial court specifically referenced the mortgage indebtedness when awarding the home to plaintiff. Accordingly, we are convinced that the trial court was fully aware of this debt when it considered the parties' credit card debt under factor (c). Because credit card debt can serve as an indicator of a party's spending habits and financial responsibility, we do not believe the trial court erred in favoring plaintiff on this factor.

Under factor (d), the trial court must consider "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The court found that this factor favored plaintiff for the following reasons:

> The plaintiff wishes to stay in the marital home and in the Plainwell area. During the pendency of this action defendant has not established independent living arrangements other than with his parents. During the pendency of this action [plaintiff] has maintained the house and kept it for herself and the child, along with employment and insofar as this

> Court is concerned [defendant] abandoned that house. He left it voluntarily with [plaintiff] and the child there.

Defendant argues that he did not abandon the marital home, but was unfairly expelled from the home by plaintiff. While defendant concedes that he lived with his parents after the parties separated, and that plaintiff and Cody continued to live in the marital home during that time, he contends that the trial court's finding that factor (d) favored plaintiff was erroneous. We believe defendant's argument is without merit.

In its opinion from the bench, the trial court made clear that it found plaintiff's testimony more credible than defendant's testimony, particularly with regard to defendant's departure from the marital home. The trial court found that defendant voluntarily abandoned the marital home, based on plaintiff's testimony that he failed to return home one night from the bar, and she locked the doors out of safety concerns. When defendant returned home the following afternoon, he gathered his belongings, stated his intention to seek a divorce, and left the marital home to live with his parents. Defendant conceded that he began living with his parents on that date, and testified that he did not "ask to move back into the home." Because the evidence supports the trial court's finding that defendant voluntarily left the marital home to live with his parents, we will not disturb its decision to favor plaintiff under factor (d).

Under factor (f), the trial court must consider "the moral fitness of the parties involved." The court determined that this factor favored plaintiff, based on a finding that defendant had committed adultery during the marriage. Although plaintiff testified that defendant had extramarital affairs before the parties separated, defendant denied that claim. As noted earlier, due deference should be given to the trial court to "judge the credibility of the witnesses who appeared before it." *Bowers, supra* at 324. Further, two women testified that they engaged in sexual relations with defendant after the parties separated, but before the divorce trial. Defendant argues that adultery, standing alone, is insufficient grounds for a court to deprive a parent of custody. *Williamson v Williamson*, 122 Mich App 667, 673-674; 333 NW2d 6 (1982). However, we believe that the circuit court properly considered moral fitness as but one of many factors bearing on the child's best interest. Therefore, the trial court's decision to accord plaintiff a preference under factor (f) was not against the great weight of the evidence.

Under factor (j), the trial court must consider "the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." The court declined to award either party a preference under this factor. Defendant argues that the court should have accorded him a preference under this factor, based on his testimony that plaintiff denied him parenting time during the divorce proceedings. In contrast, plaintiff testified that she wanted defendant to develop a strong relationship with Cody through the exercise of his visitation rights after the divorce. The court noted that while it was aware of defendant's claims that plaintiff was "interfering with his parenting time . . . the evidence wasn't sufficient for me to make any real conclusions." We find that the trial court's decision with regard to factor (j) was not against the great weight of the evidence.

After considering each of the statutory "best interest" factors, the trial court reasonably concluded that an award of physical custody to plaintiff would be in the child's best interest. Contrary to defendant's contention, the court's findings with regard to factors (a), (c), (d), (f) and (j) were not against the great weight of the evidence. Thus, we affirm the court's custody ruling.

Finally, defendant argues that the trial court's award of parenting time constituted an abuse of discretion. This Court's review of a visitation order is de novo, but the order should be reversed only if "the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed a clear legal error." *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). Because we do not believe that the trial court committed a palpable abuse of discretion in its award of parenting time, we affirm.

On July 16, 1999, the trial court entered a temporary visitation order that provided defendant with four hours of mid-week parenting time during each week, as well as twenty-seven hours and forty-five minutes of parenting time on alternate weekends. At trial, the court adopted the FOC recommendation that plaintiff receive three hours of mid-week parenting time during every other week, as well as thirty-two hours of parenting time on alternate weekends. Therefore, defendant's total parenting time during each two-week period decreased by a sum total of forty-five minutes. Defendant argues strenuously that the change in mid-week parenting time from a weekly to a bi-weekly schedule has prejudiced his rights as a parent, and argues that this decrease in parenting time can only serve to "lessen the bond that can develop between the non-custodial parent [defendant] and the minor child." We believe that defendant's argument is without merit.

In relevant part, MCL 722.27a(1); MSA 25.312(7a)(1) states that "[p]arenting time shall be granted in accordance with the best interests of the child." Furthermore, MCL 722.23; MSA 25.312(3) provides that, "[a]s used in this act, 'best interests of the child' means the sum total of the following factors to be considered, evaluated and determined by the court." The statute then lists the twelve "best interest" factors. Thus, a trial court's award of parenting time must be based on consideration of the statutory "best interest" factors. Based on our review of the record, we believe that the trial court adequately considered the best interests of the minor child, and that it did not commit a palpable abuse of discretion in its award of parenting time.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski