STATE OF MICHIGAN

COURT OF APPEALS

STACY LYNN BEEBE, Plaintiff-Appellee,	UNPUBLISHED November 3, 2000
v	No. 226125 Gladwin Circuit Court Family Division
LLOYD BURKE BEEBE, Defendant-Appellant.	LC No. 99-001153-DM

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant Lloyd Burke Beebe appeals as of right from a judgment of divorce dissolving his marriage with plaintiff Stacy Lynn Beebe. The only issues on appeal concern the trial court's decision to award sole physical custody of the children to Stacy Beebe. We affirm.

I. Basic Facts And Procedural History

A. Overview

Stacy Beebe and Lloyd Beebe married on June 14, 1986; Stacy Beebe filed a complaint for divorce on February 16, 1999. The parties have two minor children, the first born March 30, 1989, and the second born December 17, 1990. The parties were in basic agreement at the beginning of divorce proceedings that they should share physical custody of the children. At that time, Stacy Beebe worked as a secretary with the Clare/Gladwin Regional Education Service District while Lloyd Beebe worked for Robinson Industries. Both parties and the two children continued to reside in the marital home in Gladwin during most of the divorce proceedings.

Much of the testimony at trial focused on the parties' respective parenting skills and abilities as well as different negative aspects of the marriage and family relationship. Stacy Beebe offered testimony about Lloyd Beebe's temperament and characterized him as impatient and forceful with the children. Lloyd Beebe characterized Stacy Beebe as a spendthrift. The testimony established that the parties encountered serious financial problems on at least two occasions during the marriage and Stacy Beebe

testified on cross-examination that how the couple handled their finances was a major problem in the marriage.

B. Expert Testimony

At trial, Stacy Beebe called clinical psychologist Dr. Edward Mike as an expert witness. Dr. Mike testified that he met with Lloyd Beebe on thirteen occasions and he met with both parties for "two or three" joint sessions. From these meetings Dr. Mike concluded that both parties were good parents and they both loved their children. In response to questions about Stacy Beebe, Dr. Mike testified that she was concerned about Lloyd Beebe's relationship with the children because she felt he was impatient and abrupt at times. Dr. Mike testified that Lloyd Beebe was extremely upset that the family was breaking up. However, according to Dr. Mike, when it became apparent that Stacy Beebe was determined to go through with the divorce, they agreed that there was no reason for her to meet with him for further counseling.

Dr. Mike indicated that Lloyd Beebe was concerned with the children's welfare and whether they would be affected by the divorce. According to Dr. Mike, after three sessions with the children, he felt that they were comfortable with their father, not afraid of him. Dr. Mike also testified that Lloyd Beebe spent much more time with the children and that they told him they "never really have anything to do with mom because she likes to read books, and she likes to watch TV, and she never really has any time with us." However, just prior to the date Dr. Mike testified, the children told him that Stacy Beebe was doing many more different things with them than she had previously done. On cross-examination, Dr. Mike testified that his "professional opinion" was that the parties "should share custodial care-giving equally." He also testified that the children were seeing him to help them through the divorce. On recross-examination, Dr. Mike testified that he would award sole custody of the children to Lloyd Beebe if he had to make a choice between him and Stacy Beebe. He also testified that he thought both parties were good parents and that it was in the best interests of the children to spend as much time as possible with both.

C. Custody Decision

The trial court disregarded Dr. Mike's expert testimony when it decided to award custody to Stacy Beebe, saying:

> [T]here is case law to indicated [sic] that it's error for a Court to accept opinions from experts on child custody when they have not seen the children in the presence of both children [sic] – of both parents. For what it's worth. I had that particular issue jammed down my throat in a prior case, so I – I know that that is in fact, generally speaking, good law.

In its subsequent written opinion, the trial court considered the twelve best interest factors that apply in child custody cases, which are articulated in MCL 722.23; MSA 23.312(3).

Under best interest factor (a), "[t]he love, affection and other emotional ties existing between the parties," the trial court found the parties had equal emotional ties with the children.

The trial court found that Stacy Beebe had a "distinct advantage" under best interest factor (b), which concerns "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed if any." The trial reasoned that Stacy Beebe was active in church activities with the children and teaching Sunday School. The trial court further found that Lloyd Beebe had little or no involvement in these religious activities.

The trial court found the parties equal under factor (c), which considers "[t]he capacity and disposition of the parties involved to provide" for the children. The trial court explained that both parties had consistent and adequate employment. According to the trial court, the parties' current financial situation was stable despite earlier problems.

Factor (d) looks at "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity" and the trial court concluded that both parties were equal under this factor. The trial court noted that the marital home and adjacent acreage had been awarded to Lloyd Beebe. The trial court also reasoned that Stacy Beebe had the "wherewithal to obtain a suitable environment for her sons."

Factor (e) examines "the permanence, as a family unit, of the existing proposed custodial home or homes." The trial court found that neither party had an advantage since they had continued to live together in the marital home during the proceedings. The trial court also found that there was no established custodial environment.

Factor (f) asks the trial court to judge the parties' "moral fitness." The trial court concluded that both parties possessed outstanding moral attributes and that neither had an advantage regarding this factor.

Similarly, factor (g) requires the trial court to determine the parties' "mental and physical health." The trial court found that both parties enjoyed "excellent health, both mentally and physically" and no advantage existed for either.

Under factor (h), which refers to "[t]he home, school, and community record of the child," the trial court determined that both parties were "involved in school matters on an equal basis." Further, the trial court stated that "both parents seem intent on making sure that the children have an appropriate education with as little difficulty as possible."

Under factor (i), "[t]he reasonable preference of the child," the trial court found that the children had a preference to spend time with each parent equally. In making this finding, the trial court rejected Dr. Mike's testimony, explaining that

> Dr. Mike provided opinions as to preferences but they were without sufficient credibility for the court to consider for the simple reason that he never took the time or the opportunity to observe plaintiff with her sons. Therefore, the court disregards his testimony as to the preference of the boys concerning child custody.

Factor (j) encompasses "[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." The trial court concluded that the parties were equal under this factor. To reach that conclusion, the trial court characterized Lloyd Beebe's negativity toward Stacy Beebe's parenting skills and her uncooperative conduct during the whole divorce proceedings as "mud throwing" between the parties.

Domestic violence was not an issue in this case so the trial court did not make any specific findings under factor (k).

Finally, under factor (l), which permits the trial court to ponder "[a]ny other factor considered by the court to be relevant to a particular child custody dispute," the trial court found that Stacy Beebe had a "distinct advantage." In particular, the trial court concluded that Lloyd Beebe was "overly impatient with his eight and ten year old sons" and that he showed a "lack of consistency equal to that of plaintiff."

Although the trial court found the question of custody to be "an extremely close call," the court ultimately concluded that it would be in the best interests of the children to award physical custody to Stacy Beebe while granting Lloyd Beebe "quality parenting frequently."

On appeal, Lloyd Beebe challenges the trial court's decision to disregard Dr. Mike's testimony as well as it specific findings concerning best interest factors (b), (c), (d), (h), (i), (j), and (l).

II. Standard Of Review

We review all the trial court's findings to determine whether those findings are against the great weight of the evidence, affirming unless the evidence clearly preponderates in a contrary direction.[1]

III. Dr. Mike's Testimony

As the excerpt from the trial court's decision, above, indicates, the primary factor that the trial court considered when it rejected Dr. Mike's testimony was the credibility of his reluctant recommendation of Lloyd Beebe over Stacy Beebe as the custodial parent. In general, trial courts are given wide latitude to determine whether a witness is credible based on the personal ability to observe witnesses as they testify.[2] Trial courts handling domestic relations matters are not excepted from this rule.[3]

The trial court explained that Dr. Mike lacked sufficient opportunities to observe the children with their mother in order to conclude that Lloyd Beebe would be the better parent to provide physical

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[1] MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994) (*Fletcher I*).

[2] See MCR 2.613(C).

[3] See *Williams v Williams*, 214 Mich App 391, 401-402; 542 NW2d 892 (1995).

custody. Spending time with the children and their father likely gave Dr. Mike ample reasons to conclude that Lloyd Beebe was a good parent. However, the trial court asked Dr. Mike to make a relative determination: which parent would be better than the other when it came to physical custody. To make this decision, the trial court logically concluded, Dr. Mike had to have an adequate opportunity to observe and meet with Stacy Beebe. As a matter of undisputed fact, Dr. Mike met with Stacy Beebe only a fraction of the number of times he met with Lloyd Beebe. Furthermore, Dr. Mike only met with the children without the parties' presence on three occasions. While it may be debatable whether Dr. Mike could accurately judge the children's preferences from these three meetings, there certainly is not enough evidence on the record to contradict the trial court's conclusion that Dr. Mike was not sufficiently convincing to dictate a different custody outcome, much less evidence that this was against the great weight of the evidence.

IV. The Best Interest Factors

As noted above, under factor (b), the trial court reasoned that Stacy Beebe had a "distinct advantage" when it came to helping the children learn and grow in their religion because she was involved in church activities with the children and taught Sunday school while Lloyd Beebe had little or no involvement in the children's religious activities. The record supported this finding. Both Stacy Beebe and her friend described her religious activities, while Lloyd Beebe testified that he did not go to church with the children regularly. Rather, he and his mother took the children to church when Stacy Beebe did not do so.

Lloyd Beebe, in his argument concerning factor (c), contends that he and Stacy Beebe are not equal when it comes to their capacity to provide for their children because she has a history of managing money poorly. Lloyd Beebe first cites *Barringer v Barringer*[4] for the proposition that a trial court can look at a party's higher earning capacity and analyze this particular factor in making a custody decision. The trial court supported its conclusion that the parties were equal under this factor by pointing out that both parties are now employed, earning roughly the same amount of money, and each have relatively stable finances. This case is thus distinguishable from *Barringer*, *supra*, in which only one spouse worked outside the home and the capacity to earn money was a minor but relevant consideration.

Lloyd Beebe also cites *Fletcher v Fletcher*,[5] known as *Fletcher II*, in which this Court found that one party's poor financial judgment affected the children and favored the other party. While Lloyd Beebe may be correct about Stacy Beebe's financial problems in the past, he failed to provide evidence that this problem is ongoing and poses any current threat, no matter how minimal, to the children's well-being. The facts in *Fletcher II* were quite different in that the mother's financial decision continued to affect the children during the divorce proceedings and revealed her disposition to provide for her children's needs in the future. Given the trial court's clear explanation for its findings, which was well-grounded in the record, we cannot conclude that the finding that factor (c) equally favored both parties was against the great weight of the evidence.

[4] *Barringer v Barringer*, 191 Mich App 639; 479 NW2d 3 (1991).

[5] *Fletcher v Fletcher*, 229 Mich App 19, 26; 581 NW2d 11 (1998) (*Fletcher II*).

Lloyd Beebe contends that the trial court erred when it found that factor (d) favored the parties equally because the children had lived in the marital home and enjoyed the adjacent property their entire lives and the trial court had awarded him both the home and that property. Lloyd Beebe claims that *Barringer, supra,* supports his argument that this factor should tip in favor of the party who retains the marital home, at least in some cases, because it indicates stability. However, the analysis in *Barringer* focused on the defendant's willingness, if he were awarded custody, to reside with the children in the marital home and encourage a free and open relationship between the children and the other parent.[6] The *Barringer* Court did not conclude the trial court must consider who retained the marital home under this factor. Further, the trial court did not ignore that Lloyd Beebe was retaining the marital home and adjacent property. Rather, the trial court concluded that retaining these assets did not outweigh Stacy Beebe's capacity to provide continuity and stability for the children in another suitable residence. In particular, the trial court acknowledged that Lloyd Beebe was awarded the home and adjacent property because the parties had agreed to divide the marital estate in that way. Thus, it makes sense that the trial court would not use Stacy Beebe's willingness to facilitate the division of the marital estate as a factor that weighed against her in awarding custody. We see no error here.

Challenging the trial court's finding that factor (h), which assesses the children's home, school, and community records, Lloyd Beebe argues that this factor did not favor the parties equally, but favored him because he was the only parent who took action to maintain scholastic standards for both children. However, the evidence introduced at trial supported the trial court's conclusion that both parents were involved with the children's education. Even if their involvement took different forms, with Lloyd Beebe attending parent teacher conferences and Stacy Beebe supervising the children's homework, there is no evidence that one parent had substantially more positive involvement in this area of the children's lives than the other parent.

This case is also distinguishable from Lloyd Beebe's authority, *McCain v McCain*.[7] In *McCain*, the mother favored educating the child at home even though she knew the father opposed taking the child out of her school, where she was doing well.[8] Further, the mother had made an unexplained decision to prevent the child from reading a book at school, which may have interfered with her educational progress.[9] Contrary to the facts in *McCain*, there is no evidence here that Stacy Beebe made decisions about her children's education that were designed to create conflict with Lloyd Beebe, involved a dramatic change in the form of schooling, or prevented the children from progressing in their current school.

Further, the trial court attributed the slight disturbances one of the parties' children was experiencing at school to the divorce proceedings themselves. The trial testimony also indicates that both parties are concerned about educating their children. We have no reason to disagree with the trial

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[6] See *Barringer, supra* at 642.

[7] *McCain v McCain*, 229 Mich App 123; 580 NW2d 485 (1998).

[8] *Id*. at 127-128.

[9] *Id*. at 128.

court's conclusion that these problems will abate naturally once the litigation surrounding the divorce ceases. The trial court did not erroneously conclude that this factor favored both parents equally.

In applying factor (i), the children's preferences for custody, the trial court chose not to interview the children. Rather, the trial court considered the testimony of all the other witnesses at trial, which suggested that the older child enjoys playing sports with Lloyd Beebe but that both children needed their mother's "nurturing and guidance." *Bowers v Bowers*[10] presented a roughly similar situation in which the trial court failed to interview the parties' two children, who were ages six and nine. The *Bowers* Court found that the trial court's failure to interview the children was error requiring reversal because the children were old enough to have a preference and each parent had established a custodial environment with one of the children due to a lengthy separation before and during the divorce proceedings.[11] The parties to this case, however, did not each take one child for the duration of the divorce proceedings, leading to the conclusion that each child would have a strong preference regarding with which parent to live. Rather the parties shared custody in a generally equal manner.

We note that the statutory language for this factor does not refer to interviewing the child to determine his or her custody preference.[12] Case law also holds that failing to interview children is not a per se error requiring reversal as long as the trial court considers other evidence of the children's preferences.[13] While we believe that the trial court would have been well-advised to interview the children in this case to determine their preferences to custody, we cannot say that the trial court's finding that the children equally preferred each of their parents was against the great weight of the evidence. There was extensive testimony at trial in this case concerning the children's strong relationships with both of their parents from which the trial court appropriately concluded that "[t]he preferences of these children as to custody is equal."

Lloyd Beebe also claims that the trial court erroneously concluded that he and Stacy Beebe were equally favored, or disfavored as the case may be, under factor (j). This factor considers whether each party is willing and able to facilitate a relationship between their children and the other parent. To explain its finding, the trial court referred to Lloyd Beebe's negative attitude toward Stacy Beebe's parenting skills and his "nebulous" testimony concerning her willingness to allow him time with the children. The court also cited Stacy Beebe's negative attitude toward Lloyd Beebe's parenting skills, which focused on the way he expressed anger. The trial court's remark that this was "mud throwing" suggested that the trial court had observed similar conduct between parties in other divorces and thought that the parties to this case did not exhibit any unusual or concerning tendencies to impede the children's relationship with the other parent. Having heard each party's testimony first-hand, the trial court was entitled to reject the suggestion that Stacy Beebe was less willing and able to encourage a beneficial relationship between the children and their father based on the trial court's appreciation of

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[10] *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991).

[11] *Id*.

[12] See MCL 722.3(i); MSA 25.312(3)(i).

[13] See *Truetle v Truetle*, 197 Mich App 690, 694-696; 495 NW2d 836 (1993).

whether either party made credible allegations against the other.[14] Quite clearly, having mentioned that Lloyd Beebe gave only "nebulous" testimony concerning Stacy Beebe's willingness to facilitate the children's relationship with him, credibility did factor into the trial court's finding. We conclude that the finding was not against the great weight of the evidence.[15]

The last finding Lloyd Beebe challenges is the finding under factor (l), the catch-all provision that permits the trial court to consider other relevant circumstances not accounted for in the other factors. The trial court found that Stacy Beebe had a "distinct advantage" under factor (l) because she has a more even temperament when dealing with her children while Lloyd Beebe is prone to raise his voice and get angry. The trial court was careful to point out that it did not think that Lloyd Beebe was abusive and it was likely that Stacy Beebe also raised her voice on occasion. However, the trial court concluded that Lloyd Beebe was "overly impatient with his eight and ten year old sons" and that he showed a "lack of consistency equal to that of plaintiff." Lloyd Beebe actually sought counseling for this problem, providing some objective verification for Stacy Beebe's allegations. While this may be a very fine point to make when considering the best interest of the children, it is nonetheless an appropriate consideration because it is directly related to the manner in which the children would be treated if the trial court had awarded physical custody to Lloyd Beebe. Given the way the trial court narrowly tailored its framing of this observation, carefully avoiding generalities about Lloyd Beebe's potential to be a good father, we cannot conclude that the finding was against the great weight of the evidence.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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[14] See *Fletcher I*, *supra* at 890.

[15] See *Harper v Harper*, 199 Mich App 409, 414; 502 NW2d 731 (1993); see also MCR 2.613(C).