# STATE OF MICHIGAN

# COURT OF APPEALS

ROBERT L. BREWER,

Plaintiff-Appellant,

v

RUTHANN D. BREWER,

Defendant-Appellee.

UNPUBLISHED
August 21, 2001

No. 221521
Wayne Circuit Court
Family Division
LC No. 98-820472-DM

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] from the circuit court's order awarding defendant sole physical and legal custody of the parties' two minor children in the judgment of divorce. We affirm.

## I. Basic Facts And Procedural History

To say that the parties' relationship was, and to some extent still is, turbulent is an understatement. If defendant is to be believed, plaintiff physically and verbally abused her on several occasions, threatened her with a knife once, made harassing calls to her, and even forced her to have sex with him before their marriage ended. If plaintiff is to be believed, defendant was unfaithful and, though he did not abuse her, their relationship was so confrontational and stressful that he once pointed a knife at himself to illustrate that he thought she was killing the marriage.

The breaking point for the parties came in June 1998. On June 25, defendant drove the children to plaintiff's parents' home in Indiana, where the children planned to stay while the parties went to Las Vegas for a second honeymoon. According to defendant, she knew that her marriage was in trouble by this time, but she thought the vacation would help them. When

[1] Plaintiff filed a claim of appeal, but the July 27, 1999, judgment of divorce did not resolve all issues before the court, and thus was not a final order appealable as of right. MCR 7.204. This Court treated the claim of appeal as an application for leave to appeal, and granted the application.

defendant returned to Michigan, plaintiff came out of the house and told her that she was no longer welcome there. He had changed the locks and he wanted her to leave the property. Defendant nevertheless entered the house, at which time, she said, plaintiff became "very aggravated with me, very agitated with me that I had walked into the house." When she entered the house, defendant noticed that many of her possessions had been removed and placed in garbage bags on the garage floor.

Defendant then went to a friend's home. When defendant and her friend returned at approximately 12:30 a.m., they discovered that plaintiff's parents' car was in the driveway, and that there were lights on in the children's bedroom. Defendant contacted the police to ask what to do about the locks that had been changed and the fact that plaintiff was keeping her from her children. The police met defendant at the house shortly after 1:00 a.m. Plaintiff did not answer defendant's knock at the door until he saw the police. Defendant said that plaintiff and his brother attempted to prevent her from going to her children, which prompted the police to instruct the two men to step aside numerous times. According to defendant, her younger child was not asleep because of the commotion and, when she asked her child "if she wanted to come with me . . . she said yes." Plaintiff became upset when defendant took her daughter into her arms. Defendant also asked the older daughter if she wished to come with her, but the child said no.

Evidently, during this incident, plaintiff told his youngest child that he had locked defendant out of the house because she took her "clothes off and g[o]t in bed with another man." Defendant admitted that she had come to know a man named Rick Shotwell. Shotwell had sold her a car and, eventually, became her friend, but according to defendant they did not have an intimate relationship.[2] Plaintiff, however, believed that defendant was having an affair with Shotwell. Ostensibly to monitor unauthorized uses of the parties' telephone lines, plaintiff purchased and set up a recording device on the parties' home telephone. While defendant was on her way to Indiana with the children, he listened to a recording that he had made with the device. In the conversation, he heard defendant talking with Shotwell. According to plaintiff, this call left him "devastated" because he interpreted their conversation to mean that they were having an affair.

Plaintiff then packed defendant's belongings, telephoned his brother, and arranged with his father and brother to have the children returned home. Though defendant had purportedly indicated that she would be home early in the evening, she did not arrive at home until nearly 11:00 p.m. Because of the telephone recording, plaintiff believed that defendant had been with Shotwell during this time. Plaintiff confronted defendant with his suspicion that she was having an affair, and asked her to leave. Because he was nervous that Shotwell had keys to the house, he changed the locks. Plaintiff confirmed that the police appeared on the scene and that they supervised while defendant took her younger daughter from the house. According to plaintiff, his older daughter started crying because one of the officers had physically grabbed plaintiff.

---

[2] Shotwell confirmed that he did not have a physically intimate relationship with defendant before she separated from plaintiff.

While the divorce action was pending, the family court granted joint legal custody to both parents and physical custody to defendant. Plaintiff received significant, structured visitation. The family court also ordered the parties and the children to participate in family therapy.

During this period, the parties arranged to drop off and pick up their children at a police station because of their ongoing conflict with each other. This strain affected the children. Though plaintiff agreed that the children should remain together, the parties' oldest daughter had changed from a loving and warm child to "kind of cold and distant since this has started." Plaintiff also continued to record calls at his home, including calls between defendant and the children. Plaintiff said that the children knew they were being taped, but out of respect for their privacy, he turned off the recording machine when they spoke with defendant. Still, there had been "a couple of occasions" when he heard taped conversations of the children talking with defendant, who apparently was unaware that he was recording the calls.

Defendant said that, despite their separate living arrangements following the night of June 25, plaintiff continued to harass her. Shotwell said that, while he was at a bar with defendant on June 29, 1998, at approximately 11:30 p.m., plaintiff appeared with the parties' older daughter in tow. Plaintiff took a photograph of Shotwell and defendant. According to Shotwell, plaintiff "was yelling at the top of his lungs at 11:30 at night about her being in a bar and having a drink with me" and, during this incident, the child seemed "scared and agitated." Once, plaintiff also allegedly confronted defendant and the children at a post office, demanding to know about Shotwell's visit to defendant's home over the weekend. He reportedly "told the children that if Mr. Shotwell would ever come near them again to call the police, dial 9-1-1 and tell them that he had sexually molested them." According to defendant, on this occasion plaintiff struggled with the children and called defendant obscene names even though the children had met Shotwell only briefly at the car dealership where he worked and over the weekend at the barbecue. On another occasion, plaintiff called the police to report that defendant had left the children alone at her home because, when he knocked on the door, the babysitter declined to answer it for him. During the course of this litigation, defendant obtained two personal protection orders against plaintiff.

At the trial, the parties attempted to cast doubt on each other's parenting skills while emphasizing their own role as a good parent. For instance, plaintiff alleged that defendant had caused their older child to develop asthma by smoking around the child, but conceded he had not taken his daughter to a doctor to confirm his suspicion. In contrast to defendant, he claimed, he had taught the children how to walk, how to bathe and groom themselves. He also provided the children with "[r]eligious activity from the time which they were able to start to understand." Plaintiff added that he took the children to church every weekend that he had them. He described himself as the parent who primarily helped the children with their homework and prepared their meals.

In terms of discipline, plaintiff stated that he preferred to give the child an opportunity to confess having done a wrong and propose a response. He had spanked each child only three or four times, adding that a "spank" was a "pat on the butt" that "is not hard." In contrast, plaintiff said that defendant also spanked the children, describing the practice as "more of a swing, . . .

usually hit[ting] them on their arms or back side or on their legs." Plaintiff protested this discipline and "would have her stop" when he observed defendant do this.

Plaintiff also became aware that the children had been "hit" when he picked them up in October[3] and found one of the girls in tears. Plaintiff learned that one child had been hit on the face and on the legs, which prompted him to seek custody. Plaintiff had also observed various bruises on the children, on their legs and elbows, and had learned that a babysitter had inflicted these injuries. Plaintiff discussed the matter with defendant, asking that the babysitter not be allowed to discipline the children specifically, and that the children not be subject to corporal punishment generally.

Asked if he had continued to be involved in the children's T-ball and softball activities, plaintiff replied that he had not because defendant "told the children that they were not going to participate on my teams any longer because she wasn't going to allow them to see their father." Defendant, who had been a coach for the children in the past, confirmed that "because of the situation" she did not allow the children to play softball where plaintiff would be the coach. She emphasized that she did not wish to have contact with plaintiff, explaining, "every time I'm around him he creates a scene . . . or does something detrimental and I don't want to put my children [through] any further of that . . . ."

Professionals at the children's school were aware of the problems at home. The older child reported to Nicole Munoz, a counselor, that defendant had hit her younger sister. Munoz examined the child and observed a faint, thumbnail-sized mark on the child's leg that was not really a bruise, but "kind of a red area." Accordingly, Munoz reported the incident to protective services.[4] The older child also reported to Munoz that she had overheard conversations suggesting that defendant was having an affair. Further, the older child said that plaintiff had taken her where this man, evidently Shotwell, worked, and that they had a verbal confrontation. Cheryl Nowicki, one of the younger daughter's school teachers, downplayed the child's need for help with her reading though plaintiff had emphasized his efforts to help his daughter in this area. Nowicki said the child "had practiced her vocabulary and seemed to do better with her vocabulary" when with plaintiff, but her impression was that plaintiff was engaging in excessive displays of involvement in his children's schooling for the sake of strengthening his custody case.

The family court also heard extensive expert testimony. Suffice it to say, the experts observed that the parties essentially were locked in battle over the children. Both parties' experts observed the stress the children were experiencing, though they disagreed whether the children were attached more to one parent than the other and if any such attachment was natural or due to parental pressure. Although it was an extremely close call, the expert the family court appointed to make a recommendation on custody suggested that plaintiff should have physical custody.

---

[3] Apparently, October 1998.

[4] Evidently, protective services was not able to substantiate that any abuse occurred.

In its findings of fact, the family court concluded that the events leading up to the parties' separation destroyed any established custodial environment for the children. Considering the individual best interests factors, the family court awarded sole physical and legal custody to defendant on the basis of the preponderance of this evidence. On appeal, plaintiff contests the family court's determination that, at the time of the divorce, the children did not have an established custodial environment with him, as well as the family court's findings concerning several of these best interest factors, in order to argue that the family court erred in awarding physical and legal custody of the children to defendant.[5]

## II. Standard Of Review

In custody cases, "[f]indings of fact are to be reviewed under the 'great weight' standard, discretionary rulings are to be reviewed for 'abuse of discretion,' and questions of law for 'clear legal error.'"[6] "[I]f the trial court's view of the evidence is plausible, the reviewing court may not reverse."[7]

## III. Custodial Environment

The parties dispute whether an established custodial environment existed because resolution of this issue affects the standard of proof necessary to support the family court's decision to award defendant physical custody. If an established custodial environment exists, a family court may not change custody unless there is clear and convincing evidence that a change is in the children's best interests.[8] However, if there is no established custodial environment, a family court may award custody on the basis of a "mere preponderance of the evidence," which is the standard the family court applied in this case.[9]

The Legislature has defined the factors that are relevant to determining whether an established custodial environment exists:

> 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.[10]

---

[5] This Court granted defendant's motion to strike the other issues plaintiff raised in his brief on appeal. *Brewer v Brewer*, unpublished order of the Court of Appeals, entered August 28, 2000 (Docket No. 221512).

[6] *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994), quoting MCL 722.28.

[7] *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

[8] See *Ireland v Smith*, 451 Mich 457, 461, n 3; 547 NW2d 686 (1996), quoting MCL 722.27(c).

[9] *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981).

[10] MCL 722.27(1)(c).

The Michigan Supreme Court has interpreted this statutory language, noting:

> Such an environment depend[s] . . . upon a custodial relationship of a significant duration in which [the child is] 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.[11]

Plaintiff now claims that the family court erred in concluding that the custodial environment that both parties had established with the children through the course of their marriage had been destroyed simply because plaintiff filed for divorce. However, we conclude that irrespective of plaintiff's decision to file for divorce, the children's lives were upset in such a complete way in the two or so years leading up to the divorce judgment that they lacked the sort of "security, stability and permanence" that are the hallmarks of an established custodial environment.[12]

On June 25, 1998, the children were exposed to the conflict between their parents late at night under disturbing circumstances, not the least of which was being asked to decide with which parent they wished to stay while the police attempted to control the situation. For months after the separation, the children were eyewitnesses to their parents' combative and highly inappropriate behavior. Plaintiff took the children with him while he confronted and then surveilled defendant. He also, in what appears to be an unsettling incident, gave his older daughter his wedding band to keep safe for him and asked her to convey a message to defendant about this. Defendant threatened to take the children out of state and barred plaintiff from becoming involved in their after school activities. As Nowicki and one of the psychological experts observed, each parent attempted to use the children to support their own cause in the custody dispute at the expense of the children's relationship with the other parent. The other adults who met with these children all noted the emotional toll these children experienced as a result of these circumstances and their parents' actions, even if the parents were not aware of the effect that they were having on their daughters. Despite this ample evidence, plaintiff does not provide any evidence to contradict the logical conclusion that these events caused the custodial environment that existed before the parties' separation to cease. Consequently, we have no cause to disagree with the family court's determination that there was no established custodial environment.

Plaintiff alternatively argues that even if the family court correctly found that the original custodial environment with both parties had been destroyed, the court then erred in not finding that in the months thereafter the children established a custodial environment with him. Plaintiff relies heavily on his psychological expert, who testified that the children looked primarily to plaintiff as their caregiver. However, the family court discounted this witness' credibility, as was

---

[11] *Baker*, *supra* at 579-580.

[12] *Id*. at 580.

its right.[13] Even if the family court had not discounted this testimony, there was ample competing evidence on the issue of the relationship between each party and their children as it related to the custodial environment. For instance, the expert the court appointed to make a custody recommendation also concluded that each party interacted well with each child. This expert and numerous other witnesses believed that the children were torn between their loyalties to both parents, arguably because of the way each party used the children against the other.

Though the evidence suggests that plaintiff was especially close to the older child, this bond existed because he used the child as a confidant, causing the child to develop an excessive concern for his well being at the expense of her relationship with defendant. Parents and children are not typically presumed emotional equals. Rather, it is the parent's job to care for the child's emotional needs, which neither party did with any particular amount of success in the time leading to the divorce. Moreover, the way the older child tended to care for her younger sister, speaking for her and seeking out Munoz when she believed that her younger sister had been hurt, suggests that the older child had, in some respects, more of a parental relationship with the little girl than either party. Taking this evidence as a whole, the family court properly recognized that no established custodial environment existed and that the preponderance standard therefore applies to the best interests factors.

## IV. Best Interest Factors

### A. Legal Standards

MCL 722.23 sets forth twelve factors that the family court had to consider[14] when making the custody decision in this case:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The 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.
>
> (c) 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 the state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

---

[13] See *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

[14] See MCL 722.25(1) ("If a child custody dispute is between the parents, . . . the best interests of the child control.").

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) 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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.[15]

"The trial court must consider each of these factors and explicitly state its findings and conclusions regarding each."[16] However, "[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts."[17] In custody cases, a family court is not obliged to "'comment on every matter in evidence or declare acceptance or rejection of every proposition argued.'"[18]

The family court in this case found that factors (b), (f), (g), (j), and (k) favored defendant, that factors (h) and (i) favored plaintiff, and that parties were equal concerning factors (a), (c), (d), (e). With respect to factor (l), the court expressed concern about the "use of psychologists or the war of the experts," but did not appear to favor either party. Plaintiff takes issue with the family court's findings concerning factors (a), (b), (c), (d), (f), (g), and (j). We address each in turn, noting at the outset that the family court's ability to assess witness credibility in the face of competing evidence and expert testimony strongly favors affirming under this great weight of the evidence standard.[19]

---

[15] MCL 722.23.

[16] *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993).

[17] MCR 2.517(A)(2).

[18] *Fletcher*, *supra* at 883, quoting *Baker*, *supra* at 583.

[19] See *Zeeland Farm Services*, *supra* at 195.

B. Emotional Ties: Factor (a)

Plaintiff contends that the family court should have found that factor (a) favored him because the court-appointed expert concluded that defendant's interaction with the children was "a little bit problematic." We disagree. The expert also stated that this concern "wasn't of extreme significance," and explained that the interaction between each parent and both children was good. Thus, although the expert stated that the children experienced plaintiff "as the parent who is more nurturing and more caring and more loving," and added that the children were very close to, and bonded with, plaintiff, these indications suggest, at best, only a slight advantage to plaintiff in this regard.

Of greater concern are the disturbing suggestions from defendant's expert. Plaintiff emphasizes that defendant's expert described a very close relationship between plaintiff and the children, particularly his older daughter. However, defendant's expert also concluded that plaintiff had pressured his older daughter to side with him against defendant, and suggested that plaintiff's habit of confiding in the child about marital matters had injured her relationship with defendant. The witness characterized the older daughter's relationship to plaintiff as that of "caretaker and confidant." Thus, while there is a strong emotional tie between plaintiff and his older daughter, it is not necessarily the sort of relationship that MCL 722.23(a) seeks to credit and preserve in custody decisions. As a whole, plaintiff has failed to show that the evidence militates so heavily in his favor for this factor that the family court's finding that the parties are equal in this regard went against the great weight of the evidence.

C. Love, Affection, And Guidance: Factor (b)

The family court stated that both parents had the capacity to provide educational and religious guidance, but concluded that the evidence nevertheless favored defendant under factor (b). Plaintiff suggests that there is something internally illogical about this finding, as if children can look only to one parent for love, affection, guidance generally, and educational and religious guidance specifically. Yet, nothing in factor (b) required the family court to conclude that only one parent had these valuable parenting qualities. Rather, the pertinent inquiry is whether one party, according to a preponderance of the evidence, has the *better* capacity to provide this sort of support overall.

The evidence does not overwhelmingly favor one parent over the other on this factor. Though plaintiff emphasizes that defendant had subjected the children to inappropriate corporal punishment, including striking them in anger, the family court gave credit to expert testimony that this tendency was not constant, severe, nor continuing. The family court thus had an evidentiary basis for weighing this consideration only slightly, not heavily, against defendant.[20]

[20] Although the record does suggest that defendant had exercised some poor judgment in disciplining the children, the record does not support plaintiff's characterization of what took place as physical abuse.

The family court's expert also reported that defendant resorted to "some sarcasm" when dealing with the children, and that when the younger daughter expressed confusion when defendant attempted to help her with a puzzle, defendant "insisted that she wasn't being confusing." However, the expert preceded his expressions of concern with the disclaimer, "it wasn't of extreme significance." These imperfections are insufficiently weighty to throw the family court's findings into doubt.

Plaintiff emphasizes that the family court recognized that defendant relied more heavily on babysitters than did plaintiff to illustrate that the court erred in failing to take the need for daycare into account for this factor. However, we can envision only a very indirect link between the need to rely on babysitters and a parent's "capacity and disposition"[21] to provide love, affection, and guidance for her children. Further, there is no evidence that defendant has wholly abdicated her influence over these area of her children's lives to babysitters, or that she has stopped loving or showing affection to the children because she needs help caring for the children while she works. In fact, the record suggests that defendant has attempted to arrange her work schedule to maximize her time with the children, arranging for them to be with their father on the weekends when she has work when possible. She has also given up a job with benefits so that she can have a more flexible schedule. Plaintiff's work schedule simply fits more easily with a regular school day, making it less necessary for him to arrange for babysitters or other caretakers if he had custody of the children. As a whole, when considering the need for babysitters, this factor would weigh in plaintiff's favor slightly, if at all.

Plaintiff also argues that the family court failed to account for defendant's plan to move to Arizona, including defendant's lack of knowledge of details concerning class schedules, and other details of school district organization. However, the family court denied without prejudice defendant's request for a change of domicile, allowing defendant to raise the issue again at a future date. Without any definite, current plans to move to Arizona, the fact that defendant has yet to investigate schools there is not a significant failure. We have no reason to assume that, if defendant does move to Arizona with the children, she will be unable to find appropriate schools for them.[22]

More importantly, though plaintiff appears to be benefiting from counseling, the evidence supports the trial court's conclusion that plaintiff has had problems putting the children's emotional and psychological needs above his own. Plaintiff demonstrated this difficulty by, among other things, repeatedly exposing the children to overtly hostile confrontations with defendant and Shotwell, and bringing the children with him when he filed police reports against defendant and while he was tracking Shotwell. Plaintiff also repeatedly interrogated the children about defendant's activities and tried to use the school environment to further his efforts to discredit defendant with the children and others. Thus, while we do not doubt that plaintiff loves his children and shows affection for them, and that they love him in return, we must also acknowledge that the record reflects that he sometimes lacks the restraint necessary to show that

[21] MCL 722.23(c).

[22] See *Adams v Adams*, 100 Mich App 1, 14; 298 NW2d 871 (1980).

love and affection in a way that benefits the children rather than exposing them to situations that can harm them emotionally.

Plaintiff complains that the family court put too much emphasis on his poor behavior in the first three months after filing for divorce. However, plaintiff cites no authority for the proposition that a court must consider a party's conduct in the months immediately following marital breakdown separately from other behavior. We observe that a party's behavior in an emotionally stressful situation can be a valuable indicator of that party's capacity to meet parenting challenges. In this case, plaintiff does not attack any of the family court's specific factual findings, thus waiving any challenge to them on appeal.[23] For these reasons, we affirm the trial court's conclusion that defendant gets the advantage on factor (b).

D. Material Necessities: Factor (c)

Plaintiff contends that he is in a better position to provide for the children's material needs and, therefore, the family court erred in concluding that he and defendant were equal under this factor. In making this argument, he stresses that defendant admitted that she had been terminated from her employment on three occasions in the past. However, he fails to identify any evidence demonstrating that defendant's present job as a hospital nurse is anything but secure. Nor has he provided any authority holding that a family court must presume, on the basis of past job insecurity, that a parent will again be fired, jeopardizing that parent's abilities to provide for the children's material needs.

Plaintiff also relies on the possibility that defendant may move to Arizona, but has not sought employment there, to suggest that her financial future and, therefore, the children's material needs, will be jeopardized. However, again, defendant and the children could move to Arizona only with the family court's permission at some future date, at which time defendant's job prospects in the new location would become relevant. They are not relevant now. Accordingly, plaintiff has not shown that the family court erred in not finding him more likely to be able to provide the children with material necessities than defendant. There is no reason to conclude that the family court erred in finding the parties equal on factor (c).

E. Home Environment: Factor (d)

Plaintiff takes issue with the fact that the family court stated that defendant did not provide a stable and satisfactory environment for the children, yet concluded that factor (d) favored defendant as much as it favored plaintiff. He contends that this was logically inconsistent. We disagree. The family court plainly found plaintiff's home environment deficient as well. This was not a case of the family court overlooking defendant's shortcomings to find her home a superior place to raise children and ignoring the environment plaintiff had to offer to conclude that he would not be able to offer an adequate environment. Rather, the family

[23] See MCR 7.212(C)(7); *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997) ("A party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim.").

court had to consider two imperfect environments. Plaintiff's argument that defendant's desire to move to Arizona one day would destroy the continuity of the home environment for the children has no merit, again, because the move is merely speculative. Even if the move were imminent, the evidence suggests that there was little continuity in the children's existing home environment to disturb. For these reasons, the family court did not err in declining to find that this factor favored plaintiff.

F. Moral Fitness: Factor (f)

Plaintiff argues that the family court was too forgiving of defendant's extramarital sexual behavior and therefore erred when it found that factor (f) favored defendant "overwhelmingly." The parties' sexual conduct is relevant to this factor only insofar as it affects the parent-child relationship.[24] As the Michigan Supreme Court commented, "[T]he 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."[25] Furthermore,

> [e]xtramarital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship. While such conduct certainly has a bearing on one's spousal fitness, it need not be probative of how one will interact with or raise a child. Because of its limited probative value and the significant potential for prejudicially ascribing disproportionate weight to that fact, extramarital conduct, in and of itself, may not be relevant to factor f. To the extent that one's marital misconduct actually does have an identifiable adverse effect on a particular person's ability or disposition to raise a child, those parental shortcomings often may be reflected in other relevant statutory factors.[26]

In this case, whether defendant actually had a romantic or intimate relationship with Shotwell before her separation is in dispute. Consequently, the moral dimensions to this relationship are more cloudy than plaintiff would have us believe.[27] In any event, the evidence indicates that defendant brought her children into contact with Shotwell twice before the divorce. Both times the meetings were under benign circumstances: once in passing at the dealership where he worked, and once when defendant hosted a barbecue with many other guests. There is no evidence that, for example, defendant neglected the children because of her entanglement,

---

[24] *Fletcher*, *supra* at 887.

[25] *Id*.

[26] *Id*.

[27] Evidently, accusations concerning infidelity are longstanding in their relationship. Defendant alleged to the court-appointed expert that she suspected that plaintiff had had an affair early in their marriage and that he had admitted to kissing this other person, but no more. Plaintiff also indicated that others had questioned whether he was the biological father of his younger daughter, who evidently has different coloring. However he added that he had no interest in pursuing the issue further because he had always considered the little girl his daughter.

whatever its nature, with Shotwell, or that she might encourage the children to engage in immoral conduct in the future, using her own conduct as a model. In contrast, as the family court noted, plaintiff steadily attempted to bring defendant's infidelity to the children's attention, often in ways that were distressing to the children. Though plaintiff notes that one child reportedly found defendant in bed with another man on one occasion, that evidence came from plaintiff's expert, whose credibility the trial court discounted.[28]

Plaintiff also relies on the evidence that defendant had occasionally subjected the children to inappropriate corporal punishment. However, the evidence nonetheless did not indicate that this was an immoral pattern of conduct that would be considered dispositive under this factor when considering the evidence of plaintiff's misconduct, which also affected his children. Plaintiff thus fails to show that the trial court erred in favoring defendant overwhelmingly on this factor.

G. Mental And Physical Health: Factor (g)

Plaintiff contends that defendant's use of corporal punishment made the family court's finding that factor (g) favored defendant erroneous. As discussed above, the trial court afforded this evidence the weight it was due.

Plaintiff also contends that there was evidence that defendant was mentally unhealthy when she sought counseling for the children without disclosing to the counselor that the parties shared legal custody at the time and told the counselor in front of the children that she was worried about the emotional and psychological effects plaintiff had on the children. We do not see a connection between these events and defendant's mental health.

Plaintiff observes that, for a time, defendant kept the children indoors when they wished to play outdoors. Although defendant's explanation that she did not wish to subject the children to the neighborhood gossip about the divorce may not be entirely satisfactory, or reflect the best judgment, we do not see the connection between that parenting decision and defendant's mental health.

In contrast, plaintiff presents no argument to rebut family court's finding that plaintiff had exhibited many behaviors that called his mental health into question. For instance, plaintiff had a very emotional reaction to the breakdown of his marriage, he turned to his older, though still young, daughter for emotional support as if she were an adult, and he involved the children in confrontations with defendant and Shotwell.[29] While his disappointment, hurt, and even anger at the dissolution of his relationship with defendant is understandable, the way he involved his children in acting on those emotions certainly calls into question his ability to control his

---

[28] *Zeeland Farm Services*, *supra* at 195.

[29] The children may have also heard or observed his confrontations with defendant that bordered on violence well before the parties' separation.

emotions in the future to protect his children's emotional well-being. Thus we have no reason to disagree with the family court's findings concerning factor (g).

### H. Facilitating The Relationship With The Other Parent: Factor (j)

Plaintiff contends that the family court erred in concluding that factor (j) favored defendant, pointing to defendant's refusal to allow the children to participate in softball when plaintiff would have been their coach and to her interest in moving to Arizona. Defendant plainly admitted that she kept the girls from playing organized softball specifically because plaintiff would be their coach. However, she justified this decision on the ground that she wished to avoid confrontations with plaintiff. If that were her chief concern, defendant may have been able to arrange to have someone else transport the children to and from softball practices and games. This evidence does suggest that defendant has only a grudging willingness to allow plaintiff to spend time with his children. As for moving to Arizona, as we have already discussed, this move is mere speculation, and not a present concern affecting custody. The family court thus properly declined to presume that a move would take place, while respecting the possibility that defendant may some day show proper reason for doing so.

As unenthusiastic as defendant may be in encouraging her children to have a relationship with plaintiff, there is more evidence that plaintiff has endeavored overtly to damage the relationship between the children and defendant. The family court cited plaintiff's history of exposing the children to his extreme actions and statements disparaging defendant, of interrogating the children about defendant's actions, and of recording their conversations with her. Though plaintiff argues that the family court improperly emphasized his conduct during the initial stages of the separation, we again note that he has not provided any authority for the proposition that conduct during this phase should be inconsequential to the family court's consideration. From a logical perspective, we think it highly unlikely that plaintiff could provide such authority because this evidence is directly related to his willingness to facilitate the children's relationship with their mother. While plaintiff's emotions may have cooled somewhat since then, the record does not lead us to conclude that the family court gave this conduct undue emphasis or failed to view it in the context of the stress of the situation. For these reasons, plaintiff has failed to show that the trial court erred in weighing this factor in favor of awarding physical custody to defendant.

## V. Conclusion

We do not intend for our analysis in this case to imply that plaintiff is a bad parent or that his children's affection for him is anything but genuine. Nor do we wish to suggest that defendant is a perfect parent who needs no improvement in her parenting skills. Rather, this case is particularly close because of the high emotions involved and the complicated interactions the parties have had with each other since their separation. Nevertheless, under the legal standards we must apply, we must extend great deference to the family court in the factual matters this appeal raises. We are not blind to the conflicting evidence on the record. However, that there is such a significant conflict reinforces the observation that trial courts tend to have a better view of the evidence when credibility becomes an issue. Plaintiff simply has failed to provide the

quantum of proof necessary for us to reverse the family court's findings underlying its custody decision, and therefore the custody decision itself.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens