STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW HURNER,

Plaintiff-Appellee,

v

PATRICIA HURNER,

Defendant-Appellant.

UNPUBLISHED
September 28, 2001

No. 231849
Livingston Circuit Court
LC No. 93-020257-DM

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's September 29, 2000 order modifying custody. We affirm.

The parties were married on August 27, 1988. Their union produced one child, Martin Matthew Hurner, born April 24, 1990. Plaintiff filed for divorce on May 3, 1993. The October 14, 1994 consent judgment of divorce awarded the parties joint legal custody of Martin, while allowing defendant sole physical custody. On July 15, 1999, plaintiff petitioned for a change in custody. Following a two-day evidentiary hearing, the court granted plaintiff's motion, awarding him sole legal custody of Martin. The trial court also ordered that the parties share joint physical custody. Specifically, the custody order provided that Martin spend the school year in plaintiff's physical custody, and spend the summer months in defendant's physical custody.

In child custody proceedings, we review the trial court's findings of fact to determine whether they are contrary to the great weight of the evidence. *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994); *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). We will affirm a trial court's factual determinations in a custody proceeding unless the record evidence "clearly preponderates in the opposite direction." *Jordan, supra* at 20. However, we review questions of law for clear legal error. *Foskett v Foskett*, ___ Mich App ___; ___ NW2d ___ (Docket No. 230222, issued 7/24/01) slip op p 2; *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). The trial court's ultimate decision regarding custody is a dispositional ruling that we review for abuse of discretion. *Mogle, supra* at 196.

On appeal, defendant first contends that the trial court failed to find that a change in circumstances or proper cause existed before revisiting the best interest factors. Defendant does not argue that the trial court erred in finding a change in circumstances sufficient to revisit the

custody issue. Instead, defendant finds fault only with the trial court's failure to specifically state its findings in this regard on the record. By her argument, defendant invokes MCL 722.27(1)(c), which allows a trial court to modify an existing custody order "for proper cause . . . or because of [a] change of circumstances." The party seeking the custody change bears the burden of establishing proper cause or a change of circumstances. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).[1]

In his petition seeking a change in custody, plaintiff alleged that a change in circumstances existed to warrant a change in custody. In primary support of this assertion, plaintiff alleged that Martin was experiencing disciplinary problems at school, and that defendant was not responding to these concerns properly. Plaintiff also alleged that defendant was not cooperating with the school for Martin's speech therapy and hearing treatment, that she did not foster visitation, and was not providing suitable meals. Before making its findings on the best interest factors, the trial court discussed Martin's disciplinary problems. The court went on to observe that by acting out, Martin was "crying out" for help, and that he did not possess the self-discipline necessary to control his behavior. The court also noted that Martin would benefit from plaintiff's "structure, firmness and . . . consistency."

Although the trial court's findings are somewhat desultory, they nonetheless convey its concern that Martin's severe behavior problems at school constituted a change in circumstances warranting a revisiting of the best interest factors. We believe the trial court's findings were sufficient. In child custody proceedings, a trial court is not required to "comment on every matter in evidence or declare acceptance or rejection of every proposition argued." *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981); see also *Fletcher*, *supra* at 883. Further, MCR 2.517(A)(2) provides that "[b]rief, definite, and pertinent findings [of a trial court] on . . . contested matters are sufficient, without over elaboration of detail or particularization of facts."

Defendant also contends that the trial court abused its discretion in granting sole legal custody to plaintiff. MCL 722.26a, the statute governing an award of joint custody, provides:

> (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
>
> (a) The factors enumerated in [MCL 722.23]

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[1] Before modifying an existing custody order, a court must also determine whether an established custodial environment exists. MCL 722.27(1)(c). If the trial court concludes that an established custodial environment exists, a custody order may not be modified unless the court is persuaded "by clear and convincing evidence [that a modification] is in the best interest of the child." MCL 722.27(1)(c). In the instant case the trial court concluded an established custodial environment existed with defendant.

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

As defined in the statute, " ' joint custody' means an order that specifies either that 'the child shall reside alternatively for specific periods with each of the parents,' or that 'the parents shall share decision-making authority as to the important decisions affecting the welfare of the child,' or both." *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994), quoting MCL 722.26a(7). When deciding whether to award joint custody, a trial court is required to consider whether it is in the best interest of the child, and whether "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." *Wilcox v Wilcox (On Remand)*, 108 Mich App 488, 495; 310 NW2d 434 (1981); see also *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 496 (1999); MCL 722.26a(1)(b).

The October 1998 consent judgment of divorce provided that the parties share legal custody of Martin. In his petition to modify custody, plaintiff requested "a change of physical and legal custody in favor of [plaintiff]." Thus, to the extent that defendant suggests in her brief on appeal that the parties agreed to joint legal custody, this does not appear to be accurate. After weighing the best interest factors, the trial court made the following comments on the record:

> I, I uh, ordered sole physical—or sole legal custody, excuse me, to father, because I don't think these parties can talk to each other about anything that's important uh, regarding this child's life. Somebody's got to make the decisions, and I don't want you to have to come to court every time somebody has to make a decisions [sic] . . . .

Defendant challenges the trial court's ruling, claiming that a trial court may not deny joint custody solely because of animosity between the parties. In support of this assertion, defendant points to *Nielsen v Nielsen*, 163 Mich App 430; 415 NW2d 6 (1987). In *Nielsen*, a panel of this Court recognized that "cooperation is only one factor for the court to consider in its decision to grant or deny joint custody." *Id.* at 434. The *Neilsen* Court further concluded that joint custody was appropriate where the parties could agree on "basic child-rearing issues." *Id.* Conversely, in *Fisher v Fisher*, 118 Mich App 227, 233; 324 NW2d 582 (1982), this Court concluded an award of joint custody was inappropriate where the parties could not agree on basic child-rearing issues such as choice of religion. Further, the *Fisher* Court made the following relevant observations:

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child-rearing – including health care, religion, education, day to day decision-making and discipline – and they must be willing to cooperate with each other in joint decision making. *Rolde v Rolde*, 425 NE2d 388 (Mass App, 1981). If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. [*Fisher, supra* at 232-233.]

Contrary to defendant's suggestion, the trial court's decision to not award joint legal custody was not based solely on the animosity between the parties. Although the trial court noted

that the parties shared an acrimonious relationship, after weighing the best interest factors, it expressed serious misgivings about the parties' ability to be consistent and support each other in Martin's discipline. Specifically, the trial court observed that the parties had extremely different parenting styles. For example, the trial court observed that plaintiff is "self-disciplined" and almost "militaristic" in his discipline of Martin. On the other hand, the trial court found defendant easygoing, not "realistic" about Martin's discipline problems, and "off-base" with regard to what was needed to improve Martin's behavior.

The trial court's findings in this regard are supported by the record. For example, John Wesley Morgan, Martin's first-grade teacher, testified that defendant would not respond to messages left on her answering machine regarding Martin's speech therapy, and that defendant missed a parent-teacher conference. Moreover, Sandra Weiss, Martin's third-grade teacher, stated that Martin would often come to school tired and hungry, indicating that he had stayed up late the night before. Weiss also stated that Martin exhibited aggressive behavior toward other students. However, Weiss further testified that she noticed a dramatic change in Martin after he stayed with plaintiff following a five-day school suspension. Specifically, Weiss testified that Martin was alert and well-behaved. Weiss attributed this change to plaintiff's discipline of Martin.

Further, plaintiff testified that defendant did not consistently discipline Martin, and that she did not take steps to correct or encourage appropriate behavior. Plaintiff also testified that defendant had consistently thwarted his visitation with Martin, causing the court to hold her in contempt in January 1995.[2] On the other hand, defendant testified that she disciplined Martin consistently, using a token system, and that she was working with the school to correct Martin's discipline problems. However, defendant would not acknowledge that Martin had a discipline problem, in spite of numerous suspensions from school.[3] The trial court's findings regarding the parties' different parenting styles and inability to communicate hinged on its credibility determinations. In child custody proceedings, we defer to the trial court's credibility determinations. *Mogle, supra* at 201. Because the trial court's findings were not against the great weight of the evidence, we are not persuaded that it abused its discretion in awarding sole legal custody to plaintiff.

Defendant's ensuing issues on appeal relate to the trial court's consideration of several of the best interest factors. See MCL 722.23. Specifically, defendant challenges the court's findings of fact with respect to factors (b), (e), (f), (h), and (i). As mentioned previously, we

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[2] The court found defendant to be in contempt of court for "thwart[ing]" plaintiff's visitation with Martin in an order entered January 5, 1995.

[3] According to the record, the parties have difficulty communicating with each other. These difficulties have resulted in a disruption of visitation on more than one occasion. For instance, in June 2000, plaintiff missed his visitation with Martin due to a miscommunication between the parties, when defendant took Martin to a Nascar car race in Addison.

review a trial court's factual determinations to discern whether they are against the great weight of the evidence, and will affirm them unless the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20.

The prevailing concern in child custody proceedings is the welfare of the child involved. *Eldred v Ziny*, 246 Mich App 142, 150; ___ NW2d ___ (2001). To determine what is in a child's best interest, a trial court is required to consider the statutory best interest factors and make a specific finding with regard to each. *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993).

Considering factor (b), "[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 court found that this factor favored plaintiff. Specifically, the court found that because of his discipline problems, Martin "need[ed] the structure of a more self-disciplined person." Defendant challenges this finding, arguing that it is not supported by the evidence, since Martin's behavior improved while he was in third and fourth grade and in defendant's physical custody.

At the evidentiary hearing, Morgan, Weiss, and Martin's principal, Debra Wolf, testified extensively about his behavior problems in school. According to the record, Martin was suspended from school for disciplinary problems three times, once in the 1999-2000 school year, and twice in the 1998-1999 school year. These incidents involved the hitting and choking of other students. Wolf also testified that Martin was repeatedly sent to her office in the 1998-1999 school year for behavior problems. Although Wolf testified that Martin was not reported for disciplinary problems from November 1999 until the end of the 1999-2000 school year, she attributed his misbehavior to "adjustment problems" that flared up at the start of the school year. Thus, the record indicates that Martin has displayed a consistent pattern of disciplinary problems that was subject to repeat itself. Because the record supports the trial court's conclusion that plaintiff is better able to discipline Martin, its finding on this factor will not be disturbed on appeal.

Evaluating factor (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," the trial court found that this factor weighed in favor of plaintiff. When making its determination, the trial court acknowledged that plaintiff had dated his wife Gail for over seven years before they married in January 2000. Plaintiff and his wife resided in East China, Michigan, with their six-year old daughter, Jordan, in a three-bedroom home. At the time of the evidentiary hearing, defendant was residing with her boyfriend in the former martial home. The trial court went on to observe that plaintiff's family unit was "very stable" and a "permanent situation." In our opinion, the record evidence does not clearly preponderate in the opposite direction.[4]

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[4] Additionally, we disagree with defendant's assertion that the trial court faulted defendant for having a live-in boyfriend. Rather, when considering factor (f), "[t]he moral fitness of the parties involved," the trial court favored neither party, noting that both parties lived with their significant others for a period of time. The trial court went on to observe that any consideration of

(continued…)

Considering factor (h), "[t]he home, school and community record of the child," the court expressed its "huge concern" about Martin's pattern of disciplinary problems. The trial court also noted defendant's failure to acknowledge the seriousness of the matter, and her willingness to blame the problem on plaintiff. Defendant's primary dispute with regard to this finding is that Martin's behavior began to improve once she took steps with his teacher to curb his misbehavior.

A review of the record confirms defendant's claim that she became more involved with Martin's education by attending conferences, discussing homework assignments with Martin's teachers, and enrolling him in Sylvan Learning Center to hone his math skills. Defendant also attempted to provide better discipline for Martin by using a token system to reward him for good behavior. According to the record, plaintiff and his wife were also very involved with Martin's schooling and behavior management. For example, plaintiff arranged with Martin's teachers to have unfinished homework mailed to him. Plaintiff also ensured that Martin finished his homework before watching television or playing with friends. Indeed, because both plaintiff and defendant were involved with Martin's education and behavior management, it is difficult to discern who was responsible for his improvement. The trial court's ultimate finding on this factor was obviously swayed by Weiss' testimony. Weiss indicated that after Martin stayed with plaintiff and his wife for a period of time, his behavior improved dramatically. Because the trial court's finding on this factor implicated a credibility determination, we will not disturb it on appeal. *Mogle, supra* at 21.

Considering factor (i), "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference," the court found that plaintiff should have "a slight preference." The court further indicated its "sense that [Martin] wanted to spend more time with [plaintiff]." The trial court's findings on this factor were gleaned from its in camera interview with Martin. See *Hilliard v Schmidt*, 231 Mich App 316, 320; 586 NW2d 263 (1998).

> I kept finding that by the, the, the expression on, on his face when he talked about [his half-sister] Jordan, when he talked about [plaintiff's wife], when he talked about [plaintiff] uh, it was it – his demeanor seemed to tell me that he wanted to spend a lot more time with, that he enjoys [plaintiff] very much. He, he's proud of his little sister. He talked about how she gave him his—her lime disease pin, I guess it is.

(…continued)

defendant's live-in boyfriend was limited to its effect on Martin, and concluded that Martin was not "negative[ly] affect[ed]." Thus, there is no indication in the record that the trial court penalized defendant for living with her boyfriend. Moreover, contrary to defendant's assertion on appeal, the trial court took into account that Martin had lived with defendant since the parties separated when weighing factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity."

When articulating its finding that Martin preferred to live with plaintiff, the trial court noted that Martin loved his dog. However, after defendant informed the court that the dog belonged to her, the trial court promptly corrected itself, and went on to conclude that Martin preferred to live with plaintiff. In our view, the trial court's acknowledged error of associating defendant's dog with plaintiff's home does not render its findings on this factor against the great weight of the evidence.

Defendant also challenges the trial court's finding with regard to factor (f), "[t]he moral fitness of the parties involved." The trial court found that this factor did not favor either party. Defendant argues that the trial court failed to consider plaintiff's acts of dishonesty when evaluating this factor. Specifically, defendant argues that plaintiff inappropriately referred to Gail Hurner as his wife before the two were legally married in January 2000.[5] Defendant also asserts that plaintiff erroneously told the friend of the court (FOC) investigator that defendant was jailed after being held in contempt of court.

As an initial matter, we note that the trial court's failure to specifically reference plaintiff's conduct in rendering its findings on factor (f) was not improper. In child custody proceedings, a trial court is not required to comment on every matter in evidence when stating its findings. *Baker, supra*; *Fletcher, supra*. Nor do we accept defendant's assertion that, simply because the trial court did not note this evidence on the record, it failed to properly consider it. Moreover, as our Supreme Court observed in *Fletcher, supra*,

> Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*. [*Fletcher, supra* at 886-887 (emphasis in original; footnote omitted).]

In our view, the trial court's finding on factor f was not against the great weight of the evidence because there is no indication in the record that plaintiff's questionable conduct significantly influenced how he functioned as a parent to Martin.[6] *Fletcher, supra*.

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[5] According to the record, plaintiff referred to Gail Hurner as his wife in court documents, and in a 1999 interview with a friend of the court (FOC) investigator.

[6] Defendant also asserts that the trial court abused its discretion when it denied defendant the opportunity to present closing argument. However, defendant has failed to cite any authority in support of this argument. "A party may not leave it to this Court to search for authority to support its position." *McPeak v McPeak (On Remand),* 233 Mich App 483, 495-496; 593 NW2d 180 (1999); see also *Eldred, supra* at 150. Thus, we consider this issue waived.

Finally, defendant argues that the trial court inappropriately considered information obtained during the in camera interview with Martin when evaluating factors other than Martin's reasonable preference regarding custody. MCL 722.23(i).

In support of her argument, defendant cites *Molloy v Molloy*, 243 Mich App 595, 602; ___ NW2d ___, vacated in part 243 Mich App 801 (2000). In *Molloy*, a panel of this Court expressed its disagreement with the Court's holding in *Hilliard, supra*. In *Hilliard*, the Court held that a trial court's in camera interview with a child in custody proceedings may extend beyond ascertaining the child's reasonable preference with regard to custody. A special panel was convened pursuant to MCR 7.215(H)[7] on January 12, 2001, to resolve the conflict between *Molloy* and *Hilliard*.

Even if we were to accept defendant's contention that the trial court erred[8] in allowing the scope of the in camera interview to extend beyond ascertaining Martin's reasonable preference regarding custody, reversal is not warranted in the instant case because defendant was not prejudiced. Although the trial court made note of Martin's comments when considering 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 . . . ," a review of the record reveals that Martin's comments were not dispositive of the court's inquiry regarding this factor. Specifically, the court stated:

> In fact, [Martin] told me that mom and dad's relationship stinks; they're juvenile with each other. This is a ten year old saying that about his parents.

However, the trial court went on to decide that this factor did not favor either party. Thus, defendant was not prejudiced. Further, information about animosity between the parties was "not exclusively known to the judge through the in camera interview." *Hilliard, supra* at 321. Rather, testimony from the parties' themselves demonstrated that they shared a strained relationship following their divorce. Accordingly, under the circumstances, any error was harmless and reversal is not warranted. *Fletcher, supra* at 889.

Based on the foregoing, we likewise reject defendant's argument that the trial court abused its discretion in denying her motion for a new trial.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Michael R. Smolenski

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[7] The court rule governing the convening of a special panel was amended, effective April 1, 2001. See 463 Mich lxii-lxiv; MCR 7.215(I).

[8] It is doubtful that *Molloy* and *Hilliard* are applicable to the instant case, because it is not "clear from the trial court's findings that the trial court utilized the child's interview with regard to several of the best interest factors and went far beyond simply noting the child's preference." *Molloy, supra* at 600.