

STATE OF MICHIGAN
COURT OF APPEALS

REYMUNDO J. OROZCO,

Plaintiff-Appellant,

v

ANAMARIE G. RODRIGUEZ,

Defendant-Appellee.

UNPUBLISHED

September 30, 2004

No. 253791

Lenawee Circuit Court

LC No. 01-023942-DC

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Plaintiff, Reymundo J. Orozco, appeals as of right from a custody order awarding sole legal and physical custody of the parties' two minor children to defendant, Anamarie Rodriguez. We affirm.

Plaintiff and defendant, who has a child from a previous relationship, moved in together shortly before the birth of their first child. Several months after the first child was born, the parties split up. The parties shared joint legal custody of the child, with defendant having physical custody. The parties reconciled, moved in together again, and had a second child. While the parties resided together, defendant provided all of the care for the children. Less than a year after the birth of their second child, plaintiff left the home. The parties shared joint legal custody of the second child, with defendant having physical custody.

Plaintiff works the second shift (2:00 p.m. until 10:30 p.m.) and is not available to care for the children after 2:00 p.m. When plaintiff has the children, his mother and sisters care for the children while he works. Although defendant has protested, plaintiff continues to involve his family in the children's medical appointments. Defendant objects to plaintiff's reliance on his family for child care. Plaintiff had the children baptized without defendant's knowledge or participation, and plaintiff has not allowed defendant to have telephone access to one of the minor children while in his custody. Plaintiff also refused to allow one of the minor children to participate in a birthday celebration with the other minor child and half-sibling because it was not defendant's parenting time. Defendant admitted that she has changed day care providers and pediatricians without informing plaintiff because she did not want plaintiff's family visiting the day care or participating in the children's medical appointments.

Following a bench trial, the court awarded defendant sole legal and physical custody of the children and gave plaintiff parenting time on alternate weekends and holidays, in addition to

four weeks of nonconsecutive summer vacation. When plaintiff leaves for work, he must return the children to defendant instead of delivering them to his family members. The court ordered the parties to enroll in joint counseling and plaintiff to complete a parenting class.

Plaintiff first argues that the trial court failed to articulate sufficient findings of fact on each of the best interest factors set forth under MCL 722.23 to substantiate its conclusions. The trial court favored defendant on factors (b), (d), (j) and (l) and found the parties equal on factors (a), (c), (e), (f), (g), and (h). Factor (i) was not considered relevant by the court. In custody cases, we review factual findings under the great weight of the evidence standard. MCL 722.28; *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). In custody cases, we review discretionary rulings for an abuse of discretion and questions of law for “clear legal error.” *McCain, supra* at 125.

A trial court’s exercise of discretion is limited to the statutory best interest factors, and a court’s failure to consider a statutory factor necessitates remand. *Fletcher v Fletcher*, 447 Mich 871, 880-881; 526 NW2d 899 (1994). A trial court is required to “find the facts specially” and state “[b]rief, definite, and pertinent findings and conclusions on the contested matters.” MCR 3.210(D); MCR 2.517(A)(1) and (A)(2). See also *Fletcher, supra* at 883. This mandate does not, however, require a trial court to recite or comment on all of the relevant evidence or testimony considered. *Id.*

Plaintiff alleges that the trial court’s articulation of its findings are insufficient and specifically cites factors (a), (b), (c), (e), (f), (g), and (h).¹ In accordance with MCR 2.517(A), findings of fact by a trial court require:

- (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.
- (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.

MCR 2.517(A)(2) does not require extensive recitation of all evidence considered or rejected by the trial court in reaching its conclusion on each factor. *Fletcher, supra* at 883.

¹ The trial court omitted any reference to factor (k) in its ruling. Plaintiff impliedly does not find this factor particularly relevant to the custody determination, as the absence of any findings or conclusion by the court on this factor is not referenced within plaintiff’s discussion of this issue on appeal. Factor (k) is not pertinent to a determination in this case. While it was error by the court not to consider this factor specifically, such error was harmless and thus does not necessitate remand. *Fletcher, supra* at 882. Because there are no allegations of domestic violence by either party, the potential for a conclusion on this factor to favor either party is nonexistent and thus would not affect the final custody determination made by the court. *Dempsey v Dempsey*, 409 Mich 495, 498-499; 296 NW2d 813 (1980).

The record and the trial court's findings of fact and conclusions on each of the factors demonstrate that the trial court did elaborate on the basis for its findings on factors (a), (b), (c), (d), (e), and (f). While the court's reasoning was not always presented in proximity to its conclusion regarding each factor, findings of fact were contained throughout the court's ruling and provided a sufficient basis to determine the justifications relied on by the court for weighing the factors in favor of one party or the other, or a determination of equality. Moreover, much of plaintiff's argument is in actuality a contention regarding the great weight of the evidence pertaining to these factors and not a demonstration of a procedural deficiency by the court in its elucidation or consideration of each of the requisite best interest factors. While, arguably, the court failed to delineate findings supporting its determination of equality on factor (f), it should first be noted that the parties have made no specific allegations of wrongdoing or deficiency. Furthermore, factor (f) encompasses more than the existence of questionable conduct by either party; rather, it relates to an individual's fitness as a parent. *Fletcher, supra* at 887. When interpreted as such, the court did specifically find defendant to be a suitable and functional parent, but it questioned whether plaintiff possessed the requisite skills to adequately parent his two children. Even if correction of an error resulted in a different conclusion on factor (f), there is no possibility that the balance of the "best interests" factors would sufficiently shift to plaintiff's favor and require an alternative outcome. MCR 2.613; *Dempsey v Dempsey*, 409 Mich 495, 498-499; 296 NW2d 813 (1980). The court's opinion adequately satisfies the mandated articulation requirements of the court rules and case law. MCR 2.517; *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988).

Next, plaintiff contends that the trial court's rulings on several of the best interest factors are against the great weight of the evidence. Specifically, plaintiff asserts that factors (a), (b), (c), (d), and (j) were wrongly weighted and evaluated by the court and should have clearly favored plaintiff based on the evidence adduced at trial. Because we find no merit in this contention, we affirm the court's ruling on custody. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

Factor (a) requires a court to consider "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The court found the parties equal on this factor. Plaintiff argues that he has demonstrated that defendant has not bonded with one of the minor children and is often inattentive to that child's emotional needs. Plaintiff implies that the existence and involvement of his extended family puts him a superior position to care for the children because defendant does not have extended or supportive family in her life. The court noted, through the friend of the court evaluation, that any difficulties in bonding between defendant and the minor child are attributable to and exacerbated by plaintiff's and his family's purposeful interference in that mother-child relationship. Several witnesses testified about defendant's capability as a parent and the existence of emotional ties to the minor children. The court specifically discounted the credibility of plaintiff and the paternal grandmother. It is recognized that the trial court has the duty to determine what weight to assign to the testimony of each witness, and considerable deference is given to the superior vantage point of the trial court concerning credibility issues. *Phillips, supra* at 28; *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). Based on the court's determination that plaintiff and his primary witness were not credible, his contention that the court's ruling on factor (a) is against the great weight of the evidence lacks merit, particularly if any harm in the

relationship between defendant and the children is the result of interference attributable to plaintiff and his family.

Factor (b) 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.” MCL 722.23(b). The trial court slightly favored defendant on this factor and indicated that it did not believe plaintiff was involved in religious matters other than those pursued by the paternal grandmother. Plaintiff argues that all testimony weighed in his favor as a care provider and his participation in medical issues for the children. The trial court acknowledged defendant’s failure to involve plaintiff in decisions regarding day care placements and medical care providers for the minor children, but it deemed this an understandable failure based on the continuing interference of plaintiff’s family in such settings. The court indicated its belief that plaintiff was not actually providing the care for the minor children, but rather delegated authority and responsibility to family members when the children were in his custody. Because the court questioned plaintiff’s actual involvement in providing care for the children, found a lack of credibility in the testimony of plaintiff and his primary witness, and determined that defendant was the primary caretaker when the parties lived together, we conclude that the court’s findings were not against the great weight of the evidence on this factor.

Factor (c) requires a court to evaluate “[t]he 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.” MCL 722.23(c). Despite plaintiff’s superior earning capacity, the trial court found the parties equal on this factor. The court indicated there was no distinction between the parties in their ability to care for the diagnosed medical conditions of the children. The court recognized defendant’s efforts to secure job training and employment, as well as providing an appropriate living environment for the minor children. Based on the trial court’s determination that plaintiff is overly reliant on his extended family, it was not against the great weight of the evidence for the court to find the parties equivalent on this factor, despite the general disparity in income.

Factor (d) concerns “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” MCL 722.23(d). The court favored defendant on this factor. The court found that plaintiff’s home lacked stability because plaintiff was not actually providing a home for the children when he relied on his family to meet the care-taking responsibilities for the children. The court also considered the needs of the minor children to “the stability of having one home and the advantages of being with . . . siblings.” Given the court’s explanation for its ruling, it cannot be said that the court’s determination was against the great weight of the evidence.

Finally, factor (j) concerns “[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.” MCL 722.23(j). The court was explicit in its findings on this factor in defendant’s favor. Despite plaintiff’s contention that he encouraged the bond and relationship between defendant and the minor children, the record contained numerous examples of plaintiff and his family actively interfering with that relationship. No evidence was presented that defendant had taken any action to preclude plaintiff’s contact with the children or even that of his extended family. Because defendant encourages and fosters contact with the paternal grandmother of her child from a prior relationship, she has demonstrated that she is capable of

facilitating the relationship between plaintiff and the minor children. Based on a review of the testimony and record presented, plaintiff's contention that the trial court's ruling on this factor is against the great weight of the evidence is without merit.

Custody decisions are inherently difficult. The overriding concern must always be the best interests of the children. *Heid v Aasulewski (After Remand)*, 209 Mich App 587, 595; 532 NW2d 205 (1995). It is recognized that trial courts:

are in a superior position to make accurate decisions concerning the custody arrangement that will be in a child's best interests. Although not infallible, trial courts are more experienced and better situated to weigh evidence and assess credibility. Trial courts not only hear testimony and observe witnesses, but also may elicit testimony, interview children, and invoke other judicial resources to assure a thorough and careful evaluation of the child's best interests. [*Fletcher, supra* at 889-890.]

Therefore, plaintiff's contention that the trial court's findings are against the great weight of the evidence is without merit. *Phillips, supra* at 20.

Plaintiff's final issue on appeal is that the trial court inappropriately relied on the findings of the friend of the court evaluator in its custody determination. Specifically, plaintiff asserts that the court failed to perform its mandated fact-finding responsibilities and improperly deferred to the determinations contained in the friend of the court evaluation.

The parties stipulated that they would submit to a friend of the court evaluation on the issue of custody and that the report would be admissible as evidence at trial, and this stipulation was confirmed during trial. While a trial court may consider a report from the friend of the court in making its determinations, the court must reach its own conclusions on the evidence received. *Truitt v Truitt*, 172 Mich App 38, 42-43; 431 NW2d 454 (1988). A custody decision must be based on a court's own hearing and cannot be based on hearings or conclusions reached by the friend of the court. *Id.* at 43.

The court did, in reciting its findings of fact and ruling on the best interest factors, cite extensively from the friend of the court evaluation. Plaintiff asserts that this extensive recitation demonstrates the court's reliance on the friend of the court's factual conclusions. Plaintiff, however, ignores the trial court's indication of its own, separate conclusions from those made by the friend of the court. Although the friend of the court's report and recommendation "may not form the basis for the trial court's findings, it may be used to establish a background and context for the proceedings." *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). The court conducted its own custody hearing and heard extensive testimony from several witnesses. The court made its own findings of fact and recited portions of the friend of the court evaluation demonstrating the consistency of the evidence to support its conclusions. The court referenced the evaluation as a means of corroboration or support for its own custody determinations. The court used the evaluation to summarize the positions of the parties and the outcome of the friend of the court investigation on the issue of custody. A review of the record does not indicate mere adoption of the friend of the court evaluation. Rather, the lower court's ruling demonstrates its agreement with the findings of the friend of the court, based on the court's own perspective and evaluation of the evidence presented. While the court acknowledged that it gives "significant

weight to custody evaluations,” it did not improperly relinquish its role in determining the best interest factors.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O’Connell

/s/ Hilda R. Gage