STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER J. ELLIS,

Plaintiff-Appellant,

v

MELISSA MARIE EVERS,

Defendant-Appellee.

UNPUBLISHED
October 12, 2004

No. 253712
Clare Circuit Court
LC No. 96-900271-DM

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying his motion to change physical custody of his daughter Bethany from defendant to plaintiff.[1] We remand.

The following standards of review apply to custody cases:

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. *Id*. Questions of law are reviewed for clear legal error. *Fletcher, supra*, 229 Mich App 24, citing MCL 722.28; MSA 25.312(8), and *Fletcher, supra*, 447 Mich 881. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher, supra*, 229 Mich App 24, citing *Fletcher, supra*, 447 Mich 881. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183, app dis 618 NW2d 591 (2000).]

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[1] Physical custody of the parties' minor son was changed from defendant to plaintiff. This custody arrangement is not here challenged.

I

Plaintiff first argues that the trial court erred in finding that an established custodial environment existed between the minor child and defendant. We disagree. Whether a custodial environment is established is a question of fact the trial court determines based on MCL 722.27(1)(c). *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). The statutory standard is whether "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." MCL 722.27(1)(c)

While admitting that on the surface it appears that an established custodial environment exists with defendant, plaintiff argues that defendant's emotional instability and admitted violence toward the children render the established custodial environment superficial and thus illusory. Further, plaintiff asserts that the existence of physical abuse in a home should prevent a finding of an established custodial environment. He argues that such a preclusion comports with the goals of the Child Custody Act of 1970, MCL 722.21 *et seq.*, and would prevent an abusive parent from hiding behind an elevated burden of proof. He also argues that the issue of physical violence impacts consideration of the safety and security of a child who looks to an abusive parent for parental comfort.

Domestic violence is explicitly taken into account under the statutory "best interest factors." MCL 722.23(k). We agree that consideration of alleged physical abuse of a child is relevant to the issue of the child's safety and security and can impact the determination of the existence of an established custodial environment. Indeed, it arguably impacts several of the best interest factors themselves. However, contrary to plaintiff's assertion, an abusive parent is not able to find refuge behind an elevated burden of proof in circumstances where an established custodial environment exists with that parent. The elevated burden of proof, i.e., clear and convincing, does not apply to the fact question of whether abuse has occurred. Thus, plaintiff is not required to prove the existence of abuse by clear and convincing evidence. Rather, plaintiff must prove by clear and convincing evidence that a change in custody is in the best interest of the child. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). After reviewing the record, we do not conclude that the evidence clearly preponderates against a finding that the parties' minor child had an established custodial environment with defendant.

II

Alternatively, plaintiff argues that the trial court erred in considering the statutory best interest factors. We agree.

MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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 this 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.

(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.

The trial court found that the parties were equal under factors (a), (c), and (i). The trial court found defendant's mental health compromised, but plaintiff's mental health acceptable, under factor (g). Under factor (j), the trial court found plaintiff willing to facilitate the minor child's relationship with her mother, but defendant unwilling to similarly facilitate the girl's relationship with her father. None of those factors are disputed on appeal. Plaintiff challenges the trial court's findings, or lack thereof, under factors (b), (d), (e), (f), (h), (k), and (l).

The trial court found the parties equal under factor (b). Although the evidence showed that both parties are capable of giving the minor child the love and affection she needs, the evidence also showed that defendant's emotional problems would result in inconsistency, unpredictability, and an inability to be as supportive as plaintiff, and thus provide her with the guidance she needs. Given the child's personal circumstances, the need for constancy in her

environment is essential. We believe the record evidence clearly establishes that plaintiff would be significantly more capable of providing that environment in the future. Thus, the evidence clearly preponderates against a conclusion that the parties have equal capacity to give the minor child guidance.

Plaintiff argues that the court erred in failing to consider factor (d). A trial court is required to consider each factor under MCL 722.23 and "explicitly state its findings and conclusions regarding each." *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). Here, the trial court did not specifically address factor (d); however, it did address factor (e). In *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996), our Supreme Court noted that factors (d) and (e) "are phrased somewhat awkwardly, and there is clearly a degree of overlap between them." *Id.* at 465 (footnote omitted). Further, the Court observed that "the focus of factor e is the child's prospects for a *stable* family environment." *Id.* (emphasis added). Given that a trial court need not "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued" or recite all evidence considered, *Fletcher*, *supra* at 883, it is possible that the court's cursory conclusion regarding permanence encompassed the issue of stability that is the focus of factor (d). In any event, given our decision to remand for reconsideration of factor (k), see discussion *infra*, we need not speculate further on the court's handling of factor (d). On remand, the court should specifically set forth its conclusions regarding each of the best interest factors, including factor (d). We see no error in the trial court's finding that the parties were equal under factor (e).

Plaintiff's assertion of error regarding factor (f) is that the court understated the extent of defendant's problems. Again, a trial court need not "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued." *Fletcher*, *supra* at 883. We find no error in the trial court's analysis of factor (h).

The trial court concluded under factor (k) that domestic violence was not a problem concerning the parties' daughter. The trial court's reasoning evidences two critical errors. First, defendant admitted that she struck *the children* with a belt, slapped *the children* in the face, and "flew off the handle" with *the children*. Defendant's admissions were not limited to the parties' minor son. But more importantly, the plain language of the statute states that it is irrelevant "whether the violence was directed against or witnessed by the child." MCL 722.23(k). Therefore, the trial court's focus on whether there had "been any problem in terms of domestic violence concerning" the parties' daughter constituted an incorrect application of law. An incorrect application of law is "legal error that the appellate court is bound to correct." *Fletcher*, *supra* at 881.

Plaintiff argues that the trial court incorrectly found a risk of harm to Bethany to be speculative under factor (l). This reading of the trial court's findings is, to some extent, correct, but we find the language employed to be ambiguous and direct that the court directly address this factor on remand.

Because we must remand for correction of the trial court's legal error regarding factor (k), it is unnecessary to determine whether the trial court's factual errors were harmless. The proper remedy is not reversal of the trial court's custody decision, as plaintiff requests. Instead,

we remand the case for reevaluation. On remand, the trial court should also consider up-to-date information including whether defendant has had mental health counseling.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Bill Schuette