STATE OF MICHIGAN

COURT OF APPEALS

SCOTT JAMES STADEL,

Plaintiff-Appellee,

v

JILL ELIZABETH STADEL,

Defendant-Appellant.

UNPUBLISHED
September 17, 2009

No. 290903
Genesee Circuit Court
Family Division
LC No. 07-278620-DM

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant Jill Stadel appeals as of right the judgment of divorce. Specifically, she contests the trial court's award of joint physical custody, with her and plaintiff Scott Stadel alternating custody of their children, Leah, born April 7, 1998, and Ethan, born July 24, 2001, on a weekly basis. Because the trial court's factual findings were not against the great weight of the evidence, because the award of joint physical custody was not an abuse of discretion, and because the trial court did not consider evidence outside the record, we affirm.

On appeal, defendant argues that the trial court's findings on best interests factors (c), (d), (e), (i), (j), (k), and (l) of the Child Custody Act, MCL 722.21 *et seq.*, are against the great weight of the evidence. On each of these seven factors, the trial court found the parties to be equal.[1] Defendant contends that, based on the erroneous findings, the trial court's award of joint physical custody was an abuse of discretion.

This Court applies three standards of review in child custody cases. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). First, we review the trial court's findings of fact, including the court's ultimate finding on a particular factor, under the great weight of the evidence standard, and we will affirm the findings unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889

[1] The trial court also found the parties to be equal on factors (a), (b), and (g), but defendant does not challenge the court's findings on those factors. The trial court found factors (f) and (h) to favor defendant.

(1994); *McIntosh*, *supra* at 474. We defer to the trial court's credibility determinations. *McIntosh*, *supra* at 474. Second, we review the trial court's legal conclusions for clear legal error. *Fletcher*, *supra* at 881. Third, we review the trial court's discretionary decisions, including the court's ultimate award of custody, for an abuse of discretion. *McIntosh*, *supra* at 475. In child custody cases, a trial court abuses its discretion when its chosen result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Shulick v Richards*, 273 Mich App 320, 324-325; 729 NW2d 533 (2006), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).[2]

In determining custody, the overriding concern is the child's best interests." *McIntosh*, *supra* at 475. The Child Custody Act sets for the criteria for determining a child's best interests:

> (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.

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[2] Defendant argues that this Court in *Shulick*, *supra*, erred in concluding that the "palpable" abuse of discretion standard, rather than the "principled outcomes" standard, see *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), applied in child custody cases. However, *Shulick* is binding precedent under the rule of stare decisis, and we are required to follow it. MCR 7.215(C)(2), (J)(1).

> (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. [MCL 722.23.]

A trial court must consider, evaluate, and determine each of the factors contained in MCL 722.23 in determining a child's best interests. *Sinicropi v Mazurek*, 273 Mich App 149, 182; 729 NW2d 256 (2006). However, "[a] court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Id*. at 184.

Regarding factor (c), the trial court determined that "[plaintiff] may be immediately better equipped as a provider; however, [defendant] has untapped potential that can serve the children's needs. The Court finds the factor equal." Defendant argues that while plaintiff does have a substantial income, he failed to provide funds for the family's groceries throughout the marriage, instead leaving it to her parents, the Pittmans, to buy the groceries. Defendant further asserts that she was the one who took the children to their doctor appointments, sought out mental health treatment for Ethan and attended his therapy sessions, and attended the children's parent teacher conferences.

"Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity and disposition* to provide for the children's material and medical needs. Thus, this factor looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) (emphasis in original). There is no dispute that the Pittmans bought groceries, clothing, and other items for the children during the parties' marriage. Nonetheless, plaintiff is capable of providing for the children's material needs because he has a stable job as a network engineer consultant at Hurley Hospital, where he has been employed since 2000. In addition, plaintiff had attended 10 to 15 of Ethan's approximately 30 sessions with Dr. Recco Richardson, had taken Ethan to school during the time period when Ethan was having "meltdowns" when being dropped off, had attended parent teacher conferences, and was communicating with Ethan's teacher over e-mail.

Indeed, there was abundant evidence that both parents were active in caring for the children. Richardson testified that "both parents have been exceptional in following up on various recommendations, securing services for [Ethan], working with him in the home" and that "both parents have put forth a lot of effort to keep him stable, to ensure him that he's loved and to meet his needs." Dr. Harold Sommerschield, Ethan's psychologist, similarly stated that both parents were "very cooperative" in bringing the children in and neither voiced objections to the tests he performed on Ethan. The evidence does not clearly preponderate against the trial court's finding that the parties were equal on factor (c).

Regarding factor (d), the trial court found that "[t]he stability these children are entitled to has been elusive based on the angst between the parents. Both parents share responsibility.

Continuity will be achieved with the cooperative implementation of the court's ruling. The Court finds this factor equal." Regarding factor (e), the court concluded that plaintiff's "home situation appears to be a work in progress, but does not work against permanency and security. [Defendant's] home is secure and stable. The Court finds this factor equal." Defendant argues that the fact that plaintiff's girlfriend, tenant, and the tenant's girlfriend are in and out of the house preponderates against stability. Defendant further argues that plaintiff's on-call work schedule and exercise routines take him away from home. Defendant concludes that because the children spent a lot of time at the Pittmans' home before the dissolution of the marriage, it would be a natural transition for the children to make this home their residence.

"[T]here clearly is a degree of overlap between" factors (d) and (e). *Ireland v Smith*, 451 Mich 457, 464-465; 547 NW2d 686 (1996). "Factor d calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ('the desirability of maintaining continuity'). Taken literally, factor e appears to direct an inquiry into the extent to which a 'home' will serve as a permanent 'family unit.'" *Id.* at 465 n 8. The Court in *Ireland* further elaborated on factor (d), explaining, "[t]he stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions. Of course, every situation needs to be examined individually." *Id.* at 465 n 9.

Here, plaintiff had a tenant and the tenant's girlfriend living in his house, which was the marital home, but they had moved out by the end of January 2008. Plaintiff also maintained a relationship with Martina Brown, and while she spent "[a]lmost every night" at his house, Brown did have her own apartment.[3] It is also true, as defendant asserts, that the children often spent time at the Pittmans' home during the marriage. In fact, Webster Pittman testified that the children came to the house every day and he and his wife provided child care services four days a week. However, defendant testified that she hoped to rent a house after the divorce was final. Similarly, plaintiff had his house listed for sale. The fact that it was possible that defendant would someday obtain employment as a nurse and move out of her parents' home while plaintiff might remarry equally affects the stability and permanence of the homes. The evidence for stability and permanence did not clearly preponderate against the trial court's finding that the parties were equal on factors (d) and (e).[4]

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[3] At a post-trial hearing, it was indicated that plaintiff and Brown planned to marry soon after the judgment of divorce was entered.

[4] In her arguments regarding factors (d) and (e), defendant criticizes plaintiff's work schedule; however, the trial court concluded that even though "plaintiff may receive trouble calls at home, he is rarely required to go into work after hours. The testimony of the parties demonstrates an ability, in fact, a history, of dealing with this infrequent occurrence." This conclusion is supported by plaintiff's testimony, as well as that of his supervisor, that he has flexibility in determining his primary on-call schedule and rarely has to be physically on site when he does get a call.

Regarding factor (i), the trial court found that "Ethan wants more time with [plaintiff], but Ethan lacks the maturity for his preference to be given much weight by the Court. Leah wants less time with [plaintiff], but for reasons that are easily remedied: fewer chores, more latitude on bedtime, and a television in her room at [plaintiff's house]. The Court finds this factor equal." Defendant argues that factor (i) favors her because Leah gets headaches and stomachaches before she goes to plaintiff's house, she does not like Brown, and she told both the trial court and Dr. Sommerschield that she did not want to have overnights at plaintiff's house. Although defendant states that Ethan is too young to express a preference, she claims that the record reflects that he prefers her company and does not like Brown.

Leah informed both the trial court and Dr. Sommerschield that she did not want more overnights at plaintiff's house. She told the trial court that she was "not crazy" about spending nights at plaintiff's house and that she wished to see plaintiff more during the day. Similarly, she told Dr. Sommerschield that she wants to spend time with plaintiff, but she wanted the custody arrangement to remain as it was.[5] Ethan told the trial court that he wanted to spend more time with plaintiff.[6] Dr. Sommerschield testified that Ethan reported to him that he (Ethan) told the trial court that he wanted to live with plaintiff. Because the children expressed a different preference, the trial court's finding that the parties were equal on factor (i) was not against the great weight of the evidence.

Regarding factor (j), the trial court concluded, "[t]hese people do not like each other. Both parents need to stop complaining about the other in front of their very astute children. However, two therapists and a teacher acknowledge the level of cooperation provided by each parent for the benefit of their children. The Court finds this factor equal." Defendant argues that this factor favors her because plaintiff and his family speak negatively about her in the presence of the children and because plaintiff, in front of the children, stated that Scott Peterson was his hero.

Defendant testified to one incident, told to her by Leah, that plaintiff's family members mocked defendant for being fat, stupid, and unemployed. Moreover, Leah informed the trial court that her dad occasionally makes remarks about defendant. Most disturbingly, plaintiff admitted to saying that Scott Peterson was his hero in front of Leah.[7] However, as the trial court noted, and as discussed above in conjunction with factor (c), testimony from Dr. Richardson and

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[5] A temporary custody order entered before trial provided for shared parenting time, and if the parties could not reach an agreement, the order provided that plaintiff would have parenting time on alternating weekends and every Wednesday night.

[6] Although the trial court stated that Ethan lacked maturity for his preference to be given much weight, Ethan, who was seven years old when he spoke with the trial court, was not too young to express a preference. See *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991) ("Children of six, and definitely of nine, years of age are old enough to have their preferences given some weight in a custody dispute . . . .").

[7] Defendant claimed that he made the remark when Scott Peterson was in the news and that he was just trying to be funny.

Dr. Sommerschield indicated that the parties are capable of working together for the sake of the children. Therefore, the evidence does not clearly preponderate against the trial court's finding that the parties were equal as to factor (j).

Regarding factor (k), the trial court found that "[n]o objective evidence was presented regarding this factor. The incidents mentioned at trial, Mother hit with a ball and Father slapped in the face, were without malice and did not result in an injury. The acts may show a lack of mutual respect, but to suggest a violent intent works against credibility. The Court finds this factor equal." Defendant points out that it was plaintiff who slapped her in the face when she was tickling him. Defendant contends that plaintiff's claims that the ball incident was an accident must be considered in light of his other behavior, such as disparaging her in the children's presence and stating that Scott Peterson was his hero, and the fact that the children became upset and asked why plaintiff hit defendant with the ball.

Plaintiff admitted that he hit defendant in the head with a ball while throwing balls, which he claimed were "little Nerf basketballs," around with the children. He claimed, however, that it was "an accident" and that he "didn't mean to hit" defendant. Although defendant claims otherwise, the trial court found that plaintiff acted "without malice" and with no "violent intent," and we defer to the trial court's credibility determinations. *McIntosh*, *supra* at 474. As pointed out by defendant, the trial court wrongly stated that defendant slapped plaintiff. Rather, defendant testified that plaintiff slapped her after she began tickling him and he got upset.[8] However, given that defendant testified to no other acts of violence by plaintiff, the evidence does not clearly preponderate against the trial court's finding that the parties were equal as to factor (k).

Regarding factor (l), the trial court concluded: "The theme at trial suggested a low- to mid-level of mutual parental alienation. The children need to spend appreciable time with both parents in order for them to maintain their love and affection for both parents. The Court finds this factor equal." Defendant argues that there was no evidence that she attempted to alienate the children from plaintiff, but by contrast, plaintiff repeatedly disparaged her in the children's presence. Defendant points to Dr. Sommerschield's recommendation that the current schedule not be changed until Ethan was ready and his suggestion that the parties talk to Leah and work out differences so that she would want to go to her father's house.

The trial court did not specifically reference any other evidence in its statement related to factor (l). It did, however, give its general impression of the entire case in the opening paragraphs of its written opinion and order:

> So much time was expended in a "B" movie-like format in an attempt to persuade the Court as to who was the real low-life in the marriage. The tact was not outcome-determinative and was otherwise a colossal waste of money and emotional energy.

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[8] Defense counsel did not question plaintiff regarding the tickling incident.

> Father left the marriage for another woman. Regardless of the rearview mirror justifications, the children have been exposed to Father's new lifestyle with the live-in girlfriend. To his credit, Father did not attempt to minimize his actions or for that matter even remotely offer an apology. It could reasonably be concluded that Father lacks insight into the dynamics of the situation he created.
>
> Mother was characterized as a difficult person whose temperament does not improve after ingesting alcohol. Mother was said to be controlling and manipulative. Father would have the Court believe that Mother would prefer to live a life of leisure and continue to accept the largess of her generous parents.
>
> Both of the parties have lost objectivity when it comes to their mate. The parties' most glaring failure centers on their inability to stop beating up on each other long enough to appreciate the fact that their children have become the walking wounded in this conflict.

Thus, it is clear that the trial court heard all of the testimony and allegations by the parties. The trial court's finding that the parties were equal as to factor (l) was not against the great weight of the evidence.

Rather than make a judgment regarding which parent was a better human being, the trial court determined that the children would be better off maintaining an equal relationship with both, and that this would provide the stability recommended by the doctors. Therefore, the trial court awarded joint custody. We defer to the trial court's determinations of credibility and, as discussed above, the findings for the best interests factor were not against the great weight of the evidence. The trial court did not abuse its discretion in awarding joint custody.

Defendant next argues that the trial court based its custody decision on evidence outside the record by considering the demeanor of the parties "on and off the witness stand." In its opinion and order, before analyzing the best interest factors, the trial court wrote:

> Through the testimony offered during trial along with the court's assessment of the parties on and off the witness stand, the following conclusions become apparent: Mother knows how to be overbearing, inflexible and unreasonable. Father can be immature, arrogant, and downright thoughtless. In other words, both of these people are human.

We disagree with defendant that the trial court relied on matters outside the record.

Defendant relies on a criminal case, concerned with confrontation rights, which states that in a bench trial, "[t]he judge may not go outside the record in determining guilt. When the factfinder relies on extraneous evidence, the defendant is denied his constitutional right to confront all the witnesses against him and to get all the evidence on the record." *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991) (internal citation omitted). Regarding the specific facts in *Simon,* the Court observed:

> [T]he trial court convicted defendant based in part on specialized knowledge not in evidence. He specifically stated that, because of what he had learned about drug raids while a prosecutor, he found defendant's story of what occurred when

> the police entered the house impossible. The judge, in effect, served as an expert witness against defendant, thus depriving defendant of his right to confrontation and cross-examination. [*Id*. at 568.]

Nothing of the sort happened in this case. The trial court did not rely on specialized knowledge; it simply stated that during trial it observed the parties "on and off the witness stand." The trial court was not prohibited from considering demeanor evidence; in fact, such evidence is deemed "important." *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). Defendant presents no argument that the trial court was not allowed to consider the parties' demeanor over the course of trial. Accordingly, defendant's argument that the trial court considered evidence outside the record is unavailing.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra