STATE OF MICHIGAN

COURT OF APPEALS

ROBERT GREER, Plaintiff-Appellant,	UNPUBLISHED April 20, 2010
v	No. 293817 Wayne Circuit Court Family Division
CHARMAINE GREER, Defendant-Appellee.	LC No. 06-605226-DM

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for a modification of custody in this post-judgment action. We affirm.

Plaintiff and defendant are the parents of two minor children who are the subjects of this custody dispute.[1] The parties were married on June 16, 2001, and were granted a consent judgment of divorce on April 4, 2007. The minor children lived with both parties, until they separated in 2005. The children resided with defendant until July 2006 when, during the pendency of the divorce proceedings, defendant was arrested and charged with domestic violence, assault and robbery pertaining to an incident involving plaintiff and his girlfriend. Following this incident, plaintiff was granted temporary physical custody of the minor children. In anticipation of defendant's incarceration as a result of this incident, the consent judgment of divorce awarded plaintiff temporary legal custody of the minor children with defendant to have parenting time. In accordance with the consent judgment, defendant was instructed to petition the trial court for the reinstatement of joint legal custody and additional parenting time following the conclusion of her jail sentence and on demonstration of her compliance with any probation requirements. Although defendant was sentenced on January 16, 2007, to serve one year in jail with work release, she was required to serve only nine days in jail and was released on a tether. Reportedly, defendant has complied with her probation requirements.

[1] Both parties also have minor children from previous relationships.

Despite the fact that defendant did not remain incarcerated for the length of time anticipated and was available, plaintiff denied her parenting time with the minor children. Although the parties entered into a consent order on June 28, 2007, detailing defendant's parenting time with the minor children, plaintiff was later found in contempt by the trial court for his failure to cooperate and ongoing violation of the parenting time schedule. Defendant subsequently filed a motion for change of custody, seeking to obtain joint legal and physical custody of the minor children. On March 19, 2008, the trial court determined that proper cause and a sufficient change in circumstances existed to conduct an evidentiary hearing on the issue of custody. In essence, the trial court determined that defendant's compliance with the terms of her probation in conjunction with the "ongoing conflict between the parents . . . and the apparent interference . . . regarding mother exercising any parenting time with the children, and the impact that such conflict was having on the minor children" necessitated a review of the existing custody arrangement.

Finding the existence of an established custodial environment with plaintiff, the trial court properly applied a clear and convincing evidence standard in determining whether an alteration in custody was in the best interests of the children. In evaluating the best interest factors, the trial court found that the parties were equal on seven of the 12 factors.[2] Plaintiff was favored on factors (d) [time child has lived in a stable environment] and (f) [moral fitness of the parties]. Defendant was also favored on two factors: (c) [capacity to provide for material needs of child] and (j) [willingness to cooperate and foster relationship]. Although the trial court met, in camera, with both minor children, only the older child was determined to be of sufficient age to express a reasonable preference.[3] Following its analysis of the best interest factors, the trial court concluded that custody would be modified so that plaintiff and defendant would have joint legal and physical custody of the minor children and a parenting schedule was delineated. This appeal ensued.

Child custody disputes are governed by MCL 722.21 *et seq.* "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). In *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), this Court delineated the three standards of review that are applicable in child custody proceedings:

> 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. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of

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[2] MCL 722.23(a), (b), (e), (g), (h), (k), and (l).

[3] The trial court indicated that it considered the preference of the minor child but did not disclose its discussions with the children, pursuant to MCL 722.23(i).

> law are reviewed for clear legal error when it incorrectly chooses, interprets, or applies the law. [(Citations omitted).]

Evidentiary issues are also reviewed for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005).

On appeal, plaintiff first takes issue with the trial court's decision to preclude evidence pertaining to defendant's criminal history. Specifically, plaintiff contends the trial court erred when it purportedly refused to consider her 2006 arrest and incidents that occurred in excess of ten years before entry of the judgment of divorce, before the parties were married or the children were born. Contrary to plaintiff's contentions, it is obvious that the trial court did consider defendant's most recent incident in the evaluation of the best interest factors as it is repeatedly referenced in the trial court's ruling. Part of the confusion may stem from a misunderstanding regarding what may be considered in evaluating the best interest factors when compared to evidence admissible in the determination of whether a change of circumstances has occurred. Specifically:

> [I]n order to establish a "change of circumstances," a movant must prove that, *since the entry of the last custody order*, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed. [*Brausch v Brasuch*, 283 Mich App 339, 355-356; 770 NW2d 77 (2009), citing *Vodvarka v Grasmeyer*, 259 Mich App 499, 512-514; 675 NW2d 847 (2003) (emphasis added).]

Hence, in the circumstances of this case, the trial court would properly exclude evidence of the 2006 criminal incident in determining whether a change of circumstances existed, as this did not occur subsequent to the custody order contained in the judgment of divorce. With regard to the incidents alleged to have occurred more than ten years previously they are of questionable relevance having taken place before the marriage and the birth of the minor children, and, as recognized by the trial court, are clearly precluded in accordance with MRE 609(c) from consideration either with regard to the demonstration of a change of circumstances and in evaluating the best interest factors. As such, we find the trial court did not abuse its discretion in limiting the admission of such evidence.

Next, plaintiff contends that the trial court's findings on the best interest factors comprising MCL 722.23(b) [capacity for love and guidance], (c) [capacity to provide child with material needs], (f) [moral fitness], and (h) [home, school and community record] were against the great weight of the evidence. Inexplicably, plaintiff contests the trial court's finding on factor (f), even though the trial court found that plaintiff was favored on this factor. It appears to this Court that plaintiff is confusing two separate concepts as plaintiff cannot seriously be contesting the trial court's favorable determination on factor (f). In effect, plaintiff confuses great weight of the evidence, which determines whether a party is favored or deemed equivalent on a particular factor with the weight attributable by a trial court in the evaluation of the importance of certain factors in the overall determination of a child's best interests. Specifically, plaintiff seems to misconstrue the well-recognized precept that "the statutory best interest factors need *not* be given equal weight." *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998) (emphasis in original). And further, that "[n]either the circuit court nor this Court is required to 'mathematically assess equal weight to each of the statutory factors' . . . . Nor does a

finding regarding one factor necessarily countervail the findings regarding the other factors." *Pierron v Pierron*, 282 Mich App 222, 261; 765 NW2d 345 (2009) (citations omitted). In other words, the degree to which an individual is favored on a particular factor is irrelevant in the broader scheme of how that factor is weighed when it is evaluated in conjunction with the remaining best interest factors to be considered.

Of the remaining three factors challenged, the parties were deemed equivalent on factors (b) and (h), with defendant favored on factor (c). Factor (b) pertains to "[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). In finding the parties equal on this factor, the trial court noted that plaintiff and defendant report having a religious membership, but neither routinely attends religious services. Both parties were noted to "have had contact[] with law enforcement," but that defendant "does have a criminal record." Although Child Protective Services had contact with this family, no allegations of abuse of neglect had been substantiated with regard to either parent. The trial court noted that plaintiff admitted to the use of physical discipline. The trial court's ruling on this factor is not against the great weight of the evidence. Before the criminal incident in 2006, plaintiff and defendant were both involved in the raising and care of these children. Notably, plaintiff does not contest the trial court's finding of equivalence on factor (a) indicating both parents regarding the existence of "love, affection, and other emotional ties" between the parties and their children. As such, it appears that plaintiff's contention is with the trial court's determination that defendant is equal to plaintiff in the ability to provide the children with guidance. Impliedly, plaintiff contests defendant's ability to provide guidance to the children because her criminal conviction does not make her a role model. However, as noted by the trial court, neither party is without their faults or failings having made questionable behavioral choices under certain circumstances. This does not however necessitate a leap in logic that either party is incapable of learning from their mistakes and providing guidance to their children to avoid engaging in similar behaviors. Plaintiff further alleges that defendant fails to discipline the minor children when they are in her care and, instead, phones defendant for assistance or returns the children to his custody. Contrary to plaintiff's argument, this does not necessarily indicate an inability to provide guidance but rather recognition by defendant of a need for consistency and continuity in discipline. We would also note the trial court's factual finding that plaintiff had actively worked to undermine defendant's relationship with the children and, thus, the need for defendant to effectively re-establish herself as an authority figure with the minor children. As such, we cannot find the trial court's determination of equivalence on this factor to be against the great weight of the evidence.

Plaintiff also contests the trial court's determination favoring defendant on factor (c), "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . and other material needs." MCL 722.23(c). In favoring defendant on this factor, the trial court observed her "steady full-time employment" and plaintiff's election to work on a part-time basis. Both parties were recognized as providing insurance for the minor children though their respective employments. The trial court's findings are consistent with the evidence that defendant had a history of full-time employment, with the same employer compared to plaintiff who elected to work a reduced schedule and was reliant, to some degree, on his receipt of child support and his fiancée to provide for the minor children.

Hence, the trial court's determination on this factor was not against the great weight of the evidence.

Factor (h) encompasses "[t]he home, school, and community record of the child." In finding the parties equal, the trial court focused on the evidence showing that both children had good academic records and were involved in extracurricular activities and that there were no "significant concerns regarding the children's behavior at this time." Plaintiff contends he should have been favored on this factor as he attributes the children's success in school solely to his efforts and involvement. While not specifically noted by the trial court, evidence existed to demonstrate that the children did not demonstrate any particular difficulties before the divorce when they resided with either both parents or were in defendant's care. In addition, there was testimony that plaintiff actively sought to preclude defendant from involvement in the children's education. Once defendant was provided the opportunity to become re-engaged, there have been no significant problems or concerns with their school behavior or academic performance. Nor was there any evidence that defendant sought to interfere or, in any manner, disrupt, the children's attendance at school or involvement in extracurricular activities. Although plaintiff suggests that the trial court erred in failing to acknowledge certain evidence pertaining to his involvement in the schools and its positive impact on the children in evaluating this factor, we note that the court was not required to "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued." *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981). Consequently, we determine that the evidence adequately supported the trial court's findings on this factor.

Plaintiff further contends that the trial court abused its discretion in finding that clear and convincing evidence existed to modify custody. Specifically, MCL 722.28 states:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

"An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006) (citations omitted). In addition, MCL 722.27(c) provides, in pertinent part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. 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.

Having determined that the trial court's factual findings were not against the great weight of the evidence we also find that the trial court did not abuse its discretion in modifying custody. In this instance, the trial court found the parties equal on seven of the 12 best interest factors.

Each party was favored on two of the factors and the oldest child's reasonable preference was taken into consideration by the trial court. The trial court found the existence of additional siblings in both homes to be a relevant factor in determining custody, indicating that the minor children "should be able to enjoy regular sibling time with their step-sibling." While this factor[4] did not favor any party, it was deemed "a consideration for this Court in regards to parenting time."

Clearly, of significant importance to the trial court in weighing the best interests of the minor children was factor (j), which comprises "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 party." Reviewing the history of these parties, the trial court noted that defendant had provided "liberal access" of the minor children to plaintiff when they were originally in her custody. However, citing the history of interaction following the award of physical custody to plaintiff and the necessity of a show cause hearing resulting in finding plaintiff in contempt of court for repeated violation of parenting time orders, the trial court emphasized that plaintiff was found to have "demonstrated a clear pattern of denying parenting time . . . despite the negative impact that this has on the children." In addition, the trial court observed that plaintiff had "continued to interfere" with defendant's parenting time with the minor children through scheduling their participation in various activities and camps during defendant's "scheduled weekends" without consultation or agreement beforehand. The trial court also determined that plaintiff was unwilling to promote the relationship between defendant and the minor children by systematically denying her access to educational and health information and appointments or activities, precluding her participation in meaningful aspects of the children's lives. As such, the trial court ruled that this factor strongly favored defendant and would be given "significant weight" in the overall balancing of the best interest factors in evaluating the modification of custody.

A review of the trial court's opinion provides no indication that the decision to award joint physical and legal custody would constitute an abuse of discretion. In delineating its reasoning on each of the best interest factors, the trial court provided facts and evidence pertaining to the history of the parties and from the evidentiary hearing, which served as a credible basis for the trial court's ultimate determination. While plaintiff may not agree with the trial court's findings, it is apparent that the decision to award joint custody was based on clear and convincing evidence demonstrating that the change in custody would facilitate an ongoing relationship between the children and both parents and was in the best interests of the minor children. Therefore, the trial court's ruling did not constitute an abuse of discretion.

Plaintiff further takes issue with the trial court's purported failure to consider the inability of the parties to cooperate in granting joint legal custody. An award of joint custody is, in part, determined by MCL 722.26a. Specifically, after having decided whether joint custody is in a child's best interest, a trial court is required to consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child."

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[4] MCL 722.23(l).

MCL 722.26a(1)(b). Contrary to plaintiff's assertions, the trial court's ruling demonstrated that it took into consideration the historical problems involving these parties in communicating and cooperating with one another. This Court has previously indicated in *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982) (citations omitted):

> 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. 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. The establishment of the right to custody in one parent does not constitute a determination of the unfitness of the noncustodial parent but is rather the result of the court's considered evaluation of several diverse factors relevant to the best interests of the children.

In this instance, the trial court specifically found that defendant was cooperative with regard to sharing time with the minor children. Clearly, the trial court determined that to overcome plaintiff's reticence and active undermining of defendant, it was necessary to establish a joint custody arrangement to afford defendant an equal say in major decisions pertaining to the lives of the minor children and assure her involvement.

Further, the ability of the parties to cooperate does not comprise the sole factor guiding a trial court's determination regarding the propriety of an award of joint custody. *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987). In awarding joint custody, the act of cooperation focuses on the ability of the parties to "agree on basic child-rearing issues." *Id.* While there obviously exists a great deal of residual animosity between the parties and reluctance on plaintiff's part to include defendant in the children's lives, there was no evidence presented to indicate that the parties had demonstrated any major disagreements regarding religious, educational or medical decisions for the minor children. In this instance, the trial court very clearly articulated its concerns and observations regarding the respective abilities of the parties to cooperate and instructed them accordingly.

Finally, plaintiff contends that the parenting time schedule delineated by the trial court was not in the best interests of the children. Defendant has also voiced concerns regarding the schedule, but has indicated a willingness to follow the trial court's instruction. However, both parties fail to recognize that the parenting time schedule delineated by the trial court was not set in stone by the trial court indicating, "[t]he parties may also agree to any other parenting time not set forth by this court." As such, the development of a new and more efficacious schedule is within the control of the parties and presents a perfect opportunity to demonstrate their willingness to cooperate for the best interests of their children.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder