STATE OF MICHIGAN

COURT OF APPEALS

DONALD W. TALLENT

Plaintiff-Appellant,

v

CAROLYN LOUISE ROSS,

Defendant-Appellee.

UNPUBLISHED
July 23, 1996

No. 188446
LC No. 94-427217 DC

Before: White, P.J., and Smolenski, and R.R. Lamb,* JJ.

PER CURIAM.

This is a child custody dispute. Plaintiff appeals the circuit court's order, following a bench trial, denying his complaint for change of custody, arguing that the court's findings were against the great weight of the evidence and that the court abused its discretion in awarding physical custody of the parties' minor son to defendant. We reverse.

In their junior year of high school, plaintiff and defendant had a child, David, who was born on July 12, 1982. When David was about three months old, the parties began living together. They both dropped out of school. Plaintiff obtained employment to support the family. At one point, in 1984, the parties planned to marry, but never did. Around the time plaintiff turned eighteen, he became a mechanic and secured employment in that field. The parties lived together for about eight years. The relationship between the parties deteriorated in their last few years living together, and they constantly argued. Because of strife, plaintiff moved out in early 1990, when David was almost eight years old. Plaintiff provided most of the financial support while the family was together, although defendant was collecting ADC and food stamps. During the years he lived with defendant and David, and thereafter, plaintiff paid $8.00 a week in child support through the Friend of the Court, pursuant to an order which was never modified. Plaintiff also paid for David's clothes and food, and gave additional money to defendant. After moving out, plaintiff continued to pay for David's clothes, food, sporting equipment, all school materials, David's summer and extra-curricular activities, and anything David needed. In

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* Circuit judge, sitting on the Court of Appeals by assignment.

addition, David is on plaintiff's medical insurance. Plaintiff also continued giving defendant money until he filed suit in September 1994.

Until around 1993, defendant allowed plaintiff as much visitation as plaintiff wanted, and plaintiff saw David two to three nights a week and on Sundays. Around 1993, about the time that plaintiff's serious involvement with another woman became apparent, defendant began frustrating or denying visitation. Defendant had great difficulty adjusting to and coping with plaintiff's new relationship, and exhibited increasing hostility toward plaintiff. The problems with visitation resulted in plaintiff's retaining a lawyer and, eventually, in the entry of a stipulated visitation order on April 28, 1994,[1] which specified that plaintiff was to have custody of David every other weekend, Wednesday evenings, every other holiday, and from July 17 until September 3 each summer, with defendant having visitation during the summer every other weekend. Defendant abided by this order.

After David spent six weeks with plaintiff in the summer of 1994, and perhaps before, David began expressing to both parents that he wanted to live with plaintiff. Plaintiff petitioned the court for physical custody in September 1994. Plaintiff married Rebecca Tallent,[2] in December 1994.

A three-day bench trial took place in June 1995, several weeks before David would be thirteen years old.

The trial court denied plaintiff's request for custody. After summarizing its factual findings the court stated:

> Now the child has been in a custodial environment with his mother since his birth and has always been living with his mother as the custodial parent. So the Court would find that there was a custodial environment established. The mother only lived in a couple of locations basically during the time of the child's life and now is out in Clinton Township next to her parents.
>
> There being a custodial environment, an existing custodial environment, the petitioner Mr. Tallent has the burden of proof of clear and convincing evidence that it would be in the best interest of the child to change that custodial environment from his mother to his father.

The court then summarized the opinions given by the two experts, Dr. Barbara Fisher, a Ph.D. in clinical psychology, with masters degrees in developmental psychology, and school and community psychology, who testified for plaintiff, and Ms. Mary Gibson, ACSW, a social worker employed with the Family Counseling Mediation Division of the Friend of the Court. As to Dr. Fisher, the court stated:

> Dr. Barbara Fisher . . . testified that in her opinion that it would be in the best interest of the child to change custody to the father. She testified that it was a very clear case, one of the clearest cases she has ever seen in determining custody and she also testified that if there was a contrary opinion, that it would not change her opinion.

> Much of her testimony emphasized the fact that David expressed such a strong desire to live with his father. That was clear from even her testimony going down the factors under the Child Custody Act and testifying as to her opinion as to each factor. In her opinion the primary basis as to almost every factor related back to David's desire to live with his father and the relationship between David and his father.

As to Ms. Gibson, the court stated:

> . . . it was her opinion that it would be in the best interest of the child to remain with the mother and that the mother have physical custody with broad visitation with the father. It would seem that the basis of her opinion is that there was an established custodial environment and that it would take clear and convincing evidence to over come [sic] that custodial environment to change custody to the father. Now she may not have used the words "clear and convincing" but she used as the basis of her reasoning that there was no real definite reason to change custody from the mother.

The court articulated its findings under each of the statutory factors for determining the best interests of the child.[3] The court determined that factors d and l favored defendant. The court ruled that factor i, the child's preference, favored plaintiff, but assigned this minimal value. The court found the parties were equal as to eight factors a, b, c, e, f, g, h, and j, and found factor k inapplicable. The court concluded that there was not clear and convincing evidence that the custodial environment should be changed:

> I have to find that there is clear and convincing evidence that the custodial environment should be changed. Sure, maybe the mother yells at the child more, doesn't give him the space that the father gives him. He's twelve years old. He went to live with his father and that was a lot of fun, a great place to live. No one yells at him and they gave him his space. So he would like to live there.
>
> Dr. Fisher seemed to base her whole decision almost on the desirability of the son to live there. That was the basis of her whole decision. But, I don't feel that a Court should be governed by what looks good at this time to the child. I don't see any clear and convincing evidence that the custodial environment should be changed.
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> I do see some necessity at this time to have some intervention in this relationship between Ms. Ross and her son and also Ms. Ross and Mr. Tallent. I think part of this animosity has, as Mr. Ihrie [defense counsel] said, toward the son, and I don't want to use the word animosity, but some of the conflict between David and Ms. Ross stems back to the conflict between Ms. Ross and Mr. Tallent and it comes to a time where she has to put Mr. Tallent behind her, move on with her life, realize that her primary interest is now her son David and that's the most important thing for her to concentrate on and Mr. Tallent also has to maintain that relationship with his son because, as Ms.

> Gibson said, it takes all types to be a parent and you can't have both of them being the same. You're never going to have two parents being the same. Each one has a different style. And that relationship has to be maintained with Mr. Tallent as well as with Ms. Ross and Ms. Ross has to, as I said, have some psychological intervention to develop that relationship between herself and son and herself and Mr. Tallent. But I don't imply that that relationship is such between Ms. Ross and her son that that constitutes clear and convincing evidence that the custody should be changed on the basis of the established custodial environment.

The court ordered that the parties and David participate in therapy and referred the matter to the Friend of the Court for a financial investigation and recommendation as to child support and medical coverage. It ordered that plaintiff "have free and liberal visitation" as follows: alternate weekends, each Wednesday evening, each Sunday plaintiff does not have weekend visitation, half of Easter and Christmas vacations, six weeks in the summer, and alternate holidays. This appeal ensued.[4]

I

Plaintiff challenges the trial court's findings on all the statutory factors except e and k. We review findings of fact in a custody dispute under the against the great weight of the evidence standard; discretionary rulings are reviewed for abuse of discretion, and questions of law for clear legal error. *Ireland v Smith*, ___ Mich __; ___ NW2d ___ (Docket Nos. 104950, 104951, issued May 21, 1996 p 7 n6, citing *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). A trial court's findings on each of the statutory factors should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher*, 447 Mich at 879. Where an established custodial environment exists, custody may not be changed unless there is clear and convincing evidence. *Ireland*, *supra* at 5, n 3. A finding of equality or near equality on the statutory factors will not necessarily prevent a party from satisfying the burden of proof by clear and convincing evidence on a motion to modify custody. *Heid v AAA Sulewski (After Remand)*, 209 Mich App 587, 593-595; 532 NW2d 205 (1995). In any custody dispute, our overriding concern and the overwhelmingly predominant factor is the welfare of the child. *Id.* at 595.

The trial court analyzed plaintiff's request for change of custody within the proper legal framework. It correctly determined that there was an established custodial environment with defendant and that there must be clear and convincing evidence to support a change of custody. However, we agree with plaintiff that the trial court's determinations on factors b, f, g, h, j, and l were against the great weight of the evidence.

The trial court stated as to factor 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:

> The father says he helps the child with homework. The child says his father will help him with homework. The mother testified that the child does not have homework. I think that this is not an unusual situation and David almost admitted as much, that on occasion he would tell his mother he doesn't have any homework when they do have homework. He forgets, leaves books at school, wouldn't bring the things home and there would just be the attitude that he wasn't going to do some of the homework. Again, I think that homework issue is because of the fact that he wishes to please his father.
>
> There does not seem to be any particular religious factors in these parties' lives. So it does not outweigh one way or the other. Maybe the father would have the advantage in giving a certain amount of direction at this time of life of the child, although again, both have love and affection for each other.

Our discussion of this factor overlaps to some extent with factor h, the home, school, and community record of the child, discussed *infra*.

Defendant testified at trial that David was a disciplinary problem, that David acted up, stole from her, hid and stole food, lied to her, and urinated in a cup in his bedroom. On cross-examination, defendant agreed that David disobeys her the majority of the time. Defendant testified that these behavioral problems were the reasons that she took David to a therapist (one time in December 1994). However, contrary to the therapist's advice, defendant never took David back.[5] Defendant testified that the Friday prior to the trial, David had called her a "wench," and that he had also called her a "bitch" under his breath.

In contrast, there was no evidence contradicting the testimony of plaintiff, his wife, his mother, and Dr. Fisher, that David responds well to his father's discipline and that they communicate well. Dr. Fisher noted the marked difference in David's demeanor and behavior when he was with his father, as compared to his mother. Dr. Fisher testified that when she interviewed the parties and David together, David and defendant immediately got into an argument, while at the interview with David and plaintiff, there was "an extreme difference of tension," that David became observably more relaxed and had a smile on his face. Dr. Fisher testified that David responded to his father's discipline and that there were strict rules in the Tallent home. Plaintiff and his wife both testified David is not a disciplinary problem when with them.

The record also indicates as to defendant's capacity and disposition to provide guidance, that during the first three years after plaintiff moved out and defendant was handling David's school performance, when David was in the third, fourth and fifth grades, his grades were very low. There was unanimity at trial that David is very intelligent and capable of high academic performance. The record also supports plaintiff's testimony that when he became involved in helping David with homework in the sixth grade, David's grades improved drastically. David's final grades in the sixth grade were B+, B+, B, B, A- and B-. In contrast, in the 1990-1991 school year, third grade, his grades were C, B-, B-,

D+, D-, D+, and D.[6] For fourth grade, the 1991-1992 school year, David's final grades were C+, C-, C+, C-, D, B, and D+.[7] For fifth grade, David's final grades were C+, C-, C, D-, D, and B+.[8]

Plaintiff testified that when he became involved with David's school performance, he spoke to David's teachers and devised systems with incentives for David to improve. Plaintiff testified that he spoke with defendant numerous times about David's homework, and that the teachers always sent notes home if homework was not done. At trial, defendant agreed that David had failed to complete homework assignments. She denied that she, in contrast to plaintiff, did not help David with homework, but then added that David denies he ever has any homework. On cross-examination, defendant testified that she found out "through the courts" that David takes his homework to his father's to do it. She conceded that she never contacted David's teachers regarding the homework assignments, and that when David got a D- in Social Studies, she did not think he was having a problem, and did not contact the school to discuss it. Dr. Fisher testified that, as part of her interview of David, she presented him with hypothetical situations in order to elicit what he thought each parent's reactions would be. Dr. Fisher testified that she asked David what would happen if he asked his parents for help on a science paper. David responded that defendant would say that she was not good at science, while plaintiff would help him. Ms. Gibson testified that she rated the parties equally on this factor because plaintiff helps David with homework, and defendant sees that David gets to school.

We conclude based on the testimony that the trial court's determination that the parties are equal regarding factor b was against the great weight of the evidence.

As to factor f, the moral fitness of the parties, in *Fletcher, supra*, the Supreme Court stated that factor f relates to a person's fitness as a parent, and that in order 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. 447 Mich at 887. Verbal abuse and physical abuse represent the type of morally questionable conduct relevant to one's moral fitness as a parent.[9] *Id*. at 887, n 6. The evidence showed, and defendant did not deny, that she referred to David as "little fucker," "son-of-a-bitch," and "bastard." Plaintiff testified that in conversations he had with defendant, in David's presence, defendant referred to David as "your bastard little son," and "the little fucker." The sole witness defendant presented on her behalf, her father, testified that he himself had called David a "fat ass" once, that such name-calling was not going to hurt David, and that he "wouldn't think nothing" of it if he were to learn his grandson was being referred to as a little fucker, son-of-a-bitch, bastard, ugly ass or fat ass. The matter of defendant's verbal abuse came up at the Friend of the Court interview with Ms. Gibson, but was not pursued. Ms. Gibson testified that her notes reflected a notation "where mom allegedly called David names," and also a notation representing "Fat Little Bastard." When questioned about this notation on cross-examination, Ms. Gibson testified that she concluded that defendant had called David "that little bastard," and that defendant did not deny saying it. However, Ms. Gibson did not question defendant about it. She also acknowledged that there were allegations of ongoing verbal abuse, but did not recall whether she questioned defendant about them.

As to defendant physically striking David, Dr. Fisher testified that David reported to her that one of the ways his mother disciplines him was by hitting him. Plaintiff also testified that before and after he moved, defendant hit David. Plaintiff testified that he had both witnessed and been told by David that defendant pushed him. Plaintiff testified that David had told him about an incident when defendant, after learning David had gotten out of bed and called his father, came into David's room, pulled him from bed, and punched him in the chest, pushing him across the room, until he was backed into a corner. Plaintiff testified he had observed similar treatment of David when he lived with defendant. Although defendant testified that she did not believe in hitting, and that David is "a little bit too old to be hit," she later testified she sometimes chooses not to control her temper, and that she had struck David, and could not count how many times. She added that plaintiff has also hit David.

In contrast, there was no evidence that plaintiff verbally demeaned David. On the contrary, the great weight of the evidence was that David and plaintiff had mutual respect for one another, discussed and arrived at appropriate disciplinary measures should a problem arise, and that David responded much better to plaintiff's methods of interacting with and disciplining him than to defendant's. We conclude that the trial court's determination that the parties were equal on factor f was against the great weight of the evidence when the conduct declared relevant in *Fletcher* is considered.

The trial court's finding of equality on factor g, the mental and physical health of the parties also is not supported by the evidence. Although we agree with the trial court that the parties were equal in terms of physical health, we cannot agree that the evidence supported a finding of equality as to emotional health. The trial court concluded as to this factor:

> As far as emotion is concerned, Ms. Ross I think is more volatile. She has even testified to the fact that she is more emotional. There was even a factor bout [sic] her taking the child to a psychologist for some treatment concerning even the relationship between her and her son, that she had to stop it because of financial considerations, that she just didn't have—she testified she didn't have the money to continue it. But even from the testimony of Dr. Fisher, that neither one of them a [sic] party who was emotionally unstable that they could not handle the day-to-day life and the situation. So both of them are about equal in that area.

Contrary to the trial court's finding, Dr. Fisher testified that the test results of the personality assessment tests she administered were "benign" as to plaintiff, but as to defendant "pointed to some serious psychological disorders that may very well be present." Dr. Fisher stated that defendant's results showed dependency, lack of self-development, and suspiciousness of people. She testified that defendant "literally sequestered herself in terms of her social life," and tended to withdraw into the home setting, which has an impact on her relationship with David and on David's development. Dr. Fisher also testified that David complained his mother continually watched TV and did not spend quality time with him. While Dr. Fisher opined that there were psychological issues that plaintiff may need to address, she believed that as to defendant, there are "emotional issues of considerable value that would preclude her being able to enjoy a positive relationship with her son that would benefit her son." The

evidence of defendant's volatility, calling David names, not helping with his homework and not contacting the school in the face of his serious academic problems buttresses our conclusion that the trial court's finding as to this factor was against the great weight of the evidence.[10]

The trial court's findings as to factor h, the home, school, and community record of the child, were also against the great weight of the evidence. As discussed above, the evidence showed that David had serious behavioral problems at home under defendant's care, and had had very low grades while under her care for three years in a row. There was evidence that the problems persisted up to the time of trial. Nevertheless, the trial court found that there were no significant problems:

> . . . the child is not really a particularly disciplinary problem. The exhibits show that he has a fairly good record at school. As I mentioned, the one big problem he has is the fact that he doesn't do his best. He doesn't do his homework. He doesn't try hard. He doesn't finish assignments which is not the only child that has ever had that problem. When he does apply himself, he's very bright.
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> So as far as that factor is concerned, there is nothing that would indicate that the child has a problem . . . on his home, school or community record. He has not gotten into trouble at home. He doesn't run around with other children who have had problems. The only issue that came up about that was the fact that the child does go out with Mr. Cheatham and his son and Mr. Cheatham's son has had a problem with the Juvenile Court for fighting and violation of probation. But the son himself, that is David, has not had any problem.

The court's finding of equality was not supported by the evidence. While David's problems at home have not escalated to the point where he has gotten into trouble, his home and school record with defendant is not positive, while his home and school record with plaintiff, while more limited, is positive.

We also conclude that the evidence did not support the court's findings of equality on factor 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.[11] The trial court concluded that "once they put the controversies behind them, both parties can encourage a relationship between the child and the other parent." The issue, however, is not what the parties might do in the future if they happen to admicably resolve the existing tension. Both parties testified that they would encourage a relationship with the other if they were awarded custody. However, while there was no evidence presented that plaintiff demeaned or criticized defendant to David, there was evidence that defendant demeaned plaintiff to David and also that defendant undermined David's relationship with his father in other ways. Defendant testified at trial that she "might have" demeaned plaintiff to David. When asked why, she answered "because sometimes he can be a real jerk." She also testified that she "probably could have" told David his father was an ass-hole. There was evidence that defendant continued to undermine David's relationship with his father in other ways. Ms. Gibson testified that defendant told her during the Friend of the Court evaluation that David was afraid of his step-mother.

Defendant denied doing so at trial. Dr. Fisher testified that defendant expressed animosity toward plaintiff during the interview of the parties with David, during which defendant referred to plaintiff as "Mr. Tallent" throughout. In articulating its findings under the statutory factors, the trial court also failed to mention or take into account that defendant had denied or frustrated visitation beginning around 1993, and that that led plaintiff to file his complaint. The evidence did not support the trial court's finding that the problems arose when "legal involvement" began.

Finally, the trial court determined under factor l, any other factor considered relevant by the court, that plaintiff had not exhibited a financial commitment to support David from the time he was born. The court stated as to its findings on this factor that the "issue about just getting down and really supporting the child from the day it's born is a commitment to the child that Mr. Tallent has not shown me and which I think is a factor in determining this case." The court acknowledged that plaintiff testified that "he does give money to the child when it's needed. He gives clothing when needed, et cetera," but then went on to state

> I would doubt seriously from what he testified that this would really amount to a full financial commitment on his part to support the child. If you were to take the guidelines it would probably be much more than he gives during the course of a year. But Ms. Ross did not pressure him and he didn't feel that it was necessary to take on any further financial burdens to help support the child.
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> Ms. Ross is fortunate in that she had some assistance from Mr. Tallent, but it would not be comparable to what he would have to pay otherwise. That had a big factor in impressing me about Mr. Tallent's commitment to be a real father rather than being a buddy. It didn't have that sense of having to financially support this child after he left the home . . . .

We conclude the trial court's finding on factor l was both speculative and against the great weight of the evidence. Defendant testified that plaintiff had never said "no" to her when she asked for more money. Defendant testified that plaintiff bought David things he needs, such as clothes, and provides for David. Although her testimony was not as detailed as plaintiff's, it was in agreement as to plaintiff's financial contributions for David. Plaintiff testified that he estimated that from the time he moved out until he filed a complaint for custody in September 1994, he gave defendant $50 to $100 a week in cash or checks for shopping, groceries, etc. He further testified that he bought David "anything he needs," including clothes, all his school materials, sporting equipment, pays for his extra curricular activities, and carries David on his medical insurance through work. Plaintiff estimated his annual contribution, in addition to the admittedly minimal child support, was $5,000 to $7,000 a year. Plaintiff testified that since the custody complaint was filed in September 1994, he had paid more than $500 for David's school clothes. Plaintiff testified that it was difficult to estimate, but that he believed that he spent about a quarter of his income on David. Plaintiff testified that in 1994 he earned about $40,000 and brought home about $525 a week. We do not believe that the evidence supported that plaintiff had not shown a

financial commitment to David, nor do we believe this factor was properly weighted against plaintiff, when defendant never sought to modify the support order.

We conclude that the trial court's findings on factors b, f, g, h, j, and l were against the great weight of the evidence, that the first five factors should have favored plaintiff, and that the last factor, which the court appeared to weigh heavily against plaintiff was not supported by the evidence. Factor i, the reasonable preference of the child, also favored plaintiff. We agree with the trial court that the parties were about equal on factors a, c, and e.

We are mindful of the very sound policy embodied in MCL 722.27(1)(c); MSA 25.312(7) that a child's established custodial environment should not be changed without clear and convincing evidence that the change would be in the child's best interest. Stability, in and of itself, is a major positive force in a child's life. Nevertheless, we are left with an overwhelming conviction that plaintiff presented clear and convincing evidence that it is in David's best interest that his custodial environment be changed. Contrary to the trial court's implied finding forming the major predicate of its decision, the evidence shows that David's desire to live with his father stems not simply from a perception that life will be more pleasant in his father's house, but from a mature assessment of his own needs and his ability to function and thrive in each parent's house. Defendant loves David, has cared for and nurtured him despite their conflicts, and undoubtedly is capable of being a better parent than she has been in the last few years. Nevertheless, the question is not which parent deserves to have custody of David, but which parent is better able to provide the custodial environment that David deserves, one that will serve his best interests. Plaintiff established by clear and convincing evidence that he will provide this environment.

Reversed.[12]

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard Ryan Lamb

[1] The stipulated order for child visitation is not in the lower court record, but was made an exhibit at trial.

[2] Mrs. Tallent's former name is not in the record.

[3] The Child Custody Act, MCL 722.23; MSA 25.312(3), 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 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.

(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 union, 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.

[4] Our review in this case is unaided by input on appeal from defendant since no appellee brief has been filed. Nevertheless, we have painstakingly reviewed the entire trial court record.

[5] Defendant asserted she had financial and transportation problems that caused her not to continue David's therapy.

[6] There are five handwritten notations on the report card, under each subject or set of subjects stating "Missing Assignments." Under "Comments," the teacher wrote:

> 11-90, 1-91, 4-91 - David needs to make sure that he carefully completes his assignments. 1-91 - Keep on studying and learning multiplication facts. 6/91 4/91 1-91 David also needs to make better use of his time in school. 4/91 Missing many assignments. [Emphasis in original.]

[7] The "Comments" section of this report card states:

> 5th marking: David's lack of interest in school work continues to hinder his gra___. His responsibility in completing work needs improvement
>
> 6th marking: I feel David's ability has be__ hindered by his attitude towards work. I a_ disappointed in his lack of wanting to s____. He does not care about assignments and his gr____ reflect his attitude. He has failed in doing th__ he possibly could.

[8] The report card has three handwritten notations under different subjects: "No research report," "Missing and late papers affect grade No final paper turned in" and "Missing assignments." The "Comments" section states:

> A very capable student who doesn't begin to use his abilities. His papers are so disorganized that much of the good work can't be found. When David uses his time wisely he has shown his quick ability to learn and master anything he chooses. Hope to hear about great grades in the future! I hope David chooses to make grades important to him next year. Only he can choose. [Emphasis in original.]

[9] We view these issues as relevant to factor b, discussed *supra*, as well.

[10] The trial court may actually have been referring to Ms. Gibson in the finding quoted above. However, to the extent that the trial court relied on Ms. Gibson's recommendation that defendant should have physical custody, we note that Ms. Gibson administered no tests, did not observe David with either parent, and failed to ask questions regarding a number of areas, including defendant's calling David names, even though she made notations regarding the allegation. Further, on cross-examination Ms. Gibson testified that if she were apprised that defendant called David by the terms quoted above, that David disobeyed defendant most of the time, and that defendant demeaned plaintiff to David, she would want to inquire into those areas before making a recommendation as to custody. She also testified that if defendant called David by the terms quoted above, it would constitute verbal abuse and she would want to know the extent of the abuse and the implications of that abuse on David. Thus, given Ms. Gibson's incomplete evaluation of this case, her testimony alone could not properly be relied on to support a finding of equality on factor g.

[11] The court found:

> As far as that issue is concerned, there was a—the basic history of these parties was that there was that encouragement to continue a relationship with the other parent. After Mr. Tallent left the home, we had a situation where Ms. Ross allowed Mr. Tallent frequent and liberal visitation. They would go out together and they would see each other, et cetera, he would come over and it was almost up to Mr. Tallent as to when he would see David and work things out.
>
> The problems arose when we had this visitation issue and the custodial issue and you had the legal involvement which has affected Mrs. Ross' feelings toward Mr. Tallent concerning him taking her to court to change custody. But as a whole, looking at it in a life time basis, both parties did not dissuade the child toward respect and love to either parent. So I would say that the parties, once they put the controversies behind them, both parties can encourage a relationship between the child and the other parent.

[12] In light of our disposition, we need not address plaintiff's remaining argument, that the court reversibly erred by not permitting David to testify in open court.