STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA A. ORR, f/k/a
CYNTHIA A. FECHNER,

Plaintiff-Appellee,

v

JOHN P. FECHNER,

Defendant-Appellant.

UNPUBLISHED
May 19, 1998

No. 206227
Barry Circuit Court
LC No. 94-000109 DM

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order amending the parties' judgment of divorce. Specifically, defendant challenges the trial court's award of primary physical custody of the parties' minor son, Jonathan, to plaintiff. We affirm.

Pursuant to the judgment of divorce and subsequent court-ordered modifications, the parties shared joint physical and legal custody of Jonathan. In accordance with the court orders, Jonathan split his time equally between the parties' homes. Sometime before Fall 1997, the parties, who live in different school districts, realized that Jonathan was scheduled to start kindergarten. Both parties filed a motion to modify the custody schedule, each requesting primary physical custody of Jonathan. The court held a hearing on the matter, in which it agreed with the parties that a change in the established custodial environment of equally shared physical custody was necessary because of the prospective changes in Jonathan's school schedule. The court determined that all of the statutory factors set forth in MCL 722.23; MSA 25.312(3) weighed equally between the parties except for factors g and l, which weighed in favor of plaintiff. Accordingly, the court awarded primary physical custody of Jonathan to plaintiff.

Defendant argues on appeal that the court's findings of fact with respect to factors d, e, i, g and l are against the great weight of the evidence and that, therefore, the trial court abused its discretion in awarding primary physical custody of Jonathan.

All custody orders must be affirmed on appeal unless the trial court's factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear legal error with respect to a major issue. MCL 722.28; MSA 25.312(8); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997).

Defendant first challenges factors d and e. These factors provide:

> (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. [MCL 722.23(d) and (e); MSA 25.312(3)(d) and (e).]

In this case, the trial court found that the parties were equal on factor d because "both homes are – appear to be stable, satisfactory environments." The court found the parties were likewise equal on factor e on the ground that "the comments I just made [with respect to factor d] apply to . . . factor [e] as well." On appeal, defendant does not object to the fact that the court apparently "commingled" its evaluation of factors d and e. Rather, defendant contends that factors d and e weigh in his favor because his home is more stable and nurturing. Specifically, defendant notes that he has lived at his current residence for the last eleven years while plaintiff has moved five times in the last four years. Defendant also asserts that Jonathan is happy in his home and has a good relationship with himself, his fiancée and the many children in the home who are close in age to Jonathan. Defendant argues that plaintiff's home is not as well-suited for Jonathan because only one other child lives there on occasion and he is much older than Jonathan.

Clearly there is a degree of overlap between factors d and e. *Ireland v Smith*, 451 Mich 457, 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')." *Id*. at 465, n 8. "[T]he focus of factor e is the child's prospects for a stable family environment." *Id*.

In this case, the record establishes that since the divorce, Jonathan has spent approximately equal time living with both parents. The parties' present homes are situated in the country. Jonathan enjoys the outdoors, to which he has access at both homes. The testimony indicates that both parties are good parents. The parties agree that Jonathan has a good relationship with defendant, his fiancee and her children and enjoys being in defendant's home. However, the parties also acknowledge that Jonathan loves plaintiff and plaintiff loves Jonathan.

Plaintiff explained that she first moved out of the marital residence and into her parents' home. Plaintiff explained that she then moved out of her parents' home to an apartment in Hastings because there were too many people living in her parents' home (her parents and her brothers) and she wanted her own place. Plaintiff explained that she then moved from Hastings to an apartment in Grandville to be closer to her job. Plaintiff explained that she then moved to her current residence, which is being purchased by her fiancee. The testimony suggests that both parties intend to stay in their current homes for the foreseeable future. Both parties plan to marry their respective partners, which suggests stability

of the current living arrangement and the family unit. In light of this record, we conclude that the trial court's findings on factors d and e were not against the great weight of the evidence.

Next, defendant challenges the trial court's findings on factor i. The factor provides:

> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. [MCL 722.23(i); MSA 25.312(3)(i).]

In this case, the court interviewed Jonathan in chambers to determine whether he had a preference for living with either parent. After the interview, the court stated on the record:

> Likewise factor (i) is the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference. I have talked with Jonathan. He's not yet five years old. Based on my conversation with him, he's not of sufficient age to express a preference.
>
> And I'm looking at the Friend of the Court's report where the worker concluded that Jonathan does not really understand everything to express a preference. And I would certainly agree with that conclusion.

On appeal, defendant contends that notwithstanding the court's conclusion, the undisputed testimony indicates that Jonathan prefers to live with defendant and that, therefore, factor i clearly weighs in defendant's favor. However, the statutory language indicates that the preference to be considered by the trial court is the child's own stated preference. See MCL 722.23(i); MSA 25.312(3)(i). Defendant cites no authority for the proposition that the testimony of other witnesses can serve as a substitute for the child's own stated preference. Accordingly, in considering factor i, the trial court's failure to take into account the testimony of other witnesses concerning Jonathan alleged preference did not constitute error. Based on its conversation with the four-year-old child during the in camera interview, the court found that Jonathan was not of sufficient age to express a preference. Again, we find no error in this regard. *Impullitti v Impullitti*, 163 Mich App 507, 510; 415 NW2d 261 (1987).

Defendant next challenges the circuit court's findings as to factors g and l. These factors provide:

> (g) The mental and physical health of the parties involved.
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> * * *
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23(g) and (l); MSA 25.312(3)(g) and (l).]

In this case, the trial court, having found that the parties were equal as to all other factors, based its decision to award primary physical custody to plaintiff on its findings with respect to factors g and l. Based on defendant's admissions that he has at least three drinking and driving convictions, the court

concluded that defendant has a problem with alcohol abuse and that the problem may be ongoing. The court expressed concern with defendant's apparent lack of insight into his problem with alcohol, which is evidenced by his testimony that he continues, at least occasionally, to drink, and has not sought treatment for alcohol abuse. The court concluded that this is a close case, but that factors g and l tipped the balance in favor of plaintiff.

Defendant contends that the great weight of the evidence establishes that factors g and l weigh equally between the parties. Defendant asserts that his past experience with alcohol does not affect his commitment and ability to be an excellent father to his son and that he no longer drinks alcohol.

Defendant does not dispute his history of drinking and driving: (1) three drinking and driving convictions; (2) at least one serious vehicular accident while intoxicated; (3) the loss of driver's license privileges for the last three years, and; (4) an arrest for driving with a suspended license. A finding that defendant has a problem with alcohol abuse is clearly supported by the record. Furthermore, the court's concern with defendant's failure to seek treatment is proper because such failure suggests that defendant is more likely to have problems with alcohol in the future. Although defendant stated at the hearing that he does not have problems with alcohol and is not an alcoholic, the trial court clearly did not believe defendant. This Court gives considerable deference to the superior vantage point of the trial court with regard to issues of credibility *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). Given that defendant has already had three convictions relating to alcohol abuse, the trier of fact had no reason to presume that he would not have similar problems in the future. Notably, alcoholism does not simply affect one's driving capabilities, but it affects judgment generally. Defendant's ability to exercise good judgment is clearly relevant in a custody dispute. Given that there is no evidence whatsoever in the record that plaintiff has any problems with alcohol or any other substance that might negatively affect her ability to care for her son, the trial court's findings with respect to factors g and l are not against the great weight of the evidence.

In summary, we conclude that that the trial court's findings of fact with respect to the statutory factors challenged on appeal were not against the great weight of the evidence. We conclude, therefore, that the trial court's discretionary ruling that it is in the best interests of Jonathan for plaintiff to have primary physical custody did not constitute a palpable abuse of discretion.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski