

STATE OF MICHIGAN
COURT OF APPEALS

MARLENE G. BUDDE,

Plaintiff/Counterdefendant-
Appellee,

v

DAVID L. BUDDE,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

July 17, 1998

No. 202749

St. Clair Circuit Court

LC No. 95-002550 DM

Before: Wahls, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce, challenging the award of physical and legal custody of the parties' minor son to plaintiff. We affirm in part and remand.

Defendant first argues that in determining the best interests of the child, the trial court failed to consider that plaintiff knowingly made false accusations of sexual abuse against defendant and involved the minor child in those false accusations. However, the trial court found that there was no evidence that plaintiff made knowingly false accusations. This finding was not against the great weight of the evidence. MCL 722.28; MSA 25.312(8); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). Although the timing of plaintiff's request for official investigations into defendant's conduct raised some concern, there was evidence that plaintiff was acting in her child's best interests when she asked to have the matters investigated.

Defendant also argues that in analyzing factor (b), MCL 722.23(b); MSA 25.312(3)(b), which considers 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, the trial court was biased against defendant as a result of plaintiff's allegations of sexual abuse. The record does not support defendant's contention. When the court discussed the sleeping arrangement in defendant's home, where the child shared a bed with defendant, its only concern was that defendant should not have

fostered an improper emotional dependency and should have encouraged the minor child to sleep in his own bed. The court did not intimate that this arrangement involved improper sexual conduct. Similarly, when the court mentioned that the daughters of a neighbor and a daycare provider felt uncomfortable with defendant, based on the observations of the parent, the court did so in the context of defendant's apparent inability to impose effective discipline and to set limits for the minor child. The court's findings regarding the parents' abilities to impose discipline was supported by defendant's own testimony regarding an incident at a pool where defendant "couldn't convince [the minor child] to allow me to do or to get him to do anything else." Given defendant's own testimony that he was not able to discipline the minor child effectively even when he attempted to do so, the trial court was justified in referring to the testimony of the daycare provider who related an episode when the minor child was kicking his father and continued to do so despite defendant's request that he stop. The evidence that the trial court relied on for its finding that this factor favored plaintiff was consistent with plaintiff's testimony that defendant set no limits for the minor child and relied on her to impose discipline. Moreover, the court properly regarded the incident at the pool as an illustration of defendant's lack of capacity and disposition toward guiding his son's behavior. The trial court's findings were not contrary to the great weight of the evidence. *Fletcher, supra* at 878.

Further, the court described the parties' role in the minor child's religious upbringing, relying on uncontradicted evidence that plaintiff was the only parent involved in imparting religious education to the minor child. The trial court did not explicitly draw a negative conclusion from defendant's non-involvement in religious activities and did not give any indication that it was considering the merits of the religious beliefs of the parties instead of the child's best interests pursuant to MCL 722.23; MSA 25.312(3). *Fisher v Fisher*, 118 Mich App 227, 234; 324 NW2d 582 (1982). Although the court found that factor (b) favored plaintiff, we are unable to detect that this finding was based on a judgment regarding the merits of the parties' beliefs instead of an evaluation of the child's best interests, and conclude therefore that the court committed no clear legal error.

Defendant argues that the court chose to ignore highly questionable conduct by plaintiff in deciding that the parties were equal with regard to factor (f), the moral fitness of the parties involved. With regard to plaintiff's moral fitness, the court mentioned that none of the charges that she had brought with state regulatory and licensing agencies regarding defendant's sexual abuse of his son had been substantiated. The court found that the parties' problems were essentially "adult, personal problems which have not affected their ability to be moral parents with regard to their relationship with the minor child." Even though there was evidence that the minor child was questioned during the course of the investigation into defendant's alleged sexual abuse of him, the trial court was entitled to believe that plaintiff acted upon her genuine concerns and in her child's interests. *Fletcher, supra* at 886-887. Although there was some ambiguity in plaintiff's testimony, where she apparently first indicated that the reason for her regulatory action against defendant was that defendant was seeking custody of the minor child, she then denied flatly that her action was linked to defendant's request for custody. It is impossible to construe plaintiff's ambiguous testimony as an admission that she was pursuing a vindictive campaign against defendant merely to gain advantage in custody proceedings. There was no evidence that plaintiff wanted to harm the minor child. Moreover, there was no evidence that plaintiff had falsely told her fourteen-year-old son that defendant had been convicted of sexually abusing the minor child,

but only evidence that *this child* had told a friend that he hated defendant because it had been proven in court that defendant molested the minor child. The trial court's finding that plaintiff was a moral parent with regard to her relationship with the child was not against the great weight of the evidence.

Defendant argues that because the trial court failed to mention plaintiff's false accusations of sexual abuse against defendant under factor (g), the mental and physical health of the parties, it did not consider that plaintiff's behavior was indicative of a psychopath. The trial court mentioned that plaintiff suffered from bulimia, and that plaintiff had counseling in the past. The court did not give much credence to a family practitioner's testimony that plaintiff had a "borderline personality disorder" since the practitioner was not board certified in psychiatry and had not examined plaintiff in any professional manner. Without any other evidence, defendant's argument that the trial court should have considered plaintiff's allegations regarding defendant's sexual abuse of their son to be a sign of mental illness has little merit.

Defendant argues that the court's failure to consider plaintiff's false allegations of sexual abuse under factor (j), the willingness and ability of each of the parties to facilitate and encourage a close relationship with the other parent, and finding that this factor was more favorable to plaintiff, was against the great weight of the evidence. The court considered plaintiff's testimony that she wanted the child to have a close loving relationship with his father and her actions of facilitating a temporary joint physical custody arrangement with expansive parenting time for each parent. It found that despite defendant's anxiety that plaintiff would destroy his relationship with the child, no satisfactory evidence was presented establishing "parental alienation syndrome." Considering plaintiff's actions and lack of anxiety over defendant's role in parenting, the court found that plaintiff's attitude on this issue appeared controlled and mature. Accordingly, the court found that this factor tended to be more favorable to plaintiff than defendant. Since the evidence did not show that plaintiff's unsubstantiated suspicions that defendant sexually abused the child caused her to mar or discourage the relationship between defendant and the child, the trial court's finding was not against the great weight of the evidence.

Defendant argues that the court committed a clear legal error in focusing on defendant's concerns that plaintiff would not protect his relationship with the minor child, instead of defendant's conduct and capacity to facilitate a good relationship between plaintiff and the minor child. Given the visitation arrangement that plaintiff allowed without a court order, the trial court could consider defendant's reservations that plaintiff would not continue to facilitate a relationship between him and the minor child as unjustified. Although it failed to discuss all the evidence that could pertain to the parties' willingness and ability to facilitate a relationship with the other parent, the trial court did not commit any clear legal error, and satisfied the requirements of the court rules and case law. *Fletcher, supra* at 883.

Defendant next argues that many legal and factual errors were prejudicial to defendant and so distorted the "best interests" findings that reversal is mandated. With regard to factor (a), the love, affection, and other emotional ties existing between the parties involved and the child, the trial court stated that its findings tended to be more favorable to plaintiff than to defendant. The court found that although both parties loved their son, defendant's closeness might border on the obsessive. This finding was based on the daycare provider's testimony that when the child was two and one-half years old and defendant arrived at daycare to pick him up, defendant would not let him return to play with other

children, but would demand that the child give him his total affection. Another basis was defendant's own testimony that he allowed the child to sleep with him instead of in his own room, first because he thought this arrangement "fostered a sense of security" for his son, and later because of the noise of a "rock tumbler" in the child's bedroom. Although defendant argues that the daycare provider was not qualified to characterize defendant's relationship with his son as abnormal, and that her personal dislike of defendant made her testimony untrustworthy, defendant does not refute her testimony that defendant behaved in the way that she described. Similarly, defendant does not contest that at different times and for different reasons, defendant allowed the child to sleep with him. The trial court's concern was not, as defendant argues, that the sleeping arrangement was indicative of a form of sexual abuse, but only that it fostered an improper emotional dependency. This concern was supported by the opinion of a licensed clinical psychologist that a shared sleeping arrangement could become a problem if it is "not something that the parent works towards getting the child out of the habit of doing." The trial court's finding was not against the great weight of the evidence. Moreover, since the trial court was entitled to discuss emotional dependence of the child as part of the "love, affection, and other emotional ties existing between the parties involved and the child," the court did not commit clear legal error when it made its findings regarding factor (a).

Defendant next argues that the trial court committed clear legal error in its evaluation of factor (c), the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care, and other material needs. Defendant argues that this factor does not concern historical circumstances but present capacity and disposition. Although defendant demonstrated his capacity to provide for the minor child's material needs, the trial court did not err in taking into account the parties' roles and their disposition to take care of the child's material needs during his whole life. Because disposition by definition involves an habitual tendency or inclination, customary arrangements could form part of the court's assessment. The trial court did not commit clear legal error when it found that this factor tended to be more favorable to plaintiff than defendant.

Defendant next argues that the trial court committed clear legal and factual error in its evaluation of factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes, finding that this factor favored plaintiff. Defendant argues that the trial court should have focused on the next twelve years of the minor child's life, and should not have premised its finding on what it implicitly found to be a short-term situation, namely the presence of the child's half-brother in plaintiff's home. The evidence showed that these half-brothers had a close relationship. Even though the half-brother was eight years older than the parties' child, and it was therefore to be anticipated that he would leave home while the minor child was growing up, this could be seen as a normal change that would not disqualify plaintiff's family unit from being described as stable and having a measure of permanence. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). Given the flux in the affairs of most families' lives and the normal changes that are bound to occur, an evaluation of permanence necessarily has to start with the present situation. The trial court did not err in considering the "potentially detrimental effects of physically severing [the] bond" that existed between the half-siblings, *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995), and refusing to look too far down the road in making its evaluation of permanence.

Defendant next argues that the trial court committed clear legal and factual error in its determination that factor (k), concerning domestic violence, favored plaintiff. The trial court found that the minor child had been exposed to domestic violence, and that the child was aware of an incident when defendant threw plaintiff to the floor. There was evidence of other incidents of domestic violence. Even though the trial court did not mention all the incidents, it apparently considered the one incident that occurred in the child's presence to be the most serious. In doing so, the court did not commit clear legal error, nor were its findings against the great weight of the evidence.

Defendant also argues that the trial court committed clear legal and factual error in its consideration of factor (l). The trial court gave a broad characterization of the demeanor and attitude of the witnesses including their credibility and willingness to be forthright or evasive. While the trial court found that plaintiff was being candid and willing to accommodate defendant within reason, the court found defendant to be defiant, and "dedicated to fighting a battle that was to be a fight to the bitter end." The evidence showed that defendant expressed fears that if he was not awarded custody his relationship with the child would become increasingly distant and that the child would withdraw from him because plaintiff might relocate. Defendant's fears were based on plaintiff's allegedly abusive character and her alleged threats that she was going to raise the minor child by herself. Since the trial court acted within its mandate when it observed defendant and assessed the witness' credibility, it committed no legal error when it drew conclusions. *Fletcher, supra* at 889-890. Moreover, since defendant offered no proof regarding his fears that plaintiff would relocate or destroy his relationship with the minor child, the court properly relied on evidence that plaintiff had accommodated defendant by allowing him extensive parenting time with the minor child in finding that defendant's fears were unfounded. Although plaintiff testified that she liked to be in control, that she automatically assumed most of the responsibility for the minor child's needs because defendant did not participate or show concern or interest, and that she could not recall an incident where she compromised with defendant over the minor child's welfare, the court's statement that plaintiff "was willing to accommodate defendant within reason" was supported by the lack of evidence to show that plaintiff ever interfered with defendant's extensive parenting time. The trial court's findings were not against the great weight of the evidence.

Also, the trial court was entitled to consider a Friend of the Court report, considering that it reached its own conclusions. *Truitt v Truitt*, 172 Mich App 38, 43; 431 NW2d 454 (1988). Here, the language used by the trial court indicates that the court considered the Friend of the Court recommendation but arrived at an independent conclusion based on its own hearing.

Defendant next argues that the trial court committed clear legal error in denying defendant his statutory right to access the child's psychological records. The court, relying on *Thames v Thames*, 191 Mich App 299, 303; 477 NW2d 496 (1991), appointed a guardian ad litem to consult with the social worker and to report back to the court regarding whether it would be in the best interests of the child to grant defendant's request to waive the privilege on behalf of the child. Following the recommendation of the guardian ad litem that the court should exercise its discretion to prevent the social worker from revealing the case file, the court agreed to look at the file of the case worker and to consider it in an in camera review. However, defendant would not stipulate to allow the report to be read in camera without some opportunity for objection or rebuttal.

The Court's ruling in *Thames* left room for a judge to exercise some discretion when it had to make such a decision. Considering that in child custody cases the overwhelmingly predominant factor is the welfare of the child, *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993), we conclude that the judge in the instant case did not abuse his discretion when he sought to protect the minor child from the probable negative effect of a breach of confidence with the therapist and made the offer of an in camera inspection of the minor child's counseling records.

Defendant next argues that given plaintiff's history of mental illness, false accusations of sexual abuse, admitted perpetration of unprovoked domestic violence, and conduct that her own expert felt would affect and perhaps destroy the minor child's relationship with defendant, the trial court abused its discretion in failing to order her to submit to a psychological evaluation. The trial court concluded that orders for psychological testing were "not normally the type of orders that are entered in divorce actions, and unless the parties agree to joint psychological testing this court will not order them."

The court rule governing mental examination, MCR 3.311, provides as follows:

(A) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

In *Brewster v Martin Marietta Aluminum Sales, Inc*, 107 Mich App 639, 643; 309 NW2d 687 (1981), this Court held that the rule is applicable to all civil actions. However, since the trial court concluded that the rule was not applicable to a sex discrimination case, this Court found that the trial court did not reach a decision on whether the supervisor's mental condition was actually placed in controversy or whether good cause existed for granting the plaintiff's requested examination. Since the issue had not been decided by the trial court, this Court declined to consider it, *id.* at 646, but reversed the decision of the trial court, and remanded it "for determination of whether plaintiff has established that [the supervisor's] mental condition is in controversy and whether good cause existed for granting the mental examination." *Id.* at 647.

Here, the trial court similarly did not decide the issue. Therefore, the matter is remanded to the trial court for a determination of whether defendant established that plaintiff's mental condition was in controversy and whether good cause existed for granting the mental examination. If on remand defendant is able to make such a showing, the custody determination will have to be reevaluated.¹

Affirmed in part and remanded. Jurisdiction is not retained.

/s/ Myron H. Wahls
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

¹ The trial court need not conduct an entirely new hearing, but may reevaluate the factors and the determination in light of any new evidence.