STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH E. GEORGE,

Plaintiff-Appellee,

v

MONIKA GEORGE,

Defendant-Appellant.

UNPUBLISHED
September 15, 1998

No. 205262
Oakland Circuit Court
LC No. 89-377990 DM

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right the order changing custody of the parties' minor child from defendant to plaintiff and restricting defendant's visitation rights to supervised visitation only. We affirm.

I

Since the parties' tumultuous divorce in 1990, defendant has had physical custody of the parties' now 8-1/2 year old son. Plaintiff petitioned for increased visitation on several occasions and eventually filed his motion to change custody in 1997.

Pursuant to § 8 of the Child Custody Act, the Michigan Supreme Court enunciated three standards by which appellate courts are to review child custody orders depending on the type of finding the court has made. *Ireland v Smith*, 451 Mich 457, 463-464, n 6; 547 NW2d 686 (1996), quoting *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994) (Brickley, J., joined by Cavanagh, C.J. and Boyle, J.). First, findings of fact are reviewed under the "great weight of the evidence" standard. *Ireland, supra*; MCL 722.28; MSA 25.312(8). Second, discretionary rulings by the trial court are reviewed under an "abuse of discretion" standard. *Ireland, supra*; MCL 722.28; MSA 25.312(8). Lastly, this Court reviews questions of law for "clear error." *Ireland, supra*, MCL 722.28; MSA 25.312(8). Clear error exists when the trial court incorrectly chooses, interprets or applies the law. *Fletcher, supra* at 881 (Brickley, J.).

The Child Custody Acts governs child custody disputes and is designed to be liberally construed in order to promote and ensure the best interests of the minor child. MCL 722.21 *et seq.;*

MSA 25.312(1) *et seq.* See *Frame v Nehls*, 452 Mich 171, 176; 550 NW2d 739 (1996); *Booth v Booth*, 194 Mich App 284, 292; 486 NW2d 116 (1992), criticized on other grounds in *Eddie v Eddie*, 201 Mich App 509, 511-513; 506 NW2d 591 (1993). The Act enumerates twelve factors that courts are to consider and evaluate before rendering a decision in a custody dispute. MCL 722.23; MSA 25.312(3). In support of its ruling, the trial court must explicitly state its findings and conclusions regarding each factor. *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). While the court is not required to comment on each piece of evidence or every statement made in connection with the factors, failure to articulate specific findings when relevant may constitute error requiring reversal. *Fletcher*, *supra* at 883 (Brickley, J.).

In order to modify or change a custody award, the party seeking the change must demonstrate proper cause or change of circumstances establishing that the modification is in the best interests of the child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996). Proper cause or change in circumstances must be shown before the court will consider the existence of an established custodial environment and the best interest factors. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Defendant argues that the trial court erred in granting plaintiff's petition for a change in custody because plaintiff failed to demonstrate proper cause or changed circumstances. We disagree. The trial court based its decision on defendant's interference in the relationship between plaintiff and the child, her attempts to alienate the two, and the deterioration of the child's personality. There is sufficient evidence in the record of interference and behavioral problems to support the trial court's conclusion. Therefore, we agree that the changed circumstances or proper cause requirement was satisfied.

Whether an established custodial environment exists is a factual determination that the trier of fact must address before it assesses the child's best interests. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). Once the court finds the existence of an established custodial environment, the statute requires that the party seeking the change show by clear and convincing evidence that it is in the child's best interest. MCL 722.27(1)(c); MSA 25.312 (7)(1)(c); *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993).

Defendant argues that plaintiff failed to establish by clear and convincing evidence that a change of custody was in the child's best interest and that the trial court erred in its findings on eleven of the twelve factors. We disagree and affirm the custody award.

Factor (b) concerns "[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); MSA 25.312(3)(b). As to factor (b), the trial court concluded that plaintiff was favored because he was a more able individual whose affection for his son was not based on his own needs. The trial court also found that plaintiff would provide the child with more effective guidance and concluded that these aspects were more important than defendant's regular church attendance. Factor (c) addresses "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c); MSA 25.312(3)(c).

As to factor (c), the trial court concluded that although both parties had the financial ability to provide for the child, plaintiff was favored because he was the only party "who consistently demonstrated the ability to provide suitable diet and hygiene."

The evidence supports these findings. All professionals except Dr. Jones, defendant's therapist, opined that custody should be awarded to plaintiff because he was very capable of providing for the child's needs, while defendant was a needy person for whom it would be difficult to place the child's needs before her own Additionally, there was testimony that defendant failed to require the child to follow proper hygiene and that she permitted the child to stay up late and encouraged him to inappropriately watch horror movies. Moreover, Elaine Bryant, a family counselor for the Friend of the Court, testified that the child sometimes acted more like a parent than defendant did. Thus, the evidence does not clearly preponderate against the trial court's findings that these factors favor plaintiff.

Factor (d) addresses "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d); MSA 25.312(3)(d). The trial court found that factor (d) favored plaintiff because the child was not thriving in the environment in which he was currently living and had been developing bad habits. The trial court found that the environment was unhealthy because defendant was trying to alienate the child from plaintiff. The trial court also noted that defendant's recent move to a new home in Canton further removed the child from the support and supervision provided by plaintiff's relatives and promoted further instability. Factor (e) concerns "the permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e); MSA 25.312(3)(e). The trial court found that plaintiff prevailed on factor (e) because his home appeared to be more stable, while defendant's home environment had recently changed because of the move to Canton.

Defendant argues that the trial court's findings as to these factors were against the great weight of the evidence. Defendant also argues that the court committed clear legal error in analyzing factor (e) because it failed to differentiate factor (e), which addresses the family with whom the child lives, from factor (d), which addresses the home in which the child lives. Defendant contends that the trial court improperly focused on the home instead of addressing the permanence of the family unit and asserts that under the proper standard, the trial court should have determined that factor (e) favored defendant.

We find that the trial court did not employ an incorrect legal standard and that its findings are not against the great weight of the evidence. Factors (d) and (e) are not mutually exclusive, and there is some overlap between them. *Ireland, supra* at 464-465. "These factors are phrased somewhat awkwardly." *Id.* at 465. As stated in *Ireland,*

> Factor d calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ("the desirability of maintaining continuity"). Taken literally, factor e appears to direct an inquiry into the extent to which a "home" will serve as a permanent "family unit." [*Id.* at 465, n 8.]

Factor (e) focuses on "[t]he child's prospects for a stable family environment." *Id.* at 465. The trial court used the words "home environment" in its analysis, which suggests that the trial court was not

focusing strictly on the physical location of the home, but how each family functioned in the home. Further, the trial court specifically concluded that plaintiff's home appeared more stable, which is the very inquiry the court was required to make under factor (e). Moreover, there is sufficient evidence to support the trial court's findings on these factors. Defendant had recently moved out of her parents' home in Farmington Hills into a new home in Canton. While there was testimony that defendant had provided an excellent home, there was also testimony that the child was often supervised by his stepbrother and cousin. Further, the fact that defendant offered the child an extended family, while plaintiff resided with his new wife and her two young daughters, does not mandate reversal on this factor. Therefore, we affirm the trial court's findings that factors (d) and (e) favor plaintiff.

Factor (f) requires the court to consider "[t]he moral fitness of the parties involved." MCL 722.23(f); MSA 25.312(3)(f). The trial court determined that factor (f) favored plaintiff because there was no evidence he was immoral, while defendant encouraged her children to lie and was profane. We cannot conclude that the trial court's finding as to this factor was against the great weight of the evidence. Testimony from Dr. Souphis, defendant's first husband, indicated that defendant had requested their son Danny to lie about the allegations of sexual abuse he made against plaintiff. Further, plaintiff testified that the minor child had indicated that he lied for defendant. After defendant denied that she used profanity, a tape of her conversation with plaintiff's wife was admitted into evidence. During the conversation, defendant swore repeatedly. Additionally, as noted by the trial court, defendant failed to obey court orders and directed Dr. Jones to disobey a subpoena to produce records of his sessions with defendant.

Factor (g) concerns "[t]he mental and physical health of the parties involved." MCL 722.23(g); MSA 25.312(3)(g). The trial court concluded that plaintiff prevailed on factor (g) because he was a far more psychologically well developed person than defendant, whom the trial court found was very needy and emotional. The trial court stated that defendant's behavior was a detriment to the child because it demonstrated a high level of paranoia and projection of her own fears and actions on those around her. This finding is supported by the evidence. As noted by the trial court, Dr. Jones was the only professional who testified that defendant should have custody of the child. Dr. Jones' testimony was based on his treatment of defendant and his interpretation of the tests performed by Dr. Doctoroff. Dr. Jones admitted, however, that he had never met plaintiff and that he was not able to discuss his ability to satisfy the best interest criteria. Further, Dr. Jones did not perform any of his own tests on the parties.

Both Sharon Antczak, who performed a psychological evaluation of the parties in 1990, and Dr. Doctoroff, a psychologist who tested both parties, opined that plaintiff prevailed on this factor. Dr. Doctoroff determined that defendant was a needy, dependent, emotional person who often failed to think things through before acting. She stated that defendant often acted in a paranoid fashion and concluded that plaintiff was far more stable and mentally healthy. Likewise, Antczak concluded that defendant was "a woman with difficult relationship capacity, a tendency toward expressing anger and being particularly sensitive to signs of criticism and rejection and showing a disturbance in affect that is quite alarming to this examiner. She does show a potential to be manipulative and controlling in relationships so as to minimize a feeling of victimization." Antczak determined that plaintiff was "a fairly

well-adjusted man with no evidence of any serious pathology." Therefore, the evidence does not clearly preponderate against the trial court's finding that plaintiff prevailed on this factor.[1]

Factor (h) requires the trial court to consider "[t]he home, school, and community record of the child." MCL 722.23(h); MSA 25.312(3)(h). The trial court found that plaintiff was favored because it appeared that the child's record might deteriorate if he were left with defendant. The trial court noted that the child's teachers had reported that he was tired in school, seemed "spaced," and was inappropriately "street-wise for a second grader." The record supports the trial court's finding on this factor. Dr. Doctoroff testified that the child's school record indicated that he was behind in school and that his teachers had informed her that he seemed distracted and engaged in inappropriate and mischievous behavior. Further, there was evidence that the child was permitted to stay up late and was often tired in school, and defendant accepted plaintiff's offer of proof that the child's teacher would testify about the inappropriateness of the child's behavior and his being "street-wise." Therefore, the trial court's finding with respect to factor (h) is not against the great weight of the evidence.

Factor (i) requires the court to consider "[t]he 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). The trial court concluded that this factor did not favor either party because the child was not mature enough to make a well-reasoned choice. Moreover, the trial court noted that the child had said he could be happy with either parent. Defendant asserts that the trial court's finding that the child is not old enough to express a preference constitutes clear legal error and is against the great weight of the evidence because the child wants to live with defendant. We disagree. The trial court spoke with the child in chambers and noted that the child stated that he could be happy with either parent. Thus, the present case is distinguishable from *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991), where the trial court committed error requiring reversal in failing to interview the children. Moreover, the evidence established that defendant had alienated the child from plaintiff and that she did not maintain order and discipline in the home. Therefore, we cannot conclude the trial court's findings on this factor are against the great weight of the evidence. Furthermore, even if the child desires to live with defendant, the child's preference does not automatically outweigh the other factors – it is only one factor to consider. *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992).

Factor (j) addresses "[t]he 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." MCL 722.23(j); MSA 25.312(3)(j). The trial court found that this factor clearly favored plaintiff because of the documented history and pattern of defendant's interference with plaintiff's parenting time. The trial court determined that defendant had already alienated her son from his father. The trial court also adopted the report of Elaine Bryant as support for this conclusion. The evidence supports the trial court's finding. Although defendant denied the allegations, both plaintiff and defendant's first husband testified that defendant has often interfered with their parenting time. Further, Friend of the Court family counselor Elaine Bryant testified that plaintiff made numerous complaints about problems he had exercising his parenting time. In the report referred to by the trial court, Bryant concluded that defendant was not willing to encourage a close relationship between the child and plaintiff. Although defendant asserts that in adopting the Friend of the Court recommendation, the trial

court failed to make its own findings of fact and conclusions of law, a review of the court's opinion indicates that the trial court adopted the report after making its own findings. Moreover, there is ample evidence from

the record to support its conclusion. Cf. *Truitt v Truitt,* 172 Mich App 38, 42-44; 431 NW2d 454 (1988). Therefore, the trial court's finding that factor (j) favored plaintiff is not against the great weight of the evidence.[2]

Factor (k) requires the court to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k); MSA 25.312(3)(k). Analysis of factor (k) in this instance hinges primarily on a credibility assessment of the parties: both parties allege abusive behavior by the other party. The trial court acknowledged that in several instances, it was difficult to determine whether defendant was telling the truth. However, it concluded that plaintiff was the more credible party and that defendant's testimony was largely unbelievable. Thus, the trial court concluded that this factor favored plaintiff because both he and defendant's first husband testified as to her violent outbursts and physical attacks. This Court should defer to the trial court's ability to judge the credibility of witnesses. *Fletcher v Fletcher (After Remand),* 229 Mich App 19, 25; 581 NW2d 11 (1998).

There is evidence to support the trial court's findings. Both Dr. Souphis and plaintiff testified that defendant was extremely violent, made accusations of infidelity, and used profanity. Moreover, defendant's numerous allegations of physical and sexual abuse against plaintiff have not been substantiated when investigated. Although defendant's son Danny, testified that plaintiff was abusive, his father testified that Danny told him that he had lied, and defendant admitted that the picture of Danny evidencing alleged sexual abuse was not developed until 1994. She did not initiate an investigation until 1995, two days after plaintiff had filed a police report against her for home invasion. Further, plaintiff's two daughters testified that plaintiff had never been verbally or physically abusive to them or their mothers. In fact, plaintiff's daughter Andrea recalled a situation in which defendant accused plaintiff of hitting her when defendant was nowhere near plaintiff. Moreover, Andrea observed occasions in which defendant hit or pushed plaintiff. Thus, the evidence does not clearly preponderate against the trial court's finding that factor (k) favors plaintiff.

Factor (l) permits the court to consider any other factor "relevant to a particular child custody dispute." MCL 722.23(l); MSA 25.312(3)(l). As to this factor, the trial court stated that plaintiff was favored because he could provide a more patterned, structure life in a family setting. The trial court further concluded that plaintiff had presented clear and convincing evidence of why it was in the child's best interests to grant the relief and noted that most of defendant's case had little to do with the child and more to do with an attack on plaintiff.

Defendant argues that factor (l) may not be used to "double weight" an issue. She fails to clearly explain, however, specifically how the trial court used factor (l) to give double weight to factors already considered. We conclude that defendant's argument is without merit. If anything, the trial court's statement under factor (l) seems to be a summary of why it was granting custody to defendant and not a double-weighting of any factors. Moreover, we agree with the trial court that the majority of defendant's case had more to do with attacking plaintiff for events that allegedly occurred during their marriage.

Therefore, we affirm the trial court's decision to change custody from defendant to plaintiff.

II

Defendant also argues that the trial court erred in ordering supervised visitation because there is no support in the record for requiring supervised visitation. We disagree.

This Court reviews the trial court's decision to order supervised visitation for an abuse of discretion. *Booth, supra* at 292-293. The best interest of the child is the controlling factor in determining visitation rights. *Deal v Deal,* 197 Mich App 739, 741-742; 496 NW2d 403 (1993).

The trial court determined that supervised visitation was necessary so that defendant would not be permitted to disparage plaintiff and undermine what is in the best interests of the child. Defendant asserts that this is not a necessary basis for this harsh constraint because the reasoning does not demonstrate safety-related circumstances, like physical abuse. We would agree that the present case is distinguishable from *Booth, supra* at 293, where the defendant admitted that he had struck the child on at least one occasion and the plaintiff testified that the defendant hit the child when he was an infant and had also been jailed for physically abusing the plaintiff. Nevertheless, we cannot conclude, as we did in *Mann v Mann,* 190 Mich App 526, 539; 476 NW2d 439 (1991), that the trial court failed to sufficiently consider this issue. The trial court in the present case specifically stated that it ordered supervised visitation to prevent defendant from alienating the child from plaintiff. Although defendant asserts that this finding is not supported by the record, there is substantial evidence to the contrary. Therefore, we cannot conclude that the trial court abused its discretion by ordering supervised visitation.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey
/s/ William C. Whitbeck

[1] We decline to address defendant's argument that the trial court improperly relied on the report by Sharon Antczak in rendering its decision because defendant has waived any right to challenge the admission of the report. Although defense counsel did initially object to admission of the report, defendant fails to acknowledge that counsel shortly thereafter stipulated to the report's admission as part of Dr. Doctoroff's records, specifically noting that he believed that the trial court would give all documents appropriate weight. Therefore, defendant cannot contend on appeal that the trial court improperly relied on the report in making its decision because she stipulated to its use. See *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Moreover, this Court may also decline to address the issue because defendant has failed to include this issue in her statement of questions presented. *Fletcher v Fletcher (After Remand),* 229 Mich App 19, 26; 581 NW2d 11 (1998).

[2] Defendant also asserts by way of a footnote, that the trial court appears to have improperly relied on a letter sent by Dr. Souphis to Dr. Doctoroff. However, defendant concedes that this letter was part of Dr. Doctoroff's records, which as discussed under factor (g), were admitted by stipulation. Moreover,

defendant again fails to raise this issue in her statement of questions presented. MRC 7.212(C)(5). Therefore, we decline to address this argument.