

STATE OF MICHIGAN  
COURT OF APPEALS

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TAMARA SUE GRAY, a/k/a TAMARA SUE BALL,

UNPUBLISHED  
January 15, 1999

Plaintiff-Appellant,

v

No. 210161  
Osceola Circuit Court  
LC No. 90-005323 DP

MATTHEW JOHN HAMILTON,

Defendant-Appellee.

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Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the circuit court changing custody of the parties' minor daughter from plaintiff to defendant. We affirm.

Plaintiff argues that the trial court's findings as to factors (d) and (e) of the statutory best interests factors, MCL 722.23(d) and (e); MSA 25.312(3)(d) and (e), are against the great weight of the evidence. We disagree. We review the trial court's findings of fact in a child custody case under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). Under this standard, the reviewing court must not substitute its judgment for that of the trial court unless the facts "clearly preponderate in the opposite direction." *Fletcher, supra* at 878, quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). This standard applies to all findings of fact, including the ultimate finding on each factor. *Id.* at 879.

In reviewing the trial court's factual findings on the statutory best interests factors in a child custody case, "[t]he court should review 'the record in order to determine whether the verdict is so contrary to the great weight of the evidence as to disclose an unwarranted finding, or whether the verdict is so plainly a miscarriage of justice as to call for a new trial . . .'" *Fletcher, supra* at 878, quoting *Murchie, supra*. The trial "court's discretion in weighing the evidence regarding a particular factor is not unlimited; rather, it must be supported by the weight of the evidence." *Id.* at 881.

First, plaintiff challenges the trial court's findings on factor (d): "The 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 because of plaintiff's frequent moves and her former marriage during which she endured physical abuse, this factor slightly favored defendant. Plaintiff's physical abuse, while during a former marriage, occurred fairly recently, in late 1995. In contrast, defendant had been married and maintained a stable residence for the three years before the hearing on his motion to change custody. The trial court's findings regarding plaintiff's relative instability and somewhat unsatisfactory environment are supported by the evidence. We cannot conclude that the circuit court erred in finding factor (d) to slightly favor defendant, the facts not clearly preponderating in the opposite direction.

The trial court similarly found that factor (e), MCL 722.23(e); MSA 25.312(3)(e), slightly favored defendant. This factor requires consideration of "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." The court based its decision on this factor on the fact that plaintiff's housing situation was dependent on her employment. Plaintiff and her family, including her husband, lived in the downstairs apartment of a home belonging to a disabled man. Plaintiff provided full time care for the man, but she could be terminated at will. The court found defendant's situation more permanent. Again, the trial court's finding is supported by the evidence, and the facts do not clearly preponderate in the other direction. Thus, the trial court did not err in concluding that this factor slightly favored defendant.

Next, plaintiff argues that the trial court erred in placing greater weight on one factor than all the others. We disagree. Whether the trial court's finding on an individual best interest factor can outweigh the findings on the remaining factors is a question of law. *McCain v McCain*, 229 Mich App 123, 130; 580 NW2d 485 (1998). Questions of law in custody disputes are reviewed for clear legal error. MCL 722.28; MSA 25.312(8); *Fletcher, supra* at 881.

The trial court, in making its ultimate custody decision, placed great emphasis on plaintiff's husband's character, including his criminal sexual conduct conviction, which it considered under best interest factor (l): "Any other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l); MSA 25.312(3)(l). In *McCain*, this Court recently concluded that "the statutory best interest factors need *not* be given equal weight." *McCain, supra* at 131 (emphasis in original). Thus, the trial court did not err in giving factor (l) more weight than any of the other factors.

Finally, plaintiff argues that the trial court's ultimate decision to change custody was not supported by clear and convincing evidence. We disagree. A decision regarding whom to grant custody is discretionary and reviewed for an abuse of discretion. *Fletcher, supra* at 880. Because the court found an established custodial environment with plaintiff, it could not change that environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

The trial court found the parties equal on six of the best interest factors. It favored defendant on four of the factors, two of them only "slightly," and plaintiff on two of the factors, one of them only

“slightly.” The court gave the greatest weight to factor (1) and ultimately ordered a change in custody based on its finding on this factor.

The evidence establishes that plaintiff married a man who pleaded guilty in 1994 to third-degree criminal sexual conduct stemming from an incident involving the thirteen-year-old daughter of plaintiff’s husband’s former live-in girlfriend. At the custody hearing, plaintiff’s husband continued to deny responsibility for the incident, blaming it on the child and his use of alcohol and drugs. He continues to use alcohol and expressed the opinion that he has the right to use drugs. The parties’ daughter’s presence in the same home as plaintiff’s husband presents the same circumstances as those of the incident to which plaintiff’s husband pleaded guilty. Plaintiff married this man, with knowledge of his criminal background, which also includes other convictions.

We find no error in the trial court’s conclusion that there was this constituted clear and convincing evidence that a change in custody was in the child’s best interests. The trial court did not abuse its discretion in ordering the change in custody.

We affirm.

/s/ Henry William Saad

/s/ Michael J. Kelly

/s/ Richard A. Bandstra