

STATE OF MICHIGAN  
COURT OF APPEALS

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TERRY R. SCHAAF,

Plaintiff-Appellee,

v

LORRAINE A. SCHAAF,

Defendant-Appellant.

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UNPUBLISHED  
October 31, 2000

No. 224182  
Houghton Circuit Court  
Family Division  
LC No. 92-008292-DM

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from an order changing physical custody of the parties' minor child to plaintiff. We affirm.

Plaintiff and defendant divorced in March 1993, and defendant was awarded physical custody of the parties' child. In June 1999, plaintiff filed a motion requesting a change in custody. The trial court adopted the psychologist's investigation and recommendation that plaintiff be given physical custody of the child, and defendant objected. Following a de novo hearing, the trial court issued written findings of fact and awarded plaintiff physical custody of the child.

Defendant argues on appeal that the trial court abused its discretion by awarding plaintiff physical custody and that the court's findings of fact regarding the statutory best interest factors were against the great weight of the evidence. In custody cases, this Court reviews the trial court's findings of fact under the "great weight of the evidence" standard, discretionary rulings for abuse of discretion, and questions of law for clear error. *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). The decision to modify custody is a discretionary dispositional ruling that will be affirmed absent an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994).

Where, as here, an established custodial environment exists, the court cannot modify the custody order to change that custodial environment without clear and convincing evidence that the modification is in the best interests of the child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Mann v Mann*, 190 Mich App 526, 530-531; 476 NW2d 439 (1991).

Defendant argues that the trial court's findings on the following factors were against the great weight of the evidence:

(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.

(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.

(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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.23; MSA 25.312(3):]

A trial court's finding of fact is not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 879.

Regarding factor (b), the court found that this factor favored plaintiff because defendant was too rigid and lacked the capacity to give necessary guidance. Although the trial court implied that defendant was somewhat favored on the issue of religion, it decided, on balance, that factor (b) favored plaintiff. This finding was not against the great weight of the evidence. Testimony was presented at trial indicating that defendant was rigid and inflexible in her approach to parenting and that this rigidity had affected the child and would continue to affect him in the future. There was also evidence that the child lacked social skills and appeared immature for his age and that these problems were directly related to defendant's ineffective parenting. Defendant argues that, even if the court properly found that defendant was too rigid, this had nothing to do with factor (b), which addresses love and affection, education, and religion. However, defendant's argument ignores the clear language of factor (b) indicating that the court should consider the capacity and disposition of the parties to give "love, affection, and *guidance*." MCL 722.23(b); MSA 25.312(3)(b) (emphasis added). The court's finding that defendant lacked the ability to give appropriate parental guidance was directly related to the considerations of factor (b).

The court's finding regarding the parties' religious differences was also supported by credible evidence presented at the hearing. It was undisputed that plaintiff was hostile toward defendant's Catholic faith and had a history of not supporting the child's religious observance and education. However, plaintiff testified that he would allow the child to continue catechism classes and would let him choose whether to attend the Lutheran or Catholic churches once he was old enough to do so. The court's finding that plaintiff was willing to facilitate the child's religious upbringing was not against the

great weight of the evidence. Because these findings were supported by evidence, the trial court did not err in finding that factor (b) favored plaintiff.

Defendant next argues that the court erred in finding that factor (d) favored plaintiff. The court found that the child's environment with defendant was not satisfactory because the child did not have enough quality time with defendant on a day-to-day basis due to the work schedules of her two jobs. Defendant argues that the court's finding is against the great weight of the evidence because defendant gave the child a stable environment for more than six years and the child had adjusted to the situation. It does not appear to us that the trial court found defendant's environment to be unstable. Instead, the court focused on the fact that the environment was not satisfactory. In reaching this conclusion, the court noted the long hours that the child spent in daycare, the minimal amount of time defendant and the child spent together each day, and the effect of the extended daycare on the child. This finding was supported by the evidence, including defendant's own testimony and the testimony of her child care providers. The court's finding that defendant's environment was unsatisfactory was not against the great weight of the evidence.

Defendant further argues that the court unfairly penalized her for placing her child in daycare while she worked to support him. Defendant cites *Ireland v Smith*, 214 Mich App 235; 542 NW2d 344 (1995), in support of her argument that if the daycare arrangement was appropriate, it was error for the court to favor the plaintiff's proposed arrangement. However, defendant overlooks a critical difference between the facts of *Ireland* and her case. In *Ireland*, the court found that the defendant mother's child care arrangements were appropriate and working well. *Ireland, supra* at 245-246. In this case, the trial court found that the extended daycare was not working well and had a negative impact on the child. We find nothing legally inappropriate in the court's comparison of the existing and proposed environments, and the court's finding that factor (d) favored plaintiff was not against the great weight of the evidence.

Defendant next argues that the trial court's finding that factor (e) favored plaintiff was against the great weight of the evidence. We agree. The trial court found that because plaintiff had extended family to assist in raising the child and defendant had no relatives living near her, plaintiff's home provided more permanence. Factor (e) "exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other." *Fletcher, supra* at 517. There is no question that defendant has a deep commitment to her child, as does plaintiff. We find no evidence that either party was favored on factor (e).

Defendant next argues that the trial court erred when it concluded that factor (f) was weighted equally between the parties and that this factor should have favored her. Nowhere in the findings of fact did the court cite any evidence of moral problems regarding either of the parties. Defendant argues that this is contrary to evidence that plaintiff had a history of arrests and that he had difficulty with impulse control and was prone to outbursts of temper. Review of the record reveals only one reported incident of plaintiff losing his temper, but no evidence that this affected plaintiff's relationship with the child. Findings regarding a party's morality are only relevant to considerations of factor (f) if the conduct affects how that party functions as a parent. *Fletcher, supra* at 887. Because there was no evidence

that plaintiff's moral fitness affected his ability to function as a parent, the trial court's finding that this factor was weighted equally was not against the great weight of the evidence.

Defendant also argues that the trial court erred when it found that factor (g) was weighted equally between the parties. Defendant claims that the custody evaluation indicated serious problems with plaintiff's mental fitness. Testimony at the hearing suggested that plaintiff had "mild" problems with impulse control, frustration tolerance, and rebelliousness. However, there was also testimony that defendant had problems with low tolerance for stress, inflexibility in problem solving, limited awareness of the consequences of her behavior, and difficulty in perceiving the needs of others. The evidence indicated that defendant's problems were more likely to affect her parenting. Based on these facts, the court's finding that this factor was weighted equally between the parties was not against the great weight of the evidence.

Defendant next argues that the court erred when it concluded that factor (h) favored plaintiff. The court found that the child had problems with lack of socialization at school and that plaintiff had shown an interest in school activities and demonstrated an interest in involving the child in community affairs with other children his age. Defendant argues that this factor should favor her because the child's school performance was more than satisfactory and she was involved in his education. It was undisputed that the child received appropriate grades and was doing well academically. However, the court focused on the social aspects of school, and the court's finding that the child had socialization problems and that these problems were related to defendant's rigidity was supported by the evidence presented at the hearing. In addition, the court's finding that plaintiff expressed interest in the child's schooling was supported by plaintiff's undisputed testimony and the testimony of the child's school teachers and officials. The evidence did not preponderate in the opposite direction, and the court's finding on this factor was not against the great weight of the evidence.

Defendant's final argument is that the court's finding that factor (k) was not applicable to this case was against the great weight of the evidence. Defendant claims that plaintiff has a history of domestic violence and the factor should favor her. Review of the record shows no evidence of incidents of domestic violence that occurred after the last custody hearing in October 1996. On the first day of this hearing, both parties asked that the court limit proofs to incidents that occurred after the last hearing, and the court agreed. Defendant cannot now rely on alleged incidents of domestic violence that occurred before October 1996. Because there was no evidence of domestic violence after that date, the trial court's finding that domestic violence was not applicable was not against the great weight of the evidence.

In conclusion, the trial court's findings, that factors (b), (d), and (h) favored plaintiff, that factors (f) and (g) were weighted equally between the parties, and that factor (k) was inapplicable to this case, were not against the great weight of the evidence. The court did not err in its

conclusion that plaintiff proved by clear and convincing evidence that a change of custody was warranted, and the court's decision to award physical custody to plaintiff was not an abuse of discretion.

Affirmed.

/s/ Roman S. Gibbs

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra