STATE OF MICHIGAN

COURT OF APPEALS

TOBIN S. MACBETH,

Plaintiff/Counterdefendant-Appellee,

v

APRIL J. MACBETH-SCARLETT,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
December 26, 2000

No. 226912
Lenawee Circuit Court
LC No. 98-019904-DM

Before: Cavanagh, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying her motion to modify custody of the parties' minor child. We affirm.

Plaintiff and defendant were divorced in March 1999. The consent judgment of divorce awarded the parties joint legal and physical custody of their minor son. On November 4, 1999, defendant filed a motion to modify the custody arrangement to grant her primary physical custody of the child based on a material change in circumstances. The case evaluation submitted prior to the hearing recommended that defendant obtain primary physical custody of the child.

In resolving custody disputes, the trial court must consider the child's best interests, as measured by the factors articulated in MCL 722.23; MSA 25.312(3). *Bowers v Bowers*, 198 Mich App 320, 327-328; 497 NW2d 602 (1993). A change in circumstances may be grounds for modification of a custody award if the moving party can establish that the modification is in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996). Where there exists an established custodial environment, a court may not change or modify custody unless presented with clear and convincing evidence that the best interests of the child would be served by the change. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000); *Bowers*, *supra* at 324. In this case, the trial court found that a custodial environment existed with both parents, and the parties do not dispute that finding on appeal.

After reviewing the testimony from the evidentiary hearing and conducting an in-camera interview with the minor child, the trial court considered the best interest factors provided in the

Child Custody Act, MCL 722.23; MSA 25.312(3). The court essentially found that the parties were equal with respect to all factors. Based on these findings, the court concluded that defendant had not shown by clear and convicting evidence that it would be in the best interests of the minor child to change or modify physical custody. On appeal, defendant challenges the court's findings of fact with respect to each statutory interest factor, arguing that they were against the great weight of the evidence and that the court's refusal to modify custody was an abuse of discretion.

In child custody cases, findings of fact, including the trial court's findings as to each custody factor, are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994); see also *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). The trial court's custody decision is reviewed under a "palpable abuse of discretion" standard. MCL 722.28; MSA 25.312(8); *Fletcher*, *supra* at 24. An abuse of discretion occurs when the result was so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion and bias. *Fletcher*, *supra* at 879-880 (Brickley, J.), 900 (Griffin, J.). Finally, questions of law are reviewed for clear error. MCL 722.28; MSA 25.312(8).

The first factor requires the court to consider "[t]he "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a); MSA 25.312(3)(a). Defendant contends that the child indicates that he misses her when he is upset at preschool, and that plaintiff is insensitive to the child's emotional needs. However, each party testified and presented other witnesses who testified regarding their love and affection for the child. There was also evidence that the child was happy and content in both settings. In light of this evidence, even defense counsel conceded during closing arguments that factor (a) equally favored both parties. The trial court did not err in finding that the evidence on this factor did not favor either party.

The second factor examines "[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). In support of her contention, defendant cites plaintiff's failure to follow safety rules, his inappropriate language toward defendant, his decision to purchase a BB gun for the child, and the fact that only she provides religious guidance by taking the child to church. The testimony established that plaintiff and his fiancee attend counseling sessions to learn to provide a better home for the child and that plaintiff takes an active interest in how the child is faring in preschool. Although plaintiff does not take the child to church, the trial court did not err in weighing this factor equally between the parties, considering their love, affection, guidance, and involvement in the child's education.

The third factor is the "[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). Defendant maintains that she adheres to a meal schedule when the child is with

her, whereas plaintiff leaves this responsibility to his fiancee and feeds the child at irregular and late hours, that plaintiff does not always return the proper clothes with the child, and that plaintiff has exhibited a disregard for the child's asthma and medical care.

While the trial court found that both parties "have the best interests of the child at heart," it chastised them for failing to cooperate with each other and with the doctors regarding the child's medical treatment. In any event, both parties presented evidence to suggest that the child was well cared for at both residences. Contrary to defendant's assertion regarding meal preparation, plaintiff testified that he does all of the cooking during the week, and his fiancee cooks on the weekends. *Mogle, supra* at 201 (this Court defers to the trial court on issues of credibility). Defendant relies on only one instance of the child being fed at 11:00 p.m., and the failure to return the child with proper clothes does not establish that plaintiff lacks the capacity to provide the child with clothing. There was also evidence that plaintiff attended the child's doctor's appointment and that he exhibited concern for the child's care. The trial court did not err in finding that the evidence on this factor did not favor either party.

The fourth and fifth factors require the court to examine "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity" and "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(d)-(e); MSA 25.312(3)(d)-(e). Defendant claims that she offers a more stable home environment for the child because (1) she is newly married and can provide a family unit unlike plaintiff who lives with his girlfriend and her daughter (2) plaintiff has no immediate plans to be married because he does not want to "rush into anything" and (3) she and her husband own a home while defendant rents his home.

The trial court found that both parties offered a stable, satisfactory environment, and a family unit. The court commended plaintiff for making a commitment to be married, stated that it understood plaintiff's reluctance to marry hastily given his prior experience, and stated that it was appropriate that plaintiff and his fiancee were receiving counseling. With respect to the morality of plaintiff's living arrangement, the court noted that defendant's husband spent three nights with defendant (while the child was in the house) before they were married. The court stated that the parties "have taken two different routes to accomplish the same thing" and that it would "not disparage [the parties] for that." With regard to the importance of maintaining continuity, the court noted that if the custody arrangement were disrupted "it will have a negative affect [sic]" on the child. We cannot conclude that the trial court's erred in its findings on these factors.

The sixth and seventh factors require the court to consider the "moral fitness" and the "mental and physical health" of the parties. MCL 722.23(f)-(g); MSA 25.312(3)(f)-(g). Defendant argues that plaintiff does not exhibit a moral lifestyle. As discussed above, the trial court found that this factor did not weigh in favor of either party, noting that defendant's husband testified that he had spent the night at defendant's house before they were married. Although defendant questions plaintiff's mental health based upon his controlling and verbally abusive behavior, the trial court chastised both parties for their manipulations and lack of cooperation regarding the child. We find no error.

The eighth factor the court must consider is the "[t]he home, school, and community record of the child." MCL 722.23(h); MSA 25.312(3)(h). Defendant maintains that she provides a more stable home environment for the child, that she has invested more time in the child's schooling than plaintiff, and that she is committed to providing the child with a church community. In finding the parties equal on this factor, the court noted "we have had testimony from both [schools] that he has a good record. I think that bodes well for both of you." The evidence also showed that the child was happy and content at both parties' residences and, according to the instructors and daycare workers at the preschool, that both parties took an active interest in the child's schooling. The trial court's finding that the parties were equal on this issue was not erroneous.

The ninth factor the court must consider is "[t]he reasonable preference of the child" MCL 722.23(i); MSA 25.312(3)(i). Defendant contends that the court should have given great weight to the provision in the custody evaluator's report which stated that the child preferred to be with the mother. The trial court indicated that it spoke with the child and considered his preference, but did not reveal the content of the discussion to the parties. "As a general rule, a trial court must state on the record whether children were able to express a reasonable preference and whether their preferences were considered by the court, but need not violate their confidence by disclosing their choices." *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), aff'd in part, rev'd in part on other grounds 447 Mich 871 (1994), after remand 229 Mich App 19; 581 NW2d 11 (1998). See also *Hilliard v Schmidt*, 231 Mich App 316, 320-321; 586 NW2d 263 (1998); *Impullitti v Impullitti*, 163 Mich App 507, 510; 415 NW2d 261 (1987). We cannot conclude that the trial court erred in this respect.

The tenth factor requires the court to address "[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). Although defendant cites incidents in which plaintiff has been uncooperative and has interfered with the child's relationship with defendant, the evidence also revealed that defendant engaged in similar behavior. The court determined that defendant contributed to the child's emotional upset during the transition period and suggested that it did not have confidence in defendant's ability to encourage plaintiff's participation in the child's life in the event the motion were granted. Based on our review of the record, the trial court did not err in finding that both parties have acted to undermine the other's relationship with the child.

The eleventh factor requires the court to consider evidence of domestic violence. MCL 722.23(k); MSA 25.312(3)(k). The court correctly determined that no testimony had been offered in this regard, and defendant acknowledges that "[t]here has been no physical domestic violence between the parties."

The twelfth factor the court must consider is "[a]ny other factor considered by the court to be relevant to a particular custody dispute." Defendant maintains that although the court addressed the custody evaluation under this factor it erred in failing to follow the recommendation therein. The record reveals that the trial court seriously considered the evaluator's recommendation. The court stated that it was "almost" persuaded by the report which recommended that defendant receive physical custody based in part on an incident

involving the child's security blanket; however, the court noted that there was testimony that plaintiff ultimately returned the blanket to the child. Further, in declining to follow the recommendation, the court explained that the child "has begun to adjust to this situation having one home in Saline and one home in Blissfield," that the child believes that he has "two homes instead of one," and that a change at this point would have a negative effect on the child.[1] The record also indicates that the court viewed both parties as equally complicit in their bad behavior, which undermined their relationship with the child, and that the court focused on the parties' apparent inability to foster a continuing and close relationship between the child and the other parent.

The trial court's findings of fact were supported by the evidence, as were its findings on the custody factors. Because the statutory factors weighed equally with respect to both parties, the trial court properly determined that defendant failed to establish by clear and convincing evidence that a change or a modification in custody was in the child's best interests.

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[1] The court specifically explained as follows:

> The recommendation was for your husband to have custody of the child back when the divorce was filed because you were getting your life together while he was taking care of the child. And what we did, we entered an order that allowed both of you to have custody of that child.
>
> Now, the recommendation is for you to have custody of the child. And I will do the same thing. I will allow both of you to have custody of the child and it will stay the same.
>
> I think the child has begun to adjust to this situation having one home in Saline and one home in Blissfield. In talking to the child what I find the child believes he has two homes instead of one or none. I think it is very good. . . .
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> * * *
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> And so now you want me to take the very difficult step to change what is going on and hope that that will result in something better and that that will not have a negative affect [sic] on the child. I will tell you it will have a negative affect [sic] on the child if I do. Because whenever you have a change of circumstances like that it is going to have an affect [sic]. It may be better for you but I am not here to do what is in your best interests or your best interests. I am here to do what is in the child's best interests. And I have to do my best to determine what is in the child's best interests based on what is presented here.

Accordingly, we cannot conclude that the trial court abused its discretion in denying defendant's motion to modify the custody to grant her primary physical custody of the child.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter