STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH G. PENNINGTON, III,

Plaintiff-Appellee,

v

WENDY JO PENNINGTON,

Defendant-Appellant.

UNPUBLISHED
February 22, 2002

No. 231378
Barry Circuit Court
LC No. 99-000693-DM

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from the order awarding plaintiff physical custody of the parties' minor child, following a hearing for change of custody. We affirm.

"All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999), citing MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). The great weight of the evidence standard applies to all findings of fact; a trial court's findings with respect to the existence of an established custodial environment and with respect to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher*, *supra* at 879 (Brickley, J.); *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). The abuse of discretion standard applies to the trial court's discretionary rulings; to whom custody is granted is such a discretionary disposition ruling. *Fletcher*, *supra* at 879, 880 (Brickley, J.), 900 (Griffin, J.); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001).

"A custody award may be modified on a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interest." *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000), citing MCL 722.27(1)(c); *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996). When a modification of custody would change the established custodial environment of a child, the moving party must show the change to be in the child's best interest by clear and convincing evidence. MCL 722.27(1)(c); *LaFleche*, *supra* at 696.

Here, the parties agreed that a custodial environment had been established with defendant. The trial court, in examining the best interest of the child, considered the factors expressed in MCL 722.23. The trial court found that six of the twelve best interest factors favored neither party, two favored defendant, two favored plaintiff, and one slightly favored defendant. The trial court went on to say that "the real question is, can the reasonable preference of a thirteen-and-a-half-year-old child provide clear and convincing evidence that a change of custody is in the child's best interest." From this language, it is apparent that the trial court found the child's preference to be the significant factor in its determination.

On appeal, defendant contends that the trial court erred in its conclusions regarding three of the factors, MCL 722.23(f), (h), and (j), and also erred in giving undue weight to the preference of the child, MCL 722.23(i).

Defendant challenges the trial court's finding that factor (f), which addresses the moral fitness of the parties, weighed equally as to the parties. Defendant contends that the trial court ignored certain testimony concerning the moral turpitude of plaintiff. However, the court is under no obligation to comment on every piece of evidence presented or declare acceptance or rejection of every proposition argued. *Fletcher*, *supra* at 883 (Brickley, J.); *LaFleche*, *supra* at 700. Because both parties offered evidence of immoral behavior, the trial court's conclusion concerning factor (f) is not against the great weight of the evidence.

Defendant also contends that the trial court erred in concluding that factor (j), the willingness of each party to facilitate and encourage a continuing relationship with the other parent, should be weighed equally. Again, as with the previously discussed factor, there was evidence that both parties engaged in poor behavior regarding the matter considered by the factor. On the record before us, we conclude that the trial court's finding regarding this factor is not against the great weight of the evidence.

Defendant further argues that the trial court erred in concluding that the child's school record, factor (h), should be weighed in favor of plaintiff. Concerning that factor, the trial court stated "I'm weighting that factor in favor of the plaintiff due to the fact that it's uncontroverted that [the child] is not doing as well as he should be in school, and in fact this year is not doing well at all and not performing up to his past standards."

At trial, defendant testified that once she became aware the child was having trouble in school, she went to the school to ascertain the problem. Defendant also arranged for the child to receive tutoring at school and for him to go defendant's sister's home after school for help with his homework. Defendant asserts that without a determination of how plaintiff could provide a better environment for academic growth, it was error for the trial court to weigh this factor in plaintiff's favor.

We agree that ruling on the basis of a single picture of how the child was doing at the time of trial is inappropriate, especially where defendant offered testimony that the child had never done extremely well in school. Defendant was awarded custody of the child less than six months before the trial court's order to modify the judgment of divorce. It is unclear as to what "past standards" the trial court was referring to at trial. Without some indication of how the child's progress rated against his past conduct, we find that the record does not support the trial

court's implicit conclusion that the child would do better in school when under the care of plaintiff.

However, even if this factor should have been weighed evenly, or in favor of defendant, that does not necessarily mean that the trial court abused its discretion in relation to its overall decision to modify custody. Mathematical or near mathematical equality on the statutory factors does not mean that a party has not satisfied its burden of proof because a court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998).

We therefore turn to the court's determination regarding factor (i), the reasonable preference of the child. This action to change custody began because the child told plaintiff that he was unhappy living with defendant. Although plaintiff also testified that at some later point, the child said that he did not want to go through with the change of custody proceedings, the trial court interviewed the child and concluded that he was a "very unhappy child, profoundly unhappy, profoundly upset" child. The court also noted that he "clearly expressed a preference to be with his father. It's a very strong preference." When all other factors are weighted relatively evenly between parties, the preference of a thirteen-and-a-half-year-old child may be seriously considered, especially where the court finds the child to be unhappy and upset under his current conditions. *In re Custody of James B*, 66 Mich App 133, 134; 238 NW2d 550 (1975) (Where the question of custody is close, "an expression of preference by an intelligent, unbiased child might be the determining factor in deciding what the 'best interests' of the child are."). Given the overall evidence, the trial court's decision to modify custody was not an abuse of discretion. *Fletcher, supra* at 879-880 (Brickley, J.); *Foskett, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra