STATE OF MICHIGAN

COURT OF APPEALS

WENDY LOUISE HAMMOND,

Plaintiff-Appellee,

v

ROBIN W. HAMMOND,

Defendant-Appellant.

UNPUBLISHED
July 12, 2002

No. 236254
Berrien Circuit Court
LC No. 97-002479-DM

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals from an order of the circuit court denying his motion for a change in custody. We affirm.

Defendant contends that the trial court made erroneous factual findings regarding several of the statutory factors that it was required to consider in determining the children's best interests in a custody dispute. MCL 722.23. We review a trial court's findings of fact with respect to these factors to determine whether they are against the great weight of the evidence. MCL 722.28; *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). We will sustain the findings "unless the evidence clearly preponderates in the opposite direction." *Id.*, quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

Defendant specifically contends that the trial court erred by finding that factors (b), (d), (f), (g), (i) and (j) either weighed equally between the parties or in favor of plaintiff. Defendant also contends that factors (c) and (h) should have weighed more strongly in his favor. Defendant does not, however, challenge the trial court's findings with respect to the remaining factors.

First, defendant contends that the trial court incorrectly found that factor (b) was equal because the evidence established that plaintiff "does nothing to continue the children in the education of their religion or creed . . . [and] is actually impeding the children's education in their religion." In contrast, defendant contends that the evidence established that he was the party actively promoting the children's religious education. However, we note that plaintiff testified that the family prayed daily before meals and bedtime, and that they occasionally read bible stories together. Moreover, plaintiff testified that she did not have a problem with defendant taking the children to church on the Sundays when she had custody, so long as the children wanted to go. Accordingly, we are not persuaded that there is merit to defendant's

assertion that plaintiff either "does nothing" or is "impeding" the children's religious education. Furthermore, the evidence fairly suggested that defendant has stronger religious beliefs than plaintiff. Thus, plaintiff's efforts to promote and encourage the children's religious education in accordance with defendant's beliefs certainly must weigh positively in her favor. Although defendant's efforts to guide the children's religious education may be described as more "active," we do not believe that the evidence clearly indicated that plaintiff lacked the capacity or disposition to guide the children's religious education. Therefore, we do not believe that the trial court's finding with respect to factor (b) was against the great weight of the evidence.

Next, defendant contends that the trial court erred by finding that factor (c) only "slightly" favored defendant. Instead, defendant contends that this factor "strongly favored" him, noting that he was far more active in obtaining medical care and social activities for the children. Defendant asserts that plaintiff lacked initiative. Defendant further notes his superior ability, and perhaps even willingness, to financially provide for his children's needs. The trial court largely agreed with defendant's assertions regarding these financial affairs, but also found plaintiff's unemployment to be a mitigating factor. The trial court found it laudable that defendant "stepped up" and paid for many things so that the children would not "go without." Nevertheless, the trial court also found, and the record more than adequately supports, that both parents provide the necessities for their children. Moreover, the record suggests that plaintiff's employment has stabilized. Consequently, we are not persuaded that the trial court's finding that this factor only slightly favored defendant was against the great weight of the evidence.

In regard to factor (d), defendant notes several factors that undermine the satisfactory environment of plaintiff's home: the children's exposure to second-hand smoke, plaintiff's depression, plaintiff's daughter's depression, and "the shorter-term nature of the physical home." In contrast, defendant notes that he resides in the family's marital home. However, the parties have had joint custody for over three years, and there was no evidence indicating that the difference between the parties' respective homes was significant. In fact, to the extent that there was originally some difficulty dealing with the weekly "transition" from home to home, defendant testified that this "problem" was continuously improving. Moreover, the trial court specifically advised plaintiff to reduce the children's exposure to second-hand smoke by encouraging her to smoke outside. The evidence further indicated that, after some unfortunate trial and error with various drugs, plaintiff's depression now appears to be under control. Finally, there was no evidence indicating that plaintiff's daughter's depression was undermining the stability of plaintiff's home. As a result, we do not believe that the trial court's weighing of factor (d) was against the great weight of the evidence.

Defendant further contends that the trial court erred in finding that the moral fitness of the parties, factor (f), should be weighed equally between the parties. In making this allegation, defendant emphasized his opposition to the live-in status of plaintiff's boyfriend. Defendant notes that plaintiff's cohabitation is the only issue in contention with respect to this factor. As defendant concedes, however, it is well established that, standing alone, unmarried cohabitation is not enough to constitute immorality for the purposes of assessing this factor in a child custody

dispute. See *Fletcher v Fletcher*, 447 Mich 871, 885-888; 526 NW2d 889 (1994).[1] Furthermore, defendant testified that he lived with plaintiff before they were married. Thus, we agree with the trial court's assertion that defendant's change of attitude regarding premarital cohabitation raises some questions regarding the fairness of his moral disapproval of plaintiff's current living situation. Accordingly, we find defendant's argument to be without merit.

Next, defendant contends that the trial court erred by weighing factor (g) equally. Defendant alleges that plaintiff's mental health has "seriously affected the children's schooling, per her own description and admission." Indeed, plaintiff's testimony acknowledged that her depression was at least part of the reason for the attendance problem. As noted above, however, there was evidence indicating that her depression problem was finally under control. Thus, there was sufficient support for the trial court's finding that this factor did not weigh in defendant's favor.

Defendant also contends that, although the trial court found that factor (h) weighed in his favor, it should have found that this factor "overwhelmingly favored" him. Indeed, there was ample evidence demonstrating defendant's contributions to his daughter's school record. The

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[1] We briefly note our disagreement with the *Fletcher* holding. In *Fletcher*, the Supreme Court held that under factor (f) "questionable conduct" is "only relevant if it is the type of conduct that necessarily has a significant influence on how one will function *as a parent*." *Fletcher, supra*, 447 Mich at 887 (emphasis in original). In light of this holding, the Court went on to conclude that "extra-marital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship." *Id.* However, as Justice Griffin noted in his partial dissent in *Fletcher*, under factor (f), the Legislature has set forth the clear and unequivocal command that courts must consider, amongst eleven other factors, "the moral fitness of the parties involved." MCL 722.23(f). Hence, the Legislature has clearly determined that one of the twelve factors to be considered is whether each of the parties involved in the child's life are morally fit. Whether a particular person is morally fit is then to be considered along with the eleven other factors in determining what is in the best interests of the child as it relates to custody. *Fletcher, supra* at 901 (Griffin, J., concurring in part and dissenting in part). For the *Fletcher* Court to have concluded as a matter of law that "objectionable conduct" such as extra-marital affairs or, as in this case, unmarried cohabitation with minor children residing in the household, cannot be considered under factor (f) unless it is tied into how one will function as a parent narrows the scope of evidence that the Legislature determined to be relevant when considering factor (f). Of course, whether the given immorality found in a particular case inhibits that parent from functioning as an effective parent requires the consideration of the eleven other best interest factors as well.

As Justice Griffin aptly noted, "while disagreements may exist over the nexis between moral fitness and parental fitness, arguments of this type are more appropriately addressed to the Legislature." *Fletcher, supra* at 901 (footnote omitted). If the Legislature deemed it appropriate to limit consideration under factor (f) to the "moral fitness to function as a parent," it would have said so in the statute. Clearly, however, it did not. It is not the proper role of the Supreme Court to change the plain language utilized by the Legislature, but we are bound to follow that precedent until it is changed.

evidence also revealed defendant's greater role in encouraging the children's participation in community activities. There was also evidence establishing that plaintiff impeded her daughter's attendance at school, eventually resulting in an adjudication for educational neglect.

On the other hand, in light of the evidence indicating that the attendance problem had been resolved for several months, there was support for a finding that the difference between the parties had narrowed. While we understand defendant's concern that plaintiff may regress, or that her improvement is illusory because of her motivation to comply with her probation terms, we believe that the trial court was in a better position to evaluate this factor. Moreover, we note that the trial court did weigh this factor in defendant's favor, but simply declined to find that the factor "overwhelmingly favored" defendant. Thus, defendant's argument is more directed towards the weight to be ascribed to this factor, rather than the trial court's finding with respect to the factor itself. Consequently, defendant's arguments are insufficient to establish that the trial court's finding was against the great weight of the evidence.

In regard to factor (i), the reasonable preference of the child, defendant challenges the trial court's finding that the children were not of sufficient age to express a reasonable preference. The trial court stated: "I had a conference with the children and while they are delightful children, I find that there is no ability for them to make a reasonable—or indication of a reasonable preference as to which parent they wish to live." Defendant notes his testimony that the children once told him that they would prefer to live with him during the school week. However, we do not believe that this one private instance of expressing a preference is sufficient to establish that the trial court's determination, following an *in camera* interview, was against the great weight of the evidence.[2]

Defendant also contends that the trial court erroneously weighed factor (j), which addresses the "willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent." MCL 722.23(j). The trial court found that this factor weighed "slightly" in plaintiff's favor. In support of its finding, the trial court noted, by reference to specific examples, how defendant's "communication" with plaintiff was actually a memorialized reference to what he had already decided. In contrast, the trial court noted plaintiff's willingness to allow defendant to have additional time with the children, as well as her deference to defendant's decisions.

Indeed, the evidence indicated that plaintiff has allowed defendant to participate in numerous activities with the children during her custodial time. Further, the record indicated that

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[2] Defendant further argues that the *in camera* interview should have been recorded based on our decision in *Foskett.* Although *Foskett* stopped short of requiring *in camera* interviews to be recorded, we recently ruled: "In the future all *in camera* interviews with children in custody cases shall be recorded and sealed for appellate review." *Molloy v Molloy*, 247 Mich App 348, 363; 637 NW2d 803 (2001), lv gtd 465 Mich 946 (2002). However, the *in camera* interview in the instant matter took place prior to the trial court's ruling on July 13, 2001, which was several months before either *Foskett* or *Molloy* was decided. In fact, the latter decision only requires "future" *in camera* interviews to be recorded. Thus, we are not persuaded that the trial court's failure to record the *in camera* interview was an error requiring reversal.

defendant, while organized and proactive, could also be controlling. Defendant's testimony conceded his reluctance to discuss matters with plaintiff, and underscored his failure to consider the impact of plaintiff's inability to participate in the extra-curricular activities.[3] These concessions certainly undermine his contention that this factor should have been weighed in his favor. Accordingly, we do not believe that the trial court's finding with respect to this factor was against the great weight of the evidence, especially where the trial court found that this factor only "slightly" favored plaintiff.

Finally, defendant contends that the trial court erred by finding some benefit to plaintiff based on the presence of her live-in boyfriend and her daughter from a previous marriage. Indeed, the trial court suggested that the boyfriend and the daughter provided an "extra set of hands, and extra set of wheels, so to speak, for these children when they need to get to things." The trial court found their presence to be "a positive." Defendant contends that their presence is "a negative," noting that any positives to be drawn from their presence should have been reflected in other factors, although his argument merely restates arguments that he, in turn, presented with regard to the other factors. Regardless, it does not appear that the trial court assigned substantial weight to this factor, nor does the trial court's finding contradict the great weight of the evidence presented.[4] Accordingly, we reject defendant's contention that this finding was erroneous.

As such, we do not believe that any of the trial court's factual findings with respect to the aforementioned statutory factors were against the great weight of the evidence. Where, as here, there is an established custodial environment, "the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child." *Foskett*, *supra* at 6; MCL 722.27(1)(c).

We do believe that defendant deserves praise for his obvious devotion to his children. Indeed, his active involvement in his daughter's education certainly mitigated the impact of her poor attendance. Along the same lines, his active pursuit of extra-curricular activities is likely to be of great benefit to the children. Nevertheless, the record also revealed that plaintiff had demonstrated substantial improvement in making her children's attendance at school a priority, and she similarly deserves praise for that improvement. In light of the comments made by the hearing referee and the trial court, there is little doubt that plaintiff will have to maintain that improvement to continue the status quo. At the time of the hearing, the evidence established that plaintiff's emotional health had strengthened, and the children's attendance and performance in

[3] While the children's participation in the various extra-curricular activities is unquestionably beneficial, we agree with plaintiff's counsel's suggestion that it would be even **more** beneficial if the parties could reach mutual agreements regarding the children's plans. Moreover, there can be no benefit to the children coming to view plaintiff as a hindrance to their ability to participate in extra-curricular activities, which is a potential risk with the present level of cooperation and communication, or lack thereof.

[4] This is not to say, however, that we would view the cohabitation as being a "positive" from a moral standpoint. Rather, we simply find that there was evidence supporting the trial court's finding that the boyfriend and older daughter, as a whole, were positive influences on the children.

school were, at the very least, acceptable. In fact, the record convincingly established that the children were doing quite well in almost all facets, which supports the trial court's decision to deny defendant's requested custody change. In conclusion, having found no errors with respect to the trial court's application of the statutory factors, we simply cannot conclude that defendant has satisfied his burden of demonstrating by clear and convincing evidence that a custodial change would serve the best interests of the children. *Foskett, supra* at 6.

Defendant argues that even though the trial court denied defendant's request for a change of custody, the trial court erred by failing to order a change in parenting time. A court may modify or amend its previous orders of parenting time only for proper cause shown or because of change of circumstances. *Terry v Affum*, 237 Mich App 522, 535; 603 NW2d 788 (1999), quoting MCL 722.27(1)(c). When a modification of parenting time "amounts to a change in the established custodial environment, the trial court should apply the standard used for a change in custody and refuse to grant a modification unless it is persuaded by clear and convincing evidence that the change would be in the best interests of the child." *Stevens v Stevens*, 86 Mich App 258, 270; 273 NW2d 490 (1978). Because the parties share custody equally, defendant's petition for a change in parenting time would, if granted, effectively result in a change in the established custodial environment. Having already determined that defendant failed to show that the custodial environment should be changed, we do not believe that the trial court erred in declining to alter parenting time.

Affirmed.

/s/ Jane E. Markey
/s/ Christopher M. Murray

I concur in result only.

/s/Donald S. Owens