STATE OF MICHIGAN

COURT OF APPEALS

JOE LYLE HESS,

Plaintiff-Appellant,

V

DAWN KIDDER, a/k/a DAWN MCCARTER,

Defendant-Appellee.

UNPUBLISHED
July 23, 2002

No. 237076
Barry Circuit Court
LC No. 98-000046-DP

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a custody order awarding sole physical custody of the parties' minor child to defendant. We affirm.

Plaintiff argues that the trial court's findings that best interest factors (f), (h), and (j) favored defendant were against the great weight of the evidence.[1] See MCL 722.23. These findings of fact are reviewed by this Court under the great weight of the evidence standard. MCL 722.28. The trial court's findings as to each factor should be affirmed on appeal unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

After reviewing the record, we conclude that the evidence does not clearly preponderate in plaintiff's favor as to factors (f) and (j). The trial court determined that factor (f) favored defendant because it believed plaintiff cheated on his taxes and that this represented a lack of character. Plaintiff argues that this is not the type of behavior contemplated by factor (f). We disagree.

MCL 722.23(f) requires that the trial court consider "[t]he moral fitness of the parties involved." Addressing this factor, our Supreme Court has stated:

> Factor f (moral fitness) . . . relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under

[1] The trial court found that factor (d) favored plaintiff, factors (c), (f), (g), (h), (j), and (l) favored defendant, and that factors (a), (b), (e), (i), and (k) favored neither party.

> factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*. [*Fletcher, supra* at 886-887.]

Morally questionable conduct relevant to factor (f) includes, but is not limited to, such conduct as verbal abuse, drinking problems, a poor driving record, physical and sexual abuse of children, and "other illegal or offensive behaviors." *Id*. at 887, n 6.

We recognize that not all acts of dishonesty significantly influence one's ability to be a parent. Here, however, because the evidence indicated that plaintiff underreported his income to the state in order to obtain free medical insurance for the child, we believe that plaintiff's act of dishonesty does directly reflect upon his ability to function as a parent. Therefore, we conclude that the trial court correctly considered this conduct as relevant under factor (f) and its determination was not against the great weight of the evidence.

MCL 722.23(j) considers "[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 . . . ." When plaintiff obtained temporary custody of the child, defendant was granted reasonable rights of parenting time as arranged by the parties. In September 1999, plaintiff obtained a personal protection order against defendant, which did not restrict defendant's parenting time. However, plaintiff informed defendant that he had restricted defendant's visitation to supervised visitation. Plaintiff thus shows a history of allowing defendant visitation on his terms, rather than the trial court's terms. We believe that the trial court's concern regarding plaintiff's willingness in the future to facilitate a relationship between the child and defendant was well founded. Additionally, there was no evidence presented that defendant had ever interfered with plaintiff's relationship with the child. Therefore, we hold that the trial court's determination that factor (j) favored defendant was not against the great weight of the evidence.

With regard to factor (h), the trial court stated that plaintiff did not enroll the child in preschool and that plaintiff had a "general attitude toward education and schooling reflected by that." Plaintiff argues that the record does not support such a finding. We agree.

MCL 722.23(h) requires that "[t]he home, school, and community record of the child" be considered. Plaintiff testified that although he enrolled the child in the winter semesters of 2000 and 2001, he did not enroll the child in the fall semesters because she was a bright child and he did not think she needed to attend both semesters. The preschool teacher testified that while not common, it was not unusual for parents to enroll a child in only one semester per year. Plaintiff also testified that he enrolled the child in preschool because he believed there were things that teachers could teach a child that a parent could not. Plaintiff further stated that he taught the child her ABCs, numbers, and counting. Also, in anticipation of retaining custody of the child, plaintiff had enrolled her in elementary school for the fall. Given plaintiff's efforts at tending to the child's education thus far, we conclude that the trial court's determination that factor (h) favored defendant was against the great weight of the evidence. Because the evidence indicated

that defendant is also concerned about the child receiving a good education, we conclude that this factor should have been weighted equally.

Where an established custodial environment exists, the court may change custody only if the party presents clear and convincing evidence that the change serves the child's best interest. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). The custody award is reviewed for an abuse of discretion. *Fletcher*, *supra* at 879-880. An abuse of discretion occurs when "the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Id*.

Of the three factors that plaintiff challenged, we have concluded that only one should have been weighted equally instead of in favor of defendant. Plaintiff has not challenged the trial court's determination that three additional factors favored placement with defendant.[2] Most notably, the trial court gave significant weight to what it perceived as defendant's honesty and willingness to answer questions even if they cast her in a poor light, and to plaintiff's seemingly evasive nature in answering questions. This Court defers to the trial court's findings on issues of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

Accordingly, we conclude that the trial court did not abuse its discretion in determining that defendant proved by clear and convincing evidence that a change of custody was in the child's best interest.

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[2] See note 1, *supra*.