

STATE OF MICHIGAN
COURT OF APPEALS

CARLA K. LINDEEN, f/k/a CARLA K.
STINSON,

Plaintiff-Appellee,

v

ROBERT LEE STINSON,

Defendant-Appellant.

UNPUBLISHED
December 9, 2003

No. 248264
Oakland Circuit Court
LC No. 00-632191-DM

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

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

I.

Plaintiff and defendant were divorced on December 18, 2000. The terms of the Judgment of Divorce specified that plaintiff and defendant would share joint physical and legal custody of their only minor child, Robert, who was born on December 11, 1996. Plaintiff's residence was considered Robert's primary residence. Under the divorce judgment, defendant's parenting time included every other weekend, every Tuesday night to Wednesday morning, two non-consecutive seven-day periods in the winter, and four non-consecutive seven-day periods in the summer, with alternating holidays.

On July 25, 2001, plaintiff filed a petition to change the custody of Robert from joint legal and physical custody to sole legal and physical custody for plaintiff. On September 21, 2001, the trial court began an evidentiary hearing on plaintiff's petition to change custody, which continued over four days. On April 7, 2003, the trial court ordered that plaintiff be awarded sole legal custody and sole physical custody of the parties' minor child.

II.

Defendant argues that the trial court erred in granting sole legal and sole physical custody to plaintiff by ignoring facts in the evidentiary hearing favoring defendant, and that application of those ignored facts require a reversal, restoring defendant's parental rights. We disagree.

A multifaceted standard of review is applied to a custody issue. The trial court's custody order must be affirmed unless its findings were against the great weight of the evidence, it committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28. The trial court's findings with regard to each factor affecting custody should be affirmed “unless the evidence clearly preponderates in the opposite direction” *Hillard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998). The trial court's discretionary rulings, including to whom it granted custody, are reviewed for an abuse of discretion. *Id.* Upon a finding of error, appellate courts should remand to the trial court unless the error was harmless. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994).

There are eleven statutory factors provided in § 3 of the Child Custody Act that the court must consider in order to determine the best interests of children in custody cases. MCL 722.23. With each factor, the court must consider and explicitly state its findings and conclusions. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991).

The best interests of the child are determined by “the sum total of the following factors”:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
- (c) The 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.
- (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.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
- (j) 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.

(k) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23; *Bowers v Bowers*, 198 Mich App 320, 327-328; 497 NW2d 602 (1993).]

Defendant argues that the court failed to apply the facts evenly with respect to factors (a), (b), (c), (e), (g), (i) and (k). The Court's findings with regard to factors (a), (b), (c), (e), (g), (i) and (k) are affirmed because the evidence does not clearly preponderate in the opposite direction. See *Hillard*, supra at 321. The trial court did not abuse its discretion in deciding that plaintiff should gain sole legal and physical custody of Robert. See *Id.*

A. Established Custodial Environment

Under the Child Custody Act, a court may not change custody to change the established custodial environment unless presented with clear and convincing evidence that a change is in the best interests of the child. MCL 722.27(1)(c); *LaFleche v Ybarra*, 242 Mich App 692, 697; 619 NW2d 738 (2000). The party moving for custody bears the burden of establishing by clear and convincing evidence that a change in custody is in the best interests of the minor. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991). In a petition for custody change, the first step is to determine the established custodial environment. *Curless v Curless*, 137 Mich App 673, 676; 357 NW2d 921 (1984). Plaintiff stipulated that a custodial environment existed with both parties. Therefore, plaintiff must show through clear and convincing evidence that a change of custody is in the minor's best interest. *LaFleche*, supra at 697. The court must find a compelling reason to change custody, requiring more than a marginal improvement in the minor's life. *Carson v Carson*, 156 Mich App 291, 301; 401 NW2d 632 (1986).

B. Best Interest Factors

1. Factor (a)

Factor (a), MCL 722.23(a), examines "[t]he love, affection, and other emotional ties existing between the parties involved and the child." See also *Hillard*, supra at 321-322.

Defendant argues that the trial court committed legal error because the trial court's findings failed to take all the evidence into consideration. Specifically, defendant argues that evidence that John Neumann, an employee of Impact Counseling Services, witnessed that defendant and Robert have a strong love, affection, and emotional bond was not properly considered. While it is true that Neumann observed this, the court did take this fact into consideration when making its determination on this factor.

The trial court's findings were not against the great weight of the evidence. See MCL 722.28. Neumann stated that the supervised visits between defendant and Robert went well, that Robert was captivated by defendant, and that Robert was emotional and clingy with defendant. However, defendant also missed two out of five of his scheduled visits with Robert, without notification. Although defendant was aware that his parenting time with Robert would be suspended until a court ordered psychological evaluation occurred, defendant refused to submit to the evaluation because of procedural aspects. Plaintiff also testified that at times when Robert was with defendant, Robert would return to her care or call her crying to come home because he did not want to be with defendant. The trial court did not fail to take evidence in defendant's

favor into consideration. Further, upon review of the record, there was sufficient evidence to support the trial court's findings with respect to factor (a).

2. Factor (b)

The second factor, MCL 722.23(b), looks at “[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.” See *Fletcher, supra* at 26. Under factor (b), defendant argues that he has the equivalent capacity and disposition to give the child love, affection, guidance, and to continue the education of the child. In support of this, defendant states that there was “no direct credible testimony offered that [defendant] ever told his son about the ‘boogie man’¹ or played a ‘stupid game’² with him.”

First, when reviewing a trial court's findings, this Court generally will not weigh the credibility of a witness or replace its assessment of the testimony for that of the trial court. MCR 2.613(C); *Fletcher, supra* at 890. However, a court cannot immunize its findings from review by alleging that they are found on pure credibility determinations in light of other evidence. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990).

In this case, there was no testimony contrary to the findings that defendant told Robert about the “boogie man” and played the “stupid game” with him. Although plaintiff was the only witness to allege that defendant was participating in these activities with Robert, the trial court may factor in the credibility of the witnesses, and absent evidence that disputes the testimony, find that plaintiff's version of the events is credible. MCR 2.613(C); *Fletcher, supra* at 890; *Beason, supra* at 804.

Second, the court did not make its determination with regard to factor (b) based on the statements about the ‘boogie man’ and the ‘stupid game’ alone. In one incident that occurred at Kindercare, Robert said that he was going to bring a gun to school and shoot someone. In response to the incident, defendant would not answer Kindercare's question of whether Robert had access to guns and Robert was subsequently not allowed back into the program. Robert also told plaintiff that defendant encouraged him to say bad words. There is evidence that after defendant's parenting time, Robert would use foul language. And there is evidence that since defendant's parenting time has stopped, Robert no longer uses foul language. Because the court may determine the credibility of the witness and because the factor was determined in plaintiff's favor due to various other factors, there is no indication that the evidence for this factor clearly preponderates in the opposite direction. *Hillard, supra* at 321.

3. Factor (c)

¹ There is evidence that defendant told Robert that the “boogie man” lived at plaintiff's house and came out at night.

² There is evidence of defendant and Robert playing the “stupid game,” which is a game where defendant would call Robert stupid and Robert would call defendant stupid.

The third factor, MCL 722.23(c), looks at “[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.” Defendant argues that under factor (c), there is no testimony showing that defendant was not employed and could not care for his son’s needs.

The court noted that as of March 27, 2003, the Friend of the Court records show that defendant owed \$1,431.92 in back child support and \$52 in fees, for a total of \$1,483.92.³ Although there was no testimony that defendant was not employed, as defendant argues, there is no evidence that he was still employed. Defendant had an opportunity to testify to his employment at the evidentiary hearing and to submit his findings of facts and conclusions of law to the court, which he chose not to do. Further, the court’s decision on this factor was not based on the inconclusive nature of defendant’s employment alone, but rather, it included defendant’s delinquency in child support payments. Because the factor was determined in plaintiff’s favor due to the inconclusive status of defendant’s employment and his child support payments being in arrears, there is no indication that the evidence for this factor clearly preponderates in the opposite direction. *Hillard, supra* at 321.

4. Factor (e)

The fifth factor, MCL 722.23(e), looks at “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.” Defendant argued that factor (e) was wrongly decided because no testimony was offered to show that defendant could not and did not provide a permanent family unit for Robert absent interference by plaintiff. Defendant also stated that evidence concerning the benefits of extended contact between defendant and Robert could not be offered due to plaintiff’s efforts to keep them apart.

The court did not state that defendant could not or did not offer a permanent family unit for Robert, but rather, that there was no evidence to show that defendant *did* offer a permanent family unit. Supporting the permanent family unit with plaintiff, Dr. Heyna Rachmiel, an employee at the Oakland County Psychological Clinic, stated that plaintiff and Richard Davis would be effective parents to Robert. Plaintiff has had sole physical custody of Robert since defendant’s parenting time was suspended on July 31, 2001, pending the results of a psychological evaluation. Plaintiff stated that Robert benefited from her having sole physical custody and has been a lot more stable, with improved behavior and more consistency. Because there was evidence to show that plaintiff did offer a permanent family unit to Robert, and no evidence whether defendant could, there is not an indication that the evidence for this factor clearly preponderates in the opposite direction. *Hillard, supra* at 321.

Further, defendant contends there is a lack of evidence because plaintiff interfered with his ability to have contact with his son. However, the facts indicate that defendant skipped two planned visits with his son without prior notification. Defendant did not submit to a court

³ We find no evidentiary support for this claim in the lower court file, and are relying solely on the trial court’s statement on this matter.

ordered psychological examination until sixteen months after it was ordered, which prevented him from having visitation with his son. Defendant admitted that he knew his parenting time was suspended pending the evaluation, but his inability to follow policy regarding the recording of the evaluation prohibited him from fulfilling the court's requirements. Rachmiel also indicated that plaintiff did not appear to be mean-spirited in her attempt to restrict defendant's parenting time, but instead, plaintiff acted out of a genuine concern for Robert's best interests. These reasons, which are in no way plaintiff's fault, but are solely the fault of defendant, are the factors that have prevented him from having contact with his son.

5. Factor (g)

The seventh factor, MCL 722.23(g), examines "[t]he mental and physical health of the parties involved." Defendant suggests that factor (g) was against the great weight of the evidence, stating that he is mentally competent to care for his son. Defendant relies on the facts that he has been found by Michael Brock, a master level psychologist and certified social worker, to have attained a reasonable degree of success in his field of employment and that "any alleged negative psychological attributes have been controlled by [defendant] to allow him to function."

The court's decision, that the factor of mental and physical competence favor plaintiff is not against the great weight of the evidence. Officer Dale Waldo, Pontiac Police Department, testified that during defendant's arrest on September 5, 2001, defendant was "on the verge" and that defendant's demeanor was "kind of shaky." Waldo said that he could not recall someone "so agitated for such a length of time." Waldo also stated that defendant questioned and resisted almost everything the police asked him to do.

Defendant told Brock, during a psychological evaluation, that he believed that Judge Elizabeth Pezzetti either had him under surveillance or was privy to surveillance information on him. Defendant stated that he was by himself when he drove Robert down to Disney World, apparently without informing plaintiff, leaving Michigan at approximately 5:00 a.m. and reaching Orlando at about 10:00 p.m. Defendant stated that, overall, the weekend car trip to Disney World was a positive experience for Robert. Defendant said that it was possible that he called Michelle Parker, director of Prodigy Child Development Center, a "thing" and a "bitch" during an evidentiary hearing and admitted to calling Karen Ross, plaintiff's attorney, a "big fat lying pig." Defendant stated that he did not find it inappropriate to make these comments.

Roy Jones, Jr., a Friend of the Court referee, conducted an evidentiary hearing for child support in this case. Jones stated that defendant's behavior at the time of the hearing was inappropriate and abusive to the point that Jones had to ask defendant to leave the room.

Tiffany Martinez, an employee at HAVEN, had an interview with defendant on August 26, 2002, that lasted for an hour and a half. Defendant let Martinez know during the intake that he would not fill out any more than his name and address on the paperwork. Martinez repeatedly told defendant that it was his choice on whether to fill out the paperwork, but if he did not complete it, he would not be accepted into the program. About an hour into the intake process, Martinez noticed that he was tape recording the session without notice or permission. Martinez told defendant that he must turn off the tape recorder, or the interview would stop. Defendant refused to stop taping and Martinez reluctantly agreed to continue the interview. After five to

ten minutes, Martinez again said that defendant had to turn off the tape recorder, and when defendant would not comply, Martinez stopped the interview. According to Martinez, defendant's demeanor changed at this point and he seemed panicky. Defendant told Martinez that he wanted the paperwork back. Defendant walked over to her quickly and ripped the paperwork from her hand and began to tear it up. Once he had finished tearing up the paperwork he stuffed it in his pockets and left. Martinez stated that defendant made her feel uneasy and labeled his behavior as desperate and unpredictable.

Officer Todd Chatterson, of the Oakland County Sheriff's Department, stated that on November 25, 2002, he responded to the Oakland County Mental Health Department in regard to defendant. Defendant was told that he could not videotape in that office because there were legal documents there. Defendant began to yell. Defendant lunged his video camera at Chatterson. Chatterson grabbed the video camera and defendant's arm to check him for weapons. Once assured that defendant did not have a weapon, Chatterson released defendant. Defendant claimed that Chatterson hurt him, walked out into the waiting room and called 9-1-1. Chatterson's lieutenant and sergeant came to the scene and interviewed defendant. Defendant eventually left the psychological clinic and an arrest warrant was subsequently issued for disturbing the peace.

Officer James Gregory, of the Oakland County Sheriff's Department, issued a police report involving defendant on December 2, 2002. When defendant was spotted at the Oakland County courthouse, defendant was advised of the warrant and placed in custody. Defendant was asked to step onto an elevator and he refused to comply. Defendant was unresponsive to the officers' commands to exit the elevator, and when an officer touched defendant's arm to escort him out, defendant fell to the floor screaming that the officers were abusing him.

Defendant testified that when Neumann interviewed him, he refused to state his employer, instead saying he worked for George W. Bush. Defendant claimed it was none of Neumann's business who he worked for. When asked why he did not comply with Neumann's requests if he wanted to have parenting time with his son, defendant stated:

Very simply because I will not be held hostage by people asking for things that are not part of their, it's not their business to have. And to have people be allowed to request anything or everything or I don't get to see my son, I mean he made that very clear to me. He's holding me hostage for the information so he could force me down the counseling path and other things. And I told him that was not what I was here for.

Defendant's intake session with Neumann was then terminated.

Brock testified that he completed a psychological examination on defendant. The results of the psychological examination, which also included a medical social questionnaire and a **Minnesota Multiphasic Personality Inventory-2 ("MMPI-2")** that were administered on August 15, 2002, diagnosed defendant with a paranoid personality disorder.

In reviewing factors leading to the diagnosis of paranoid personality, Brock explained the evidence supporting the diagnosis. With regard to the incident at Kindercare, Brock stated that defendant inappropriately handled the situation and caused a lot of trauma for his own child and

the other children at the daycare by involving the police. Brock noted also that defendant hired and fired the same trial counsel more than once, keeping with his general suspicion of everyone. Brock even found that defendant was suspicious of him while he was evaluating defendant. Brock stated that defendant's paranoid personality disorder could indirectly harm Robert because of defendant's inappropriate decisions, involving bad judgments based on his perception of being persecuted. Brock also considered defendant telling Robert about the "boogie man", playing the "stupid game" and using foul language in front of his son as bad parenting skills, but stated that these things would not be reasons to eliminate parenting time from defendant. Brock indicated that defendant functions at a reasonably high level with regard to his professional performance.

Defendant's reliance on his reasonable degree of success in his employment is not a relevant factor in determining his mental health. As defendant indicated, despite his negative psychological attributes, all that a reasonable degree of success in his field of employment indicates is that he can function. The statutory factors are used to ascertain "the best interest of the child." MCL 722.23. It is not against the great weight of the evidence for the court to favor plaintiff over defendant, who has had many situations where his mental health has been called into question, and who has been diagnosed with a personality disorder, but who can function enough to maintain employment.

6. Factor (i)

The ninth factor, MCL 722.23(i) is "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." Defendant contends that the court erred in failing to interview the minor child to determine the reasonable preference of the child under factor (i). The court stated that "[t]he factor is not applicable in this case."

At the conclusion of the evidentiary hearing in January 2003, the child was six years old. The trial court has the discretion to determine whether a child is of sufficient age to express a reasonable preference regarding custody arrangements. *Dempsey v Dempsey*, 96 Mich App 276, 282-283; 292 NW2d 549, modified on other grounds 409 Mich 495 (1980). This Court has previously found clear error where a trial court failed to discover the preferences of children as young as six and nine years old. *Bowers, supra* at 55-56.

The court did consider Robert's reasonable preference and found it to be inapplicable in this case. In *Treutle v Treutle*, 197 Mich App 690, 695-696; 495 NW2d 836 (1992), the Court found that the trial court had considered the reasonable preference of the child despite the fact that it failed to interview the child. The trial court in *Treutle, supra*, decided that there was no need to talk to the child because there was no opinion the minor could have expressed that would have affected the case. *Id.*

In this case, the court also considered the preference of the minor child and stated that, "the factor is not applicable in this case." The court found in favor of plaintiff with regard to factors (a), (b), (c), (d), (e), (g), (h), (j), (k), and (l). The court did not find in favor of defendant with regard to any of the factors, but found plaintiff and defendant equal in reference to factor (f). The child's preference does not automatically outweigh the other evidence, but is only one element to evaluate in determining the best interests of the child *DeGrow v DeGrow*, 112 Mich App 260, 271; 315 NW2d 915 (1982). The trial court, therefore, did not err in failing to

interview Robert where it considered Robert's reasonable preference, and found it to be inapplicable.

7. Factor (k)

The eleventh factor, MCL 722.23(k), looks at "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Defendant argues that, under factor (k), the court should not have favored plaintiff because there was no evidence of domestic violence. The court specifically stated that, "[a]side from the incidents prompting Plaintiff to petition for and the Court to issue a PPO against Defendant, domestic violence has not been an issue in this proceeding. Plaintiff is slightly favored on this factor."

On April 13, 2001, plaintiff filed a petition requesting an ex parte personal protection order (PPO) against defendant. Plaintiff stated in the petition that defendant had been stalking her, had come to her house without permission, and had been making threatening phone calls to her home and employment.

When issuing a PPO under MCL 600.2950(1), the court may restrain "a former spouse . . . from doing 1 or more of the following":

- (a) Entering onto premises.
- (b) Assaulting, attacking, beating, molesting, or wounding a named individual.
- (c) Threatening to kill or physically injure a named individual.
- (d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.
- (e) Purchasing or possessing a firearm.
- (f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.
- (g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs petitioner's employment or educational relationship or environment.
- (h) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address.
- (i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.

(j) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.

Further, the court must have cause to issue a PPO:

The court shall issue a personal protection order under this section if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1). [MCL 600.9250(4).]

The court previously determined that reasonable cause existed to believe that plaintiff might require a PPO against defendant. Therefore, it is not against the great weight of the evidence for the court to “slightly” favor plaintiff with regard to this factor.

C. Conclusion

In viewing the “sum total” of the factors under MCL 722.23, the court did not abuse its discretion in determining that granting sole legal and sole physical custody of Robert to plaintiff was in the best interest of the child. *Hillard, supra* at 321. Nine of the eleven factors under MCL 722.23 were decided in favor of plaintiff, including (a), (b), (c), (d), (e), (g), (h), (j), and (k). The court found factor (f), the moral fitness of the parties involved, equal between the parties. The court further expounded under factor (l), in which the court may incorporate discretionary factors it finds relevant, that defendant’s behavior and lack of respect for plaintiff, counsel, the court, and other individuals was “very disturbing,” noting specifically that the court had held defendant in criminal contempt, placing him in jail for two days. Defendant stated in his closing argument that the court had improperly held him in contempt of court. Specifically, defendant stated:

I’m not sure what the full reasons were, but [the court] accused me of calling [it] a lying sack of s---. I think maybe somebody has better terms than that. My comments were that [the court was] a lying sack of whatever.

The court also stated that it was “very concerned about Defendant’s mental stability and his overall ability to parent at this time.” We conclude that the trial court’s findings were not against the great weight of the evidence, and even if factor (i), the reasonable preference of the child, which was not examined, was found to favor defendant, the court did not abuse its discretion in determining that granting sole legal and sole physical custody of the minor to plaintiff was in the best interest of the child. *Hillard, supra* at 321.

III.

Defendant next argues that the trial court erred in not considering the preference of the minor child. Questions of law are reviewed for clear legal error, and a trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). As stated in, hereinbefore, Robert’s reasonable preference was considered and determined inapplicable. Thus, there is no legal error requiring reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell