STATE OF MICHIGAN

COURT OF APPEALS

TINA K. ALDERSON,

Plaintiff-Appellee,

v

JAMES A. ALDERSON,

Defendant-Appellant.

UNPUBLISHED
September 23, 2008

No. 283595
Mackinac Circuit Court
LC No. 05-006106-DM

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

In this child custody dispute, defendant appeals as of right from an order of the circuit court awarding plaintiff sole legal custody of the parties' minor son. Defendant appeals as of right. The parties were granted a divorce in California, and the custody issue was decided in Michigan, where plaintiff and the parties' son reside. We affirm in part, reverse in part and remand.

The court concluded that best interest factors (a) and (j) favored plaintiff, factor (e) favored defendant, and all the rest were equal. In making the custody award, the court stated that it found factor (j) to be the most significant under the circumstances. Defendant's argument is that the court's findings and conclusions for best interest factors (a), (b), (c), (d), (f), (g), and (j) were against the great weight of the evidence. Defendant also raises an argument with respect to MCL 722.23(e). However, the court weighed factor (e) in his favor.

I. Best Interest Factors

The best interest factors are set forth in MCL 722.23:

> (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 to continue the education and raising of the child in his or her 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 considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close an continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23(a)-(*l*).]

A. MCL 722.23(a)

"Since the child has resided with the Plaintiff since birth," the court reasoned, "the love, affection and emotional ties between Plaintiff and the minor child are more well defined than they are with the Defendant. Plaintiff has provided the child with love and affection to the child [sic] on a regular basis." Testimony established that the minor child has resided with plaintiff in Michigan for the entirety of his life. Defendant argues that the minor child actually spent more time in daycare than with his mother, that plaintiff prevented him from establishing an emotional tie with the minor child, and that plaintiff's alleged current personal romantic relationship takes priority over the minor child. It is true that the court did not consider on the record these alleged facts when making its determination. However, as this Court observed in *Glover v McRipley*, 159 Mich App 130, 142; 406 NW2d 246 (1987), the "distillation of information is the very essence of fact-finding. Thus, to the extent that defendant challenges the failure of the trial court to include all of the evidence of record in its opinion, we find no error." We see no error in the court's handling of this factor.

B. MCL 722.23(b)

The court concluded that this factor favored neither party. In coming to this conclusion, the court determined that both parties had the capacity to provide love, affection, and guidance to

the child, as well as provide "appropriate religious guidance." The court made the following findings with respect to the ability of the parties to continue the child's education:

> The Defendant has a more extensive formal education background than does the Plaintiff, but that does not by itself mean the Defendant is better suited to provide guidance in that area. The Plaintiff has had some learning difficulties associated with Dyslexia. The Defendant's expert testified that, depending on how an individual with such a condition dealt with the disability, it could be a hindrance or could be an asset to the education of the child.

A review of the record supports the court's findings. While defendant received a professional degree (JD) and plaintiff her GED, defendant's expert witness, Wayne Simmons, Ph.D, testified that a parent's higher educational level does not necessarily translate into a child having a better educational experience. "I've seen it go both ways," he observed. Similarly, Simmons testified that the effect a parent's dyslexia would have on the parent's ability to promote the child's educational development would depend upon how the parent has learned to cope with the problem. Again, he stated that "it can go either way."

According to defendant, plaintiff's alleged alcoholism, emotional instability, and poor judgment prevent her from providing the love, affection, and guidance that the minor child will need. Defendant also points out that the doctrines of plaintiff's stated religious preference (Baptist) conflict with her alleged lifestyle. Defendant argues that plaintiff will have to deal with the confusion this contradiction causes for the minor child. Defendant did testify that plaintiff has drunk to excess. However, plaintiff characterized her past drinking as moderate and testified that she does not now drink. Defendant's assertion that plaintiff's lifestyle will lead to religious confusion for the minor child is pure speculation. Deferring to the lower court's unique opportunity to judge the witnesses' credibility, *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991), the court's conclusion on this factor is not against the great weight of the evidence.

C. MCL 722.23(c)

MCL 722.23(c) does not "contemplate which party makes more money" at the time of trial or which party was the family's primary breadwinner. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Rather, this factor looks to the future and evaluates which party has the capacity and disposition to provide material and medical necessities for the child. *Id*. In the present matter, the court concluded that this factor favored neither defendant nor plaintiff. The court made the following findings in support of this conclusion:

> Both parties are gainfully employed and have the financial capability to provide for the child's material needs. The Plaintiff has obtained the necessary medical care for the child including surgery to correct a birth defect. Both parties also have the disposition to provide the child with the appropriate care under this variable.

These findings are not against the great weight of the evidence. The record indicates that, despite some spotty employment in the past, plaintiff works for the United States Coast Guard as a salaried employee. Although defendant earns more than plaintiff and plaintiff has received

financial help from others, she has nonetheless been able to provide for the minor child's material needs. In addition, plaintiff receives child support from defendant. Thus, at the time of trial the financial disparity between the two parties was not as great as defendant claims. See *LaFleche v Ybarra*, 242 Mich App 692, 701; 619 NW2d 738 (2000). The trial court did not err when it determined that this factor favored neither plaintiff nor defendant.

According to defendant, plaintiff's long-term prognosis for financial stability is poor because of her work history prior to her present employment. Plaintiff has abandoned this assertion because he cites no authority in support of it. *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005). In any event, we conclude that the court did not commit clear legal error. The court did consider the relative abilities and dispositions of the parties to provide for the minor child in the future. *Berger*, *supra* at 712. Moreover, past employment history is but one circumstance to be considered when considering factor (c). The court has the discretion to weigh the impact this circumstance has in relation to the other relevant circumstances.

D. MCL 722.23(d)

MCL 722.23(d) "calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ('the desirability of maintaining continuity')." *Ireland v Smith*, 451 Mich 457, 465 n 8; 547 NW2d 686 (1996). In this case, the court concluded that this factor weighed in neither party's favor. The court made the following factual findings:

> The child has resided with the Plaintiff for his entire life. Plaintiff has had to relocate on three occasions for financial and employment reasons. The Defendant has resided in the same residence since the birth of the child. There was no testimony from any witness from which the Court can find that either residence/environment is in any way superior to the other. The Plaintiff has also had to change child care providers on two occasions. The child is currently a licensed day care facility while the Plaintiff is working. The Defendant testified that his family members would be able to provide care for the child while the Defendant is working.

The court acknowledged that plaintiff has had to move on multiple occasions both due to her job and to her financial situation. Plaintiff has changed roommates three times, although not since the minor child's birth, and has also allegedly maintained a romantic relationship with her current roommate. Over this time period, plaintiff has also placed the child with several different daycare providers, and on one occasion plaintiff hired an unlicensed provider. Conversely, defendant has lived in the same three-bedroom home since the child's birth, asserts that he intends to remain in this home, and has maintained a stable income. Defendant also lives a short distance from his family and plaintiff's family, the former of which he asserts would be able to care for the child while he is at work.

While a closer issue, the court's conclusion that neither party is favored on factor (d) is not in error. Although plaintiff has moved several times and defendant has not, this does not mean that the minor child's environment with plaintiff is unstable. It is a circumstance to consider, as is the fact that the minor child has lived with plaintiff for his entire life. That continuity is also a stabilizing force in his life. Roommates can impact both the stability and

acceptability of a child's environment. However, multiple roommates do not necessarily raise a presumption that either characteristic is lacking. Also, while a lack of continuity in daycare providers is important, the lack of such continuity does not mean that a child is unmoored.

E. MCL 722.23(f)

This Court recently noted the following with respect to factor (f), the moral fitness of the parties:

> [W]ith respect to extramarital affairs . . . [,] a spouse's "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 v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994).] Examples of such conduct include, but are not limited to, "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id.* at 877 n 6. Trial courts must "look to the parent-child relationship and the effect that the conduct at issue will have on that relationship." *Id.* at 877. Thus, under factor f, the issue is not who is the morally superior adult, but rather "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Id.* [*Berger*, *supra* at 712-713 (emphasis in original).]

The court determined that factor (f) favored neither party. This conclusion was reasonable. Much of the testimony relevant to this factor came down to defendant's word against plaintiff's word. Again, this Court will defer to the trial court on matters of credibility. *Thames*, *supra* at 302. The court noted defendant's testimony that plaintiff had an excessive drinking problem, past and present, and plaintiff's testimony to the contrary. Ultimately, the court concluded that the matter was inconclusive because plaintiff's lack of memory regarding the details and the lack of "hard evidence that the Plaintiff is consuming alcohol to excess." The court also considered the fact that plaintiff has a clean work record with the Coast Guard.

Further, the court also considered defendant's moral character, including the allegations that he degraded and sexually assaulted plaintiff, and the charges brought against him for sexually assaulting a minor years prior. The court concluded that plaintiff's allegations about defendant's degrading behavior were credible, but it did not specifically address the question of defendant's alleged sexual assault of plaintiff. With respect to the charges involving a minor, the court gave them no weight because the record had been expunged and defendant had passed the character and fitness requirement of the California Bar. The court's findings were not against the great weight of the evidence.

F. MCL 722.23(g)

Defendant states that courts have considered an individual's drinking problem when considering the mental and physical health of the parties. Defendant argues that plaintiff has had such a problem. However, defendant does not make an argument beyond these statements. When a party gives a matter cursory treatment on appeal, this Court may deem the issue waived. *Badiee v Brighton Area Schools*, 265 Mich App 343, 359-360; 695 NW2d 521 (2005). Further, as noted above, the court's findings regarding plaintiff's alleged alcoholism were based to a significant degree on witness credibility and were not against the great weight of the evidence.

G. MCL 722.23(j)

Under MCL 722.23(j), the trial court must consider "[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." Some circumstances relevant to this factor include a party's attempts to turn the child against the other parent, *Hilliard v Schmidt*, 231 Mich App 316, 325; 586 NW2d 263 (1998) (plaintiff habitually berated defendant in sons' presence), an unwillingness to share custody with the other parent, *Wright v Wright*, 279 Mich App ___; ___ NW2d ___ (Docket No. 281918, issued 4/22/08, approved for publication 6/3/08), slip op at 7 (plaintiff refused to cooperate to make joint custody a workable option), and a party's actions to undermine the other party's childrearing and disciplinary decisions, *Fletcher v Fletcher*, 229 Mich App 19, 28-29; 581 NW2d 11 (1998) (defendant made childrearing decisions without plaintiff's input and undermined plaintiff's attempt at disciplining children).

In the present matter, the court concluded that this factor favored plaintiff. In support of its conclusion, the court stated the following:

> The Plaintiff claims the Defendant has demeaned her in the past due to her educational background compared to the Defendant's. The Defendant claims the Plaintiff has interfered with his attempts to have parenting time with his child.
>
> The Court finds Plaintiff's testimony regarding the Defendant's demeaning behavior and mental cruelty to be credible. Once again this finding is bolstered somewhat by Defendant's Exhibit # 1. The Court further finds this behavior is inconsistent with fostering a close and continuing relationship between the Plaintiff and the child.
>
> The Court finds the Plaintiff did not act inappropriately under the circumstances by refusing to allow out of state parenting time during the processing of this and the California case. As stated at the outset, the Plaintiff filed for divorce here and the Defendant filed for divorce in California. During the processing of both files, the Defendant had at one time denied paternity of the child. Further, the defendant was also attempting to have the Michigan case transferred to be heard in California under several different theories. Finally, based on the tone of the communications between the parties during this period the Court finds that it was not unreasonable for the Plaintiff to request the Defendant utilize [sic] parenting time in Michigan until an order regarding parenting time was established.

There does seem to be record evidence that plaintiff might have interfered with defendant's ability to see the minor child. Defendant indicated in an email sent in June 2006 that he did not know where his son resided or with whom. In addition, defendant had complained to plaintiff about three weeks prior that she had not "made a single attempt" to allow defendant to see the minor child and insisted that her "conduct in precluding me to be with my son has got to end."

It is unclear from these email exchanges whether defendant was referring to visitation in Michigan or California. Defendant also proposed a visitation schedule that is similarly

ambiguous about location. Specifically, defendant proposed the following: "Each party to have every two months. Pick-up and drop-off to occur on the first of every month. I will pick-up on June 5, 2006, and deliver him on August 1, 2006. Transportation costs to be split equally." Given the proposed duration of visitation (two months) and the fact that these periods are to alternate continuously, it is reasonable to assume that he was proposing to take the minor child to California during his scheduled parenting time. Under the circumstances outlined by the court, it properly noted that it was reasonable for plaintiff to require defendant to visit his son in Michigan pending the outcome of the divorce and custody dispute.

Defendant does assert plaintiff has failed to comply with the terms of the temporary custody order. In support, he cites a portion of the trial transcript where defendant had plaintiff read from the June 5, 2006, referee hearing. In this passage, the referee is referring to the lack of parenting time up to the date of the hearing, which could have nothing to do with an alleged violation of the March 23, 2007, temporary custody order.

However, the court erred when it found that defendant's "demeaning behavior and mental cruelty" toward plaintiff "is inconsistent with fostering a close and continuing relationship between the Plaintiff and the child." It is reasonable to presume that a respectful relationship between a child's parents benefits the development of the child's bond with both. It also seems logical to be concerned that animus toward one parent would be expressed, even indirectly, to the parties' child. However, nothing in the record shows that defendant has disparaged or belittled plaintiff in front of the minor child, or that defendant has undercut plaintiff's parenting decisions or taken affirmative steps to prevent plaintiff from developing a relationship with her son. Accordingly, the court's concern over the impact on the minor child of defendant's attitude toward plaintiff is speculative.

Therefore, the court erred in concluding that this factor favored plaintiff. Nonetheless, it was not error, given the record evidence, not to weigh it in defendant's favor.

II. Custody Award

Again, the court concluded that plaintiff was favored in two best interest factors and defendant in one. Of the two factors weighed in plaintiff's favor, the court gave "the most weight to factor (j) . . . because the Court believes under these facts this is the most significant factor in determining what is in the best interest of the child." Given the distance between the parties' homes, an award of sole physical custody with plaintiff, with who the minor child has resided his entire life, is still warranted. However, an award of sole legal custody is outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Under the circumstances of this case, both parties "share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering