STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER J. STARK, Plaintiff-Appellant,	UNPUBLISHED March 12, 2009
v	No. 287314 Kent Circuit Court
CYNTHIA L. STARK, Defendant-Appellee.	LC No. 99-005236-DM

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Plaintiff Christopher Stark appeals as of right the trial court's August 1, 2008 order, which granted defendant Cynthia Stark's motion for a change in physical custody of the parties' two minor children. We affirm.

I. Change of Custody

Plaintiff first argues that the trial court abused its discretion in concluding that a change in custody was in the children's best interests.

A. Standard of Review

This Court must affirm a trial court's custody order unless the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. MCL 722.28; *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005). Modification of an established custodial environment requires clear and convincing evidence that the change is in the best interest of the child. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). The trial court must weigh the statutory best interest factors enumerated in MCL 722.23 and make a factual finding regarding each factor. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). "A [trial] court's ultimate finding regarding a particular factor is a factual finding that can be set aside if it is against the great weight of the evidence." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Therefore, a trial court's findings "with respect to each factor regarding the best interests of the child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

B. Analysis

In this case, the trial court found that a custodial environment existed with plaintiff and properly weighed each of the best interest factors. After weighing the best interest factors, the trial court found that a change was warranted by clear and convincing evidence. Specifically, the trial court found that factors (a), (b), (d), (e), (f), (h), (j), (k), and (l) favored defendant, that plaintiff was favored on factor (c), and that the parties were equal with regard to factor (g). Plaintiff challenges the trial court's findings of fact pertaining to factors (a), (b), (d), (e), (f), (h), (j), (k), and (l) of the best interest factors, arguing that the findings were against the great weight of the evidence.

Factor (a) refers to "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court found that plaintiff's emotional relationship with the children was severely damaged because of pornography found in the home, excessive use of corporal punishment, and uneven treatment of the children. There was ample evidence showing a strained emotional tie between plaintiff and the children. The parties' son was very angry with plaintiff and refused to see plaintiff because of plaintiff's punishment techniques and the perceived disparate treatment amongst the children. In addition, the parties' daughter had unresolved fear and anxiety stemming from the pornography in plaintiff's house and his use of corporal punishment. Furthermore, plaintiff admitted that he had declined to take the steps necessary to continue supervised visitation and strengthen the emotional tie. The evidence does not clearly preponderate against the trial court's finding that this factor favored defendant.

Factor (b) requires the trial court to consider "[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." MCL 722.23(b). The trial court found that defendant had a greater disposition to fulfill this factor because the children harbored unresolved fear and anger against plaintiff. The trial court recognized that plaintiff met this factor in the past, but after a specific incident on August 28, plaintiff failed to provide the intervention necessary for "healing and restoration of relationships." David Bosworth testified that the children found more comfort with defendant despite spending the majority of their time with plaintiff. In addition, both of the children had unresolved anger towards plaintiff, but he has refused to exchange letters through the children's therapist to repair the relationship. Accordingly, the trial court's finding that this factor favors defendant is not against the great weight of the evidence.

In regards to factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), the trial court found that defendant enjoyed custody of the children since the August 28 incident and was in a stable relationship and environment for several years while plaintiff's home was less stable because of the use of corporal punishment and pornography in the home. Defendant testified that she has lived with her boyfriend for four years and that they had recently purchased a house. Plaintiff lived with his partner and had two other roommates until April 2008, and while in plaintiff's custody, the children were exposed to pornography and received excessive corporal punishment. Accordingly, the trial court's finding that this factor favors defendant is not against the great weight of the evidence.

As for factor (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e), the trial court found that defendant's living situation exhibited more permanence than plaintiff's situation. Defendant testified that she was in a four-year, stable relationship with her boyfriend and that she planned to move into a house in August 2008. The new house was located in the children's school district and would not result in a change of school. Plaintiff lives in a four bedroom duplex with his partner. While in custody of the children, plaintiff has had other partners and roommates living with him and has lived in a number of different places, including defendant's home. Therefore, the trial court's determination of this factor is consistent with the evidence on the record and was not against the great weight of the evidence.

Factor (f) "[t]he moral fitness of the parties involved," MCL 722.23(f), relates to the parent-child relationship and the effect that any identified conduct at issue may have on that relationship. *Fletcher, supra* at 887. Conduct relevant to this factor includes "verbal abuse, drinking problems, driving record, physical or sexual abuse and other illegal or offensive behaviors." *Id.* The trial court indicated that its primary concern on this factor was the children's exposure to pornography. Bosworth interviewed the children and determined that they both had been exposed to inappropriate sexualized images and situations in plaintiff's home. Some of the sexual images were purposefully shown to the children by plaintiff and his partner. Bosworth testified that exposure to sexual images and items caused the children to experience anxiety and could be deleterious to their future development. Accordingly, the trial court's finding that this factor favors defendant is not against the great weight of the evidence.

The trial court found in favor of defendant with regard to factor (h), "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court commended plaintiff's efforts for establishing a foundation for the children's educational successes; however, plaintiff's ongoing discipline regime was unhealthy and detrimental to the children's development. Bosworth testified that plaintiff's discipline techniques were not suitable for someone with special educational needs like the parties' son. Plaintiff's use of corporal punishment caused both of the children to experience anxiety. Defendant on the other hand used a system of privilege removal and timeouts, and the children were responsive to those techniques. Both of the children found more comfort with defendant. Therefore, the trial court's determination of this factor is consistent with the evidence on the record and was not against the great weight of the evidence.

With regard to factor (j), "[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 or the child and the parents," MCL 722.23(j), the trial court found that defendant attempted to facilitate a strong relationship between the children and plaintiff while plaintiff was unwilling to accept criticism of his past mistakes and had terminated contact with the children. Bosworth testified that the parties are often inappropriate in the comments they make concerning the other party; however, plaintiff's criticisms are more prolific. In addition, during the supervised visitation, William Edwards testified that defendant encouraged the parties' reluctant son to visit with plaintiff. Conversely, plaintiff refused to bring the children's Christmas presents or video game equipment to the supervised parenting time because he felt their property should stay at his home. In addition, plaintiff refused to take the steps necessary to continue

supervised visitation. Accordingly, the trial court's finding that this factor favors defendant is not against the great weight of the evidence.

Factor (k) refers to "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court found that there was a long history of domestic violence between the parties and that both parties bear the responsibility to change their behavior; however, the trial court found that more recent events were dispositive on this issue. Defendant admitted that she was arrested twice for domestic violence against plaintiff in the past and previously used corporal punishment with the children. Plaintiff recently used corporal punishment as a motivation for the parties' son to behave properly in school and used it when he threatened to slap the parties' daughter after she used "the Lord's name in vain." In addition, plaintiff was arrested after the August 28 incident because the son had red marks on his neck and chest. Furthermore, Edwards testified that he was primarily concerned about emotional abuse that may be occurring between the children and plaintiff. The children were more comfortable with defendant because of the corporal punishment and pornography issues at plaintiff's household. Therefore, the trial court's determination of this factor is consistent with the evidence on the record and was not against the great weight of the evidence.

Factor (l) refers to "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The trial court found that the parties' daughter required special care because she was a victim of sexual abuse and that plaintiff did not fully appreciate the situation and allowed the child to be exposed to pornography. Bosworth testified that the child was intrigued by pornography and searched for pornographic images and that plaintiff had not completely restricted access to the sexualized images and, in fact, had shown some of them intentionally. Bosworth testified that the child was experiencing anxiety because of her exposure to inappropriate adult images and that such exposure could cause further deleterious effects. Accordingly, the trial court's finding that this factor favors defendant is not against the great weight of the evidence.

Our review of the record indicates that the trial court properly considered each of the best interest factors and made factual findings consistent with the record evidence. The majority of the statutory factors weighed in favor of defendant and the great weight of the evidence supported the challenged findings. Because the evidence did not clearly preponderate in the opposite direction, and because the findings favored defendant, there is no basis on which to find that the trial court abused its discretion in granting defendant sole custody of the children.

II. Adjournment

Plaintiff next argues that the trial court erred in denying his request for an adjournment to allow him more time to prepare for the hearing.

A. Standard of Review

This Court reviews a trial court's decision on a motion for an adjournment for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32-33; 553 NW2d 619 (1996).

B. Analysis

An adjournment may be granted because of the unavailability of a witness or evidence, but the motion "must be made as soon as possible after ascertaining the facts" and "only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(1) and (2). In addition, a motion for an adjournment must be based on good cause, and a trial court may grant an adjournment to promote the cause of justice. *Soumis*, *supra* at 32.

Plaintiff's claim that the trial court erred in refusing to grant his motion for an adjournment is without merit because plaintiff's motion for adjournment was not timely and was not made for good cause. Plaintiff moved for an adjournment three days before the hearing because he was unable to reestablish supervised parenting time with the children and was unable to communicate with his counsel preceding the hearing because of a prolonged illness. While we do not question that plaintiff's counsel suffered a prolonged illness before the hearing, the record does not support that an adjournment was necessary. Counsel appeared in this matter on February 20, 2008, and even without most of the month of May to prepare, he had more than two months, including a full week before trial to prepare. Nothing in the record or in plaintiff's arguments on appeal indicates that certain witnesses or evidence was not presented because of any lack of preparation. Further, plaintiff failed to articulate to the trial court, or to this Court, how additional preparation would have benefited plaintiff. In addition, there was evidence that plaintiff's counsel was aware that Edwards suspended plaintiff's supervised parenting time in April 2008, and he discussed the matter with plaintiff. Plaintiff had ample time to address the issue before the evidentiary hearing. Therefore, we conclude that plaintiff's motion, made the Friday before the hearing, was not only untimely, but was not made for good cause. The trial court did not abuse its discretion in denying plaintiff's motion.

III. Friend of the Court Report

Plaintiff next argues that the trial court erred in admitting the Friend of the Court (FOC) report over his objection at the evidentiary hearing.

A. Standard of Review

A trial court's evidentiary decision is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

B. Analysis

The FOC report and its recommendations concerning custody may be placed in the court file and considered by the trial court for background purposes. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989); See also *Jacobs v Jacobs*, 118 Mich App 16, 23; 324 NW2d 519 (1982). However, the FOC report is only admissible as evidence if the parties stipulate to its admission. *Duperon*, *supra* at 79. Where it is not evidence, "[t]he trial court's ultimate findings relative to custody must be based upon competent evidence adduced at the hearing," and "the FOC's report may not form the basis for the trial court's findings." *Id.*

The trial court erred in admitting the FOC report over plaintiff's objection at the evidentiary hearing. *Duperon*, *supra* at 79. However, the trial court's error was harmless. The trial court properly considered the FOC report as background and only erred in its admission into

evidence. *Duperon*, *supra* at 79. In rendering its opinion, the trial court never referred to the FOC report and did not rely on the report as the basis for its decision. The trial court based its opinion upon competent evidence adduced at the hearing. *Id.* Therefore, we find that the error in the admission of the report was harmless. The trial court's modification of the custody order was proper.

Affirmed.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro