STATE OF MICHIGAN

COURT OF APPEALS

SANDRA AUSTIN, f/k/a SANDRA PARKS,

Plaintiff-Appellee,

v

HENRY PARKS,

Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 178283
LC No. 92-440888

Before: O'Connell, P.J., and Reilly and D.E. Shelton,* JJ.

PER CURIAM.

Defendant Henry Parks appeals as of right a judgment of divorce entered in circuit court that granted the parties joint legal custody of their son Erik and awarded physical custody to plaintiff. We affirm in part, reverse in part and remand for further proceedings.

Initially, we note that our review in this case is more difficult because of the manner in which the court made its findings. When the court initially explained its ruling, the findings as to some of the factors were unclear. After the court stated its decision, defense counsel asked the court specific questions to clarify the findings. Unfortunately, the court's answers to defense counsel's questions at times contradicted its other statements. For example, with respect to factor i (reasonable preference of the child), the court stated:

> After conference, the question of whether or not the child would have a reasonable preference of one parent or the other, it would appear to me that the child is too young to express a preference at nineteen or twenty months. But, on the other hand, the reasonable inference is the fact he spent most of the time with his mother, that if he could speak objectively, he would prefer the mother. But it really is academic in light of the youth of the child.

---

*Circuit judge sitting on the Court of Appeals by assignment.

Defense counsel later asked, "And then did you find on [i]. that you preferred the mother also?" The court responded, "Yes." Similarly, the court seemed to find the parties equal on factor b (capacity and disposition to give the child love, affection, and guidance and continuation of the educating and raising the child in its religion) when it stated:

> As to religion, it would appear that neither party practices any religion and that that does not seem to be an important consideration, but [the] statute requires you to consider it. Obviously the child is of an age where he hasn't been exposed to that, if either party had the capacity to expose him. Both parties do have the ability and have had the disposition to give the child love, affection, guidance in educating and raising this child, and there's evidence that the defendant should have visitation because he is capable of taking care of the child's needs.

However, when defense counsel later asked if the court found the parties equal on factor b, the court responded:

> No. I think the advantage is to the mother. She's had greater opportunity and she was totally responsive to any questions put to her. And in accordance, as to that factor, the balance is in her favor.

In addition, as discussed in more detail below, the court did not seem to differentiate between factors d and e. With this background in mind, we turn to defendant's specific challenges.

Defendant challenges the trial court's finding that an established custodial environment existed with plaintiff and the court's findings as to best interest factors a, c, d, e, h, i, and j. Under *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994), we review the court's findings of fact under the great weight of the evidence standard, e.g. the court's findings on each factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*. at 879. The court's discretionary rulings are reviewed under a palpable abuse of discretion standard. *Id.* Questions of law are reviewed for clear legal error. *Id*. at 881. Upon a finding of error, we must remand the case for reevaluation, unless the error was harmless. *Id.* at 889.

The trial court found that an established custodial environment existed with plaintiff. An established custodial environment depends "upon a custodial relationship of significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); MCL 722.27(1(c); MSA 25.312(7)(1)(c). Plaintiff was Erik's primary caretaker from birth. He lived with plaintiff, her daughter, and extended family at plaintiff's mother's house until April 15, 1994, when he was approximately sixteen months old. At that time, plaintiff, her daughter and Erik moved into an apartment. Despite the change in physical environment, we conclude that the evidence does not clearly

preponderate against the court's finding. Compare *Ireland v Smith,* 214 Mich App 235; 542 NW2d 344 (1995).

The court found that factor a, " The love, affection, and other emotional ties existing between the parties involved and the child," favored plaintiff. The trial court noted that both parties have shown love and devotion to Erik. Although the court's reasons for finding that this factor favored plaintiff are somewhat unclear, the court stated that it felt that "a long period of time has made the bonding even more important between the mother and the child." The evidence does not clearly preponderate against the court's finding on this factor.

The court found that the parties were equal with regard to factor (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." The court stated:

> An economic balance between the two – there's little to choose. The defendant works steadily, but his income is modest enough that with food stamps and Medicaid and ADC monies which the plaintiff gets, it would appear the two will almost be a fair balance.

We agree with defendant that the court's finding on this factor was against the great weight of the evidence, and inconsistent with its other findings. At the time of the hearing, defendant had been employed for over three years by a computer company. The court found that his net pay was "in the neighborhood of $250 a week." The court found that plaintiff "has part-time employment off and on, with Aid to Dependent Children and comparing her income at minimum wage, probably in the neighborhood of a hundred dollars a week." As the custodial parent, plaintiff's income must support herself, another child and Erik. If defendant were the custodial parent, his income would only have to support himself and Erik. Considering the evidence and the court's findings with regard to the parties' incomes, plaintiff does not have an equal capacity to provide for the child. The court's finding that the parties were equal on this factor is against the great of the evidence.[1]

We agree with defendant that the court appears not to have differentiated between factors d ("The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," and e ("The permanence, as a family unit, of the proposed or existing custodial home or homes.") The court seemed to address factor d when it stated:

> The length of time that the child has resided with the mother and number of hours obviously spent with the mother is a factor which the Court considered and feels is important in keeping the physical custody of the majority of the time with the mother.

The court seemed to be addressing the stability of the environment when it stated:

> The home that the plaintiff has established in an apartment is not necessarily permanent, and the plaintiff indicated as I recollect that she intended to move into a two bedroom when she could make arrangements for it. This is of little moment, although the law requires you to take into consideration the permanence of the location for the family unit. When the child is age twenty months, it is not of the importance that it would be later in the child's life. And obviously it would be a superior arrangement if a two bedroom apartment were the one to be lived in.

Later, the following colloquy occurred:

> [Defense counsel]: The length of time that the child has lived in a stable environment, you favored the mother on that?
>
> THE COURT: Yes.
>
> [Defense counsel]: With regard to the permanence of the family unit, of the existing or proposed custodial home, what was the Court's finding? Was that equal or to the mother?"
>
> THE COURT: I found it was satisfactory in her case because – she might have done it by accident, but when she moved from her mother's house principally because there were eleven people in the house instead of the five that were there. But, incidentally, there were five cigarette smokers the proof showed, and I would submit to you for a child that was asthmatic, it would be almost suicide to stay there. So whether the mother knew that or not, you have to give her credit. She moved out of a situation and moved into another situation which in this Court's opinion was adequate.

The court's statements suggest that it was not differentiating between factors d and e. Whether plaintiff's choice to change the child's physical environment was appropriate is irrelevant to the permanency as a family unit of the proposed or existing custodial home or homes as considered in factor e. "'This factor exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other.'" *Ireland, supra* at 246, quoting *Fletcher v Fletcher,* 200 Mich App 505, 517; 509 NW2d 689 (1993). Because the appropriateness of the choice to change living arrangements is not pertinent to factor e, the court committed clear legal error by considering it. See *Fletcher,*. 447 Mich at 884-885.

With respect to factor d, the court indicated that it favored plaintiff. Defendant argues that the evidence indicated plaintiff frequently changed residences, especially before Erik was born[2], that the environment changed in April, 1994, less than four months before the hearing, and the court found that plaintiff intended to move again. Because of the court's lack of differentiation between factors d and e, we cannot tell whether the court separately considered the stability of the environment, as opposed to the permanency of the family unit. We conclude that on remand, the court should further articulate its findings on both factors.

We agree with defendant that the trial court's findings that factors h (home, school, and community record) and i (reasonable preference of the child) favored plaintiff were against the great weight of the evidence. The child, who was approximately nineteen months old at the time of the hearing, was too young for these factors to apply. *Wellman v Wellman*, 203 Mich App 277, 284; 512 NW2d 68 (1994) (these factors held not applicable to children ages 6 ½ months and 2 ½ years old.)

In regard to factor 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,"), the trial court found:

> Well, I found that neither one of them were willing and neither one of them had done what I thought they should have done to cooperate with each other in bringing up the child.

We are not persuaded that the evidence clearly preponderates against this finding.

In light of our conclusions that that the court committed legal error with respect to factor e and that its findings as to factors c, h, and i were against the great weight of the evidence, and considering the lack of clarity with respect to the court's findings on factors d and b, we cannot conclude that the errors were harmless, and therefore, we must reverse and remand for reevaluation. *Fletcher*, 447 Mich at 889. On remand, the court is to consider "up-to-date information", as well as the fact that the child has "been living with the plaintiff during the appeal and any other changes in circumstances arising since the trial court's original custody order." *Id.*

Affirmed in part, reversed in part and remanded for reevaluation consistent with this opinion. We retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Maureen Pulte Reilly
s/ Donald E. Shelton

[1] In addition, the court's discussion of this factor only in terms of the financial situation of the parties ignored the evidence indicating that plaintiff was unwilling to admit that Erik has asthma and to treat it appropriately. Although the court is not required to comment on every matter in evidence, see *Fletcher*, 447 Mich at 883-884, the court's statements suggest that it was considering only the parties' capacity, and not their disposition, to provide for the child.

[2] Plaintiff testified that during the five and one-half years of her daughter's life, they lived with plaintiff's mother, then plaintiff's aunt for "a couple weeks", moved back with plaintiff's mother, then lived with

defendant from July, 1991 to June 15, 1992, moved back in with her mother and moved to an apartment on April 15, 1994.