# STATE OF MICHIGAN

# COURT OF APPEALS

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DAVID R. LANCASTER,

Plaintiff-Appellee/
Cross-Appellant,

v

BRENDA L. LANCASTER,

Defendant-Appellant/
Cross-Appellee.

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UNPUBLISHED
February 14, 1997

No. 181986
Oakland Circuit Court
LC No. 93-456675-DM

Before: Markman, P.J., and Smolenski and G.S. Buth,* JJ.

PER CURIAM.

In this custody case, defendant appeals as of right from the child custody provisions of the judgment of divorce entered by the trial court. Plaintiff cross-appeals as of right the same judgment. We affirm.

The parties, who were married on September 18, 1982, in Dearborn Heights, Michigan, have two minor children of this marriage: Scott David Lancaster, born July 16, 1984, and Keith David Lancaster, born February 22, 1990. On February 1, 1992, the parties ceased cohabiting as husband and wife, but they continued to live at the family home in Troy, Michigan. On June 10, 1993, plaintiff filed his complaint for divorce, requesting the following relief: (1) dissolve the marriage between the parties, (2) grant plaintiff permanent custody of Scott and Keith, and (3) divide the marital property in an equitable manner. An eight-day bench trial was held on the custody issue from March 2, 1994, to May 20, 1994. Twenty witnesses testified at trial, including both parties, Dr. Lyle Danuloff, the court-appointed psychologist, and Dr. Terrance Campbell, defendant's psychological expert. Dr. Danuloff testified that he performed an independent evaluation in order to determine which party should have custody of Scott and Keith. The evaluation consisted of three tests (M.M.P.I. 2, Rorschach, Brooklyn Perceptual Scales) and various interviews. Dr. Danuloff concluded that plaintiff should have physical and legal custody of Scott and Keith. He believed that defendant lacked the emotional stability needed

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

to properly raise the children and therefore should not be the decision maker for the children. Dr. Terrance Campbell, defendant's expert witness, testified that he reviewed Dr. Danuloff's evaluation and evaluated defendant. Contrary to Dr. Danuloff's conclusions, Dr. Campbell believed that defendant was not socially or interpersonally isolated, or suffering from a psychological disorder. He stated that defendant was a competent and effective parental figure. Dr. Campbell concluded that Dr. Danuloff's evaluation was wilfully inadequate, and that Dr. Danuloff had lost his objectivity. Dr. Campbell stated that he was not able to render an opinion on which parent should have custody of the children because he did not interview plaintiff or the children.

On May 27, 1994, the trial court issued its partial opinion from the bench. After making detailed findings of fact and conclusions of law on the "best interest" factors enumerated in MCL 722.23; MSA 3.12(3), the court held that it was in the best interest of the children for the parties to have joint legal and physical custody of Scott and Keith. The court further ordered plaintiff to attend parenting classes on discipline techniques and ordered defendant to continue with psychotherapy. On May 28, 1994, the trial court issued its opinion from the bench on the issues not addressed on May 27, 1994. The court stated that the parties had met and agreed upon a revised custody schedule, and had reached an agreement relating to child support and division of the marital property. On December 14, 1994, the trial court issued the judgment of divorce, reflecting its opinion rendered on May 27, 1994, and on May 28, 1994. It is from this judgment of divorce that the parties appeal.

I.

Plaintiff argues that the parties' consent modification of the trial court's May 27, 1994, custody and visitation ruling rendered the custody and visitation provisions of the divorce judgment a nonappealable consent judgment. We disagree.

This Court has jurisdiction on appeals from all final judgments from the circuit court except for certain exceptions not here relevant. MCL 600.308(1)(a); 27A.308(1)(a); MCR 7.203(A). However, one may not appeal from a consent judgment, order or decree. *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990). A consent judgment differs substantially from the usual litigated judgment because it is primarily the act of the parties rather than the considered judgment of the court. *Espinoza v Thomas*, 189 Mich App 110, 117; 472 NW2d 16 (1991). A consent judgment of divorce involving child custody differs from other consent judgments because it involves the rights of third parties. *Koron v Melendy*, 207 Mich App 188, 191-192; 523 NW2d 870 (1994). Therefore, even if a court accepts a parties' custody agreement, the judgment is that of the court and not of the parties since the court must determine whether the agreement is in the child's best interest. *Id.*

We find that the custody portion of the trial court's divorce judgment did not constitute a nonappealable consent judgment even though the parties agreed to portions of that judgment because the court's judgment on the custody issue was ultimately the judgment of the court, not the parties, whereby the court determined that the parties' agreement was in the best interests of the children. *Koron, supra* at 191-192. Therefore, this Court has jurisdiction to review the trial court's custody

determination even though the parties agreed to portions of the custody arrangement. We further note that the parties did not consent to the trial court's award of joint physical and legal custody of the children. They merely agreed on ancillary provisions to that determination, such as the custody schedule.

II.

Defendant argues that the trial court made insufficient findings of fact on the custodial environment issue and that its finding that no custodial environment existed was against the great weight of the evidence. We disagree.

In reviewing child custody cases, appellate courts must apply three different standards of review to three distinct types of findings. *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). Findings of fact are reviewed under the great weight standard, a discretionary ruling, such as to whom custody is granted, is reviewed for a palpable abuse of discretion, and questions of law are reviewed for clear legal error. *Id.* at 876-877, 880. Under the great weight standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Id*. at 878. Previous caselaw has defined "abuse of discretion" as a result that 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*. at 879-880. A "palpable abuse of discretion" is not significantly unlike this standard. *Id*. at 880.. However, a trial court's exercise of discretion is not unfettered, but, rather, is limited by the statutory best interest factors contained in MCL 722.23; MSA 28.312(3). *Fletcher, supra* at 881. Finally, clear legal error exists if the trial court incorrectly chooses, interprets, or applies the law. *Id*. If this Court determines that the trial court made findings of fact against the great weight of the evidence, abused its discretion or committed clear legal error, it should remand the case for reevaluation, unless the error was harmless. *Id*. at 889. In custody cases, the trial court is not required to recite all the evidence it considered in rendering its decision. *Id*. at 883.

Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). A trial court must determine whether a custodial environment exists before it rules on the child's best interest. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). The relevant statute, MCL 722.27(1)(c); MSA 25.312(7)(1)(c), states in part:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

In determining whether a custodial environment exists, the court's concern is not with the reasons behind the custodial environment, but with the existence of such an environment. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

Although the court did not list in detail the reasons why a custodial environment did not exist, it is clear that the court understood the issue and correctly applied the law. See MCR 2.517(A)(2); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). It can be reasonably inferred from the court's statement that no custodial environment existed since the children lived with both parents all of their lives and that the court was convinced the children did not look to one parent for their guidance, discipline and necessities of life. See MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Furthermore, the trial court's finding that no custodial environment existed was not against the great weight of the evidence. The evidence presented at trial did not clearly preponderate in the direction that a custodial environment was established with defendant given the fact that both parties remained in the marital home during the divorce proceeding. *Fletcher, supra* at 878.

III.

Next, the parties raise various allegations of error concerning the trial court's factual findings on the various "best interest" factors. The "'best interests of the child'" means the sum total" of the factors enumerated in MCL 722.23; MSA 25.312(3). A trial court must consider, evaluate and determine each of the statutory factors. *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993). A 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, supra* at 881. A trial court's discretion in weighing the evidence is not unlimited; rather, it must be supported by the weight of the evidence. *Id.*

Factor a is "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a); MSA 25.312(3)(a). In this case, the trial court found that the parties were equal on factor a because the evidence showed that both parties equally loved and were emotionally tied to the children. Plaintiff argues that the great weight of the evidence favored him on factor a given defendant's emotional problems. We disagree. Although plaintiff correctly points out that Dr. Danuloff testified that the children looked to plaintiff as the psychological parent, Dr. Campbell testified that defendant was a competent and effective parental figure and that Dr. Danuloff had lost his objectivity in evaluating defendant. Therefore, because plaintiff has failed to show that the evidence clearly preponderated toward favoring him on factor a, we conclude that the trial court's finding on factor a was not against the great weight of the evidence. *Fletcher, supra* at 881.

Factor b is "[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); MSA 25.312(3)(b). In this case, the trial court ruled in plaintiff's favor on factor b based on defendant's problems in establishing interpersonal relationships. The court believed that defendant's inability to properly guide her children would be hampered by her personality problems. Defendant argues that the great weight of the evidence favored her on factor b because the evidence established that she was more committed to the educational and religious needs of the children.

The trial court recognized defendant's strength relating to the educational and religious needs of the children. However, it believed that her problems with interpersonal relationships might prevent her from using her strengths in a positive way. Because defendant has failed to show that the evidence clearly preponderated toward favoring her on factor b, we conclude that the trial court's finding on factor b was not against the great weight of the evidence. *Fletcher*, *supra* at 878.

Factor c is "[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." MCL 722.23(c); MSA 25.312(3)(c). In this case, the trial court found that the parties were equal on factor c. It stated that although plaintiff was the "major breadwinner" of the family, it believed that defendant could adequately provide for her children since she was a registered nurse.

Factor d is "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d); MSA 25.312(3)(d). In this case, the trial court found that the parties were equal on factor d because it believed that after the parties were divorced each parental home would provide a stable environment for the children.

Factor g is "[t]he mental and physical health of the parties involved." In this case, the trial court found that the parties were equal on factor g. It believed that the evidence presented at trial established that both parties were physically and emotionally able to care for their children.

Plaintiff argues that the trial court's factual findings relating to factors c, d and g were against the great weight of the evidence given defendant's emotional problems. We disagree. First, defendant's mental condition was only relevant to factor g. Therefore, plaintiff's argument relating to factors c and d are not persuasive. As to factor g, the evidence establishing defendant's alleged emotional problems, offered mainly by Dr. Danuloff, was contradicted by the testimony of Dr. Campbell. The court recognized this contradiction and concluded that it believed defendant would be mentally stable to provide for her children if she continued with therapy. Therefore, because plaintiff has failed to show that the evidence clearly preponderated toward favoring him on factors c, d and g, we conclude that the trial court's findings were not against the great weight of the evidence. *Fletcher*, *supra*.

Factor f is "[t]he moral fitness of the parties involved." MCL 722.23(f); MSA 25.312(3)(f). In this case, the trial court found that the parties were equal on factor f. It asserted that although both parties made allegations against the other about immoral conduct, none of the allegations were substantiated at trial. Defendant argues that the great weight of the evidence favored her on factor f given the evidence of child abuse by plaintiff. We disagree. First, defendant's argument relates to factor k, not factor f. Second, and more importantly, Jeanette Wallington, a social worker with the Michigan Department of Social Services, testified that although a complaint was filed with her office against plaintiff alleging that he had physically abused Scott, she found no basis for the complaint because Scott denied being abused and there was no evidence substantiating the complaint. Therefore, because defendant has failed to show that the evidence clearly preponderated toward favoring her on

factor f, we conclude that the trial court's finding was not against the great weight of the evidence. *Fletcher, supra*.

Factor h is "[t]he home, school, and community record of the child." MCL 722.23(h); MSA 25.312(3)(h). In this case, the trial court found that the parties were equal on factor h because the evidence established that both parents were involved and interested in the childrens' schooling. Defendant argues that she should have been favored on factor h for the reasons offered relating to factor b. We hold, for the same reason, that the trial court's finding that the parties were tied on factor h was not against the great weight of the evidence. *Fletcher, supra*.

Factor i is "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i); MSA 25.312(3)(i). The trial court must state on the record whether the child was able to express a reasonable preference and whether the court considered that preference in arriving at its determination. *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988). However, the court does not have to violate the child's confidence by disclosing his or her preference. *Id.* In this case, the trial court found that neither Keith nor Scott was able to express a preference. Defendant argues that the trial court's finding of fact on factor i was insufficient. We disagree. Contrary to defendant's assertion, the factual findings state that the trial court interviewed the children and that the interview revealed they were too upset to express a preference. Accordingly, the factual findings relating to factor i were sufficient and indicate that the trial court was aware of the issue and correctly applied the law. *Fletcher, supra* at 883; *Triple E, supra*.

Factor j is "[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); MSA 25.312(3)(j). In this case, the trial court found in favor of plaintiff on factor j based on its determination that he could better facilitate the parent-child relationship. Defendant argues that the trial court committed a clear error of law by basing its ruling on her relationship with her family of origin. We find that the trial court did not err in considering defendant's history of allegedly sabotaging her relationship with her family of origin because it relates to her willingness to facilitate a relationship between her children and plaintiff. Linda Taylor, defendant's sister, testified that defendant had attempted to prevent a relationship between Scott and Keith and her family, and between Scott and Keith and plaintiff's family, and that she believed that defendant would attempt to interfere with plaintiff's relationship with Scott and Keith after the divorce. Therefore, we concluded that the trial court did not commit clear legal error in considering defendant's relationship with her family of origin in determining factor j. See *Fletcher, supra* at 881.

Factor k is "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k); MSA 25.312(3)(k). Defendant argues that the trial court made insufficient findings of fact on factor k. We disagree. The trial court essentially found that there was no substantial evidence favoring either party on the issue of domestic violence. Although the trial court stated that it was not weighing factor k, we believe that the trial court was merely indicating that it would not favor either party on this factor. Although the trial court could have set forth its findings of fact on factor k more explicitly, it appears that the trial court understood the domestic violence issue and

properly applied the law to that issue. We conclude that the court's findings of fact concerning factor k were sufficient. *Fletcher, supra* at 883; *Triple E, supra*.

IV.

Defendant argues that the trial court's award of joint physical custody constituted an abuse of discretion. We disagree. The statute that governs the issue of joint custody, MCL 722.26a; MSA 25.312(6a), states in pertinent part as follows:

> (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
>
> (a) The factors enumerated in section 3 [MCL 722.23; MSA 25.312(3)].
>
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

Cooperation between the parties on basic child rearing issues is only one factor for the court to consider in its decision to grant or deny joint custody. *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987).

After considering all the evidence presented at trial, the trial court awarded the parties joint legal and physical custody of the children. The trial court painstakingly analyzed the eleven factors enumerated in MCL 722.23; MSA 25.312(3) in determining that joint custody was the appropriate custody award. After reviewing this record, we conclude that the trial court's award of joint custody did not constitute a palpable abuse of discretion. *Fletcher, supra* at 879.

V.

Defendant argues that the trial court abused its discretion by affording too much weight to Dr. Danuloff's psychological evaluation and too little weight to Dr. Campbell's psychological evaluation. We disagree. MCL 722.27(1)(d); MSA 25.312(7)(1)(d) permits a circuit judge to utilize "community resources in behavioral sciences and other professions" in determining a custody matter. The decision to use, and the weight given to, this information, however, is a matter of trial court discretion. *Siwik v Siwik*, 89 Mich App 603, 609; 280 NW2d 610 (1979). Trial courts are more experienced and better situated to weigh evidence and assess credibility. *Fletcher, supra* at 890. This Court defers to the ability of the trial court to determine the credibility of conflicting witnesses. *Barringer v Barringer*, 191 Mich App 639, 642; 479 NW2d 3 (1991).

We find that the trial court did not improperly give too much weight to Dr. Danuloff's testimony because the weight afforded expert testimony is within the trial court's discretion and there is no evidence that the trial court abused that discretion. Specifically, we defer to the trial court's finding that

Dr. Danuloff's testimony was more credible than Dr. Campbell's testimony. *Fletcher, supra* at 879, 890.

VI.

Defendant argues that the circuit court's decision to deny her sole physical custody of her children was based on gender bias and sexual stereotyping. Defendant did not preserve this issue for review because she failed to move for disqualification pursuant to MCR 2.003(C). Therefore, we will not address this issue.

VII.

Finally, plaintiff argues that the trial court abused its discretion in ordering him to take parenting classes to learn alternative discipline techniques. We disagree. There was evidence that defendant had spanked Scott so hard that it left a hand mark on his thigh and that he had also twisted Scott's arm. Although this evidence does not amount to child abuse, it does justify the court's concern regarding plaintiff's discipline. Accordingly, we conclude that the court's order requiring plaintiff to attend parenting classes did not constitute a palpable abuse of discretion. *Fletcher, supra* at 880.

Affirmed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth