STATE OF MICHIGAN

COURT OF APPEALS

DANIELLE AIMEE IRVING,

Plaintiff-Appellee,

v

RAYMOND THOMAS PERKINS,

Defendant-Appellant.

UNPUBLISHED
July 8, 1997

No. 196022
Oakland Circuit Court
LC No. 92-443232-DP

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting physical custody of the parties' minor child to plaintiff. We reverse and remand for further proceedings before a different judge consistent with this opinion.

Defendant argues that several of the trial court's findings of fact were against the great weight of the evidence presented at the de novo evidentiary hearing held to decide which of the parties should be given permanent custody of the parties' minor child. Specifically, defendant complains that the trial court erred with regard to five of the best interest factors, MCL 722.23(a), (b), (d), (e), and (f); MSA 25.312(3)(a), (b) (d) (e) and (f).

In child custody cases, this Court reviews the trial court's findings of fact under a great weight of the evidence standard. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994). We will not substitute our judgment for that of the trial court unless the facts "clearly preponderate" a finding opposite to that made by the trial court. *Id.* at 878.

Turning now to the first factor challenged, factor (a) requires the court to consider and evaluate "[t]he love, affection, and other emotional ties existing between the parties involved and the child." The trial court found that this factor was equal as to both parties. We believe that the evidence contradicts the trial court's conclusion. While there was testimony directly from defendant and other witnesses that defendant loved the child, had a very loving relationship with the child, and played with and interacted with the child, there was no testimony or evidence as to this factor on the part of plaintiff. Plaintiff did not testify as to her love and affection toward the child nor did any other witness testify for her in this

regard. The great weight of the evidence preponderated in favor of defendant on this issue and the trial court's finding in this regard must be set aside.

Factor (b) requires the trial court to consider and evaluate "[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." The trial court held that this factor weighed equally for both parties. We agree. There was no testimony that preponderated in defendant's favor on this factor. There was no testimony that either party was more *capable* than the other of providing love and affection. Moreover, there was no testimony at all with regard to religion or creed. The finding of the trial court on this issue is upheld.

Factor (d) required the trial court to consider and evaluate "[t]he length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity." The trial court held that this factor favored plaintiff. We agree with defendant that the trial court's finding in this regard was against the great weight of the evidence and should be set aside. Factor (d) "calls for a factual inquiry as to how long the child has been in a stable, satisfactory environment." *Ireland v Smith*, 451 Mich 457, 465 n 8; 547 NW2d 686 (1996). Factors that are considered include whether there is a custodial environment and whether the homes in question were properly prepared for the child. See *Straub v Straub*, 209 Mich App 77, 90; 530 NW2d 125 (1995) and *Harper v Harper*, 199 Mich App 409, 416; 502 NW2d 731 (1993). In this case, it is unclear whether the trial court found that plaintiff had established a custodial environment. However, we would find such a conclusion to be erroneous.

After the parties separated in the spring of 1994, a temporary order giving plaintiff physical custody during the pendency of the custody hearings was entered; there was no understanding that this order could be used as a basis to create a custodial environment in favor of plaintiff. Moreover, temporary custody orders do not, by themselves, establish custodial environments. See *Bowers v Bowers*, 198 Mich App 320; 497 NW2d 602 (1993). Unfortunately in this case, the hearings with regard to custody took place over an approximate twenty-month period and the trial court considered that plaintiff had physical custody during that time per its order. Relying on this time frame, the trial court found this factor in plaintiff's favor. However, the trial court failed to consider that during that time, each parent shared the child almost equally. The parties even apparently stipulated that the child was with defendant 12 to 15 days each month.[1] Looking at the criteria for a custodial environment, it appears that both parents spent almost equal parenting time and neither party had a custodial relationship of significant duration. In addition, both parties had properly prepared homes for the child, with the child having his own room in each home. Plaintiff conceded that defendant's home was a proper and safe place for the child. Accordingly, the great weight of the evidence favored a finding that the parties were equal with regard to factor (d) and that the factor did not weigh in favor of plaintiff. The trial court's finding in this regard is set aside.

Factor (e) calls for the trial court to consider and evaluate "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." The trial court found that this factor weighed in favor of plaintiff. We find that the great weight of the evidence did not support the trial court's finding. The focus of factor (e) "is the child's prospects for a stable family environment." *Ireland, supra* at

465. Stability can be undermined by frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions, etc. *Id.* at 465, n 9. The court should look at the *settings* proposed by the parties and whether the child was familiar with them and whether they were to remain stable. *Id.* at 465. In this case, defendant's home was equally permanent to plaintiff's home. The child had lived in defendant's home from the time he was born until plaintiff removed the child from the home and the custody proceedings began. Defendant's home never changed. Moreover, the child was familiar with the home and stayed there for 12 to 15 days each month. Defendant's father lived in the same vicinity as defendant and the arrangement had been the same for several years. Stability of that setting was established. Plaintiff also lived in a stable home. It was the same home from October 1994, a few months after the start of the proceedings, through the hearings and the child was familiar with it. In addition, plaintiff had married the individual with whom she shared the home, thus creating a sense of permanence. The great weight of the evidence demonstrated that this factor weighed equally to both parties and the trial court's finding to the contrary should be set aside.

Finally, factor (f) requires the trial court to consider and evaluate "[t]he moral fitness of the parties involved." The trial court found that this factor weighed equally in favor of both parties. Based on the record presented, we believe this finding was clearly against the great weight of the evidence.

> Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness as a parent. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, 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, 886-887; 526 NW2d 889 (1994).]

Although the Court in *Fletcher* did not promulgate standards of moral conduct, it indicated that morally questionable conduct included, in part, "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id.* at 887, n 6. In this case, plaintiff admitted to lying to the Department of Social Services and the police, to striking and bruising the minor child, and to filing a false police report against defendant regarding parental kidnapping. Moreover, she was ultimately criminally convicted of abusing the child in question. There was no evidence as to any similar improprieties committed by defendant.[2] The trial court's finding that this factor weighed equally to both parties is set aside.

The end result is that none of the best interest factors weighed in favor of plaintiff and four weighed in favor of defendant. Given this and the fact that plaintiff was convicted of child abuse and was under investigation for another instance of child abuse at the time the trial court awarded her physical custody, we hold that the trial court abused its discretion in entering an order awarding custody to plaintiff. The trial court's ultimate dispositional ruling was not supported by the weight of the evidence and was a palpable abuse of discretion. See *Fletcher*, *supra* at 880-881. For that reason, we are required to remand the case to the circuit court. *Id.* at 889. Upon remand, the court should

consider all the statutory factors and conduct whatever hearings or other proceedings are necessary to allow it to make an accurate decision concerning a custody arrangement that is in the best interests of the child. See *Ireland, supra* at 469. Given the tortured procedural history of this case and the numerous erroneous findings made below, we direct that this case should be assigned to a different judge on remand.

Reversed and remanded for a reevaluation of the custody award and further disposition consistent with this opinion. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] Defendant attaches a copy of "stipulated findings of fact" to his brief on appeal. Although a copy of this document is not contained in the lower court record, the transcripts contain references to a set of stipulated facts upon which the trial court relied in deciding this case.

[2] The parties stipulated that although there may have been drug use by both plaintiff and defendant, it would not be considered by the judge and testimony on the issue would not be taken.