

STATE OF MICHIGAN
COURT OF APPEALS

RUTH ANN HULBERT,

Plaintiff-Appellant,

v

HARRY R. HULBERT,

Defendant-Appellee.

UNPUBLISHED

May 26, 1998

No. 203673

Wayne Circuit Court

LC No. 91-107157-DM

Before: Hood, P.J., and MacKenzie and Young, Jr., JJ.

PER CURIAM.

Plaintiff appeals as of right from an order permanently changing custody of the parties' minor child to defendant. We affirm.

Plaintiff was awarded custody of the parties' minor daughter, Nicole Genevera Hulbert, born March 28, 1990, in the parties' 1991 divorce. In November 1995, custody was temporarily granted to Nicole's maternal grandparents after plaintiff's live-in boyfriend¹ allegedly beat Nicole with a dog leash². Later, in April 1996, the court returned custody to plaintiff after her boyfriend moved out. Plaintiff was aware the court had ordered that her boyfriend was not to be allowed in Nicole's presence unless and until there was a further order from the court on the issue. In June 1996, unbeknownst to the trial court, plaintiff's boyfriend moved back into plaintiff's home. Plaintiff failed to seek an order of the court allowing him to do so. In February 1997, defendant moved for a change of custody after learning that criminal sexual conduct charges had been filed against plaintiff's boyfriend for sexually molesting Nicole. The court granted defendant temporary custody pending an evidentiary hearing on the change of custody petition. It did so because it believed that plaintiff's judgment in matters concerning Nicole was questionable. Following the evidentiary hearing, the court granted permanent custody to defendant. It found that there was clear and convincing evidence that it was in Nicole's best interest to order a change of custody.

Plaintiff first argues that the trial court erred in granting defendant temporary custody prior to the evidentiary hearing wherein custody was ultimately changed. This issue is moot. "An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to

grant relief." *Michigan Nat'l Bank v St Paul Fire & Marine Insurance Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). In this case, even if plaintiff was correct that the trial court should not have given temporary custody to defendant prior to the hearing, there is no relief that can be granted. The evidentiary hearing has taken place and a permanent custody order has been issued, which gives defendant permanent custody. Because this issue is moot, we need not address it. We do not issue abstract opinions of purely academic interest. *Detroit v Killingsworth*, 48 Mich App 181, 184; 210 NW2d 249 (1973).

Plaintiff next argues that the trial court's findings of fact with regard to the statutory factors used in determining the best interest of the child, MCL 722.23; MSA 25.312(3), were against the great weight of the evidence. We disagree. In a child custody case, findings of fact are to be reviewed under the great weight of the evidence standard; discretionary rulings are to be reviewed for abuse of discretion; and questions of law are to be reviewed for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 877-881; 526 NW2d 889 (1994); MCL 722.28; MSA 25.312(8). With regard to the great weight standard, the Supreme Court has stated, "a trial court's findings on each factor should be affirmed unless the evidence "clearly preponderate[s] in the opposite direction." *Id.* at 879 (citation omitted).

The trial court determined that an established custodial environment existed between plaintiff and Nicole. Because there was an established custodial environment, custody could only be changed if clear and convincing evidence was presented that such a change would be in Nicole's best interest. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Harper v Harper*, 199 Mich App 409, 411; 502 NW2d 731 (1993). When determining the best interest of the child, the trial court must consider, evaluate, and determine the statutory factors. *Mann v Mann*, 190 Mich App 526, 536; 476 NW2d 439 (1991).

Plaintiff complains that the trial court's findings with regard to factors B, C, D, E, F, G and H were against the great weight of the evidence. We disagree.

Factor B involves "[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). Our review of the record indicates that the evidence did not clearly preponderate in favor of plaintiff with regard to this factor. The trial court's finding that this factor favored defendant was supported by testimony that defendant was more capable and dedicated to raising Nicole in her religion. The record indicates that he is a long-time, consistent churchgoer whereas plaintiff's attendance was sporadic until shortly before the hearing.

Factor C involves "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . ." MCL 722.23(c); MSA 25.312(3)(c). The court's finding that factor C favored defendant is supported by evidence that both defendant and his current wife are employed and able to support Nicole while plaintiff is chronically unemployed and has taken no initiative for numerous years to become self-sufficient. See *Harper, supra*, 199 Mich App 415-416. In order to support her position that defendant was not in a better position to support Nicole, plaintiff argues that he was over \$2,000 in arrears in child support. Her emphasis on this fact is slightly misleading. The record revealed that there was no court ordered child support obligation after

November 1995. Defendant was, however, continuing to pay child support at the time of the hearing. These payments were being made on a past arrearage, which had been approximately \$2,000 at one point in time. The trial court refused to make any rulings concerning child support because there was not sufficient evidence presented to it and because there was a hearing scheduled to determine if any past support was owed. Defendant and his wife had solid incomes at the time of the hearing whereas plaintiff did not and had not attempted to obtain a job. The record clearly reflects that defendant had the better capacity to support Nicole.

Factor D requires the court to take into consideration "[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). Although Nicole had only lived with defendant for two months prior to the evidentiary hearing, there was ample evidence to support the trial court's determination that this factor weighed in favor of defendant. Defendant was providing a stable, satisfactory home, which was free from any abuses. Nicole shared a bedroom with her half-sibling and had access to a large park where she could run and play. There was a desirability to maintain her continuity in that environment. Plaintiff, who had previously had custody of Nicole for numerous years, did not provide a stable or safe environment. Plaintiff moved Nicole three times following the divorce. In addition, the environment she provided allowed Nicole to be physically and sexually abused. The home environment was unstable where two other men had come into the home, lived there, and then left. The trial court's finding that this factor favored defendant was supported by the great weight of the evidence.

Factor E requires a trial court to consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MSA 722.23(e); MSA 25,312(3)(e). This factor was also properly found to weigh in favor of defendant. The record revealed that defendant and his second wife provided a more permanent family unit for Nicole than did plaintiff. Plaintiff was involved in two live-in relationships after her divorce from defendant. Both of the men involved with plaintiff lived in the home and then left. The second boyfriend returned to the home in violation of a court order, only to become absent from the home when he was incarcerated on charges stemming from his sexual abuse of Nicole. Although plaintiff had extended family in the area, there was no permanent family unit in her home. Her assertion that she alone provided a permanent family unit is contradicted by the record.

Factor F involves the moral fitness of the parties. MCL 722.23(f); 25.312(3)(f). The court's finding that factor F favored defendant is supported by the record. The record revealed that plaintiff has lived with two different men since her divorce, had at least one child with each, and violated a court order at the ultimate expense of Nicole's safety. Contrary to plaintiff's contentions, the trial court did not base its finding with regard to this factor solely on the fact that plaintiff had engaged in unmarried cohabitation. Rather, the court considered the effect of plaintiff's conduct, in living with and having children with men to whom she was not married, on Nicole. There was evidence that Nicole knew of the abusive relationship between plaintiff and one of her boyfriends and also knew of her mother's conduct in having babies by different fathers without the benefit of marriage. The court considered the message that this behavior was sending to the child. We also note with interest that plaintiff, herself, testified that she believed her behavior was immoral. In spite of her belief, she continued to subject Nicole to her behavior. Believing something is improper, yet subjecting your child to it, evidences a lack

of moral fitness. The evidence demonstrated that plaintiff's moral fitness as a parent was clearly less than defendant's moral fitness as a parent. The trial court did err, however, in stating that no issues were raised about defendant's moral fitness. Defendant had engaged in questionable behavior, including physically assaulting plaintiff, numerous years before. However, the trial judge took this behavior into account in determining that the domestic violence factor favored plaintiff. Moreover, there was no evidence that defendant's moral fitness was questionable at any time since the parties' divorce. The great weight of the evidence supported that factor F favored defendant.

Factor G requires the trial court to consider "[t]he mental and physical health of the parties involved." MCL 722.23(g); 25.312(3)(g). With regard to this factor, the trial court's finding was also proper. The trial judge questioned plaintiff's mental health because of past instances wherein she had utilized extremely poor judgment on issues related to Nicole. Poor judgment may be taken into account under this factor. *Harper, supra* at 417. There was no evidence or testimony that defendant's mental or physical health was not appropriate.

Finally, factor H requires the court to consider the home, school and community record of the child. MCL 722.23(h); MSA 25.312(h). This factor was properly found to be equal to both parties because there was evidence that Nicole did well at school while living with defendant and while living with plaintiff. While there was testimony that defendant had not taken an active role in Nicole's school prior to having custody, there was evidence that he had done so since that time. Moreover, every indication in the record demonstrated that her school record and performance was equivalent in both places³. The finding was not against the great weight of the evidence.

Given the factors that were properly found to favor defendant and given the facts of this case, we find that the trial court did not abuse its discretion in ultimately determining that there was clear and convincing evidence that it was in Nicole's best interest to change custody to defendant.

Plaintiff's third argument on appeal is that the trial court did *not* err in finding that an established custodial environment existed with plaintiff. Because plaintiff prevailed on this issue and assigns no error to the trial court's determination in this regard, we find it entirely unnecessary to review the issue. Plaintiff was not aggrieved by the trial court's decision finding an established custodial environment. *Kocenda v Detroit Archdiocese*, 204 Mich App 659, 666; 516 NW2d 132 (1994).

Plaintiff's final argument on appeal is that the trial court erred in excluding from evidence two reports from protective services workers who failed to appear as witnesses despite being subpoenaed. Plaintiff's argument on this issue, which covers three paragraphs of her thirty-three page brief, is cursory, incomplete, and misrepresents the record. Plaintiff misrepresents the record by claiming that the reports of two protective service workers were offered into evidence when the witnesses failed to appear in court. Plaintiff cites to page 363 of the hearing transcript to support this allegation. Neither page 363 nor any of the pages following it support that plaintiff's counsel attempted to admit the reports. There is simply nothing in the record to support that she moved for their admission. Our review of the entire record does not reveal that any records or reports by the protective service workers with regard to plaintiff's boyfriend beating Nicole or sexually abusing Nicole were ever offered. Plaintiff did attempt to introduce social service records concerning an incident between Nicole and a female cousin. These

records were not admitted because of lack of foundation and because the records were hearsay. Plaintiff does not take issue with that ruling.

We also note that plaintiff declined the court's offer to issue bench warrants to obtain the presence of the protective service witnesses who failed to respond to the subpoenas. Although plaintiff correctly indicates that the court was not going to extend the hearing, the record reveals that the court knew what the witnesses were going to testify to and found that the testimony would have been cumulative. Plaintiff does not take issue with that finding. She does not offer any argument or authority that would require this court to consider whether the trial court's refusal to extend the hearing to secure the presence of the witnesses, whose testimony would have been cumulative, was improper. Because plaintiff has offered no argument or authority on this issue, we need not consider it. We also note that plaintiff's attorney was aware that the protective service workers ignored her subpoenas on the first day of the hearing, which occurred on a Friday. At that time the court offered to issue bench warrants. Plaintiff's counsel did not follow up on securing such warrants. On the second day of the hearing, the following Monday, there was no evidence that plaintiff's attorney had taken further steps to obtain their presence. She thereafter informed the trial court that bench warrants would not be helpful at that point in time.

Affirmed.

/s/ Harold Hood

/s/ Barbara B. MacKenzie

/s/ Robert P. Young, Jr.

¹ This live-in boyfriend is the father of plaintiff's third and fourth children. The father of plaintiff's second child is a past boyfriend, whom plaintiff lived with after her divorce from defendant.

² Although the court ruled on the temporary custody issue and gave custody to the maternal grandparents in November 1995, the order evidencing the court's rulings was not actually entered until April, 1996.

³ Plaintiff cites to the testimony of an expert witness, Dr. Doctoroff, who stated that Nicole was having numerous adjustment difficulties from the time of the temporary custody change to the custody hearing. This testimony was discounted by the trial court. The trial court was in a superior position to weigh the evidence and assess credibility. *Fletcher, supra* at 890. Moreover, we find that the expert's testimony had no bearing on this factor where there was clear evidence that the child's school records were equivalent in both places.