

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ERIK S. GILLESPIE,

Plaintiff,

and

ROBERT W. GILLESPIE and SHARON G.  
GILLESPIE,

Intervening Plaintiffs-Appellants,

v

CORA LYNN HOLTZ,

Defendant-Appellee.

UNPUBLISHED

August 10, 1999

No. 213189

Macomb Circuit Court

LC No. 91-000020 DM

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Before: Collins, P.J., and Jansen and White, JJ.

WHITE, J. (concurring in part and dissenting in part).

I agree with the majority that the trial court properly determined that it was necessary to make a finding whether an established custodial environment existed, and that the trial court's finding that an established custodial environment existed with the grandparents was not against the great weight of the evidence. I conclude, however, that the trial court's findings regarding factors (f), (h), and (j) were against the great weight of the evidence. I also disagree with the majority's determination regarding legal custody, i.e., that the trial court "simply failed to include awarding legal custody to defendant as well," and with the remand for the limited purpose of amending the order of physical custody to include that defendant has sole legal custody as well.

The trial court concluded that the parties were equal on four factors (a, e, h and k), the grandparents were favored on three factors (b, c and d), and defendant was favored on four factors (f, g, j and m).<sup>1</sup>

Factor (f), the moral fitness of the parties involved, relates to "a person's fitness as a parent." *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994). "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.” *Id.* Conduct relevant to factor (f) includes illegal or offensive behavior. *Id.* at 887 n 6.

The trial court’s opinion and order states regarding factor (f):

The Court recognizes allegations have been made by Mr. And Mrs. Gillespie that Ms. Gillespie is not morally fit. However, based upon its observation of Ms. Gillespie and in light of the testimony presented, the Court does not believe Ms. Gillespie lacks moral fitness. The Court has considered the testimony presented regarding Ms. Gillespie’s separation of employment from Arbor Drug Store. Having observed the demeanor of the witness during the testimony, the Court accepts Ms. Gillespie’s explanation. The Court questions the motivation of Mr. and Mrs. Gillespie and, because of their unfounded allegations, the Court finds this factor weighs in favor of Ms. Gillespie.

The trial court’s finding that factor (f) weighed in defendant’s favor was against the great weight of the evidence. Defendant began employment at Arbor Drugs in 1991 as a data entry person in the accounting department. She then worked in the Pharmacy Information Services department for about five years, until August 1, 1997. There was no dispute that defendant had submitted prescription receipts over a period of about 1 ½ years that exceeded the amount she had paid for the prescriptions.<sup>2</sup> Defendant engaged in the wrongful conduct during the pendency of the proceedings below. Although defendant testified at trial that she was confused about the Arbor policy on submitting prescription receipts, Anthony Sherman, Arbor Drugs’ district loss prevention manager, testified that when he confronted defendant, she did not tell him that she was confused, and defendant’s handwritten letter does not make mention of any such confusion. See n 2, *supra*.

Even assuming, as did the trial court, that defendant’s explanation for the above described conduct was accurate, the trial court’s conclusion that the grandparents were less morally fit is against the great weight of the evidence. My review of the record yielded no evidence that either of the grandparents had engaged in any of the behaviors identified in *Fletcher, supra* at 887 n 6, as bearing on a party’s moral fitness: verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors. Although it is true that Sharon Gillespie testified that she believed defendant was untruthful, lied on the stand and committed theft, these were not bald assertions without factual support in the record. Further, defendant testified similarly that the grandparents were untruthful, but nothing other than her own testimony supported that allegation. I conclude that the trial court’s apparent determination that the grandparents made “unfounded” allegations is against the great weight of the evidence, as is its finding that the grandparents were less morally fit than defendant. Factor (f) should have weighed in the grandparents’ favor, or at the least been weighed as equal.

Regarding factor (h), the home, school, and community record of the child, the trial court found the parties equal:

Here, the testimony established the minor children had been enrolled in a Montessori school. However, it has come to the Court’s attention, through the parties’ letters to the

Court, that the minor children are no longer enrolled in that school. The Court was concerned with the continuity of the education of the minor children. It is undisputed the minor children will be in different schools regardless of the outcome of the parties' custody dispute. Consequently, the Court finds this factor does not weigh in favor of either party.

There was abundant, unrefuted testimony at trial regarding the school record of the children, who had resided with the grandparents since 1990. The children had been enrolled in a Montessori school since first grade. One of the teachers who had taught both girls from first grade forward, and the school director, testified that the grandparents regularly attended the girls' school functions, parent-teacher conferences, attended extracurricular activities with the girls, and that the grandfather for two years had been on the executive committee of the parents' guild, a non-profit group that plans enrichment programs for the students and promotes community awareness. The teacher testified that when the girls first came to the school, they were somber and withdrawn, and that they had flourished over the years. There was unrefuted testimony that the grandparents enrolled the girls in girl scouts and travelled with them on group trips, had them in piano lessons, extracurricular math classes, swimming lessons, and took them to church regularly. In contrast, there was unrefuted testimony from the children's teacher that defendant had not attended any parent teacher conferences and, to her recollection, had attended only one school function. The director of the Montessori school testified regarding the grandfather's extensive involvement with the children's school activities, and characterized him as "exemplary" in terms of his relationship to the school and his grandchildren. The teacher testified that the girls were doing exceptionally well in school.

Regarding defendant's involvement, defendant testified at trial that the children have called her several times with homework questions and that she helps them with homework when they are with her. Defendant also testified that she reads from the Bible to the children and from books with Bible stories. There was evidence defendant did not ask the school to send her a calendar of events, that she never attended a parent-teacher conference, and attended only one school function. Although defendant testified that the school had refused to cooperate, school staff testified that there are a number of divorced parents with children in the school and that, if requested, the school sends separate mailings to each parent.

Weighing the evidence at trial, I conclude that even if the trial court sufficiently addressed this factor, its determination that the parties were equal was against the great weight of the evidence.

Regarding factor (j), the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the children and the other parent, the trial court found in defendant's favor. The trial court's findings that the grandparents "repeatedly interfered with [defendant's] efforts toward visitation" is unsupported by the record.

Defendant presented only her own testimony on this issue. Defendant testified that her visitation had slowly but surely been reduced to the "bare minimum." She testified that at the time of trial she had visitation every other weekend and alternating holidays, and that at one time she had had visitation during the week. However, on cross-examination, counsel for the grandparents introduced a letter from

defendant's former counsel to the grandparents' counsel stating that defendant ceased the mid-week visitation.

Robert Gillespie testified that when the children raised issues with him regarding their mother, he would "edify her" and tell them that their mother loved them because he felt it very important that the girls develop a strong sense of self-esteem. Sharon Gillespie testified that she encouraged the girls several times a week to call defendant because defendant did not call the girls. She testified that when the girls spoke to their mother the speaker phone would be on. If read as a whole, the trial testimony supports that defendant's complaints that the grandparents denied her visitation were actually related to instances when defendant asked for extra visitation, i.e., visitation beyond her regularly scheduled visitation or in lieu of her regularly scheduled visitation. The great weight of the evidence supported that the grandparents acceded to these requests much or most of the time. Further, the record is clear that defendant never contacted the Friend of the Court regarding these alleged visitation problems or regarding increasing her scheduled visitation.

Lastly, I would not order that defendant be awarded sole physical custody but would remand with instructions to address the issue.

/s/ Helene N. White

<sup>1</sup> The Friend of the Court testified that the parties were equal on six factors, the grandparents were favored on four factors, and none of the factors weighed in defendant's favor.

<sup>2</sup> Arbor Drugs' District Loss Prevention Manager, Anthony Sherman, testified that Arbor is self-insured. He testified that defendant was terminated following an investigation that determined that in 1996 and the first few months of 1997, defendant submitted claims to Arbor's claims management company, HRM, using prescription receipts that showed higher amounts (retail price) than she had paid for the prescriptions (employee discounted price). Sherman testified that defendant's fiancée, a pharmacist at Arbor Drugs, was terminated on the same day. Sherman testified that the pharmacist admitted to him that he generated most of the prescription receipts defendant used, which reflected the prescriptions' retail price, and not the employee discounted price defendant had paid. Sherman testified that defendant had gotten prescriptions on a regular monthly basis. He testified that when he and another loss prevention manager, Jill Hillard, confronted defendant, she stated that her fiancée generated the fraudulent receipts and that she knew it was wrong. Sherman testified that in his estimation, defendant had committed theft and that he was ready to prosecute the case. He testified that in 1996 defendant sent in prescription receipts totaling more than her deductible, which was apparently \$250.00, including monthly figures of \$133.35, \$154.38, \$141.90, \$140.97, and \$231.93. In the months of 1997 included in the investigation, defendant had submitted \$230 worth of receipts, against a \$250 deductible. A document handwritten and signed by defendant and dated August 1, 1997 was admitted at trial that stated in pertinent part:

Today I talked to Anthony and Jill about my prescription insurance. Anthony and I discussed my prescription profile history and why some of my scripts were submitted as cash to the insurance but were scanned at the pharmacy at a lower cost. I was submitting the cash label to HRM in order to meet the deductible at a faster rate. I was doing this due to some financial difficulties I have been experiencing. The medication is mostly for my allergies and athsma [sic] and is necessary for me to breathe effectively. The financial difficulties I have been experiencing stem from a lengthy court proceeding that I have been involved in regarding the custody of my children. That added expense on top of other everyday expenses and the child support money that I pay out each week leave me with about \$200 per week take home. My prescriptions are very expensive and I just needed a little help trying to meet the deductible on my insurance.

The way this would happen would be that I would call the store and request a refill on a prescription. When the Rx was filled I would receive both the cash label and the employee label and I would in turn submit the cash label to the insurance company.

This statement is made of my own free will. No threats or promises were made to me. I was treated fairly during the interview.

A second document, also handwritten and signed by defendant, and dated August 1, 1997, stated:

I authorize Arbor Drugs to deduct \$10 from my paycheck dated August 8, 1997. I will then make payments of \$50 per month until the balance of \$335.19 is paid full [sic] for restitution.

Sherman testified that defendant came up with the \$335.19 figure, that \$10 had been withheld from defendant's paycheck and that she subsequently made a \$50 payment by check dated September 1, 1997.