

STATE OF MICHIGAN
COURT OF APPEALS

JAYE P. LEE HARRER,

Plaintiff-Appellee,

v

JOHN BARRON BROWN,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 246960

Wayne Circuit Court

LC No. 96-662357-DP

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting sole legal and physical custody of the parties' minor child to plaintiff. We affirm.

Defendant first argues that the trial court erred when it concluded that a custodial environment existed with both plaintiff and defendant and the trial court should have concluded that he was the only parent that established a custodial environment. We disagree.

"To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Therefore, this Court reviews for clear legal error the trial court's choice, interpretation, or application of the existing law. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). Findings of fact are reviewed pursuant to the great weight of the evidence standard. *Id.* at 5. Unless the evidence clearly preponderates in the opposite direction, this Court will sustain the trial court's factual findings. *Id.* Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. *Id.*

"The threshold determination in a court's decision to modify an existing custody order is whether an established custodial environment exists." *LaFleche v Ybarra*, 242 Mich App 692, 695-696; 619 NW2d 738 (2000). MCL 722.27(1)(c) provides, in pertinent 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.

Here, the trial court's finding that a custodial environment existed with both plaintiff and defendant was not against the great weight of the evidence. The evidence presented at the hearing did not clearly preponderate in the direction that defendant was the only parent that established a custodial environment considering that (1) both parents shared equal time with the minor child, (2) plaintiff testified that the minor child lived two separate lives, and (3) he had two of everything, including eyeglasses and doctors. Although it was undisputed that the minor child looked to defendant for guidance and discipline, there was testimony that he also looked to plaintiff for love and guidance. Having reviewed the trial court's findings and the record before us, we cannot say that the evidence clearly preponderates in the opposite direction. See *Foskett, supra*.

Next, defendant challenges the trial court's findings with respect to nine of the twelve child custody best interest factors. Under the Child Custody Act, MCL 722.21 *et seq.*, the best interests of the child, as determined through evaluation of the factors listed in MCL 722.23, control the determination of custody. *Phillips v Jordan*, 241 Mich App 17, 21-22; 614 NW2d 183 (2000). A trial court must consider and explicitly state its findings and conclusions with respect to each of the factors. *Foskett, supra* at 9.

Defendant argues that the trial court improperly weighed best interest factor (a) equally because the evidence at trial established that the minor child was (1) detached from plaintiff, (2) often failed to communicate with her, and (3) was more communicative with defendant. MCL 722.23(a) examines "[t]he love, affection, and other emotional ties existing between the parties involved and the child." We would agree with defendant's assertion if not for substantial evidence that the minor child was conflicted regarding his feelings toward plaintiff because defendant interfered with plaintiff's relationship with the minor child by excluding her from major decisions regarding the minor child. Therefore, we conclude that the evidence did not preponderate in the opposite direction on this factor. See *Foskett, supra* at 5.

Defendant argues that trial court improperly evaluated best interest factor (b) in plaintiff's favor. MCL 722.23(b) examines "[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." See, also, *Fletcher v Fletcher*, 229 Mich App 19, 26; 581 NW2d 11 (1998). Here, the trial court concluded that this factor favored plaintiff although both parties were able to provide love, affection and guidance, because the evidence established that plaintiff was the parent who (1) did so in a less aggressive and excluding manner, (2) did not use corporeal punishment, (3) spent equal time with the minor child and spent the time in positive ways and (4) exposed him to a broader world. With respect to defendant, the trial court concluded that defendant had (1) used corporeal punishment on more than one occasion, (2) unilaterally changed the minor child's school without informing plaintiff in advance, and (3) created a small community for the minor child where defendant maintained exclusive control. Although there was substantial evidence that defendant was a strong father figure, we conclude that the evidence did not preponderate in the opposite direction because defendant's rigidity, anger and uncooperativeness in lessening the minor child's stress ran contrary to his best interests and undermined his relationship with plaintiff.

Defendant argues that the trial court improperly evaluated best interest factor (c) in favor of plaintiff. We disagree. MCL 722.23(c) examines “[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.” See *LaFleche*, *supra* at 700-701.

Here, the evidence did not preponderate in the opposite direction because defendant presented no evidence that the minor child was denied any essentials while in the custody of plaintiff or that plaintiff failed to disclose pertinent medical information. In contrast, defendant either delayed medical treatment, overruled plaintiff’s medical decisions, or failed to disclose pertinent medical information. The trial court did not err in evaluating this factor in plaintiff’s favor.

We are also unpersuaded that the trial court erred with regard to factor (d). MCL 722.23(d), examines “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” See *Fletcher*, *supra* at 28. Here, the trial court evaluated this factor in favor of plaintiff because (1) the body of evidence from the experts indicated that defendant had issues with violence and anger, (2) the conflict over the minor child was escalating, (3) the minor child’s relationship with plaintiff and emotional health had suffered as a result, and (4) the experts’ provided recommendations after they had the opportunity to evaluate plaintiff, defendant, and the minor together, whereas defendant’s witnesses systematically excluded plaintiff. We defer to the trial court’s assessment of witness credibility regarding plaintiff’s opportunities to participate in the minor child’s school activities. See *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000).

Defendant argues that the trial court improperly evaluated best interest factor (h) in favor of plaintiff. MCL 722.23(h) examines “[t]he home, school, and community record of the child.” The record indicates that it was undisputed that the minor child was performing well in school. Therefore, the trial court’s finding did not preponderate in the opposite direction that the minor child’s emotional stress could be eliminated by enrolling him in a different school, which (1) was accessible to plaintiff and defendant, and (2) would eliminate the minor child’s chronic tardiness to class.

Defendant also argues that the trial court improperly disregarded the minor child’s stated preference when it evaluated best interest factor (i). MCL 722.23(i) examines “[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.” See, also, *Flaherty v Smith*, 87 Mich App 561, 564; 274 NW2d 72 (1978). “[I]n a close case, an expression of preference by an intelligent, unbiased child might be a determining factor in the decision as to what the best interests of the child are.” *Id.*

The trial court found that (1) the minor child’s expressed preference was rehearsed, and (2) he was incapable of expressing a preference. These findings were not contrary to the great weight of the evidence at the hearing. Because evidence at the hearing suggested that the minor would say anything if he thought it would please defendant, the trial court’s conclusion regarding this factor was not against the great weight of the evidence.

Defendant next argues that the trial court improperly evaluated best interest factor (j) in favor of plaintiff instead of concluding that both parties failed to communicate. Again, we

disagree. MCL 722.23(j) examines “[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.” See *Fletcher, supra* at 28-29.

Here, the trial court concluded that a strong remedy was required because of (1) defendant’s conduct in excluding plaintiff from major aspects of the minor child’s life, and (2) defendant’s inability to comprehend the impact of his actions on the child’s emotional health. The trial court’s findings on this factor were not contrary to the great weight of the evidence in light of defendant’s consistent exclusion of plaintiff from decisions regarding the minor child’s health needs and education. Not only did defendant withhold information, he purposefully gave plaintiff misinformation. The trial court did not err in evaluating this factor in favor of plaintiff.

Similarly, examining the trial court's findings as applied to factor (k), the trial court’s conclusion that this factor did not favor defendant was not against the great weight of the evidence. MCL 722.23(k) examines incidents of “[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child.” Defendant argues that because he was not charged with domestic assault, this factor was improperly evaluated in plaintiff’s favor. Contrary to defendant’s assertion, factor (k) does not require that an “incident of domestic violence” include only “charged” instances of abuse. Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995), quoting *Nat’l Exposition Co v Detroit*, 169 Mich App 25, 29; 425 NW2d 497 (1988). We also defer to the trial court’s assessment of witness credibility regarding allegations of domestic violence by either party. See *Mogle, supra*.

Lastly, defendant argues that the trial court erred in weighing MCL 722.23(l), which examines “[a]ny other factor considered by the court to be relevant to a particular child custody dispute.” See *LaFleche, supra* at 701-702. Here, the trial court considered “either party’s willingness to acknowledge the degree of conflict, its detrimental effects on [the child], and the need to change course to alleviate his stress and encourage positive relationships with both parents,” which the trial court considered to be a sign of maturity and effective future parenting skills. The trial court evaluated this factor in favor of plaintiff because (1) she recognized her role in creating the minor child’s stress and intended to move away from “conflict mode” with defendant, (2) plaintiff acquiesced on many occasions in order to remove the child from the conflict, and (3) defendant had not demonstrated such enlightenment. Examining the trial court's findings as applied to factor (l), the trial court properly considered this factor and its findings were not against the great weight of the evidence. See *Foskett, supra* at 4-5.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot