

STATE OF MICHIGAN  
COURT OF APPEALS

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JEFFREY MARK LESSNAU,

Plaintiff/Counter-Defendant-  
Appellee,

v

KATHRYN ANN LESSNAU,

Defendant/Counter-Plaintiff-  
Appellant.

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UNPUBLISHED

October 12, 2004

No. 253587

St. Clair Circuit Court

LC No. 00-000498-DM

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order changing custody of the parties' minor child from sole physical custody with defendant to joint physical custody. We affirm.

I. Facts and Procedure

The parties were married in 1994 and had their only child in 1999. The 2001 judgment of divorce awarded the parties joint legal custody and defendant sole physical custody of the child. Plaintiff initiated the present proceedings by filing a motion for a change in custody, seeking full legal and physical custody of the child. After conducting an evidentiary hearing, the trial court issued an opinion examining the statutory best interest factors, MCL 722.23, and changing the custody order, awarding plaintiff joint physical custody.<sup>1</sup>

II. Analysis

Defendant argues that the trial court erred in granting plaintiff's petition to change the custodial arrangement of the parties' child. A court may change a custody award upon a showing of proper cause or change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). Here, the custodial environment of

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<sup>1</sup> The trial court also stated that its "decision to award sole physical custody to the plaintiff is taken under advisement for one year."

the child existed with defendant. The custodial environment may only be changed if the party seeking the change presents clear and convincing evidence that the change serves the best interests of the child. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). A determination whether a change in custody would be in the child's best interest is made by weighing the best interest factors set forth in MCL 722.23. *Id.* at 9. A trial court must consider and explicitly state its findings and conclusions with respect to each of the factors. *Id.*

In custody cases, this Court reviews for clear legal error a trial court's choice, interpretation, or application of the existing law. *Foskett, supra* at 4-5. This Court employs the great weight of the evidence standard to review findings of fact. *Id.* at 5. This Court will sustain the trial court's factual findings, including its findings with regard to the best interest factors, unless the evidence clearly preponderates in the opposite direction. *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004); *Foskett, supra* at 5. The trial court's discretionary rulings, including a determination on the issue of custody, are reviewed for an abuse of discretion. *Id.*

Defendant criticizes the trial court's findings regarding numerous best interest factors, but does not argue specifically which best interest factors she believes the trial court should have decided differently. Nonetheless, we will discuss each best interest factor where defendant criticized the trial court's findings.

#### A. Best Interest Factor (a)

Best interest factor (a) considers "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(d). The trial court determined that this factor did not favor either party because "it is clear that both parties have love, affection and other emotional ties" with the child. This finding is supported by testimony from both the parties and Dr. Jack P. Haynes, the court-appointed psychologist in this case. Defendant admits that there is evidence that both parties are close to the child, but argues that the trial court ignored some of the evidence by stating, "defendant is extremely possessive of her daughter . . . ." Defendant seems to have taken offense to the trial court's characterization of her actions. Regardless, whether defendant is possessive of the child does not affect the conclusion that both parties share loving and affectionate relationships with the child. Defendant has not shown that the trial court's statement regarding defendant's possessiveness caused his finding regarding this best interest factor to be against the great weight of the evidence.

#### B. Best Interest Factor (b)

Best interest factor (b) considers "[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). The trial court determined that best interest factor (b) favored neither party because the parties "are both Roman Catholic and are agreeable that the child should be raised the same." Defendant argues that factor (b) should have favored her because she takes the child to church regularly and is paying for the child's

education, and plaintiff “has spent \$40,000 on lawyers.”<sup>2</sup> While the evidence suggests that defendant was more involved with taking the child to church, plaintiff testified that he tried to teach the child about religion. Further, the evidence shows that the parties had an equal capacity and disposition to give the child love, affection, and guidance. We conclude that the trial court’s finding that the parties were equal under best interest factor (b) was not against the great weight of the evidence.

#### C. Best Interest Factor (c)

Best interest factor (c) considers “[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). The trial court determined that best interest factor (c) favored neither party because both parties were gainfully employed, lived in appropriate housing for raising the child, and had medical insurance. The court noted that even while plaintiff was on administrative leave from work, he continued to pay for the child’s medical insurance out of his own pocket. Defendant argues that this factor should have favored her because the child’s surgeon testified that plaintiff allowed the custody dispute to affect his decisions regarding the child’s health. However, while the evidence shows that the parties had a dispute regarding the child’s surgery, they both consented to the surgery and were willing to schedule an appointment when they could both be present. Further, the evidence showed that both parties were willing and able to provide the child with food, clothing, housing, and medical care. We conclude that the trial court’s finding that the parties were equal under best interest factor (c) was not against the great weight of the evidence.

#### D. Best Interest Factor (d)

Best interest factor (d) considers “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” The court weighed best interest factor (d) slightly in favor of defendant because she had established a custodial environment for the child. Defendant argues that because she had established the custodial environment for the child, the trial court should have weighed this factor heavily, rather than slightly, in her favor. However, that one party has established the custodial environment does not mandate that factor (d) be weighed in any particular fashion. The evidence establishes that stability exists with both parents. Although the custodial environment existed with defendant, the child spent a fair amount of time with plaintiff after the divorce. We conclude that the trial court’s finding that best interest factor (d) slightly favored defendant was not against the great weight of the evidence.

#### E. Best Interest Factor (f)

Best interest factor (f) considers “[t]he moral fitness of the parties involved.”

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<sup>2</sup> Defendant does not explain how the amount of money plaintiff has allegedly spent on lawyers is relevant to best interest factor (b).

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, 887; 526 NW2d 889 (1994).]

The trial court determined that best interest factor (f) “clearly favors” plaintiff because defendant maliciously falsely accused plaintiff of sexually molesting the child in an effort to prevent plaintiff from having a relationship with the child. In reaching this conclusion, the court explained that defendant testified that she began noticing that the child was acting in an unusual manner a full year before reporting the suspected abuse. However, she filed the Child Protective Services (CPS) report only after plaintiff moved for a hearing regarding his parenting time. The court also cited instances of defendant’s ill will toward plaintiff. Finally, the court relied on Haynes’s report, in which he stated that defendant acted with “antagonistic intentionality” when she made the allegation of sexual abuse.

Defendant argues that the trial court’s findings were faulty because the evidence shows that she truthfully believed that plaintiff was sexually abusing the child and made the CPS report in good faith. Defendant contends that no witness opined that defendant fabricated the allegations of sexual abuse.

Defendant testified at trial that after the parties separated, she told a psychologist that she was concerned because the parties’ child had talked about sleeping and showering with plaintiff. Defendant also told the psychologist that the child had placed her mouth over a bedpost in an unusual manner. The psychologist told defendant to report her concerns to CPS and referred her to a child psychologist. After defendant reported the matter to CPS, the child was examined by two doctors for sexual abuse, but the doctors found nothing unremarkable. The CPS worker assigned to the case ultimately concluded that defendant’s concerns were unfounded. When defendant learned of the results of the investigation, she was not satisfied and maintained that plaintiff was abusing the child. Defendant then referred the matter to the police department. Plaintiff testified that defendant, through her attorney, told him that she would try to get the criminal abuse charges against him dismissed if he gave up visitation rights with the child. Plaintiff refused, and took and passed a polygraph examination regarding the sexual abuse. The police investigation revealed no signs of abuse. But defendant continued to demand that abuse was taking place and was critical of the police closing the investigation.

The court appointed Dr. Haynes to test the parties and provide a custody recommendation. Haynes noted that defendant misled him when she told him that the pediatrician who examined the child had told her that the child’s hymen was torn. Haynes also found it unusual that defendant stated that she was not relieved when she discovered that plaintiff passed the polygraph examination regarding the sexual abuse. Given the facts and his examination of defendant, Haynes determined that defendant’s sexual abuse allegations appeared to be the result of “antagonistic intentionality” on the part of defendant.

We conclude that the evidence does not preponderate against the trial court's finding that best interest factor (f) favored plaintiff. Although there was testimony that defendant appeared to truly believe that the abuse was occurring, there was also testimony supporting the inference that defendant filed the CPS report with ill will toward plaintiff. The trial court's finding that defendant intentionally falsely accused plaintiff of sexual abuse is supported by Dr. Haynes's conclusion that defendant acted with "antagonistic intentionality." The trial court's finding is further supported by the timing of the CPS complaint with reference to plaintiff's parenting time petition, and defendant's lack of relief, denial, and refusal to let the abuse allegations die after two physical examinations found no evidence of sexual abuse. There is a great deal of evidence that defendant harbored resentment toward plaintiff. This evidence, when viewed in its entirety, supports the trial court's finding that defendant maliciously made the false sexual abuse claim against plaintiff. Falsely accusing the child's other parent of sexual abuse certainly weighs against a party's fitness as a parent. We conclude that the trial court's finding that best interest factor (f) favored plaintiff was not against the great weight of the evidence.

#### F. Best Interest Factor (j)

Best interest factor (j) considers "[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). The trial court found that best interest factor (j) weighed "clearly heavily in favor of the plaintiff" because defendant not only failed to foster a relationship between plaintiff and the child, but had taken steps to disenfranchise the relationship. The court found that "defendant has been posturing from the very beginning of the case right up to and including the filing of the CPS complaint in an effort to prevent the plaintiff from having a relationship with his daughter."

Defendant argues that the trial court's determination regarding best interest factor (j) was against the great weight of the evidence. We disagree. As discussed, there was substantial evidence to support the trial court's conclusion that defendant purposely made false sexual abuse allegations against plaintiff in order to destroy his relationship with the child. A single circumstance can be relevant to and considered in determining more than one of the best interest factors. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). The trial court also found that plaintiff was a more credible witness than defendant and accepted his testimony. We defer to the trial court's determination regarding the credibility of the witnesses. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). Plaintiff testified that defendant would not allow him to care for the child and would leave with the child for days at a time. After the parties separated for the last time, defendant would not allow plaintiff to see or communicate with the child. There is evidence that both parties were unwilling to facilitate the other parent's relationship with the child. But Dr. Haynes indicated that defendant was less willing to facilitate the child's relationship with plaintiff, stating that defendant is "obstructionistic and antagonistic to the father, and although each of the situations they present seems to have many complexities to it, it seems clear that in some of these situations the mother has acted in a way clearly to discourage contact" between the child and plaintiff. The trial court also determined from the testimony that defendant felt that she, as the mother, had a superior claim to the child. This is a reasonable inference in light of the testimony of defendant and Dr. Haynes. In light of this evidence, we conclude that the trial court's finding that best interest factor (j) favored plaintiff was not against the great weight of the evidence.

### G. Best Interest Factor (k)

Best interest factor (k) considers “[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child.” The trial court determined that best interest factor (k) weighed “slightly in favor of the defendant” because plaintiff once held defendant up against a wall and grabbed the child from defendant’s arms after an argument. Defendant argues that the trial court should have weighed this factor heavily, rather than slightly, in her favor. Although the parties’ testimony concerning the incident varies, plaintiff testified that he was only trying to retrieve the child from defendant’s arms and might have touched defendant’s arms in the process. Defendant, on the other hand, testified that plaintiff pinned her to a wall, started choking her, and grabbed the child from her arms. After removing the child from defendant’s arms, plaintiff went upstairs with the child. About forty-five minutes later, defendant called her parents and eventually called the police and reported the incident. In the meantime, plaintiff had given the child back to defendant and laid down on the couch. When the police arrived, defendant told them that plaintiff had a violent temper and had guns in the home. The police arrested plaintiff at gunpoint and took him to jail. Plaintiff testified that he pleaded no contest to the charge of domestic violence because he wanted the situation to be over and he wanted to move on with his life.

The trial court appears to have believed most of plaintiff’s account of the incident and found that defendant embellished the report to the police. Plaintiff’s testimony gives the impression that the incident was not as serious as defendant made it out to be. Nonetheless, the trial court weighed this factor in favor of defendant because the situation “could have been handled better by the plaintiff.” Deferring to the trial court’s determination of the credibility of the witnesses, *Thames, supra* at 302, we conclude that the great weight of the evidence does not go against a finding that best interest factor (k) slightly favors defendant.

### III. Conclusion

We conclude that the trial court’s findings regarding the best interest factors were not against the great weight of the evidence. Defendant argues that in weighing the best interest factors, the trial court gave too much weight to the sexual abuse claim issue and erred in changing custody. However, in determining the best interests of the child, the trial court need not give equal weight to the statutory best interest factors. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). There is no indication that the trial court clearly erred in applying the statutory best interest factors. The sexual abuse claim issue was relevant to both defendant’s moral fitness and her willingness to facilitate a relationship between plaintiff and the child. Having reviewed the record in its entirety, we conclude that the trial court did not abuse its discretion in determining that an analysis of the best interest factors supported a change of custody.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Hilda R. Gage  
/s/ Brian K. Zahra