

STATE OF MICHIGAN
COURT OF APPEALS

BETSY ANN FLAMBOE,

Plaintiff-Appellee,

v

CHRISTOPHER JAY FLAMBOE,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 268877

Allegan Circuit Court

LC No. 04-036602-DM

Before: Sawyer, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce awarding primary physical custody of the parties’ two minor children to plaintiff. We affirm.

Child custody disputes are governed by the Child Custody Act of 1970, MCL 722.21 *et seq.* “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; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court’s findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court’s discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted).]

Defendant first contends on appeal that the trial court erred in failing to make a factual finding regarding the existence of an established custodial relationship. We agree. The first step in deciding any child custody dispute is to determine if an established custodial environment exists. *Stringer v Vincent*, 161 Mich App 429, 434; 411 NW2d 474 (1987). 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. MCL 722.27(1)(c). In other words, a custodial environment “is one of significant duration ‘in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.’ ” *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child’s best interest. *Mogle, supra* at 197. In this case, the trial court failed to make a factual determination regarding the existence of an established custodial environment before elaborating on the best interest of the child factors, MCL 722.23. Thus, the trial court committed clear legal error on a major issue. *Bowers v Bowers*, 190 Mich App 51, 54; 475 NW2d 394 (1991). “ ‘Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review.’ ” *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000), quoting *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991).

Upon de novo review of the record, we conclude that the evidence shows that an established custodial environment existed with both parents. In determining whether an established custodial relationship exists, “the focus is on the circumstances surrounding the care of the children in the time preceding trial.” *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Historically, plaintiff was the primary caregiver for the children. However, defendant occasionally participated in preparing meals for the children, bathing them, and putting them to bed. Defendant picked up the children every day after work and took them home. After plaintiff filed for divorce, defendant accepted more of a parenting role and, according to plaintiff, became more involved in family life. He had a close relationship with both children. The children went to him with concerns, and he was able to comfort or soothe them when they were injured or needed help. The children responded favorably to him. The children love both plaintiff and defendant. Both were likely to hear about the children’s problems and triumphs, and the children were likely to come to both of them for comfort. Both parents made decisions regarding the children’s education, daycare, health, and discipline. Thus, while plaintiff may have, historically, been the primary caregiver, that does not necessarily mean that an established custodial environment existed only with her. Further, the fact that plaintiff was frequently absent from the marital home after she filed for divorce did not extinguish the custodial environment that existed with her. For an appreciable amount of time before plaintiff filed for divorce, and in the time preceding the trial in this case, the children looked to both parents to provide them with guidance, discipline, the necessities of life, and parental comfort. Therefore, an established custodial environment existed with both parents. MCL 722.27(1)(c); *Hayes, supra* at 388.

Because an established custodial environment existed with both parents, the next inquiry is whether there was clear and convincing evidence to support the conclusion that the change of the established custodial environment was in the children’s best interests. *Thompson v Thompson*, 261 Mich App 353, 362; 683 NW2d 250 (2004); *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). To determine the best interests of the children, the trial court must examine the factors listed in MCL 722.23. *Phillips, supra* at 26. In this case, the trial court found that the parties were equal with regard to all factors listed in MCL 722.23, except factors

(b), (j), and (k), which the trial court found to weigh in favor of plaintiff. Thus, the trial court awarded primary physical custody of the children to plaintiff.

Defendant next contends that the trial court's findings regarding factors (b), (e), (f), (j) and (k) were against the great weight of the evidence. We disagree.

In determining child custody, a court must consider the capacity and disposition of the parties to give the children love, affection and guidance and to continue the education and raising of the children in their religion or creed, if any. MCL 722.23(b). The trial court's finding that factor (b) weighed in favor of plaintiff was not against the great weight of the evidence. Both parents were capable of giving the children love, affection and guidance. However, the evidence supports the conclusion that plaintiff had a greater capacity and disposition to continue the education and raising of the children in their religion. She took the initiative to find a preschool and daycare for children to attend. She attended parent-teacher conferences. She took the children to church while the divorce was pending. Defendant, on the other hand, disapproved of and interfered with plaintiff's attempts to take the children to church. For example, one Sunday, she wanted to take the children to church but he planned a trip to the movie theater instead. We give deference to the trial court's ability to weigh the evidence and judge the credibility of witnesses. MCR 2.613(C); *Fletcher, supra* at 871. Therefore, although the evidence does not prove that defendant is incapable of continuing the children's education or religious upbringing, we cannot conclude that, in light of all of the evidence, the trial court's finding regarding factor (b) was against the great weight of the evidence. The evidence does not clearly preponderate in the opposite direction. Therefore, we must affirm the finding. *Phillips, supra* at 20.

In determining child custody, a court must also consider the permanence, as a family unit, of the existing or proposed custodial home or homes. MCL 722.23(e). The trial court's finding that the parties were equal under factor (e) was not against the great weight of the evidence. Plaintiff engaged in an extramarital relationship with her co-worker, George Moore. Nevertheless, defendant's implication that Moore is part of plaintiff's family unit is unfounded. Nothing in the record in this case indicates that Moore lives with plaintiff or that the children have been acquainted with Moore. Further, defendant's argument, that plaintiff's dishonesty regarding the duration of the affair creates uncertainty regarding the permanence, as a family unit, of plaintiff's home, is without merit. Therefore, contrary to defendant's assertion, evidence of plaintiff's infidelity does not support a finding that factor (e) weighs in favor of defendant. "[T]he focus of factor e is the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). Each parent has provided an adequate custodial home for the children. Moreover, nothing in the record in this case indicates that there are any impending events or circumstances that will substantially increase or reduce the stability of either parent's life or diminish the children's prospects for a stable family environment in either home. Therefore, we affirm the trial court's finding regarding factor (e).

In determining child custody, a court must also consider the moral fitness of the parties involved. MCL 722.23(f).

Factor f (moral fitness), like all 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, supra* at 886-887 (emphasis in original).]

Conduct relevant to this factor includes, but is not limited to, “verbal abuse, drinking problems, driving record, physical or sexual abuse and other illegal or offensive behaviors.” *Id.* at 887 n 6. The trial court’s finding that the parties were equal under factor (f) was not against the great weight of the evidence. Contrary to defendant’s argument, “[e]xtramarital relations are not necessarily a reliable indicator of how one will function with the parent-child relationship.” *Id.* at 887. Plaintiff did not expose the children to Moore and, in her opinion, the relationship did not affect her ability to parent her children. Thus, evidence of plaintiff’s extramarital relationship, while certainly relevant to plaintiff’s fitness as a spouse, is not necessarily probative of her moral fitness *as a parent*. *Id.*

Plaintiff was convicted of drunk driving, which is probative of plaintiff’s fitness as a parent. *Id.* at 887 n 6. There was also testimony that plaintiff used inappropriate language and told defendant she hated him in front of the children. However, plaintiff testified that, after she filed for divorce, defendant yelled and screamed at her every day. He yelled and called her derogatory names in the presence of the children. The trial court found that defendant was “emotionally abusive” when the children were in the home. Based on the evidence presented at trial, giving deference to the trial court’s ability to weigh the evidence and judge the credibility of witnesses, we cannot conclude that the trial court’s finding was against the great weight of the evidence. *Id.* at 871. The trial court also found that defendant was “to a certain extent physically abusive when the children were in the home.” Again, we cannot conclude that this finding was against the great weight of the evidence. Defendant admitted that he woke plaintiff up by shaking her pillow and yelling and screaming at her. Evidence of verbal and physical abuse is probative of a parent’s fitness as a parent. *Id.* at 887 n 6. Contrary to defendant’s argument, the evidence does not support a finding that defendant was more morally fit as a parent than plaintiff. Therefore, we must affirm the trial court’s finding that the parties were equal under factor (f).

In determining child custody, a court must also consider 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. MCL 722.23(j). The trial court’s finding, under this factor, that defendant made derogatory comments “to the children about their mother,” was against the great weight of the evidence. The evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20. Defendant admitted that he used inappropriate language in the children’s presence and that he called plaintiff derogatory names in front of the children. However, nothing indicates that these comments were made *to the children*. To the contrary, several witnesses testified that defendant never said anything derogatory or critical of plaintiff to the children.

Nevertheless, the trial court’s finding that factor (j) weighed in favor of plaintiff was not against the great weight of the evidence. Plaintiff testified that, on several occasions, defendant refused to tell her where he was taking the children, even though he always insisted that she tell him where she was taking the children and what time she would be home. He brought the

children home past their bedtimes and told them that they could stay up as late as they wanted. He questioned plaintiff's discipline of the children in the children's presence. There was also testimony that defendant refused to cooperate with plaintiff in caring for their son when he was sick and putting the children to bed when she specifically asked for his help. There is ample evidence that defendant was not willing to facilitate and encourage a close and continuing parent-child relationship between the children and plaintiff. See *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 459; 705 NW2d 144 (2005). Thus, we cannot conclude that the trial court's finding regarding factor (j) was against the great weight of the evidence. The evidence does not clearly preponderate in the opposite direction and, therefore, we must affirm the finding. *Phillips, supra* at 20.

In determining child custody, a court must also consider domestic violence, regardless of whether the violence was directed against or witnessed by the children. MCL 722.23(k). The trial court's finding that factor (k) weighed in favor of plaintiff was not against the great weight of the evidence. There was testimony that defendant physically blocked plaintiff's retreat from the garage during an argument. This was a form a domestic violence. See *MacIntyre, supra* at 459 n 34. Moreover, plaintiff testified that, during that same incident, defendant "kind of shoved [her] off to the side." She testified that he woke her up one night by pulling on her blankets. He pulled on the blankets until he pulled her off of the couch and onto the floor. Thus, the evidence demonstrates that defendant engaged in physical violence toward plaintiff. Furthermore, the evidence regarding defendant's verbal abuse of plaintiff supports the trial court's finding. In light of all of the evidence, we cannot conclude that the trial court's finding regarding factor (k) was against the great weight of the evidence. The evidence does not clearly preponderate in the opposite direction and, therefore, we must affirm the finding. *Phillips, supra* at 20.

Because the trial court's findings were not against the great weight of the evidence, and because there was clear and convincing evidence in the record to support that a change in the established custodial environment was in the best interests of the children, we hold that the trial court did not abuse its discretion in awarding primary physical custody of the minor children to plaintiff. Therefore, we must affirm the judgment of divorce. MCL 722.28; *Fletcher, supra* at 876-877.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell