

STATE OF MICHIGAN
COURT OF APPEALS

HOPE RACHEL HAYES,

Plaintiff/Counter-defendant-
Appellant,

v

GARY FLOYD HAYES,

Defendant/Counter-plaintiff-
Appellee.

UNPUBLISHED

October 12, 2006

No. 269819

Manistee Circuit Court

Family Division

LC No. 05-011964-DM

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce that awarded defendant sole legal and physical custody of the parties' two minor children. We reverse and remand for further proceedings.

I

Plaintiff and defendant separated in April 2005. The parties stipulated to an interim custody order that instituted a joint custody arrangement, with the parties alternating custody each week. In August 2005, the trial court granted plaintiff's ex parte motion for full custody, but a month later reinstated the stipulated interim order pending the outcome of a custody hearing. At the custody hearing, plaintiff sought a joint custody arrangement, and defendant sought full custody. The trial court found that the children did not have an established custodial environment with either parent and, therefore, applied a preponderance of the evidence standard to determine custody. After considering the statutory best interest factors, MCL 723.23(a) – (l), the court determined that the parties were even with regard to factors (a), (b), (c), (d), (e), (g), and (h), but that factors (f), (i), and (k) favored defendant. The court awarded defendant both legal and physical custody of the children, and awarded plaintiff parenting time every other weekend and one evening during the week she does not have weekend custody. The court did not make any finding regarding best interest factor (j), the willingness of the parties to facilitate and encourage the children's relationship with the other parent, nor did it address plaintiff's request for joint custody.

II

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999). The question whether the trial court adequately set forth findings of fact as required by statute is a question of law that is reviewed de novo on appeal. See *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000). This Court reviews the trial court's findings of fact to determine whether they are against the great weight of the evidence. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

III

Plaintiff first argues that the trial court erred by failing to make findings regarding her request for joint custody. We agree.

MCL 722.26a provides, in pertinent part:

(1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. . . . The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in section 3.

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

This provision requires the trial court to consider a parent's request for joint custody. *Mixon, supra* at 163. In this case, plaintiff specifically requested that the trial court consider an award of joint custody, but the trial court never addressed this request. We cannot conclude that this error was harmless. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994). The trial court characterized its custody decision as "a close call," and determined that the children's preferences were the deciding factor. We note that, in its findings, the court commented that the joint custody arrangement seemed to be effective. But the court also failed to make findings regarding best interest factor (j), the willingness of the parties to facilitate and encourage the children's relationship with the other parent, which would be relevant to a determination whether joint custody would be feasible. Under the circumstances, it would be improper for this Court to make a de novo finding with respect to the question of joint custody. *Id.* at 882. Accordingly, we remand this case to the trial court for consideration of plaintiff's request for joint custody.

IV

Plaintiff argues that the trial court failed to adequately explain the factual basis for its finding that there was no established custodial environment with either parent, and that this finding is against the great weight of the evidence. We disagree.

When a custody decision would change the established custodial environment of a child, the party seeking to change that environment must show by clear and convincing evidence that the change is in the child's best interests. MCL 722.27(1)(c); *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005). Whether an established custodial environment exists is a question of fact for the trial court to resolve based on the statutory best interest factors. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). The trial court must make a finding regarding the existence of an established custodial environment pursuant to MCL 722.27(1)(c).

In this case, the trial court did not fail to make a finding regarding the existence of an established custodial environment. It found that an established custodial environment did not exist with either parent. Although plaintiff argues that the trial court failed to adequately explain the basis for its finding, the record is sufficient to permit review of the trial court's decision according to the great weight of the evidence standard.

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). The existence of an established custodial environment depends upon a custodial relationship of significant duration in which the parent provides the child with appropriate parental care, discipline, love, guidance, and attention, and in which the environment is physically and psychologically secure, stable, and permanent. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

An established custodial environment can exist in more than one home, but repeated changes in physical custody, and the uncertainty created by an ongoing custody dispute can destroy a custodial environment. *Mogle v Scriver*, 241 Mich App 192, 197-198; 614 NW2d 696 (2000); *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993).

In this case, an established custodial environment presumably existed between the children and both parties before their separation. But after the parties separated in April 2005, until the custody trial in January 2006, the children alternated custody each week, except for the period the ex parte order was in effect. During this time, the children lived with the uncertainty created by the ongoing, acrimonious custody dispute. The evidence did not show that the children relied primarily on plaintiff for guidance, affection, discipline, and the necessities of life, or that plaintiff's home was physically and psychologically secure, stable, and permanent. *Baker, supra* at 579-580. The trial court's finding that an established custodial environment did not exist with either parent is not against the great weight of the evidence. Thus, the trial court properly applied a preponderance of the evidence standard to determine the issue of custody.

V

Plaintiff also argues that the trial court failed to make any findings regarding statutory best interest factor (j), thereby requiring a remand for reconsideration of the custody decision. We agree.

In a child custody dispute between the parents, the best interests of the child control. MCL 722.25. The best interests of the child are evaluated by the 12 best interests factors set

forth in MCL 722.23(a) – (l). Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor and the failure to do so is error requiring reversal. *Foskett, supra* at 9; *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988).

In addressing the statutory best interest factors, the trial court did not make any findings 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 child and the other parent.” Considering that the trial court found that the parties were equal on most of the best interest factors, and its acknowledgment that this was a close case, we cannot conclude that this error was harmless. Moreover, there was conflicting evidence concerning this factor below. The evidence could have supported a finding in favor of either parent, depending on how the trial court resolved the evidence. This factor is also relevant to the question of joint custody, which the trial court did not consider. Accordingly, we remand for reconsideration of the trial court’s custody decision and direct the court to explicitly state its findings and conclusions regarding factor (j).

VI

Plaintiff also argues that the trial court’s findings regarding best interest factors (c), (f), (h), (i), and (k) were contrary to the great weight of the evidence. We disagree.

Plaintiff challenges the trial court’s findings with respect to the following best interest factors:

(c) The 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.

* * *

(f) The moral fitness of the parties involved.

* * *

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express the preference.

* * *

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.23.]

The trial court found that the parties were equal with respect to factors (c) and (h), and that factors (f), (i), and (k) favored defendant. This Court reviews the trial court’s findings of fact to

determine whether they are against the great weight of the evidence. *Thompson, supra* at 358. This Court grants deference to the trial court's findings in light of its superior position to weigh the evidence and evaluate the witnesses' credibility. *MacIntyre v MacIntyre*, 267 Mich App 449, 459; 705 NW2d 144 (2005).

With respect to factor (c), the capacity and disposition to provide for the children's material needs, the trial court found that "[t]he parties have a similar income: there is no advantage here as child support payments would reduce any advantage." Although plaintiff's employment and earnings history are more consistent than defendant's, defendant earns sufficient income to provide for the children, and any imbalance can be offset by child support payments. And while plaintiff historically assumed primary responsibility for scheduling the children's medical appointments, buying them clothes, and managing educational responsibilities, defendant assumed responsibilities in these areas after the parties' separation. Plaintiff admitted that defendant historically prepared the family's meals. The trial court's determination that this factor did not favor either party is not against the great weight of the evidence.

The trial court found that factor (f), moral fitness, favored defendant because plaintiff had a secret relationship with another man while she was still living with defendant. Plaintiff admitted that she began having a surreptitious relationship with a male friend before she separated from defendant, although she denied having sexual relations with this man until after the divorce proceedings were underway. Defendant testified that he believed plaintiff was having an affair, because she lied about her whereabouts to spend time with her friend, and refused to tell him whom her friend was. The trial court was free to discredit plaintiff's more innocent explanation of the relationship and infer that she was instead involved in an adulterous relationship, or one on the verge of being adulterous. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 28; 581 NW2d 11 (1998). Although plaintiff emphasizes that defendant became sexually involved with a woman after the separation and failed to inform his new partner of his sexually transmitted disease, the trial court was not obligated to consider defendant's post-separation relationship as equally immoral to plaintiff's adultery. Accordingly, the trial court's finding that factor (f) favored defendant was not against the great weight of the evidence.

The trial court found that the parties were equal with respect to factor (h), the children's home, school, and community record. The court noted that Elijah had some problems, but found it "questionable that a change of custody would improve things." It also noted that Carmen appeared to be performing well in school. Plaintiff argues that the trial court should have found that this factor favored her because Elijah's school performance improved during the 2005-2006 school year. But the children were alternating residences between plaintiff and defendant during the 2005-2006 school year, so this does not compel a finding that this factor weighed in plaintiff's favor. Plaintiff also argues that the trial court's finding supports a joint custody arrangement, rather than sole custody for defendant. We agree that this is a relevant matter for the trial court to consider on remand when addressing the question of joint custody.

Plaintiff also argues that the trial court erred in finding that factor (i), the reasonable preferences of the children, favored defendant. After conducting an in camera review, the trial court found that both children "steadfastly favored living with the father." Plaintiff argues that

Elijah's preference was not reliable, because defendant had previously become extremely angry with him after he said that he wanted to divide his time 50/50 between his parents. However, the incident in question occurred several months before trial, when the parties initially separated, and there was conflicting evidence regarding Elijah's stated preference throughout the subsequent proceedings. We defer to the trial court's finding that Elijah reasonably expressed a preference for defendant. Plaintiff also argues that both children prefer defendant because he is more lenient. But the trial court specifically asked about this subject when questioning the children. It was within the trial court's province to weigh the evidence, and determine that the children reasonably and sincerely preferred residing with defendant. The trial court's findings regarding factor (i) are not contrary to the great weight of the evidence.

Plaintiff lastly challenges the trial court's determination that best interest factor (k), domestic violence, favored defendant. There was evidence that plaintiff committed acts that could be characterized as domestic violence. Defendant testified that plaintiff twice brandished a knife toward him, and threw things at him. Although plaintiff argues that these incidents did not involve the children, MCL 722.23(k) specifically states that domestic violence should be considered "regardless of whether the violence was directed against or witnessed by the child." Plaintiff argues that defendant also committed an act of domestic violence when he became enraged and threw her belongings in the driveway. However, the circumstances surrounding this incident were disputed and the trial court could have accepted defendant's and his brother's more innocuous version of that incident. The trial court's findings regarding factor (k) are not against the great weight of the evidence.

VII

Plaintiff argues that the trial court abused its discretion by awarding her parenting time only on alternate weekends and one evening a week during the intervening weeks. A trial court's discretionary rulings in a custody case are reviewed for an abuse of discretion. *Thompson, supra* at 358.

MCL 722.27a(1) provides:

Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

The trial court did not violate this statute, which does not specify any formula for determining the proper amount of parenting time. Further, the trial court did not abuse its discretion in determining parenting time. The court's order represents a reasonable effort to allow plaintiff sufficient time with her children while maintaining a stable custody arrangement with defendant.

Nevertheless, because we are remanding for reconsideration of the trial court's custody decision and consideration of the question of joint custody, the trial court is free to revisit the issue of parenting time in light of its decision on remand.

VIII

Plaintiff argues that the trial court should have calculated her child support obligation in accordance with defendant's testimony that he earned \$920 a week. This Court reviews child support orders for an abuse of discretion. *Burba, supra* at 647. The court's findings of fact are reviewed for clear error. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

Contrary to what plaintiff argues, defendant did not testify that he earned \$920 every week. Rather, he testified that his earnings vary throughout the year, and that he earned \$920 some weeks of the year. The trial court did not clearly err in rejecting plaintiff's proposed calculations of defendant's income for purposes of determining child support.

IX

Finally, plaintiff argues that this case should be assigned to a different judge on remand. We disagree.

In *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004), this Court stated:

The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case. . . . We may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.

* * *

However, we will not remand to a different judge merely because the judge came to the wrong legal conclusion. Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying. Rather, plaintiff must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views. [Citations omitted.]

Plaintiff relies on her attorney's affidavit, which was filed in support of plaintiff's post-judgment motion for disqualification of the trial court. The affidavit includes several claims that the trial court made erroneous legal decisions. However, erroneous rulings or decisions generally do not constitute a ground for disqualification. *Bayati, supra*. In any event, the only errors established on appeal are the trial court's failure to make necessary findings. We are not persuaded that the trial court would be unable to fairly correct these omissions on remand. Plaintiff's counsel also averred that the trial court made improper ex parte communications with opposing counsel, but

the trial court found that these allegations were not true. On this record, we do not find a basis for remanding this case to a different judge.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto