

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT P. BEATON,

Plaintiff/Counterdefendant-Appellee,

v

DIANE P. BEATON,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED

February 3, 1998

No. 202753

St Clair Circuit Court

LC No. 95-002290 DM

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the decision to award the parties joint legal and physical custody of the parties' minor child. We affirm.

We consider first defendant's argument that the trial court's findings with regards to factors (b), (c), (d), (e), (h), (k), and (l) of MCL 722.23; MSA 25.312(3) were against the great weight of the evidence. We disagree. When we review questions of fact, the trial court findings will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

With regard to factor (b), the trial court found the parties equal. Defendant argues that the trial court should have favored her because plaintiff's abuse of alcohol would affect his ability to provide proper guidance. The record contained testimony that showed plaintiff no longer indulged in alcoholic beverages. Moreover, the record contained testimony showing plaintiff to be a competent provider of guidance as he has: (1) coached the child's hockey team; (2) spent time with the child's educational needs; and (3) regularly attended religious services with the child. In light of the record, the trial court's finding on factor (b) was not against the great weight of the evidence.

With regard to factor (c), the trial court found the parties equal. Defendant argues, however, that this is error because plaintiff never provided health insurance for the child and defendant is currently able to provide this service because of the benefits package offered by her employer. The record does not contain evidence to suggest that plaintiff never provided or never would provide health insurance for

the child. Thus, based on the record before it, the trial court's finding was not against the great weight of the evidence.

With regard to factor (d), the trial court favored neither party and found that the current environment of the child was a stable and satisfactory environment. Defendant argues that the trial court erred in considering the child's ties to a particular community in evaluating factor (d), as this should be a consideration only under factor (h), whereas under factor (d), the court should have examined the continuity and stability of the parties' home environments. According to defendant, this constitutes impermissible "double-weighting" by allowing one consideration to permeate into several factors. Our Supreme Court has acknowledged that the best interest factors are sometimes awkward and represent overlapping considerations. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). Thus, it is not error per se for the trial court to "double-weigh" considerations that properly belong in the analysis of both factors. Considerations of factors (d) and (e) contain some natural overlap. It would have been difficult for the trial court to discuss the stability and appropriateness of an environment without describing the environment and the child's interaction with it. Thus, the trial court did not engage in improper "double weighting" of considerations, and its findings were not against the great weight of the evidence.

With regard to factor (e), the trial court again favored neither party. Defendant argues that the trial court improperly considered the child's community ties instead of focusing on the family unit or the proposed custodial homes. However, the trial court addressed the child's prospects for a stable family environment and, in short, the trial court found that both parties were able to provide a stable family environment for the child, but determined that the joint arrangement, which continued the child's current residence, was in his best interests. The trial court's findings were not against the great weight of the evidence on the record.

With regard to factor (h), the trial court found the parties equal. Defendant argues that the trial court as a matter of law was required to determine that the child was too young to have acquired a school and community record. The record supported the trial court's determination that this factor was applicable because the child: (1) had become involved with hockey; (2) had created a network of friends in the neighborhood; and (3) had close relatives in the community. Thus, these applicable findings were not against the great weight of the evidence on the record.

With regard to factor (k), the trial court found this factor to be inapplicable. Defendant argues that the record contained overwhelming evidence of domestic violence and that the trial court erred in not considering it. Apart from defendant's assertions, the record contained: (1) defendant's own testimony that plaintiff never hurt her or the child; (2) testimony that plaintiff did not become violent when he had previously drunk alcohol; (3) plaintiff's testimony that domestic violence did not occur; and (4) expert testimony that plaintiff did not have an alcohol problem and that he was a reasonable and open-minded person. In light of this evidence and the trial court's unique ability to assess the credibility of the witnesses, the trial court's finding with regard to factor (k) was not against the great weight of the evidence.

With regard to factor (1), among other considerations, the trial court considered that defendant may attempt to remove the child to Canada, attempt to circumvent Michigan jurisdiction, and affect the child's derivative U.S. citizenship status in the future. Defendant argues that this was an improper consideration because all custody orders contain provisions by which court approval is required before a child is removed from the State of Michigan. The purpose of the catch-all factor (1) is to give the trial court a broad scope of discretion to fully explore every aspect of the parties' circumstances in order that its custody determination will reflect the child's best interests. *Berman v Berman*, 84 Mich App 740, 745; 270 NW2d 680 (1978). In the present case, defendant's return to Canada was a valid concern as evidenced by: (1) her threats to return to Canada prior to the parties' separation; (2) defendant's actual flight to Canada in order to file for divorce; and (3) defendant's request in her counter-complaint for divorce to remove the child to Canada. Thus, in light of the broad discretion afforded under factor (1) and the evidence in the record, the trial court's findings with regard to factor (1) were not against the great weight of the evidence.

On the basis of its findings under the statute, the trial court clearly concluded that the best interests of the child required that the parties be awarded joint legal custody. Although defendant suggests that this was not the trial court's decision, reference was specifically made to the statute regarding joint custody, MCL 722.26a; MSA 25.312(6a), and the trial court's opinion otherwise clearly establishes that this was the decision.

Defendant argues that the trial court erred when it granted joint custody because of the parties' lack of goodwill and trust, and the lack of cooperation between the parties. Upon the request for a joint custody arrangement, the trial court is required to determine whether joint custody is in the best interests of the child by considering both the "best interest" factors enumerated in MCL 722.23; MSA 25.312(3), and whether "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(a) and (b); MSA 25.312(6a)(1)(a) and (b). A joint custody arrangement is inappropriate when the parties are unwilling to cooperate with each other and unable to agree on basic child-rearing issues such as health care, religion, education, day-to-day decision making, and discipline. *Fisher v Fisher*, 118 Mich App 227, 232; 324 NW2d 582 (1982). Cooperation between the parties, however, is but one of the factors to be considered by the trial court when determining whether a joint custody arrangement is in the best interests of the child. *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987).

In the present case, the parties have shown a willingness to cooperate with one another to further the best interests of their child. First, at the beginning of their separation, they agreed upon a joint parenting arrangement that appeared to function without significant problem for almost an entire year. Second, the parties had cooperated in the past to an extent that allowed joint parenting time in the marital home. Third, expert testimony described plaintiff as a reasonable and open-minded person willing to compromise. Fourth, expert opinion called for the continuation of a joint parenting arrangement. Fifth, the parties agreed to alter the parenting time schedule to accommodate defendant's new employment schedule and plaintiff's religious services schedule. In light of the trial court's finding with regard to the "best interests" factors and the evidence of past cooperation above, the trial court's grant of joint custody was not error.

Defendant argues that the trial court's decision requiring that the child be enrolled in the Marysville school district¹ was in error. We disagree. "[J]oint custody in this state by definition means that the parents share the decision-making authority with respect to the important decisions affecting the welfare of the child, and where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child." *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993). The parties in this case were at odds as to the appropriate school district in which to enroll their child. Considering the social and family ties the child has in Marysville and determining that "he is thriving in his present scholastic and social community," the trial court concluded that it was in his best interest to continue enrollment in Marysville. These findings were not against the great weight of the evidence on the record.²

Defendant also argues that a number of provisions in the judgment of divorce unconstitutionally impede her "right to travel" within Michigan. We find that the provisions of the judgment pertaining to support and transportation expenses do not preclude defendant from moving; they merely impose an additional economic cost upon defendant. Therefore, such provisions do not implicate any conceivable "right to travel," in our judgment.

The provision restricting the child's school district does effectively preclude defendant from relocating outside of the Marysville school district. However, given the compelling interest of Michigan in the "best interests of the children," as they are affected by the dissolution of their parents' marriage, *Fisher, supra* at 232, we are aware of no characterization of a constitutional "right to travel" that would enable such a right to prevail over a judicial "best interests" determination. Cf. *Musto v Redford Twp*, 137 Mich App 30, 33-34; 357 NW2d 791 (1984). Given our conclusion that the trial court did not abuse its discretion in its determination that the best interests of the child are served by enabling him to remain in the Marysville school district, we do not believe that it is necessary to address defendant's constitutional argument further.³

Finally, defendant argues that the trial court erred when it ruled on plaintiff's motion to restore the status quo because it determined that an established custodial environment existed without an evidentiary hearing. We disagree. The trial court did not address the issue of custody nor an established custodial environment. Rather, it reestablished the status quo and referred the matter to the Friend of the Court for a recommendation. Defendant's argument is therefore without merit.

We affirm.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

¹ Defendant argues that the trial court's order requires the child to be enrolled in the school district of plaintiff's residence, wherever that may be. However, considering the judgment in its entirety, we

conclude that the trial court's intent was that the child would be enrolled in the Marysville school district where plaintiff currently resides. Plaintiff acknowledges that this was the intent, and, in the event that plaintiff seeks to remove the child from the Marysville school district, this matter could be addressed by the trial court through a motion for modification of the order brought by defendant.

² This decision is not inconsistent with *Dehring v Dehring*, 220 Mich App 163, 559 NW2d 59 (1996), upon which defendant relies. *Dehring* is inapposite because it involved a question not at issue here, whether a long distance move of a parent having primary physical custody of a child was a sufficient change in circumstances to warrant a reconsideration of the custody determination.

³ The record does not suggest that the trial court failed to consider defendant's career aspirations or job opportunities in determining that the best interests of the child were served by remaining in Marysville. Should defendant want to make a different move in the future or if there are other changed circumstances, that provision of the trial court's order could be reconsidered on a motion for modification or other relief.