

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JONELLE F. PITRE,

Plaintiff-Appellee,

v

ALLAN R. PITRE II,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2003

No. 239483

Ottawa Circuit Court

LC No. 00-036939-DM

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce awarding joint legal custody and joint physical custody of the parties' minor children, Jessica and Johnah Pitre. The trial court also ordered that plaintiff be awarded primary parenting time and the marital home. We affirm.

I. Basic Facts And Procedural History

Plaintiff and defendant were married on June 30, 1990. The parties' two daughters, Jessica and Johnah, were born in September 1991 and July 1996, respectively. Plaintiff originally filed for divorce from defendant in 1998 based in part on defendant's infidelity, a lack of communication, and an absence of family togetherness. Plaintiff later dismissed this divorce action after the parties had agreed to reconcile. Plaintiff subsequently instituted the present divorce action in May of 2000 based on another incident of infidelity as well as a continuation of the relationship troubles.

The only witnesses at trial were the two parties and Steven Cotton, the friend of the court investigator. Cotton testified that before the filing of divorce, during the course of the parties' ten-year marriage, the primary items causing stress on the relationship were financial. As a result, both parties worked full-time jobs. Plaintiff explained that defendant generally worked a second or third shift throughout the marriage and that she was generally working during the day. When the children were born, the parties maintained a similar schedule until plaintiff filed for divorce in 2000. Specifically, defendant testified that he was employed as a nurse from October 1990 until April 1999, working between 50- and 55-hour weeks. It was uncontested at trial by both parties that during this time, the weekday routine involved plaintiff taking the children to day care, picking them up from day care, cooking their meals, cleaning them, and making sure

they did homework, although defendant testified that he had occasionally gotten up with the children on the weekends and attended a few school events.

Defendant's time with the children was limited while he worked as a nurse; it was almost nonexistent when the parties decided that it would be better for the family if defendant quit his nursing job in favor of one that afforded better pay and benefits. Thereafter, defendant began working 12-hour shifts at a factory from 3:30 P.M. to 3:30 A.M. Plaintiff testified that defendant had little or no contact with the children during the approximately eleven months he worked at the factory. Defendant worked at the factory job until May 8, 2000, four days after plaintiff filed this action for divorce.

Soon after plaintiff filed for divorce, she began a relationship with another man. Cotton noted in his testimony that plaintiff also purchased a mobile home with this individual where she had originally intended to move and raise the children if she was awarded custody. However, this plan fell through for financial reasons and she eventually decided to remain in the marital home. Both parties continued to live in the marital home until entry of the judgment of divorce.

Meanwhile, defendant had decided to take a larger role in the lives of his children. Defendant quit his factory job and began working a schedule that allowed him to be around the children more frequently. Additionally, defendant claimed at trial that he took on added responsibilities such as cooking, cleaning, doing laundry, and picking up the children from day care. Defendant also contended that he continued to pay all of the bills for the house the parties lived in before the divorce judgment. Defendant also testified that he told plaintiff that on several occasions he had contemplated suicide, but that he had never taken any action in that direction.

Ultimately, in deciding that joint physical and joint legal custody was appropriate, the trial court recognized the contribution of both parties before and after the filing of the divorce. In the main, the trial court recognized that before the filing, plaintiff had played the major role in the children's lives and thus had established a custodial environment with the children. The trial court also recognized that following plaintiff's filing for divorce, defendant took a more prominent role in the children's lives by increasing his parental and household responsibilities. The trial court went on to say, "The end result of this transformation is the extant established custodial environment with both parents with the one qualification. It seems the girls still relate better with their mother than the father." These factual considerations resulted in a fairly equal balancing of the "best interests of child" factors contained in the Child Custody Act. The trial court gave a slight edge to the mother for such factors as overall permanence of a family unit, moral fitness, mental and physical health, and reasonable preference of the child. The trial court noted specifically that the children had consistently looked to plaintiff for love, attention, and guidance. The trial court also made factual findings regarding defendant's repeated incidents of infidelity, his inability to stay in a steady relationship, and his acknowledgment of suicidal thoughts.

The trial court granted the marital home to plaintiff and gave her primary physical custody of the children. The trial court allowed defendant to have the children on alternate weekends and one evening per week as well as one other evening every other week. The trial court also set up a summer schedule with the children spending alternate weeks and major holidays with each parent.

Before the trial court entered its judgment on January 10, 2002, defendant brought a motion to reopen proofs, for reconsideration of the court's opinion, and for a stay in the issuance of a judgment of divorce. This motion constituted an attempt by defendant to reargue the same facts that had been brought out at trial, and also to argue facts that had developed since the trial. As the trial court pointed out at the motion hearing, defendant cited no law requiring it to reconsider its factual findings, nor did defendant explain how the trial court had clearly erred in its factual findings. Accordingly, the trial court denied the motion.

## II. Establishment Of A Custodial Environment

### A. Standard Of Review

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 under the statutory factors.<sup>1</sup> We will uphold the trial court's decision regarding the established custodial environment unless the decision is against the great weight of the evidence.<sup>2</sup>

### B. The Trial Court's Decision

Defendant contends that the trial court's findings of fact regarding the establishment of a custodial environment were against the great weight of the evidence. The trial court found that such an environment was established with both parties. When deciding whether there is an established custodial environment with one or both parties, the court looks to whether there is a relationship of significant duration, both physical and psychological, between the custodian and child marked by security, stability and permanence.<sup>3</sup>

Defendant correctly points out that he became more involved with the children's schooling the year after the divorce was filed because he had changed to first shift and was able to pick the children up after school and that his limited time with the children before that time was the result of his working many hours to support his family. However, Cotton testified that before the plaintiff's filing for divorce, both parties were involved in the children's lives, but it was plaintiff who provided the primary care for the children. Further, plaintiff testified that she did everything for the children during this time; she got them up in the morning, took them to day care, picked them up from day care, cooked, cleaned, bathed them, and put them to bed. We therefore conclude that the trial court's finding regarding the custodial environment was not against the great weight of the evidence.

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<sup>1</sup> *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

<sup>2</sup> *Fletcher v Fletcher*, 447 Mich 871, 876-877, 879 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

<sup>3</sup> MCL 722.27(1)(c); *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *Mogle*, *supra*.

### III. The Best Interest Factors

#### A. Standard Of Review

The great weight of the evidence standard applies to the trial court's findings of fact regarding each custody factor; therefore, its decision should be affirmed unless the evidence clearly preponderates in the opposite direction.<sup>4</sup> We review the trial court's discretionary rulings, including to whom custody is granted, for an abuse of discretion.<sup>5</sup>

#### B. Reviewing The Best Interest Factors

Defendant contends that the trial court's findings regarding the best interest factors were against the great weight of the evidence and that the trial court abused its discretion in awarding joint custody. We will review each statutory factor in turn.<sup>6</sup>

##### (1) Love, Affection, And Other Emotional Ties Between The Parties And The Children

The trial court found each party's emotional ties to the children were strong and so considered the factor to be equal. Cotton testified that both parties are "good" and "capable" people who love and care about the children. We conclude that the trial court's finding that this factor is equal was not against the great weight of the evidence.

##### (2) Capacity And Disposition Of The Parties To Give The Children Love, Affection And Guidance And To Continue Educating And Raising The Children In Their Religion

The trial court found that both parents show an ability to put love, guidance and affection into action. The trial court further found that defendant now regularly attends church with the children and gave plaintiff credit for allowing the children to be raised in the Catholic faith of their father while she returned to her roots in the Protestant church. The trial court also noted that the parties neglected the religious aspect of their lives during the marriage and so their present actions could be better characterized as a renewal of faith rather than a continuation. The trial court found this factor to be equal.

Defendant argues this factor should not have been equal but should weigh slightly in his favor because of his involvement in the children's religious faith and school activities. Cotton testified that defendant was involved in the children's religion and school activities. However, there was also testimony that before the filing of divorce, plaintiff took care of most of the children's day-to-day needs, in addition to providing care and guidance for them. We conclude that the trial court's finding that this factor is equal was not against the great weight of the evidence.

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<sup>4</sup> *Fletcher, supra* at 879 (Brickley, J.), 900 (Griffin, J).

<sup>5</sup> *Id.*

<sup>6</sup> MCL 722.23(a)-(l).

(3) Capacity And Disposition Of The Parties To Provide Food, Clothing, Medical And Remedial Care, And Material Needs

Defendant's main contention concerning this factor is that plaintiff has financial problems and cannot provide the essentials to the children. The trial court acknowledged in its opinion that plaintiff had financial problems, but also concluded that "she is working this out and in the past has worked two jobs to make ends meet." The record indicates that plaintiff maintains a steady income, makes steady payments to her mother on a previous debt, and has paid for the children's clothing and daycare. Furthermore, contrary to defendant's contention, plaintiff testified at trial that she had worked two jobs for one year while the defendant went to nursing school. We conclude that the trial court's weighing this factor as equal was not against the great weight of the evidence.

(4) Length Of Time The Children Have Lived In A Stable, Satisfactory Environment, And The Desirability Of Maintaining Continuity

The trial court's chief concern on this factor was that the children stay in the marital home, as Cotton recommended. It was uncontested at trial that plaintiff had changed her mind and decided to stay in the marital home after earlier telling defendant and Cotton that she intended to move into a mobile home. The trial court also acknowledged that Cotton had originally recommended that the children stay with defendant in the marital home during the school year. However, Cotton also testified that "whoever's got the kids mostly during the school year, ought to be in the home." Therefore, we conclude that the trial court's decision was not against the great weight of the evidence because both parties claimed an equal right to the marital home and that was where the trial court recommended the children should be.

(5) Permanence, As A Family Unit, Of The Existing Or Proposed Custodial Home Or Homes

The trial court was clearly concerned with defendant's past infidelities and lapses in parental responsibility in finding this factor in plaintiff's favor. Thus, even if defendant demonstrated a newfound personal and parental stability in his life, defendant acknowledged having two affairs and maintained contact with one of the women towards the end of the marriage. Moreover, even if plaintiff improperly introduced her boyfriend into the children's lives since the divorce action was filed, the record indicates that plaintiff consistently attempted to maintain a more permanent family unit with her children. We conclude that the trial court did not err in giving "a slight" advantage to plaintiff on this factor and that its decision was not against the great weight of the evidence.

(6) Moral Fitness Of The Parties

The trial court noted that in 1998, defendant moved in with his girlfriend, thus setting a poor example for his children, and that plaintiff had become involved "with another man in the children's presence soon after filing divorce." The trial court weighed this factor as equal. The testimony at trial indicated that defendant had at least one affair and that plaintiff began a new relationship immediately after filing for divorce. We conclude that the trial court's decision to weigh this factor as equal was not against the great weight of the evidence.

#### (7) Mental And Physical Health Of The Parties

The trial court gave plaintiff a slight edge respecting this factor, largely because of the fact that defendant admitted to contemplating suicide and taking prescription medication for his depression. Both of those facts are substantiated in the testimony. We conclude that the trial court's decision with this factor was not against the great weight of the evidence.

#### (8) Home, School, And Community Record Of The Children

The trial court acknowledged plaintiff's more active involvement in the children's schooling preceding the divorce, as well as defendant's increased involvement after the filing. However, the trial court also acknowledged that if plaintiff remained in the marital home, this factor would be slightly in her favor. Defendant argues that there was no evidence in the record that plaintiff had a more flexible morning work schedule. However, it was uncontested that defendant begins works at 5:30 A.M. and would have to bring someone into the home four days a week to get the children ready for school. We conclude that the trial court's decision with this factor was not against the great weight of the evidence.

#### (9) Reasonable Preference Of The Child

The trial court concluded that this factor favored the plaintiff. Generally, if the children are capable, the trial judge should interview the children and then state on the record whether the children were able to make a choice.<sup>7</sup> However, it is also a general rule that the failure to interview a child whose preference cannot overcome the weight of the other factors does not require reversal.<sup>8</sup> Nothing in the record indicates the trial court attempted to interview the children. The trial court's evaluation of this factor was apparently based on Cotton's testimony regarding the children's parental preferences. According to Cotton, the children told him they relate better to plaintiff and that they prefer her because she had taken care of them their whole lives. However, Cotton also testified that both parents were involved and both were doing things for the children. Therefore, even if the trial court did not interview the children or state on the record whether they could choose one parent over the other, the facts relevant to this decision are too close to have weighed decisively in defendant's favor. We conclude that the trial court's finding with respect to this factor was not against the great weight of the evidence.

#### (10) 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

With respect to this factor, the trial court stated: "These parties have been willing to facilitate and encourage a relationship between the children and each other. This factor is equal." Cotton testified that there has been no interference by either parent with the other

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<sup>7</sup> *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), rev'd on other grounds, *Fletcher*, *supra* at 871.

<sup>8</sup> *Treutle v Treutle*, 197 Mich App 690, 696; 495 NW2d 836 (1992).

parent's relationship with the children. We conclude that the trial court's finding with respect to this factor was not against the great weight of the evidence.

(11) Domestic Violence

Defendant does not challenge the trial court's finding respecting this factor. The trial court observed that there was no domestic violence, and there was no evidence of any in the testimony.

(12) Other Factors

The trial court noted that on one occasion, defendant left the younger daughter at home sleeping while he drove the other daughter to school and that although defendant tries to control his smoking, he admits that he has smoked in the presence of one child who had allergies that were adversely affected. The trial court gave a slight advantage to plaintiff. Defendant does not challenge these findings. Instead, defendant argues that because the trial court did not discuss Cotton's report and testimony under this factor, the trial court's findings under this factor were against the great weight of the evidence. Defendant also contends that, overall, the trial court erred in "failing to follow the thorough recommendations of the evaluator."

The Friend of the Court Act requires the friend of the court to "investigate all relevant facts, and to make a written report and recommendation to the parties and to the court regarding child custody or parenting time."<sup>9</sup> Nothing in the Friend of the Court Act requires a trial court to follow a recommendation made by an officer. We conclude that the trial court's findings under this factor were not against the great weight of the evidence.

Based on our review and analysis of the statutory factors, we conclude that the trial court did not abuse its discretion in awarding joint legal and physical custody to both parties.

Affirmed.

/s/ William C. Whitbeck  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray

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<sup>9</sup> MCL 552.505(1)(g).