

STATE OF MICHIGAN
COURT OF APPEALS

LISA L. TERRILL, f/k/a LISA L. TOMS,

Plaintiff-Appellee,

v

RICHARD B. TOMS,

Defendant-Appellant.

UNPUBLISHED

March 17, 2009

No. 285145

Livingston Circuit Court

LC No. 01-031597-DM

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right the trial court's change of custody order that awarded plaintiff primary physical custody of two of the parties' children. We affirm.

The parties' relationship began in the early 1990's, and their two daughters were born before their May 17, 1995, marriage. The parties' son was born approximately one year later. The parties separated on May 1, 2000, and the trial court subsequently awarded joint legal custody of the three children to both parties but physical custody to defendant. The judgment of divorce maintained that custody ruling. During the succeeding years, there were allegations of child abuse and neglect.

In September 2006, after the parties' oldest daughter and son alleged that defendant had sexually abused them, plaintiff moved for a change of custody. The child protective services ("CPS") investigation did not find sufficient evidence of sexual abuse; however, it acknowledged that some risk factors for sexual abuse existed in defendant's residence. The parties thereafter stipulated that plaintiff would have physical custody of the parties' oldest daughter, but defendant would maintain physical custody of the two younger children.

In May 2007, the parties' son was involved in a sexual assault on a school bus, and he was charged with first-degree criminal sexual conduct (CSC), second-degree CSC, and gross indecency. The trial court dismissed the CSC charges, and a nolo contendere plea was entered as to the latter charge.

In October 2007, defendant was incarcerated for a marijuana offense that occurred in December 2006. Defendant made no arrangements for the two younger children when he went to jail. The trial court granted plaintiff's subsequent ex parte motion to change custody, and it later concluded that plaintiff demonstrated by a preponderance of the evidence that there was

proper cause or change in circumstances to warrant a reevaluation of the custody of the parties' younger children. The trial court conducted a number of evidentiary hearings, reviewed psychological evaluations of the parties and their three children, numerous CPS reports and the friend of the court report before finding by clear and convincing evidence that it was in the best interests of the younger children to remain in plaintiff's physical custody.

On appeal, defendant challenges the trial court's findings with respect to several of the best interests factors, MCL 722.23. This Court reviews "the trial court's factual findings under the 'great weight of the evidence' standard, its discretionary rulings for an abuse of discretion, and questions of law for clear legal error." *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998); *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). We find that none of the challenged findings were against the great weight of the evidence.

With respect to factor (b), MCL 722.23(b), "[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," the trial court's findings were not against the great weight of the evidence. The trial court found that both parties have the capacity and disposition to provide the children with love and affection, and that religious upbringing was not at issue; however, the trial court opined that the critical issue was whether each parent had the capacity and disposition to provide the children with guidance. The trial court found that factor (b) favored plaintiff with respect to both children.

In making that finding, the trial court noted competing evidence. The children had been in defendant's primary care from November 2000 to October 2007, and a psychologist reported that the "children present significant emotional, mental health, behavioral and academic concerns." The trial court concluded that the children did not do well in the care and custody of defendant. The trial court also made specific findings regarding defendant's past physical abuse of the oldest daughter, defendant's alleged sexual abuse of the oldest daughter and the son, defendant's substance abuse and criminal proceedings, defendant's failure to identify problematic behavior of the younger daughter and the son, defendant's denial and minimization of his problematic behavior, and defendant's failure to take remedial action. The trial court additionally made specific findings regarding plaintiff's physical abuse of the children, her inappropriate conduct and judgment, her substance abuse, her ability to identify the problematic behavior of the younger daughter and the son, her acknowledgment of her problematic behavior, and her remedial actions. The trial court compared the capacities of both parties, and it concluded that plaintiff possessed greater capacity and disposition to provide the children with proper guidance MCL 722.23(b). Its conclusion was based on the facts. Moreover, the facts do not clearly preponderate in the opposite direction opposite from that found by the trial court. *Fletcher, supra* at 878. Thus, the trial court's findings were not against the great weight of the evidence with respect to factor (b).

With respect to factor (d), MCL 722.23(d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," the trial court found that the children did not live in a stable, satisfactory environment during the several years they resided with defendant. The trial court concluded that plaintiff was favored with respect to factor (d). Again, the record supports the trial court's decision.

The trial court compared both parties' home environments, noting that the psychologist's testimony and report indicated that all of the children have significant psychological, behavioral, and emotional problems. The trial court found that defendant behaved abusively towards the older daughter and plaintiff; that defendant undermined plaintiff's parental authority; that defendant had been prosecuted and convicted twice for marijuana offenses within the past two years; that his jail sentence left the youngest daughter and the son without parental care; that defendant would be on probation until January 2009, and he would be subject to intense monitoring during that period; and that defendant behaved in a sexually inappropriate manner with the older daughter and the son. Significantly, the trial court found that while defendant had physical custody, the son sexually assaulted another minor, and during the juvenile proceedings, plaintiff discovered pornography in defendant's residence, which was contrary to conditions of the son's safety plan. Ultimately, the trial court found that "major barriers to [defendant's] ability to provide a stable, satisfactory environment for the children are unrelated to his substance abuse and cannot be remedied without major changes in [his] attitudes, perceptions and behavior that [he] does not appear able or willing to undertake."

The trial court also expressed concerns about plaintiff's ability to provide a stable or satisfactory environment for the children. The trial court acknowledged plaintiff's lack of judgment, and the psychologist's recommendation of third-party placement for the children. Nevertheless, on the record the trial court found that plaintiff "demonstrated a willingness and ability to acknowledge and address her own problematic behaviors and those of the children." The trial court also noted that plaintiff accepted responsibility for her poor judgment, and that she was engaged in counseling services to address both her own and her children's issues. The trial court also found that plaintiff's mother and sister were actively involved in the children's lives and provided a necessary support system. The evidence supported finding these facts, and the great weight of the evidence did not preponderate in finding that this factor favored defendant.

With respect to factor (e), MCL 722.23(e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," the trial court concluded that factor (e) favored neither party. This factor focuses on the permanence of the proposed custodial home, not the comparable acceptability of one custodial home over the other. *Fletcher, supra* at 884-885. While the trial court's finding did not expressly determine whether the family unit will remain intact, the record is sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005). With plaintiff's maintaining physical custody, the parties' three children will be kept together. The record demonstrates some evidence of sibling rivalry; however, generally, it will be in the best interests of each child to keep siblings together. *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001). Further, defendant resides in a two-bedroom mobile home. He indicated that he was in the process of creating another bedroom so that the younger daughter and the son could have their own bedrooms; however, there is no indication that this has been completed. Plaintiff rented a three-bedroom apartment where the girls shared one bedroom, and the son and plaintiff had their own. We further note that because the existing situation is appropriately considered, defendant's argument regarding plaintiff's past is without merit. We conclude that the trial court's findings with respect to MCL 722.23(e) were not against the great weight of the evidence. The facts do not clearly preponderate in the direction opposite to that taken by the trial court. *Fletcher, supra* at 878.

With respect to factor (f), MCL 722.23(f), “[t]he moral fitness of the parties involved,” the trial court found that plaintiff was favored. The trial court acknowledged that both parties have a substance abuse history and have arrests for failure to pay child support. The trial court also noted defendant’s extensive criminal history and the fact that plaintiff has no criminal convictions. The trial court found plaintiff credible when she testified regarding defendant’s “extensive history of physical violence” against her. Further, plaintiff testified that defendant physically and emotionally abused the older daughter and that defendant is a racist. The trial court acknowledged the friend of the court report, which provided conflicting statements by the parties regarding involving third parties in their sexual encounters.

We conclude that the record supports the trial court’s findings and conclusion. On appeal, defendant attacks the trial court’s finding that plaintiff was credible. But this Court defers to the trial court’s determination of credibility. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). Defendant ultimately argues that the trial court found that plaintiff made several mistakes in judgment, which should have demonstrated plaintiff’s lack of morality. The inquiry under factor (f), however, “is not who is the morally superior adult but rather ‘the parties’ relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct.’” *Berger v Berger*, 277 Mich App 700, 713; 747 NW2d 336 (2008), quoting *Fletcher*, *supra* at 887. On appeal, defendant hurls a litany of allegations against the trial court’s findings; however, defendant fails to link plaintiff’s conduct and her fitness to provide for the child. More importantly, the record supports the trial court’s findings regarding both parties. Significantly, defendant left the younger daughter and the son without parental care when he was in jail for a drug charge. Clearly, leaving children, ages 12 and 11, without parental care potentially posed grave threats to their welfare. “In child custody cases, the overwhelmingly predominant factor is the welfare of the child.” *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993). Here, there is a clear link between defendant’s fitness to provide for the children and his moral disposition as demonstrated by his conduct. *Fletcher*, *supra* at 887. The facts do not clearly preponderate in the direction opposite to that taken by the trial court, and the trial court’s findings with respect to MCL 722.23(f) were not against the great weight of the evidence. *Id.* at 877-878.

With respect to factor (g), “[t]he mental and physical health of the parties involved,” the trial court made extensive findings regarding the mental health of each party, concluding that plaintiff was favored. The trial court ultimately concluded that defendant’s mental health issues greatly outweighed plaintiff’s, i.e, defendant previously attempted suicide; defendant was previously hospitalized for depression; defendant has anger management issues; defendant has a tendency to be preoccupied with his own needs at the expense of others; defendant has inadequate coping skills, and defendant’s parenting awareness skills were notably lower than plaintiff’s. The trial court also noted that plaintiff has engaged in individual and family therapy, while defendant has not yet done so. On appeal, defendant argues that the trial court should have reached the same conclusion that the friend of the court did regarding this factor. While the friend of the court slightly favored defendant, a trial court need not consider a friend of the court report in deciding a custody dispute. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). Here, the trial court’s “comparison of evaluations” provides an excellent balancing of the parties’ mental health issues. The trial court drew on a traditional equitable principle in family law cases by balancing the fitness of the competing parents. *Sinicropi v Mazurek (After Remand)*, 279 Mich App 455, 466; ___ NW2d ___ (2008). Once again, the facts do not clearly

preponderate in the direction opposite to that taken by the trial court, so we conclude that the trial court's findings with respect to MCL 722.23(g) were not against the great weight of the evidence.

With respect to factor (h), “[t]he home, school, and community record of the child[ren],” the trial court found that the home record favored neither parent; the school record favored defendant, and the community record favored plaintiff. The trial court, therefore, concluded that factor (h) favored neither party. With respect to the home record, the trial court found that the son responded to defendant's direction, but he was nonresponsive or defiant to plaintiff's, and that fact reflected poorly on both parents. The trial court also saw an intense sibling rivalry between the younger daughter and the son. Significantly, the trial court also noted that all of the children have serious psychological and emotional problems, and that the children were in defendant's custody for most of their lives. With respect to the school record, the trial court found that the younger daughter and the son performed better academically when they resided with defendant. Still, the trial court observed that the son's juvenile proceeding involved conduct on a school bus. Further, the trial court was uncertain if the children's academic decline was due to plaintiff's parenting or the chaotic circumstances of the children's abrupt move from their former school setting following defendant's incarceration and the pressures and demands of the son's juvenile proceeding. With respect to community, the trial court noted that the parties' daughters have had no involvement with law enforcement, while the son, in defendant's custody, engaged in sexual misconduct on a school bus with other boys. The facts do not clearly preponderate in finding this factor in favor of defendant. The trial court's findings with respect to factor (h) were not against the great weight of the evidence.

With respect to factor (j), MCL 722.23(j), “[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,” the trial court found that plaintiff was more amenable to foster a relationship between the children and defendant. The trial court also noted defendant's past attitude towards plaintiff, where he refused to permit her parenting time; he verbally abused her in the presence of the children, and undermined her attempts to discipline them. The record supports the trial court's findings and conclusion regarding this factor. On appeal, defendant claims that the trial court completely ignored the friend of the court record, which found that the parties were equally favored regarding factor (j), where the friend of the court noted that the parties “appear[ed] to get along well and to work together on behalf of their children” over the past several months. As noted previously, a trial court need not consider a friend of the court report in deciding a custody dispute. *Duperon, supra* at 79. And, there is no requirement that the trial court confine its analysis of this factor to a specific time period. Further, defendant may well be cooperating now because he no longer had physical custody of the children after his incarceration for the marijuana offense. The facts do not clearly preponderate in a direction other than that taken by the trial court. The trial court's findings with respect to factor (j) were not against the great weight of the evidence. *McCain, supra* at 125.

With respect to factor (l), MCL 722.23(l), “[a]ny other factor considered by the court to be relevant to a particular child custody dispute,” the trial court made an additional finding with respect to the son, concluding that this factor also favored plaintiff. The trial court acknowledged that neither home provided the son with proper structure, and there was high conflict in each home; however, it “consider[ed] in which home is there more likelihood that

proper structure can be imposed and conflict minimized, and in which home is [the son] more likely to receive the intervention and support necessary to correct the circumstances that led to his sexual misconduct.” After comparing the parties’ psychological strengths, weaknesses, and resources, the trial court concluded that plaintiff possessed more psychological resources than defendant to counter aspects of the son’s worrisome psychological tendencies, particularly in the context of his sexual misconduct. Once again, the record supports the trial court’s findings and conclusion regarding this factor. On appeal, defendant asserts that the trial court’s finding is contrary to the psychologist’s testimony that the son cannot live with plaintiff. The record demonstrates, however, that the son has severe behavioral and emotional issues, that plaintiff pursued individual and family counseling, and that her parental awareness was quantified higher in the test administered by the psychologist. The trial court’s conclusion does not clearly preponderate in the opposite direction. *Fletcher, supra* at 878. We conclude that the trial court’s findings with respect to factor (l) were not against the great weight of the evidence.

In sum, we conclude that the trial court’s findings with respect to factors (b), (d), (e), (f), (g), (h), (j), and (l) were not against the great weight of the evidence. The trial court did not commit a palpable abuse of discretion in awarding primary physical custody to plaintiff because the ruling was not “so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Berger, supra* at 705. In reaching our conclusion, we emphasize that the overwhelmingly predominant factor in deciding a custody dispute is the welfare of the child. *Harper, supra* at 417. On the record before us, we clearly see the difficult nature of the trial court’s task of placing the two younger children, and we cannot conclude that the trial court abused its discretion.

On appeal, defendant also alleges that he was denied due process when the trial court prevented him from cross-examining witnesses. This unpreserved allegation of error lacks merit. At the evidentiary hearings, the trial court directed defendant, who proceeded *in propria persona*, to pose his cross-examination questions of the psychologist and plaintiff first to the trial court, which would then convey those questions to the respective witnesses. Defendant acquiesced to this procedure. “A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (quotation omitted). Moreover, the record demonstrates that defendant was not deprived any opportunities to cross-examine the psychologist or plaintiff. The trial court exercised its broad discretion to control the mode and manner of defendant’s cross-examination of those witnesses. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 415; 516 NW2d 502 (1994), abrogated on different grounds *Ormsby v Capital Welding, Inc*, 471 Mich 45, 56 n 8; 684 NW2d 320 (2004). Defendant failed to establish outcome-determinative plain error. *In re Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

We affirm. As the prevailing party plaintiff may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey