

STATE OF MICHIGAN
COURT OF APPEALS

SHEILA MARIE GENDICH,

Plaintiff-Appellee,

v

TERENCE ARTHUR R. WHITEMAN,

Defendant-Appellant.

UNPUBLISHED

June 29, 2010

No. 293139

Clinton Circuit Court

LC No. 99-013367-DM

Before: DAVIS, P.J., AND DONOFRIO AND STEPHENS, JJ.

STEPHENS, J. (*concurring*)

While I concur with the holding of the majority I write separately to address the issue of whether the trial court impermissibly considered evidence of the dismissed criminal charges under factor (f). The majority correctly cites *Berger v Berger*, 277 Mich App 700, 712-713; 747 NW2d 336 (2008), in holding that a court may consider any questionable illegal or offensive behavior under section (f). Defendant's conviction was set aside. He made no admission of immoral or illegal conduct. There was no evidence presented in the custody dispute that he had engaged in the heinous behavior of which he had been accused. Thus there was no proof of illegal, immoral or offensive behavior. *Berger* drew its' essence regarding the scope of evidence appropriate under factor (f) from, *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994). In quoting *Fletcher*, *Berger* explained that "under factor f, the issue 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*, 277 Mich App at 713, quoting *Fletcher*, 447 Mich at 887.

At best, defendant admitted that his daughter was alienated from him, due in part to the absence associated with the criminal proceedings. A court-compelled absence does not equate to immoral or offensive behavior. Likewise, while the trial court was reasonably appalled that defendant testified that he did not remember the litany of criminal charges that kept him in jail for a year, that lack of candor or memory was not evidence that could be appropriately considered under factor (f).

Although the trial court erroneously considered the criminal charges when evaluating factor (f), defendant is not entitled to relief. Had the trial court not improperly applied factor (f) to the facts in this case, there was still more than sufficient competent evidence upon which to

make the custodial ruling made in this case. Consequently, I agree with the outcome reached by the majority.

/s/ Cynthia Diane Stephens