

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL JOSEPH TUTAK,

Plaintiff-Appellant,

v

SUSAN KAY TUTAK,

Defendant-Appellee.

UNPUBLISHED

April 18, 2013

No. 312557

Oceana Circuit Court

LC No. 06-005653-DM

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiff father appeals as of right the circuit court's order denying his motion for a change of custody for the parties' minor children. We affirm the circuit court's order.

The parties divorced several years ago, when their two children were approximately aged seven and five, respectively. The circuit court's custody order granted the parties joint legal custody of the children, with mother having primary physical custody. In 2009, the court entered a specific parenting time order with an attached calendar, because the parties had been unable to cooperate to arrange an acceptable parenting time schedule. Disputes concerning parenting time apparently continued, and in February 2010, father moved for a change of custody. In his motion, father acknowledged that the children had an established custodial environment with both parties. The circuit court held several hearings on father's motion and ultimately determined that father had failed to present clear and convincing evidence to support a change in custody.

On appeal, father argues that the circuit court made erroneous factual findings on the statutory best-interest factors of MCL 722.23.¹ This Court will not disrupt the circuit court's factual findings unless the record demonstrates that the findings were against the great weight of the evidence. MCL 722.28. We must affirm the denial of father's motion "unless the trial judge

¹ In raising this issue, father asks this Court to assess the mother's credibility. We defer to the circuit court's credibility assessments. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” *Id.*

The Child Custody Act, MCL 722.21 *et seq.*, “governs child custody disputes between parents, agencies or third parties.” *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). “[C]ustody disputes are to be resolved in the child’s best interests” and “[g]enerally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in [MCL 722.23].” *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Those factors are:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The 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.
- (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.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health 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 preference.
- (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 or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

Where, as here, “there is a joint established custodial environment, *neither parent’s custody* may be disrupted absent clear and convincing evidence.”² *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008), quoting *Sinicropi v Mazurek*, 273 Mich App 149, 178; 729 NW2d 256 (2006). To be clear and convincing, the evidence must produce in the trier of fact a clear conviction as to the truth of the precise facts at issue. See *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009).

In regard to best-interest factor (a), the circuit court found that the factor was neutral because both parties demonstrated love and affection for the children and both parties engaged the children in family activities. On appeal, father argues that mother’s efforts to alienate the children from him should have caused the circuit court to find in his favor on this factor. The circuit court found that mother did not engage in parental alienation; the record indicates that this finding was not against the great weight of the evidence. MCL 722.28. Accordingly, the circuit court’s finding on best-interest factor (a) does not require reversal.

In regard to best-interest factor (b), the circuit court found that the factor was equal because both parents showed love and affection, were involved in the education of the children, and provided guidance in the children’s religious training. Father argues that because of mother’s parental alienation, she lacked the ability to love and provide guidance to the children, that a psychologist found mother to be narcissistic, and that the facts show that father spent more time and effort raising the children in the Catholic faith. As discussed *supra*, the circuit court did not err in finding that mother did not engage in parental alienation. And, while a psychologist found that mother had a narcissistic personality *trait*, there was no indication that trait prevented mother from loving or caring for the children. Moreover, the record shows that both parents provided religious guidance for the children. The circuit court’s finding that best-interest factor (b) was neutral was not against the great weight of the evidence. MCL 722.28.

Regarding best-interest factor (c), the circuit court found that both parents had the capacity and disposition to provide the children with food, clothing, and material needs. Father argues that the circuit court mischaracterized his employment status and further argues that he has a greater capacity and disposition to provide for the children. However, the record indicates that the circuit court correctly summarized both father and mother’s employment statuses, and father offers no factual or legal argument in support of his assertion that he had a greater capacity and disposition to provide for the children. On this record, there is no indication that the circuit court’s finding that factor (c) was neutral was against the great weight of the evidence. MCL 722.28.

Turning to best-interest factor (d), the circuit court found that each parent had a stable and satisfactory environment, and that both parents appeared to be able to continue those

² Father argues on appeal that the circuit court erred in finding an established custodial environment with both father and mother. However, father specifically stated in his motion that “both parties have an established custodial environment.” Accordingly, father has waived the custodial environment issue. See *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492, 495 n 2; 665 NW2d 484 (2003).

environments into the future. Father argues that mother's environment was unstable because she was living with and working for her boyfriend, that mother exercised poor judgment by leaving the children home alone while in her care, and that mother's home was not a safe environment because accidents occurred while the children were in her care. However, the record contradicts father's arguments. Mother's testimony, combined with that of other witnesses, provided sufficient evidence to support the circuit court's finding on factor (d). MCL 722.28.

Regarding best-interest factor (e), the circuit court found that both children had adapted quite well to both parents' home environments. Father argues that mother's relationship with her boyfriend lacked permanence and stability. However, father offers no explanation of how the mother's relationship affected the permanence of the family unit. Thus, there is no indication that the circuit court's finding that factor (e) was neutral was against the great weight of the evidence. MCL 722.28.

In regard to best-interest factor (f), the circuit court found that, as parents, neither parent was morally superior to the other. Father argues that the circuit court erred in finding that factor (f) was neutral because there was evidence that mother and her boyfriend were connected to illegal substances. The circuit court did not discuss this evidence in deciding factor (f). However, in *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994), the Michigan Supreme Court explained that:

[f]actor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult;" the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*. [*Id.* at 886-887.]

The record does not demonstrate that any connection mother and her boyfriend had to illegal substances had a significant influence on how mother would function as a parent. The circuit court correctly disregarded those circumstances in discussing factor (f). *Id.* The circuit court's finding that factor (f) was neutral was not against the great weight of the evidence. MCL 722.28.

Regarding best-interest factor (g), the circuit court found that neither party had a mental or physical condition that would have a negative impact on the children. Father argues that the circuit court erred based on mother's parental alienation and her blindness to the children's anxiety. Again, the circuit court did not err in concluding that mother did not practice parental alienation, and any "blindness" on mother's part to the children's anxiety had no necessary connection to mother's mental health. Father also notes that mother had suffered a closed head injury in her early 20's. However, there is nothing in the record to indicate that the injury continued to affect mother's physical or mental health. The circuit court's finding that factor (g) was neutral was not against the great weight of the evidence. MCL 722.28.

In regard to best-interest factor (j), the circuit court essentially found that both parents were in conflict with each other. This finding was supported by the record. And, while father argues that this factor was not equal because mother practiced parental alienation, the circuit court did not err in concluding that mother did not practice parental alienation. The circuit court's finding that factor (j) was neutral was not against the great weight of the evidence. MCL 722.28.

Father admits that best-interest factors (h), (i), (k), and (l) were all equal.

Based on the discussion above, we find no error warranting reversal in the circuit court's findings. Given the existence of an established custodial environment, the circuit court could not disrupt the environment absent clear and convincing evidence on at least some of the best-interest factors. *Powery*, 278 Mich App at 529. On the record before the circuit court, father failed to show by clear and convincing evidence that changing the children's established custodial environment was in their best interests. *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). Thus, the circuit court did not abuse its discretion in denying father's motion for a change of custody. MCL 722.28.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro