STATE OF MICHIGAN

COURT OF APPEALS

JAMES E. BEAM,

Plaintiff-Appellant,

v

MARIA D. BEAM,

Defendant-Appellee.

UNPUBLISHED
October 13, 1998

No. 208466
Macomb Circuit Court
LC No. 94-000251 DM

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying his motion for change of custody of his two minor children. We affirm.

Plaintiff and defendant were divorced in July 1994. Under the judgment of divorce, the parties share legal custody of their two minor children, and defendant has physical custody of the children. On January 16, 1996, plaintiff filed a petition in the Macomb Circuit Court requesting a change in the physical custody of the two minor children from defendant to plaintiff.

In resolving custody disputes, the trial court must consider the child's best interests, as measured by the factors articulated in MCL 722.23; MSA 25.312(3). *Bowers v Bowers*, 198 Mich App 320, 327-328; 497 NW2d 602 (1993). Where there exists an established custodial environment, a court may not change custody unless presented with clear and convincing evidence that the best interests of the child would be served by such a change. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Bowers, supra* at 324. In this case, the parties stipulated that there existed an established custodial environment.

After reviewing testimony from a three-day evidentiary hearing and conducting two in-camera interviews with the minor children, the trial court considered the best interest factors provided in the Child Custody Act, MCL 722.23; MSA 25.312(3). The court found that the parties were equal in respect to factors (a), (d), (e), (g), and (j), that plaintiff was superior in respect to factors (b), (c), and (h), and that defendant was superior with respect to factors (f) and (k). Based on these findings, the trial court concluded that plaintiff had not shown by clear and convincing evidence that it would be in the

best interests of the minor children to change physical custody. On appeal, plaintiff specifically challenges the court's findings with respect to factors (f), (k), and (e).

When reviewing child custody cases, this Court reviews findings of fact under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). The trial court's findings will be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* The trial court's custody decision, which is a discretionary dispositional ruling, is reviewed under a "palpable abuse of discretion" standard. MCL 722.28; MSA 25.312(8); *Fletcher, supra* at 879-880. Finally, questions of law in custody decisions are reviewed for clear legal error. MCL 722.28; MSA 25.312(8). A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher, supra* at 881.

Plaintiff first argues on appeal that the trial court erred in finding in favor of defendant on factor (f). Factor (f) requires the court to consider "[t]he moral fitness of the parties involved." MCL 722.23(f); MSA 25.312(3)(f). Morally questionable conduct is relevant to factor (f) determinations if it is the type of conduct that has a significant influence on how one functions as a parent. *Fletcher, supra* at 886-889. The trial court found that factor (f) weighed in favor of defendant because plaintiff was convicted of carrying a concealed weapon and received a sentence of two years' probation. Plaintiff's conviction arose from an incident at the home where defendant and the minor children were staying. Plaintiff arrived armed and seeking entrance to the home. When defendant would not let him in, he knocked on doors and windows, including the window to the room where his children were sleeping. Defendant called the police. Plaintiff was arrested, charged, and eventually pleaded guilty.

Plaintiff argues that the trial court ascribed disproportionate weight to his conviction, given that it was an isolated incident and the children knew nothing about the conviction or the subsequent period of probation, and given the fact that plaintiff takes his children to church regularly and provides moral guidance in other respects. However, while the children knew nothing of the conviction or probationary period, they were present in the home the night of the incident and there was testimony that they knew of defendant's conduct and were adversely affected by it. Therefore, we find that the evidence does not clearly preponderate against the trial court's finding that this factor weighs in favor of defendant.

Next, plaintiff argues that the court erred in finding in favor of defendant on factor (k). Under factor (k) the court considers incidents of "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k); MSA 25.312(3)(k). The trial court found that the circumstances that gave rise to the charge against plaintiff of carrying a concealed weapon constituted an incident of domestic violence. Plaintiff argues that because he was not charged with domestic assault pursuant to MCL 750.81(2); MSA 28.276(2), his behavior on the evening in question cannot be characterized as domestic violence. However, there is no language in factor (k) that suggests that to qualify as an incident of domestic violence, the behavior being considered must be proscribed by a particular statutory provision. Given that

the Legislature is presumed to have intended the meaning it plainly expressed, *Institute of Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996), and given the testimony concerning plaintiff's behavior on the night in question, we find that the court did not err in finding in favor of defendant on factor (k).

Plaintiff's third argument on appeal is that the trial court erred in finding the parties equal in regard to factor (e). Factor (e) addresses "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e); MSA 25.312(3)(e). Under factor (e), acceptability of the home is not pertinent. Rather, it is the permanence of the custodial unit that should be considered. *Fletcher, supra* at 884-885. See also *Ireland v Smith*, 451 Mich 457, 463-464; 547 NW2d 686 (1996). Plaintiff, who has remarried since the divorce, asserts that there is no comparison between a two-parent home with a swimming pool where each child has his or her own room, and a two-bedroom apartment where the children must share a room. However, plaintiff offered no evidence that the family unit offered by defendant was any less permanent than that offered by plaintiff. Therefore, we find that the trial court's determination that the parties were equal with regard to factor (e) was not against the great weight of the evidence.

Finally, plaintiff argues on appeal that the trial court's improper consideration of information included in a supplemental brief submitted by defendant, well after the stipulated deadline for such submissions, requires reversal. Because we find no evidence that the court considered information in that supplemental brief when making its custody decision, we find plaintiff's argument to be without merit.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff