STATE OF MICHIGAN

COURT OF APPEALS

OLGA ORTIZ BUTTON, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED July 27, 2006
v	No. 268930 Allegan Circuit Court
RANDALL RUSSELL BUTTON, Defendant-Appellant/Cross-Appellee.	LC No. 91-013859-DM

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

I. Introduction

Defendant appeals as of right, and plaintiff cross-appeals, from a circuit court order changing custody of the parties' two minor children, Jordan (age 17) and Elijah (age 15), by awarding physical and joint legal custody of the children to plaintiff, but staying the change of custody until the conclusion of the appellate process.[1] The trial court characterized this longstanding custody dispute as a very troubling case, a characterization with which we fully agree. Indeed, this is the third time since 1995 that this case has reached this Court on custody issues, and there has been one other voluntary change in at least one child's custodial situation. Most recently, through a February 1, 2006, order, the trial court found clear and convincing evidence to change custody of Jordan and Elijah from defendant to plaintiff, concluding that the children's best interests under the child custody factors, MCL 722.23(a) – (l), supported a change in custody. Central to this appeal, however, was the trial court's conclusion that plaintiff had done everything she could since 1995 to interfere with defendant's relationship with the children, and to improperly manipulate the children's preferences, with all of this leading to certain child custody factors being in her favor. Yet despite recognizing this interference, the trial court acknowledged it was uncertain whether it could take this interference into consideration while evaluating the child custody factors. We conclude that the trial court erred in failing to give

[1] An older child, Joshua, had attained the age of majority and, therefore, was not subject to the custody order.

weight to the effect of plaintiff's misconduct on its consideration of the child custody factors and, therefore, remand for further proceedings.

II. Facts and Proceedings

Plaintiff and defendant were divorced in 1993. The parties originally agreed that plaintiff would receive physical custody of the children, and that the parties would share legal custody. The divorce judgment provided "that the children shall have the right to the natural affection and love of both parents, and neither party shall do anything to estrange, discredit, diminish or cause disrespect for the natural affections of the children for the other party." In February 1996, the trial court granted defendant's motion for a change of custody, awarding him both physical and legal custody after determining that plaintiff repeatedly denied defendant scheduled parenting time and manufactured allegations that defendant sexually abused the children. In a prior appeal, this Court affirmed the trial court's order changing custody to defendant. *Button v Button*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 1998 (Docket No. 194175) (*Button I*).

Also, in April 2000, the parties stipulated to an order changing custody of the oldest child, Joshua, from defendant to plaintiff. Joshua failed high school while in plaintiff's custody. Joshua turned 18 in February 2004.

In February 2004, plaintiff filed a motion requesting a change in custody of the two younger children, Jordan and Elijah. The trial court originally dismissed the motion without conducting an evidentiary hearing, concluding that plaintiff failed to show by clear and convincing evidence proper cause or a change in circumstances warranting a change in custody. In a subsequent appeal, this Court reversed the trial court's order because the court improperly applied a clear and convincing evidence standard, rather than a preponderance of the evidence standard, in determining whether plaintiff made a proper showing of proper cause or a change in circumstances to warrant consideration of her request for a change in custody. *Button v Button*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 255282) (*Button II*).

Following this Court's decision in *Button II*, plaintiff renewed her request for a change in custody in December 2004, alleging that Jordan had psychological problems that were being aggravated by his living with defendant, and that he had expressed in a web log (blog) suicidal ideology and problems with defendant's fiancé, Linda.

After conducting an evidentiary hearing in August 2005, the trial court characterized this case as the "most troubling" case on its docket, and noted its prior determination that plaintiff had previously harmed her children by pursuing unfounded abuse allegations against defendant in an effort to destroy his relationship with the children. The trial court expressed regret that it had not "cut off all contact" by plaintiff and her children when it awarded defendant custody in 1996. The court found that plaintiff directly or "by insinuation, continued the destructive philosophy that she instilled in these children at the very beginning." The court stated that it had interviewed the children and they had expressed a preference to live with plaintiff, but found it interesting that the children gave "the same reasons they gave me 10 years ago." Jordan still talked about hiding from defendant when he was four or five years old. The trial court recalled that plaintiff used to hide the children from defendant believing that "he was going to do some

dastardly deed to them," and that plaintiff had taught the children that defendant was a bad person who they could not trust. The trial court considered each of the statutory best interest factors and found that the parties were neutral on most of them, but determined that four of the factors favored plaintiff and two favored defendant. The court concluded that there was clear and convincing evidence that it was in the children's best interests to change custody to plaintiff, principally because of their ages, their desire to live with plaintiff, and their difficulty adjusting to defendant's home. However, the court stated that it was plaintiff's inappropriate and manipulative conduct that enabled her to prevail in the consideration of these latter factors. Nonetheless, because the best interest factors favored plaintiff, the court believed it was compelled to award plaintiff custody of the children, even though it was her misconduct that enabled her to prevail in the consideration of some of the best interest factors. As noted, however, the trial court stayed enforcement of its change-of-custody decision pending completion of the appellate process.

III. Standard of Review

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003), aff'd on other grds, 470 Mich 186 (2004). "[A] reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (citation omitted). "If the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Harper v Harper*, 199 Mich App 409, 410-411; 502 NW2d 731 (1993).

IV. Analysis

We first consider whether an established custodial environment existed with defendant. Plaintiff claims that no such environment existed with the children. A trial court may not modify a custody order to change an established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). "Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests." *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

The trial court did not directly decide this question, but the parties agree that it implicitly determined that an established custodial environment existed with defendant because the court applied a clear and convincing evidence standard to determine whether custody should be changed to plaintiff.

An established custodial environment exists if, over an appropriate amount of time, "the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). See, also, *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981) "[C]ommunity contacts and familiar associations" may be a part of an established custodial environment. *Id.* at 580-581.

In this case, there was much emphasis on Jordan's estrangement from defendant, but the trial court found that this was principally caused by plaintiff's inappropriate conduct. There is

ample evidence in the record that the children looked to defendant for guidance, discipline, the necessities of life, and that he had provided a stable home environment since 1995. Both parties had moved since the divorce, and defendant had been married and divorced in the interim, but the children had friends and participated in school activities. Defendant attended most of the children's concerts and sporting events, helped them with their homework, and was involved in their school as a band booster. Elijah was an honor student. Although Jordan was doing poorly in school, there was evidence that his school troubles did not escalate until the latest custody battle. Defendant made the effort to find a program that was designed to help Jordan succeed, and he communicated with the children's counselors and teachers. Defendant went on family vacations with his children and they participated in many activities together. Although there were problems with Jordan's relationship with defendant, and it was undisputed that plaintiff had a close bond with her sons, the trial court did not find anything wrong with the home environment that defendant provided. It was clear that the parties had profoundly different styles of parenting, but there was evidence that defendant provided care, discipline, love, guidance, and attention appropriate to the children's ages and needs that mark an established custodial relationship. The evidence supports the trial court's implicit determination that an established custodial environment existed with defendant.

Because there was an established custodial environment with defendant, the trial court could change custody only if clear and convincing evidence established that a change was in the children's best interests. MCL 722.27(1)(c).[2] The burden of establishing clear and convincing evidence that a change of custody was in the children's best interests was on plaintiff, as the party moving for a change of custody. *Treutle v Treutle*, 197 Mich App 690, 692; 495 NW2d 836 (1992).

Here, the trial court considered each of the following statutory best interest factors:

> (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.

[2] Neither party raises an issue as to the existence of proper cause or a change of circumstances.

(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.]

Initially, we consider the effect of plaintiff's misconduct on her ability to prevail in a consideration of the statutory best interest factors, MCL 722.23(a) – (l). We agree with the trial court that the child custody factors may not be abrogated, "even in fairness to the parties." *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996). "In child custody cases, the overwhelmingly predominant factor is the welfare of the child." *Harper*, *supra* at 417. The best interests of the child results from a full evaluation of all of the child custody factors. MCL 722.23(a) – (l). It is well settled in Michigan that some types of parental wrongdoing, such as infidelity, are not relevant to a custody decision when the wrongdoing is not probative of how the parent would interact with or raise a child. *Fletcher*, *supra* at 887-888. It follows, therefore, that any misconduct by plaintiff did not, as a matter of law, preclude her from gaining an advantage under the child custody factors, but her misconduct could be considered to the extent it compromised her ability to properly parent and raise her children. Thus, the trial court was required to consider any evidence in its analysis of the child custody factors, including either party's misconduct, if that misconduct had "an identifiable adverse effect on a particular person's ability or disposition to raise a child." *Id.* at 887.

It is evident from the record that the trial court was having difficulty weighing the custody factors given its belief as to plaintiff's misconduct. Indeed, the trial court expressly stated that it had "a real problem balancing the equitable function of this Court, because I believe that the advantage exists in Olga Button because of her misconduct." Thus, although it recognized that certain of its findings resulted only because of plaintiff's misconduct, it quite naturally struggled with whether it could be considered given the law noted above. See *Soumis*, *supra*.

Turning to the specific findings made under the factors, the trial court found that factors (b), (c), (e), (g), and (k) favored neither party, but that defendant was favored under factors (f)

and (j), and plaintiff was favored under factors (a), (d), (i), and (l).[3] However, the trial court also made it clear that it believed that plaintiff had gained an advantage with respect to factors (a), (b), (d), and (i) because of her continued efforts to destroy and undermine the children's relationship with defendant. Although it appears from the trial court's findings that it believed that plaintiff's misconduct had "an identifiable adverse effect on [her] ability or disposition to raise" the children, *Fletcher, supra* at 887, as noted it is also apparent that the trial court did not believe it was permitted to consider her misconduct in this context when evaluating the best interest factors. "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Id.* at 881. Because we cannot tell from the record whether the trial court believed that it could properly consider the effect of either party's fault where it was relevant to their ability or disposition to parent and raise the children, we remand to the trial court for reevaluation of its custody award with respect to these factors.

Regarding factor (c), "[t]he 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," the trial court did not clearly err in determining that this factor did not favor either party.

In its analysis of factor (e), the "permanence, as a family unit, of the existing or proposed custodial home or homes," the trial court stated that it had not "heard anything that would indicate that one party or the other would have anything better or more stable one way or the other based on the evidence presented." "This factor exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other." *Fletcher v Fletcher*, 200 Mich App 505, 517; 504 NW2d 684 (1993), aff'd in part *Fletcher, supra*. Both parents are clearly committed to their children, both children—despite the unfortunate conflicts—love their parents, and there is no reason to believe that those relationships will not remain intact. The trial court's finding that the parties were equal under this factor is supported by the evidence.

Factor (f) relates to "[t]he moral fitness of the parties involved." 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.* [*Fletcher, supra* at 886-887 (emphasis in original).]

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[3] With respect to factor (l) (any other relevant factor), the trial court found that the children's ages (Jordan was 17 years old and Elijah was approaching 16 years of age), coupled with their desire to live with plaintiff, required that this factor be weighed in plaintiff's favor.

The trial court found that this factor favored defendant because of plaintiff's continued, inappropriate conduct in not allowing the children to have a natural, loving, and close relationship with defendant, which the court found plaintiff had "done everything she can to destroy." There was evidence that plaintiff continued to talk to the children about where they wanted to live and encouraged them to pray for a change of custody, that she made decisions about psychological and medical matters without consulting defendant even though she did not have legal custody, that she circumvented a court ruling about telephone usage by purchasing cell phones for the boys, and that she had abused the terms of her parenting time. Each of these considerations was probative of how plaintiff would interact with or raise the children and, therefore, were appropriately considered by the trial court. *Fletcher, supra* at 887-888. The trial court did not clearly err in finding that factor (f) favored defendant.

Factor (g) involves "[t]he mental and physical health of the parties involved." The trial court found that both parties were equal under this factor because Dr. Steven Townsend, who evaluated both parents and the children, concluded that no psychological diagnosis was warranted with respect to either parent. It is apparent from the trial court's other findings that it was aware of the psychological aspects of the case, so it was not a legal error for the court to give an apparently "one-sided" account of the evidence. *Fletcher, supra* at 883-884. There was scant evidence concerning the "health" of the parties, either physical or mental. Because Dr. Townsend's report provides plausible evidentiary support for the trial court's findings regarding this factor, we do not disturb it on appeal. *Harper, supra* at 410-411.

Regarding factor (h), the trial court evaluated the "home, school, and community record" of the children. The court found the parties neutral on this factor, explaining:

> [T]he children have not done very well with [defendant] over these last 10 years. I think that's because of their attitude with him. They haven't done well in school. I guess I don't know that they would do any better with [plaintiff] based on what she's done with the oldest boy, so I guess I don't feel that there's a superiority there when I evaluate what both of these parties have done with their children.

In fact, the evidence presented at the hearing showed that Elijah was doing well in school, that Jordan's grades did not begin to fall until plaintiff renewed the custody battle by petitioning for a change of custody, but were improving in defendant's home, and that Joshua failed high school after he moved to plaintiff's home, although he later earned a GED. There was also evidence that the children were involved in both family and school activities within their community. We conclude that the trial court's finding that both children had not done well in school while in defendant's custody is against the great weight of the evidence.

Regarding factor (j), the trial court evaluated "[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 court stated:

> [T]here's been a lot of animosity here throughout the years. I guess I disagree to some extent with Dr. Townsend.[4] I don't think he knew the history of the case. I think Mr. Button is more willing to facilitate a close relationship than Mrs. Button, but certainly I don't think that he is without some negatives in that respect. I understand why, but they exist. It's a fact. I think he's slightly better than she is.

There was evidence that neither party was inclined to ask the input of the other before making decisions that concerned the children, that there were still issues concerning parenting time, and that both parties had been unable to resolve their animosity. However, defendant had legal custody and plaintiff did not, and her independent actions to make decisions without consulting defendant was more culpable than defendant's decisions not to consult plaintiff. Because the trial court's view of the evidence is plausible, we may not reverse the trial court's determination that factor (j) favored defendant. *Harper, supra* at 410-411.

Regarding factor (k), "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child," the trial court found, and we agree, that there was no evidence of domestic violence. The trial court did not clearly err in determining that this factor did not favor either party.

Regarding factor (l), the trial court had the discretion to consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." The trial court considered the ages of the children, and found that this factor favored plaintiff. Jordan was nearly 17 years old, and Elijah was approaching the age of 16. The court explained:

> I think you have to take that into consideration. These are not intellectually below par children or wanting in intelligence. . . . As I said, the older boy, you know, about another year and a half can go where he wants to. I think you couple that with what their desire is and with what the – what exists in respect to the emotional ties between them and their mother, and the fact that they have had difficulty adjusting to the environment they're in now.

It appears from the trial court's findings that it was simply reiterating the preference of the children, reasonable or not. There can be some overlap between the factors, and some evidence may be related to several factors. *Ireland v Smith*, 451 Mich 457, 465-466; 547 NW2d 686 (1996). The trial court did not clearly err under this factor.

In sum, we affirm the trial court's findings with respect to factors (c), (e), (f), (g), and (j), reverse the trial court's finding with respect to factor (h) as being against the great weight of the evidence, and remand for the trial court to reevaluate its findings concerning factors (a), (b), (d), (i), and (l) in accordance with this opinion. *Fletcher, supra* at 889 (Brickley, J.), 900 (Griffin,

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[4] Dr. Townsend recognized that Jordan felt a great deal of conflict, and Elijah felt some conflict, about their relationships with defendant, and that both boys loved and were comfortable with plaintiff. On this basis, Dr. Townsend recommended that plaintiff be awarded custody.

J.). On remand, the trial court should consider all the statutory factors in its determination of the children's best interests and, within its discretion, may consider plaintiff's alleged misconduct as it relates to the custody factors and her ability to be a proper parent. Additionally, the trial court may conduct further hearings or receive additional evidence as necessary to allow it to make an accurate decision concerning a custody arrangement that is in the children's best interests. *Ireland, supra* at 468-469.

As a final matter, we find no abuse of discretion in the trial court's decision to stay its order changing custody pending completion of the appellate process in order to maintain as much continuity as possible for the children until proceedings are resolved.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray