STATE OF MICHIGAN

COURT OF APPEALS

CANDACE M. VITO,

Plaintiff/Counter Defendant-Appellant,

v

MARK A. BELL,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
July 25, 2006

No. 267468
Iosco Circuit Court
LC No. 05-001651-DP

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order awarding the parties joint physical custody of their son Mark M. Bell (Mark). Because the trial court properly found that the evidence was clear and convincing that Mark's best interests would be served by awarding the parties joint custody, and because the trial court's findings regarding the best interest factors were not against the great weight of the evidence, we affirm.

Mark was the result of a brief relationship between the parties. Defendant did not provide plaintiff with any emotional or financial support during her pregnancy. When Mark was approximately two months old, plaintiff instituted a paternity action against defendant. Defendant filed a counterclaim for custody dependant on being determined Mark's father. Genetic testing indicated that defendant was Mark's father. After the first pre-trial hearing in this matter, when Mark was aged between five and six months, defendant began to have parenting time with him. Parenting time slowly increased over the months leading up to the trial in this matter. Following trial, the court found that there was no established custodial environment, and that Mark's best interests would be served by awarding the parties joint custody.

On appeal, plaintiff first challenges the trial court's finding that Mark did not have an established custodial environment in her home. 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. MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 282-283; 668 NW2d 187 (2003).

The Child Custody Act of 1970 regulates child custody disputes. Under the act, the trial court is to award custody based on the best interests of the child. MCL 722.25. The act sets out specific factors that a court must consider and explicitly state its findings in determining a child's best interests. MCL 722.23; *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). However, a trial court must determine whether an established custodial environment exists before addressing the question of the best interests of the child. MCL 722.27(1)(c); *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). If an established custodial environment exists, then the party bearing the burden of proof must establish by clear and convincing evidence that a custody change is in the best interests of the child. MCL 722.27(1)(c); *Foskett*, *supra* at 6.

The Act states that an established custodial environment exists:

> if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment is "an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

At the time of trial in this case, Mark was just under one year old. He had spent every night of his life in plaintiff's care. Plaintiff testified that she provided Mark with the necessities of life in a structured but loving home, and that Mark had bonded with her and her other children. It appears that this relationship was "marked by qualities of security, stability and permanence." *Baker*, *supra* at 579-580. While there was an ongoing custody dispute that resulted in defendant spending increasing time with Mark, we do not believe that this destroyed the custodial environment that existed with plaintiff. In this case there were no repeated custodial changes or geographic moves that created uncertainty about the continuing nature of the custodial environment in plaintiff's home. Contrast *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993) (holding that "repeated changes in physical custody and uncertainty created by an upcoming custody trial" destroyed a prior established custodial environment and precluded the creation of a new one).

In reaching its decision, the trial court noted that Mark was less than a year old, and that defendant had started bonding with Mark when he was aged five months and had come to look to both parents for comfort when with strangers. However, the fact that Mark also looked to defendant for parental comfort, does not necessarily indicate that he did not have an established custodial environment with plaintiff, as exemplified by the fact that an established custodial environment can exist with more than one parent. See *Foskett*, *supra* at 8. The trial court further noted that because plaintiff had changed attorneys on several occasions that the court was delayed in reaching a custody decision, suggesting that this fact resulted in Mark remaining in plaintiff's primary care for longer than might have otherwise been the case. However, the manner in which the custodial environment came into existence is irrelevant to the determination

of whether an established custodial environment exists. *Heltzel v Heltzel*, 248 Mich App 1, 33 n 22; 638 NW2d 123 (2001). "Rather, the focus is on the circumstances surrounding the care of the children in the time preceding trial[.]" *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). The trial court erred in finding that Mark did not have an established custodial environment with plaintiff because the evidence clearly preponderates in the opposite direction. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

However, the trial court made clear that although it concluded that Mark did not have an established custodial environment with plaintiff, it nevertheless concluded that clear and convincing evidence was presented that Mark's best interests would be served by joint physical custody. Accordingly, any error that resulted from the trial court's finding that no established custodial environment existed with plaintiff was harmless because the trial court utilized the correct evidentiary standard in evaluating Mark's best interests. Therefore, remand is not required on this basis. *Fletcher v Fletcher*, 447 Mich 871, 882, 889; 526 NW2d 889 (1994); *Harvey, supra* at 292.

Plaintiff further contends that the trial court's findings on several of the best interest factors were against the great weight of the evidence. Plaintiff specifically asserts that the trial court should have found that factor (a) ("[t]he love, affection, and other emotional ties existing between the parties involved and the child"), MCL 722.23(a), favored her. Plaintiff relies on the fact that defendant had no contact with Mark until Mark was aged almost six months, and also claims that the testimony showed that Mark cried when he was taken to defendant's home and that defendant admitted that plaintiff had stronger ties to Mark.

Contrary to plaintiff's characterization of the evidence, plaintiff's friend testified that Mark only cried the first time she drove him to see defendant, but that he did not cry after that occasion. Defendant similarly testified that Mark initially cried when he would pick him up from plaintiff's home, but that the situation had improved. Defendant's ex-wife also testified that Mark had become more comfortable with defendant over time. Defendant testified that when he first began visiting Mark, Mark's bond with plaintiff was stronger than his own bond with his son. But defendant testified that his bond with Mark had grown stronger and stronger over time and that he wanted to be a part of Mark's life and to help him grow up. The record displays that after tests showed defendant was Mark's father, defendant sought custody and the trial court granted regular visitations. While defendant may not have been a part of Mark's life for the first five to six months after his birth, we conclude that the trial court's finding that at the time of trial the parties were equal regarding the "love, affection, and other emotional ties existing between" them and Mark was not against the great weight of the evidence.

Plaintiff next asserts that the trial court erred by concluding that the parties were equal with regard to best interest factor (b) ("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"), MCL 722.23(b). Plaintiff asserts that defendant failed to take full advantage of his visitation rights. Particularly, plaintiff testified that when Mark was sick, plaintiff would leave him with her, and that defendant stopped visiting Mark at her house for a period of approximately three weeks because of a rumor that plaintiff was pregnant again. But defendant continued to visit with Mark at his own home during this period of strained relations with plaintiff and eventually continued his visits with Mark at plaintiff's home. This evidence actually reflects more on the parties' communication difficulties than on defendant's

disposition to give Mark love and affection. The trial court's conclusion regarding this factor is further supported by defendant's clearly stated desire to help Mark grow-up, and by defendant's stated interest in raising Mark as a Catholic and sending Mark to Catholic elementary school, a possibility that he had discussed with plaintiff. The trial court's decision that the parties were equal with regard to factor (b) was not against the great weight of the evidence.

Plaintiff also asserts that the trial court erred in evaluating best interest factor (c) ("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"), MCL 722.23(c), because plaintiff should have been favored under this factor. Plaintiff claims that defendant failed to provide her with support until he was determined to be Mark's father, that after defendant began visiting Mark plaintiff still bought the formula and diapers, that defendant allegedly told plaintiff that he would not seek custody if she did not seek child support from him, and that plaintiff had to buy a proper car seat for defendant to use.

The record evidence does not support plaintiff's characterization of the evidence. Specifically, plaintiff testified only that "[w]hen we started, I supplied the formula." However, she admitted that defendant had taken over purchasing the formula several months before the trial started. Second, plaintiff testified only that when Mark had outgrown a diaper size, she provided a new diaper size to defendant, telling him that the ones he had been using were no longer large enough. This may indicate some level of inattention to detail on defendant's part, but we do not believe that it reflects so poorly on his disposition for providing for Mark's material and other needs that the trial court's finding on this factor could be considered against the great weight of the evidence.

Similarly, plaintiff testified that the car seat defendant was initially using "wasn't an infant car seat and so we had some discussions over that and I believe the price was possibly an issue so I ended up just purchasing one." It is not clear from plaintiff's testimony whether defendant raised concerns about the cost of purchasing an infant car seat, or whether it was only plaintiff's belief that defendant's hesitancy to obtain another car seat was due to cost. In any event, the weight of this evidence does not preponderate against the trial court's conclusion that the parties were generally equal in regard to factor (c) in light of the evidence presented at trial that defendant had the disposition and capacity to provide for Mark's needs. Notably, defendant provided medical insurance for Mark, provided him with a crib in his room and a separate bedroom, and provided lunch for Mark when Mark was at his home during the day and gave him a bottle before he took a nap. And defendant testified that he could provide for Mark's medical and physical needs. The fact that defendant did not provide plaintiff with this support until genetic tests indicated that he was the father does not, under the circumstances, clearly reflect poorly on defendant's disposition to provide for Mark's material and other needs, where as soon as he was determined to be the father, he sought custody and began providing support as required by the court including back due benefits. We conclude the trial court's decision with regard to factor (c) was not against the great weight of the evidence.

Plaintiff also asserts that the trial court erred in evaluating factor (d) ("length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity"), MCL 722.23(d). Regarding this factor, the trial court stated that the fact plaintiff's other children would spend summers with plaintiff's ex-husband negated any pluses that plaintiff

might otherwise have been entitled to because she had provided the sole care for Mark during the first five months of his life. Plaintiff contends the court's analysis ignores the fact that defendant did not provide any "meaningful" parenting. Certainly, the fact that plaintiff's other children would not be present in her home during the summers impacted, at least to some extent, the stability of plaintiff's home environment. Moreover, evidence was presented that defendant was providing for Mark's needs and had bonded with him to the extent that when they were with other people, Mark would turn to defendant for comfort. Certainly, at this stage of Mark's life, this constitutes meaningful parenting that it would be desirable to continue. The trial court's decision with regard to factor (d) was not against the great weight of the evidence.

Plaintiff contends that in evaluating best interest factor (e) ("permanence, as a family unit, of the existing or proposed custodial home or homes"), MCL 722.23(e), the trial court failed to take into account that defendant indicated to plaintiff that he might be moving to Virginia. Plaintiff testified that when she was pregnant, defendant told her that he might be moving to Virginia. However, she further testified that he later told her that was not a serious thought. No other evidence suggested that defendant might be moving. The trial court's decision that the parties were equal with regard to factor (e) was not against the great weight of the evidence.

Plaintiff contends that the trial court erred in finding the parties equal regarding factor (f) ("moral fitness of the parties involved"), MCL 722.23(f), because defendant allegedly indicated a desire for plaintiff to terminate the pregnancy and did not provide any support until genetic tests indicated that he was Mark's father. In evaluating this factor, the trial court indicated that both parties were at fault for conceiving a child without having a relationship, which was the primary cause of the parties' problems. Because the parties apparently had no relationship to speak of, defendant's hesitancy to admit paternity does not necessarily indicate moral unfitness, but simply demonstrates a lack of trust. Contrarily, the fact that defendant did come forward to seek custody and offer support, including back support, once he was determined to be the likely father of the child demonstrates defendant's sense of responsibility. The trial court's decision with regard to factor (f) was not against the great weight of the evidence.

Plaintiff next contends the trial court erred in finding the parties equal under factor (g) ("mental and physical health of the parties involved"), MCL 722.23(g). Plaintiff argues this factor should have been weighed in her favor because she testified that she believed defendant had been hospitalized for depression in 2002, that he had taken anti-depressants following a car accident in 2003, and because defendant had lingering physical problems because of the car accident. Defendant testified that he was gradually recovering from the accident and that any lingering physical problems would not affect his ability to parent Mark, and that his overall health was "excellent." He further testified that the only medications he was taking were for inflammation and mild hypertension. No evidence was presented that defendant still suffered from depression. The trial court's finding that the parties were equal with regard to factor (g) was not against the great weight of the evidence.

Plaintiff further contends that the trial court erred in concluding that best interest factor (j) ("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"), MCL 722.23(j), favored defendant. Plaintiff argues that the court placed too much emphasis on the fact that she would not let defendant take Mark to visit defendant's mother

without her accompanying them, and also placed too much emphasis on the fact that she did not take advantage of Mark's desire to share parenting duties in order to return to school. We agree that plaintiff's failure to return to school despite the opportunity presented by defendant's willingness to take on a greater parental role, is not particularly relevant to plaintiff's willingness to foster a relationship between defendant and Mark. Nevertheless, we conclude the trial court's decision on this factor was not against the great weight of the evidence. Plaintiff's refusal to permit defendant to visit family without her being present evidences a reluctance on her part to encourage the parent/child relationship between defendant and Mark. The fact that plaintiff was also previously held in contempt of court for violating her former husband's parenting time rights also supports the trial court's conclusion that this factor favors defendant. The trial court's conclusion that factor (j) favored defendant was not against the great weight of the evidence.

Finally, plaintiff asserts that the trial court erred by not addressing under factor (l) ("[a]ny other factor considered by the court to be relevant to a particular child custody dispute"), MCL 722.23(l), defendant's failure to support her and Mark until paternity tests indicated he was the child's father. However, the trial court did consider this issue in analyzing factor (j). The court stated, "I can understand, Mrs. Vito, the displeasure of going through a pregnancy and birth without the help or encouragement of the father. However, the lack of the relationship between the two of you causes problems. But here, for six months, the dad has been willing and anxious to assume the role of the father and you have resisted it." Thus, we cannot say that the court failed to consider the issue of defendant's unwillingness to support plaintiff and Mark until he was proven to be Mark's father. The court simply found that, under the circumstances, the impact of this evidence was diminished by the parties' lack of a relationship and by the evidence that defendant was interested in fostering a custodial relationship with Mark as soon as he was shown to be Mark's father. The court's finding in that regard was not against the great weight of the evidence.

Therefore, we conclude that none of the trial court's challenged findings on the best interest factors were against the great weight of the evidence.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto