STATE OF MICHIGAN

COURT OF APPEALS

CAROL S. VANVOLKENBURG,

Plaintiff-Appellant,

v

DOUGLAS M. NAIDUS, JR.,

Defendant-Appellee.

UNPUBLISHED
July 20, 2006

No. 268313
Montmorency Circuit Court
LC No. 00-002088-DP

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for a change of custody of the parties' minor child. Because the trial court appropriately applied the best interest factors and did not abuse its discretion in changing the established custodial environment, we affirm.

In September of 2000, plaintiff filed a complaint against defendant under the paternity act. At that time, the parties were not married, but were the biological parents of one minor child. An order of filiation vesting plaintiff with sole legal and physical custody of the child was entered in this matter shortly thereafter. In March, 2005, defendant moved for a change in custody with respect to the minor child. After a hearing on defendant's motion, the trial court found clear and convincing evidence existed to change the established custodial environment and thus awarded defendant primary physical custody of the minor child while providing the parties with joint legal custody.

In *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), this Court set forth the three standards of review applicable in custody cases:

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. (Internal citations omitted).

In deciding a child custody matter, a trial court must first determine whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). "The custodial environment of a child is established 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). A court should not change the 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).

"In any custody dispute, our overriding concern and the overwhelmingly predominant factor is the welfare of the child . . . . [T]he best interest of the child shall control." *Heid v AAASulewski* (*After Remand*), 209 Mich App 587, 595; 532 NW2d 205 (1995). The twelve factors to be considered in determining the best interests of a minor child are enumerated in MCL 722.23:

> (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.

On appeal, plaintiff contends that the trial court's findings with respect to factors (c), (d), (e) and (h) were against the great weight of the evidence. Plaintiff also argues that clear and convincing evidence did not exist to change the established custodial environment. We disagree.

With regard to best interest 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," MCL 722.23(c), the trial court found the evidence weighed in favor of defendant. Plaintiff testified that she has been unemployed since 1999 (except for one three month period) and has not sought unemployment benefits. Defendant, on the other hand, works a seasonal job five months out of the year and collects unemployment benefits for the remainder of the year. Defendant's wife, Sherry, also works full time.

The primary issue before the court on factor (c) was the disposition of the parties to provide the child with the necessary medical care. It is undisputed that the child in question has a number of medical conditions that require frequent doctor, dentist, and specialist visits. The evidence demonstrated that plaintiff was almost exclusively responsible for meeting the child's medical and dental needs because she had physical custody of the child during the week while doctors' and dentists' offices were open. The evidence also demonstrated that plaintiff had cancelled a number of doctors' appointments and failed to reschedule them and that on several occasions, plaintiff refused to alter the parenting time schedule to allow defendant or his wife to take the child to the various appointments.

It was also shown that the child's teeth were in a terrible state of disrepair as a result of high sugar intake and poor oral hygiene and that the child required oral surgery. Plaintiff had cancelled a number of scheduled appointments for oral surgery, and the surgery had not been rescheduled as of the date of the hearing, although plaintiff indicated the child was on a waiting list. Sherry testified that defendant's dental insurance would pay for a portion of the child's necessary dental work, and that she and defendant saved enough money to pay the balance of the dental bill.

Further, no appointments had been scheduled with a neurologist and plaintiff did not make it to a scheduled appointment with an ophthalmologist, although both were recommended. Plaintiff offered no real explanation as to why these appointments had not yet been scheduled (or rescheduled), although she did note that time was not an issue for her because she did not work and was at home with the child during the day. Given plaintiff's lack of follow through with necessary medical and dental appointments, the court's finding that factor (c) favored defendant was not against the great weight of the evidence.

With regard to factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), the trial court found the evidence weighed in favor of neither party. While no evidence was presented that plaintiff's house itself was unsuitable, an investigator from the Michigan Department of Human Services testified as to having investigated plaintiff's residence on four occasions as a result of various allegations including disruptive behavior at school by plaintiff's two daughters, inappropriate physical discipline, and medical neglect of the child in question. Although the allegations were ultimately unsubstantiated, four investigations are concerning. Moreover, evidence was presented that plaintiff smoked marijuana. Accordingly, the trial court's finding that factor (d) did not weigh in favor of either party was not against the great weight of the evidence.

As to factor (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e), the trial court found the evidence weighed in favor of neither party. Plaintiff testified that the child had resided with her since birth and that her family was very supportive. Plaintiff also testified that she had just ended a relationship. Defendant, on the other hand, was involved in the child's life somewhat sporadically for the first few years. Defendant has, however, by all accounts, been much more involved from 2004 on and has not missed any scheduled parenting time with the child. Defendant is also married and has been for the past two years. The trial court's finding that factor (e) did not weigh in favor of either party was not against the great weight of the evidence.

With regard to factor (h), "[t]he home, school, and community record of the child," MCL 722.23(h), the trial court found the evidence did not weigh in favor of plaintiff. School records revealed that the child in question had missed 28 out of 99 days of school during preschool. Plaintiff admitted that the absences were sometimes simply because the child did not want to go to school. Moreover, the child's teachers consistently reported that his skill level was low and he needed additional assistance. His preschool teacher was also concerned with the child missing school and being tired when he was in school. Accordingly, the trial court's finding that factor (h) did not weigh in favor of plaintiff was not against the great weight of the evidence.

Finally, plaintiff contends the trial court erred in finding that there was clear and convincing evidence to change the established custodial environment. Plaintiff did not dispute the court's findings that factor (a) slightly favored plaintiff; factors (b), (e), (i), (j), and (k) favored neither party; and factors (f) and (g) favored defendant. With regard to the remaining factors, for the reasons stated above, the court's findings that factor (c) favored defendant; factor (d) favored neither party; factor (e) favored neither party; and factor (h) did not favor plaintiff were not against the great weight of the evidence. Therefore, the only factor that slightly favored only plaintiff was factor (a). Accordingly, the trial court did not abuse its discretion in changing the established custodial environment and awarding the parties joint legal custody and defendant primary physical custody.

Affirmed.

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