

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH JEANNE DYKSTRA,

Plaintiff-Appellee,

v

BRIAN CHARLES DYKSTRA,

Defendant-Appellant.

UNPUBLISHED

August 6, 1996

No. 189506

LC No. 92-75009-DM

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order awarding physical custody of the parties' child, Brooke Waite, to plaintiff. On appeal, defendant argues that the trial court erred in finding that granting physical custody to plaintiff was in the best interests of the child. We affirm.

When the minor child in this case was conceived, plaintiff was married to another man, whom she divorced before the child was born. The evidence at trial indicated that defendant was not supportive of plaintiff's pregnancy and did not provide any financial support. After the child was born, defendant denied paternity and continued to avoid his responsibilities to the child for the first nineteen months of the child's life. At the time, defendant informed plaintiff that he was not ready for a relationship or to be a father. In December 1989, when the child was one year and seven months old, defendant and plaintiff married. In May 1992, plaintiff filed for a divorce. A temporary order established that the child live with plaintiff and that defendant had the rights to visitation. At the custody hearing, it was demonstrated that both plaintiff and defendant had a loving and affectionate relationship with the child. Testimony at the hearing indicated that the child loved both parents but that the child preferred to live with defendant. However, it was also shown that defendant tended to coach the child into liking him more than plaintiff, whereas plaintiff attempted to foster a healthy relationship between the child and defendant.

Both plaintiff and defendant sought sole physical custody of the child. Defendant intended to live at home with his parents indefinitely, raising the child in his parents' home in Holland, Michigan.

Plaintiff, who lived on her own and supported herself and the child, sought to keep the child with her in Grand Rapids. Despite the child's strong relationship with both parents, the trial court awarded physical custody to plaintiff pursuant to a judgment of divorce on June 16, 1995. On September 14, 1995, the court amended the order, granting joint legal custody to both parties, but sole physical custody remained with plaintiff.

Defendant first argues that the trial court erred by ruling that the established custodial environment was with plaintiff alone, rather than with defendant or both parties. We disagree. The first step in considering a petition to change custody is to determine whether an established custodial environment exists; it is only then that the court can determine what burden of proof must be applied. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Whether an established custodial environment exists is a question of fact for the trial court to resolve. *Id.* at 387-388. Findings of fact are reviewed under the great weight standard and will be sustained on appeal unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994). We find that the evidence does not preponderate in favor of defendant and therefore we affirm the trial court's decision.

At the hearing, the evidence showed that, throughout the child's life, plaintiff provided her with parental care, discipline, love, guidance, and attention appropriate to her age and individual needs. Ultimately, the court held that the child's life with plaintiff was secure, stable and had some degree of permanence in terms of a family structure. Accordingly, the trial court's finding that plaintiff had created an established custodial environment was supported by the great weight of the evidence.

Defendant also argues that the court improperly required defendant to prevail by clear and convincing evidence while not imposing the same burden on plaintiff. Defendant contends that, because custody changed from joint physical custody to sole physical custody, plaintiff should have been held to the clear and convincing standard. We disagree. A court may not change the established custodial environment of a child unless clear and convincing evidence is presented that it is in the best interest of the child. *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1995). However, in this case, the trial court did not change the child's established custodial environment; custody remained with plaintiff. Accordingly, the trial court did not err in its application of the burden of proof. *Id.* at 241.

Defendant next argues that awarding physical custody to plaintiff was contrary to the great weight of the evidence and contrary to the best interests of the child. We disagree. To whom custody is granted is a discretionary dispositional ruling in which the lower court is given great deference due to its superior position to make accurate decisions concerning the custody arrangement that will be in the child's best interest. *Fletcher, supra*, at 889-890. In the context of child custody cases, the great weight of the evidence standard applies to all findings of fact, and a trial court's findings on each factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* at 879. Therefore, a custody award should be affirmed by this Court unless it represents an abuse of discretion. *Id.* at 880.

All custody matters are to be resolved in the child's best interest. The factors for this determination are set forth in MCL 722.23; MSA 25.312(3). Defendant argues that factor (c) (the parties' ability to provide food, clothing and care), which the court found favored plaintiff, should have been equal. We disagree. At the time of trial, defendant was making \$250 a week and planned to live with his parents for the indefinite future. In addition, the evidence showed that defendant had failed in the past to consistently maintain any type of full-time employment. On the other hand, plaintiff maintained a full-time teaching position and was working toward her master's degree in education. This evidence was sufficient to support the lower court's findings.

Finally, defendant argues that the court made an error with regard to factor (l) (any other factor considered relevant). Defendant contends that, based on the evidence of defendant's strong family support, the court erred in finding that this factor favored plaintiff. We disagree. While it was not disputed that defendant's parents provided support, the trial court also looked at the fact that defendant planned to live with his parents indefinitely. It found that defendant himself was still being parented. This conclusion was supported by the evidence, thus we find that the trial court did not abuse its discretion. *Fletcher, supra*, at 880.

Having reviewed the record in this matter, we conclude that the trial court's findings of fact were supported by the great weight of the evidence, thus, no abuse of discretion occurred. *Hayes, supra*, at 389. The trial court did not err in finding that the statutory best interest factors dictated that custody be awarded to plaintiff. *Id.*

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski