STATE OF MICHIGAN

COURT OF APPEALS

JAMES MATTHEW KIK,

Plaintiff/Counter-Defendant-Appellee,

v

AMBER DALE KIK,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
February 12, 2008

No. 280359
Kalkaska Circuit Court
LC No. 06-009042-DM

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from the divorce judgment which granted plaintiff primary physical custody of the parties' minor child. We affirm.

Defendant first argues that the trial court's finding that no established custodial environment existed was against the great weight of the evidence. We disagree. In reviewing a custody decision, three standards of review apply:

> 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. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (citations omitted).]

Whether an established custodial environment exists is a question of fact for the trial court to make before it makes any determination regarding what is in a child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A "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." MCL 722.27(1)(c). "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." *Id.* An

established custodial environment can exist in more than one home and "is one of significant duration 'in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.'" *Mogle, supra* at 197-198 (citation omitted). If no established custodial environment exists, custody is determined by a preponderance of the evidence standard. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). If an established custodial environment exists, it must be established by clear and convincing evidence that a change in custody is in the best interests of the child. MCL 722.27(1)(c).

The evidence here demonstrated that since about three weeks after defendant took the minor child from the former marital home on January 1, 2006, the minor child had very little stability with regard to which parent she would be staying with. The parties readily acknowledged that the parenting time that occurred under the February 2006 parenting time order and the parties' March 2006 mutual agreement provided the minor child with much uncertainty. Based on our review of the record, there simply was not enough time where the minor child would constantly be with one parent or the other to establish the qualities of security, stability, and permanence that are created when a custodial environment is established. *Mogle, supra* at 197-198. Moreover, the 180-mile trip to and from the parties' home added to her emotional unrest. This action ultimately involved a very young girl who had little stability with regard to who was taking care of her. See *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993) (stating that a minor child's expectations as to the permanency of a custody situation is relevant with regard to establishing a custodial environment). While the minor child spent more time with defendant than she did with plaintiff, given her young age and the constant movement between parents, we conclude that the trial court's finding that no established custodial environment existed is not against the great weight of the evidence. Additionally, we disagree that the trial court's rationale was flawed because the opinion does not evidence that the trial court found that an established custodial environment existed with both parents. To the contrary, it is evident that the trial court focused on the uncertainty of the situation as a result of the custody trial and the constant movement between parents as precluding an establishment of a custodial environment with either parent, which were both proper considerations.

Defendant next challenges the trial court's finding with regard to best interest factors (a), (b), (c), (d), (e), (f), (h), (j), (k), and (*l*) as against the great weight of the evidence. We disagree. The statutory best interest factors are as follows:

> (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. [MCL 722.23.]

As to best interest factor (a), the trial court's finding that the parties were equal is not against the great weight of the evidence because there was testimony from witnesses for both parties that love, affection, and other emotional ties existed between the minor child and both parents. While defendant relies solely on testimony to suggest that the bond between defendant and Emma was particularly strong, there is testimony to suggest that the bond between plaintiff and Emma was strong as well.

As to best interest factor (b), the trial court's finding that the factor slightly favored plaintiff is not against the great weight of the evidence. The trial court concluded that both parties were equal in their capacity and disposition to provide the minor child with love, affection, and guidance and to continue with her education in the future. The record supports this finding, and it is evident that plaintiff would continue to support the minor child in regard to her education based on his statements at trial. As to raising Emma in her religion, the trial court found that this sub-factor favored plaintiff based on the testimony that plaintiff had a stronger religious background and was more actively involved in bringing the minor child to church than was defendant. Because this finding was based on the record evidence, no error occurred with regard to this factor.

As to best interest factor (c), the trial court's finding that the factor favored plaintiff is not against the great weight of the evidence. The trial court focused solely on the record evidence that clearly demonstrated that plaintiff had a greater capacity to provide the minor child with food, clothing, and medical care. While defendant faults the trial court's failure to discuss the disposition of either party to provide food, clothing, and medical care, there was no direct evidence suggesting that either party had a relatively stronger or weaker disposition than the other to provide those necessities. Moreover, simply because the trial court did not reference this

point does not mean that it did not consider it. The trial court need not comment on every matter in evidence or decide every proposition argued. *MacIntyre v MacIntyre* (*On Remand*), 267 Mich App 449, 452; 705 NW2d 144 (2005). Accordingly, no error occurred regarding best interest factor (c).

As to best interest factor (d), the trial court found that the factor favored plaintiff, and as to best interest factor (e), the trial court found the parties equal under the factor. These factors involve some degree of overlap with factor (d) requiring a factual inquiry into the length the child has been in a stable, satisfactory environment followed by a determination of the desirability of maintaining continuity, while factor (e) focuses on the prospects for a stable family environment. *Ireland v Smith*, 451 Mich 457, 465 & n 8; 547 NW2d 686 (1996). For factor (d), the trial court focused on the evidence that the minor had lived in the former marital home almost since birth until January 2006, when defendant left the home with the minor child who was about two and one-half years old at the time. Testimony provided that the minor recognized the home as her original home and loved spending time there with her friends, which is a strong indicator that the home was a stable, satisfactory environment. Further, plaintiff acknowledged having stable employment and had recently refinanced the home, which is evidence that plaintiff wished to maintain a continuous environment. The trial court also considered the minor child living with defendant, who had been residing with her parents or in her own mobile home since January 2006, but found it to be within the minor child's best interest to continue living in her original home. Because the evidence does not clearly preponderate in favor of finding that best interest factor (d) favored defendant, no error occurred.

As to best interest factor (e), the trial court focused on the fact that both parties had family members who lived close to them. Testimony further provided that both parties had been involved in a relationship since separation, with the permanence and stability of those relationships being unknown. Contrary to defendant's assertion, no error occurred regarding factor (e) because the evidence does not clearly preponderate in favor of defendant.

As to best interest factor (f), the trial court found that the parties were equal under this factor, substantially relying on testimony that both parties had used profanity toward each other and had generally acted inappropriately. While there may have been more testimony to suggest that plaintiff cursed more than defendant, the testimony does not clearly preponderate in favor of finding that best interest factor (f) weighed in favor of defendant because both parties acknowledged acting inappropriately at times.

As to best interest factor (h), the trial court found that the parties were equal under this factor. Testimony provided that the minor child attended an educational program while the parties were married and had been attending preschool sometime since moving in with defendant. Testimony further provided that the minor child had done well while attending daycare. This particular factor has little relevancy given the age of the minor child, and the evidence does not clearly preponderate towards defendant as to this factor.

As to best interest factor (j), the trial court found that the factor favored plaintiff. Testimony provided that defendant did not allow plaintiff to see the minor child for three weeks after she left the marital home. Additional testimony evidenced that defendant had not demonstrated a willingness to facilitate a close and continuing relationship between the minor child and plaintiff for an additional six week period in which defendant failed to exchange the

minor child at their agreed upon meeting place. The trial court's finding that defendant was less than credible in allocating blame on plaintiff will not be disturbed given the special deference afforded the trial court when sitting as the trier of fact. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Accordingly, the record supports the trial court's finding and clearly does not preponderate in favor of a finding in favor of defendant in regard to factor (j).

As to best interest factor (k), the trial court found that the parties were equal on the factor given the lack of relevant evidence. While defendant argues that the record shows that plaintiff used more inappropriate language than she did, this evidence did not rise to the level of domestic violence as contemplated by the factor. Accordingly, no error occurred.

As to best interest factor (*l*), the trial court focused on plaintiff being well-educated with strong family values, being more financially secure and better able to provide for Emma, and being able to provide Emma with a stable, loving, and constant home environment, and this factual finding was also not against the great weight of the evidence. The trial court weighed several factors in favor of plaintiff and ultimately concluded that it was in Emma's best interest for plaintiff to be awarded primary physical custody. Based on the factual findings that are not against the great weight of the evidence, we conclude that this decision was not an abuse of discretion.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray