STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. WEEKS, JR.,

Plaintiff-Appellant,

v

SARA KRISTIN DOUCETTE,

Defendant-Appellee.

UNPUBLISHED
May 8, 2007

No. 269666
Oakland Circuit Court
Family Division
LC No. 04-701403-DC

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order setting child support, but raises issues regarding the court's judgment of custody that granted primary physical custody of the parties' minor child to defendant. Because the trial court properly applied the clear and convincing evidence standard to the best interest factors and did not abuse its discretion in determining that it was in the child's best interest that defendant be awarded primary physical custody, we affirm.

Plaintiff argues that the trial court erred when it failed to apply the clear and convincing evidence standard with regard to its evaluation of the best interest factors, and the trial court abused its discretion when it altered the established custodial environment and granted defendant primary physical custody of the parties' minor child.

> [This Court] appl[ies] three standards of review 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. 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) (internal citations omitted), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).]

The first step in considering a custody issue is to determine whether an established custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995).

Such a determination is necessary so that the court can apply the appropriate burden of proof. *Hayes, supra* at 387. Absent the existence of an established custodial environment, custody is determined by a preponderance of evidence standard. *Hayes, supra* at 387. 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 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. MCL 722.27(1)(c). A child may have an established custodial environment in more than one home or with more than one parent. *Mogle v Scriver*, 241 Mich App 192, 197-198; 614 NW2d 696 (2000).

In the instant case, after the parties presented the evidence, the trial court began its analysis of the custody issue by first considering whether there was an established custodial environment. The court cited and applied the proper standard found in MCL 722.27 and concluded that an established custodial environment exists with both parties. Plaintiff does not contest this determination. Although there was conflicting testimony with regard to which party the child spent more time with, both parties agreed that the child, since birth, spent a considerable amount of time with the other party, was loved by the other party, and enjoyed engaging in activities with the other party. Additionally, during the year preceding the court's entry of the judgment of custody, there was a temporary order of custody in place that awarded each party a week-on/week-off schedule of physical custody. In light of these facts, the trial court's determination that an established custodial environment existed with both parents was proper given that the evidence does not clearly preponderate in the opposite direction. *Vodvarka, supra* at 507-508 (a trial court's findings regarding the existence of an established custodial environment should be affirmed unless the evidence clearly preponderates in the opposite direction).

Once the court makes a factual determination regarding the existence of an established custodial environment, the court must weigh the statutory best interest factors found in MCL 722.23 and make a factual finding regarding each of the factors. *Grew v Knox*, 265 Mich App 333, 337; 694 NW2d 722 (2005); *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); MCL 722.23; MCL 722.27. The controlling consideration in child custody disputes between parents is the child's best interest. *Lombardo v Lombardo*, 202 Mich App 151, 159-160; 507 NW2d 788 (1993); MCL 722.25. "[T]he statutory best interest factors need *not* be given equal weight. Neither a trial court in making a decision, nor this Court in reviewing such a decision, must mathematically assess equal weight to each of the statutory facts." *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). The court shall not issue an order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. MCL 722.27(1)(c).

The trial court considered the aforementioned factors and concluded that eight of the factors were equally credited to both parties, two were credited to defendant, and two were not credited to either party. Plaintiff does not contest the trial court's findings with respect to the factors that were equally credited or not credited to either party, but does contest the two factors that were credited to defendant. Of the two not credited factors, factor (l) was subject to trial

court findings without crediting the factor. Defendant claims from the findings concerning factor (l), that factor (l) is credited to defendant. Plaintiff contends that the trial court erred because there was an insufficient basis on which to find that the factors weighed in defendant's favor.

Regarding factor (d), "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," the trial court reasoned:

> [T]he evidence is uncontroverted that [the child] has lived, when he's with his mother, in her parents' home, a home she's lived in since she was born. That he has his own room in that home, and that he has continuity in that environment. As indicated by [defendant's counsel], Mr. Weeks has moved on numerous occasions, and although he is living in his mother's home right now, which I find to be a very loving, warm, and stable environment, I find that with – with regard to Factor D, it should be credited to mother because her – she has been able to maintain a stable, satisfactory environment in her community for a longer period of time. As I – as I indicated previously, Mr. Weeks has moved on a number of occasions, four or five in the past couple of years. So Factor D is credited towards the mother.

We conclude that there was a sufficient basis for the trial court to award factor (d) to defendant. The evidence established that the child has lived primarily with defendant, who has lived with her parents in a stable and supportive environment since her birth. Although plaintiff asserted that the child lived primarily with him, multiple witnesses testified to the contrary and various records all list the child's address as defendant's home. Plaintiff's home life has been considerably less stable. Plaintiff moved five times to four different residences in approximately two and a half years. One of those moves was over 200 miles away from defendant and the child's residence. The trial court did not err in crediting factor (d) to defendant because the evidence did not clearly preponderate in the opposite direction.

With respect to factor (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," the court found:

> Frankly, this is the factor that causes the Court the greatest concern. I find that Mr. Weeks does have some issues with honesty, that he loves his child very much, but he's so desperate to spend time with his child it makes him desperate and irrational and willing to do things that I think he sometimes later regrets. I think he acts impulsively. I think he acts aggressively, and I think he's a very angry person. He may have some right to feel angry against Ms. Doucette.
>
> There's been some testimony that perhaps Ms. Doucette in some way led him on or made him think that we're going to be together forever and then changed her mind the next day. So Mr. Weeks might feel that Ms. Doucette led him on in some way. However, it is clear that the relationship has been over for some time, and he, you know, needs to get over it. He needs to get over it. She's moved on. He needs to move on. They'll always have this child together. They're going to have to sit together at his wedding. So he needs to move on. Ms. Doucette has moved on. He has been either unable or unwilling to do so, and the problem with

> that is it's hurting the child. His inability to move on is hurting his child. He – you know, four year olds are smarter than we give them credit for.
>
> I'm sure that [the child] can tell that Mr. Weeks has great contempt for [the child's] mother, and that hurts a child. You, Mr. Weeks, will not give [the child] permission to love his mother, and that has a – great deal of an effect on him. And because of that I've – I also have not found similar wrath in Ms. Doucette. I have to say. I – I think that she might be a little afraid of Mr. Weeks and that they've been down some rocky roads together. And there have been some domestic type of issues and stalking type of issues that may have scared her, but I believe that she still continually expressed an interest in having Mr. Weeks have contact with his son and has expressed an ability to co-parent. Therefore, mother is credited for Factor J.

Similarly, we affirm the court's findings regarding factor (j) given that the evidence does not clearly preponderate in the opposite direction. Substantial testimony was presented that plaintiff has a considerable amount of anger and resentment toward defendant. What troubled the trial court was not only the fact of plaintiff's anger, but that he has expressed these feelings in the presence of the parties' child on numerous occasions. Defendant recounted an occasion where plaintiff left her a threatening and "horrible" voice message on her phone and then immediately thereafter handed the phone to the child. The reasonable inference is that the child heard plaintiff's message to defendant. Defendant recalled another instance that occurred on Thanksgiving, after the commencement of the custody trial, when defendant arrived at plaintiff's house in order to pick up the child. The child was sitting on plaintiff's lap as defendant approached and plaintiff stated, "I hope you're f---ing happy you b---- . . . f--- you, you f---ing whore." To the contrary, there was no evidence that defendant harbors similar resentment toward plaintiff, has spoken ill of plaintiff in the child's presence or has in any manner stood in the way of a loving relationship between plaintiff and the child. Further, defendant has made efforts to communicate with plaintiff about the child's needs, but has not met with success due to plaintiff's refusal to work with her for the good of the child. In light of the evidence, the trial court did not err in crediting defendant with factor (j).

Regarding factor (l), "any other factor considered by the court to be relevant to a particular child custody dispute," the court noted:

> I'm considering the entire record. The letter – the letter is very, very disturbing. The letter that's – that's been admitted into evidence is very disturbing. However, my father has a saying that none of us want to be judged by the worst thing we've ever done. So although I think the letter is disturbing, and I think that Mr. Weeks wishes – wishes he couldn't – could take it back, I'm not sure of what the facts and circumstances were on – at the time he wrote it. It's very disturbing. It's threatening. It's disgusting, and it again goes to Mr. Weeks' impulsive behavior, his inability to control his emotions, his inability [sic] to act in desperation instead of waiting to – till calmer or cooler heads prevail. So I find that letter very disturbing.
>
> I also find that the situation where Mr. Weeks left and went to another county and tried to get custody out of love for his child, but it's an act of desperation, and it's

> an irrational act. And I can only imagine what Mr. Weeks would have done if Ms. Doucette had left and gone to another county. I think Mr. – Ms. Doucette would have paid dearly for that kind of behavior. I find that very disturbing.
>
> I am going to order him to pay the attorney's fees. I'm also going to order him to pay the attorney's fees that Ms. Doucette incurred in fighting that action in the other county, and perhaps [defendant's counsel] can let me know how much that was, and Mr. Weeks can let me know how long he'll need to pay that. Because I don't think that was necessary. They were both living here, and that's very – that's very disturbing. I know how I would feel if that happened to me.

While the trial court never expressly credited factor (l) to either party, the comments are clearly uncomplimentary toward plaintiff and a review of the record reveals that the evidence does not clearly preponderate in the opposite direction.. The evidence of the case as reflected in the trial court's findings establish that the trial court should have credited factor (l) to defendant. Such credit further supports the trial court's conclusion on change of custody and is consistent with our conclusion that the trial court did not err in finding that the best interest factors as a whole weigh in favor of defendant.

Plaintiff's contention that the factors the trial court credited to defendant were credited to her on "ephemeral and unsubstantiated grounds" is without support. Again, unless the evidence clearly preponderates in the opposite direction, the trial court's finding regarding the custody factors should be affirmed. *Vodvarka, supra* at 507-508. Given the evidence adduced at trial, the trial court had a sufficient basis to credit defendant with those factors. We further hold that the trial court's discretionary determination that defendant should have physical custody was not an abuse of discretion.

Finally, we reject plaintiff's contention that the trial court failed to apply the clear and convincing evidence standard with regard to its ultimate determination of custody. In fact, the trial court expressly stated, more than once, that it was applying the clear and convincing evidence standard. The trial court's remarks are as follows:

> I found custodial environment with – with both parents, and as [defendant's counsel] indicate – indicated, *we therefore have to look to the best interests, by clear and convincing evidence, the best interest of the child.*
>
> I – I think it'd be hard – anyone here to argue that it's good for a four year old to go back and forth every other week, and I think that was designed based on the fact that Mr. Weeks was up north. So first of all by – *I find by clear and convincing evidence that that situation needs to be changed. I am going to go through the factors required by the statute.* [Emphasis added.]

The above portion of the record is sufficient to establish that the trial court applied the clear and convincing evidence standard to the best interest factors. The trial court evaluated the best interest factors immediately after making the statement highlighted above. In light of the trial court's explicit mention of "clear and convincing evidence" in the context of its evaluation of the best interest factors, and in the absence of any evidence that the trial court applied a different standard of proof, we conclude that the trial court used the correct standard of proof. The court

based its findings under each factor on the evidence presented, and the testimony supported the custody award by clear and convincing evidence. Consequently, we affirm the trial court's custody determination.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto