STATE OF MICHIGAN

COURT OF APPEALS

PAMELA J. COSENZA,

Plaintiff-Appellant,

v

WILLIAM COSENZA,

Defendant-Appellee.

UNPUBLISHED
July 6, 2006

No. 265272
Wayne Circuit Court
LC No. 04-431826-DM

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce granting the parties joint legal and physical custody of their minor children, but changing the children's primary physical residence to be with defendant during the school year. We affirm.

At the outset of the proceedings, the trial court entered a temporary custody order granting joint legal and physical custody to both parties, with primary physical residence to be with plaintiff. Both parties then sought sole physical custody of the children. A custody award may be modified on a showing of proper cause or change of circumstances that establishes that modification is in the children's best interests. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). The threshold determination in a trial court's decision to modify an existing custody order is whether an established custodial environment exists. *Id*. at 695-696. Where an established custodial environment does not exist, the trial court may change custody if the moving party proves by a preponderance of the evidence that the change is in the child's best interests. *Id*. at 696. However, where an established custodial environment does exist, the trial court may change the established custodial environment only if the moving party proves by clear and convincing evidence that the change is in the child's best interests. *MacIntyre v MacIntyre*, 267 Mich App 449, 451; 705 NW2d 144 (2005).

Plaintiff first argues that the trial court erred in determining that the children had an established custodial environment with both parties. Specifically, plaintiff contends that, as a result of that determination, the trial court improperly changed the children's primary physical residence based on the less stringent "preponderance of the evidence" standard. However, contrary to plaintiff's assertion, the record reveals that because the trial court found that an established custodial environment existed with both parties, it employed the more stringent "clear and convincing evidence" standard when determining that changing the children's primary physical residence to be with defendant during the school year was in their best interest.

Whether an established custodial environment exists is a question of fact to which we apply the great weight of the evidence standard. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003); *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). That is, we will affirm a trial court's findings regarding the existence of an established custodial environment unless the evidence clearly preponderates in the opposite direction. *Vodvarka*, *supra* at 507. 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," MCL 722.27(1)(c), 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 v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Further, a child may have an established custodial environment in more than one household. *Mogle*, *supra* at 197-198.

A review of the record reveals that an established custodial environment existed with both parties. Although Breanna, born July 2, 1999, lived solely with plaintiff until she was two and a half years old, defendant saw Breanna almost every day during that period of time. Since then, Breanna has lived with both parties, and Alexandria, born January 15, 2003, has lived with both parties for her entire life, except for those occasions when defendant left the home due to marital problems. However, defendant frequently visited the children during those absences, and the children had several overnight visits at defendant's mother's house as well. Because the evidence does not clearly preponderate in the opposite direction, we affirm the trial court's finding that an established custodial environment existed with both parties. Moreover, even if the trial court had erred in its determination that an established custodial environment existed with both parties, plaintiff's allegation of error is unfounded because the trial court specifically used the more stringent "clear and convincing" standard in determining that the parties should retain joint legal and physical custody but that the children's primary physical residence should be changed to be with defendant during the school year.

Plaintiff next challenges the trial court's determination that this change was in the children's best interests. Because an established custodial environment existed with both parties, the trial court could change custody under MCL 722.27(1)(c) only if clear and convincing evidence established that the change was in the children's best interests. *Winn v Winn*, 234 Mich App 255, 262-263; 593 NW2d 662 (1999). Defendant bore the burden of proof in this regard, and whether he met this burden turns on the trial court's findings regarding the statutory best interest factors. *Id*. at 263. In rendering a custody determination, the trial court must state its factual findings and conclusions regarding each factor. *MacIntyre*, *supra* at 451-452. These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties; however, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings. *Id*. at 452. We then review for an abuse of discretion the trial court's ultimate custody determination. *Id*. at 451. The best interests factors are delineated in MCL 722.23 and we will discuss each factor in turn.

Factor (a) involves "[t]he love, affection, and other emotional ties existing between the parties involved and the child." After interviewing the parties, a social worker found that this factor favored both parties. The trial court agreed and neither party challenges this determination on appeal.

Factor (b) involves "[t]he 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." The social worker determined that the parties were equal in relation to this factor; however, the trial court disagreed, finding in favor of defendant. Noting that "the principle point of contention in this case was the issue of fostering the education of the minor children," the court found:

> While the parties are equally capable of giving the children love and affection, [plaintiff] has demonstrated through her raising of the two older daughters a lack of ability to provide necessary guidance both in day-to-day supervision and in fostering education. This has also been shown through the number of days tardy and absent for Breanna during her kindergarten year. As noted earlier, even though this was a primary concern[,] no efforts were undertaken during the course of the trial and other proceedings to address absences and tardiness of either Chelsi or Breanna, nor did she have a plan to address the issue in the future. Moreover, little, if anything, has been done to address the educational needs of Shainna. [Defendant] has been involved in the educational process, including the pre session in March 2004. His responses to the extensive cross-examination about the children also demonstrated a better understanding of the need to promote the children's education. [Plaintiff's] lack of responsiveness to serious attendance problems is also cause for concern.

At the conclusion of the 2004-2005 school year, Breanna had been tardy 27 times, absent 12 times, and absent without excuse four times. Although Breanna's kindergarten teacher testified that she was "not concerned about Breanna scholastically," the teacher stated that Breanna's tardiness was "very disruptive." While plaintiff tried to blame some of Breanna's absences and tardy arrivals on defendant, defendant presented significant testimony comparing Breanna's school attendance chart to his parenting time schedule to refute that allegation. Moreover, even after the social worker recommended that Alexandria and Breanna's primary physical residence be with defendant because of this problem, plaintiff continued to bring Breanna to school late.

While plaintiff correctly notes that her older daughters from previous relationships, Shainna and Chelsi, are not the subjects of this custody dispute, the social worker expressed concern that their school attendance and behavior problems would repeat with Alexandria and Breanna. Chelsi's middle school principal also testified that poor attendance can be a pattern in some families. Moreover, as plaintiff attributed her inability to bring Breanna to school in a timely fashion due to difficulties caused by Chelsi, the behavior of plaintiff's older daughters has admittedly affected plaintiff's parenting of the younger children. Shainna has dropped out of school and Chelsi missed approximately half of the school days in the first semester of the 2004-2005 school year. In fact, Chelsi's poor attendance resulted in criminal proceedings against plaintiff for violation of the Michigan Compulsory Attendance Act, MCL 380.1561 *et seq*. Plaintiff testified at trial that further court proceedings were scheduled and that she could be placed on probation at that time. Further, both girls began drinking, smoking, and trying marijuana at early ages, and swear at their mother in the presence of the younger girls. Both girls frequently snuck out of the house, broke curfew, and disobeyed their mother as well. Plaintiff

even allegedly called Chelsi's father, telling him that Chelsi was "out of control" and needed to move in with him.

Plaintiff admittedly felt helpless to compel her daughters to attend school, noting that "at 16 they can quit legally." However, it appears from the record that plaintiff has not made her best effort at ensuring that the girls attend school. Plaintiff testified that, despite her awareness that Chelsi often returns to bed in the morning, plaintiff goes back to sleep herself after awaking Chelsi. Plaintiff testified that Chelsi throws tantrums in the morning because she does not want to go to school, making it harder for plaintiff to get the younger girls ready for the day. Despite the behavioral problems of her daughters, plaintiff expressly testified that she felt she had made no mistakes in raising them. Moreover, ignoring Shainna's clear troubles stemming from her previous rape and abandonment by her father, plaintiff testified that Shainna was not in counseling because she did not need to be.

Factor (c) involves "[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." The social worker found that this factor favored both parties, because both were employed, covered by insurance, and could provide adequate childcare while at work. The trial court disagreed and found that this factor favored defendant:

> Although his earnings are less than the plaintiff, she has had extensive absences from work (10/01 through 04/03 and again 04/05 through the close of the hearing at the end of June 2005). She also amassed serious debt, which plaintiff paid off prior to and during the marriage. More important, despite portraying Chelsi as troubled, nothing has been done to address her problems; and, although Shainna is obviously troubled, little attention has been given to meeting her medical needs. The disparity in income can be overcome by child support.

While plaintiff earns a higher income than defendant and has maintained her employment despite her poor attendance record, her future employment is uncertain given that record. Moreover, as indicated by the trial court, the discrepancy in the parties' incomes can be overcome with child support.

Plaintiff also challenged defendant's ability to financially support the children because he had failed to pay child support as ordered by the court. Defendant asserted that he had been unable to forward his child support payments to the Friend of the Court because it had not yet created his account. After being ordered to make support payments directly to plaintiff, defendant learned that plaintiff had not paid the mortgage in three months and that the mortgagor intended to foreclose. Rather than making a direct support payment to plaintiff, defendant then sent $1,800, which he had saved for support, as payment on the mortgage. Plaintiff had, finally, made the required payment and asked defendant to stop payment on the check, but defendant refused. Defendant also testified that plaintiff failed to pay the May 2005 mortgage bill, forcing him to make that payment, as well as paying the late fees for April 2005. Defendant made more than $2,500 in mortgage payments, which plaintiff had been ordered to pay during these proceedings, during a period when he owed less than $2,100 in child support. Although

defendant should have made these payments to plaintiff as ordered by the court, his failure to pay is not evidence of an inability to support his children under these circumstances.

Factor (d) involves "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The social worker found that this factor favored defendant, because he had owned the family's home before marrying plaintiff and because he intended to remain in the home if awarded custody of the children. However, the trial court found that this factor favored neither party, as defendant's leaving home "twice interrupted the stability of the home," and because the children's school records "reflect a lack of stability under [plaintiff's] care." Plaintiff has not challenged this finding on appeal.

Factor (e) involves "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." While the social worker found that this factor favored neither party, the trial court found that this factor "slightly" favored defendant, because he owned the home in which the children had been raised. However, plaintiff was uncertain where she would live if not awarded the home. Plaintiff correctly notes that Breanna and Alexandria have consistently lived with their mother and two older sisters throughout their lives. Maintenance of the sibling bond is a serious issue in a custody dispute and is properly considered in analyzing the best interest factors. *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1998), overruled in part on other grounds in *Molloy v Molloy*, 247 Mich App 348; 637 NW2d 803 (2001). Yet, plaintiff was granted significant parenting time with the younger girls, who would spend significant time with their older sisters as a result. Moreover, even when defendant did not live in the same house as his daughters, he always maintained a close relationship with them. Accordingly, defendant is also part of Alexandria and Breanna's permanent family unit. Even if the trial court erred and should have found that this factor favored plaintiff, there is no indication in the record that this change would have affected the trial court's ultimate determination.

Factor (f) involves "[t]he moral fitness of the parties involved." The social worker found that this factor favored neither party, but the trial court found that this factor favored both parties. Although defendant had accused plaintiff of alcohol abuse and extramarital affairs, defendant presented no evidence to support these assertions, and the trial court believed that the social worker had noted nothing of concern in these regards. The parties have not challenged this finding on appeal.

Factor (g) involves "[t]he mental and physical health of the parties involved." The social worker found that this factor favored defendant, citing plaintiff's alleged alcohol abuse. The trial court found that this factor "slightly favors" defendant, because "plaintiff has had two periods of extensive medical leave for psychological problems," and yet had never received formal treatment. Plaintiff is currently on stress leave from work and is taking medication for anxiety and depression. However, plaintiff has only sought treatment from her family doctor and has received no counseling or psychological care. Defendant, on the other hand, has no known mental or physical health conditions. Given the trial court's restrained finding that this factor only slightly favored defendant, we do not find that the trial court committed error.

Factor (h) involves "[t]he home, school, and community record of the child. . . ." The social worker also found that this factor favored defendant, and the trial court agreed, again citing the school records of Breanna and plaintiff's older daughters:

> As noted throughout, the principal concerns addressed during the course of the hearing involved the attendance records of [plaintiff's] older children and Breanna. [Plaintiff's] lack of insight into the existence of a problem, her responsibility in causing or contributing to the problem, and steps to correct the problem are of great concern. This factor was the primary reason for the recommendation of [the social worker], in which the court concurs. While the attendance problems did not appear to create a great problem in kindergarten, the effect on Chelsi in eighth grade was clearly demonstrated. As [Chelsi's father] testified[,] the lack of attendance caused her to get farther and farther behind[,] resulting in falling grades. Moreover, Shain[n]a's dropping out of school and the lack of any plan to address the situation demonstrates that there are unlikely to be developed corrective measures to alter the school records of the children.

We will not duplicate our analysis provided in relation to factor (b). However, for the same reasons as cited in that analysis, we agree with the trial court's determination of this factor.

Factor (i) involves "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." In relation to this factor, the social worker and the trial court merely found that the "children are deemed too young to express a meaningful preference" and neither party challenges this finding on appeal.

Factor (j) involves "[t]he 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 social worker found that this factor favored both parties because they had successfully exercised parenting time since the current parenting time order had been entered. The trial court found that this factor "clearly favors" plaintiff:

> [t]he plaintiff demonstrated a willingness to foster a relationship between Breanna and defendant prior the marriage and, although[] the PPO was obtained[,] she had continued to work with the defendant to allow contact with his children. Defendant had little good to say about plaintiff and the testimony of his mother and brother as well as the actions of other family members in the courtroom indicate there is likely to be pressure placed on defendant and may [there] may well be interference.

Defendant testified at length regarding plaintiff's failures in raising her older daughters. He specifically testified that he believes plaintiff to be a "poor parent." Defendant's mother and brother stated that plaintiff was a "lousy mother," and was "indifferent" toward her children. Defendant admitted, however, that plaintiff told him that he was a "loving father." The trial court had grounds to believe that the negative opinions of defendant and his family may interfere with plaintiff's ability to exercise her parenting time.

Factor (k) involves "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Noting the prior personal protection order against defendant, the social worker found that this factor favored neither party. The trial court found that "[t]his factor favors neither party or may slightly favor plaintiff":

> Although there was an incident in March 2004, that involved a level of physical altercation between the parties, neither the plaintiff nor the defendant's present characterization is fully credible. The testimony of the investigating police officer based on contemporaneous statements of the parties appears to provide a more accurate description of the events and the court accepts her characterization of an argument that escalated into some pushing and shoving by both parties with [defendant] suffering a slight scratch. The September incident with Chelsi, although resulting in a PPO, on hearing all the evidence is more as characterized herein. Defendant, inappropriately, washed her mouth out with soap for using foul language.

If the allegations of plaintiff and Chelsi are true and accurate, then two incidents of domestic violence did occur in their home. However, plaintiff's version of the March 2004 incident during which defendant allegedly choked her, changed between giving her statement to the police and testifying at trial. The investigating officer testified that she believed the situation to be mutually combative. Moreover, plaintiff did not even mention the March incident during her interview with the social worker. In fact, when asked by the social worker, both plaintiff and defendant denied ever having any physical altercations. The social worker also characterized as "isolated" the September 2004 incident during which defendant allegedly choked Chelsi while swearing at her and rubbing soap against her mouth. Given the conflicting testimony of the parties, the trial court had grounds to find that this factor favored neither party.

Factor (l) involves "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." The trial court considered no other factors in making its custody determination.

Because the trial court properly considered each relevant best interest factor and rendered factual findings consistent with the record evidence, there is no basis on which to find that the trial court abused its discretion in granting joint legal and physical custody to both parties, but in requiring "primary physical residence" to be with defendant during the school year.

We affirm.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens