STATE OF MICHIGAN

COURT OF APPEALS

JILL POLICHT, n/k/a JILL KNAFL,

Plaintiff-Appellant,

v

ROGER POLICHT,

Defendant-Appellee.

UNPUBLISHED
May 30, 1997

No. 196861
Washtenaw Circuit Court
LC No. 90-041534 DM

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff mother appeals as of right from the order granting defendant father's petition for change of primary physical custody of the parties' minor children. We affirm.

Plaintiff and defendant were married on March 10, 1985, and have three minor children, Cory, Haley, and Jacob ("Jake"). On May 14, 1991, a judgment of divorce was issued, granting joint legal custody with primary physical custody to plaintiff; defendant was granted visitation on Tuesdays and Thursdays from 4:30 p.m. to 7:00 p.m., alternate weekends, and specified alternate holidays and vacations. On October 3, 1994, defendant filed a petition for change in primary physical custody. Following a six-day custody hearing, held between January 8 and May 1, 1996, the trial court issued an opinion and order in which it found no established custodial environment in favor of either party and that the children's best interests would be served best by awarding primary physical custody to defendant.

I

Plaintiff first argues that the trial court failed to clearly state whether a custodial environment was established. We disagree. 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 finding as to the existence of an established custodial environment should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

The trial court, in its finding, stated "The court finds that there is no established custodial environment with either parent. For several years both parents have acted as custodians of the

children." Plaintiff argues that it is not clear whether the court found that no custodial environment had been established, or rather, that there was an established custodial environment with both parents. It is possible to find an established custodial environment in more than one home, *Nielsen v Nielsen*, 163 Mich App 430, 433-434; 415 NW2d 6 (1987). However, the trial court's finding in this case is clear on it face that no established custodial environment existed. The court's statement that "both parents have acted as custodians" is not inconsistent with that finding; rather, the court's use of that language stresses that a custodial environment had not been established strictly in favor of one party over another.

II

Plaintiff next argues that the trial court's finding that no established custodial environment existed with her was contrary to the preponderance of the evidence. We disagree. The issue of whether an established custodial environment exists is a prerequisite to findings by the trial court on the issue of custody, and if such an environment is found to exist, the statute requires that any change must be shown by clear and convincing evidence to be in the best interest of the children. *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992). Again, this initial determination is a factual finding and will be affirmed on appeal unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra*, 879. Generally, the court's concern is not with the reasons the custodial environment was established, but with whether it exists. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

According to MCL 722.27(1)(c); MSA 25.312(7)(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." Although the children in this case lived with plaintiff since birth, and defendant initially failed to exercise all of his visitation rights, the record shows that plaintiff admittedly has not consistently provided the children with sufficient guidance, discipline and necessities in life. Our review of the record supports the court's finding that no custodial environment was established with plaintiff when defendant petitioned for a change of custody; therefore, defendant needed only to show by a preponderance of the evidence that a change in custody would be in the best interests of the children, *Underwood v Underwood*, 163 Mich App 383, 390; 414 NW2d 171 (1987); *Curless v Curless*, 137 Mich App 673, 676; 357 NW2d 921 (1984).

III

Finally, plaintiff argues that the court's findings with regard to the best interest factors were either against the great weight of the evidence, or the result of an erroneous application of the law. Plaintiff specifically argues that the evidence presented clearly supports custody in her favor, taking issue with the court's findings as to factors (d), (e), (g), (h), and (l). The great weight of the evidence standard applies to all findings of fact, and a trial court's findings will be affirmed unless the evidence "clearly preponderates in the opposite direction." *Fletcher, supra*, 876-877. We have reviewed plaintiff's challenges to the factors and find them without merit, with perhaps one exception under factor (e). However, any possibility of error was harmless, as discussed below.

With respect to factor (d) (length of time in a stable and satisfactory environment and desirability of maintaining continuity), the court found that defendant's household had "been established longer as a stable, satisfactory environment" and particularly considered the fact that plaintiff's house was soon to be sold and she may be moving out of the children's current school district. Plaintiff argues that the court failed to consider that the children had been in plaintiff's home since birth and improperly considered the fact that plaintiff's home was to be sold. We conclude that the sale of the home and the possibility of moving the children was a relevant and proper consideration, and plaintiff offered no evidence, apart from longevity, that she would be able to provide a stable and satisfactory environment or that she would maintain continuity in the children's environment.

As to factor (e) (permanence, as a family unit, of the proposed or existing custodial home), the court found in favor of defendant "for the reasons stated in factor (d)." Plaintiff correctly argues that factor (e) is concerned with whether a family unit will remain intact, or permanent, not with which custodial home is more acceptable. *Ireland v Smith*, 214 Mich App 235, 246; 542 NW2d 344 (1995). Therefore, the permanence of the custodial home is a separate consideration from whether the family unit itself will remain intact, and the court's consideration of the fact that plaintiff would be selling her home and moving was improper under factor (e). Nevertheless, even if factor (e) had been found in plaintiff's favor, reversal would not be warranted where there is evidence that the party awarded custody still retains an overall advantage after an assessment of the factors in total. See *Wellman v Wellman*, 203 Mich App 277, 284; 512 NW2d 68 (1994). Therefore, even with the trial court's error as to factor (e), we conclude that such an error was harmless in light of the fact that the evidence still supports an overall preference for awarding custody to defendant.

As to factor (g) (the mental and physical health of the parties), the record indicates that plaintiff has had a history of alcoholism and, although she has been seeking treatment and has made improvements, she admitted to having "lapses" of drinking and evidence was presented that the children were well aware of plaintiff's drinking. This Court has considered a party's drinking history relevant to mental health under factor (g). *Bowers v Bowers*, 198 Mich App 320, 332; 497 NW2d 602 (1993). Conversely, as to defendant's mental health, there was evidence of defendant's involvement in the illegal production and selling of marijuana, but he asserts that he stopped such behavior several years before this proceeding and no evidence was presented to the contrary. We further find no merit in plaintiff's argument that the court erred in considering defendant "and his household," as this language presumably referred to defendant's wife's mental health with regard to whether living in defendant's household was in the children's best interest. In any event, given the evidence presented regarding both parties' involvement with drugs and alcohol, and without any indication that the court considered other evidence relevant to this factor, we conclude that the trial court's finding in favor of defendant as to physical and mental health was not against the great weight of the evidence.

As to factor (h) (home, school, and community record of the child), the court found that defendant and his home "are better able to insure the children are properly prepared for and assisted in their participation in school and community activities." Testimony was presented by both parties that plaintiff has had organizational problems, resulting in the children frequently being tardy for school and not completing, or not turning in, homework assignments on time. Conversely, defendant testified that

despite having only two weeknight visitations for a few hours at a time, he has made consistent efforts to assist the children in their homework and see that it is turned in; he has also attended all of the children's parent-teacher conferences. Further, the trial court considered the recommendations from the Friend of the Court and the University of Michigan Center, both of which indicated plaintiff's frequent organizational problems with the children and their schoolwork. The Friend of the Court report also noted that defendant was better prepared to provide the children's health and educational needs. Given the overwhelming evidence against plaintiff as to this factor, we conclude that the court's finding in favor of defendant was not against the great weight of the evidence.

We note that plaintiff cites this Court's decision in *Carson v Carson*, 156 Mich App 291; 401 NW2d 632 (1986), in support of her argument that "being organized and tardy is not a reason to change custody." However, *Carson* is distinguishable from the present case, both on its facts, and the applicable standard of review. See *Carson*, *supra*, 301-302. We also note that plaintiff refers this Court to two appendices attached to her appellate brief, which attempt to prove that the children's performance in school has not improved since custody was granted to defendant. However, because the documents contained in those appendices were not presented to the trial court, this Court must disregard them. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994).

As to factor (l) (any other factor considered by the court to be relevant to the dispute), plaintiff's argument that the court erred in this regard is primarily a reiteration of her previous arguments, which have been addressed and need not be reviewed under this factor. Plaintiff failed to prove that the evidence as to this factor clearly preponderates in her favor; therefore we conclude that the trial court's finding was not against the great weight of the evidence.

In sum, we find that the trial court's findings are supported by the record, or at the least, are not against the great weight of the evidence. *Fletcher*, *supra*, 879, 900. We further note that the trial court properly considered the recommendations by the Friend of the Court and the University of Michigan Center for the Child and the Family, because both parties stipulated to their admission into evidence. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). We therefore conclude that plaintiff failed to produce argument or evidence that the evidence clearly preponderates in her favor, and reversal by this Court is not warranted.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy