STATE OF MICHIGAN

COURT OF APPEALS

LYNETTE J. FERRELL,

Plaintiff-Appellant,

v

ROOSEVELT TILLMAN,

Defendant-Appellee.

UNPUBLISHED
January 23, 1998

No. 201375
Kent Circuit Court
LC No. 95-002024-DS

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff Lynette J. Ferrell appeals as of right from an amended order for custody and support of minor children granting defendant Roosevelt Tillman joint legal and physical custody and ordering an alternating physical custody arrangement based on a trimester schedule. We reverse and remand.

On June 16, 1995, the trial court awarded plaintiff sole legal and physical custody of plaintiff's and defendant's minor children. The issue of visitation, previously established as weekly weekend visits, was held in abeyance until a motion hearing on December 8, 1995, at which the court ordered from the bench that defendant's visitation would be decreased to weekend visits every other week. Subsequently, the trial court granted defendant's motion for an evidentiary hearing wherein defendant would seek to establish that an established custodial environment existed jointly with plaintiff and defendant. After the evidentiary hearing, the trial court amended its previous order, finding that a custodial environment had been established with defendant. It is from this order that plaintiff now appeals.

On appeal, plaintiff contends that the trial court committed error necessitating reversal by finding that an established custodial environment existed with defendant. We agree. When this Court reviews a child custody matter, findings of fact are reviewed under the great weight of the evidence standard, discretionary rulings are reviewed for an abuse of discretion, and questions of law are reviewed for clear error. *York v Morofsky,* 225 Mich App 333, 335; ___ NW2d ___ (1997).

First, we note that defendant demonstrated proper cause in requesting the trial court to revisit the custody issue in that he testified that plaintiff had informed him that the custody hearing was canceled

when it, in fact, was not. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Although plaintiff testified that she had merely told him that she would not attend the hearing, not that the hearing had been canceled, the trial court had discretion to believe either defendant or plaintiff. Therefore, we hold that the trial court properly found that defendant had presented proper cause for a revisiting of the custody order.

"Where an established custodial environment exists, custody may not be changed unless there is 'clear and convincing evidence that [a change] is in the best interest of the child.'" *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996), citing MCL 722.27(c); MSA 25.312(7)(c). Whether a custodial environment exists is a question of fact for the trial court to resolve on the basis of the following statutory criteria:

> "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. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered." [MCL 722.27(c); MSA 25.312(7)(c).]

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and the child is marked by qualities of security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). An established custodial environment can exist in more than one home." *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989).

Defendant's visitation schedule did not amount to an established custodial environment with either one of the children. Until some time after the birth of the second child, defendant's evening visits, while frequent, were of limited duration. Moreover, because the evidence showed that defendant's arrival time at plaintiff's residence often coincided with the children's bedtime, defendant's daily time with the children may have been minimal at times. Therefore, we conclude that the environment between defendant and the children, until sometime after the second child's birth, was not marked by qualities of stability and permanence.

Although defendant subsequently enjoyed frequent visitations from Friday until Sunday with his children, plaintiff testified that the weekend visitations varied in duration and pick-up times. Moreover, prior to the trial court's amended order, defendant had never had the sole obligation of taking care of the children for a period of time exceeding five or six days. Plaintiff's mother was generally responsible for taking the children to the doctor, while plaintiff chose the physicians attending to the children and the day-care facility. Defendant testified that he had concurred with the choice of day care facility. Furthermore, defendant admitted that his weekend visitations had not been sufficient in permitting him to be a part of the children's guidance, nurturing, and development. Likewise, he testified that he had not disciplined his children because they had not been in need of disciplining, while plaintiff and another witness indicated the opposite. We, therefore, hold that the trial court's finding and ruling that a custodial environment had been established with defendant was against the great weight of the evidence and constituted a palpable abuse of discretion.

Having determined that no custodial environment had been established with defendant by the time of the December 8, 1995, hearing, the burden fell on defendant to prove by clear and convincing evidence that a change of the established custodial environment with plaintiff was in the best interests of the children. See *Ireland*, *supra* at 461 n 3. However, the trial court specifically found that the statutory factors, under MCL 722.23; MSA 25.312(3), favored neither parent. The trial court's findings of fact were not against the great weight of the evidence. In fact, we note that factor (b) leans more in favor of plaintiff because defendant admitted that the weekend visitation schedule had not enabled him to be a part of his children's guidance, nurturing, and development.[1] Therefore, defendant did not satisfy the clear and convincing standard of proof that a change was in the best interests of the children.

However, because defendant enjoyed custody of the children for approximately half of the summer of 1996, alternating weekends during the fall school semester of 1996 and summer of 1997, and for approximately six months in 1997, we hold that this case should be remanded for an evidentiary hearing determining whether an established custodial environment has been established with defendant since the summer of 1996. See *Carson v Carson*, 156 Mich App 291, 302; 401 NW2d 632 (1986).

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] MCL 722.23(b); MSA 25.312(3)(b) involves a determination of "[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."