STATE OF MICHIGAN

COURT OF APPEALS

BRIAN L. LOUGHMILLER,

Plaintiff-Appellant,

v

REBECCA LARKINS,

Defendant-Appellee.

UNPUBLISHED
March 9, 1999

No. 211102
Wexford Circuit Court
LC No. 95-011813 DC

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiff father appeals as of right from an order granting primary physical custody of the parties' minor child to defendant mother pursuant to MCL 722.23; MSA 25.312(6). An earlier order granting defendant sole physical custody of the child was vacated by this Court, *Loughmiller v Larkins*, unpublished per curiam opinion of the Court of Appeals, issued 10/31/97, (Docket No. 201887), and the matter remanded to the trial court for further proceedings. On remand, the trial court held a hearing and thereafter issued an opinion and order again granting sole physical custody of the child to defendant. Plaintiff now appeals from the March 31, 1998, order. We reverse and remand.

I

In our prior opinion in this matter, this Court summarized the pertinent facts leading up to the first appeal:

> . . . The parties lived together in Cadillac and had one child, Brian, born January 14, 1994. In August 1995, the parties separated. On January 8, 1996, a custody order was entered awarding them joint legal and joint physical custody of Brian. Under the terms of the order, plaintiff father was granted parenting time every other weekend and two nights per week.
>
> In fall 1996, defendant mother moved from Cadillac to Owosso. Plaintiff then filed a petition for sole physical custody or, in the alternative, continued joint physical custody but with parenting time switching between the parties on a weekly basis. The

> friend of the court recommended joint custody with each party having parenting time on alternating weeks. Defendant objected to the recommendation and requested a de novo hearing. That hearing resulted in an order [dated February 19,1997] changing the previous joint physical custody arrangement to sole physical custody in defendant mother. Plaintiff was awarded parenting time every other weekend and six weeks in the summer.

In vacating the February 19,1997, order for a change in custody and remanding, this Court held in pertinent part:

> On appeal, plaintiff first argues that the court's acceptance of the parties' stipulation as to the nonexistence of an established custodial environment constituted clear legal error requiring reversal. We agree. The determination regarding an established custodial environment results in a determination of whether the standard of proof is clear and convincing evidence or a preponderance of the evidence. The proper standard of proof in custody matters should not be left to the parties, but should be made by the trial judge. . . .
>
> The error cannot be considered harmless, since the record suggests that the child may have had an established custodial environment with both parents. . . . If that is the case, then the trial court used the wrong, lesser standard of proof when he ordered a change of custody. . . . Moreover, we reject defendant's contention that the error is "moot" because her move to Owosso forced a custody change regardless of the applicable standard of proof. An intrastate change of domicile, without more, is not sufficient to warrant a change in custody. . . . The less drastic step of modifying the parties' parenting time schedule could well provide an adequate method to deal with the increased travel time necessitated by defendant's move. We therefore vacate the trial court's order modifying the parties' joint physical custody of Brian. [Citations omitted.]

As a consequence of this ruling, the parties resumed the week-to-week parenting schedule, but difficulties eventually resulted in defendant's petition for rehearing of the custody issue. Plaintiff filed a motion to consolidate the petition with his motion for a determination of support, parenting time, and make-up parenting time.

Following a hearing on the matters raised by the parties, the trial court determined that an established custodial environment existed in both parents' homes. The trial court found, significant to this appeal, that

> The court has considered the testimony and evidence presented at the rehearing and finds that inasmuch as the parties had joint physical custody of said minor child during at least 3 of the past 4 years, and that said child looked to both parents for guidance, discipline, the necessities of life, and parental comfort, that both parents had an established custodial environment.

Reevaluating the matter pursuant to the best interest factors set forth in MCL 722.23; MSA 25.312(3),[1] the court found the parties to be equal, or that it was unable to rule in favor of either party, with respect to the majority of factors. Factors (e) and (f), however, were decided in defendant's favor for related reasons. Regarding factor (e), which evaluates the "permanence, as a family unit, of the existing or proposed custodial home or homes," the court noted that defendant had married and established a home with her new husband while in comparison, plaintiff "apparently" had no definite plans to marry his "live-in companion." The court found, with respect to factor (f) ("[t]he moral fitness of the parties involved") that "living together without the benefit of marriage, especially when young children were involved [was] immoral." As to factor (l) ("[a]ny other factor considered by the court to be relevant to a particular child custody dispute"), the trial court stated that the minor child's enrollment in a headstart program was more of an advantage than a disadvantage to the child. The trial court ultimately concluded that it was in the best interests of the child that defendant have primary physical custody and set forth a visitation schedule virtually identical to that set forth in the court's previous order. The present appeal followed.

II

In the context of child custody cases, appellate courts must apply three different standards of review to three distinct types of findings. *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). This Court will review findings of fact under the great weight of evidence standard. A "trial court's findings on each factor should be affirmed unless the evidence 'clearly preponderates in the opposite direction.'" *Id*. at 879, quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). Questions of law are reviewed for clear legal error. *Id*. at 881. "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Id*. Finally, "[t]o whom custody is granted is a discretionary dispositional ruling," and the ruling will be affirmed unless it "represents an abuse of discretion." *Id*. at 880.

Here, following remand by this Court, the trial court found that "both parents had an established custodial environment." MCL 722.27(1)(c); MSA 25.312(7)(1)(c).[2] Because of the existence of an established custodial environment, custody could only be changed based on a showing of clear and convincing evidence. MSA 722.27; MSA 25.312(7);[3] *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995).

Plaintiff argues on appeal that the trial court committed error requiring reversal in considering cohabitation for purposes of the moral fitness factor (f) in violation of *Fletcher, supra* and *Truitt v Truitt*, 172 Mich App 38; 431 NW2d 454 (1988).[4] However, we need not decide this issue, for even considering factors (e) and (f) in defendant's favor as was done by the trial court, we conclude that the evidence was not sufficiently clear and convincing to justify a change from what the trial court found was an established custodial environment of joint physical custody in both parents to sole physical custody with defendant.

The overriding concern in custody disputes is, of course, the welfare of the child. *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993). Where, as in the instant case, the best interest factors are scored almost equally, we are reminded of the admonition that the process of

reviewing custody decisions is a qualitative, not quantitative decision. *Heid v Aasulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995). The stringent burden of proof – clear and convincing evidence – required to change an established custodial environment, was intended by the Legislature "to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment', *except in the most compelling cases*." *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981) (emphasis added). See also *Carson v Carson*, 156 Mich App 291, 301-302; 401 NW2d 632 (1986).

As noted previously, the trial court herein found that Brian's best interest warranted sole physical custody with defendant. Reviewing the record with the exacting standard of clear and convincing evidence in mind, we conclude that the court's ultimate custody ruling, changing the established custodial environment, constituted an abuse of discretion.

The evidence of record established that Brian attended a four-day-a-week, morning headstart program in Owosso and also attended an afternoon daycare program provided by defendant's school. During the weeks he spent with his father, Brian was in daycare at a licensed facility. Defendant shared a home in Owosso with her self-employed new husband, his two children by a previous marriage, and Brian. Plaintiff continued to live in Cadillac with his fiancee and her three children in a home that they owned together. The testimony at the hearing was consistent in two important respects – the parties were "two good parents," and more significantly, their child, Brian, was characterized by all witnesses as a very happy little boy with no emotional problems. In light of the fact that the parties have shared custody of Brian for three out of the past four years, the testimony adduced at the hearing indicated that Brian had adapted well to the shared custody arrangement and had a close, loving relationship with both parents. By all accounts, the child has thrived in the shared custody arrangement.

A showing of marginal improvement in the child's life is not enough to satisfy the burden of clear and convincing evidence and open the door for a change in custody. *Carson, supra* at 301. In the instant case, the evidence of record does not reflect the requisite compelling circumstances that would justify upsetting the established custodial environment, which currently consists of joint physical custody between the parties. We conclude that the trial court abused its discretion in modifying this arrangement. We therefore reverse the decision of the trial court, reinstate joint legal and joint physical custody of the parties, and remand for the establishment of a new parenting schedule consistent with this opinion and the circumstances of the parties.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

[1] MCL 722.23; MSA 25.312(3) provides:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

[2] An established custodial environment exists if

> [o]ver 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 permanency of the relationship shall also be considered. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

[3] MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides in pertinent part:

> The court shall not modify or amend its previous judgments or orders or issue a new 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.

[4] In *Truitt, supra* at 46, this Court held that "[s]tanding alone, unmarried cohabitation is not enough to constitute immorality under the Child Custody Act." In *Fletcher, supra* at 885-888, this Court held that extra-marital conduct unknown to the child or children did not, as a matter of law, bear on the moral fitness factor.