

STATE OF MICHIGAN
COURT OF APPEALS

DARRELL ANTHONY EAGAN,

Plaintiff-Appellee,

v

CARRIE LYNN EAGAN,

Defendant-Appellant.

UNPUBLISHED

June 1, 1999

No. 214314

Midland Circuit Court

LC No. 91-009065 DM

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

The trial court ordered that physical custody of the parties' three minor children be changed from defendant to plaintiff. Defendant appeals as of right, and we affirm.

A court may not change the established custodial environment of a child unless there is clear and convincing evidence that a change in custody would be in the best interest of the child.¹ *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993); MSA 722.27(1)(c); MSA 25.312(7)(1)(c). In order to determine what the best interests of the child are, the trial court is required to make determinations with regard to the best interest factors enumerated in MCL 722.23; MSA 25.312(3). *Id.* at 327-328. This Court will affirm the decision of the trial court with regard to custody unless it made findings of fact that were against the great weight of the evidence, committed a palpable abuse of discretion in making a discretionary ruling, or committed clear legal error on a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *Bowers, supra* at 324.

The dispositive issue on appeal is whether the trial court's decision to change the custody of the minor children to plaintiff was supported by clear and convincing evidence. In *Fletcher, supra* at 880-881, the Court stated:

To whom custody is granted is a discretionary dispositional ruling. . . . While the abuse of discretion standard is strict, it does not afford trial courts unfettered discretion in awarding custody. The court's exercise of that discretion is already limited by the statutory best interest factors, MCL 722.23; MSA 25.312(3), each of which must be

carefully evaluated by the trial judge. Further, as noted above, a court's ultimate finding regarding a particular factor is a factual finding that can be set aside if it is against the great weight of the evidence. Therefore, a court's discretion in weighing the evidence regarding a particular factor is not unlimited; rather, it must be supported by the weight of the evidence. [Citations omitted.]

In this case, the trial court granted a change in custody after finding that four of the twelve statutory factors, MCL 722.23; MSA 25.312(3), favored plaintiff. Defendant challenges the trial court's findings of fact as to two of those factors and argues that there was not clear and convincing evidence to warrant a change of custody to plaintiff.²

Factor (d) required the trial court to consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d); MSA 25.312(3)(d). The trial court concluded that the environment in defendant's household had not been satisfactory and had led to real problems for the children. By contrast, it found that the change of custody to plaintiff appeared to have been good for the children. The weight of the evidence supported the trial court's finding with respect to factor (d). The Midland Friend of the Court [FOC] family evaluator stated that defendant's life was chaotic and acknowledged that Protective Services had substantiated that some physical abuse had taken place. Plaintiff's fiancée testified that based on what the children had told her, the situation in defendant's home was chaotic. Defendant acknowledged that it was proving very difficult to "blend" her children and the children of her boyfriend into one family unit, and while she acknowledged some incidents of physical "discipline", she discounted their importance. There was also testimony that the children feared defendant's boyfriend. The children's therapist, on the other hand, stated that while the children initially had some emotional problems when he met them after plaintiff obtained temporary custody, they were improving in plaintiff's care. He opined that the best interests of the children would be served if they remained with plaintiff. Plaintiff's mother also noted that the children's behavior had improved significantly from when they had first come to live with plaintiff and that competition between the children had eased.

Factor (h) required the trial court to consider the children's "home, school, and community record." MCL 722.23(h); MSA 25.312(3)(h). The trial court concluded that the children had low skills, were suffering academically, and were having problems in their schooling before living with plaintiff. He further found that plaintiff had taken positive steps to address the children's poor performance in school. Further, the trial court found that the children were under tension at defendant's home and were not adapting well to the chaotic situation of trying to "blend" two families. The trial court's findings with respect to factor (h) were supported by the weight of the evidence. With regard to schooling, defendant acknowledged that the boys had problems in school while they were living with her. Defendant's boyfriend admitted that he had written a letter plaintiff, stating that defendant thought one of the children had a learning disorder and memory problem, that he was "in constant trouble and problems at school," and that he received poor grades. While the boyfriend acknowledged that defendant had not put the children into summer school or gotten them a tutor, he claimed that he had worked on their homework with them and that they had gradually improved. Plaintiff testified, however, that when the three boys began to live with him, they were behind in their schooling. He apparently

started meeting with their teachers every week to monitor their progress and also enrolled them in summer school. Plaintiff and his fiancée further testified that they worked with the boys on their schoolwork in the evenings and had enrolled them in a summer reading program. Plaintiff also testified that the children's report cards evidenced that they were progressing well. The FOC evaluator testified that defendant gave very cursory information about the children's education and that defendant had not supplied her with report cards regarding the children's schooling while they were with defendant. She had received copies of the children's report cards covering the period since they had been with plaintiff, however. In her report, she noted that one of the children was doing well and the other two were showing improvement in the short period of time they had been at their new school. With regard to the home, defendant's boyfriend indicated that he had thought that he and defendant "could make a family sort of like 'The Brady Bunch'." There was ample evidence that their two families had not blended in such a manner.

Based on our review of the record, we cannot conclude that any of the trial court's findings were against the great weight of the evidence. Moreover, we cannot conclude that the trial court abused its discretion in determining that a change of custody was supported by clear and convincing evidence. In ruling on this matter, we note that we strongly disapprove of the parties conduct with regard to the custody of their minor children. There has been significant involvement between the courts and these parties since the complaint for divorce was filed in May of 1991. Moreover, the parties have continually involved the FOC in their matters whether warranted or not. The parties have demonstrated a complete lack of regard for the well-being of their children as well as a lack of maturity in all matters relating to custody and visitation.

Defendant also contends that the trial court committed clear error or a palpable abuse of discretion when it permitted plaintiff to retain temporary physical custody of the minor children pending the full custody hearing. Plaintiff gained temporary physical custody pursuant to an ex parte order. The trial court later concluded that the allegations, which supported the issuance of the ex parte order, were not supported such that a finding of imminent danger could be made. Nevertheless, the trial court allowed plaintiff to keep temporary physical custody pending the full custody hearing rather than returning the children to the established custodial environment with defendant. Defendant's issue is moot. "An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *Michigan National Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). Because we affirm the change of custody order entered by the trial court, no relief can be granted to defendant on this issue.

Affirmed.

/s/ Roman S. Gribbs

/s/ Michael J. Kelly

/s/ Harold Hood

¹ In this case, neither party contests that the children had an established custodial environment with defendant.

² In addition to determining that factors (d) and (h) favored plaintiff, the trial court found that factor (i) favored him because the children expressed a preference to live with him. Under factor (l), any other factor relevant to custody, the trial court considered that the three male children wanted to be with plaintiff and that, at their age, they ought to be given that opportunity, implying that they wanted and needed a male role model. Defendant does not contest the trial court's findings as to factors (i) and (l).