STATE OF MICHIGAN

COURT OF APPEALS

KRISTY LEE LENZ, a/k/a KRISTY LEE BARNES,

Plaintiff-Appellant,

v

RICHARD NEAL,

Defendant-Appellee.

UNPUBLISHED
September 3, 1999

No. 217165
Muskegon Circuit Court
LC No. 95-032831 DI

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

This is a custody case in which the trial court, following a bench trial, awarded primary physical custody to defendant and joint legal custody to both parties in an order filed December 17, 1998. Plaintiff appeals as of right. We affirm.

The parties were never married, but they had a child together, who was born on March 13, 1993. Plaintiff lived with her aunt and uncle (Denise and Dennis Smith) in the city of Muskegon from the time of the child's birth until about one year later, when she moved out. For the following two years, plaintiff did not maintain a stable living environment and in May 1996, the Smiths became limited guardians of the child. The child resided with the Smiths from May 1996 until September 1998. In September 1998, the child began to reside with plaintiff. Meanwhile, defendant moved to Florida shortly after the child was born, has resided there ever since, and married in October 1995. Defendant moved to change custody on July 24, 1997, requesting that he have legal and physical custody of the child. The bench trial occurred on October 20, 1998 and November 6, 1998, and the trial court ultimately awarded defendant joint legal and primary physical custody of the child. Plaintiff's subsequent motion for reconsideration was denied.

We begin with the standards of review in a custody case, which are established by MCL 722.28; MSA 25.312(8):

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal

> unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

Plaintiff first contends that the trial court erred in finding that there was no established custodial environment. "Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria." *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). Specifically, MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides:

> 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 permanency of the relationship shall also be considered. [Emphasis added.]

The trial court found that the child did not have an established custodial environment with either parent because the child resided with a limited guardian from May 1996 until September 1998, resided with plaintiff from September 1998 to the time of trial (approximately 2½ months) and only saw defendant for three weeks during the summer of 1997 and 1998. In *Meyer v Meyer*, 153 Mich App 419, 424; 395 NW2d 65 (1986), a three-month period was considered not to be an "appreciable" period of time with regard to finding an established custodial environment. Based on these facts, the trial court's conclusion that there was no established custodial environment with plaintiff is not against the great weight of the evidence.

Having found that there was no established custodial environment, the trial court had to then determine whether defendant proved by a preponderance of the evidence that custody should be changed. *Hayes, supra* at 387-388. Thus, defendant had to prove by a preponderance of the evidence that it was in the child's best interests for the child to be placed with him. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). A trial court determines the best interests of the child by weighing the twelve statutory factors set forth in MCL 722.23; MSA 25.312(3). *Hilliard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998). A trial court's findings with regard to each of the twelve factors is subject to the great weight of the evidence standard and should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.*, citing *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (Brickley, J.).

Plaintiff contests the trial court's decisions with regard to factors (a) (the love, affection, and other emotional ties existing between the parties involved and the child), (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity), (g) (mental and physical health of the parties involved), and (i) (the reasonable preference of the child if the court considers the child to be of sufficient age to express a preference).

With regard to factor (a), the trial court determined that both parties were equal in emotional ties. The trial court supported its finding by finding that: the strongest emotional ties were with the co-guardian (Denise Smith); although plaintiff had considerably more contact with the child than defendant, very little attachment or affection between the child and plaintiff was observed; defendant had

established an appropriate and realistic relationship with the child, but the emotional ties were not as strong as they could have been because of the limited contact defendant had with his daughter; and both parties needed to strengthen their emotional ties with the child. The friend of the court found that plaintiff and defendant both had love and affection for the child, that the child had love and affection for both parents, and that plaintiff and defendant scored equally on that factor. The Family Independence Agency found that the child and plaintiff appeared to be getting along while they were living together, and that defendant and his wife called the child on a regular basis and also had a three-week visit with her in Florida during the summer of 1997. Based on this evidence, it cannot be said that the trial court's conclusion regarding this factor is against the great weight of the evidence.

With regard to factor (d), the trial court determined that neither plaintiff nor defendant had provided the child with a stable environment and that the only stable environment she had ever had was when she lived with her co-guardians. This decision was supported by the friend of the court, which stated that this question could not be answered because the child had not lived with either party. The Family Independence Agency stated that the only time the child had a stable environment was when she was living with her co-guardians. Although plaintiff argues that she has lived with the child for the past 2½months, as has been discussed, 2½months is not an "appreciable time" with regard to this child custody matter. Based on this evidence, it cannot be found that the trial court's conclusion regarding this factor is against the great weight of the evidence.

With regard to factor (g), plaintiff argues that without expert testimony or testimony from her treating therapist, psychologists, or psychiatrist, this factor should not have been weighed against her. The trial court supported its finding by stating that neither party experienced any physical health impediments; plaintiff had been in counseling after a suicide attempt in 1997; that plaintiff also attended anger management classes; that plaintiff was sexually abused as a child and was in therapy for it; that plaintiff had domestic violence convictions; that plaintiff demonstrated inappropriate sexual behavior in the presence of her daughter; and that these findings negatively impacted the parenting abilities of plaintiff. The friend of the court rated both parties equal as to their mental health. The Family Independence Agency found that plaintiff had a history of domestic violence, had been sexually victimized in the past, had several destructive relationships, and had not been a stable or supportive parent. Therefore, the trial court's finding with respect to this factor is not against the great weight of the evidence.

With regard to factor (i), plaintiff argues that the reasonable preference of the child to remain with plaintiff, as stated in the in-camera meeting with the trial court, should be afforded more weight than the statement that the child made to the social worker that she wanted to live with defendant, because the statement made to the social worker was too remote in time from the custody hearing. The trial court found that both parties were in equal status regarding this factor. The trial court found that when it interviewed the child, she expressed a preference to live with plaintiff, but preferred defendant when interviewed by the social worker. The trial court also stated that the child's ambivalence was understandable given her age and lack of any lengthy residence with either party. The friend of the court had no opinion on factor (i) because it did not talk to the child about her preference. Because the child

stated two different preferences, we cannot conclude that the trial court's finding that the parties were equal regarding factor (i) was against the great weight of the evidence.

Accordingly, the trial court did not abuse its discretion in concluding that defendant satisfied his burden of proving by a preponderance of the evidence that it was in the best interests of the child to change custody to defendant.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck