

STATE OF MICHIGAN
COURT OF APPEALS

ARVID WALLER and BEULAH WALLER,

Plaintiffs-Appellants,

v

NEIL WALLER,

Defendant,

and

LAURA BROWN,

Defendant-Appellee.

UNPUBLISHED

January 7, 2000

No. 217407

Genesee Circuit Court

LC No. 98-202602 DC

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

This appeal concerns the custody of three minor children. Defendants were married in June 1989, and Laura Brown obtained a divorce from Neil Waller in North Carolina in March 1998; the three children were born at various times during the marriage. In late 1996, while defendants were still married, defendants sent the three children to live with plaintiffs Arvid and Beulah Waller in Flint, Michigan; the Wallers are Neil Waller's parents and, therefore, the children's grandparents. Neil Waller and Laura Brown gave the Wallers a limited power of attorney to care for their children at the time the children began living with the Wallers. In April 1997, the Wallers obtained a court-ordered guardianship of the three children, which defendants did not oppose. In April 1998, the Wallers filed for custody of the children. Following a bench trial, the trial court granted custody to Brown. The Wallers appeal as of right. We affirm.

I. The Great Weight Of The Evidence

A. Standard Of Review

The Wallers argue that the trial court's findings in evaluating the child custody factors, MCL 722.23; MSA 25.312(3),¹ were against the great weight of the evidence. A trial court's findings regarding the existence of an established custodial environment and each custody factor should be affirmed unless the evidence "clearly preponderates" in the opposite direction. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998).

B. Burden Of Proof

This case involves two conflicting statutory presumptions regarding custody. Ordinarily, if a custody dispute is between a parent and a third party, a court must "presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." MCL 722.25(1); MSA 25.312(5)(1). However, MCL 722.27(C); MSA 25.312(7)(c) makes clear that a

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.

These provisions conflict in this case because the trial court determined that the Wallers, not Brown, provided the children with an established custodial environment. Case law resolves this conflict, holding that the parent challenging a third party who has provided an established custodial environment has the burden of persuading the court to grant him or her (the parent) custody, but only by a preponderance of the evidence. See *Straub v Straub*, 209 Mich App 77, 79-80; 530 NW2d 125 (1995), citing *Rumvelt v Anderson*, 196 Mich App 491, 496; 493 NW2d 434 (1992).

C. The Trial Court's Findings

The trial court found that the parties were equal in regard to child custody factors (a), (b), (c), (e), (f), (g), (h), (i) and (k). MCL 722.23; MSA 25.312(3). The trial court specifically found that factor (d), time in a stable environment, favored the Wallers, and factor (j), willingness to facilitate the children's relationship with the parents, favored Brown. With respect to factor (l), which permits a trial court to consider "[a]ny other factor" it deems "relevant to a particular child custody dispute," the trial court in this case commented at length on Brown's efforts to train for and obtain a job to support her family. The trial court also noted that Brown testified that she believed that the Wallers were going to take care of the children on a temporary basis, and only after Neil Waller was unable to care for the children himself. The trial court further noted that Brown granted the Wallers a limited power of attorney to care for the children, but not custody, and that this supported her testimony that the arrangement was temporary. The trial court did not explicitly say that its findings under this "catchall" factor favored Brown. Yet, the positive tone the trial court used toward Brown and its failure to identify additional facts that favored the Wallers under this factor suggest that it concluded that factor (l) favored Brown, and ultimately tipped the balance of the findings under all the factors in her favor.

The Wallers argue the trial court's findings concerning factors (a), (b), (c), (e), (f), (h), (i), (j), and (k) go against the great weight of the evidence. We disagree. Nothing in the record indicates that the trial court erred in its findings.

To the contrary, the record indicates that both Brown and the Wallers established emotional ties between themselves and the children, both parties love the children, and both plan to continue to educate the children and involve them in religious activities. The record also reflects that both parties have the capacity to provide for the children. The Wallers are retired schoolteachers and Brown is enlisted in the United States Coast Guard. Brown, although a member of the military, has rented a three-bedroom home and can provide a permanent family home. We have found nothing in the record to suggest that either party was morally unfit to raise and care for the children. Although the trial court, after speaking with the three children, determined that the eldest child was of sufficient age to render a preference for the Wallers, the trial court did not err in concluding that the preference was based on the child's desire not to move, rather than an actual preference for the Wallers.

The trial court also found that Brown was more willing to facilitate and encourage a relationship between the children and the Wallers than the Wallers would be willing to do the same for Brown. Although the Wallers and Brown testified that they each would be willing to encourage a relationship between the children and the other party or parties to this dispute, there was sufficient evidence on the record to support the court's finding. For instance, the Wallers did offer to establish a regular time for Brown to speak with the children by telephone. However, they did little or nothing to encourage Brown to spend more time with the children during her brief visits to Michigan. We also note that the Wallers asked Brown to give them guardianship of the children several times and, even though she refused each time, they then sought custody of the children against Brown's will. Also, as the trial court remarked, Brown divorced the Wallers' son, which would make it difficult for them to overcome any animosity they have toward Brown in order to encourage her to have a relationship with the children. Indeed, the record makes it apparent that there is tension between the parties. For instance, the Wallers reportedly told Brown that the only way she would ever regain custody of her children would be to reconcile with Neil or to obtain a court order. Overall, there is nothing to indicate that the trial court's findings under this factor or its conclusion that those findings weighed in Brown's favor was against the great weight of the evidence.

II. *Straub*

A. Standard Of Review

The Wallers argue that the trial court erred in applying the holding in *Straub, supra* at 81, to this case, awarding custody to Brown after evaluating the child custody factors evenly among the parties. Specifically, the Wallers contend that the public policy to return custody to a parent who relinquished custody temporarily to protect the child's best interest does not apply in this matter. *Id.* Because this is a custody case, we review the trial court's decision to apply the holding in *Straub* to this case for clear legal error. MCL 722.28; MSA 25.312(8); *Fletcher, supra* at 23.

B. The Holding In *Straub*

In *Straub*, this Court held that the lower court erred by not considering the temporary nature of the defendants' relinquishment of her daughter to the grandparents. *Id.* at 81. The *Straub* Court held that it is "good public policy to encourage parents to transfer custody of their children to others temporarily when they are in difficulty by returning custody when they have solved their difficulty." *Id.* Here, although there was no specific agreement that the Wallers' custody was temporary, there is absolutely no evidence to support a conclusion that Brown intended to have them care for her children permanently. Therefore, the trial court did not err in applying *Straub* to this case.

IV. Conclusion

Because the trial court's findings regarding the child custody factors were not against the great weight of the evidence and the trial court properly applied the holding in *Straub*, we conclude that the trial court did not abuse its discretion in awarding custody of the children to Brown.

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra

¹ The text of MCL 722.23; MSA 25.312(3) reads as follows:

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.