STATE OF MICHIGAN

COURT OF APPEALS

BRADY L. NELSON,

Plaintiff-Appellant,

v

RACHEL L. NELSON,

Defendant-Appellee.

UNPUBLISHED
February 4, 2000

No. 219605
Delta Circuit Court
Family Division
LC No. 98-014379-DM

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered on May, 3, 1999, that dissolved the parties' marriage and awarded physical custody of the parties' son, Paul, to defendant. Specifically, plaintiff challenges the trial court's decision to award physical custody of Paul to defendant. We affirm.

Plaintiff first argues that the trial court erred in finding that no established custodial environment existed. We find no error.

In a child custody case, we review the trial court's findings of fact under the "great weight of the evidence" standard, the court's discretionary rulings for an abuse of discretion, and questions of law under the clearly erroneous standard. MCL 722.28; MSA 25.312(8); *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). A trial court's findings as to the existence of an established custodial environment and as to each best interests of the child factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995).

The criteria for determining a child's best interests in a child custody case are contained in MCL 722.23; MSA 25.312(3). Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). The court must make a specific finding regarding the existence of a custodial environment. If the court fails to do so, this Court will remand for such a finding. *Underwood v Underwood*, 163 Mich App 383, 389; 414 NW2d 171 (1987).

MCL 722.27(1)(c); MSA 25.312(7)(1)(c), states in relevant 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. 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.

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence. *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987); *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

The trial court in this case found that "[g]iven the history of parenting by both parties, the Court finds that no established custodial environment exists." Plaintiff cites *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989), for the proposition that an established custodial environment can exist in more than one home. However, repeated changes in physical custody and the uncertainty created by an upcoming custody trial destroys an existing established custodial environment and precludes the establishment of a new one. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995); *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993). In the present case, plaintiff left the marital home on May 2, 1998, and filed a complaint for divorce on May 15, 1998. Two weeks later, on May 29, the parties agreed to a temporary order that granted them joint legal and physical custody of Paul and provided a schedule for parenting time.

Plaintiff neglects the fact that the parties' arrangements were temporary and were made in contemplation of their upcoming divorce and custody trial. The effect of this agreement was to provide equal parenting time for each party. An established custodial environment is one of security, stability, and permanence. *DeVries*, *supra* at 271; *Baker*, *supra* at 579-580. These facts demonstrated an uncertainty regarding who would be Paul's ultimate custodian and were sufficient to preclude Paul from having an established custodial environment with either parent. We do not find that the evidence before the court preponderated in defendant's favor. The trial court did not err in concluding that the parties' history evidenced that no established custodial environment existed with respect to either parent.

Plaintiff next argues that the trial court erred in its determination that granting physical custody of Paul to defendant would be in the child's best interests. We disagree.

MCL 722.23; MSA 25.312(3) sets forth the criteria necessary to determine a child's best interests in a custody case. Plaintiff contends that the trial court evaluated factors (c), (e), and (j) incorrectly.

The court found that factor (c) ("[t]he 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") favored defendant. The court found that each party possessed the ability to identify and respond to Paul's needs and to support him financially. The court was concerned, however, that plaintiff's diabetes posed a risk to Paul, given his tender age, and the fact that plaintiff could have a diabetic reaction without warning.

Plaintiff argues on appeal that the great weight of the evidence adduced at trial demonstrated that his diabetes would not interfere with his ability to care for Paul. Plaintiff points to the fact that he changed his insulin intake and eating habits, as well as the absence of any evidence that he had had any insulin reactions since 1995. Plaintiff further notes that he took care of Paul and defendant's nieces in the past without any problems, and defendant never expressed any concern. Finally, plaintiff's physician testified that plaintiff had his diabetes under control.

Plaintiff's argument has merit insofar as the evidence presented to the trial court demonstrated that his control over his diabetes had greatly improved. Nevertheless, this evidence does not completely negate the risk that plaintiff would suffer an insulin reaction, without warning, that could jeopardize Paul's safety. Plaintiff testified at trial that his diabetic reactions caused fatigue and lack of coordination. Plaintiff's physician testified that such reactions could lead to a state of unconsciousness, and that plaintiff still posed a theoretical risk of suffering an insulin reaction. Three witnesses, including defendant, testified to incidents in which plaintiff was unable to halt the effects of an insulin reaction without the help of others. While plaintiff may have improved his ability to control his diabetes in recent years, this testimony supported the trial court's concern that a risk still existed. Therefore, the trial court's finding that plaintiff's diabetes continued to pose a risk to his ability to care for Paul was not against the great weight of the evidence.

The court also decided factor (e) ("[t]he permanence, as a family unit, of the existing or proposed custodial home or homes") in favor of defendant. Plaintiff contends that the trial court's findings were against the great weight of the evidence because the court failed to take into consideration the fact that defendant had removed her live-in nanny from the house, that she had decided not to sell the marital home after she stated that she would, and that defendant's other children did not have any contact with their own fathers.

Factor (e) focuses on the "child's prospects for a stable family environment." *Ireland, supra* at 465. The trial court accepted defendant's testimony that her own children's relationship with Paul had improved since the separation, and that defendant had created an uncomfortable environment for all the family members. The court also doubted that plaintiff would promote a relationship between Paul and his half-siblings. Defendant testified that while neither of her children had seen their respective fathers for many years, both men were alcoholics and one was physically abusive. In our view, the court's finding was not against the great weight of the evidence. Testimony at trial indicated that plaintiff was known as a "baby hog" and that defendant's children began to strengthen their relationship with Paul after he left the home. The trial court was free to give appropriate weight to the testimony presented, and its findings were supported by the record.

Finally, the court found that factor (j) ("[t]he 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") favored defendant. The court cited instances where plaintiff deprived defendant of information about Paul and prevented her from access to the child.

Plaintiff argues that the trial court erred in not considering instances in which defendant did not return Paul to him once her scheduled parenting time had ended. Plaintiff places particular emphasis on his testimony regarding an incident at his apartment that resulted in defendant taking Paul away from him on a day that she was not scheduled for parenting time. Plaintiff testified that the parties had an argument in his apartment, and that defendant tore his telephone from the wall and carried Paul away. According to plaintiff, he had to call the police on a neighbor's phone, and needed police assistance to secure Paul's return. Defendant, on the other hand, testified she took Paul from plaintiff's house because plaintiff was having a diabetic reaction, and she feared for Paul's safety. Defendant testified that she believed plaintiff had ripped the phone out of the wall in frustration, and that she took Paul immediately to the police station.

The trial court was free to determine the weight to be given to this conflicting testimony. On review, we substantially defer to the trial court's superior vantage point respecting issues of credibility and preferences under the statutory factors. *Harper v Harper*, 199 Mich App 409, 414; 502 NW2d 731 (1993). While the trial testimony could have supported a finding in plaintiff's favor with respect to factor (j), we do not conclude that the court's findings were against the great weight of the evidence. The trial court did not err in determining that defendant would be more willing to foster a continuing relationship between Paul and the other parent.

Because the court found that no established custodial environment existed, defendant, as the petitioning party needed only to convince the trial court by a preponderance of the evidence that it should grant her physical custody. *Hayes*, *supra* at 387; *Hall v Hall*, 156 Mich App 286, 289; 401 NW2d 353 (1986). A trial court, while considering the best interests of the child factors, MCL 722.23; MSA 25.312(3), need not give each factor equal weight, *McCain*, *supra* at 131, but must make specific findings of fact and conclusions of law on each factor, *Meyer v Meyer*, 153 Mich App 419, 426; 395 NW2d 65 (1986). In the present case, four of the twelve factors weighed in defendant's favor, while one factor favored plaintiff. The court made a straightforward, step-by-step analysis of the various factors, and its findings were based on the evidence adduced at trial. The court's findings of fact were not against the weight of the evidence, nor did its ultimate weighing of the factors in favor of plaintiff constitute an abuse of discretion.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald