STATE OF MICHIGAN

COURT OF APPEALS

PENNY KAY ULVUND,

Plaintiff-Appellant,

v

BILL JAMES ULVUND,

Defendant-Appellee.

UNPUBLISHED
August 22, 2000

No. 224566
Charlevoix Circuit Court
LC No. 94-012717-DM

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

PER CURIAM.

Plaintiff appeals as of right from an order modifying the parties' judgment of divorce, regarding the custody and support of their minor son. We affirm because we believe that clear and convincing evidence supported a finding that the change of custody was in the child's best interest.

The parties married in 1981 and divorced in 1994. The judgment of divorce ordered joint legal and physical custody of the parties' three children. In 1995, plaintiff moved from Charlevoix County to Jackson County, necessitating a change in the physical custody of the minor children. The parties stipulated to a custody arrangement under which defendant obtained primary physical custody of the two older children, but the parties maintained joint physical custody of the youngest child. That child resided with defendant twelve days out of every month, otherwise resided with plaintiff, and attended pre-school in both locations. When he became old enough to attend kindergarten, it again became necessary to change the physical custody arrangement. The parties filed cross-motions, each seeking physical custody of the youngest child during the school year. Following a three-day evidentiary hearing, the trial court awarded physical custody to defendant during the school year, and to plaintiff during the summer. Plaintiff appeals as of right.

Plaintiff first argues that the trial court erred in determining that an established custodial environment did not exist. The standard of proof applied to motions for change of custody turns on the circuit court's factual determination regarding the existence of an established custodial environment. The Child Custody Act provides that a trial court may change custody of a minor child, when an established custodial environment exists, only upon a showing of clear and convincing evidence that the change of

custody is in the child's best interest. 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. 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.

Our Supreme Court has interpreted this provision as creating a high standard of proof for changing an established custodial environment. As the Court held:

> In adopting § 7(c) of the act, the Legislature intended 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, 576-577; 309 NW2d 532 (1981).]

In contrast, when an established custodial environment does not exist, the trial court may order a change of custody upon a showing by a preponderance of the evidence that the change of custody is in the child's best interest. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). In this case, the trial court determined that an established custodial environment did not exist, and therefore applied the preponderance of the evidence standard instead of the clear and convincing evidence standard. We will only reverse a trial court's factual determination regarding the existence of an established custodial environment if that determination was against the great weight of the evidence. *Fletcher v Fletcher*, 447 Mich 871, 878-879 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Id.*; *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), aff'd 451 Mich 457 (1996). In this case, we conclude that the trial court's finding that no established custodial environment existed was against the great weight of the evidence.

The circuit court found as a matter of fact that the parties' youngest child spent substantial time with each of the parties, attended pre-school out of both homes, and looked to both parties equally for guidance, discipline, the necessities of life, and parental comfort. Furthermore, the circuit court found as a matter of fact that each parent was fully invested in the child's life. Nevertheless, the court concluded that an established custodial environment did not exist *in one parent's home.* The circuit court apparently believed that an established custodial environment may exist in the home of only one divorced parent, and that such an environment cannot exist simultaneously in the homes of both parents, where the parents share joint physical custody. Clearly, where supported by the facts, a circuit court may find that an established custodial environment exists in more than one home. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000); *Duperon v Duperon*, 175 Mich App 77, 80; 437

NW2d 318 (1989); *Nielsen v Nielsen*, 163 Mich App 430, 433-434; 415 NW2d 6 (1987). Were it the rule that a custodial environment may exist in only one parent's home, then any joint physical custody arrangement could be disturbed by the other parent on a mere preponderance of the evidence, in derogation of MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

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. *Baker*, *supra* at 579-580; *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987). In this case, the shared physical custody arrangement was in place for most of the child's life. Given the circuit court's factual finding that the child looked to both parties equally for guidance, discipline, the necessities of life, and parental comfort, we find that the circuit court committed error when it held that an established custodial environment did not exist. Absent facts indicating that the custodial environment dissolved, the circuit court could not change custody, in favor of either parent, without a showing of clear and convincing evidence that the change was in the child's best interest. MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

Plaintiff next argues that the circuit court erred in awarding physical custody of the child to defendant during the school year, contending that defendant failed to demonstrate by clear and convincing evidence that such a change in custody was in the child's best interest. We disagree.

A circuit court's custody award is a discretionary disposition that we may only reverse if the result is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Fletcher*, *supra* at 879-880 (Brickley, J.), 900 (Griffin, J.); *Winn v Winn*, 234 Mich App 255, 262; 593 NW2d 662 (1999); *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Custody disputes must be resolved in the best interests of the child, as measured by the factors set forth in MCL 722.23; MSA 25.312(3).[1] *Deel v Deel*, 113 Mich App 556, 559; 317 NW2d 685 (1982).

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[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.

(continued…)

In this case, the trial court carefully considered the best interest factors, and after reviewing the substantial hearing record, we conclude that the court's factual findings were not against the great weight of the evidence. The central thrust of plaintiff's argument is that the trial court's custody determination was infused with bias against her because of her homosexual lifestyle. The court's consideration of plaintiff's homosexual lifestyle where relevant to the statutory factors was not legal error. *Hall v Hall*, 95 Mich App 614, 615; 291 NW2d 143 (1980). Contrary to plaintiff's contention, the trial court generally considered plaintiff's stable relationship with her partner as a factor in favor of her gaining physical custody of her son during the school year. The court's opinion only mentioned her relationship when discussing four of the twelve best interest factors. In discussing factor c, plaintiff's capacity and disposition to provide for the child's material needs, the court included her partner's income. In discussing factor e, the permanence of the family unit, the court observed that plaintiff and her partner may face societal pressures because of their relationship, but concluded that they are sufficiently mature

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(…continued)

(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.

and wise to deal with the burden. The court concluded that the parties were equal concerning both these factors.

In discussing factor b, the capacity and willingness of the parties to provide affection, guidance, education, and religious training, the court found both parties fully and equally competent, except that it concluded that defendant will be more readily able to raise the child in his religion. The court found defendant to be extensively involved in his church, and that finding is supported by the record. The court found that although plaintiff attends church, she will eventually have to deal with the conflict between church doctrine and her choice of a homosexual lifestyle. The existence of the conflict was supported with evidence at the hearing, and plaintiff acknowledged that she will someday have to deal with it. The evidence does not preponderate against the court's finding that this factor favored defendant. *Fletcher*, *supra* at 879-880 (Brickley, J.), 900 (Griffin, J.).

In discussing factor l, the catch-all factor, the court stated that it could not find that plaintiff's homosexual lifestyle had directly harmed the child. It is true that the decision by plaintiff and her partner not to physically express their affection in the child's presence affected the court's determination that the child's best interests were better served by an award of custody to defendant, who testified that he and his wife do express affection for each other in their home. However, this was but one concern of several that inclined the court toward defendant under this factor. The court also explicitly compared: (1) plaintiff's continuing cigarette smoking in the child's presence, after receiving direction from a health professional that she must stop doing so, and the lack of cigarette smoking in defendant's home; (2) the availability of other siblings in defendant's home for companionship and the diminishing frequency of visits by plaintiff's older children to Jackson; (3) the child's television exposure in plaintiff's home as compared to more monitored and restricted viewing in defendant's home; (4) the availability of extended family in Boyne City and lack thereof in Jackson; and (5) defendant's more flexible work hours and more limited use of daycare. We must give considerable deference to the superior vantage point of the trial judge respecting issues of credibility and preferences under the statutory factors. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991); *Lewis v Lewis*, 138 Mich App 191, 193; 360 NW2d 170 (1984). The trial court's findings of fact were supported by the evidence, as were its findings on the custody factors. *Fletcher*, *supra* at 879-880 (Brickley, J.), 900 (Griffin, J.). The placement of the child with defendant did not defy logic or indicate a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id*.

As the circuit court noted, this is a close case. The child has two good parents who live several hours apart, and the child must attend school in just one location. The existing, joint physical custody arrangement simply could not continue, and had to be changed in favor of one parent or the other. We believe, under the circumstances of this case, that the evidence in the record supports a finding by clear and convincing evidence that the change of custody was in the child's best interests.

Further, we note that plaintiff's argument assumes that the trial court should have awarded her custody during the school year if defendant was unable to satisfy the clear and convincing evidence standard. In this case, the trial court considered cross-motions for physical custody of the child during the school year. In order to gain custody of the child during the entire school year, plaintiff was also required to prove by clear and convincing evidence that such a change

from the existing joint custody arrangement was in the child's best interests. Plaintiff has not shown that she satisfied this burden of proof on her cross-motion.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins