STATE OF MICHIGAN

COURT OF APPEALS

AARON KENT GREENE, Plaintiff-Appellee,	UNPUBLISHED October 6, 2000
v	No. 225702 Alpena Circuit Court
MARYANN GREENE, Defendant-Appellant.	LC No. 99-000505-DM

Before: Saad, P.J., and Hoekstra, and Markey, JJ.

PER CURIAM.

Defendant appeals by right the order regarding the custody of the parties' daughter set forth in the parties' judgment of divorce. We affirm.

The parties first married in 1992 and divorced in 1993. They married again in 1998 and obtained a judgment of divorce on February 18, 2000. Between the marriages, the parties had a child, Anne Marie (born January 25, 1997); however, a consent order of filiation was entered in July 1997. Pursuant to a custody order entered that year, defendant received legal and physical custody of Anne Marie.

Defendant first argues that the trial court erred by granting plaintiff an ex parte order preventing the removal of the child from the marital home in February 2000 when the 1997 custody order awarding the child to her was still in effect, without determining whether an established custodial environment existed for the child. On appeal, we must affirm an order of the circuit court unless the court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed clear legal error on a major issue. MCL 722.28; MSA 25.312(8).

MCR 3.207(A) states:

> The court may issue ex parte and temporary orders with regard to any matter within its jurisdiction, and may issue protective orders against domestic violence as provided in subchapter 3.700.

Regarding ex parte orders, MCR 3.207(B)(1) provides in part:

> Pending the entry of a temporary order, the court may enter an ex parte order if the court is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued.

However, MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides:

> 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.

"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).

The ex parte order required that the child not be removed from the marital home at a time when both parties still resided in the home. It also provided that a written objection filed within fourteen days after service would trigger an investigation by the fiend of the court and if that did not produce a satisfactory resolution, the circuit court would review the matter. Defendant did not contest the order. She moved from the marital home in Alpena County to the Flint area, leaving the child with plaintiff. Because a change in custody was not mandated by the ex parte order, we conclude that the trial court did not err in issuing the order without determining the existence of an established custodial environment under MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

Next, defendant argues that the friend of the court violated its duty to be fair and impartial. Defendant filed objections to the final report of the friend of the court, challenging allegations and conclusions contained in it, and the report was not admitted as evidence in the trial. Defendant was free to present contrary evidence and arguments at trial. There is no indication that the trial court improperly used the report and recommendation in forming its decision. Defendant provides no legal authority or basis for relief on this issue, and we therefore deem this issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Next, defendant argues that the trial court made erroneous and insufficient findings of fact and abused its discretion by awarding custody of the child to plaintiff in the judgment of divorce. We must affirm a trial court's custody order unless its findings were against the great weight of the evidence, the

court committed a palpable abuse of discretion, or it made a clear legal error on a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 879-880 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999). The great weight of the evidence standard applies to all findings of fact. *Fletcher*, *supra* at 879 (Brickley, J.), 900 (Griffin, J.); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), aff'd as modified 451 Mich 457; 547 NW2d 686 (1996). Questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Fletcher*, *supra* at 881 (Brickley, J.), 900 (Griffin, J.); *Schoensee v Bennett*, 228 Mich App 305, 312; 577 NW2d 915 (1998). The trial court's determination of the party to receive custody is a discretionary disposition that we may reverse only 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.), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child's best interests. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). Where, as here, a custody order exists, the trial court must make a finding regarding the existence of a custodial environment. If it fails to do so, we will remand for a finding unless sufficient information in the record permits this Court to make its own finding by de novo review. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000), quoting *Thames v Thames*, 191 Mich App, 299, 304; 477 NW2d 496 (1991). During closing arguments, counsel for the parties stated on the record that the parties agreed that the existence of a custodial environment was not an issue in the case. This same fact was reiterated at oral argument before this Court. A complete reading of the trial court's opinion evidences that it had concluded that the child had an established custodial environment with plaintiff. Indeed, the trial court did not utter the exact words, "I find an established custodial environment." But that finding is evident. We do not believe it incumbent on us to put form over substance in this fact scenario. The trial court did explicitly indicate, albeit when discussing the best interest factors, that the child had lived with plaintiff since birth and that defendant had moved out of town which resulted in her having less contact with the child.

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and the child is marked by security, stability, and permanence. *Baker*, *supra* at 579-580. We find that such was precisely the situation in the instant case and was also clearly recognized by the trial court.

If the trial court finds that an established custodial environment exists, it must determine the best interests of the child under the clear and convincing standard. *Winn v Winn*, 234 Mich App 255, 262-263; 593 NW2d 662, remanded on other grds 459 Mich 1002 (1999). Custody disputes must be resolved in the best interests of the child as measured by the factors in MCL 722.23; MSA 25.312(3). *Deel v Deel*, 113 Mich App 556, 559; 317 NW2d 685 (1982). Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor and the failure to do so is usually error requiring reversal. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998); *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). However, the court

need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *Fletcher, supra* at 883 (Brickley, J.), 900 (Griffin, J.). A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances. *McCain, supra* at 130-131. A single circumstance can be relevant to and considered in determining more than one of the child custody factors. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 25-26; 581 NW2d 11 (1998).

Here, the trial court considered each of the best interests factors of MCL 722.23; MSA 25.312(3). The court found the parties equal with regard to factors (a), love, affection, and ties with the child; (f), moral fitness; (g), mental and physical health; and (j), willingness to facilitate a relationship with the other party, without discussing the evidence on which it based its findings, contrary to *McCain, supra* at 124. However, defendant has not claimed that any of these factors favored her, and we find that the record supports the court's conclusion of equality as to these factors. We therefore conclude that defendant waived this error. The court found that factors (h), home, school, and community record; (i), the preference of the child; and (k), domestic violence, were not relevant in this case and made no use of (l), the catch-all factor.

The court found that factors (b), the capacity and disposition to give love, affection, guidance, education, and religious training; (d), the length of time the child lived in a stable satisfactory environment; and (e), the permanence of the family unit and permanence of the homes, favored plaintiff. Regarding factor (b), MCL 722.23(b); MSA 25.312(3)(b), the capacity and disposition of the parties to give love, affection, guidance, and continue the education and religious life of the child, the court quoted the conclusions in the psychological evaluations that were admitted at trial that plaintiff needed counseling and parenting classes to be an effective parent and had addressed and was making progress with these weaknesses, and that defendant needed individual therapy for her personal issues and decision making under stress, and that defendant had failed to address her problems. The evidence presented at trial supported the court's findings regarding plaintiff's efforts and progress. Defendant did not present evidence of any counseling she had recently obtained. We affirm the court's findings of fact on this issue.

Regarding factor (d), the length of time the child lived in a stable, satisfactory environment, and the desirability of continuity, MCL 722.23(d); MSA 25.312(3)(d), the court stated:

> Here, the father has demonstrated that he occupies the more stable home environment. The child has been with him since birth. The Defendant mother did relocate, for reasons that are not entirely clear to this Court, at a time and at a distance that has not allowed her the contact with her child that otherwise would have been available.

Defendant argues that the court erred by finding that the child resided with plaintiff since her birth. The Court did not, however, so conclude. Nonetheless, the evidence clearly supports a finding that plaintiff had always been involved with the child since her birth, but that defendant moved away from the marital home at a time and a distance that severely limited her contact with her child. The stability of the home

might be undermined by events including "frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent," as well as other disruptive factors. *Ireland v Smith*, 451 Mich 457, 465 n 9; 547 NW2d 686 (1996). In light of the evidence, we conclude that the evidence did not preponderate against the trial court's finding that this factor favored plaintiff. *Fletcher, supra* at 879 (Brickley, J.), 900 (Griffin, J.).

Regarding factor (e), the permanence, as a family unit, of the existing or proposed custodial home, MCL 722.23(e); MSA 25.312(3)(e), the court stated:

> Here, again, the advantage is with the father. He has been more attentive and concerned with the issues of stability. Except for one necessary change of abode, his living conditions and employment have been stable. He offers that stability in the future.
>
> The Defendant has been less stable in her employment, hours of employment and abode. In fact, she has made many changes in a relatively brief period of time.

The focus of this factor is on the permanence of the family unit in each of the homes to be compared and not on their acceptability. *Ireland*,451 Mich at 464.

Defendant argues that the trial court erred by finding that plaintiff was more stable because he maintained employment with one employer while defendant changed jobs. Our review of the evidence persuades us that the court's finding that plaintiff's tendency was to stay with the same employer for a longer period of time than defendant stayed with an employer was not against the great weight of the evidence. This finding is not particularly relevant to the factor under consideration. The parties' work history would appear to be relevant, instead, to factor (b), the parties ability to support the child's education, to the extent that irregular hours might make it more difficult to accommodate the child's regular daytime activities and support her homework efforts, as well as factor (c), their abilities to provide for her material needs, factor (d), the stability of the home environment and schedule, and the catch-all factor, (l). While our Supreme Court has noted the overlap between factors (d) and (e), the focus of the evaluation under factor (e) must be on the facts that bear on which party can best provide "the benefits of a custodial home that is marked by permanence, as a family unit." *Ireland, supra* at 465-466. The court's focus on the parties' employment history in evaluating this factor was erroneous; however, the balance of the trial court's analysis on this factor was appropriate as was the court's ultimate conclusion that this factor favored plaintiff.

Finally, defendant argues that the trial court erred by failing to state the reason for denying her motion for amended judgment. Although defendant's motion was to amend the judgment, she brought her motion before judgment had been entered. At the hearing, acting in propria persona, she requested a new trial on a limited issue so that she could present new evidence. She complained that her trial counsel was not adequately prepared for trial, that she attended three counseling sessions after receiving her psychological evaluation, and alleged that plaintiff remarried her in order to obtain custody of the child. The court properly denied her motion for new trial based on new evidence because she failed to

show that the evidence could not have been discovered and produced at trial. *Gillispie v Bd of Tenant Affairs of Detroit Housing Comm*, 122 Mich App 699, 702-703; 332 NW2d 474 (1983).

Over the course of the hearing, the court explained to defendant that the time for producing new evidence was over and denied her motion. MCR 2.611(F) does, in fact, require that a court give a concise statement of reasons for ruling. Although the court did not provide a concise statement of reasons for denying defendant's motion, *Plaza v Plaza*, 40 Mich App 430, 431-432; 199 NW2d 251 (1972), the motion was not properly before the court and argument should not have been entertained. We conclude that the court committed no error requiring reversal on this issue.

We affirm.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey