

STATE OF MICHIGAN
COURT OF APPEALS

JILL BOOT, a/k/a JILL BATES,
Plaintiff-Appellee,

UNPUBLISHED
January 30, 2001

v

No. 227262
Lapeer Circuit Court
Family Division
LC No. 93-018875-DM

CHARLES BOOT,
Defendant-Appellant.

Before: Talbot, P.J., and O’Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right the trial court’s order granting in part, and denying in part, his motion to modify custody of the parties’ minor children. We affirm.¹

Plaintiff and defendant divorced in July 1994. The judgment of divorce awarded the parties joint legal custody of their four minor children and awarded plaintiff physical custody of the children subject to defendant’s reasonable visitation rights. In October 1998, defendant moved for a change of custody. After a three-day custody hearing, the trial court entered an order granting physical custody of two of the parties’ minor children, Amelia and Joshua, to plaintiff. In the same order, the trial court awarded physical custody of another of the parties’ minor children, Jenny, to defendant. The custody of the parties’ fourth minor child was not at issue.²

Before it can modify an existing custody order, the trial court must determine whether an established custodial environment exists. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000); *Overall v Overall*, 203 Mich App 450,

¹ At oral argument this Court was advised that subsequent custody proceedings had taken place in the trial court. This opinion does not in any fashion address those proceedings.

² The subject of this appeal is the denial of a change in custody of Amelia and Joshua. Defendant’s motion to modify custody requested physical custody of all four children, Dylan, Jenny, Amelia, and Joshua. At the time of the custody hearing, Dylan, then an emancipated minor, and Jenny, were living with defendant. The trial court’s order granted physical custody of Jenny to defendant, and defendant does not contest this ruling on appeal. Accordingly, we do not address the trial court’s rulings relative to Jenny.

455; 512 NW2d 851 (1994). An established custodial environment exists when there is an environment of both physical and psychological duration, where the relationship between the custodial parent and children is marked by “qualities of security, stability, and permanence.” *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). If an established custodial environment exists, the trial court cannot modify the custody order to change this environment absent clear and convincing evidence that such a modification is in the best interests of the children. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Mann v Mann*, 190 Mich App 526, 530-531; 476 NW2d 439 (1991). If no custodial environment has been established, a preponderance of the evidence standard applies. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993).

Defendant first argues that the trial court’s finding that Amelia and Joshua had an established custodial environment with plaintiff was against the great weight of evidence. In custody cases, we review the trial court’s findings of fact under the great weight of the evidence standard, discretionary rulings for abuse of discretion, and questions of law for clear legal error. *Mogle, supra* at 196. The establishment of a custodial environment is a question of fact that is reviewed under the great weight of the evidence standard. *Id.* This Court will affirm a trial court’s finding that an established custodial environment exists unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

In this case, the trial court found that since the parties’ divorce, plaintiff had been the primary caregiver of Amelia and Joshua and had provided them with guidance, discipline, and life’s necessities. This finding was amply supported by the evidence presented at the custody hearing. We conclude that the trial court did not err in determining that, with regard to Amelia and Joshua, an established custodial relationship existed with plaintiff.

Defendant also argues that the trial court abused its discretion in awarding plaintiff physical custody of Amelia and Joshua and the court’s findings of fact on the statutory best interest factors were against the great weight of evidence. We will not reverse a trial court’s findings of fact unless the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20. The trial court’s custody decision is a discretionary dispositional ruling that will be affirmed absent an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1984). A trial court abuses its discretion when the decision reached 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. The trial court’s findings regarding each custody factor are questions of fact which we review under the great weight of the evidence standard. *Id.*

After reviewing the testimony from the evidentiary hearing and conducting interviews with the minor children, the trial court considered the requisite factors provided in the Child Custody Act, MCL 722.23; MSA 25.312(3). The trial court determined that physical custody of Amelia and Joshua would remain with plaintiff. On appeal, defendant challenges the court’s findings of fact with respect to statutory factors (a), (b), (c), (d), (e), (g), and (k). Defendant also contends that factor (i) should have been weighed in his favor and that factors (j) and (l) were improperly weighed.

Defendant contends that factor (a), the emotional ties between the parents and the children, should have been weighed equally because there was no strong evidence preponderating

in either direction. The trial court found that this factor favored plaintiff because plaintiff played the primary role in raising Amelia and Joshua. This finding was not against the great weight of the evidence. Testimony presented at the hearing indicated that plaintiff had an excellent relationship with Amelia and Joshua. The evidence demonstrated that the children felt safe and content with plaintiff. These findings were not against the great weight of the evidence.

Defendant argues that the trial court erred in finding that factor (b), the parties' capacity to provide guidance, favored plaintiff. The court found that although both parties had the capacity to provide their children with love, affection, and guidance, plaintiff had been very involved with Amelia and Joshua's education, extracurricular activities, and religious training. Moreover, the court found that defendant had not demonstrated that he provided the children with any moral or religious training, that defendant's involvement in their education was minimal, and that defendant had not fully availed himself of extra parenting time when the opportunity had presented itself in the past. Overwhelming evidence was presented to show that plaintiff was actively involved in the children's education and extracurricular activities, that plaintiff was an excellent mother, and that plaintiff often attended church with the children. We conclude that the trial court's findings of fact on this criterion were not against the great weight of the evidence.

Defendant maintains that factor (c), the capacity to provide food, clothing, and care, should have favored him. The court found that the parties were equal on this factor. Although the evidence presented at the hearing demonstrated that defendant earned more money than plaintiff, there was also evidence that the children were appropriately attired and well nourished while in plaintiff's care. This finding was not against the great weight of the evidence.

Defendant also asserts that the trial court erred in determining that the parties were equal on factor (d), the length of time the child has lived in a stable environment. The court noted that although plaintiff's situation had not been very stable in the recent past, it appeared to be stabilizing and that plaintiff and the children had been together as a family unit for some time. Testimony indicated that the children were doing well in their current school and that changing schools would prove detrimental. This finding was not against the great weight of the evidence.

Defendant contends the trial court erred in determining that the parties were equal with respect to factor (e), the permanence of the family unit. The court found that a permanent family unit existed between plaintiff and the children, that had existed since the parties' divorce. The court also noted that plaintiff's situation appeared to have stabilized. The testimony at trial established that plaintiff had been Amelia and Joshua's caregiver for their entire lives and that the three of them functioned as a happy family unit. This finding was not against the great weight of the evidence.

The trial court determined that factors (g) and (k), regarding health and domestic violence, were non-issues. Defendant contends that this finding was erroneous and that both of these factors should have been weighed in his favor.

With respect to factor (g), defendant claims that plaintiff's failed marriages, constant relocation, and lesbian relationship reflected poorly on plaintiff's mental health such that this factor should have weighed in his favor. The court found that, although plaintiff had experienced

some difficult times and had sometimes exercised poor judgment, there was no evidence that either party had mental or physical problems that affected their parenting abilities. Much of defendant's argument focuses on plaintiff's involvement in a same-sex relationship. However, the court properly considered this relationship under factor (f), the moral fitness of the parties, which was weighed in defendant's favor.

Regarding factor (k), defendant contends that an alleged incident of domestic violence between plaintiff's third husband and his former wife that occurred at plaintiff's home made this factor relevant and it should have been weighed in his favor. There was little testimony offered at the hearing about what appeared to be an isolated incident and involved persons who no longer have contact with any of the parties. We conclude that the court's decision not to consider this factor in making its decision was reasonable and not against the great weight of the evidence.

Defendant next argues that factor (i), the children's preference, should have been weighed in his favor. The court explained that it considered the children's preferences in making its custody determination, but it did not comment on the exact amount of weight it accords this factor. The court found that Amelia and Joshua had expressed preferences to live with plaintiff and that he had given more weight to Amelia's preference because she was older than Joshua. Testimony indicated that plaintiff and the children enjoyed a very close relationship and that the children loved plaintiff. This finding was not against the great weight of the evidence.

Finally, defendant argues that factor (j), the willingness to encourage a parent-child relationship, and other factors considered by the court under the catch-all factor (l), were improperly weighed by the court. First, defendant claims that the court's finding that factor (j) favored him should have been given more weight by the court in rendering its ultimate decision. Second, he contends that the court's concern about some bad choices made by plaintiff under factor (l) should have been given more weight. Third, he maintains that the court placed too much emphasis under factor (l) on the detrimental effect of a change of schools if defendant were granted physical custody. The testimony presented at the hearing established that plaintiff was, for the most part, an excellent mother, who had previously made some questionable choices that were largely attributable to her transition from stay-at-home to working mother. The evidence also demonstrated that plaintiff's and the children's environment had stabilized considerably. Moreover, there was evidence that the children were doing well in their current school and that changing schools would be detrimental.

This Court has stated that "[n]either a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors." *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). Our Supreme Court has recognized that trial courts are in a superior position to make accurate decisions concerning the custody arrangement that will be in a child's best interests. Although not infallible, trial courts are more experienced and better situated to weigh evidence and assess credibility. *Fletcher, supra* at 889-890. Accordingly, we defer to the trial court's determinations

of credibility. *Mogle, supra* at 201. We conclude that the weight given to these findings on factors (j) and (l) were not against the great weight of the evidence.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper