

STATE OF MICHIGAN
COURT OF APPEALS

GARY M. DESMARAIS,

Plaintiff-Appellant,

v

SHERRY ANN DESMARAIS,

Defendant-Appellee.

UNPUBLISHED

February 23, 2001

No. 226223

St. Clair Circuit Court

LC No. 98-003272-DM

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of divorce awarding defendant sole physical custody of the parties' seven-year-old daughter. We affirm.

Plaintiff first argues that the trial court erred by failing to make a factual finding regarding whether an established custodial environment existed. Before considering the statutory best-interest factors set forth in MCL 722.23; MSA 25.312(3), the trial court must determine, as a factual matter, whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). This factual finding is important because it determines the appropriate burden of proof. Where an established custodial environment exists, a change in custody is allowed only where clear and convincing evidence demonstrates that it is in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). However, where no established custodial environment exists, the trial court may award custody in the child's best interests, based on a preponderance of the evidence. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). Here, the trial court failed to make a factual finding on the record regarding whether an established custodial environment existed. Where a court fails to make this finding, we will remand unless the record contains sufficient information for us to determine de novo whether an established custodial environment exists. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

The evidence reveals that the child resided with her paternal grandfather for over a year and a half, and plaintiff father resided with them for a number of months before the custody hearing began. It is clear that no established custodial environment existed in defendant mother's home. However, we are unable to determine whether an established custodial environment existed in the grandfather's home, and if so, whether that environment existed in favor of the grandfather or in favor of plaintiff himself. Thus, we would ordinarily remand for the trial court

to make a factual finding on this issue. However, plaintiff's counsel commented during closing argument that the burden of proof was a preponderance of the evidence because neither party had demonstrated the existence of an established custodial environment. We therefore decline to grant relief on this issue because plaintiff conceded the point. See *Dep't of Transportation v Pichalski*, 168 Mich App 712, 722; 425 NW2d 145 (1988). A party may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Plaintiff next argues that the trial court erred by failing to consider the possibility of granting him custody conditioned on his continuing to reside with the child's paternal grandfather. However, this was precisely the recommendation made by the friend-of-the-court custody investigator. The trial court's rejection of this recommendation based on its assessment of the child's best interests does not create error.

Finally, plaintiff challenges the trial court's factual findings on each statutory best-interest factor. MCL 722.23; MSA 25.312(3). We will affirm the trial court's factual findings unless they are against the great weight of the evidence, and we review the trial court's ultimate custody decision for a palpable abuse of discretion. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 879-880 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). We have reviewed the entire record and find no merit to plaintiff's challenges. It is the trial court's duty to decide what weight to give to each witness' testimony, *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1998), and we give considerable deference to its superior vantage point concerning issues of credibility. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). The trial court's factual findings in this case are not against the great weight of the evidence. Although this was a close case in which neither party was a particularly worthy choice in light of their history of substance abuse and domestic violence, the evidence did not clearly preponderate in the opposite direction of the court's findings. *Fletcher, supra* at 879. Further, the court did not abuse its discretion by awarding custody to defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald