STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL SCOTT ELDRED,

Plaintiff-Appellant,

v

LISA MARIE LONG,

Defendant-Appellee.

UNPUBLISHED
January 20, 2004

No. 248420
Tuscola Circuit Court
LC No. 02-020726-DC

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's award of sole physical custody of the parties' daughter to defendant. We affirm.

Plaintiff first argues that the trial court failed to determine whether an established custodial environment existed before entering an amended custody order. We disagree.

A trial court must make the factual determination whether an established custodial environment exists before it assesses the child's best interest. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). The findings of fact will be affirmed on appeal unless they are determined to be against the great weight of the evidence, i.e., the evidence clearly preponderates in the opposite direction. MCL 722.28; *Mogle*, *supra* at 196. Discretionary rulings, including dispositional rulings, are reviewed for a palpable abuse of discretion and questions of law for clear legal error. *Id*.

Here, the parties initially had an evidentiary hearing before a family division referee. The referee first found that there was no established custodial environment. The referee then applied the best interest factors and recommended that plaintiff be granted physical custody. Defendant filed objections and requested a de novo hearing. The parties agreed that the transcript of the referee hearing would be presented to the court for its de novo consideration, and that they would be permitted to present supplemental live testimony. The court read the transcript, heard additional testimony from the parties and several other witnesses, heard arguments of counsel, and spoke with the child. During closing arguments both attorneys asserted that no established custodial environment existed. Further, the court itself expressly raised the question and

acknowledged its obligation to assess the issue whether an established custodial environment existed. The court then issued a written opinion. While that opinion did not explicitly state that the court considered the issue whether an established custodial environment existed, it is apparent that the court considered and decided that issue, concluding that one did not exist. Consequently, plaintiff's argument that the trial court failed to determine whether an established custodial environment existed is without merit.

Next, plaintiff argues that the trial court abused its discretion in granting primary custody to defendant because its determinations of best interest factors MCL 722.23(b), (i), and (k) were against the great weight of the evidence. We disagree. The great weight of the evidence standard applies to the trial court's findings on the statutory best interest factors, MCL 722.23, and those findings will be upheld on appeal unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

MCL 722.23(b) addresses the capacity and disposition of the parties to give love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed. Despite finding that both parents were capable of showing love and affection to the child, the trial court weighed this factor in favor of defendant because it had concerns about plaintiff's ability to provide proper guidance to the child since he frequently left the child in the care of others, participated in activities that he preferred rather than those that would be more enjoyable to the child, and continued to smoke in the child's presence although she has allergies. These findings are not against the great weight of the evidence.

MCL 722.23(i) examines the reasonable preference of the child. Here, the trial court conducted an *in camera* interview with the child and indicated that, although her preference would not be disclosed, the child's preference would be considered in making the custody decision. Plaintiff argues that the child should not have been permitted to express her preference because she was not "of sufficient age" since she was only five years old. See MCL 722.23(i). Plaintiff relies on *Treutle v Treutle*, 197 Mich App 690; 495 NW2d 836 (1992) in support of his argument; however, that case does not stand for the proposition that children under six years of age are too young to have their preference considered as a best interest factor. Rather, *Treutle* holds that a child's preference is just one factor and is not to be accorded more weight than any other best interest factor. *Id*. at 694-695. It was properly within the trial court's discretion to determine whether the child was "of sufficient age to express [her] preference." See MCL 722.23(i). After considering the record, we cannot conclude that the trial court abused its discretion in conducting the interview with the child and considering her preference in accordance with MCL 722.23(i).

MCL 722.23(k) considers domestic violence against or witnessed by the child. Plaintiff argues that the trial court's finding that this factor weighed equally between the parties was against the great weight of the evidence. However, the only incident considered by the trial court was a parenting time dispute that involved defendant slapping plaintiff's face and plaintiff pushing defendant out the door. The trial court concluded that it was an isolated incident and did not assign blame to either party. This finding was not against the great weight of the evidence.

In sum, the trial court did not abuse its discretion in granting primary custody to defendant. The evidence in support of the trial court's findings with regard to the disputed best interest factors did not clearly preponderate in the opposite direction.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White