STATE OF MICHIGAN

COURT OF APPEALS

MEAGAN KAY RUSSELL,

Plaintiff-Appellee,

v

RUDY JOE GONZALES,

Defendant-Appellant.

UNPUBLISHED
November 20, 2008

No. 285619
Ottawa Circuit Court
LC No. 01-039908-DS

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff primary physical custody of the parties' children. We affirm.

Meagan Russell and Rudy Joe Gonzales are the parents of two minor children, Allen (DOB: July 28, 2000) and Ayden Gonzales (DOB: August 25, 2003). Plaintiff and defendant began their relationship in 1999. During the relationship, the parties lived together and separately for periods of time in Michigan, Arkansas and Florida with the minor children.

The children have primarily lived with plaintiff, who provided for their basic needs. However, beginning in 2004, the children resided with defendant for varying time periods. Typically, these incidents of extended parenting time were for a pre-arranged or agreed upon duration. For example, in March 2007, Ayden stayed with defendant because plaintiff and Allen went to Florida to visit plaintiff's family. Unfortunately, plaintiff's father died during this visit. Consequently, Ayden remained with defendant and Allen returned to Michigan and also stayed with defendant, until July 28, 2007, while plaintiff was in Florida to settle her father's estate. Although plaintiff returned to Michigan, in the interim defendant filed an ex parte motion for temporary custody, which the trial court granted. Although defendant is currently working and has provided for the children during their residence at his home, there have been extended periods of time where defendant was either unemployed or underemployed. As a result, defendant maintains a significant child support arrearage. Although, defendant is currently sober, he remains on probation for his third offense of driving while intoxicated and has a history of addictions to alcohol and narcotics. Plaintiff has also used narcotics, especially marijuana.

Historically, the parties' relationship has involved verbal abuse and physical violence. The contentious nature of the parties' relationship continues with both plaintiff and defendant demonstrating an inability to communicate with each other in a mature and respectful manner.

Parenting time exchanges are marred by plaintiff allegedly yelling obscenities at defendant in the presence of the children.

Defendant first contends that the trial court's finding of an established custodial environment with plaintiff is against the great weight of evidence. A trial court's determination regarding the existence of an established custodial environment comprises a question of fact, which this Court must "affirm unless the trial court's finding is against the great weight of the evidence." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008); MCL 722.28. "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Berger, supra* at 706.

An established custodial environment exists "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." MCL 722.27(1)(c); *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). "An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger, supra* at 706, citing *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). "The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian." *Berger, supra* at 706-707.

Although Allen and Ayden have moved frequently, they have primarily lived with plaintiff, who has served as their caregiver and source of financial support. When plaintiff left the children with defendant to take care of her father's estate, the arrangement was understood to be temporary. See *Theroux v Doerr*, 137 Mich App 147, 151; 357 NW2d 327 (1984). During her absence, plaintiff remained in contact with the children by telephone, and they were aware she would return to Michigan and intended to resume custody. While the trial court noted the positive changes defendant had recently made, the facts demonstrated plaintiff has acted as the primary caregiver and provider throughout the children's lives. In addition, defendant has failed to demonstrate that Allen and Ayden consistently looked to defendant to provide them with love, guidance and the necessities of life during plaintiff's absence such that the established custodial environment with plaintiff was destroyed. See *Pluta v Pluta*, 165 Mich App 55, 60-61; 418 NW2d 400 (1988). As a result, the trial court's finding that an established custodial environment existed with plaintiff was not against the great weight of the evidence.

When an established custodial environment exists, a party must establish by clear and convincing evidence that a change in custody would be in the children's best interest. *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2006); MCL 722.27(1)(c). To make this determination, the trial court must make specific findings of fact and weigh "the 'sum total' of twelve statutory factors." *Ireland v Smith*, 214 Mich App 235, 243; 542 NW2d 344 (1996), mod 451 Mich 457 (1996); MCL 722.23. "A [trial] court's ultimate finding regarding a particular factor is a factual finding that can be set aside if it is against the great weight of the evidence." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Therefore, a trial court's findings "with respect to each factor regarding the best interests of the child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction." *Berger, supra* at 705.

The trial court found plaintiff and defendant were equal on factors (a), (d), (e), (f), and (g). MCL 722.23. The trial court favored defendant on factors (b), (h), and (j), while plaintiff was favored on factors (c) and (k). MCL 722.23. On appeal, defendant contends the trial court erred by finding in favor of plaintiff on factors (c), "the capacity and disposition . . . to provide the child with food, clothing, medical care . . ." and (k), "domestic violence, regardless of whether the violence was directed against or witnessed by the child."

Testimony established that before defendant obtained temporary custody in 2007, the children lived primarily with plaintiff, and she was the main provider of food, clothing and medical care for them. While evidence existed that plaintiff recently failed to attend to certain medical needs for Ayden, defendant also failed to provide plaintiff with medical information and include her in the child's medical appointments. However, there was no evidence presented that either of the children were unhealthy or deprived of proper medical care when in plaintiff's custody. Moreover, while plaintiff's actions of not filling a prescription or using the nebulizer for Ayden were less than ideal, they do not negate the fact that she was the primary provider for many years. See *Phillips v Jordan*, 241 Mich App 17, 27; 614 NW2d 183 (2000). In contrast, defendant has failed to pay child support or provide for their basic financial needs for a considerable portion of his children's lives. As a result, the trial court's favoring of plaintiff with regard to factor (c) was not against the great weight of the evidence.

Additionally, defendant disputes the advantage given to plaintiff on factor (k), "domestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The evidence demonstrated that defendant had been physically abusive to plaintiff in the past. Specifically, defendant extinguished a cigarette on plaintiff's face and struck her on at least one occasion, and has previously been charged with domestic violence. Although defendant argues that all of the incidents of physical abuse perpetrated by him occurred in the past, evidence of a 2006 altercation with his current wife undermines this assertion. Although plaintiff's inability to control her verbal attacks on defendant during parenting time exchanges remains a concern, the trial court correctly based its determination regarding factor (k), MCL 722.23(k), by examining the entire history of abuse and violence perpetrated throughout the relationship. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 459; 705 NW2d 144 (2005). Based on this record, the trial court's conclusion that factor (k) favored plaintiff was not against the great weight of the evidence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot