

STATE OF MICHIGAN
COURT OF APPEALS

NICOLE BUCHAN,

Plaintiff-Appellee,

v

RANDON BUCHAN,

Defendant-Appellant.

UNPUBLISHED
November 5, 2009

No. 290066
Livingston Circuit Court
LC No. 07-039213-DM

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

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

After plaintiff and defendant separated, defendant left the marital home, and the couple's two minor children remained with plaintiff. The couple filed a complaint for divorce without representation by counsel and opted out of involving the friend of the court. A judgment of divorce was submitted to the court for signature that proposed joint custody of the children with plaintiff having primary physical custody. This judgment was ultimately not entered. Plaintiff began attending classes to complete a bachelor's degree in nursing and also taught classes at a local community college. Because of her work and school schedule, plaintiff asked defendant to take physical custody of the children. During the 2007-2008 school year, the children resided with defendant. In the winter of 2008, plaintiff learned that defendant had retained counsel and intended on requesting permanent physical custody of the children. Consequently, she stopped attending school and teaching and retained her own counsel.

In lieu of proceeding before the friend of the court, the parties stipulated to an evaluation by psychologist, Dr. Charlene Kushler, and the result of the evaluation would determine custody. The initial evaluation was based on separate interviews with the parties and the children. In the interview, defendant alleged that plaintiff smoked so much marijuana on Christmas that she slept for most of the day and that plaintiff associated with her brother and mother who were both "drug addicts." Defendant also reported that he suffered verbal and physical abuse from plaintiff. Dr. Kushler concluded that there was no reason to change the custody arrangement with defendant having physical custody and recommended that the parties submit to a hair analysis to determine if there were substance abuse problems.

The parties agreed to allow Dr. Kushler to conduct a more thorough investigation that included an evaluation of the best interests of the children. Following this investigation, Dr. Kushler concluded that the parties share legal and physical custody, but recommended that plaintiff have primary physical custody. Despite the prior agreement that allowed Dr. Kushler to resolve the custody dispute, defendant protested the findings and decision.¹ Therefore, the parties requested a bench trial to resolve the issue of custody only.²

Plaintiff testified that she had an associate's degree in nursing, was pursuing a bachelor's degree in nursing, and was teaching a class part-time when she allowed the children to go live with defendant in September 2007. The completion of a bachelor's degree would have increased plaintiff's earning potential and allowed her to seek a management position. However, in January 2008, plaintiff learned that defendant had retained an attorney to seek permanent physical custody of the children instead of allowing them to return to her care in June 2008. Upon learning of defendant's plan, plaintiff stopped attending school and teaching in order to devote more time to the children.

Plaintiff acknowledged that she agreed to allow Dr. Kushler to decide the issue of custody. After Dr. Kushler rendered an opinion in favor of defendant, plaintiff requested the opportunity to meet with the doctor to address the best interest factors to determine the custody placement. Plaintiff knew of the earlier adverse decision, but wanted to clear up the discrepancies from the initial assessment. She testified that, contrary to defendant's representations to the doctor, he did not pay child support to her. Rather, defendant's bills were paid from plaintiff's checking account. Therefore, defendant gave her a check for his truck payment, his cell phone payment, a loan payment, and the house payment. Additionally, plaintiff denied having an alcohol or drug problem. Because of her employment, she passed a drug test, and inappropriate behavior or substance abuse would adversely affect plaintiff's license. Plaintiff volunteered to take a drug test knowing that a positive result could cause her to lose her license.

Plaintiff testified that she resided with her boyfriend, a Lansing firefighter. In the home shared by the couple, each child had their own room. Plaintiff testified that she was affectionate with her children. She was predominantly responsible for the children's medical and dental appointments. In fact, plaintiff was instrumental in having her son diagnosed with an infection in his bone, a condition that was not diagnosed while the child was in defendant's care. Plaintiff testified that she was involved in her children's activities and made defendant aware of upcoming events and appointments. However, defendant failed to timely notify plaintiff of a

¹ On June 26, 2008, the parties stipulated to having Dr. Kushler conduct a full custody and parenting time investigation. The stipulation provided that "the results of Dr. Kushler's investigation] should determine custody in this case."

² Defendant asserted that plaintiff provided inaccurate information to Dr. Kushler, and the inaccuracies caused Dr. Kushler to change the initial custody recommendation. However, on October 16, 2008, the parties stipulated to the admission of Dr. Kushler's report regarding the custody evaluation and waived her presence at the custody trial.

school play and their daughter's graduation. When the couple's daughter began to experience problems in school as a result of the separation, plaintiff took her to weekly counseling sessions. Plaintiff testified that she was willing to foster the relationship between the children and defendant. However, she testified that defendant was talking to their daughter about the divorce case, which included sending texts to the girl at midnight.

Plaintiff testified that she currently worked six to eight shifts per month and scheduled twelve-hour shifts on the weekends when defendant had visitation. Plaintiff acknowledged that her brother lived with her and helped with the children, but testified that his drug problem was resolved before he lived with her. She denied introducing the children to various boyfriends and that she contemplated moving to another state to follow one of her paramours. In addition to plaintiff's testimony, Justin Conklin testified that plaintiff and her children lived in his home, and the couple planned to marry after the divorce was finalized. He testified that plaintiff was a good mother and that he had a good relationship with her children. Plaintiff's father testified that plaintiff was a good mother who did not scream and yell profanities at the children. He also opined that plaintiff had never been in trouble and did not have a drug or alcohol problem.

Defendant lived with Roann Andrew and her two teenage children. Andrew testified that defendant was a good father who was very involved with his children's activities. However, when Andrew observed plaintiff at a school function she was seen "texting" the entire time. Because of their work schedules, Andrew would be able to watch the minor children when defendant was unavailable, and they would not be placed in daycare.

Defendant testified that he was from a broken home and was bound and determined to keep his family together. When his marriage failed, defendant left the home, but spent many evenings attending to the children while plaintiff went to school or out to bars with friends. He testified that he showered his children with affection, unlike plaintiff, and was especially close to his daughter. Defendant acknowledged that he did discuss the divorce case with his daughter, but did so in response to her questions. He opined that the children should be placed with him because they lived in a loving environment surrounding by family and friends in the area. Defendant had little praise for plaintiff or her parenting skills.³

The trial court concluded that an established custodial environment existed with both parents, but concluded that plaintiff would have primary physical custody of the children. Although the psychologist recommended that defendant received three weekends of visitation each month, the trial court only awarded two weekends per month and two weekday visits.

³ Defendant also presented the testimony of Dana Saunders, a longtime friend of plaintiff. Saunders testified that plaintiff was harsh and demeaning to the children. However, Saunders admitted that while she was still married, she began a relationship with a man on parole for criminal sexual conduct and kidnapping and exposed the man to her children. Additionally, despite the harsh criticism of plaintiff as a parent, Saunders allowed her child to spend time with plaintiff. Accordingly, the trial court disregarded this testimony as incredible.

Defendant first alleges that the trial court reversibly erred in concluding that an established custodial environment existed with both parties when the children had been placed in the sole care of defendant for the past school year. We disagree.

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. [MCL 722.28.]

A trial court's factual finding regarding the existence of an established custodial environment and the facts regarding the best interests of a child must be affirmed unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). The trial court's discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. *Id.* The trial court's custody decision is given the utmost level of deference. *Id.* at 705-706. Questions of law are reviewed for clear legal error and occur when a trial court incorrectly chooses, interprets, or applies the law. *Id.* at 706. When reviewing the trial court's findings, we defer to the trial court's assessment of the credibility of the witnesses. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

The determination regarding the existence of an established custodial environment presents a question of fact that must be affirmed unless the trial court's finding is against the great weight of the evidence. *Berger, supra* at 706. Stated otherwise, the decision must be affirmed unless the evidence clearly preponderates in the opposite direction. *Sinicropi, supra*. Upon finding an established custodial environment, custody will not be changed unless clear and convincing evidence is presented. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003); MCL 722.27(1)(c). The evaluation of the custodial relationship is designed to minimize unwarranted and disruptive changes in custody except in the most compelling cases and to provide a stable environment for the children. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001); *Vodvarka, supra* at 511. A custodial environment is established where, over an appreciable time, the child naturally looks to the custodian for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c). Other considerations include the age of the child, the physical environment, and the permanency of the relationship between the custodian and the child. *Vodvarka, supra*. An established custodial environment can exist with both parents. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000); *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989).

Defendant contends that the trial court reversibly erred in concluding that a custodial environment existed with both parents. We disagree. In *Theroux v Doerr*, 137 Mich App 147, 148-149; 357 NW2d 327 (1984), the plaintiff was given physical custody of the minor children in a judgment of divorce entered in 1978. In 1982, the plaintiff was accepted into a nine-month master's degree program out of state. She petitioned for removal of the children from Michigan for this nine-month period, but defendant objected to the removal. The parties stipulated to transfer physical custody to defendant for the nine-month period. However, after plaintiff returned from the program, defendant moved for continuation of custody. Although the trial court found that the parties were equal in most factors, custody was modified to continue with defendant and his new wife. This Court reversed:

This Court has previously given effect to agreements entered into by the parents which temporarily limit the period of one parent's custody. In doing so we have acknowledged the general policy which seeks to maintain continuity to protect the best interests of the child. Nevertheless, because of our desire to encourage a mother to relinquish custody if she feels unable to provide for her charges, we have excepted from this general policy the practice whereby a parent temporarily and voluntarily relinquishes custody to protect the children's best interests. We encourage such a practice by returning custody to that parent; otherwise a mother would be reluctant to relinquish custody if she knew that, once it passed to the father, it could not be regained. In reinforcing this practice, we will reverse a trial court which, because of its desire to maintain continuity, continues custody with the parent who was the beneficiary of a temporary arrangement. ... We give effect to the stipulation entered into by the parties as we desire to encourage the practice plaintiff utilized of voluntarily and temporarily relinquishing custody of her children to protect their best interests. [*Theroux, supra* at 149-151 (citations omitted).]

Based on *Theroux*, the trial court did not err in concluding that an established custodial environment existed with both parents. Despite the fact that the most recent period of physical custody was with defendant, plaintiff voluntarily relinquished custody to defendant in an attempt to improve her circumstances for herself and her children. An additional college degree and part-time employment would have enabled plaintiff to increase her earning potential. However, upon learning that defendant had retained counsel to eliminate plaintiff as the primary physical custodian, she stopped pursuing her bachelor's degree, stopped teaching, and retained counsel. Under the circumstances, defendant's contention is without merit. *Theroux, supra*.

Defendant next alleges that the trial court erred in concluding that there was an established custodial environment with both parties, but then altered the environment by awarding plaintiff sole physical custody and limited defendant's visitation as a sanction. We disagree. Review of the record reveals that a signed order regarding child custody was never entered. Consequently, the child custody arrangement was established based on the couple's agreement. The couple initially agreed that plaintiff would have primary physical custody, but agreed to transfer physical custody to defendant for the 2007-2008 school year. When a disagreement arose over child custody when the school year ended, the parties submitted the issue of child custody to a psychologist and agreed to be bound by the psychologist's evaluation. The parties agreed to alternate weeks during the summer. When the evaluation was delayed and defendant did not agree to be bound by the evaluation, the trial court temporarily awarded primary physical custody to plaintiff because the 2008-2009 school year was beginning. Unfortunately, the parties could no longer alternate weekly custody because of the distance between their homes. Consequently, defendant's contention that the trial court altered the "joint" custody decision by awarding primary physical custody to plaintiff is without merit. Under the factual circumstances presented, primary physical custody had to be placed with one party because the children could not alternate weekly attendance at different schools. The trial court's factual findings were not clearly erroneous. *Berger, supra*.

We also reject defendant's contention that the trial court sanctioned defendant by removing one of the weekend visitations recommended by the psychologist. Review of the

record reveals that defendant was granted two evenings during the week to spend with his children. However, he did not timely appear for those visits despite the fact that his workday ended at 2:00 p.m. Defendant also sent texts to his daughter at midnight about the case. Additionally, in the psychological evaluation, it was noted that defendant admitted leaving his daughter alone despite her young age. The trial court recommended that defendant receive counseling to foster the relationship between his children and plaintiff. Based on the record, the trial court's visitation schedule was not designed to sanction defendant, but rather reflected that adverse consequences were occurring as a result of defendant's interaction with his daughter. In determining visitation rights, the trial court must consider the best interests of the children. *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993). On this record, we cannot conclude that the trial court abused its discretion by altering the visitation schedule. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher