

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN A. GERMAN,
Plaintiff-Appellant,

v

MICHELLE M. GERMAN,
Defendant-Appellee.

UNPUBLISHED
January 12, 2010

No. 292244
Oceana Circuit Court
LC No. 07-006232-DM

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

In this child custody action, plaintiff appeals an order of the trial court denying his petition to change custody. The court ordered that the parties continue to share joint legal and joint physical custody of the parties' two minor children, Jaymes and Scott German. We affirm.

Plaintiff first argues that the trial court erred in finding that the children had an established custodial environment with defendant. We disagree.

In a child custody case, findings of fact, including findings regarding the existence of an established custodial environment, should be affirmed unless they are against the great weight of the evidence. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). "Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings clearly preponderate in the opposite direction." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (citation and internal quotation marks omitted).

Whether an established custodial environment exists is a question of fact that the trial court must address before it turns to the best interest factors. *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009). A custodial environment is established 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

The trial court, as is required (see, *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000)), made a specific finding that a custodial environment existed with both parties:

It is the factual finding of this Court that since the entry of the Judgment of Divorce on September 27, 2007, subject to the protective services intervention, the parties have exercised a one week on / one week off parenting time rotation. When Plaintiff exercised parenting time, he had the responsibility for providing food, clothing, shelter, education, discipline and attending to the medical needs of the children. When Defendant exercised parenting time, she had the same responsibility for providing food, clothing, shelter, education, discipline and attending to the medical needs of the children. Given the young ages of the children, 5 and 7, the children naturally looked equally to both their father and their mother for guidance, discipline, and the necessities of life.

Because a custodial environment does exist, the burden of proof required for the Court to change custody is by a clear and convincing standard so as to minimize unwarranted and disruptive changes of custody.

According to the record, from the divorce on September 26, 2007 until December 19, 2007, the children were with each parent for alternating weeks. From December 19, 2007 until March 7, 2008, they were placed with defendant's mother, Cheryl Hilliard. During this time, plaintiff apparently only had custody of the children every other weekend. On March 7, 2008, defendant resumed custody of the children but it is not clear whether they moved back in with defendant at that time or remained with her parents. The regular alternating week parenting time arrangement did not get reinstated until July 2008. In October 2008, defendant moved from Shelby to Walkerville, about 25 miles away. As of the February trial date, the children stayed at defendant's parents home during the weekdays when she was exercising her parenting time because it was easier to get to their school in Shelby from the grandparents house, but defendant also spent time at her parents' home during her parenting time weeks.

Although there may appear to be some instability in terms of the children's environment, the children are used to living with the parties equally and are also used to spending significant amounts of time with their maternal grandparents. Even while the children were placed with their grandparents during protective services proceedings, they were able to see each parent, every other weekend. There were no repeated changes in the joint physical custody arrangement, or periods where the children spent more time with one parent or the other. Rather, the children stayed with their grandparents for one period lasting about three months. In October of 2008, defendant did move to Walkerville, but defendant has made efforts to maintain stability for Scott and Jaymes by staying with her parents so that the children are close to their school. The evidence does not clearly preponderate toward a lack of custodial environment with both parties.

Plaintiff next argues that the trial court did not properly weigh the statutory best interest factors found in MCL 722.23:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

One of plaintiff's main arguments on appeal is that the court made no credibility determinations, but rather blindly accepted the testimony presented at trial. However, the fact that the court made factual findings against plaintiff, based on the testimony provided, is not evidence that the court abandoned its responsibility to consider and weigh the evidence. Indeed, great deference must be given to the trial court's assessment of the weight of the evidence and witness credibility (*People v Shipley*, 256 Mich App 367, 372-374; 662 NW2d 856 (2003)), and this Court must make credibility choices in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Moreover, a judge's findings and conclusions need not include consideration of every piece of evidence entered and every argument raised by the parties. *MacIntyre v MacIntyre*

(*After Remand*), 267 Mich App 449, 452; 705 NW2d 144 (2005). Nor must the court give each factor equal weight. *Pierron v Pierron*, 282 Mich App 222, 261; 765 NW2d 345 (2009).

Regarding factor (a), the trial court found that the present parenting time schedule allows each parent equal time with both children, and that “[e]ach parent has been equally responsible for preparing meals.” Plaintiff asserts an error in this conclusion, claiming that it is defendant’s parents that provide such care when defendant exercises her parenting time. However, the court’s findings also addressed the children’s bonds with the parties, including their ability to continue to foster such a bond. The evidence of record does not clearly preponderate against the court’s finding of equality on factor (a).

Plaintiff argues, in part, that because he wanted Scott to attend summer school, as recommended by his teacher, and because defendant did not send him to summer school, he should have prevailed on factor (b). However, the trial judge explicitly included these facts in his opinion and recounted the disagreement over summer school between the parties. The judge also considered other facts concerning providing love, affection, and guidance, to conclude that neither party prevailed on this factor. Reviewing all of the evidence relevant to this factor, there is no clear evidence that preponderates in plaintiff’s favor on factor (b).

With respect to factor (b), plaintiff also argues that the trial judge mischaracterized an altercation between defendant’s boyfriend and a former neighbor as a “scuffle.” There was testimony that there was a fight, and using “scuffle” as a label is not improper in this context. Indeed, it was a word used by the neighbor in his testimony.

As for factor (c), the trial court found that defendant marginally prevailed. The judge acknowledged that “[b]oth parties struggle economically,” but noted that plaintiff has a substantial history of not being able to maintain steady employment. These conclusions were certainly supported by the record.

Regarding factor (d), plaintiff argues that he should have overwhelmingly prevailed rather than “marginally prevailed” as the trial court found. Either way, this factor was found to weigh in plaintiff’s favor, so what plaintiff hopes to accomplish by making an argument on this factor is unclear. Moreover, the court’s specific finding on this factor is supported by the evidence, giving due consideration to plaintiff’s history of unstable housing.

Plaintiff also asserts that factor (e), which the trial court found marginally favored defendant, should have instead favored him. In weighing this factor, the trial court considered that plaintiff had moved several times in the year and a half since the parties’ divorce, and had still not maintained a steady income. The trial court also noted that defendant had moved only once and is now better able to provide for the family. The evidence thus supported the trial court’s finding.

Plaintiff raises no real argument with respect to the trial court’s findings on factors (f), (g), (h), (i), (j), and (k) (aside from credibility issues in some instances), which, again, we view in favor of the verdict. *People v Nowack, supra*. Plaintiff does assert that the trial court did not give the testimony and opinions provided by the children’s counselor due weight. The trial court did consider that testimony, but expressed some concern about the counselor’s understanding of the relevant background. The trial court also felt the counselor was unduly biased in favor of

plaintiff. Given the trial court's history with the parties and these proceedings, and deferring to the trial court's superior position to assess the testimony, we will not second-guess the trial court's evaluation of this evidence.

In sum, the evidence does not clearly preponderate in favor of plaintiff on the challenged factors. Because the ultimate disposition was not against the great weight of the evidence, the trial court did not abuse its discretion in continuing the existing custody arrangement.

Lastly, we reject plaintiff's argument that the trial court erred in failing to keep a record of the judge's in camera interview with the children. In the instant case, the trial court properly conducted interviews, and kept the preferences expressed by the children to himself. The trial court need not necessarily keep a record of such interviews. *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002).

Affirmed.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Jane E. Markey