STATE OF MICHIGAN

COURT OF APPEALS

CAROL C. TREACY,

Plaintiff-Appellee,

v

KEVIN T. SOLON,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 190809
LC No. 89-067286-DM

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

Defendant appeals as of right from the November 9, 1995 order which denied his petition for sole custody of the parties' minor daughter and which instead continued joint custody with both parties but modified the custody arrangement to reduce the frequency of visitation. We affirm.

Defendant first claims there was no evidentiary support for the trial court's finding that an established custodial environment existed with plaintiff. The existence of a custodial environment will depend upon a custodial relationship of a significant duration, both physical and psychological, in which the minor child is provided with care, the necessities of life, discipline, love, guidance, and attention appropriate to her age and individual needs. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 521 (1981). Contrary to defendant's assertion on appeal, the testimony presented at the extensive hearing does not support his contention that plaintiff was never home to provide care for Chelsea and that plaintiff's mother provided virtually all the care for Chelsea. Moreover, as recently noted by our Supreme Court, both single and married parents have many obligations, including continuing their education, and daycare is an entirely appropriate manner of balancing such obligations. *Ireland v Smith*, 451 Mich 457, 466-468; __NW2d__ (1996). Plaintiff's arrangement for Chelsea's before- and after-school care seems appropriate and the evidence does not reveal that it has negatively affected Chelsea's development Ample evidence, including defendant's own testimony, established that there is a close bond between plaintiff and Chelsea, regardless of the temporary nature of their home, that plaintiff is very involved in activities with Chelsea, and that Chelsea looks to plaintiff for love, guidance, comfort and security. The evidence does not clearly preponderate against the trial court's finding that Chelsea still looks to each party for the guidance and comfort that

children traditionally look to their parents for. *Fletcher v Fletcher,* 447 Mich 871, 878; 526 NW2d 889 (1994).

Defendant next asserts that, even if the trial court correctly determined that an established custodial environment existed with plaintiff, defendant proved by clear and convincing evidence that he should be granted sole custody of Chelsea.[1] Where an established custodial environment exists, custody may not be changed unless there is clear and convincing evidence that such a change is in the best interest of the child as determined by the eleven factors in MCL 722.23; MSA 25.312(3). *Ireland, supra* at 461 n 3. Defendant failed to carry his burden of showing by clear and convincing evidence that it would be in Chelsea's best interest to change the joint custody arrangement. MCL 722.27(c); MSA 25.312(7)(c); *Treutle v Treutle,* 197 Mich App 690, 691; 495 NW2d 836 (1992); *Duperon v Duperon,* 175 Mich App 77, 82; 437 NW2d 318 (1989). The court's findings on each factor and its ultimate finding that virtually all of the factors were even (some for offsetting neutral reasons and most for offsetting negative reasons due to the parties faring equally badly) are supported by the great weight of the evidence. Hence, the court did not abuse its discretion in denying defendant's petition for sole custody. *Fletcher, supra* at 879-880.

The court did not abuse its discretion in modifying the existing custody arrangement by reducing the frequency of *both parties'* visitation with Chelsea. The modification to the custody arrangement does not constitute a change in the established joint custodial environment; plaintiff still has primary custody during the school year and defendant has primary custody during the summer. Therefore, the clear and convincing standard need not have been met. See *Irish v Irish,* 102 Mich App 75, 79; 300 NW2d 739 (1980). The frequency, duration and type of visitation is determined according to the best interest of the child, including whether the child's mental and emotional health would be endangered. MCL 722.27a(1) and (3); MSA 25.312(7a)(1) and (3). The facts in this case warranted modification of the existing custody arrangement in the interest of Chelsea's welfare, and the court was amply justified in reducing the frequency of visitation by both parties to protect Chelsea's emotional well-being.

In claiming that the trial court's decision was influenced by the ex parte communication regarding a visitation problem, defendant has not overcome the heavy presumption of judicial impartiality and has not established that the court was actually biased or prejudiced as a result. *Cain v Dep't of Corrections,* 451 Mich 470, 495, 497; ___ NW2d ___ (1996). Our review of the facts indicates that the likelihood of the trial court being swayed by any information conveyed in the ex parte communication would be slight, if any, because the court would not have been told anything of substance that it had not already heard at the extensive custody hearings. Since the case is not being reversed or remanded for any reason, the question is moot whether the case should be assigned to a different judge on remand, although there is no indication that this is an "extreme" case in which the original judge would be unable to set aside his previously expressed views and findings in the event this case was remanded to him. *Id.* at 498.[2]

We decline to address defendant's final issue in his brief because he has not appropriately argued its merits and has attempted to circumvent the page limitations of MCR 7.212(B) by

merely incorporating by reference arguments and authority made outside the parameters of his brief. See *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992).

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Kenneth W. Schmidt

[1] The record reveals a very troublesome relationship between the parties which appears to be fueled primarily by plaintiff's intransigence. After remand family counseling should be considered as was discussed with both parties at oral arguments in this court.

[2] The trial Judge is to be commended for his sensitive and diligent handling of this problematic litigation. Magruder, *The trials and tribulations of an intermediate appellate court*, 44 Cornell L Q 1 (1958).