STATE OF MICHIGAN

COURT OF APPEALS

TED M. CHICHESTER,

Plaintiff-Appellant,

v

JODDIE L. CHICHESTER, a/k/a JODDIE L. KENT,

Defendant-Appellee.

UNPUBLISHED
March 13, 1998

No. 198181
Calhoun Circuit
LC No. 95-002133 DM

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of divorce in which the trial court awarded physical custody of the parties' two young children to defendant. We affirm in part, reverse in part, and remand for further proceedings.

The parties' union of approximately five years ended in divorce in September 1996. The couple had two children, a son and a daughter, ages five and four years old, respectively, at the time the judgment of divorce was entered.

During the marriage the family lived in a three-bedroom house that plaintiff was purchasing from his parents. The children had separate bedrooms. The parties participated approximately equally as care givers for the children. Plaintiff was employed throughout the marriage, while defendant was employed off and on. During periods of unemployment, defendant cared for the children. Defendant disputed the amount of time plaintiff spent with the children during the marriage, with defendant arguing that she had to force plaintiff to bathe them and plaintiff testifying that he had to cook dinner for the family when he returned home after work most days. During the parties' first separation (before the daughter was born) and from the filing of the divorce complaint in August 1995 through the entry of the child custody order in July 1996, the children remained in the marital home with plaintiff. When defendant was working outside the home, and during the parties' separation, plaintiff's mother routinely babysat for the children.

The parties gave differing versions of the occasion on which defendant finally left the marital home. Plaintiff testified that defendant came home late one night and announced that she wanted to

leave, and that after a dispassionate discussion the two mutually decided that the children would remain with plaintiff. Defendant testified that after she returned home late from work, plaintiff began yelling at her and she decided to leave. She wanted to take the children with her, but plaintiff physically restrained her from doing so, leaving bruises on her arms. Defendant stated that she was in great fear on that occasion, as plaintiff had been abusive previously, including threatening her with a handgun, which plaintiff denied. Defendant never told the friend of the court investigator, however, about any domestic abuse, and she presented no evidence to support these allegations.[1]

Defendant shortly thereafter signed a stipulation and order granting temporary custody to plaintiff while retaining liberal visitation rights for herself. Defendant testified that she did not have the assistance of counsel at the time and signed the order under duress. Notably, however, defendant subsequently obtained counsel and signed another order that confirmed the earlier arrangements except for correcting an apparent typographical error in the earlier one and giving up one evening a week of defendant's visitation so that the older child could attend a church program.

For the approximately one year between separation and divorce, the children remained in the marital house with plaintiff. Plaintiff's mother baby-sat while plaintiff was at work.

Upon leaving the marital home, defendant began cohabiting with her new boyfriend. The couple moved several times in the following months,[2] but at the time of trial were living in a two-bedroom expandable trailer that they intended to make their permanent home.[3] Plaintiff's boyfriend testified that in that trailer, pending a planned expansion of the facility, the children slept in bunk beds in one of the bedrooms. Defendant's boyfriend testified that he had solid full-time employment, grossing $22,000 to $26,000 per year, and expected to support defendant and the children. Defendant testified that she planned, for the present, to devote herself full time to raising her children.

Defendant took full advantage of her weekend visitation privileges, but took less than full advantage of her weekday privileges. Plaintiff testified that the children enjoyed the weekend visits with defendant, but they were disappointed when defendant failed to appear for weekday visitation. Plaintiff enrolled the older child in preschool and participated fully in activities that involved parents. Defendant did not become involved in the child's preschool until near the time of trial. Plaintiff says he informed defendant of such opportunities, but defendant testified that she did not know about these activities. She also testified that her medical condition, i.e., asthma and allergies, precluded her from attending two events with the children.

Each parent has been fully cooperative regarding the other's rights to the children. Moreover, the friend of the court investigator testified that, based upon her investigation, she recommended that plaintiff be granted physical custody of the children.

The trial court found that no established custodial environment existed and, applying the statutory best-interest factors, determined on the preponderance of the evidence that the children's interests were best served by awarding primary physical custody to defendant.

Plaintiff argues on appeal that the trial court erred in finding that no established custodial environment existed, and that it failed to address, or made erroneous findings, under four of the statutory factors. We reverse the trial court as to whether either party had an established custodial environment and as to five statutory factors, (b), (c), (d), (e), and (k), affirm as to factor (h) and remand for further proceedings.

I

The issue of whether the children had an established custodial environment with plaintiff is crucial to the outcome of this case because where an established custodial environment exists, custody may not be changed except upon clear and convincing evidence that the change is in the best interests of the children. MCL 722.27(c); MSA 25.312(7)(c); *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1996) [*Ireland I*], aff'd as modified 451 Mich 457; 547 NW2d 686 (1996) [*Ireland II*].

Whether an established custodial environment exists is a question of fact. *Id.* This Court must uphold a trial court's findings of fact in a custody case unless the court's findings were against the great weight of the evidence. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-878; 526 NW2d 889 (1994); *Ireland.* 214 Mich App 242. Factual findings are against the great weight of the evidence if the evidence of record clearly preponderates in the opposite direction. *Fletcher, supra* at 878; *Ireland I*, 214 Mich App 242.

Section 7(1)(c) of the Child Custody Act provides the starting point for an inquiry as to whether an established custodial environment exists:

> The custodial environment of a child 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); MSA 25.312(7)(1)(c).]

In *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981), the Supreme Court expounded upon this statutory language:

> Such an environment depended . . . upon a custodial relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.

The trial court stated its finding as follows: "This Court finds, considering the contributions each parent made to raising the children before they separated and the extensive contact each has had with them after the separation, that there is no established custodial environment as [statutorily] defined . . . ." We believe that the evidence clearly preponderates in the opposite direction, i.e., that plaintiff had

established a custodial environment with the children in the same home where the children had lived their entire lives.

In *Treutle v Treutle*, 197 Mich App 690; 495 NW2d 836 (1992), this Court affirmed the circuit court's finding of an established custodial environment under facts similar to those in the instant case. The child had resided with both parents during the marriage, his mother acting as primary care giver. The child then remained with his father in the marital home for the six months after his parents separated and for the six months following the divorce. Since the separation, the child spent his father's working hours with a babysitter, and the child's mother exercised visitation rights. These facts supported the finding that the child's environment with his father was "marked by qualities of security, stability and permanence." *Id.* at 693-694, quoting *Baker*, *supra*, at 580.

In *Ireland I*, 214 Mich App 242, our Court affirmed the trial court's finding of an established custodial environment where the young plaintiff-mother of the child had raised the child with the plaintiff's sister and plaintiff's mother in the mother's home and at the mother's expense, but we reversed the trial court's determination that the statutory best interests analysis resulted in the defendant father receiving custody of the child. Regarding the establishment of a custodial environment, the defendant-father initially did not seek visitation but regularly and satisfactorily visited the child, although he was never solely obligated to care for the child for any extended period. The defendant's parents did not provide the plaintiff with any financial support but purchased things for the child's use when she was on visitation in their home. *Id.* This Court affirmed the trial court's finding that although both parties lived with their parents, the plaintiff had matured in her commitment to parenting and was living alone with the child. Accordingly, we found an established custodial environment. *Id.* at 242-243. The Michigan Supreme Court affirmed this finding, *Ireland II*, 451 Mich 469, and went on to review the statutory best interests factors in determining that it was not in the child's best interests to change the established custodial environment. *Id.* at 463-466.

In the instant case, these same qualities of security, stability, and permanence were present for the children in their home with their father. The children had lived in the marital home their entire lives and had their own rooms there. Plaintiff had always resided with them, and while he was at work, the children were able to stay in their home during the day because their paternal grandmother came to the house to care for them.[4] Although the parties make limited, unsupported allegations against each other regarding physical abuse, neither denied the love and caring that the children received from the other.[5]

Moreover, the circumstances surrounding the children's care in the years immediately preceding the divorce are of particular relevance to the issue of an established custodial environment. *Schwiesow v Schwiesow*, 159 Mich App 548, 557; 406 NW2d 878 (1987). The disruption in these children's lives from the breakup of their parents' marriage was softened by their staying in their familiar home with plaintiff after defendant left. This Court does not discredit defendant's testimony that she only reluctantly agreed to that temporary arrangement, but at issue is the existence of an established custodial environment, not the reason for its creation. *Bowers v Bowers*, 190 Mich App 51, 54; 475 NW2d 394 (1991)[6].

For these reasons, we find that the trial court's conclusion that no established custodial environment existed was against the great weight of the evidence and that the evidence clearly preponderates in the opposite direction. *Ireland I*, 214 Mich App 242.

II

In light of this finding that plaintiff had an established custodial environment with his children, we must now determine whether defendant presented clear and convincing evidence that it is in the best interests of the children to change this established custodial environment. *Ireland I, supra* at 241. Absent this showing, the court is prohibited from changing the custodial environment. *Baker, supra* at 577; *Ireland I, supra* at 243. To determine the children's best interests, the court must weigh the "sum total" of twelve statutory factors. *Ireland I, supra*; MCL 722.23; MSA 25.312(3). The court's ultimate findings regarding one of the twelve factors can be set aside if it is against the great weight of the evidence. *Ireland I, supra*, citing *Fletcher, supra* at 881. When the trial court incorrectly chooses, interprets or applies the law, however, it commits legal error that we are bound to correct. *Id.*

The statutory best interests factors that the trial court must address are as follows:

> (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 the 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. [MCL 722.23; MSA 25.312(3).]

It is well settled that in determining the best interests of a child, a trial court must consider and state a conclusion on each factor. *Schubring v Schubring*, 190 Mich App 468, 470; 476 NW2d 434 (1991).

The circuit court rated the parties equal under factors (a), (c), (e), (f), (g), (h), (j), and gave defendant the advantage on factors (b) and (k). The court declared factor (d) to be of little relevance, accepted the stipulation of the parties that factor (i) should not be considered, and tacitly declined to introduce other considerations as allowed by factor (l).

Plaintiff also takes issue with the court's findings regarding factor (b).

Regarding factor (b), the court gave defendant the advantage, finding that she had the greater capacity to provide love, affection, and guidance, citing defendant's stated intention to forego outside employment and remain at home with the children, and also plaintiff's reliance on his mother for baby-sitting. Plaintiff argues that defendant did not rule out returning to the work force and was indeed engaged in work outside the home. Plaintiff also argues that his reliance on his mother for baby-sitting in fact properly promoted continuity in the relationship between the children and their grandmother. Indeed, defendant testified that she "might" go back to work one day and that she was helping a friend to get a day care business started. Moreover, a strong bond between the children and their grandmother should be encouraged. We question whether it is possible to weigh the value of a mother versus a grandmother caring for the children under the circumstances presented in this case.[7] Here the trial court decided this factor in defendant's favor solely for her contention that she was going to stay home with them full-time and not enter the work force. This fact, in and of itself, is insufficient to support such a finding and against the great weight of the evidence, particularly in view of the fact that presumably both children now attend school for some part of the day.

Plaintiff objects to the court's disposition of factor (d). We agree that factor (d) was not of "little relevance." The court discounted the relevance of the length of time the children had spent in a stable and satisfactory environment and the desirability of continuity, observing that the marital home had been generally stable, that both parents had had extensive contact with the children since the separation, and that because the children would soon start school, the present pattern of extensive contact with both parents probably could not be continued. The court did not acknowledge, and seems not to have considered, that the children had spent their entire lives in the marital home with their father, and that plaintiff's desire to keep them in that environment would indeed have promoted stability and continuity

for the children. While some particulars of the then-existing custody and visitation arrangements would have had to be modified as the children started school, this could readily have been done against the backdrop of the children continuing to live in the house in which they had always lived.[8] Thus, the court's conclusion that this factor is irrelevant is contrary to the great weight of the evidence. We therefore conclude that factor (d) is relevant to this case, and that the circuit court erred in not only concluding otherwise but also by failing to acknowledge that the environment in which plaintiff wished to keep the children was essentially the same stable and satisfactory one they had always known.

Regarding factor (h), the court stated that this factor was of limited relevance because of the children's young ages, but it then concluded there was no evidence establishing that the home, school, or community environments that either parent could supply would be any more or less beneficial to these children. Plaintiff argues that the court erred in discounting the relevance of this factor, then further erred in failing to give the advantage to defendant in light of the older child's involvement in preschool, plaintiff's involvement with the preschool, and defendant's failure to involve herself until near the time of trial.

While a more thorough account of the court's balancing would have been helpful, the court's findings satisfy its duty. Factual findings are sufficient "without over elaboration of detail or particularization of facts." MCR 2.517(A)(2). Because the children were not yet school age, there were few school or community records to consult. Plaintiff's exclusive reliance on the older child's preschooling as a factual basis to rebut the court's finding is unpersuasive. Defendant's failure to participate in the older child's preschool activities, in light of evidence that she had not been informed of opportunities to do so, and was prevented by her medical condition from joining in when she was informed,[9] does not weigh against a finding that the evidence supports the court's conclusion that the parties are equally capable of providing for the children in the ways that factor (h) addresses.

Regarding factor (k), the court acknowledged the conflicting testimony of the parties and then considered other testimony to conclude that plaintiff had engaged in domestic violence. The court reasoned that testimony that defendant moved out of the marital home in haste indicating that she left under duress made more sense than plaintiffs' assertion that defendant left following calm discussions. Plaintiff attempts to rebut this finding by pointing to defendant's testimony that the decision to divorce was mutual, that defendant agreed to a temporary custody and visitation scheme shortly after the separation, that defendant's boyfriend had slapped the parties' daughter, and that plaintiff denied that he had physically abused or threatened defendant. It is not at all apparent to this Court that mutual agreement to divorce, plus prompt agreement to a temporary custody and visitation arrangement, either contradicts or confirms a finding that violence accompanied defendant's departure from the marriage. We do not believe, however, that a minor error in the circuit court's recollection regarding whether a gun was visible when defendant left the home is of import. Given that both parties allege different instances of domestic abuse but can provide no corroborating evidence to support these allegations, we believe that the evidence clearly preponderates against the conclusion that this factor weighs in defendant's favor. On remand, we caution the court against concluding that defendant suffered domestic abuse at the hands of plaintiff while discounting testimony that defendant's boyfriend hit the parties' daughter, as none of these allegations were substantiated. Further, the fact that plaintiff

prevented a situation from escalating by calling the police when defendant demanded entry into the house after she returned the children from visitation does not, in our view, constitute domestic violence.

Although plaintiff does not object to several other factors, we believe that the evidence presented is contrary to the trial court's conclusions regarding factors (c) and (e), and that, on remand, the court should reexamine all of the factors. *Ireland II*, 451 Mich 468-469; *Ireland I*, 214 Mich App 249. Specifically, as to factor (c), which involves that capacity and disposition of the parties to provide basic material needs to the children, the court found that neither party prevailed. We believe, however, that plaintiff is better suited to provide for the children because he has adequate employment income and a home. Defendant, on the other hand, is unemployed and is living with a man who is not her husband and upon whom she must rely for all housing and support for her and the children. While defendant's boyfriend professed a desire to provide for defendant and her children, he is not obligated in any way to do so. Plaintiff clearly had the greater capacity and disposition to provide the children's basic material needs; thus, the great weight of the evidence preponderates in favor of plaintiff for factor (c).

Regarding factor (e), our Supreme Court in *Ireland II*, 451 Mich 465, determined that "the focus of factor (e) is the child's prospects for a stable family environment." Further,

> The stability of a child's home can be undermined in various ways. This might include *frequent moves* to unfamiliar settings, a succession of persons residing in the home, *live-in romantic companions for the custodial parent*, or other potential disruptions. Of course, every situation needs to be examined individually. [*Id.* at 464, n 9; emphasis added.]

Both defendant and her boyfriend admitted that within the first year of their relationship, the couple moved approximately five times. The boyfriend testified that they moved to get into a better environment. In light of *Ireland II, supra,* the trial court erred in determining that factor (e) has "very little to do with whether a party changes residence frequently."[10] Moreover, although the boyfriend indicated a desire to expand the trailer, neither their decision to enhance the physical attributes of the home in the future nor their desire to marry after the divorce mitigates the negative impact of defendant's decision to live with another man while still married to her husband and in the presence of her young children. In contrast, plaintiff's status as a single man does not detract from his ability to provide stability to the children as he continues to reside in the only home the children knew throughout their lives, and where he was not cohabiting with anyone.

Finally, we disagree that the evidence supports the trial court's conclusion that defendant had no other alternative but to move in with her current boyfriend. Although defendant said she had friends who said she could stay with them, the record is silent as to whether defendant made other attempts to find more permanent housing with relatives or female friends. The boyfriend also testified that defendant's decision to move in was sudden, and she did so just a few days after leaving the marital home. Regardless, the evidence clearly establishes that defendant and her boyfriend are cohabiting without the benefit of marriage and have moved repeatedly within the year before the custody hearing, which our Supreme Court indicates are two factors that undermine the stability of the children's home.

Ireland, supra at 465, n 9. Accordingly, the great weight of the evidence preponderates against finding that factor (e) is neutral as to the parties. Factor (e) should have been decided in plaintiff's favor.

We further find that statutory factor (d) is relevant to this case, and that the court must take into account that the children spent their entire lives with plaintiff in the house in which he intends to remain. We also affirm the circuit court's findings regarding factor (h), but also find that the trial court's conclusions regarding factors (b), (c), (e) and (k) are against the great weight of the evidence. Therefore, we find that the children in this case had an established custodial environment with plaintiff

Review de novo by an appellate court of the ultimate custodial disposition is inappropriate. Upon a finding of error potentially affecting the outcome, this Court must remand the case for reevaluation. *Ireland II*, 451 Mich 468-469; *Fletcher, supra* at 889. Accordingly, we remand this case to the circuit court for reevaluation of the evidence consistent with this opinion. Because we have found an established custodial environment with plaintiff, the court is instructed to award physical custody to plaintiff unless the court finds that clear and convincing evidence establishes that the children's interests would better be served by placement with defendant.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Jane E. Markey

[1] Plaintiff also testified that his daughter returned from visitation with defendant bearing a red mark on her face, and she explained that the boyfriend had slapped her. Both defendant and the boyfriend denied the incident.

[2] The boyfriend admitted that he and defendant had moved approximately five times over the course of a year.

[3] Plaintiff testified that he had seen the boyfriend's motorcycle parked in the middle of the family room in the trailer. The boyfriend admitted that he brought the motorcycle inside on special occasions, i.e., "making payments," and had a ramp built to get the motorcycle inside the trailer.

[4] Although the trial court agreed with defendant's claim that because she did not work, she could provide the best care for the children, we note that our Supreme Court in *Ireland II*, *supra* at 466-467, refused to say that using day care will cause a parent seeking custody to "lose ground" when the best interests factors are considered. Rather, the Court opined that

> [m]ore fundamentally, every child, every adult, and every custody case is unique. There can be no broad rules that dictate a preference for one manner of child care over another. The circuit court must look at each situation and determine what is in the best interests of the child. [*Id.* at 468.]

Indeed, the fact that the defendant father in *Ireland* was living with his parents in their home and could provide an apparently stable custodial home was not determinative because "that stability may be chimerical." *Id.* at 466. Indeed, because the father's plans for the future regarding education, employment, and his life were uncertain but he was able to care for the child now, the Court believed it would be ironic to say that the father could offer a more stable home as a result of this uncertainty. *Id.*

Thus, in *Ireland II*, *supra* at 466-469, our Supreme Court remanded the case to the trial court to reconsider the statutory factors in light of the Supreme Court's decision, permitting the court to also consider changes in circumstances that have occurred during the appeal.

[5] Notably, however, both parties testified that their son was bitten, presumably in the face, by a dog while in defendant's care. Defendant testified that she was watching television only a few feet away from her son when the attack occurred, that she had known the dog for many years, and that the boy had been around the dog before. Defendant made no mention of any injuries that the children suffered while with plaintiff.

[6] On appeal after remand, *Bowers v Bowers*, 198 Mich App 320; 497 NW2d 602 (1993).

[7] See footnote 4 and our Supreme Court's discussion regarding how such child care arrangements are to be considered in the context of child custody disputes. *Ireland II*, 451 Mich 466-468. Unfortunately, the Court only raised several good questions and stated that there was no easily discernible answer to this question.

[8] We disagree with the trial court's conclusory statement that "issues of transportation and school placement probably make continuation of the present situation impossible."

[9] We believe, however, that defendant could have found out about these activities earlier but failed to do so.

[10] Surprisingly, the Michigan Supreme Court's decision in *Ireland* was published approximately three months before the trial court issued its findings regarding the established custodial environment and the best interests factors. We believe that a close review of both this Court's opinion in *Ireland* and our Supreme Court's subsequent treatment of the same would have provided the trial court with valuable guidance in this case.