

STATE OF MICHIGAN  
COURT OF APPEALS

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ARTHUR EARL PROCTOR,

Plaintiff-Appellant,

v

RENEE PROCTOR,

Defendant-Appellee.

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UNPUBLISHED

April 23, 1999

No. 213604

Kent Circuit Court

LC No. 93-077740 DM

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying his petition for change of custody. We affirm.

At the time of the petition, plaintiff and defendant shared joint legal custody of their four-year-old daughter, Ashley, while defendant had physical custody of the minor child. Plaintiff filed the petition for change of custody after learning that Ashley had been sexually molested by the son (Mike, Jr.) of defendant's boyfriend, Mike Hansen, Sr. (Mike, Sr.), with whom defendant and Ashley were living at the time. Defendant does not dispute that the sexual abuse occurred.

The trial court found, and plaintiff does not contest, that there was a custodial environment for Ashley established with defendant. Given an established custodial environment with defendant, it was plaintiff's burden to show by clear and convincing evidence that a change in custody would be in the best interest of Ashley. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Bowers v Bowers*, 198 Mich App 320, 327-328; 497 NW2d 602 (1993). The trial court found that plaintiff did not meet this burden. When reviewing child custody cases, this Court reviews findings of fact under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). The trial court's findings will be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* The trial court's custody decision, which is a discretionary dispositional ruling, is reviewed under a "palpable abuse of discretion" standard. MCL 722.28; MSA 25.312(8); *Fletcher, supra* at 879-880. Finally, questions of law in custody decisions are reviewed for clear legal error. MCL 722.28; MSA 25.312(8); *Fletcher, supra* at 881.

In order to determine the best interest of the child, the trial court was required to weigh twelve statutory factors. MCL 722.23; MSA 25.312(3); *Bowers, supra* at 328. The trial court found in favor of defendant on four of the statutory factors, found in favor of plaintiff on one factor, and found that six of the remaining seven factors weighed in favor of neither party. Plaintiff has not alleged that the trial court neglected its evaluation of the twelve factors. Rather, plaintiff alleges that the trial court did not ascribe proper weight to the “catchall” factor, factor (I), which addresses “[a]ny other factor considered by the court to be relevant to a particular child custody dispute.” MCL 722.23; MSA 25.312(3). Plaintiff argues that the molestation of Ashley was the type of factor “bearing on the welfare of the child [which] may turn the scale” in determining custody, *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 595-596; 532 NW2d 205 (1995), quoting *Weiss v Wiess*, 174 Mich 431, 436; 140 NW 587 (1913), and that in light of the molestation, the trial court abused its discretion in leaving Ashley in the custody of defendant without any restrictions on contact with Mike, Jr.

Although the trial court did not explicitly state in which party’s favor it found factor (I), the court did make specific findings with regard to that factor and it is clear from the context of its ruling that the court found in favor of defendant. In discussing factor (I), the trial court referred to the evaluations and reports supplied by the professionals who testified in this case, one of whom recommended a change of custody based on Mike, Jr.’s sexual abuse of Ashley, and one of whom recommended maintaining custody with defendant. The professional who recommended the change reasoned that if Ashley remained in defendant’s custody, it would be difficult to protect her from further abuse by Mike, Jr., since defendant remained in a relationship with Mike, Sr. However, the trial court noted that the same report did not limit contact with defendant, and, in fact, recommended very broad participation by defendant in Ashley’s life. Thus, reasoned the court, a change in custody would not necessarily remedy the problem of potential contact with Mike, Jr.

The court went on to explain that it considered the reaction of defendant to the discovery of the molestation, immediate removal of herself and Ashley from Mike, Sr.’s household, to be appropriate and to reflect the fact that defendant can separate Ashley’s needs from her own. Additionally, the court emphasized the importance it placed on the vigilance of both defendant and Mike, Sr. during the many months since the discovery of the molestation, ensuring that there was no contact between Ashley and Mike, Jr. The trial court also noted the emotional bond between Ashley and defendant and explained its agreement with the assessment of a social worker that a change in custody, following this traumatic event, could send the wrong signal to Ashley:

Ashley, like any other child, as her teacher testified, is being taught to tell when bad things happen, especially when sexual abuse occurs, and my feeling mirrors that of Mr. High, who said here we have a situation where a child is taught and encouraged to tell the truth and, in fact, did after much prompting by her mother, action was taken because she told, and now to change the custodial environment, which is clearly with the mother, because she told the truth and did what she was told to do, would in my mind create a needless conflict and an unjust consequence.

Our review of the trial court’s findings with regard to factor (I) shows that the trial court decided this factor based on what it determined was in Ashley’s continued best interest in light of the fact that

she had been assaulted, instead of deciding solely based on the fact that she had been assaulted. We conclude that a finding in favor of defendant on this factor is not against the great weight of the evidence, nor do we find a palpable abuse of discretion in the court's decision to maintain custody of Ashley with defendant.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins