STATE OF MICHIGAN

COURT OF APPEALS

CATHY LYNN NELSON,

Plaintiff-Appellee,

v

CLOYSE DEAN NELSON,

Defendant-Appellant.

UNPUBLISHED
November 2, 1999

No. 217182
Berrien Circuit Court
LC No. 98-000512 DM

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

This is an appeal that concerns the custody of two minor children, Kelli Lynn Nelson (DOB 4/13/96) and Cloyse Andrew Nelson (DOB 11/29/97). The parties were married in December 1996, and a judgment of divorce was entered in this matter in January 1999. In the judgment of divorce, the trial court modified the temporary custody order that ordered joint physical custody of the minor children to grant plaintiff sole physical custody. Defendant appeals as of right. We affirm.

First, defendant contends that the trial court erred when it determined that there was no established custodial environment in his home (or plaintiff's). We disagree. In reviewing the lower court's finding that no established custodial environment existed, this Court applies the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), modified 451 Mich 457 (1996). The trial court's finding that no established custodial environment existed in defendant's home must be sustained unless evidence clearly preponderates in the opposite direction. *Id*.

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); MSA 25.312(7)(1)(c).]

The trial court found that an established custodial environment did not exist because the guidance, discipline, necessities of life, and parental comfort have been significantly divided between both parents since the entry of the temporary order.[1]

Both parties acknowledge that the existence of a temporary custody order does not create an established custodial environment. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). On the other hand, the fact that the custody order was temporary does not prevent an established custodial environment from existing because an established custodial environment may be established while a temporary custody order is in place. *Blaskowski v Blaskowski*, 115 Mich App 1, 6; 320 NW2d 268 (1982).

Having reviewed the record, we cannot conclude that the evidence clearly preponderates against the conclusion that there was no established custodial environment in either of the homes. There was testimony regarding the inconsistencies in the care and guidance of the children between the two homes during the joint custody. Additionally, there was testimony that the children woke up in the middle of the night unsure of where they were or who was caring for them. The confusion apparent during the joint custody arrangement prevented the children from looking to either parent "for guidance, discipline, the necessities of life, and parental comfort" under the statute. MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

Next, defendant contends that the trial court needed clear and convincing evidence that it was in the children's best interest to modify the order. We disagree. The court is only required to have clear and convincing evidence presented in order to modify a previous order if there is a change in the established custodial environment. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Having concluded that the trial court did not err when it determined that there was no established custodial environment, we also conclude that the trial court properly applied a preponderance of the evidence standard in deciding whether to modify the custody order. *Hayes*, *supra* at 387.

Next, defendant argues that the trial court erred in its findings on the statutorily required "best interest" factors.[2] We review findings of fact under the great weight of the evidence standard, and these findings will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Here, the trial court found that there was no advantage to either party in regard to factors (a), (c), (e), (f), (h), and (j). The court found that under factor (i), neither child was old enough to express a preference. Under factor (l), the court found that there were no other factors that were relevant to the custody dispute. The court found that factors (b), (d), (g), and (k) favored plaintiff.

Factor (b) concerns the capacity and disposition of the parties involved to give the children love, affection, and guidance and to continue the education and raising of the children in their religion or creed, if any. MCL 722.23(b); MSA 25.312(3)(b). The lower court acknowledged that both parties cared for the children. Additionally, the court found that, in the past, plaintiff had used inappropriate methods of discipline when disciplining her other children; however, the court found that plaintiff's mental health was better suited for disciplining the children. A counselor who provided the custody evaluation in this case concluded that defendant presented a greater risk of harm to the children than did

plaintiff. We cannot conclude that the trial court's findings, with respect to factor (b), were against the great weight of the evidence.

Factor (d) concerns the length of time the children have lived in a satisfactory environment and the desirability of maintaining continuity. MCL 722.23(d); MSA 25.312(3)(d). Again, the court found that plaintiff's mental health was stronger and that she was better able to provide a stable and satisfactory environment for the children. There was testimony that plaintiff's depression was merely temporary, but that defendant's mental state was more of a permanent nature. Additionally, there was credible testimony that defendant had threatened to commit suicide, which defendant denied. We hold that the trial court's finding that plaintiff has the advantage in factor (d) was not against the great weight of the evidence.

Factor (g) concerns the mental and physical health of the parties involved. MCL 722.23(g); MSA 25.312(3)(g). The court noted that plaintiff's depression was likely to be a temporary condition, while defendant has made credible threats to harm himself over a longer period of time and has engaged in controlling behaviors in his relationship with plaintiff. We cannot conclude that the lower court findings on this factor were against the great weight of the evidence.

Factor (k) concerns domestic violence whether directed against or witnessed by the children. MCL 722.23(k); MSA 25.312(3)(k). The trial court noted that both parties had engaged in domestic violence but found that defendant's actions were more severe. Plaintiff admitted to slapping defendant, while defendant admitted he was involved in an incident in which plaintiff, who was five months pregnant at the time, fell down the stairs. We cannot conclude that the trial court's findings regarding this factor were against the great weight of the evidence.

Defendant also contends that the trial court abused its discretion in the dispositional ruling when it found by a preponderance of the evidence that it was in the children's best interest to change physical custody from joint to sole with plaintiff. A trial court's custody decision is a discretionary dispositional ruling, and it will be affirmed unless it constitutes an abuse of discretion. *Winn v Winn*, 234 Mich App 255, 262; 593 NW2d 662 (1999). An abuse of discretion occurs when the result is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). After reviewing all of the evidence, we conclude that the lower court's decision was not an abuse of discretion.

We affirm.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] At oral argument, defendant complained that the trial court should have better stated its reasoning for determining that no established custodial environment existed. We have reviewed the lower court record regarding this claim and conclude that the trial court's response was sufficient and in accordance with MCR 2.517(A)(2) ("Brief, definite, and pertinent findings and conclusions on the contested matters

are sufficient, without overelaboration of detail or particularization of facts."). See, also, *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994) (Brickley, J.).

[2] These factors are found at MCL 722.23; MSA 25.312(3), which states in part:

> (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.