STATE OF MICHIGAN

COURT OF APPEALS

PAUL D. DROSTE,

Plaintiff-Appellee,

v

SANDRA J. DROSTE,

Defendant-Appellant.

UNPUBLISHED
February 11, 2000

No. 213294
Mecosta Circuit Court
LC No. 97-011920-DM

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right from the circuit court order awarding plaintiff sole physical custody of the parties' two minor children. Because the circuit court applied the correct legal standard to its custody determination and because its findings of fact were supported by the great weight of the evidence, we affirm.

Defendant first contends that the circuit court erred in applying the preponderance of the evidence standard, rather than the clear and convincing evidence standard, to its decision regarding physical custody of the parties' minor children. We disagree. MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides, in pertinent part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

Therefore, a circuit court may issue an order changing custody of a minor child only upon a showing of clear and convincing evidence, when an established custodial environment exists. However, when an established custodial environment does not exist, the circuit court may order a change of custody under a preponderance of the evidence standard. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). In order to determine which standard of proof applied to the physical custody determination, the circuit court was first required to determine whether an established custodial environment existed. Such a determination "is a question of fact for the trial court to resolve on the basis of statutory criteria." *Id*. at 388.

The Child Custody Act sets forth the factors which a circuit court must examine to determine the existence of an established custodial environment. MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides, in pertinent part:

> 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.

Noting that the parties shared physical custody of the minor children for six or seven months preceding trial, with custody alternating on a weekly basis, the circuit court found insufficient evidence to support an established custodial environment, and therefore applied the preponderance of the evidence standard to the custody determination. To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. MCL 722.28; MSA 25.312(8).

Defendant contends that the circuit court's finding of no established custodial environment was erroneous, arguing that the joint custody arrangement which existed in this case either created an established custodial environment with her, or created such an environment with both her and plaintiff, which could not be altered without a showing of clear and convincing evidence that a change in custody would be in the best interests of the children. *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989); *Nielson v Nielson*, 163 Mich App 430, 433; 415 NW2d 6 (1987). While it is true that an "established custodial environment can exist in more than one home," *Duperon*, *supra* at 80, the expectations of the minor children as to the permanency of their custody situation are relevant to the establishment of such an environment. *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993); *VanderMolen v VanderMolen*, 164 Mich App 448, 457; 418 NW2d 108 (1987); *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984). The Child Custody Act requires a circuit court to consider "the inclination of the custodian and the child as to permanency of the relationship," and provides that a custodial environment can be established only if, "over an appreciable time the child looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). In this case, testimony was presented that neither the parties nor the children maintained expectations of permanence in the joint custody arrangement, and that the children had not experienced stability in their custodial environment for an "appreciable time." Having reviewed the record in this matter, we conclude that the circuit court's findings of fact on the issue of an established custodial environment were supported by the great weight of the evidence, and that the circuit court correctly applied the preponderance of the evidence standard.

Defendant next contends that the circuit court's findings of fact on the "best interests of the child" factors[1] were against the great weight of the evidence and constituted a palpable abuse of discretion. In divorce actions involving custody of minor children, the circuit court must make findings of fact and conclusions of law with regard to each of the "best interests of the child" factors. *Mann v*

Mann, 190 Mich App 526; 476 NW2d 439 (1991). As set forth above, this Court must affirm the circuit court's findings of fact in a child custody dispute unless those findings are against the great weight of the evidence. MCL 722.28; MSA 25.312(8). In this case, the circuit court made findings of fact on each of the required factors, finding the parties equal on each factor, except for factors (f) and (l), which favored plaintiff. While defendant concedes that factors (g), (h), and (i) should be considered to favor both parties equally, she takes issue with factors (a), (b), (c), (d), (e), (j), and (k), arguing that each of those factors weighed heavily in her favor. Again, our review of the record leads us to conclude that the circuit court's factual findings with respect to these seven factors were supported by the great weight of the evidence.

Defendant next contends that the circuit court erred in determining that factors (f) and (l) favored plaintiff. Factor (f) is "the moral fitness of the parties involved," while factor (l) is "any other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23; MSA 25.312(3). With regard to factor (f), the circuit court found credible evidence to support its conclusion that defendant had engaged in an extramarital relationship with her employer prior to the breakup of the parties' marriage. The court considered this evidence probative of defendant's moral fitness and found in favor of plaintiff on factor (f). Defendant argues that the circuit court was not permitted to consider her extramarital relationship in its decision regarding factor (f), citing *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994). We disagree.

In *Fletcher*, a majority of the Michigan Supreme Court held that a party's extramarital relationship may not always be relevant to a trial court's evaluation of factor (f). However, the Court did not rule that a party's extramarital relationship may *never* be relevant to factor (f). As the Court explained:

> Extramarital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship. While such conduct certainly has a bearing on one's spousal fitness, it need not be probative of how one will interact with or raise a child. Because of its limited probative value and the significant potential for prejudicially ascribing disproportionate weight to that fact, extramarital conduct, *in and of itself*, may not be relevant to factor f. [*Fletcher*, *supra* at 887, emphasis added.]

In contrast to *Fletcher*, plaintiff in this case presented testimony that defendant's extramarital relationship had an identifiable adverse effect on the parties' children because defendant's affair frequently caused her to be absent from the marital home. Because of this testimony, the facts in this case are distinguishable from the facts presented in *Fletcher*. The circuit court's findings of fact in favor of plaintiff on factor (f) were not against the great weight of the evidence, and did not constitute a palpable abuse of discretion or a clear legal error on a major issue.

Defendant also argues that the circuit court's findings of fact on factor (l) were against the great weight of the evidence and constituted a palpable abuse of discretion. With regard to that factor, the circuit court made the following findings of fact:

> Clear, compelling evidence makes me very comfortable making the following finding: That mother [defendant] has a continued romantic and intimate relationship with a third party, an individual of questionable character and habits, thus causing me severe concern about mother's [defendant's] judgment. That's the finding.

Plaintiff argues that the circuit court essentially double-counted her extramarital relationship in its consideration of factor (l) and impermissibly judged her moral fitness based on the moral fitness of an "individual of questionable character and habits" with whom she was having an extramarital relationship. Contrary to defendant's suggestion, the circuit court made it very clear that it was not imputing the individual's moral fitness to defendant. Rather, the circuit court concluded that defendant's association demonstrated extremely poor judgment on her part.

The testimony presented to the circuit court regarding the individual's conduct was extremely troubling. He testified as to the details of a September 1993 incident in Georgia where he committed indecent exposure. The circuit court was concerned enough about his influence that it included a provision in the divorce judgment prohibiting him from having "contact of any kind, verbal, written, or in person at any time with the minor children of these parties," for a period of at least one year. We conclude that the circuit court properly considered defendant's poor judgment in associating with this individual under factor (l), and conclude that this does not constitute an impermissible double-counting of defendant's decision to engage in an extramarital relationship or of her moral fitness as a parent.

Finally, defendant argues that the circuit court erred by permitting plaintiff to call witnesses not previously disclosed on a required witness list. MCR 2.401(I)(2) governs the filing of witness lists by parties to civil actions. The rule provides that the circuit court "may order that any witness listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." The rule furthers the ultimate objective of pretrial discovery, which is to avoid trial by surprise by making available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). We review a circuit court's decision to allow testimony of witnesses not disclosed on a witness list for an abuse of discretion. *Dunn v Lederele Laboratories*, 121 Mich App 73, 89; 328 NW2d 576 (1982).

In this case, the circuit court held a pretrial conference and issued an order directing the parties to exchange and file a witness list within thirty days. Plaintiff filed an untimely witness list, which disclosed neither LaShawn Stevens nor Danielle Sturdavant. At trial, the circuit court permitted both witnesses to testify, over defendant's objection. We conclude that the circuit court did not abuse its discretion in admitting the testimony of these two witnesses. Even if there was an abuse of discretion, we determine that the error was harmless because the testimony of neither witness affected the ultimate custody decision. Stevens testified that she knew of no improper relationship between the individual who committed indecent exposure and defendant. Sturdavant simply testified that she witnessed the individual and defendant standing in close proximity to one another, on one occasion. The admission of testimony from these two witnesses

was harmless with regard to the custody issue and does not constitute error requiring reversal.

Affirmed. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter

[1] MCL 722.23; MSA 25.312(3).