STATE OF MICHIGAN

COURT OF APPEALS

AMY LYNN ROOT,

Plaintiff-Appellant,

v

MICHAEL RONALD SMITH,

Defendant-Appellee.

UNPUBLISHED
February 18, 2000

No. 222266
Ionia Circuit Court
LC No. 94-015947-DS

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying the parties' cross-petitions for sole physical custody of the parties' two minor daughters.[1] We affirm.

Plaintiff Amy Root and defendant Michael Smith resided together for over five years and had two minor daughters. The parties, who were unmarried, separated and reunited on several occasions. In September 1997, the parties agreed that if a permanent separation occurred they would share legal and physical custody of the children. On September 25, 1997, a "Referee Recommendation/Order Following Child Support and Custody Hearing" was entered. The order stated in pertinent part:

> IT IS RECOMMENDED; based upon the agreement of the parties, that the following order enter in the event the parties notify the office of the Friend of the Court in writing that they have separated and no longer reside together. This agreement and order is intended by the parties to maximize the quality time each parent spends with the children given the parties' respective schedules.
>
> 1. The parties shall have joint legal and joint physical custody of the minor children.
>
> 2. That parenting time for the Defendant-father shall be from Friday after work through Monday morning, wherein he will drop the minor children off to Shelly Martin, the child care provider. The Plaintiff-mother's parenting time shall be from Monday through Friday morning.

In December 1997 the parties separated for the final time. Both parties filed petitions for sole physical custody. On August 20, 1998, the Friend of the Court filed a "Recommendation and Order Regarding Custody, Parenting Time, and Support." The referee recommended that joint physical custody continue, with the following pertinent changes:

> a. The Defendant-father shall have primary care and custody during the school year.
>
> b. Defendant-father shall have care and custody of the children on weekdays during the school year with the mother having parenting time three weekends per month during the school year starting Friday evening and lasting until Sunday evening.
>
> c. The mother shall have the minor children during the weekdays during summer/non-school period and the father shall have parenting time every other weekend starting Friday night until Sunday night.

After this FOC recommendation, plaintiff sought de novo review in circuit court. The court took the matter under advisement and issued an opinion on July 7, 1999. The court ruled that an established custodial environment existed in the parties' joint custodial arrangement. After reviewing the best interest factors set forth in MCL 722.23; MSA 25.312(3), the court determined that there was not clear and convincing evidence that a change in custody was in the best interests of the children.

Plaintiff first argues that the trial court erred in determining that a custodial environment had been established with both parties, thus requiring plaintiff to show by clear and convincing evidence that a change in custody was warranted before her petition could be granted. A custodial environment is established if, over an appreciable time, the children naturally look to the parent in that environment for guidance, discipline, the necessities of life and parental comforts. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). A custodial environment suggests that an established relationship exists between the parent and the child in which the parent exercises responsibility for the care, supervision and upbringing of the child. *In re Lang*, 236 Mich App 129; 600 NW2d 646 (1999). An established custodial environment can exist in more than one home. *Duperon v Duperon*, 175 Mich App 77, 81; 437 NW2d 318 (1989); *Nielsen v Nielsen*, 163 Mich App 430, 433-434; 415 NW2d 6 (1987). Whether an established custodial environment existed is a question of fact for the trial court to resolve. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995).

Here, the parties had a joint physical custodial arrangement from December 1997 until the time of trial in July 1999. Although the children physically reside in defendant's home for a greater portion of the week, the stability and continuity of the joint custody situation in the present case supports the court's finding. At the time of the decision, the children had been changing residences for one-and-a-half years. Testimony showed that the children spend a substantial amount of time with each parent and look to each parent for "guidance, discipline, the necessities of life, and parental comfort." The joint custodial relationship was of significant duration and was marked by qualities of security, stability, and permanence. Evidence was presented that during this time period, the children were provided parental care, discipline, love, guidance, and attention appropriate to their ages and individual needs. The

court's finding that an established custodial environment existed in the joint custody arrangement is supported by the record. *Fletcher v Fletcher,* 447 Mich 871, 877-878; 526 NW2d 889 (1994).

If an established custodial environment exists, clear and convincing evidence must be presented to change custody. *Mann v Mann,* 190 Mich App 526, 531; 476 NW2d 439 (1991). Custody disputes are to be resolved in the child's best interest, as measured by the factors set forth in MCL 722.23; MSA 25.312(3). *Deel v Deel,* 113 Mich App 556, 559; 317 NW2d 685 (1982). The factors are:

> (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 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).]

The trial court found that factors (a), (c), (e), (g), and (h) equally favored plaintiff and defendant. The court also found that factors (b) and (d) favored defendant, that factor (l) favored plaintiff, and that factors (f), (j), and (k) favored neither party. The great weight of the evidence standard applies to all findings of fact, and a trial court's findings as to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 879.

Plaintiff first contends that the trial court improperly emphasized the religious aspects of factor (b) without considering the educational aspects of this factor. The court's opinion does indeed stress evidence that defendant regularly took the children to church and had registered them for Catholic school. However, the Court also noted that it was not specifically addressing education under factor (b), although it took education into account, because the court specifically found that the parties were equally involved in the children's school activities under factor (h). Given defendant's regular church attendance and the children's actual registration in St. Patrick's Elementary school, the court's findings regarding factor (b) were not against the great weight of the evidence.

Plaintiff also challenges the trial court's finding that the parties were equal with regard to factor (d). Plaintiff appears to contend that defendant's employment requires the girls to be in daycare in the morning and, therefore, plaintiff can provide a more stable environment. However, the evidence presented reveals that the parties conceded that both girls were doing well under the joint arrangement and that sole custody with either parent would deprive the children of benefits of extended family, church, and the nurturing they were receiving under the joint arrangement. The court's finding with respect to factor (d) was not against the great weight of the evidence.

Next, plaintiff challenges the trial court's finding that neither party was favored under factor (f). Having carefully reviewed the record, we find that the court's findings with respect to factor (f) are not against the great weight of the evidence.

Plaintiff also challenges the trial court's finding that the parties were equal with regard to factor (h) because the evidence presented demonstrates that plaintiff was more involved in the children's extracurricular activities. While plaintiff presented extensive testimony about her involvement with the children's school and school work, the evidence showed that while under defendant's primary care the children have continued to progress in school. A child's continuing improvement in school can be considered when assessing this factor. *Hall v Hall*, 156 Mich App 286, 289; 401 NW2d 353 (1986). Defendant provided testimony that he attended both official school functions and talked frequently to the girls' teachers and counselors about their progress. We find that the court's finding with respect to factor (h) was not against the great weight of the evidence.

Finally, plaintiff challenges the trial court's finding that factor (j) favored neither party. Although both parties have indicated a willingness to work together in the best interest of the children, evidence was presented that each party made important decisions regarding the children without consulting the other party. The trial court's finding that this factor favored neither party is not against the great weight of the evidence.

As noted above, plaintiff carried the burden of establishing by clear and convincing evidence that a change of custody is in the children's best interest. We agree with the trial court's finding that plaintiff failed to carry her burden of demonstrating that the best interests of the children would be served by awarding her sole physical custody.

Affirm.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck

[1] Although the trial court order also denied defendant's motion for sole physical custody, defendant has not appealed the order.