

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS J. LICH,

Plaintiff-Appellee,

v

KIM ANNETTE LICH,

Defendant-Appellant.

UNPUBLISHED

May 16, 2000

No. 221438

Saginaw Circuit Court

Family Division

LC No. 97-021203-DM

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce that awarded physical custody of the parties' minor son, Carter, to plaintiff. We affirm.

First, defendant contends that the trial court erred in finding that Carter had an established custodial environment with plaintiff. We disagree. MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides that "[t]he 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." "Whether or not an established custodial environment exists is a question of fact for the trial court to resolve based on the statutory factors." *Blaskowski v Blaskowski*, 115 Mich App 1, 6; 320 NW2d 268 (1982). A trial court's findings as to the existence of an established custodial environment should be affirmed unless the evidence clearly preponderates in the opposite direction. *Ireland v Smith*, 214 Mich App 235, 241-242; 542 NW2d 344 (1995), modified 451 Mich 457 (1996). An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987).

Here, the trial court found that since December 22, 1997, plaintiff and Carter's paternal grandmother have been Carter's primary caregivers. After entry of the trial court's temporary order that plaintiff and Carter vacate the marital home, defendant stipulated to an interim order granting custody of Carter to plaintiff on January 22, 1998. Defendant contends that the trial court should have

found that an established custodial environment existed with both parties or with her alone. While an established custodial environment does not arise solely from a temporary custody order, such an order may ripen into an established custodial environment. See, e.g., *DeVries, supra* at 268-272. Defendant did not controvert plaintiff's testimony that after the parties' separation in December 1997, plaintiff was primarily responsible for Carter's care. In light of this evidence, we conclude that the trial court did not err in finding that Carter looked to plaintiff for guidance, discipline, the necessities of life, and parental comfort, MCL 722.27(1)(c); MSA 25.312(7)(1)(c), and therefore had an established custodial environment with plaintiff.

Next, defendant contends that the trial court erred in awarding physical custody of Carter to plaintiff. In a child custody case, this Court reviews the trial court's findings of fact under the great weight of the evidence standard, the court's discretionary rulings for an abuse of discretion, and questions of law under the clearly erroneous standard. MCL 722.28; MSA 25.312(8); *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). Defendant challenges many of the trial court's findings with regard to the statutory "best interest" factors enumerated in MCL 722.23; MSA 25.312(3).¹ The trial court's findings with respect to each factor will be affirmed unless the evidence is against the great weight of the evidence and the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878-879 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994).

In evaluating factor (a), the trial court found that the love, affection, and other emotional ties between Carter and each parent was equal. Defendant contends that the trial court erred in not adopting the friend of the court's assessment that Carter had greater emotional ties to defendant. While defendant's family physician testified that plaintiff was not involved in defendant's prenatal care and that plaintiff was under the influence of alcohol when he visited the hospital after Carter's birth, plaintiff testified that he provided most of Carter's care during his first few weeks of life because defendant's depression incapacitated her. Moreover, defendant did not controvert plaintiff's testimony, and that of plaintiff's mother, that plaintiff took charge of Carter's needs after the parties separated. The trial court's findings with respect to this factor are not contrary to the great weight of the evidence.

Defendant does not challenge the trial court's finding that the parties were equal with respect to factor (b).

Defendant challenges the trial court's finding that factor (c) weighed in plaintiff's favor. This factor requires courts to consider the capacity of each party to provide the child with food, clothing, medical care, and other material needs. *Barringer v Barringer*, 191 Mich App 639, 641; 479 NW2d 3 (1991). Defendant does not dispute that she was unemployed and received financial assistance from relatives. However, defendant cites the testimony of a friend of the court worker that defendant took primary responsibility for meeting Carter's basic needs for the majority of his life. Plaintiff testified that his annual salary was approximately \$60,000, that he provided health insurance for Carter, and that he took Carter to his doctor's appointments. Plaintiff testified that defendant refused to share Carter's medical care records with him. Given this testimony, we cannot conclude that the trial court's finding was against the great weight of the evidence.

The trial court weighed factor (d) in favor of plaintiff, based on the court's finding that plaintiff provided Carter with "the parental care, discipline, love, guidance, and attention appropriate to a child of his age and individual needs." The court cited the February 1998 incident where defendant threatened to kill herself and Carter and the fact that one of defendant's sons from a prior marriage had engaged in what the court deemed to be "sexually deviant behavior." Defendant contends that the trial court should have considered the testimony of her psychiatrist and her family physician that defendant no longer posed a risk of harm to herself or to her children. Defendant further contends that the court should have considered her family's physician's opinion that with structure and guidance, her older son could overcome his problems. We find no error. At trial, defendant did not dispute the fact that, at a minimum, she kept Carter for longer than her scheduled visitation period, took him to a motel room, and threatened to kill herself and Carter. Nor did defendant deny knowledge that her older son engaged in sexually inappropriate behavior with his cousin and with his sister. The trial court's finding with respect to this factor was not against the great weight of the evidence.

The trial court weighed factor (e), "the permanence, as a family unit, of the existing or proposed custodial home or homes," in favor of plaintiff, based on the fact that Carter had resided with plaintiff for over eleven months and, given Carter's young age, his only memories would be of his current environment. Defendant contends that the trial court did not properly consider the friend of the court's determination that defendant's home offered a more secure and permanent sense of family. For the reasons discussed in our analysis of factors (c) and (d), we cannot conclude that the trial court's finding was against the great weight of the evidence.

The court found that factor (f), "[t]he moral fitness of the parties involved," did not favor either party. Defendant contends that this factor weighed in her favor, citing plaintiff's history of violence and alcoholism, that plaintiff struck her and her children, that plaintiff obtained sexual favors from her after the parties separated, and that plaintiff coerced her into obtaining an abortion. Although plaintiff admitted at trial that he slapped defendant numerous times, both parties testified that defendant also struck plaintiff on some occasions. Defendant also admitted at trial that both parties were responsible for initiating their post-separation sexual encounters. Finally, while plaintiff admitted that he did not want to have another child, he denied threatening defendant that he would never reconcile with her unless she terminated her pregnancy. After reviewing the record, the foregoing demonstrates to us that the trial court did not err in failing to weigh this factor in either party's favor.

With regard to factor (g), the mental and physical health of the parties involved, the trial court stated:

As the Court has previously found, defendant mother has in the past had serious mental problems to the point that she was threatening suicide and threatening to kill the minor child Carter. The Court finds that she also has difficulty in properly raising her three children from a prior marriage who reside with her. Despite the fact that there was some testimony from defendant's physicians that she is currently stable, the Court finds that the danger of her mental problems resurfacing to be significant. The Court finds by clear and convincing proof that plaintiff father is at an advantage on this factor.

The parties presented the trial court with the testimony of Scott Trylch, Ph. D., an independent psychologist appointed by the friend of the court to assess both parties, plaintiff's psychologist, Kenneth Bertram, Ph. D., and defendant's psychiatrist, C. A. N. Rao, M.D. Dr. Trylch testified plaintiff was stable, even though he exhibited some underlying tension and anger and seemed less empathetic than defendant. Dr. Trylch further testified that defendant fit the profile of one who was suspicious and over-sensitive and that she would be more likely to lose control in an emotionally laden situation. Dr. Bertram testified that he assessed plaintiff as a psychologically competent individual who was reasonable, intelligent, and open to suggestions for improvement. Finally, Dr. Rao testified that while defendant's depression was in remission, she would need to continue with her counseling and medication. Given the testimony of these witnesses and the other evidence presented at trial, we cannot conclude that the trial court's finding was against the great weight of the evidence.

Defendant does not challenge the trial court's findings that factors (h), and (i) were inapplicable.

The trial court found factor (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, to weigh equally with the parties. In support of her contention that this factor favors her, defendant argues that plaintiff was obsessed with winning custody of Carter and has denied defendant visitation since August 1999. Whether plaintiff was obsessed with winning the custody battle over Carter was not a matter of record. Further, plaintiff's actions taken in August 1999 are not relevant to the trial court's findings made in February 1999 or its judgment entered in July 1999. The trial court's finding with respect to this factor was not against the great weight of the evidence.

We agree with defendant's contention that the trial court's finding with respect to factor (k), that neither party had committed domestic violence against the child, was erroneous, and that the court should have weighed this factor in favor of defendant. Plaintiff did not dispute that he slapped defendant on certain occasions and that he choked defendant when she held Carter. While the testimony adduced at trial also revealed that defendant physically attacked plaintiff on occasion, we are of the opinion that plaintiff's actions were more frequent and more severe, especially in light of the fact that defendant lost consciousness during the choking incident. Given the gravity of the choking incident, we conclude that the trial court's finding that each parent was entitled to equal weight with respect to factor (k) was clearly erroneous.

A trial court, while considering the criteria of MCL 722.23; MSA 25.312(3), need not give each factor equal weight. *McCain, supra* at 131. Here, the trial court was faced with a particularly difficult custody decision. Both parties exhibited episodes of erratic and violent behavior. Despite the trial court's error in failing to weigh factor (k) in defendant's favor, we conclude that the court's ultimate weighing of the factors in favor of plaintiff did not constitute an abuse of discretion.

Finally, defendant contends that the trial court abused its discretion when it denied defendant's motion for attorney fees. We review a trial court's decision to award or deny attorney fees in a divorce action for an abuse of discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). MCL 552.13(1); MSA 25.93(1) authorizes an award of legal fees in a divorce action where the award is necessary to enable one of the parties to carry on or defend the action. *Id.* The reason for

the rule is that no party should have to invade the very assets that the party relies on for support in order to obtain representation. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Here, although there was a disparity in the parties' relative incomes, the lower court record indicates that defendant will be provided for, and does not support her claims that she had no funds with which to pay her attorney fees, or that she will have to invade her assets to do so. Accordingly, we conclude that the trial court did not abuse its discretion in declining to award attorney fees.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ MCL 722.23; MSA 25.312(3) lists the factors that the trial court must consider in determining a child's best interests in a custody case:

(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.