

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW A. TRABUCCHI,

Plaintiff-Appellant,

v

ALISA MARIE DAVIS,

Defendant-Appellee.

UNPUBLISHED

July 7, 2000

No. 222140

Oakland Circuit Court

LC No. 97-538383-DP

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

PER CURIAM.

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

I. Facts

On August 20, 1996, defendant gave birth to Nicholas Galin Davis. At that time, defendant was not married and did not name the father of the child on the birth certificate. Plaintiff suspected that Nicholas was his child and eventually brought a paternity suit that resulted in a finding that plaintiff is Nicholas' biological father. Thereafter, plaintiff sought increased parenting time and eventually petitioned for custody of Nicholas.

Before the custody trial, the trial court gradually increased plaintiff's parenting time to the point where it was approximately equal with that of defendant. The court also awarded joint legal custody to both parties and ordered plaintiff to provide child support. Sometime after the order of filiation was entered, plaintiff sought to amend Nicholas' birth certificate to include his name as the father and to change Nicholas' name to Nicholas Davis Trabucchi. The State of Michigan notified plaintiff that the mother's signature was required to change the birth certificate. Plaintiff then sought to have the trial court order a change in Nicholas' name. However, when the trial court heard the issue on the name change, the state had already inadvertently changed Nicholas' name to the name requested by plaintiff. Thereafter, the trial court determined that plaintiff's motion for a name change was moot and, in the absence of a motion by defendant, ordered that the parties use Nicholas Davis Trabucchi as the child's legal name.

Following a two-day bench trial, the trial court denied plaintiff's petition to change custody and ordered that Nicholas' name be changed to Nicholas Davis-Trabucchi. In making its findings, the trial court first found that, despite each of the parties' individual shortcomings, Nicholas is important to both of them and that they are both good parents. The court found that both parties have had a history of alcohol abuse and emotional problems. The court found that defendant gets involved in inappropriate relationships and plaintiff does not commit emotionally to relationships. Furthermore, the court found that both parties have "difficulty controlling their temper and acting out in an immature manner."

Next, the court determined that an established custodial environment existed with defendant, thus requiring plaintiff to establish by clear and convincing evidence that custody should be changed. Turning to the question of the child custody factors, the court favored neither party in all factors except (I). As to factor (I), any other relevant factor considered by the court, the court found that this factor favored defendant. After denying plaintiff's petition to change custody, the court took up the issue of Nicholas' name. Defendant requested that the name be: "Nicholas Galin Davis-Trabucchi," and plaintiff argued against any change in the name. Although the court initially indicated that the name would not be hyphenated, the court returned to the issue and stated that it could be hyphenated.

II. Standard of review

The standard of review in custody cases involves three steps. First, the great weight of the evidence standard applies to all findings of fact; a trial court's findings as to the existence of an established custodial environment and as to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Second, the abuse of discretion standard applies to the trial court's discretionary rulings; to whom custody is granted is such a discretionary dispositional ruling. MCL 722.28; MSA 25.312(8); *Fletcher, supra* at 24. Finally, questions of law are reviewed for clear legal error. *Id.*

III. Custodial environment

Plaintiff first argues that the trial court erred in its finding that a custodial environment existed with defendant. We disagree. 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. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). In determining whether a custodial environment exists, the trial court may not rely solely on the existence of a prior custody order, but rather, must look to the actual circumstances surrounding the care of the child prior to trial. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

Here, the trial court found that Nicholas had been in defendant's custody since birth, although plaintiff, at the time of trial, had equal parenting time. We do not find that plaintiff's increased parenting time had the effect of destroying the established custodial environment.

IV. Best interest factors

Plaintiff also contends that the trial court's findings of fact on the best interest factors are erroneous. Again, we disagree. The trial court found all the best interest factors, but for (l), equal between the parties, and found factor (l) for defendant. Plaintiff contends that the court's finding on factor (l) for defendant, and factors (b), (c), (d), (e), (f), (g), and (j), which were considered equal, to be against the great weight of the evidence. After an examination of the record, we do not find that the trial court's finding were against the great weight of the evidence. Although plaintiff contends that defendant's testimony is inherently unreliable and should be disregarded by this Court, as the trier of fact the trial court was in the best position to evaluate the testimony of the witnesses. *Fletcher, supra* at 25.

The record clearly established that both parties give Nicholas love, affection and guidance. Although each party has emotional problems, we do not find that the trial court erred in finding the parties equal as to factors (b), (c), (d), (e), (f), (g), and (j). We also conclude that the trial court properly relied on the opinion of Dr. Rodney Yeager, the court psychologist, that a change in custody was not necessary at that time. Factor (l) allows the court to consider any other relevant factor. MCL 722.23(l); MSA 25.312(3)(l). We find no error in the court's finding, based on the opinion of Dr. Yeager, that factor (l) favored defendant. In light of the trial court's findings, we find no abuse of discretion in the trial court's decision to deny plaintiff's petition for a change in custody.

V. Joint custody

Plaintiff also contends that the trial court's failure to consider the joint custody factors in MCL 722.23; MSA 25.312(3) requires reversal. See, e.g., *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999). Under the facts of this case, we disagree. In his motion for change of custody, plaintiff sought full custody of Nicholas. Nonetheless, the trial court questioned plaintiff's counsel to determine if plaintiff was seeking joint physical custody. Plaintiff's counsel responded that plaintiff preferred full custody, "but if we can't have that, that's certainly a fall back position."

In its lengthy and detailed opinion, the court noted that it was in Nicholas' best interests to spend equal time with each parent. However, the court also noted that there is a history of great conflict between the parties, including manipulative behavior and misrepresentation. Indeed, the court consistently had to arrange for a third party to be present to facilitate the exchange of the child for parenting time as a result of the conflict between the parties. Thus, the court noted that the present circumstances favored defendant retaining physical custody. Specifically, the court noted that "there is no indication for the need for a change of custody to address the interests of Nicholas at this time. Nicholas is certainly stable in the current arrangement and it would be more advantageous to Nicholas if conflict were reduced than there were a change in custody." Clearly, the court's findings reveal that the court determined that joint physical custody was not in the best interests of the child. Under these circumstances, where the parties have equal parenting time but are unable to communicate without conflict, we conclude that the trial court did not abuse its discretion in refusing to award joint physical custody.

VI. Nicholas' surname

Plaintiff finally argues that the trial court erred when it changed Nicholas' surname from Trabucchi to Davis-Trabucchi. We disagree. Because Nicholas' paternity was determined by the court in a paternity action, defendant had the right to designate the child's name. MCL 333.2824(4); MSA 14.15(2824)(4). Therefore, the trial court properly refused to grant plaintiff's request to change Nicholas' surname.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald