

STATE OF MICHIGAN  
COURT OF APPEALS

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TODD E. MERLINGTON,

Plaintiff-Appellee,

v

VICTORIA L. MERLINGTON,

Defendant-Appellant.

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UNPUBLISHED

July 25, 2000

No. 225231

Montcalm Circuit Court

LC No. 97-000206-DM

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from an order awarding physical custody of the parties' minor child, Tyler Merlington (born March 12, 1993), to plaintiff. We affirm.

Plaintiff and defendant were divorced on April 14, 1998. The judgment of divorce awarded the parties joint legal custody and awarded defendant physical custody of Tyler. On September 2, 1999, plaintiff moved for change of physical custody, claiming that defendant was mentally unstable. The friend of the court referee recommended that plaintiff receive physical custody; defendant objected to the recommendation, and the trial court conducted a de novo hearing. After the hearing, the court issued an opinion finding that defendant had not established a custodial environment and concluding that awarding physical custody to plaintiff would be in the child's best interests. The court subsequently entered an order awarding joint legal custody to the parties and physical custody to plaintiff.

I

Defendant argues that the trial court erred when it decided that Tyler did not have an established custodial environment. The threshold determination in a court's decision to modify an existing custody order is whether an established custodial environment exists. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995); *Wealton v Wealton*, 120 Mich App 406, 410; 327 NW2d 493 (1982). "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." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Factors to be considered in this determination include the age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship. *Id.*

The court's determination whether a custodial environment exists is a question of fact that will not be disturbed unless it is shown to be against the great weight of the evidence. *Hayes, supra* at 387-388; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); MCL 722.28; MSA 25.312(8).

In this case, the trial court found that “[t]he existing arrangement fails quantitatively and qualitatively as an established custodial environment.” The court based this determination on several facts including (1) plaintiff experienced parenting time equivalent to or greater than defendant, (2) defendant relocated several times and moved just before school started, (3) defendant failed to provide a bed for the child, (4) defendant forgot to pick up the child from school or child care, (5) defendant neglected to bring the child to soccer games, and (6) defendant spent time at the bar instead of with her child. The court also took into consideration that, when defendant was not available for the child, plaintiff would be there to provide for him.

Based on these findings of fact, the court's determination is not against the great weight of the evidence. A trial court's findings are not against the great weight of the evidence unless the facts clearly preponderate in the opposite direction. *Fletcher, supra* at 878. Each of the facts cited in the court's opinion was introduced as evidence at the de novo hearing. Many of the facts were undisputed by defendant. Although defendant did dispute some of the facts, the court, as the trier of fact, was free to accept or reject defendant's testimony and to determine which of the witnesses were credible, and we grant deference to these findings of fact. *Id.*; *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 604; 546 NW2d 690 (1996).

Defendant disputes the trial court's reliance on *Wealton, supra*, for the premise that extended contact with the noncustodial parent is sufficient to refute the existence of an established custodial environment. In *Wealton*, we remanded the case so that the trial court could make a determination whether a custodial environment existed. *Id.* at 410-411. Defendant is correct that *Wealton* does not hold that a determination of an established custodial relationship can be based solely on the amount of time spent with the noncustodial parent. However, the trial court's incorrect interpretation of the holding of *Wealton* does not alter the fact that the court's decision was not against the great weight of the evidence. The trial court relied heavily on the fact that the child spent as much or more time with plaintiff than he spent with defendant; however, this was not the sole factor on which the court based its decision. The court also relied on evidence of the overall circumstances of defendant's custody of the child, which the court found was “marked by impermanence, instability and insecurity.” The trial court's decision that no established custodial environment existed was amply supported by evidence presented at the de novo hearing, and the court did not err in reaching this conclusion.

## II

Defendant also argues that the trial court erred when it determined that awarding physical custody to plaintiff was in the child's best interests. We review a trial court's decision to modify a custody award for an abuse of discretion. *Fletcher, supra* at 880-881. Abuse of discretion occurs when the court's decision is “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise

of reason but rather of passion or bias.” *Id.* at 879-880, quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Because the trial court determined that no established custodial environment existed, the court could modify the existing custody arrangement if it found, by a preponderance of the evidence, that the change of custody would be in the child’s best interests. *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991). The best interests of the child are determined by applying the statutory factors cited in MCL 722.23; MSA 25.312(3):

(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.

The trial court carefully detailed its findings of fact and determination on each of the best interests factors in its opinion. The court found the parties equal on factors (a), (g), (j) and (k). It further noted that, because the child did not express a preference for either parent, factor (i) did not favor either party. However, the court found that factors (b), (c), (d), (e), (f), (h) and (l) favored plaintiff. Defendant argues that the court abused its discretion by determining that these seven factors favored plaintiff.

A review of the court's opinion shows no perversity of will, defiance of judgment, passion or bias that would indicate an abuse of discretion. In each of the instances where the court favored plaintiff, the opinion cites credible facts and evidence introduced at the de novo hearing or gleaned from the court's interview of Tyler on which the court based its determination. Although defendant may disagree with the court's findings, it is apparent that the court's decision to award custody of Tyler to plaintiff was based on a preponderance of the evidence showing the change in custody was in the child's best interests and was not an abuse of discretion.

Affirmed.

/s/ Gary R. McDonald  
/s/ Janet T. Neff  
/s/ Brian K. Zahra