STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY ALAN WILLIAMS,

Plaintiff-Appellant,

v

DAWN MARIE WILLIAMS,

Defendant-Appellee.

UNPUBLISHED
September 15, 2000

No. 220488
Kent Circuit Court
LC No. 96-013124-DM

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce in which the court awarded physical custody of the parties' minor child to defendant. We affirm.

Plaintiff first argues that the trial court's factual finding that an established custodial environment existed with defendant was against the great weight of the evidence. Plaintiff argues that the trial court should have concluded that an established custodial environment existed with both parties, not just defendant. We disagree because the evidence clearly preponderated toward the conclusion that an established custodial environment existed with neither parent.

MCL 722.27(1)(c); MSA 25.312(7)(1)(c) states in relevant 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. 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.

"An established custodial environment is one of significant duration 'in which the relationship between the custodian and child is marked by qualities of security, stability, and permanence.'" *Mogle v*

Scriver, 241 Mich App 192; 614 NW2d 696 (2000), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

The trial court concluded that an established custodial environment existed with defendant alone. The trial court based its decision on the relationship between the parties and their child, Mason, during the time the parties lived in Saginaw, three to four years before trial. The trial court noted that, during the time the couple lived in Saginaw, defendant worked only sporadically outside of the home, while plaintiff worked an "appreciable period of time" as a self-employed carpenter. The court noted that the parties failed to provide sufficient information about the family dynamics for the time period before the divorce, but the court still determined that an established custodial environment existed with defendant based on the fact that she was Mason's primary daycare provider.

Whether an established custodial environment exists is a question of fact. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). The great weight of the evidence standard applies to the trial court's findings of fact on this issue. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court should affirm the trial court's findings as to the existence of an established custodial environment unless the evidence clearly preponderates in the opposite direction. *Id.*

The trial court's decision that an established custodial environment existed with defendant only was against the great weight of the evidence. The child's custodial environment after the divorce proceedings began was marked by instability. In such cases, "[w]here there are repeated changes in physical custody and there is uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Further, in cases where the parties cannot agree on a custodial arrangement and the parties are uncooperative in making reasonable exchanges of the children, an established custodial environment does not exist. *Curless v Curless*, 137 Mich App 673, 677; 357 NW2d 921 (1984). In this case, there were repeated changes in physical custody, each party refused to agree on a custodial arrangement, and each was often uncooperative in allowing Mason to see the other party. We therefore conclude that the great weight of the evidence shows that an established custodial environment existed with neither plaintiff nor defendant.

Plaintiff next argues that the trial court erred in granting physical custody to defendant. 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 great weight of the evidence standard applies to all findings of fact, including the trial court's findings as to each custody factor, and these findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20. Plaintiff argues that the court's findings of fact on each of the best interests factors, except factors (g) and (k), were against the great weight of the evidence, and therefore, the trial court erred in awarding physical custody to defendant. We disagree.

The first factor requires the court to examine the affection and emotional ties between the parties and Mason. MCL 722.23(a); MSA 25.312(3)(a). On this factor, the court accorded preference to neither party, concluding that both parties loved Mason. This finding is supported by the testimony. Plaintiff argues that the court erred by not considering testimony that showed defendant placing herself

before Mason. However, any such testimony was countered with defendant's own testimony concerning her affection for Mason. We conclude that the trial court's finding that both parents loved their child was reasonable and not against the great weight of the evidence.

The second factor examines "[t]he 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." MCL 722.23(b); MSA 25.312(3)(b). On this factor, the court again accorded preference to neither party. The court noted that, although plaintiff had taken a more active role in Mason's academic affairs than defendant, defendant made up for this inactivity by taking an active role in providing discipline for Mason. In contrast, the court noted that discipline was nonexistent when Mason was with plaintiff. Thus, the court concluded that the parties scored equally on this factor.

The court's findings on this factor are supported by the evidence. The testimony at trial showed that, at least during the time the divorce was pending, defendant was not taking an active role in Mason's academic affairs. The testimony also showed that plaintiff did not provide discipline for Mason. Plaintiff argues that he should not be penalized for his "liberal approach to child rearing" and that there was no evidence presented at trial that his approach to discipline had any effect on Mason in dealing with plaintiff, defendant or others. However, there was testimony presented to the contrary, including Mason's occasional disrespect for plaintiff. Thus, the court's findings on this factor were not against the great weight of the evidence.

The third factor is "[t]he 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." MCL 722.23(c); MSA 25.312(3)(c). The court found that this factor strongly favored defendant. In this respect, the court noted plaintiff's infrequent employment, his failure to maintain a standard of living that met his capabilities and his failure to place the financial needs of Mason first, which was demonstrated by plaintiff's decision to take on the support of another woman and her two sons.

This finding was not against the great weight of the evidence. The testimony at trial shows that defendant had a steady job that paid $671.81 per week and included benefits. Meanwhile, although plaintiff earned about $22,000 in 1995 and $16,000 in 1996, plaintiff had earned only $6,000 during 1997 and, at the time of trial, had earned only $6,000 to $7,000 during 1998. The trial court acknowledged defendant's possible interference with plaintiff's employment, but the court still reasonably concluded from the testimony that plaintiff could have sought other employment that did not require his tools. The evidence also shows that plaintiff was taking on more financial responsibility, with the additional support of a woman and her two sons, despite his limited income and debt and despite the woman's lack of income. Because the court's findings were not against the great weight of the evidence, we will not disturb the court's conclusion on this factor.

The fourth factor requires the court to examine "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d); MSA 25.312(3)(d). The court found that this factor favored defendant because of the length of time that Mason had lived in defendant's house with defendant. This finding was not against the great weight of

the evidence. The record shows that Mason lived in defendant's home from late 1994, when defendant first moved to Grand Rapids, to March 1997, when physical custody was awarded to plaintiff. In August 1997, the court again modified physical custody so that Mason was living, with limited exceptions, at defendant's home. In January 1998, physical custody was modified yet again, so that Mason was spending alternating weeks with plaintiff and defendant. Thus, for the most part, Mason has lived at defendant's home since 1994, and the court's finding that this house provided a stable environment was not against the great weight of the evidence. Although plaintiff argues that Mason spent a comparable amount of time living with him, the above facts indicate otherwise.

The fifth factor requires the court to consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e); MSA 25.312(3)(e). The court concluded that this factor favored defendant because her living arrangements displayed more permanence than plaintiff's arrangements. This finding is not against the great weight of the evidence. The evidence shows that defendant had been living in the same home since 1994. In contrast, plaintiff's living arrangement was much less permanent. Thus, the court was justified in finding that this factor favored defendant.

The sixth factor requires the court to examine the moral fitness of the parties. MCL 722.23(f); MSA 25.312(3)(f). The court accorded preference to neither party on this factor because both parties behaved equally reprehensibly, with respect to alcohol and marijuana use, as well as verbal and physical abuse. Plaintiff argues that all the issues concerning his conduct occurred at least three years before trial. However, the testimony showed that verbal and physical abuse occurred while the divorce was pending. Further, because both parties testified that they had stopped using marijuana, the trial court considered the parties' marijuana use in general, not just their marijuana use within the last few years. Thus, the trial court's conclusions on this factor were not against the great weight of the evidence.

The seventh factor requires the court to examine the mental and physical health of the parties. MCL 722.23(g); MSA 25.312(3)(g). The court accorded neither party a preference on this factor, and plaintiff does not dispute the court's findings on this issue.

The eighth factor the court must consider is the home, school, and community record of the child. MCL 722.23(h); MSA 25.312(3)(h). The court concluded that this factor favored neither party because both parties failed to show concern over Mason's academic ability or progress. This finding is not against the great weight of the evidence. At trial, the testimony indicated that neither party attended to Mason's schooling on a consistent basis. Defendant was unaware of apparent absences and tardiness by Mason and was unsure of the name of Mason's current school. Plaintiff testified that he was active in Mason's academic affairs in the past school year, but did not provide any testimony to show that he was active in this respect before that time. Further, the court also noted that both parties were neglectful at home, at least with respect to care for Mason's teeth. We will not disturb the trial court's finding on this factor.

The ninth factor the trial court must consider is the reasonable preference of the child. MCL 722.23(i); MSA 25.312(3)(i). As a general rule, the trial court must state on the record whether the child was able to express a reasonable preference and whether the child's preference was considered

by the court, but the court need not violate the child's confidence by disclosing his or her preferences. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), rev'd on other grounds 447 Mich 871 (1994). In this case, the court indicated that it had spoken to Mason, but the court decided not to reveal the specifics of their conversation because the court believed that maintaining confidentiality encouraged candor. The court did not directly state whether the child expressed a preference or whether the court considered the child's preference, as is normally required of the court. However, by acknowledging that it had spoken with Mason and stating that it would keep this conversation confidential, at a time during trial where the court would normally consider the child's preference, the court reasonably indicated that the information was considered. Thus, the trial court did not err in deciding to award preference on this factor to neither party.

The tenth factor requires the court to examine "[t]he 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." MCL 722.23(j); MSA 25.312(3)(j). The court accorded neither party a preference on this factor. The court noted that defendant intentionally violated orders from the court concerning communication with plaintiff, especially with respect to disclosure of babysitters for Mason. Further, the court concluded that plaintiff's conduct toward defendant in front of the child was equally reprehensible. These findings were not against the great weight of the evidence. Plaintiff argues that defendant violated court orders several times and denied visitation to plaintiff on several occasions, but his only indiscretion was that he spit at defendant. However, defendant's testimony revealed that plaintiff acted angrily toward her in other instances as well, which included yelling at her in front of Mason, harassing her, and breaking into her home and stealing items. Thus, we will not disturb the court's finding on this factor.

The eleventh factor the court must consider is domestic violence. MCL 722.23(k); MSA 25.312(3)(k). The court concluded that this factor favored defendant because plaintiff was found in violation of a personal protection order. Plaintiff does not dispute the court's findings on this factor, and we conclude that the court's finding is not against the great weight of the evidence.

The twelfth factor the court must consider is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23 (l); MSA 25.312(3) (l). The court did not consider any other factors, and plaintiff only addresses issues that were previously addressed in the court's analysis on the other factors.

Based on its findings regarding the best interests of the child, the court awarded primary physical custody of Mason to defendant. In sum, four factors favored defendant, while eight other factors favored neither party. While clear and convincing evidence must be presented to change custody if an established custodial environment exists, if no established custodial environment exists, the trial court may modify a custody order on a showing by a preponderance of the evidence that such a change is in the child's best interests. *Hayes, supra* at 387. Although the trial court based its decision on physical custody on its conclusion that an established custodial environment existed with defendant, we concluded that an established custodial environment existed with neither party. Thus, custody can only be modified if, by a preponderance of the evidence, a change is in the best interests of the child. *Id*. The abuse of discretion standard applies to the trial court's discretionary rulings, including to whom

custody is granted. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). "An abuse of discretion occurs when the result is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 408 (1999). Because the statutory factors weighed in favor of defendant, we believe that a preponderance of the evidence supports the trial court's decision to change custody. Thus, the trial court did not abuse its discretion in awarding physical custody to defendant.

Plaintiff next argues that the trial court erred in its determination of child support, specifically with respect to the court's findings on both plaintiff's and defendant's income. During trial, the parties noted that the Kent County Friend of the Court ("FOC") had completed a support recommendation, to which plaintiff objected. At trial, the parties asked the court to make a ruling on the issue of plaintiff's income, and the trial court agreed to make such a determination based on the testimony presented at trial.

In its decision, the court came to identical conclusions as the FOC. The court noted that there had been fluctuations with respect to plaintiff's salary, ranging from $24,000 to $6,000. The court also examined plaintiff's 1996 and 1997 income tax returns and noted that, during 1997 and the beginning of 1998, plaintiff had reported his income in loan applications and in FOC forms in a range from $350 per week to $692 per week. Because of this range, the trial court imputed income for plaintiff at $609.51 per week, a figure equivalent to the FOC's recommendation. This figure was based on the Michigan Occupational Wage Book. The court stated that it imputed income for plaintiff based on plaintiff's testimony that he underreported his income for tax purposes and that he had been working less since the filing for divorce.

Regarding issues in a divorce trial other than custody, we review a trial court's factual findings for clear error. *Edwards v Edwards*, 192 Mich App 559, 562; 481 NW2d 769 (1992). A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake was made. *Thames v Thames*, 191 Mich App 299, 301-302; 477 NW2d 496 (1991). Under this standard, the reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Id*. An award of child support rests in the sound discretion of the trial court, and its exercise of discretion is presumed to be correct. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1993). The party appealing the support order has the burden of showing an abuse of discretion. *Thompson v Merritt*, 192 Mich App 412, 416; 481 NW2d 735 (1991).

Plaintiff argues that the court's determination of his income ignored his income tax returns for 1996 and 1997. We are satisfied that the court considered these returns but rejected reliance on them because of plaintiff's testimony that he underreported his income. Further, from the testimony concerning plaintiff's employment and income, the court made reasonable inferences that plaintiff was underemployed. For purposes of a child support award, a parent's actual resources can include an unexercised ability to earn. *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998). The court's findings of fact on these issues were not clearly erroneous.

Plaintiff also argues that the court failed to consider the interference to plaintiff's business caused by defendant. Earlier in its opinion, in its determination of the child's best interests for custody, the court

acknowledged the difficulties that plaintiff was having in gaining access to his tools in the barn located on defendant's property, but nevertheless concluded that plaintiff could have been earning a higher wage. Thus, it is reasonable to conclude that the trial court was well aware of any alleged interference caused by defendant when making its decision on child support. This finding did not constitute clear error. We believe that the court did not err in imputing plaintiff's income at a figure equivalent with the FOC and the figures established in the Michigan Occupational Wage Book.

Plaintiff also argues that the trial court erred in its determination of defendant's income because the court failed to consider the income that defendant was receiving from third parties. When assessing a parent's ability to pay support, the trial court is not limited to consideration of a parent's actual income, but may also consider all relevant aspects of the parent's financial status. *Good v Armstrong*, 218 Mich App 1, 5-6; 554 NW2d 14 (1996). However, the duty imposed on a party by the court for child support must also be fair, and whether money received by a party should affect the level of child support depends on the particular facts of each case. *Id*. at 6. In this case, the duty of child support imposed on defendant was fair. Her duty included her income, but did not include gifts and support received from third parties, which were intermittent. Thus, the court did not err by refusing to include additional money received by defendant in her income, and the trial court's award of child support should be affirmed.

Plaintiff finally argues that the trial court abused its discretion in failing to grant his motion for a mistrial. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Persichini v William Beaumont Hospital*, 238 Mich App 626, 635; 607 NW2d 100 (1999), citing *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992).

During trial, defendant introduced a bag that contained marijuana, as well as pornographic videotapes and magazines that defendant claimed belonged to plaintiff. At that time, plaintiff moved for a mistrial, stating that defendant's introduction of this bag was inappropriate and prejudicial to plaintiff because it could not be shown that the drugs or other materials belonged to plaintiff. The court denied this motion, stating that the taint from the possession of these items fell equally on both parties because the items were located at the home of both plaintiff and defendant. Further, the court noted that there had already been testimony concerning both parties' drug use. The court noted that the introduction of the material merely showed the level of deterioration of the marriage and the inability of the parties to settle their differences civilly.

On the final day of trial, the court again mentioned the bag and its contents. The court stated that the contents were "unviewed and untouched" by the court and that law enforcement officers had inventoried the contents and provided the court with a list of the contents. The court listed the contents, but stated that the contents were not evidence and that it did not draw any conclusions concerning whether the bag contained drugs or drug paraphernalia. The court finally stated that it regarded none of the contents of the bag as "per se illegal as contraband."

Plaintiff moved for a mistrial again, stating that defense counsel only introduced the bag to prejudice plaintiff, not to seek admission of the materials into evidence. Further, plaintiff claimed that a

mistrial was appropriate because the court had reviewed the materials, which were never admitted into evidence. The court again denied plaintiff's motion, stating that it did not make any determination regarding ownership of the bag or the legality of its contents.

In determining whether to grant a new trial due to an attorney's misconduct, this Court must decide whether the misconduct "may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted." *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Further, "matters which constitute error requiring reversal when a case is tried before a jury do not necessarily require reversal when they occur in a bench trial." *People v Rushlow*, 179 Mich App 172, 175; 445 NW2d 222 (1989), aff'd 437 Mich 149 (1991).

The trial court did not abuse its discretion in denying plaintiff's motions for a mistrial. Although the trial court marked the bag as evidence, it did not accept the bag or its contents into evidence, and the trial court took deliberate steps to distance itself from the materials so as not to give the impression of prejudice in its decision. Further, the court expressly stated that it was not considering the contents of the bag. Because there is no indication that the result of the trial was affected, the trial court did not commit error requiring reversal.

Finally, plaintiff argues that the trial court erred by not issuing sanctions against defendant for this alleged misconduct. Because the issue of sanctions was not raised at trial and the trial court did not address this issue, this Court will not consider this issue on appeal. *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 330; 539 NW2d 774 (1995).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski