STATE OF MICHIGAN

COURT OF APPEALS

KATHY J. BROWN,

Plaintiff/Counterdefendant-Appellant,

v

TODD D. BROWN,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
June 29, 2001

No. 229576
Livingston Circuit Court
LC No. 98-027768-DM

Before: Hood, P.J., and Whitbeck and Meter, JJ.

WHITBECK, J. *(concurring).*

I concur in the opinion in this case. I write separately to emphasize that, in my view, the question of an established custodial environment is a very close call and it is upon this close call that the entire case depends.

MCL 722.27(1)(c) governs a request to change a minor child's custody by modifying or amending a custody order or judgment establishing custody. The plain language of that statute requires the court considering the motion or petition for a change of custody to determine whether an "established custodial environment" exists.

> 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.[1]

To paraphrase this Court's opinion in *Hayes v Hayes*,[2] whether an established custodial environment exists depends on the factual circumstances surrounding the child's care in the time preceding the request for change of custody, not the reasons behind the existence of a custodial

[1] MCL 722.27(1)(c).

[2] *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

environment, including any orders affecting custody. The outcome of this analysis concerning the custodial environment is critical to the ultimate decision whether to grant the request for change of custody. The existence or absence of an established custodial environment determines whether the party requesting the change of custody must provide proof in support of the request to change custody that meets the clear and convincing standard, where there is an established custodial environment, or the preponderance standard, where there is no established custodial environment.[3]

The trial court in this case found:

> As to the custodial arrangement that – or environment, in this case. Specifically, I find that . . . the parties, both parties, have been actively involved with this child . . . since [a] very early age. I realize that . . . they were not married when he was . . . initially, conceived, in fact, they had just met; the parties had just barely met, I believe by about a month. But . . . they've both been involved in his life for a long time and eventually they got married and lived together for a period of time, quite a period of time, in Brighton. The . . . approximately four years there. And, while the child was with either parent, I think the child looked to either parent for . . . the . . . nurturing that, that he needed; looked to each of them on an equal basis for . . . for his care. There came a, a problem after the separation and during the – during the actual proceedings in the case, where the relationship between the father and son became quite strained and visitations were denied on many, many occasions and it was – to me, it almost seemed as though it was an attempted destruction of the father-son relationship. And in spite of that, [the child], when left along [sic] with his father . . . did do very well and did look to his father for . . . the parenting that he needed. So, I am not finding that the established custodial environment favored either party, although by shear [sic] amount of time, mother had more time in the last year with the child, clearly, than the father did, but, as I say, it, it was against the Court's orders . . . that this happened.

To the extent that the trial court considered that plaintiff Kathy Brown had violated court orders to conclude that there was no established custodial environment, it erred.[4] However, I cannot conclude that the trial court's finding that there was no established custodial environment was against the "great weight of the evidence."[5] The record simply does not present overwhelming, or even significant, evidence indicating that there was an established custodial environment. If there was an established custodial environment, it is not clear where that

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[3] See *Wealton v Wealton*, 120 Mich App 406, 410; 327 NW2d 493 (1982).

[4] See *Hayes*, *supra* at 388; see also *Bowers v Bowers (After Remand)*, 198 Mich App 320, 325; 497 NW2d 602 (1993) (the "reasons why an established custodial environment exists are not important").

[5] MCL 722.28 ("To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.").

environment existed in light of the relatively limited time in which the child lived with Kathy Brown, the extensive parenting time defendant Todd Brown had with his son during that time, the questionable independence of the child's preference to live with his mother, the poor conditions in Kathy Brown's home, and other factors. Thus, the restrictive standard of appellate review the Legislature has prescribed for this sort of decision makes it impossible for me to conclude that the trial court committed error requiring reversal when making the threshold determination as to an established custodial environment.

Because the trial court concluded that no custodial environment existed, it properly required Todd Brown to meet the preponderance standard of proof[6] rather than the more difficult clear and convincing standard of proof[7] on the question of what was in the child's best interests.[8] The majority has done an able job of explaining the facts of this case and why the trial court did not err when it concluded that the best interests of the child favored a change in custody under this lower standard. I need not belabor that point here. Suffice it to say, however, I have considerable doubts concerning whether Todd Brown could meet the clear and convincing standard of proof on the basis of the evidence in the record. However, I believe that the legal posture of this case, including the standard of review, requires the result the Court has reached and in which I concur.

/s/ William C. Whitbeck

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[6] See *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000), citing *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991).

[7] See MCL 722.27(1)(c) ("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*.") (emphasis added).

[8] See MCL 722.27(1); see also MCL 722.25.