STATE OF MICHIGAN

COURT OF APPEALS

MARK E. HICKSON,

Plaintiff-Appellant,

v

URSULA HARRIS-JOHNSON,

Defendant-Appellee.

UNPUBLISHED
June 11, 2002

No. 237691
Wayne Circuit Court
Family Division
LC No. 01-111697-DC

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting sole physical custody of the parties' child to defendant. We affirm.

The parties have never been married. Their daughter was born on October 2, 1992, and initially lived with defendant until March or April of 1993, when defendant relinquished custody of the child to plaintiff. Plaintiff had custody until August 1995. The child then lived with defendant from August 1995 until August 2000. In August 2000, the child went to live with plaintiff in New York; however, the parties were in disagreement about the living arrangements. Plaintiff believed that the child would be living with him permanently. Defendant, on the other hand, stated that she would be out of the country for three to six months for job training and that it was her intent to have the child returned to her in December 2000. In November 2000, plaintiff was concerned that he would not have permanent custody of the child, so he sought custody in New York on December 20, 2000.[1] Defendant flew to New York on December 24, 2000, to pick up the child, but plaintiff did not arrive with her. Defendant then went to the child's school in New York on January 23, 2001, and removed the child from the school and returned to Michigan.

On April 6, 2001, plaintiff sought custody of the child and parenting time in the Wayne Circuit Court. The friend of the court subsequently recommended that custody be awarded to defendant, while plaintiff be granted certain parenting time. Plaintiff appealed the friend of the court recommendation; however, the trial court accepted the recommendation and entered a

[1] There were some initial proceedings in the New York court; however, the family court in New York determined in an order dated May 8, 2001, that it lacked jurisdiction to decide the custody petition and dismissed the case, determining that the child's home state is Michigan.

temporary order consistent with the friend of the court recommendation. A custody trial was then conducted in August 2001, and the final order awarding defendant sole physical custody of the child to defendant was entered on October 19, 2001.

Plaintiff first argues that he was denied due process because the trial court entered a temporary custody order without first conducting an evidentiary hearing.

This issue is unpreserved because plaintiff failed to demand that an evidentiary hearing be held before the temporary custody order was entered. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). In any event, even if the trial court erred by failing to conduct an evidentiary hearing before entering a temporary custody order, we would find that appellate relief is not available because a full evidentiary hearing was conducted before the trial court entered its final custody order. See *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991); see also *Jackson v Thompson-McCully Co*, 239 Mich App 482, 493; 608 NW2d 531 (2000) (an issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief).

Plaintiff also argues that the trial court erred in awarding physical custody of the child to defendant.

The standard of review of child custody cases is set forth in 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 evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

The court's dispositional ruling, involving the question "[t]o whom custody is granted," is reviewed for a palpable abuse of discretion. *Fletcher*, *supra* at 880-881 (Brickley, J.), 900 (Griffin, J.). For this Court to find a palpable abuse of discretion, "'the result must be 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 (Brickley, J.), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

The parties do not challenge the trial court's determination that no established custodial environment existed. Where an established custodial environment does not exist, the court may change custody if it finds by a preponderance of the evidence that the change would be in the child's best interests. *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). The statutory best interest facts are set forth in MCL 722.23(a) – (l).

The trial court found that the parties were equal on most of the best interest factors, but found that factors (d) and (e) favored defendant, and that factors (j) and (l) favored plaintiff. The trial court ultimately determined that physical custody would be granted to the mother. Having reviewed the transcript of the custody hearing, we conclude that the trial court's findings are not against the great weight of the evidence. We emphasize that the trial court's factual finding with

regard to each statutory factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher*, *supra* at 879. Here, the factual findings are supported by the evidence, especially where there were credibility issues and weight of the evidence issues, matters that were within the province of the trial court to resolve. Ultimately, we conclude that the trial court's decision to award sole physical custody to defendant was not a palpable abuse of discretion.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly