STATE OF MICHIGAN

COURT OF APPEALS

MARY K. CLINE,

Plaintiff-Appellee,

v

STEPHEN H. CLINE,

Defendant-Appellant.

UNPUBLISHED
November 8, 2002

No. 240303
Gogebic Circuit Court
Family Division
LC No. 00-000141-DM

Before: Hood, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging specifically the trial court's decision awarding the parties joint legal custody, but awarding plaintiff sole physical custody, of the parties' two children. We reverse and remand for further proceedings.

To expedite final resolution of child-custody disputes, custody orders must be affirmed unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 890 (Cavanagh, Boyle, and Mallet, JJ., concurring the judgment); 526 NW2d 889 (1994).

Defendant first argues that the trial court erred in failing to determine whether the children had an established custodial environment with both parties. We agree.

Where an established custodial environment exists, custody may not be changed unless there is clear and convincing evidence that a change is in the children's best interests. *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996), citing MCL 722.27(c). Where no established custodial environment exists, a court may award custody on the basis of a mere preponderance of the evidence. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Whether an established custodial environment exists is a question of fact. *Id*. at 387-388. According to statute, a custodial environment is established where "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).

In this case, the trial court stated as follows with respect to this threshold question:

> [T]he initial finding . . . that I have to make, is whether there is an established custodial environment. There is an established environment, in the sense of both parents having the children look to them or natural guidance, care and affection and those kind of things. There's not necessarily an established custodial environment in either home, at this time, and I therefore move on to these custody factors.

Then, although expounding on the statutory best-interest factors and announcing its decision, the court nowhere indicated whether it was applying a clear and convincing evidentiary standard or a mere preponderance standard. The court's ambivalent statements do not indicate whether the court recognized the possibility that an established custodial environment existed with both parties.

"Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of the issue by de novo review." *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991), quoting *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

In this case, the trial court appears to have regarded an established custodial environment with both parents as the equivalent of no established environment exclusively with either for purposes of deciding between the parents on a preponderance of the evidence. If so, the court erred. An established custodial environment with both parents requires maintaining that status unless clear and convincing evidence indicates that the children's best interests require a change to custody with just one parent. *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001); see also *Jack*, *supra* at 671.

The trial court thus erred in failing to determine clearly on the record whether an established custodial environment with both parents existed, and to indicate what evidentiary standard it was applying. This error is harmless only if the record plainly indicates that there was no established custodial environment so that this Court need not concern itself with the trial court's ambivalence, or if the record plainly indicates that the custody factors clearly and convincingly militated in favor of a change of primary custody to plaintiff. See *Fletcher*, *supra* at 882, 889 (Brickley, J.), 900 (Griffin, J.); *Foskett*, *supra* at 12. That is more appellate fact-finding than we hazard to undertake from review of the cold record on appeal. Accordingly, we remand this case to the trial court with instructions to ascertain, clearly and on the record, whether the children have an established custodial environment with both parties, and to apply the statutory best-interest factors with the appropriate evidentiary standard. On remand, the court should take into account factual developments that have occurred during the pendency of this appeal. *Fletcher*, *supra* at 889 (Brickley, J.), 890 (Cavanagh, Boyle, and Mallet, JJ., concurring the judgment).

We further agree with defendant's contention that the trial court erred in announcing that neither party was seeking joint physical custody and then deciding against such an arrangement on the basis of that erroneous factual predicate. MCL 722.26a(1) provides, in part:

> In custody disputes between parents, the parents shall be advised of joint

> custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child . . . .

Subsection (1)(a) provides that in reaching that determination, the court is to consider the statutory best-interest factors set forth in MCL 722.23, and subsection (1)(b) includes as a consideration "Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child."

In this case, the trial court decreed as follows:

> Considering a joint custodial arrangement; the Court must consider the parties[']willingness. First of all a Court must consider it if requested by either party. It sounds to me like it's not requested by either party in this case. I'm not going to go with a joint custodial arrangement [be]cause at this point, nobody is asking for it.

In fact, defendant consistently maintained that his first choice was for joint physical custody. In closing argument, defendant's attorney acknowledged that the witness from the Friend of Court had expressed doubts regarding the wisdom of such an arrangement, but stated, "my client is willing to go along," then added, "But, if your Honor can't decide to do that at this point, then he, his request becomes that, if we can't consider a joint, physical custody situation, then he's asking then that the Court give primary, physical to himself." The trial court evidently mistook defendant's alternative request for a change of position. This was clear error.

Plaintiff points out that the defense neither tried to inject a contrary position when the trial court stated that no one wanted joint physical custody, nor filed a post-trial motion requesting amended findings over the matter, but neither is required to preserve this issue. See MCR 2.517(A)(7) ("No exception need be taken to a finding or decision."). If the trial court had wished to establish on the record that the defense had changed its position and no longer sought joint physical custody, the court should have done more than simply state such a conclusion, but should have elicited an affirmative statement to that effect from defendant or his attorney.

Because the trial court eschewed joint physical custody on the erroneous ground that neither party was asking for it, the court ran afoul of MCL 722.26a(1). On remand, the trial court should give full consideration to the possibility that joint physical custody would comport with the children's best interests.

Defendant additionally argues that the trial court failed to indicate clearly that it did not count his blindness against him excessively. We disagree. In light of the strong public policy of this state favoring the total integration of disabled persons into the mainstream of society, it is inappropriate for a trial court to weigh a physical disability against a custody litigant. *Bednarski v Bednarski*, 141 Mich App 15, 27-28; 366 NW2d 69 (1985), citing the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq.* In this case, apparently anticipating that the issue might arise, the trial court stated, "I'd just indicate that the Court's findings, obviously, the fact came up that [defendant] is legally blind, that is not my only, or my most compelling reason. I think it's a fairly minor reason, and I'm not basing my decision based upon

that for the purposes of this record." The record comports with the court's statement. We need not consider further defendant's suggestion that some prejudice may have been at work.

We turn now to defendant's challenges to the trial court's findings and conclusions on the best interest factors set forth in MCL 722.23:

> (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 the 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 must consider each of these factors and explicitly state its findings and conclusions regarding each." *Bowers v Bowers (After Remand)*, 198 Mich App 320, 328; 497 NW2d 602 (1993). However, "[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). In custody cases, a court is not obliged to "'comment upon every matter in

evidence or declare acceptance or rejection of every proposition argued.'" *Fletcher*, *supra* at 883 (Brickley, J.), 890 (Cavanagh, Boyle, and Mallet, JJ., concurring the judgment), quoting *Baker*, *supra* at 583.

In this case, the trial court expressly or impliedly rated the parties equal on factors (a), (b), (f), (g), and (j). The court expressly or impliedly gave plaintiff the advantage on factors (c), (e), and (h). The court gave defendant the advantage on none of the factors, impliedly or otherwise. The court found the children too young to have their preferences taken into account and thus bypassed factor (i). The court likewise found that factor (k), concerning domestic abuse, did not come to bear, and declined to add factors under the catch-all, factor (l). The court skipped factor (d) entirely.

Defendant presents argument concerning factors (b) through (e) and (g) through (j). Defendant suggests that the parties should have been rated equal under factors (b) and (j); however, we conclude that the trial court did in fact rate them equally, which leaves in dispute the trial court's treatment of factors (c) through (e) and (g) through (i).

First, the trial court erred in failing to consider factor (d). See *Bowers*, *supra* at 328. Emanations from other matters that the trial court discussed suggest that plaintiff may have had a slight advantage, but we decline to engage in such evidentiary interpolation. Second, we must credit defendant's protestation that the trial court passed over factor (i). The trial court recognized that there were indications that the older child preferred to live with defendant, but discounted that preference as not reasonable, on the ground that the child was but seven years old. This Court has ruled that "[c]hildren of six, and definitely of nine, years of age are old enough to have their preferences given some weight in a custody dispute . . . ," and that a court's failure to interview such children was error requiring reversal. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). We conclude here that the trial court erred in discounting evidence that the older daughter preferred to live with defendant without at least interviewing the child to ascertain if that preference was reasonable.

Third, defendant argues that the trial court's statements concerning factor (g) were ambiguous: "[O]ther than some associated matters of depression that went on with [defendant]; a [sic] this time they are both in good mental health. Physical health, other than his disability, [defendant] is in good, physical health. [Plaintiff] is in good physical health." We consider these statements to impliedly rate the parties equal on this factor.

Finally, we are also satisfied that the trial court clearly enough indicated that plaintiff had the advantage concerning factors (c), (e), and (h), and that the evidence supports those conclusions.

Nonetheless, the deficiencies we have noted in the court's treatment of the statutory best-interest factors – particularly with regard to the child's preference, factor (i) – must be corrected on remand in order to allow for meaningful appellate review of the custody decision reached. MCL 722.28; *Bowers*, *supra* at 55-56.

To summarize, on remand the trial court is to take into account factual developments that have taken place while this appeal was pending, *Fletcher*, *supra* at 889, state clearly and on the record whether an established custodial environment exists, including with both parties, afford

full consideration to an award of joint physical custody if either party requests it, and, if a decision based on the children's best interests is again required, announce sufficiently detailed findings and conclusions on all relevant factors, so the court leaves no question concerning the basis for its decision. *Bowers (After Remand)*, *supra* at 328; *Bowers*, *supra* at 55-56.

Reversed and remanded. We retain jurisdiction.

/s/ Harold Hood
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell