STATE OF MICHIGAN

COURT OF APPEALS

HEATHER ANN UNDERHILL,

Plaintiff-Appellee,

v

DELMER ELI GARCIA,

Defendant-Appellant.

UNPUBLISHED
December 6, 2005

No. 261651
Kent Circuit Court
LC No. 01-009178-DS

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order awarding sole physical custody of the parties' son to plaintiff. We reverse and remand for further proceedings consistent with this opinion.

This case began in August 2001, when an action for support of the parties' minor child, Eli, was initiated. The parties were still together at that time, although their relationship apparently ended shortly thereafter. Following defendant's motion for equal parenting time, the trial court entered a temporary order providing for equal parenting time in alternating four-day/three-day blocks. Because plaintiff did not want to go four days without seeing Eli, the parties agreed to modify this schedule, alternating Eli's physical custody on a daily basis.

At the custody hearing, the trial court heard testimony from the parties, their families, a Friend of the Court custody evaluator, and defendant's expert psychologist, who specialized in bonding assessments.

In December 2004, nearly three years after entry of the temporary order, the trial court awarded sole physical custody of the then almost 3½-year-old Eli to plaintiff, allowing visitation for defendant one day a week and on alternate weekends. The trial court found that Eli had an established custodial relationship with both parties, but concluded, after considering each of the statutory factors for determining the best interests of the child, that plaintiff presented clear and convincing evidence that a change in custody was in Eli's best interest. The trial court found that each of the statutory factors weighed evenly between the parties, except for factor (c), concerning the capacity and disposition of the parties to provide the child with food, clothing, medical care or other remedial care, and factor (e), concerning the permanence, as a family unit, of the existing or proposed custodial homes. MCL 722.23(c), (e). The trial court found that each of these factors favored plaintiff. Defendant argues that the trial court's determination regarding

each of the applicable statutory best interest factors was against the great weight of the evidence.[1]

In a custody determination, a trial court must make specific findings of fact regarding each of the twelve factors that are to be taken into account in determining the best interests of the child, as set out in MCL 722.23. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). The trial court's findings on each factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

We reject defendant's arguments regarding most of the factors that the trial court determined to be equally in favor of both parties. Regarding factor (a) (the love, affection, and other emotional ties between each party and Eli), evidence presented below showed that Eli demonstrated appropriate love and affection for both parents and that each parent had demonstrated strong emotional ties. Regarding factor (d) (the length of time the child has lived in a stable, satisfactory environment), the evidence presented below established that Eli was comfortable and was thriving in each environment. Therefore, there is no basis to conclude that the trial court's determination regarding these factors was against the great weight of the evidence. The trial court further determined that the parties weighed equally regarding moral fitness (factor (f)), mental and physical health (factor (g)), willingness and ability to facilitate and encourage a close and continuing relationship between Eli and the other parent (factor (j)), and domestic violence (factor (k)). Based on our review of the record, we find that the evidence presented to the trial court does not preponderate against such findings.

The trial court determined that factor (b) (the capacity and disposition of the parties to provide Eli with love, affection, and guidance, and to continue his religious upbringing) did not favor either party. The trial court determined that both parties had the capacity and ability to provide for Eli and that religion did not seem to be an issue between them. While defendant asserts that evidence presented below indicates that plaintiff is ineffective in disciplining Eli and that plaintiff's verbal outbursts indicate an inability to provide Eli with proper guidance, we note that the custody evaluator testified that she would give a "slight preference" to plaintiff on her 'actual parenting skills' and that she did not see any significant difference in the parties' discipline of Eli. We also note that there was testimony from a number of witnesses, including plaintiff's mother and defendant's father, regarding plaintiff's love and concern for Eli and her disposition to care for him. Thus, we conclude that the trial court's determination that both parties had the capacity and ability to give Eli love, affection, and guidance was not against the great weight of the evidence. However, we find that the evidence presented below clearly preponderates against the trial court's determination that neither party displayed a greater capacity and disposition to continue Eli's religious upbringing. There was ample testimony that defendant regularly took Eli to church and Sabbath school, taught Eli how to pray and read him

[1] Given Eli's young age, the trial court essentially concluded that factor (h) (the home, school, and community record of the child) and factor (i) (the reasonable preference of the child) were inapplicable. MCL 722.23(h), (i). Defendant does not challenge the trial court's findings regarding these two factors.

Bible stories, while plaintiff testified that she did not regularly attend church and presented no evidence demonstrating any willingness or capacity to attend to religion with Eli. Thus, the trial court should have found that the disposition to continue Eli's religious upbringing weighed in favor of defendant.

We also find merit in defendant's arguments regarding factors the trial court determined to favor plaintiff. The trial court determined that factor (c) (the capacity and disposition of the parties to provide Eli with food, clothing, and medical care) favored plaintiff. In reaching this conclusion, the trial court determined that defendant made an error in judgment resulting in Eli's hospitalization, referring to an occasion when defendant proceeded with previously-scheduled family pictures despite Eli's being ill with diarrhea. The trial court also found that defendant brought into question his willingness to furnish Eli with basic necessities by depleting his bank account to avoid its inclusion in child support calculations.

We find the trial court's determination that defendant made an error in judgment resulting in Eli's hospitalization to be against the great weight of the evidence. Both plaintiff and defendant testified that Eli had a virus and that they were instructed by Eli's doctor to keep him hydrated and to attend to any diaper rash that might develop; they were not given any other instructions or restrictions. The next morning, on the day defendant's family was scheduled to have family pictures taken, defendant (a certified nursing assistant) and his mother (a registered nurse), repeatedly checked Eli's temperature, which was normal. They both testified that Eli was staying hydrated and was acting "fine" throughout the morning; the pictures were taken without incident and defendant took Eli to visit defendant's father. Later, Eli began vomiting and, for the first time, refused fluids. Defendant returned home, where his mother assessed Eli and told defendant to take him to the hospital, which defendant did. Eli was admitted to the hospital and treated for dehydration.

The testimony is clear that defendant was providing the care that was instructed by the doctor and that he sought and relied on the advice of his nurse-mother in determining whether it was appropriate to continue with the day's planned activities. Defendant's mother testified that there was no medical reason that having pictures taken or being at his grandfather's house would have caused Eli's condition to worsen. Nor was there any evidence presented that the result would have been different had defendant and Eli stayed home. Thus, while it may have been wiser for defendant to cancel his family plans, we conclude that the trial court's determination that defendant's continuation with those plans was a serious error in judgment is against the great weight of the evidence.

We also conclude that the evidence clearly preponderates against the trial court's determination that defendant called into question his willingness to provide for Eli by temporarily removing money from his bank account to avoid its inclusion in child support calculations. There was substantial testimony during the course of the hearing that, in the three years since this occurred, defendant has repeatedly demonstrated his willingness to provide for Eli's needs. While we do not condone defendant's actions in removing the money from his account, we find that the trial court's determination that factor (c) favored plaintiff is against the great weight of the evidence.

Regarding factor (e) (permanence as a family unit), the trial court concluded that Eli's "prospects for a stable family environment without economic manipulation lie" with plaintiff.

The trial court based this conclusion on the custody evaluator's indication that it was possible defendant exploited plaintiff's emotional ups and downs over their relationship as a manipulative tool and again noted defendant's temporary removal of funds from his bank account.[2] In *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996), our Supreme Court explained that the focus of factor (e) is the child's prospects for a stable family environment and not the acceptability of the settings proposed by the parties. Thus, the trial court was required to determine whether plaintiff or defendant could best provide Eli "the benefits of a custodial home that is marked by permanence, as a family unit" *Id*. at 466. In this context, the trial court's reliance on defendant's possible exploitation of plaintiff's emotions over their relationship and his removal of money from his bank account as weighing on the permanency of the family unit offered by the respective settings was misplaced. Rather, there was no indication from the evidence presented that defendant's home was less stable than plaintiff's; instead, it was clear that Eli was familiar with defendant's home and was thriving there. Indeed, we note that it is plaintiff, not defendant, who has moved to unfamiliar settings and added unfamiliar persons to her home. Further, testimony established that Eli is a happy, well-adjusted child who was thriving in the respective environments provided by the parties. Thus, we find that the trial court's determination that factor (e) favored plaintiff was against the great weight of the evidence.

Defendant next argues that the trial court's award of sole physical custody to plaintiff was an abuse of discretion. In light of our conclusions above, we agree.

A decision regarding custody is a discretionary dispositional ruling which should be affirmed unless it represents a palpable abuse of discretion. *Fletcher, supra* at 879-880. Nonetheless, as this Court noted in *Heid v AAASulewski*, 209 Mich App 587, 595; 532 NW2d 205 (1995), "[i]n any custody dispute, our overriding concern and the overwhelmingly predominant factor is the welfare of the child . . . the best interest of the child shall control." Therefore, a trial court may disrupt an established custodial environment, such as that Eli enjoyed with each of his parents, only "on a showing, by clear and convincing evidence, that such a disruption is in the child[]'s best interests"; it is an abuse of discretion for a trial court to change the custodial environment "without the attendant clear and convincing evidence presented to justify" such a disposition. *Foskett v Foskett*, 247 Mich App 1, 8, 13; 634 NW2d 363 (2001). This is because the Child Custody Act is "intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid, supra* at 593-594. Thus, "[w]hile the abuse of discretion standard is strict, it does not afford trial courts unfettered discretion in awarding custody." *Fletcher, supra* at 880-881.

The evidence presented to the trial court was clear and undisputed that Eli was a happy, well-adjusted child, who was thriving in the joint custody of his parents; the evidence also

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[2] The trial court appears to have placed some significance in evaluating this factor on the fact that defendant did not seek custody or parenting time in court until after this case was filed. However, because the parties' relationship continued after this case was filed, there was no reason for defendant to have sought parenting time in court before this action began.

clearly established that Eli had a strong bond with defendant and that he showed defendant love and affection. Plaintiff's mother testified that defendant was a "very good kid," that Eli is "a happy little boy that's happy wherever he is" and that "[i]t's amazing how well adjusted [Eli] is." Defendant's mother testified that Eli is very comfortable and content in defendant's home, that he knows where his things are and that he is very well-adjusted. Defendant's stepfather testified that when Eli sees defendant, his "eyes light up" and he comes running, and that there is a "real bonding" between Eli and defendant. Defendant's brother testified that "you can tell" that Eli loves defendant "a lot." Defendant's expert psychologist testified that Eli was very bonded with defendant and that defendant's interactions with Eli were "very positive," providing gentle guidance and solid support. Further, as noted by the custody evaluator, Eli was doing well in the parties' joint custody and there "wasn't a whole lot of reason to change that." Rather than change his custody, both the custody evaluator and psychologist indicated that Eli's best interest would best be served by reducing the number of times he was exchanged by the parties, by returning to a "block time" arrangement, so as to minimize his transitions and his exposure to potential conflict between his parents.

We conclude that, on the record presented below, the trial court order changing Eli's physical custody from joint to solely with plaintiff and reducing defendant's parenting time by more than half constituted an abuse of discretion. We reverse the trial court order awarding sole physical custody to plaintiff. We remand this matter for reevaluation in light of this opinion and in light of updated information or changes in circumstances arising since the trial court's original custody order. *Fletcher, supra* at 889. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey