STATE OF MICHIGAN

COURT OF APPEALS

DANIEL L. FORER,

Plaintiff-Appellee,

v

WENDY A. FORER, a/k/a WENDY A. FORER-BOON,

Defendant-Appellant.

UNPUBLISHED
June 21, 1996

No. 187861
LC No. 93-079403-DM

Before: O'Connell, P.J., and Sawyer and G.R. Corsiglia,* JJ.

PER CURIAM.

Defendant mother appeals as of right from the order amending the parties' judgment of divorce in which primary physical custody of the parties' minor child, Danielle L. Forer, was awarded to plaintiff father during the school year, and to defendant during the summer months. We affirm.

Plaintiff and defendant were married in 1989, and have one minor child, Danielle. The parties stopped living together as husband and wife in August 1993, but continued to share the marital home during the daytime hours until September or October 1993, to allow defendant to maintain her daycare business. Plaintiff filed for divorce in September 1993, and pursuant to the consent of both parties, a temporary custody order was issued on September 28, 1993. In accordance with the temporary order, plaintiff assumed physical custody of Danielle on weeknights, while defendant assumed physical custody during the weekdays, with each alternating custody every other weekend and holiday. For approximately 1-1/2 years, the temporary custodial arrangement continued as ordered, with the exception of defendant also caring for Danielle on Monday nights, rather than plaintiff. The parties' divorce trial was then held in May 1995.

* Circuit judge, sitting on the Court of Appeals by assignment.

I

Defendant first argues that the court committed legal error in finding that an established custodial environment existed from the temporary order alone, rather than considering the necessary statutory factors. We disagree.

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877, 900; 526 NW2d 889 (1994). Applying the great weight of the evidence standard, the court's findings of fact should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*. at 879, 900. An abuse of discretion is found only when a court's discretionary ruling 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," and a court commits legal error when it incorrectly chooses, interprets or applies the law. *Id*. at 879-881.

The issue of whether an established custodial environment exists is a prerequisite to findings by the trial court on the issue of custody, and if such an environment is found to exist, the statute requires that any change must be shown by clear and convincing evidence to be in the child's best interest. *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992). Generally, the court's concern is not with the reasons the custodial environment was established, but with whether it exists. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

In the present case, we find that although the trial court continually spoke of the existence of an established custodial environment only in reference to the existence of the temporary order, it did not rely on the mere existence of the order alone, but instead, the circumstances created by that order. Nevertheless, even if the court did determine that such an environment existed solely due to the fact that the court had issued a previous temporary custody order, the court's reasons are irrelevant. *Blaskowski v Blaskowski*, 115 Mich App 1, 6-7; 320 NW2d 268 (1982). The significant issue is only whether an established custodial environment in fact existed, and whether the court applied the correct evidentiary standard to its review of the best interest factors. *Id*. We find that the record supports the court's finding that a custodial environment was established, regardless of its reasoning. See *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995).

Defendant next argues that the court erred in finding that the established custodial environment existed in both parties, and asserts that the evidence clearly shows that she alone maintained such an environment for Danielle. We again disagree. The record reveals that both parents mutually shared, as far as time and consistency, in the care of Danielle. For nearly eighteen months, Danielle became accustomed to spending the evenings with plaintiff in the marital home, and spending every Monday evening and the weekdays with defendant in defendant's home. Nothing in the record indicates that the parties' custodial arrangement was sporadic and unpredictable, nor one in which Danielle never found stability and a sense of permanence. We find that defendant fails to point to any evidence that would

"clearly preponderate" in her favor, or support the conclusion that Danielle did not deem her time with plaintiff as also being marked with "security, stability, and permanence." See *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). We find that the court's determination is not contrary to the great weight of the evidence. *Fletcher, supra* at 879, 900.

Having determined that the trial court did not err in finding an established custodial environment in both parties, rather than with defendant alone, we find that defendant's last argument, that the court neglected to require plaintiff to show by clear and convincing evidence that a change from defendant's primary custody was in Danielle's best interest, is irrelevant. After reviewing the best interest factors, the court correctly determined that there was clear and convincing evidence to support a change in the parties' previous alternating custody arrangement in order to obtain the daily stability Danielle needed during the school year. Thus, after finding that an established custodial environment existed, the court correctly employed the higher evidentiary standard as dictated by statute. *Rummelt, supra* at 494. We find no error.

II

Second, defendant argues that the trial court erred in failing to make a factual finding with respect to the child's preference under factor (i) of the best interest factors. We disagree. The record clearly shows that the trial court addressed the factor concerning the child's preference, and related the fact that Danielle was unable to communicate a specific custody preference. After reviewing the trial judge's statements, it is evident that he interviewed Danielle, and essentially gained nothing of significance from that interaction, nor any real insight as to whether she preferred to live with one parent as opposed to the other. In addition, the trial judge specifically stated on the record that he did not want to give the impression that Danielle had indeed expressed a preference. Therefore, we find that the court adequately addressed the issue. See *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988).

III

Defendant next argues that the court's findings with regard to the best interest factors were either against the great weight of the evidence, or the result of an erroneous application of law. Defendant specifically argues that the evidence presented during trial clearly supports custody in her favor, taking issue with the court's findings that factors (b), (c), (d), (e), (f), and (l) weighed in favor of plaintiff and that factors (h), (j), and (k) were of equal weight, and that the court failed to give adequate weight to the friend of the court's recommendations. We have reviewed defendant's challenges to the factors and find them without merit, with perhaps one exception.

As to factor (f) (moral fitness), defendant argues that the court committed legal error in considering her "indiscretions" as an issue of moral fitness, stating that no evidence was presented to suggest that Danielle was in any way affected by her acts. However, we find, as the trial court did, that defendant's poor judgment and conscious involvement in illegal activity definitely raise questions of

Danielle's well-being while in defendant's care. Just because defendant never used marijuana in Danielle's presence, that alone does not dispel the probable detrimental effect defendant's illegal behavior presents.

Nevertheless, even if the court had found the parties equal as to this factor, as defendant argues, that finding would not be sufficient to sway the court's ultimate custody decision in favor of defendant. In *Wellman v Wellman*, 203 Mich App 277, 284; 512 NW2d 68 (1994), this Court stated that even if there is some merit to an argument that the parties are essentially equal under a factor, reversal would not be warranted where there is evidence that the party awarded custody still retains an overall advantage after an assessment of the factors in total. Therefore, even if the court did err, we conclude that such an error would be harmless in light of the fact that the evidence still supports an overall preference for plaintiff assuming custody of Danielle during the school year.

In sum, we find that defendant fails to produce argument or evidence to warrant reversal by this Court. The trial court's findings are supported by the record, or at the least, are not against the great weight of the evidence. *Fletcher, supra* at 879, 900. We further note that the trial court is given great discretion to both assess the credibility of the witnesses who testify before it, as well as disregard the friend of the court report and recommendation written in defendant's favor [see *Harper v Harper*, 199 Mich App 409, 410; 502 NW2d 731 (1993)], and conclude that defendant failed to show, in any instance, that the evidence clearly preponderates in her favor.

IV

Finally, defendant argues that the custody decision in favor of plaintiff was unduly colored by the court's bias against her pregnancy. We disagree. Generally, to establish bias of a trial judge, the complaining party must show actual prejudice, and overcome the presumption of impartiality. *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 731; 465 NW2d 395 (1991). We find that defendant has failed to bear this burden.

On appeal, defendant has isolated several statements made by the trial judge, and specifically focuses on any mention by the court of her pregnancy and/or her present boyfriend. When read in context, we find that the court's statements expose no real bias against defendant, and that defendant's pregnancy and her relations with her boyfriend were mentioned only where logically relevant and significant to the court's assessment of the best interest factors. Thus, we conclude that the court did not commit a palpable abuse of discretion in awarding plaintiff primary physical custody. *Fletcher, supra* at 879-880.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ George R. Corsiglia