STATE OF MICHIGAN

COURT OF APPEALS

MARGARET KNAPE DAVIS,

Plaintiff-Appellant,

v

THOMAS KELLY DAVIS,

Defendant-Appellee.

UNPUBLISHED
October 18, 1996

No. 192357
LC No. 93-77351-DM

Before: Michael J. Kelly, P.J. and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce entered in the circuit court awarding custody of the parties' minor child to defendant. We affirm.

The parties were married in September 1989 and have one minor child, Erin. The parties ceased living together as husband and wife in January 1993, and upon their separation, plaintiff and Erin remained in the marital home, while defendant moved into his parents' apartment. For the succeeding three years until the entry of the judgment of divorce, plaintiff maintained primary care of Erin, while defendant exercised liberal visitation. Despite this, the court found no established custodial environment to exist and awarded custody of Erin to defendant.

On appeal, plaintiff first argues that the court erred in failing to find an established custodial environment in her favor, and , in failing to require defendant to prove his case by clear and convincing evidence. The issue whether an established custodial environment exists is critical on issues of custody. *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992). Where no established custodial environment exists, the court determines the best interests of the child, and, concomitantly, to whom custody should be awarded, based on the preponderance of the evidence. See *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). In contrast, where the court finds that one parent has established a custodial environment, the other parent, to justify a change in custody, must prove by clear and convincing evidence that such a change is in the best interest of the child. *Rummelt, supra*.

In the present case, plaintiff contends, in essence, that because the court failed to recognize that an established custodial environment existed in her favor with respect to Erin, defendant was held to a

lesser evidentiary standard than appropriate. However, our review of the record indicates that the court expressly ruled that clear and convincing evidence supported its conclusion that the best interests of Erin demanded that she be placed with defendant. The court stated, "I'm convinced that there's clear and convincing evidence that [plaintiff's] other character flaws make it so serious in this case that [defendant] is the one who should have custody of [Erin]". Therefore, even assuming that plaintiff is correct that the court erred in failing to recognize an established custodial environment in her favor, this error had no bearing on the court's ultimate decision. Thus, any error was harmless. See *Fletcher v Fletcher*,447 Mich 871, 882, 889-900; 526 NW2d 889 (1994).

Plaintiff also argues that the evidentiary findings made by the court when evaluating the best interests of Erin were against the great weight of the evidence and were marred by errors of law. The statute sets forth eleven specific factors that must be considered when determining what is in the best interests of a child, as well as noting that, "[a}ny other factor considered by court to be relevant to a particular child custody dispute" must also be considered. MCL 722.23; MSA 25.312(3). The circuit court's factual findings will be affirmed unless the evidence "clearly preponderates in the opposite direction" or the court has committed clear legal error on a major issue. *Fletcher, supra*, pp 876-877, 879.

Here, with the exception of considering the child's preference in the context of custody, MCL 722.23(i); MSA 25.312(3)(i), plaintiff failed to specifically object to the court's findings. Having reviewed the lower court record, we find that the evidence does not clearly preponderate in plaintiff's favor, and find no errors of law.

As to factor (I), plaintiff maintains that the court erred in failing to interview Erin, who was five years old at the time, to ascertain her custody preference. While it is true that the circuit court did not interview Erin, the court did take Erin's preference into account where it stated that even had Erin stated a preference for plaintiff, her preference would not have been sufficient to overcome the weight of the evidence militating against plaintiff. This situation is similar to that occurring in *Treutle v Treutle*, 197 Mich App 690, 696; 495 NW2d 836 (1992), where we concluded that such an approach does constitute consideration of the child's preference: it is a presumption that the child would have preferred to live with the parent raising the allegation of error. Accord *Duperon v Duperon*, 175 Mich App 77; 437 NW2d 318 (1989). Therefore, the court committed no error of law, and, because the court did, in effect, consider the preference of the child, committed no factual error.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Kenneth W. Schmidt