**S T A T E O F M I C H I G A N**

**C O U R T O F A P P E A L S**

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MOHAMMAD B. ARBABI, UNPUBLISHED
March 11, 1997

Plaintiff-Appellant,

v No. 193640
Saginaw Circuit Court
AKRAM ARBABI, LC No. 92-047882-DM

Defendant-Appellee.

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Before: Taylor, P.J, and McDonald and C. J. Sindt*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order modifying the custody provisions of the parties' judgment of divorce. Under the original order, plaintiff father had sole physical custody and the parties shared legal custody of their three minor children, Cassra (born 9/10/82), Sherene (born 3/16/84) and Justin (born 7/20/90). The parties subsequently moved for modification of this order, each seeking sole legal and physical custody. The trial court granted the parties joint legal and physical custody. We affirm.

Plaintiff first contends that the trial court erred in finding that a custodial environment had not been established with either party and that it therefore applied the wrong burden of proof. Plaintiff asserts that the trial court should have found that a custodial environment had been established with him because he, not defendant, provided stability for the children. A custodial environment involves "a custodial relationship of a significant duration in which [the child is] provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Where physical custody repeatedly changes, any previously established custodial environment is destroyed and a new one is not created unless the child remains in that environment for an appreciable time. *Id*. Under the original visitation schedule, the children spent one-half of each week in their parents' separate households. Physical custody repeatedly changed, and the children did not remain in an environment with either party for an appreciable time. Thus, the evidence

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

did not clearly preponderate in a direction opposite the trial court's finding that a custodial environment had not been established with either party. Accordingly, the trial court correctly concluded that the burden of proving that the original custody order should be modified was by a preponderance of the evidence. *Hayes v Hayes*, 209 Mich App 385; 532 NW2d 190 (1995).

Plaintiff also asserts that the trial court's finding that the parties were equal with respect to the best interests factors was against the great weight of the evidence. In particular, plaintiff argues that the trial court should have found that the evidence weighed in favor of plaintiff on factors (b), (c), (d), (f), (g), (h) and (j). We conclude that the evidence did not preponderate in a direction opposite the trial court's findings.

With respect to factor (b), the trial court determined that the parties had equal capacities to give the children love, affection, guidance, and a continuation in educating and raising the children in their religion. The evidence established that plaintiff helped the children with their homework, participated in their activities and disciplined the children, allowing them to watch little television and setting a precise bedtime. The evidence also established that defendant helped the children with their homework, participated in their activities to a greater extent than plaintiff, participated in a reading program at Justin's school, was more approachable and accessible than plaintiff for discussing their problems, and through guidance and discipline, attempted to teach the children to become responsible adults. Thus, the finding that defendant was at least equal to plaintiff on this factor was not against the great weight of the evidence.

The trial court correctly determined that there was no issue with respect to factor (c), the parties' ability to provide the children with food, clothing and medical care. Both parties are financially secure. We do not agree with plaintiff's assertion that defendant is less able to provide for the children because she chooses not to work. The evidence established that defendant is wealthy enough to care for her children without having to work to support them. Moreover, having earned a Master's degree in business administration, she is employable.

The trial court also determined that the parties were equal on factor (d), the length of time that the children had lived in a stable, satisfactory environment and the desirability of maintaining continuity. The trial court concluded that by its nature, the original custody order provided the children with an unstable environment because the children did not spend more than four days at a time with either parent. There was evidence that the parties' hostility toward each other and their attempts to use the children to manipulate the other parent created a less than satisfactory environment. The evidence also supports the conclusion that these things disrupted the children's lives, causing formerly happy children to become confused, depressed and reclusive. Thus, the evidence indicated that the environment itself, rather than the personality traits of either party, created instability, and the court's finding that there was no desirability in continuing with this arrangement was not against the great weight of the evidence.

Next, the trial court determined that factor (f), the moral fitness of the parties, was irrelevant. Plaintiff contends that this finding was erroneous because defendant allegedly had been known to lie. Plaintiff cites several examples of instances in support of this; however, these examples were either not

made part of the record or were misrepresentations of defendant's testimony. There was no evidence that defendant's moral character was inferior to plaintiff's; therefore, the trial court did not err in finding that this factor did not apply.

The trial court also concluded that the parties were equal with respect to factor (g), their mental and physical health. Plaintiff contends that this finding was in error, noting that two psychologists testified that defendant was histrionic and narcissistic and had flawed self-esteem. These psychologists did not report that defendant had diagnosable mental problems that required treatment, and neither psychologist believed that defendant's problems should preclude her from having custody of the children. Thus, the trial court committed no error in determining that this factor was not a relevant consideration.

The court also found that the parties were equal on factor (h), the home, school and community records of the children. The record established that the children were doing well in their school and community activities and that both parties encouraged and facilitated these activities. Thus, this finding was not against the great weight of the evidence.

Finally, the court found that the parties were equal in their willingness and ability to facilitate and encourage a close and continuing relationship between the children and the other parent, factor (j). As plaintiff asserts, the record is replete with examples of defendant's inability or unwillingness to do this; however, the record contains as many examples of plaintiff's difficulty in this regard. Thus, because the evidence did not preponderate in the opposite direction, this finding was not against the great weight of the evidence.

Affirmed.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt