STATE OF MICHIGAN

COURT OF APPEALS

KIP A. THIBEAULT,

Plaintiff-Appellant,

v

ROSANE THIBEAULT,

Defendant-Appellee.

UNPUBLISHED
March 10, 1998

No. 203235
Cheboygan Circuit Court
LC No. 93-003633 DM

Before: Griffin, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

Plaintiff and defendant are the divorced, natural parents of twelve year old Keith Arthur Thibeault and seven year old Jessica Rose Thibeault. In their October 1994 judgment of divorce, defendant was awarded sole physical custody of the two children. Plaintiff appeals as of right from the circuit court order. We affirm.

I

Plaintiff raises two related issues on appeal. First, plaintiff argues that the circuit court erred in finding that the children had an established custodial environment with defendant. Second, plaintiff argues that when examining the best interest factors set forth in MCL 722.23; MSA 25.313(3), the circuit court made several erroneous findings of fact, and as a result abused its discretion when denying plaintiff's motion to change physical custody. Resolution of the first issue significantly impacts our examination of the second, in that the answer to the first issue establishes the burden of proof that plaintiff must ultimately surmount in the second.

MCL 722.27(1)(c); MSA 25.312(7)(1)(c) states that a circuit court

> shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented *clear and convincing* evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and

> parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [Emphasis added.]

Where no established custodial environment exists, a court may modify or amend a custody order on a showing, "by a preponderance of the evidence, what custodial arrangement was dictated by the child's best interests." *Baker v Baker*, 411 Mich 567, 582; 309 NW2d 532 (1981). "Whether a[n established] custodial environment exists is a question of fact, which the trial court must address before ruling on the child's best interests." *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). This Court must uphold a trial court's findings of fact in a custody case unless the court's findings were against the great weight of the evidence. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). Factual findings are considered to be against the great weight of the evidence if the evidence of record clearly preponderates in the opposite direction. *Fletcher, supra* at 878.

In his challenge to the circuit court's resolution of the custodial environment question, plaintiff argues that the disruptions attendant to defendant's two convictions for driving under the influence of intoxicating liquor (hereinafter "drunk driving"), MCL 257.625a; MSA 9.2325(1), especially her eighteen day term of incarceration, operated to destroy the children's established custodial environment with defendant. We disagree. No evidence in the record suggests that the children's temporary move from defendant's home while defendant was incarcerated was abrupt, disorienting, or otherwise seriously disruptive. Instead, defendant appears to have arranged for the children's care during her incarceration in such a way as to minimize any disorienting effect on them. Because defendant was incarcerated for just eighteen days, and because the children spent that time with close family, we conclude that occurrence did little to threaten the children's established custodial environment with defendant.

Further, we do not believe that plaintiff has shown that defendant's problems with alcohol or the ramifications of her convictions has sufficiently hindered defendant's ability to provide "the parental care, discipline, love, guidance and attention appropriate to [her children's] . . . age[s] and individual needs." *Baker, supra* at 579. Undisputed evidence in the record speaks to defendant's successful abstinence from alcohol and participation in Alcoholics Anonymous since her convictions. The conditions of defendant's parole impose little if any burden on the children, and the restrictions on defendant's driving privileges only affect the children inasmuch as that defendant must arrange for other others to transport them pending reinstatement of her own license.

In short, we conclude that plaintiff has failed to establish that the consequences of defendant's convictions were of sufficient duration or intensity as to compel the circuit court to find that the children's established custodial environment with defendant had been destroyed. Accordingly, the court's finding in this regard was not contrary to the great weight of the evidence.

II

Plaintiff next challenges the circuit court's analysis of the statutory best interest factors. MCL 722.23; MSA 25.313(3). At the conclusion of a one day hearing, the circuit court found that: the parties were equal with respect to factors (a), (c), (e), (g), (h), (j) and (k); the parties were essentially equal with respect to factor (b); factor (d) weighed in favor of defendant; and that factor (f) weighed slightly in favor of plaintiff. Although the circuit court did cite defendant's driving while intoxicated convictions when finding that plaintiff had a slight advantage as to factor (f), the court did not feel as if those actions carried any further significant relevance under factor (l). Plaintiff asserts that because the evidence established that factors (b), (c), (d), (f) and (l) strongly favored himself, the circuit court's findings with respect to these factors were against the great weight of the evidence. As a result, plaintiff contends that the circuit court committed an abuse of discretion when it denied his motion to change the physical custody award. Once again, we disagree.

With respect to factor (b), plaintiff argues that he is better equipped to assist the children with their education given that he has more formal education that defendant. We are not convinced that a parent with more formal education can necessarily provide a child with a better learning environment. Indeed, the record shows that both children have been doing well in school while living with defendant, particularly Keith. For example, the record is replete with examples of awards Keith has won for academic achievement. As for the parties' capacity and disposition with respect to raising the children in their religion, we agree with both the circuit court and plaintiff that at this time plaintiff appears to be more conscientious about raising the children in their creed. However, we disagree with plaintiff's contention that this fact alone establishes that factor (b) favors plaintiff. When considering all of the elements found in factor (b), we conclude that the record supports the circuit court's finding.

As for factor (c), the circuit court observed that the parties were equally situated with regard to the capacity and disposition to provide for their children's material and medical needs, "especially when [defendant] . . . is benefited by child support."[1] Plaintiff argues that because he is employed full-time by a dairy farm, he is better able to provide for his children than defendant, who is seasonally employed in Mackinaw City. However, the record does not evidence that the children have in anyway not been adequately provided for since they have been living with defendant. See *Wellman v Wellman*, 203 Mich App 277, 283; 512 NW2d 68 (1994) (observing that a finding that the parties were equally situated with respect to factor [c] was not clearly erroneous given that the evidence showed that the children had been adequately provided for). Accordingly, we see no reason to disagree with the circuit court's conclusion.

The record also supports the circuit court's finding with respect to factor (d). Plaintiff's challenge to this particular finding is predicated on defendant's drunk driving convictions. He argues that defendant's incarceration effectively disrupted the children's environment to such a degree that defendant can no longer provide them with a stable, satisfactory environment. As we noted above, the record does not support the argument that the children's life has been seriously disrupted by these events. Conversely, the record does establish that since their parents' divorce, the children have established a stable environment with defendant. This environment includes the neighborhood in which they live, the schools that they have attended and the friendships they have developed. We believe the

circuit court correctly concluded that it would be desirable to maintain continuity by keeping the children in this environment.

Like factor (d) plaintiff's arguments with regard to factors (f) and (l) are both predicated on defendant's drunk driving convictions. In *Fletcher, supra*, the Michigan Supreme Court explained that "questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*." 447 Mich at 887. We conclude that alcohol abuse and drunk driving are two such types of conduct. *Id.* at 887, n 6 (observing that "drinking problems" and "driving record" are two "type[s] of morally questionable conduct relevant to one's moral fitness as a parent"). The circuit court's ruling makes it clear that it too believed that such behavior could influence defendant's ability to function as a parent. However, the circuit also balanced this conduct against defendant's attempts to effectively address her problems. As a result of this balancing, the circuit court concluded that plaintiff had a slight advantage on this factor. Recognizing that the circuit court is "better situated to weigh evidence and assess credibility," *Fletcher, supra* at 890, we conclude that this finding is not against the great weight of the evidence. We further conclude that the circuit court did sufficiently address how the children's best interests were impacted by defendant's drunk driving convictions. Even though the circuit court's account of its analysis of this relevant factor is limited, we note that the court did more fully address the impact of defendant's behavior when evaluating both the existence of an established custodial environment, as well as its analysis of factor (f). Accordingly, we see no error in the circuit court's handling of the matter.

As previously noted, once the circuit court has determined that an established custodial environment exits, the court "shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment . . . unless there is clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). The burden of proof in this regard rests with plaintiff as the party seeking to change the established custodial environment. *Rummelt v Anderson*, 196 Mich App 491, 496; 493 NW2d 434 (1992). Because we have concluded that the circuit court did not make findings of fact against the great weight of the evidence when analyzing the statutory best-interest factors, we further conclude that the plaintiff has not established with clear and convincing evidence that the custody of the children should be changed. Accordingly, the circuit court's denial of plaintiff's motion did not constitute an abuse of discretion.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

[1] The record indicates that plaintiff has had some difficulty in meeting his child support responsibilities. Indeed, on March 18, 1996, the office of the Friend of the Court filed with the Cheboygan County Clerk a show cause petition after it had been determined that there was an arrearage of $876.61. On April 30, 1996, Cheboygan Circuit Judge Robert C. Livo issued an order holding plaintiff in contempt for his "failure to pay out of currently available resources all or some portion of the amount due."