

STATE OF MICHIGAN
COURT OF APPEALS

LAVINA JACOBS,

Plaintiff-Appellee,

v

STEVEN W. JACOBS,

Defendant-Appellant.

UNPUBLISHED

March 31, 1998

No. 202427

Kent Circuit Court

LC No. 95-001380 DM

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

PER CURIAM.

Defendant appeals as of right from a judgment of divorce in which the circuit court awarded physical custody of the parties' two minor children to plaintiff. We reverse and remand for further proceedings.

The parties to this action, married in 1985, have both campaigned for physical custody of their children since their separation in May of 1995. The circuit court issued three orders granting plaintiff temporary custody pending the divorce proceedings. During the three-day custody trial in October 1996, evidence was admitted which in most part consisted of testimony regarding various incidents involving alcohol and physical altercations between the parties. Some of those incidents resulted in police intervention. There was also testimony regarding domestic violence between plaintiff and the man with whom she became involved after leaving defendant. At the conclusion of the trial, the court found in pertinent part that the children had an established custodial environment with plaintiff and that defendant had not presented clear and convincing evidence that a change in custody was in the children's best interests.

Defendant argues on appeal that the court's finding with regard to an established custodial environment is contrary to the great weight of the evidence. We agree. The issue whether the children had an established custodial environment with plaintiff is crucial to the outcome of this case, because where an established custodial environment exists, custody may not be changed except upon clear and convincing evidence that the change is in the best interests of the children. MCL 722.27(c); MSA 25.312(7)(c); *Ireland v Smith*, 214 Mich App 235, 261 n 2; 542 NW2d 344 (1996), aff'd as

modified 451 Mich 457; 547 NW2d 686 (1996). Where no established custodial environment exists, a court may award custody based on a mere preponderance of the evidence. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981).

Whether an established custodial environment exists is a question of fact. *Ireland, supra* at 241. 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 against the great weight of the evidence if the evidence of record clearly preponderates in the opposite direction. *Id.* at 878.

Statutory law sets forth the appropriate inquiry as to whether an established custodial environment exists:

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. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

In *Baker, supra* at 579-580, the Supreme Court expanded upon this statutory language:

Such an environment depended . . . upon a custodial relationship of a significant duration in which [the child] was 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.

Where a custodial arrangement is the result of a temporary order, the court must look into the actual circumstances of the case to determine whether a custodial environment exists. *Bowers v Bowers*, 190 Mich App 51, 53-55; 475 NW2d 394 (1991). At issue is the existence of a custodial environment, not why such an environment did or did not come about. *Id.* at 54. In the instant case, the trial court provided little explanation for its finding that the children had an established custodial environment with plaintiff. The trial court's few comments regarding the custodial environment referred only to plaintiff having the benefit of temporary custody orders during the pendency of the divorce. The trial court's exclusive reliance on the temporary custody orders in finding an established custodial environment with plaintiff falls short of the inquiry required by *Bowers, supra*.

Further, abundant evidence in the record militates against a finding that the children's lives with plaintiff after the parties' separation were "marked by qualities of security, stability and permanence." *Baker, supra* at 579-580. Plaintiff and the children spent their first month after the parties' final separation in a domestic abuse shelter, then moved into an apartment. One month later, plaintiff's boyfriend moved in, which the trial court observed was "a real negative factor" in the children's lives. Thereafter, in August 1995, police found the children unattended at 2:00 a.m. and plaintiff visibly intoxicated, resulting in the removal of the children to Child Haven. In January 1996, police found

plaintiff at the apartment at 4:00 a.m. with a cut on her chin and a swollen eye. Although plaintiff's boyfriend was arrested, plaintiff nonetheless continued her relationship with the boyfriend and, in August 1996, the police intervened again and subdued yet another argument. In September 1996, at 4:00 a.m., the police were called and, finding the children "just running about the block" outside, took plaintiff into custody and again removed the children to Child Haven. Although plaintiff testified that her relationship with her abusive boyfriend had ended, the absence from her and the children's lives of that destabilizing influence was an improvement of apparently only recent development at the time of trial, not one of "significant duration" for purposes of finding a custodial environment. *Id.* at 579.

The evidence of record overwhelmingly suggests that during the period of plaintiff's temporary custody of the children, they knew neither stability nor permanence. Despite this evidence, the trial court relied on the temporary custody orders to the exclusion of any other explanation, in finding that the children had an established custodial environment with plaintiff. We conclude that the trial court's finding in this regard was contrary to the great weight of the evidence. *Fletcher, supra.*

We decline defendant's invitation to issue a new custody determination with this opinion. De novo review of the ultimate custodial disposition is inappropriate; upon a finding of error potentially affecting the outcome, this Court must remand the case for reevaluation. *Id.* at 889. Accordingly, we remand this case to the trial court for reevaluation of the evidence on the issue of an established custodial environment. On remand, the trial court should consider up-to-date information, including any change in circumstances arising since the trial court's original custody order. However, we caution against a presumption that events taking place during the appellate process necessarily give rise to an established custodial environment where none existed at the time of trial. *Id.* at 889, n 10. In light of our disposition, we need not address the other issues raised on appeal by defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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