

STATE OF MICHIGAN
COURT OF APPEALS

In re SCOTT R. HARTSELL, a Minor.

UNPUBLISHED
March 16, 1999

ELWIN TERPENNING and MARGARET
THOMPSON,

Petitioners-Appellees,

v

MARY TERPENNING BATEMAN,

Respondent-Appellant,

and

MARK HARTSELL,

Respondent

No. 211281
Sanilac Circuit Court
LC No. 96-270070 GD

In re GREG ELWIN HARTSELL, a Minor.

UNPUBLISHED

ELWIN TERPENNING and MARGARET
THOMPSON,

Petitioners-Appellees,

v

MARY TERPENNING BATEMAN,

No. 211312
Sanilac Circuit Court
LC No. 96-270071 GD

Respondent-Appellant,

and

MARK HARTSELL,

Respondent

In re JENNIFER ANN HARTSELL, a Minor.

UNPUBLISHED

ELWIN TERPENNING and MARGARET
THOMPSON,

Petitioners-Appellees,

v

MARY TERPENNING BATEMAN,

Respondent-Appellant,

and

MARK HARTSELL,

Respondent

No. 211313

Sanilac Circuit Court

LC No. 96-270072 GD

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Respondent Mary Terpenning Bateman appeals as of right from an order granting joint legal custody of her three minor children to herself, their father, respondent Mark Hartsell, and petitioners, the children's maternal grandparents, Elwin Terpenning and Margaret Thompson. By this same order, Terpenning was awarded physical custody of Scott and Gregory Hartsell and Thompson was awarded physical custody of Jennifer Hartsell. We affirm.

Respondent first argues that the trial court erred in granting petitioners guardianship of the children. "The standard of review in cases where the probate court sits without a jury is whether the

court's findings are clearly erroneous." *In re Estate of Williams*, 133 Mich App 1, 13; 349 NW2d 247 (1984). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). In addition, questions of law are reviewed de novo. *In Re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997).

MCL 700.424(2)(b); MSA 27.5424(2)(b) states that the probate court may appoint a guardian for an unmarried minor if "[t]he parent or parents have permitted the minor to reside with another person and have not provided the other person with legal authority for the care and maintenance of the minor." Respondent asserts that because she verbally conveyed legal authority to petitioners to act on the children's behalf as well as provided a written authorization for medical treatment, she had provided "legal authority for the care and maintenance" of her children which thereby rendered improper the appointment of a guardian pursuant to MCL 700.424(2)(b); MSA 27.5424(2)(b). The probate court, however, found that the guardianship statute applied because the medical authorization, which was executed several months after respondent left the children with the petitioners and by law expired six months after execution, and the limited verbal authorizations with respect to the children's schooling needs, did not rise to the level of providing for the "care and maintenance" of the minors. We conclude that the probate court's finding were not clearly erroneous and that it did not err in appointing a guardianship pursuant to MCL 700.424(2)(b); MSA 27.5424(2)(b). The measures taken by respondent were limited and did not fully provide for the care and maintenance of the children. Consequently, the provisions of MCL 700.424(2)(b); MSA 27.5424(2)(b) applied and the probate court was thereby authorized to make a guardianship appointment.

Respondent next argues that in making its subsequent decision to award custody to petitioners, the trial court made findings on the best interests factors that were against the great weight of the evidence. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). Specifically, respondent contests the court's findings on factors b, c, d, h, i, j and l. The trial court's findings on each factor should be affirmed unless the evidence "clearly preponderates in the opposite direction." *Fletcher, supra* at 879.

We find that the evidence clearly supports the trial court's findings on factors b, c, h, and j. The record indicates, in regard to factor b, that petitioners made an active effort to keep apprised of the children's efforts at school and kept them actively involved in extracurricular, sports and church activities. In terms of factor c, we note that respondent did not go out of her way to pay for items the children needed, and petitioners readily moved in to fill any gaps. We agree with the trial court's finding that factor h modestly favored petitioners in that respondent did not take more initiative in keeping abreast of school matters. Finally, in regard to factor j, the record more than supports the trial court's finding that the parties were "equally deficient" in keeping each other apprised of what was happening with the children.

Regarding factor d, the trial court did not ignore the fact that the proposed custody arrangement had the siblings divided between two homes, but only questioned whether it amounted to an issue in maintaining continuity in the children's lives when they saw each other every day. In *Weichmann v*

Weichmann, 212 Mich App 436, 440; 538 NW2d 57 (1995), this Court acknowledged that “in most cases” it is in the best interests of each child to keep siblings together. There is no evidence in this record, however, that clearly preponderates in a direction opposite to the trial court’s finding that the children’s present living arrangements constitute a stable and satisfactory, if somewhat unique, environment.

Respondent also argues that the trial court failed to give the reasonable preference of the children (factor i) proper consideration in its ultimate dispositional ruling. The decision to award custody is a “discretionary dispositional ruling,” and will be affirmed unless it represents an abuse of discretion. *Fletcher*, *supra* at 880. A child’s preference is only one element used in a custody determination and does not automatically outweigh the other best interests factors. *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992). It is error requiring reversal for the trial court to fail to state whether a child is able to express a preference and whether the preference was considered in the custody order. *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988). In the present case, the trial court noted that it was a struggle for the children to express a preference regarding with whom they preferred to live and therefore decided not to consider this factor in its ultimate determination. We conclude that this was a proper exercise of the court’s discretion.

Respondent asserts, however, that in denying her motion for relief from the judgment, the trial court did not properly consider a letter from Scott, dated five days after the entry of the custody order, expressing a wish to live with respondent. The preference of the child does not automatically outweigh the other best interests factors. *Treutle*, *supra* at 694-695. In this case, the issue of the children’s preference was not the deciding factor in awarding custody to petitioners. New evidence on one of the best interests factors will not prompt a court to reconsider its custody determination where the party who was awarded custody retains an “overall advantage” in the best interests factors analysis. *Wellman v Wellman*, 203 Mich App 277, 284; 512 NW2d 68 (1994). The trial court therefore did not abuse its discretion in denying respondent’s motion for relief from judgment based on this letter. *Redding v Redding*, 214 Mich App 639, 645; 543 NW2d 75 (1995).

Finally, respondent asserts that the trial court erred in finding under factor 1 that the temporary arrangement with petitioners had become permanent. Upon a review of the record, we find evidence to support the court’s conclusion that in the eyes of the children, the living arrangement had become permanent. Moreover, the trial court found that factors other than factor 1 weighed in favor of petitioners. In looking at all the best interests factors, the trial court did not abuse its discretion in concluding that the evidence demonstrated that joint custody between petitioners, respondent and the children’s father was warranted and that physical custody should remain with petitioners.

Affirmed.

Judge Gage concurred in result only.

/s/ William B. Murphy
/s/ Brian K. Zahra