

STATE OF MICHIGAN  
COURT OF APPEALS

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SHELLEY MARIE MEDRANO,

Plaintiff-Appellee,

v

KURT BRADLEY MEDRANO,

Defendant-Appellant.

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UNPUBLISHED

October 28, 2004

No. 254842

Lapeer Circuit Court

LC No. 03-032557-DM

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

PER CURIAM.

Defendant appeals as of right the judgment of divorce challenging the trial court's award of custody, parenting time, and spousal support. We affirm.

Defendant first argues that the trial court erred in not granting him joint physical custody or greater parenting time than specified in the friend of the court guidelines. We disagree. "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "When reviewing the trial court's findings of fact, this Court defers to the trial court on issues of credibility." *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). "To whom custody is granted is a discretionary dispositional ruling. Therefore, a custody award should be affirmed unless it represents an abuse of discretion." *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994) (citations omitted).

Before turning to the best interest factors, a court must determine whether an established custodial environment exists. Whether a custodial environment is established is a question of fact. *Thompson v Thompson*, 261 Mich App 353, 363 n 3; 683 NW2d 250 (2004). Whether there is an existing custodial environment determines the burden of persuasion on a party arguing for a custody change:

While clear and convincing evidence must be presented to change custody if an established custodial environment exists, if no custodial environment exists, the trial court may modify a custody order if the petitioning party can convince the court by a preponderance of evidence that it should grant a custody change. [*Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995) (citations omitted).]

The court found that “there is an established custodial environment over a significant period of time (the children’s entire lives) with the Plaintiff.” The evidence supports this finding. The court heard testimony that plaintiff was the children’s primary caregiver and most responsible for their upbringing. Plaintiff testified that the parties agreed that plaintiff would postpone advanced education so she could stay home with the child. After the parties’ son was born, plaintiff worked only part time so she could be home with the children.

Although defendant, his brother, and mother testified that defendant was fully involved in the children’s upbringing, this does not preclude a finding that the children looked to plaintiff for guidance, discipline, and comfort. MCL 722.27(1)(c) See also *Mogle, supra* at 197-198 (observing that an established custodial environment can exist with both parents). Deferring to the trial court’s superior position to assess witness credibility, *id.* at 201, we conclude that the evidence does not clearly preponderate against the court’s finding an established custodial environment with plaintiff. Therefore, defendant must present clear and convincing evidence that the children’s best interest would be served by changing custody. *Hayes, supra* at 387.

“[A] trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23.” *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). “The trial court need not necessarily engage in elaborate or ornate discussion because brief, definite, and pertinent findings and conclusions regarding the contested matters are sufficient. MCR 2.517(A)(2).” *Foskett v Foskett*, 247 Mich App 1, 12; 634 NW2d 363 (2001). A parent may request joint custody, and the court is required to consider, though not necessarily grant, a parent’s request and document the reasons for its decision. MCL 722.26a.

Contrary to defendant’s assertion, the trial court elaborated its findings on each best interest factor. The court assessed best interest factors (a), (b), and (c) equally for both parties “when settlement assets, and child support are factored in.” The court assessed factors (d) and (e) in favor of plaintiff, affirming its previous determination that an established custodial environment existed with plaintiff. The court scored factor (f) against defendant, “given Defendant’s admitted extramarital affair and his less than credible testimony regarding the time of the affair, a wedding spat, and his commitment to spending time with the children.” The court found that factor (g) was equal, and that factors (h) and (i) were inapplicable because the children were too young to go to school or express a custodial preference. Finally, the court found that factors (j) and (k) weighed in plaintiff’s favor, “given the Defendant’s deceptive and manipulative testimony” and “Defendant’s controlling and verbally aggressive attitude.” The court did not weigh any additional considerations under factor (l).

Defendant argues that the court erred in determining that factors (a), (b), and (c) weighed equally between the parties. Defendant does not specifically assert that he outweighs plaintiff with respect to the “love, affection, and other emotional ties” that exist between the children and the parties. MCL 722.23(a). Rather, he focuses on the parties’ relative abilities to provide for the material needs of the children, factor (c), and to actively promote their education factor (b). But as noted in the discussion above regarding an established custodial environment, the evidence demonstrates that plaintiff took the lead in nurturing and caring for the children before the divorce. Further, the court recognized the disparity in earning capacity and assets between the parties, and indicated that it was equalizing this consideration through its handling of the property settlement. Therefore, defendant has not shown that the evidence clearly weighs against the court’s assessment of factors (a), (b), and (c).

Defendant also argues that the court erred in scoring factors (d) and (e) in plaintiff's favor. The court found that plaintiff "had custody of the children throughout the divorce and was the primary caregiver prior to the divorce" and "[t]he children naturally look to the mother for care and nurturing." Defendant argues this was error because he had established a permanent residence and was committed to working toward a joint physical custody compromise.

Our Supreme Court has noted that factors (d) and (e) "are phrased somewhat awkwardly and there is clearly a degree of overlap between them. However, we are satisfied that the focus of factor e is the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). The court's findings on these factors were based on its prior finding of an established custodial environment with plaintiff, which we have already concluded was supported by the record evidence. Defendant fails to demonstrate how his new home or desire for joint custody make erroneous the court's finding that factors (d) and (e) favor plaintiff. Therefore, defendant has not shown that the evidence clearly weighs against the court's assessment of these factors.

Defendant also argues that the court erred in scoring factor (k) in plaintiff's favor. Defendant appears to believe that the court's evaluation of the factor was based solely on a reported incident of domestic violence. But the court indicated that its assessment of factor (k) was based on defendant's general controlling and verbally aggressive attitude throughout the course of the hearings. Therefore, defendant has not shown that the evidence clearly weighs against the court's assessment of this factor.

Having found no error in the court's evaluation of the challenged best interest factors, we conclude that the court did not abuse its discretion in denying defendant's request for joint custody. As for increased parenting time, there is no evidence suggesting that the court abused its discretion by awarding parenting time under the friend of the court guidelines.<sup>1</sup>

Defendant next argues that the court's financial settlement was unfair and inequitable, and that the court abused its discretion in ordering defendant to pay \$9,000 of plaintiff's attorney fees. We disagree. The trial court's factual findings are reviewed for clear error, and the court's rulings on property division and financial support are reviewed to ensure they are fair and equitable in light of those facts. *Olson v Olson*, 256 Mich App 619, 629; 671 NW2d 64 (2003). A trial court may order one party to pay the other party's reasonable attorney fees and litigation costs "if the record supports a finding that financial assistance is necessary because the other party is unable to bear the expense of the action." *Id.* at 635.

The court considers a variety of factors in awarding spousal support:

The award of alimony is in the trial court's discretion. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable

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<sup>1</sup> We also note that the trial court awarded defendant significantly *more* parenting time than the child psychologist – whom defendant retained – would have recommended.

under the circumstances of the case. Among the factors that should be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson, supra* at 631 (citations omitted).]

Defendant has not shown that the court clearly erred in its findings or awarded spousal support unfairly or inequitably. “[D]ue to the disparity in incomes and education,” the court awarded plaintiff \$250 per week support (\$13,000 annually) for two years, with her share of her monthly health insurance premiums to be deducted from that amount. The court also ordered defendant to pay plaintiff \$9,000 toward her attorney fees out of his share of the home equity proceeds. Given defendant's superior financial position and the fact that he has already purchased another home, the court did not abuse its discretion by allowing plaintiff to conserve more of her assets from the settlement. There is no indication that court's award was punitive.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Hilda R. Gage

/s/ Brian K. Zahra