

STATE OF MICHIGAN
COURT OF APPEALS

BENSON FRED REED,

Plaintiff-Appellant,

v

NANCY LEWANDOWSKI, f/k/a NANCY
CRABTREE,

Defendant-Appellee.

UNPUBLISHED

September 20, 2005

No. 260372

Manistee Circuit Court

LC No. 95-007901-DP

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant physical custody of the parties' minor child. We affirm.

The parties' child was born in 1991. Defendant was granted primary physical custody of the child in 1996, with plaintiff receiving liberal parenting time. In July 2003, plaintiff filed a motion for change of custody because of a change in circumstances, specifically defendant's move to another city 160 miles away and the child's wishes to live with plaintiff. Before a hearing on that motion could be held, plaintiff filed an ex parte motion for temporary change in custody on August 20, 2003, alleging that defendant had inappropriately disciplined the child, that the child wished to live with plaintiff, that defendant refused to allow the child to compete in a barrel racing competition, and that defendant moved a great distance without the consent of the court. On August 21, 2003, the trial court signed the ex parte order and granted plaintiff temporary custody. On August 25, 2003, defendant filed objections to the motion for ex parte order and the ex parte order, and she requested an emergency hearing. A hearing took place on August 27, 2003. The transcript of the hearing contains, for the most part, only the trial court's ruling. The court first mentioned that it would have had serious reservations about allowing defendant to move with the child such a great distance if a motion on the issue would have been presented; however, the court saw no problem because plaintiff had previously agreed to the move and did not raise any objection. The trial court also indicated that it had spoken to the child and that she had voiced a preference to live with plaintiff. By virtue of the court's discussion with the child, the court further touched upon the barrel racing matter, the incident where the child was disciplined by defendant, and the child's schooling. The trial court found a change of circumstances and ordered that the ex parte order be continued as a temporary order. The court stated that if the parties were not satisfied with the temporary order, the case could proceed in a contested fashion, beginning with mediation and psychological evaluations.

Defendant affirmatively indicated that she was dissatisfied with the temporary order and wished to proceed with litigation, which was acknowledged by the trial court. There is no indication that the trial court analyzed, let alone discussed, the statutory best interest factors or the issue of the established custodial environment before making its ruling. An order was subsequently entered, providing that either party shall have the right to seek modification of the order and that, “because of the representation by defendant to pursue this matter to litigation, this case shall be submitted to mediation and psychological evaluation.”

On August 23, 2004, after mediation was held, which was unsuccessful, and the psychological evaluations were completed, defendant filed her own motion to change custody. A custody trial was held over three days in October 2004, and the trial court issued a written opinion in November 2004, finding that the established custodial environment was with defendant despite the temporary order and that it was in the child’s best interests for defendant to have primary physical custody. The presiding judge at the custody trial was not the same judge who issued the ex parte and temporary custody orders.

On appeal, plaintiff first argues that the trial court erred in holding an evidentiary hearing without first finding a change of circumstances or proper cause. We disagree.

There are three different standards of review applicable to child custody cases. A trial court’s factual findings, such as the existence of an established custodial environment and with regard to each factor affecting custody, are reviewed under the great weight of the evidence standard and will be affirmed “unless the evidence clearly preponderates in the opposite direction.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003); *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing MCL 722.28. In reviewing the findings, this Court defers to the trial court’s determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). A trial court’s discretionary rulings, such as a court’s determination on the issue of custody, are reviewed for an abuse of discretion. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Further, pursuant to MCL 722.28, questions of law in custody cases are reviewed for clear legal error. *Fletcher, supra* at 24.

Here, the trial court at the hearing on the objections to the ex parte order found a change in circumstances. However, at this hearing, there was no determination of whether a custodial environment existed or whether a change in custody was in the best interests of the child. In *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999), this Court stated:

This Court has held that it is improper for a trial judge to decide the issue of custody on the pleadings and the report of the friend of the court when no evidentiary hearing was held. *Stringer v Vincent*, 161 Mich App 429, 432; 411 NW2d 474 (1987). The trial court must determine the best interests of the child as defined in MCL 722.23; MSA 25.312(3), and must make findings on each factor. A hearing is required before custody can be changed on even a temporary basis. *Mann v Mann*, 190 Mich App 526, 529-530; 476 NW2d 439 (1991). The court rules also recognize the right to a hearing in custody cases. MCR 3.210(C).

In *Pluta v Pluta*, 165 Mich App 55, 60; 418 NW2d 400 (1987), this Court ruled that the trial court could not be allowed to circumvent and frustrate the purpose of the law by issuing an ex parte order changing custody without any notice to the custodial parent or without a hearing

on the issue of whether clear and convincing evidence existed that a change of custody was in the child's best interest.

As the case law makes abundantly clear, the ex parte and temporary orders should never have been entered in the case before us today. The manner in which this case should have proceeded is by way of a full evidentiary hearing or trial on plaintiff's motion for change of custody pursuant to which the court would have needed to rule on the established custodial environment and the best interests factors before changing custody, temporary or not. Even as this case proceeded as it did, with the trial court allowing full litigation of custody after defendant voiced dissatisfaction with the temporary order, the eventual custody trial that took place should have been pursuant to plaintiff's motion for change of custody and not the later motion for change of custody filed by defendant, which was evidently filed only to get matters moving.¹ While MCL 722.27(1)(c) requires a change of circumstances or proper cause shown before there is a modification or change in custody, plaintiff was required to establish this fact, and he did so at the hearing on the objection to the ex parte order when the court found a change of circumstances. Under the convoluted procedure that occurred in this case, we do not believe that defendant had to subsequently establish a change of circumstances prior to the custody trial. Assuming that defendant was mandated to again establish a change of circumstances or proper cause shown, the record overwhelming shows that the circumstances involving this family and the care of the child had changed. There is no basis for reversal.

Plaintiff next argues that the trial court erred in finding that a custodial environment existed with defendant and not him. MCL 722.27(1)(c) states that a custodial environment 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." "An established custodial environment is one of significant duration 'in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.'" *Mogle, supra* at 197, quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). An established custodial environment cannot be changed unless there is presented clear and convincing evidence that it is in the best interests of the child. MCL 722.27(1)(c).

Again, as this case should have proceeded, it would be plaintiff with the burden to show by clear and convincing evidence that a change of custody was warranted under the best interest factors because there can be no doubt that at the time plaintiff initially sought custody and requested the ex parte order, the established custodial environment had been with defendant for a considerable period of time.

The *Pluta* panel stated that an order for temporary custody does not, by itself, establish a custodial environment, and the Court further ruled that where a party obtains custody by virtue of an invalid ex parte order, the custody arrangement created by the order should not be a basis for establishing the custodial environment in that party. *Pluta, supra* at 60-61. The same reasoning and logic is equally applicable here.

¹ On the first day of trial, the court told counsel for defendant to proceed first because it was defendant's motion.

Moreover, assuming that we must take into consideration the temporary order placing the child with plaintiff, along with said placement, in the context of determining the established custodial environment, we nonetheless find that the established custodial environment was with defendant. The evidence did not clearly preponderate against the trial court's finding that an established custodial environment existed with defendant. Defendant had been the child's primary caregiver from her birth in 1991 until the ex parte order in August of 2003. Defendant testified that she took care of the child's physical, emotional, and mental needs. Defendant also indicated that she was the person who disciplined the child. Plaintiff testified that the child had no past or current problems and any problems the child did have were only when she was with defendant and not with him. Plaintiff also testified that he never had to discipline the child. The child had only spent fourteen months in plaintiff's primary care and during this time defendant had liberal visitation. The trial court's finding that the child looked to defendant "for guidance, discipline and parental comfort" was not against the great weight of the evidence, nor was its determination that the established custodial environment was with defendant. We note that despite the trial court's conclusion that the established custodial environment was with defendant, it nevertheless found that there was clear and convincing evidence to change custody from plaintiff to defendant; the preponderance of the evidence test was not utilized. See *Foskett, supra* at 7. Considering that the established custodial environment was properly found to be with defendant, it would seem that plaintiff would have to prove by clear and convincing evidence that a change in the established custodial environment was warranted; however, he already had actual physical custody.² We find that the trial court did not err in awarding custody to defendant regardless of the appropriate burden of proof and assuming the burden rested with defendant.

Plaintiff argues that the trial court made many factual errors in its opinion and in its findings on the statutory best interest of the child factors.³ We note that plaintiff does not argue that the trial court's custody determination was an abuse of discretion, only that its findings were against the great weight of the evidence. Regardless, we will review the errors plaintiff alleges that the trial court made in considering the best interest factors.⁴

Plaintiff disputes the trial court's findings on factors (a), (b), (d), (e), (f), (h), (i), and (j). We find no error in the trial court's findings as to whether either party was favored by factors (a), (b), (d), (e), (f), (h), and (j). Although the trial court's finding on factor (i) was against the great weight of evidence, this alone is no basis to reverse the custody award.

² This raises intriguing questions regarding the burden of proof in situations where the party with actual physical custody is not deemed to be the party with whom the established custodial environment exists. We need not explore the matter in light of our ultimate ruling.

³ MCL 722.23.

⁴ Plaintiff also argues that the trial court made errors in its recitation of the procedural history and background of the case. Plaintiff fails to explain how any of these errors affected the trial court's custody determination, and we decline to review such alleged errors apart from the best interest factors. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Of the disputed factors, the trial court found factors (a) and (h) were to be weighed equally. Regarding factor (a), the trial court found that both parties had a loving relationship with the child. Although testimony indicated that defendant and the child's relationship was a bit strained, the evidence presented showed that both parties loved and cared for the child and that the child loved both parties. Regarding MCL 722.23(h), "[t]he home, school, and community record of the child[.]" the trial court also determined that this factor was equal as the child was an excellent student when with either parent. The evidence presented at trial supported this finding as testimony indicated that the child did well in school in both defendant's and plaintiff's care. We conclude that the evidence did not clearly preponderate against the trial court finding factors (a) and (h) to be equal between the parties.

The court concluded that factors (b), (d), (e), (f), (i), and (j) weighed in defendant's favor. We find no error regarding factors (b), (d), (e), (f), and (j). The court found factor (b) to weigh in defendant's favor as defendant attended church regularly and brought the child with her. We hold that this finding was not against the great weight of the evidence. Although plaintiff testified that he tried to teach the child about religion at home, he stated that he did not attend church. Regarding factor (d), we find sufficient record support to uphold the court's determination. Regarding factor (e), the trial court stated that plaintiff had numerous affairs before and during his marriage. This finding was in error as there was testimony indicating that plaintiff had some affairs during his relationship with defendant, but there was no testimony that he engaged in any affairs during his marriage. However, we do not believe that his error necessitates a finding in favor of plaintiff on this factor. The evidence at trial showed that defendant engaged in premarital counseling before her current marriage and this was her first marriage since the child's birth. Plaintiff had a past history of affairs and had been married, divorced, and remarried in the child's lifetime. Although there was no testimony of any problems in plaintiff's current marriage, we find that the evidence does not clearly preponderate against the trial court's findings.

Likewise, we find that the evidence supported the trial court finding factors (f) and (j) in defendant's favor. Factor (f) concerns a party's moral fitness as a parent. MCL 722.23(f). Plaintiff testified at trial that he had an affair with the child's eighteen-year-old babysitter and that it would be alright for the child to have an affair with the father of a child she was babysitting if she was eighteen years old. This testimony supports the trial court finding in defendant's favor on this factor. Regarding factor (j), testimony indicated numerous times that plaintiff had interfered with defendant's parenting time. Additionally, testimony indicated that defendant encouraged the child's relationship with plaintiff. The evidence does not clearly preponderate against the trial court's finding favoring defendant on this factor.

We do find that the trial court erred with respect to factor (i). The trial court weighed factor (i) in defendant's favor, even though the child expressed a preference to live with plaintiff. Therefore, we find that the evidence clearly supported weighing this factor in plaintiff's favor.

Although we find that the trial court erred regarding factor (i), we conclude that the trial court did not abuse its discretion in awarding custody to defendant. Although the child indicated that she wished to live with plaintiff, a "child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child." *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992)(citation omitted).

Consideration of the remaining factors strongly reflects that it was in the child's best interests to live with defendant.

Affirmed.

/s/ Michael R. Smolenski

/s/ William B. Murphy

/s/ Alton T. Davis