

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CLAUDIO CAAMANO,

Plaintiff-Appellant,

v

RAQUEL NOEMI GONZALES,

Defendant-Appellee.

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UNPUBLISHED

April 3, 1998

No. 200758

Washtenaw Circuit Court

LC No. 93-1154-DC

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order granting sole custody of his daughter to defendant, the child's mother. We affirm in part and remand in part.

Plaintiff and defendant met and became romantically involved in their native country, Argentina. They were never married. Their daughter, Lucia, was born in Argentina on February 25, 1986. Plaintiff, defendant and Lucia moved to the United States in 1987. Plaintiff and defendant separated in 1989 and agreed to a schedule of visitation. Defendant petitioned for sole custody of Lucia in late 1989 but the parties stipulated to dismissal of the action so that defendant could return to Argentina with Lucia. Defendant actually went to Canada for approximately one and one-half months first and did not inform plaintiff of her whereabouts. She arrived in Argentina in February 1990 and initiated custody proceedings there. Defendant returned to the U.S. in May 1990. Her attorney continued the custody matter in Argentina in her absence. The Argentinean court issued an order in December 1990 awarding defendant sole custody of Lucia but defendant never asserted this order against plaintiff in the U.S. Plaintiff testified that from defendant's return to the U.S. to the time of trial he had maintained a pattern of visitation of two times per week (for a two to three month period he regularly had three visits per week but defendant decided that it was too disruptive.) Plaintiff was married in July 1992; he and his wife had a daughter in June 1994. Since 1993, defendant has lived with her fiancé.

Plaintiff filed a complaint for custody in August 1993. The proceedings to determine custody were not concluded until June 1995. The trial court found that Lucia had an established custodial environment with defendant and that defendant fared slightly better than plaintiff in the weighing of the

statutory factors for determining custody. The court awarded sole custody to defendant. Plaintiff filed a delayed application for leave to appeal this order; this Court granted leave to appeal.

MCL 722.28; MSA 25.312(8) states:

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 722.27(c); MSA 25.312(7)(c) states in pertinent part:

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 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.

While clear and convincing evidence is required to change custody where an established custodial environment exists, where no established custodial environment exists, a court may award custody based on the preponderance of the evidence. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995); *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). “Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria.” *Hayes, supra* at 387-388. MCL 722.23; MSA 25.312(3) sets forth factors for determining the best interests of the child that are to be considered in custody decisions.

Here, the evidence demonstrates that from the time plaintiff and defendant discontinued living together through trial, Lucia lived with defendant and plaintiff exercised regular visitation with her (generally two days per week.) While plaintiff maintained regular and extensive contact with Lucia through such visits, defendant apparently had primary custody throughout this period. The present case is readily distinguishable on this basis from cases like *Baker, supra* and *Hayes, supra* in which physical custody of the child actually changed from one party to the other precluding establishment of a custodial environment. Therefore, we find no error in the trial court’s determination that Lucia had an established custodial environment with defendant.

The trial court considered the “best interests of the child” factors on the record.<sup>1</sup> It found the parties equally situated with respect to most of the factors. But it found that factors (a) (love, affection, emotional ties) and (d) (length of time in stable environment) favored defendant and that factor (j) (ability to facilitate relationship between child and other parent) favored plaintiff. It awarded custody of Lucia to defendant. On appeal, plaintiff has failed to demonstrate that consideration of the statutory factors favors granting custody to him by even a preponderance of the evidence, much less by “clear

and convincing evidence.”<sup>2</sup> Thus, we find no palpable abuse of discretion in the trial court’s dispositional ruling nor do we find that the factual findings underlying this ruling were against the great weight of the evidence.

Plaintiff also challenges the trial court’s failure to apply the “shared economic responsibility” provision of the child support guidelines in light of the award of extensive overnight visitation to him. This provision states that child support obligations should be offset in accordance with a stated formula when “the parent with the lesser amount of time with the children has the children in his/her care for a minimum of 128 overnights annually.” MCL 552.16(2); MSA 25.96(2) provides that a court may deviate from the formula if it determines that application would be “unjust or inappropriate”; the court must specify its reasons for deviation in writing or on the record. *Eddie v Eddie*, 201 Mich App 509, 513; 506 NW2d 591 (1993). Here, the order arranges visitation such that plaintiff will be entitled to 128 or more overnight visitations in even-numbered years but under 128 overnight visitations in odd-numbered years. Plaintiff suggests that we average the number of overnight visitations per year and provides figures for 1996, 1997 and 1998. Defendant does not contest the accuracy of these figures but contends that no authority authorizes averaging the number of overnight visitations per year when they fluctuate from year to year. We are aware of no authority addressing this issue. To avoid the logistical burdens of having to recalculate support each year on the basis of whether the 128 overnight visitations threshold is met, we believe that averaging over several years is not unreasonable or inappropriate. Everything else being equal, we also believe that a longer-term rather than a shorter-term assessment of the non-custodial parent’s overnight visitation ensures a more accurate picture of that parent’s contribution to the economic support of the child. On the basis of the information provided, which covers the three most recent years, the average number of overnight visitations per year is  $(134 + 122 + 129) \div 3 = 128.3$ . Therefore, plaintiff’s average number of overnight visitations per year fits within the letter as well as the purpose of the shared economic responsibility provision. We accordingly remand this matter for entry of an order determining child support in accordance with the shared economic responsibility provision.

For these reasons, we affirm the order granting custody to defendant and remand solely for a redetermination of child support. No taxable cost pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

<sup>1</sup> We note that the court failed to explicitly discuss factor (k), domestic violence, on the record. “The trial court must consider each of these factors and explicitly state its findings and conclusions regarding each.” *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). Here, plaintiff testified that, following their separation, defendant’s methods of raising Lucia changed, including what he viewed as sometimes inappropriate physical discipline. Our review of the record does not suggest that the discipline described by plaintiff, even assuming that it occurred, could fairly be construed as “domestic

violence.” Indeed, we believe that the only evidence of genuine domestic violence raised in this case related to defendant’s allegation that plaintiff had beaten defendant. Accordingly, in our judgment, explicit consideration of factor (k) could have only worked to plaintiff’s detriment if the court believed defendant’s allegations. Therefore, any error in the court’s failure to discuss this factor on the record was harmless to plaintiff. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

<sup>2</sup> Accordingly, even if the trial court erred in determining that Lucia had an established custodial environment with defendant, such error would be harmless because plaintiff failed to show, even by a preponderance of the evidence standard, that the trial court erred in not awarding custody to him.