

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ALLEN RILEY,

Plaintiff-Appellee,

UNPUBLISHED
December 1, 2000

v

NANCY KAYE DOWNS,

Defendant-Appellant.

No. 224314
Shiawassee Circuit Court
LC No. 86-005158-DM

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from an order awarding plaintiff primary physical custody of the parties' son, David. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Defendant first contends that the trial court erred in determining that an established custodial environment did not exist with defendant and, therefore, applied the wrong standard of proof to plaintiff's petition for a change of custody. We agree.

Modifications to a custody order involving a minor child are governed by MCL 722.27(1)(c); MSA 25.312(7)(1)(c), which provides, 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.

Generally, "the first step in considering a petition to change custody is to determine whether an established custodial environment exists; it is only then that the court can determine what burden of proof must be applied." *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). The existence of a previous custody order is irrelevant to the determination of an established custodial environment. *Id.* at 388. Instead, the trial court considers "the

circumstances surrounding the care of the children in the time preceding trial.” *Id.* The existence of an established custodial environment is a question of fact for the trial court, *id.* at 387-388, which is reviewed under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

In this case, the trial court found that defendant had established a custodial environment with David. However, the court held that the custodial environment had been destroyed because the relationship between David and defendant had deteriorated during the two or three years preceding the motion for change of custody. Because we believe this factual finding is against the great weight of the evidence, we find that the trial court committed error requiring reversal.

Defendant maintained physical custody of David from the time he was two years old until after his fourteenth birthday, when the trial court entered its order changing custody. Other than periodic visitation with plaintiff, David was in defendant’s daily care for more than twelve years. Uncontested evidence established that, each day, defendant woke David and helped him get ready for school. Although defendant worked full-time since 1992, she routinely dropped David off at her parents’ home for breakfast and a ride to school. After defendant and David arrived home at 4:30 p.m. on school days, they ate dinner together and defendant helped him with his homework.

Defendant regularly took David to medical and dental appointments, drove him to and from athletic practices, and attended every home and away game in which David participated. Moreover, defendant attended every open house and parent-teacher conference at David’s school, volunteered as a room mother from kindergarten through fifth grade, helped with numerous field trips, athletic events and class projects. She was also a member of the parent teacher organization for his elementary school, was vice-president of the parent teacher organization for his middle school, and was a den mother for his cub scout troop from first to fifth grade.

Defendant also took responsibility for day-to-day discipline, requiring David to complete household chores and finish his homework before watching television or talking on the telephone. Also, defendant set rules in the household with regard to David being at home alone with other teenagers and with regard to the time he was expected home after evening events. Evidence also showed that David shared problems with defendant and she counseled him on issues such as drugs, violence and sex. Thus, according to the uncontested evidence, defendant provided David’s daily parental care, discipline and attention for more than twelve years, in a secure and stable home.

Nevertheless, the trial court found that a change occurred in the home within the two or three years preceding the motion for change of custody, such that the established custodial environment was destroyed. In light of the proofs presented at the custody hearing, we believe the trial court’s conclusion that the relationship between David and defendant had changed in recent years was factually accurate. Evidence showed that the two argued more as David entered adolescence and that defendant had to impose rules regarding his behavior that were less flexible than those instituted at plaintiff’s house. However, this change was an insufficient reason for the trial court to find that the established custodial relationship with defendant had been destroyed.

Evidence showed that David's relationship with defendant was strained because of age, gender differences, increased discipline, and David's desire to spend more time with his father in a less-restricted environment. Yet under MCL 722.27(1)(c); MSA 25.312(7)(1)(c), the child's "inclination" is not the sole factor which determines the existence of an established custodial environment. Rather, the trial court must consider "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." *Id.* David's growing pains do not negate the fact that, over many years, his established home was with defendant. The great weight of the evidence showed that defendant provided David's daily guidance, discipline, necessities of life, and parental comfort in a permanent and stable home.

Further, the trial court must consider "the inclination of the custodian and the child as to the permanency of the relationship," when determining whether an established custodial environment exists. MCL 722.27(1)(c); MSA 25.312(7)(1)(c), (emphasis added). Our review of the record reveals that defendant's inclination as the child's custodian was that the custodial arrangement would continue indefinitely. The purpose of MCL 722.27(1)(c); MSA 25.312(7)(1)(c) is "to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid v Aasulewski*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). We decline to hold that an established custodial environment is extinguished whenever a child expresses a preference to spend more time with a non-custodial parent, notwithstanding a long-established living situation. As much as any child might prefer otherwise from time to time, rules, daily guidance, discipline and consistent parenting are what foster the security, stability and permanence of a home environment. As such, it was against the great weight of the evidence for the trial court to find that the established custodial environment with defendant had been destroyed, simply based on the child's preference, because the evidence clearly preponderates in the opposite direction. *Fletcher, supra*, 447 Mich 877-878.

If an established custodial environment exists, a trial court may order a change of custody only when clear and convincing evidence demonstrates that such a change would be in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). It is well settled that a "trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). As set forth above, the trial court erroneously held that the established custodial environment existing with defendant had been destroyed. Accordingly, the trial court committed a clear legal error by ruling that plaintiff's standard of proof was a preponderance of the evidence. *Id.*

Defendant next contends that the trial court made erroneous findings of fact with regard to the best interest factors contained in MCL 722.23; MSA 25.312(3). The trial court determined that factors a and i favored plaintiff, while factors b, c, d, e, f, g, h, and j favored both parties equally. Defendant challenges the trial court's findings with regard to factors a, b, d, e, f and i. A trial court's findings of fact regarding the best interest factors are reviewed under the great weight of the evidence standard. *Hilliard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998).

The first of the best interest factors to be considered concerns the “love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a); MSA 25.312(3)(a). The trial court found that this factor weighed in favor of plaintiff because he and David had grown closer, while David and defendant often argued. We conclude that this factual finding was not against the great weight of the evidence. Testimony revealed that plaintiff and David had a close, loving relationship, that they enjoyed spending time together and that David expressed an interest in living with plaintiff. While David still shows affection for defendant, and defendant’s devotion to her son is evident by her participation in his daily activities, the evidence did demonstrate some strain on their relationship. Therefore, the trial court’s conclusion that this factor favored plaintiff was not against the great weight of the evidence.

As for factor b, the “capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any,” MCL 722.23(b); MSA 25.312(3)(b), the trial court found the parties equal. The trial court’s decision was based on its factual findings that plaintiff made an effort to visit David regularly and that plaintiff supported David’s educational well-being. While the trial court admitted that plaintiff should do more to encourage David to attend church, the court also noted that David occasionally missed services while living with defendant. We believe that the trial court’s finding of equality on this factor was against the great weight of the evidence.

In terms of guidance, the evidence presented at trial indicated that plaintiff did not discipline David and was less restrictive of his behavior. Also, plaintiff allowed David to stay home alone during the summer, without supervision, while plaintiff worked 9 ½-hour days as a truck driver. Further, plaintiff testified that he did not take David to church. In contrast, while living with defendant during the summer, David went to his maternal grandparents’ house in the morning and studied the Bible, worked on a computer and helped with the family business. Defendant was responsible for discipline and, on a daily basis, supervised David’s homework and chores and restricted telephone and television use. Further, defendant set rules regarding when David should be home from evening events and prohibiting him from being at home alone with other teenagers. Moreover, defendant testified that she took David to church every week when he was with her, except when special events or vacations interfered.

In terms of education, the evidence showed that defendant asked plaintiff to enroll David in a five-day preparation course for the MEAP test, because the course occurred during plaintiff’s summer parenting time. Plaintiff did enroll David in the course, but then allowed David to skip the final two days of the class. Plaintiff testified that he talked to David about his grades and that he considered them unacceptable. However, he also admitted that he did not study with David, never checked his homework, and was not aware of any school problems until he saw David’s report cards. Plaintiff went to some parent-teacher conferences while David was in elementary school, but did not do so in recent years and was unable to name David’s teachers or the courses in which David was struggling.

In contrast, defendant checked David’s assignment sheets each day, helped him with homework and helped him study for tests. Defendant was familiar with David’s grades and courses, was in regular contact with his teachers, and actively participated at his school. Thus, evidence showed that defendant played an active role in David’s behavioral, religious and

academic training and that plaintiff was uninvolved in David's academic progress and did not encourage him to attend church. For these reasons, we believe that the trial court's finding that the parties were equal on factor b was against the great weight of the evidence. Instead, the trial court should have found that this factor favored defendant.

The trial court also weighed the parties equally on factor d, the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d); MSA 25.312(3)(d). The trial court's finding on this factor was apparently influenced by its determination that an established custodial environment existed with neither parent. We believe that the trial court's finding of equality on this factor was against the great weight of the evidence.

As noted above, David lived with defendant for twelve years. Defendant remarried in 1995, has lived in the same home since early 1996, and has lived in the same school district for all of David's school years. In addition, defendant testified that David gets along well with her current husband. Defendant has worked for the same employer since 1995 and had one other employer before that. And, as discussed above, the disagreements between defendant and David concerning various rules did not create an unstable home environment.

Plaintiff's time with David was limited by the custody arrangement in the divorce judgment. However, the environment plaintiff established for David was less stable and less satisfactory than that provided by defendant. As noted above, plaintiff allowed David to stay home alone during the summer, with no structured activities and no supervision. Plaintiff has lived in his current home only since April 1999, and, although he has worked for the same company for three years, he worked for five other companies since 1991. In terms of personal relationships, plaintiff lived with more than one woman, without the benefit of marriage, while exercising parenting time with David. Plaintiff's personal relationships are clearly less stable than defendant's marriage. Based on this evidence, the trial court's finding that the parties were equal on factor d was against the great weight of the evidence. Defendant created a long-term, stable home for David. Compared to plaintiff's home environment, with his various female companions, frequent changes in employment and lack of daily supervision while David is in the home, the evidence clearly preponderated in defendant's favor.

With regard to factor e, the "permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e); MSA 25.312(3)(e), the trial court again found the parties equal. The trial court stated that, although defendant was married and plaintiff was single, it was uncertain whether those living situations would continue in the future. Further, the trial court found that both parties owned permanent homes in David's school district and that both parties had relatives close by.

We believe the trial court's finding of equality on this factor was against the great weight of the evidence. First, there was no evidence that defendant's marriage was unsound and no evidence that plaintiff planned to marry in the near future. Therefore, the trial court's conclusion that the two family units were equally stable was unsupported, especially since plaintiff had numerous female companions that were in and out of plaintiff's house during his scheduled visits with David. In terms of nearby family members, evidence showed that defendant's parents were actively involved in David's life and that they spent time with him every day, while there was no

evidence that plaintiff's parents spent any time with David. In light of this evidence, the trial court should have found that the evidence preponderated in favor of defendant on factor e.

The trial court also found the parties equal on factor f, the "moral fitness of the parties involved," MCL 722.23(f); MSA 25.312(3)(f). Defendant argues that the trial court's factual findings with regard to this factor were erroneous because of plaintiff's history of extramarital relationships, including his practice of having live-in girlfriends while exercising visitation time with David, and because plaintiff's extramarital affairs caused the breakup of the parties' marriage. While the trial court found that plaintiff exercised poor judgment by having women stay overnight at his house when David was visiting, the trial court found that David was not harmed by the activities. Factor f "relates to the parent-child relationship and the effect that the conduct at issue may have on that relationship." *Hilliard, supra*,. 231 Mich App at 323-324. The trial court's finding that David was not adversely affected by plaintiff's behavior was not against the great weight of the evidence. No testimony showed that David was harmed by plaintiff's behavior or that the activities interfered with plaintiff's ability to be an effective parent. Further, the only other evidence regarding moral fitness was defendant's testimony that plaintiff allowed David to be at home alone with girls, but plaintiff denied allowing such behavior. In light of this, it was not against the great weight of the evidence for the trial court to conclude that the parties were equally morally fit within the meaning of MCL 722.23(f); MSA 25.312(3)(f).

Also, contrary to defendant's argument on appeal, the trial court was not permitted to consider the fact that the marriage between plaintiff and defendant ended because of plaintiff's extramarital affairs, as "extramarital conduct, in and of itself, may not be relevant to factor f." *Fletcher, supra*, 447 Mich at 887. However, the trial court was permitted to consider plaintiff's choice to allow women to spend the night in his home, to the extent it affected his ability to raise David. *Id.*

The final statutory factor defendant challenges on appeal is factor i, the reasonable preference of the child. The trial court found that this factor favored plaintiff because David expressed a preference for living with plaintiff, and further found that David was old enough and mature enough to express a preference. The trial court also found that David had expressed his preference for a sufficient length of time and the preference was sufficiently strong so that the factor should be weighed more heavily than the others.

It is undisputed that David expressed a desire to live with plaintiff. Therefore, we cannot conclude that the trial court's finding was against the great weight of the evidence. Although defendant contends that the trial court gave undue weight to this factor in its decision to change custody, a trial court is not required to give the best interest factors equal weight. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). Given the current posture of this case, we decline to address whether too much weight was accorded to factor i, as the trial court must reassess this issue when it reconsiders whether clear and convincing evidence demonstrates that a change of custody is truly in David's best interests.

In summary, defendant challenged the trial court's findings of fact with regard to best interest factors a, b, d, e, f and i. We find that the trial court's findings with regard to factors a, f and i were supported by the evidence. However, we find that the trial court's findings with

regard to factors b, d and e were against the great weight of the evidence. Instead, we believe that those factors should have weighed in defendant's favor.

Finally, defendant contends the trial court abused its discretion by failing to award her an increase in child support. Modification of a child support order is a matter within the sound discretion of the trial court. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999); *Good v Armstrong*, 218 Mich App 1, 4; 554 NW2d 14 (1996). The burden is on the party appealing a child support order to show that the trial court clearly abused its discretion. *Kosch, supra* 233 Mich App 350; *Good, supra* 218 Mich App at 4. Defendant has not shown that the trial court's failure to increase her amount of child support during the pendency of her motion was a clear abuse of discretion. We also note that defendant did not raise before the trial court the argument that she should receive increased support for the limited period between the time of filing and the time the motion was decided. Defendant's motion was filed in response to plaintiff's petition for a change of custody, and was filed with the assumption that custody would remain with her. Under these circumstances, the trial court did not abuse its discretion by failing to grant defendant support during the time her motion was pending.

Because the trial court made findings of fact against the great weight of the evidence regarding the statutory best interest factors and applied the wrong standard of proof in deciding that a change in custody was in David's best interests, the trial court's order constituted error requiring reversal. We reverse the trial court's finding that no established custodial environment existed with defendant, as the evidence clearly preponderates in the other direction. We also reverse the trial court's findings of fact with respect to statutory best interest factors b, d and e, and affirm the findings of fact regarding factors a, f and i. Finally, we remand for reconsideration of the change of custody motion under the proper standard of proof, clear and convincing evidence.

Affirmed in part, reversed in part, and remanded. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck