

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK DONALD STEFFEN,

Plaintiff-Appellant,

UNPUBLISHED
March 12, 2013

v

BOBBY-JO MULLER, f/k/a BOBBY-JO
STEFFEN,

No. 310956
Kent Circuit Court
LC No. 05-002725-DM

Defendant-Appellee.

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying his motion to change custody in regard to the minor child. We affirm.

I. FACTUAL BACKGROUND

Plaintiff and defendant were divorced in 2005. The trial court ordered joint legal custody but primary physical custody was awarded to defendant. The court granted parenting time consisting of alternating weekends, alternating one or two weekdays, and alternating holidays to plaintiff.

On December 21, 2011, plaintiff filed a motion for change of custody, requesting primary physical custody. He contended that defendant's living situation had become unstable, as she had separated from her current husband and was living in a condemned home with her new boyfriend. He also stated that since October 31, 2011, the minor child had resided with him, not defendant.

Upon review of the allegations, the trial court found that plaintiff had alleged circumstances sufficient to warrant a review of the custody arrangement pursuant to the standard set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). The trial court then granted plaintiff temporary physical custody and ordered an evidentiary hearing to be scheduled if the parties failed to settle.

Defendant responded by filing a motion to modify the trial court's order. She argued that the trial court did not specifically state its reasons for changing custody and that pursuant to *Theroux v Doerr*, 137 Mich App 147, 149; 357 NW2d 327 (1984), a custodial parent is allowed

to temporarily relinquish custody in certain circumstances. After a hearing on defendant's motion, the trial court entered an order denying her motion to modify the order that granted plaintiff temporary physical custody.

An evidentiary hearing was held on March 12, 2012. Plaintiff testified that beginning in August 2011, he had taken care of the minor child almost exclusively, and that in October 2011, defendant asked him to take care of the minor child because she would be moving around and did not want the child to be "bouncing from house-to-house." Plaintiff claimed that from then on, the child stayed with defendant only on a limited basis. On one such occasion, the child stayed overnight with defendant and received several bug bites, prompting plaintiff to call Child Protective Services (CPS). The minor child's teacher testified that she had noticed the child had numerous bites on his arms and hands.

Defendant's husband at the time of the evidentiary hearing testified that after defendant moved out of their marital home, she lived with her parents, and then moved into a condemned home that had leaky faucets, animals, a broken furnace, and not enough beds. Plaintiff, however, acknowledged that defendant no longer lived in that condemned home. He also admitted that he did not work due to a back injury, that he owed \$1,900 in child support, and that he smoked marijuana daily for his back injury although he did not have a medical marijuana card.

According to defendant, she only lived in the so-called condemned home for a couple of months, it had running water and heat, and it was not actually condemned. She also denied seeing bug bites on the child's arms. While she admitted that she asked plaintiff if the minor child could stay with him until she was settled into a new house, it was only for a couple of weeks. She also claimed that plaintiff refused to return the minor child to her care after she was settled into a new home. A mediator for the Friend of the Court testified that she visited defendant's new home and it was clean with running water and beds. The mediator also testified that defendant had signed a 12 month lease for the home, beginning on December 4, 2011. Moreover, a CPS worker testified she had received a report that the minor child had been bitten by fleas and was physically abused, but that none of these allegations were substantiated. She only saw one mark on the child, which could have been a scratch or could have been a bite.

The trial court found that there was an established custodial environment with both parents. The trial court further found that plaintiff failed to meet his evidentiary burden of establishing clear and convincing evidence that removal of the child from the established custodial environment with defendant was in the best interests of the child. Thus, the trial court ordered that primary physical custody should remain with defendant. Plaintiff now appeals.

II. MOTION TO CHANGE CUSTODY

A. Standard of Review

As we articulated in *Wardell v Hincka*, 297 Mich App 127, 133; 822 NW2d 278 (2012):

Three standards of review apply to child custody cases. The great-weight-of-the-evidence standard applies to all findings of fact; under this standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial

court's discretionary rulings such as custody decisions. Finally, trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [(Quotation marks, citations, and brackets omitted).]

Issues regarding the burden of proof are questions of law reviewed de novo. *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009). "A court's ultimate finding regarding a particular [best interest] factor is a factual finding that can be set aside if it is against the great weight of the evidence." *Ireland v Smith*, 214 Mich App 235, 243; 542 NW2d 344 (1995), affirmed and modified on other grounds 451 Mich 457 (1996).

B. Clear and Convincing Standard

Plaintiff first argues that the trial court erred in applying the clear and convincing standard to the instant matter and instead should have required plaintiff only to satisfy the preponderance of the evidence standard. This argument fails. This Court has clearly stated that "[w]here there is a joint established custodial environment, *neither parent's custody* may be disrupted absent clear and convincing evidence." *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008) (emphasis in original) (quotation marks and citation omitted). In the instant case, the trial court found that there was an established custodial environment with both parties. Thus, plaintiff had the burden of proving by clear and convincing evidence that modification of the existing custody order was in the best interests of the child. *Mitchell v Mitchell*, 296 Mich App 513, 520; 823 NW2d 153 (2012).¹

Furthermore, plaintiff's argument that defendant was the party seeking a change in custody is meritless. Plaintiff contends that defendant was the moving party because she filed a motion to modify the order that granted temporary physical custody to plaintiff. Yet, defendant's motion was resolved on February 23, 2012, when the court denied it. The only pending motion at the time of the evidentiary hearing was plaintiff's motion to change custody, which the trial court denied. Therefore, plaintiff was the moving party at the evidentiary hearing and had the burden of showing by clear and convincing evidence that granting his motion to change custody was in the best interests of the child. *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000).²

¹ Moreover, the trial court did not err in finding that there was a joint established custodial environment with both parties. "The established custodial environment is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.'" *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010), quoting MCL 722.27(1)(c). Defendant testified that she has always been the person who takes care of the minor child's needs, takes care of him when he is sick, and provides him with love, affection, and comfort. Thus, the trial court properly found that an established custodial environment existed with defendant.

² We also note the inconsistency in plaintiff's argument, namely, that he was not trying to change custody even though his motion prompting the evidentiary hearing was titled "Motion For Change of Custody."

C. Voluntary Relinquishment

Plaintiff next argues that the trial court incorrectly interpreted and applied *Theroux*, *supra*, in the context of best interest factor (l).³ In *Theroux*, 137 Mich App at 148, the mother of the minor children had physical and legal custody. Yet, four years after the parties divorced, they entered into a stipulation that physical custody of the children would be transferred to the father's care for a nine-month period. *Id.* At the end of the nine-month period, the father filed a motion for continuation of custody, and the trial court ordered joint legal and physical custody. *Id.* at 148-149. This Court reversed, holding that “[w]e give effect to the stipulation entered into by the parties as we desire to encourage the practice plaintiff utilized of voluntarily and temporarily relinquishing custody of her children to protect their best interests.” *Id.* at 151.

In the instant case, the trial court found that this was “the type of case particularly relevant here to the concept announced in *Theroux*” This finding was not in error. Plaintiff acknowledged that in October 2011, defendant asked him to take their minor son because she was going to be moving around and did not want him bouncing from house to house. Defendant testified that she asked plaintiff if their son could stay with him for “a couple of weeks while I got moved over into – I find and got moved over into a new house.” Thus, consistent with the trial court's finding, the parties agreed to a temporarily relinquishment of physical custody, just like in *Theroux*.

While plaintiff argues that this case is unlike *Theroux* because there was no agreement regarding a specific time frame for the temporary relinquishment, even if we agree regarding the lack of specificity, that is not dispositive. In *Straub v Straub*, 209 Mich App 77, 79; 530 NW2d 125 (1995), the mother agreed to temporarily relinquish custody until “she was able to provide a stable home” for the child. This Court held that the trial court erred in failing to consider this factor in the mother's favor because this Court has “determined it to be good public policy to encourage parents to transfer custody of their children to others temporarily when they are in difficulty by returning custody when they have solved their difficulty.” *Id.* at 81. Thus, pursuant to *Straub*, an agreement lasting until a party is able to secure housing is sufficient. Because “[t]his Court has emphatically stated that a parent who voluntarily and temporarily relinquishes custody to foster his or her child's best interests should not suffer a penalty for this election[.]” *Frowner v Smith*, 296 Mich App 374, 385; 820 NW2d 235 (2012), we find that the trial court did not err in weighing this factor in favor of defendant.

D. Acceptability of Home

Finally, plaintiff argues that the trial court incorrectly applied this Court's opinion in *Mogle v Scriver*, 241 Mich App 192; 614 NW2d 696 (2000), in the context of best interest factor (d). Pursuant to MCL 722.23, best interest factor (d) is “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” In *Mogle*, 241 Mich App at 199, we recognized that the Supreme Court has decreed that “in making their

³ Best interest factor (l) is “[a]ny other factor considered by the court to be relevant to a particular child custody dispute.” MCL 722.23.

best interests determination, trial courts must not consider the acceptability of the homes to be established by each parent, but instead must concentrate on the permanence or stability of the family environments offered by the contesting parents.” (Quotation marks and citation omitted).

Here, the trial court stated that pursuant to *Mogle*, “the gravamen of [factor (d)] is stability of for [sic] the child and not the acceptability of the home or child care arrangements.” The trial court accurately summarized the holding in *Mogle*, that courts should focus on permanency and stability, not acceptability. See *Mogle*, 241 Mich App at 199. Plaintiff, however, contends that this factor should have weighed against defendant because she had been changing homes and lived in an inadequate condemned home. Yet, plaintiff overlooks that at the time of the evidentiary hearing, defendant had secured a stable living situation in a home with a 12 month lease. The mediator for the Friend of the Court specifically testified that she visited defendant’s new home and that it was clean with running water and beds. Furthermore, while defendant’s housing situation was disrupted due to her separation from her husband, there is no indication that this lack of permanent housing was a chronic or repeated occurrence throughout the years since the parties divorced in 2005. Because there was sufficient evidence consistent with *Mogle* that defendant was in a stable living situation, plaintiff has failed to demonstrate any error requiring reversal.

III. CONCLUSION

Plaintiff has failed to demonstrate that the trial court erred in applying the clear and convincing standard, relying on *Theroux, supra*, or relying on *Mogle, supra*. We affirm.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan