

STATE OF MICHIGAN
COURT OF APPEALS

DALE SCOTT HAGENBUCH, II,
Plaintiff-Appellee,

UNPUBLISHED
December 11, 2014

v

KARLY KATHLEEN HAGENBUCH,
Defendant-Appellant.

No. 322422
Otsego Circuit Court
Family Division
LC No. 13-014934-DM

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right the judgment of divorce, challenging the award of joint custody of the minor children to plaintiff and defendant. Defendant argues that the trial court erred in its determination regarding the established custodial environment, erred in weighing the moral fitness of the parties, and erred in its determination regarding the best interests of the minor children. We disagree and affirm.

The trial court's determination regarding the existence of an established custodial environment is a factual inquiry, and the great weight of the evidence standard therefore applies. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001); see also MCL 722.28. Our inquiry is whether the evidence on which the trial court relied to determine the existence of an established custodial environment clearly preponderates in the opposite direction. *Foskett*, 247 Mich App at 8. A trial court's findings regarding the best interest factors are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

Whether an established custodial environment exists is a question of fact to be determined before the court addresses the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). 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. 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. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, in which security, stability, and permanence marks the relationship between the custodian and child. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

Defendant argues that the trial court failed to consider the years immediately preceding the divorce action when considering the existence of an established custodial environment. However, defendant does not cite, and this Court has not located, a rule requiring the trial court to examine any particular timeframe. Only an “appreciable time” allowing for guidance, discipline, the necessities of life, and parental comfort is required. MCL 722.27(1)(c). The testimony established that defendant had cared for the children during the marriage and that this caused plaintiff no concern. Even though defendant handled the majority of the childcare during the marriage, plaintiff also cared for the children, did so appropriately, and was capable of being a good caregiver. Further, the children were bonded to plaintiff during the divorce proceedings and looked to him for care and comfort while in his custody, which was equal in time to defendant’s parenting time. In light of the testimony of the witnesses, the evidence does not clearly preponderate against the trial court’s determination that a custodial environment existed with each parent.

Defendant next argues that because plaintiff is a registered sex offender, the trial court clearly erred by finding that MCL 722.23(f), the moral fitness of the parties, favored neither party. The trial court noted plaintiff’s no-contest plea to fourth-degree criminal sexual conduct, MCL 750.520e, which predated the marriage. The conviction did not cause concern for defendant at the time of the marriage and did not prevent her from leaving the boys with plaintiff. Testimony indicated that the underlying act occurred with a forty-year-old woman, was consensual, and had no nexus to children. Defendant presented no evidence or testimony to rebut this characterization. Factor f examines “a person’s fitness *as a parent*” and “*not ‘who is the morally superior adult.’*” *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (opinion by BRICKLEY, J.). In this case, the testimony established that the plaintiff’s criminal sexual conduct occurred before the marriage and did not impact plaintiff’s fitness as a parent. The trial court’s conclusion that factor f was equal between the parties was not contrary to the great weight of the evidence.

Finally, defendant argues that the trial court’s findings regarding the best interests of the children were not supported by the evidence because the court relied on the period during the divorce and not the preceding years. However, the trial court is not required to comment on all the facts in evidence, including past behavior. *Sinicropi*, 273 Mich App at 183-184. Additionally, contrary to defendant’s assertions, the trial court did consider the period prior to the divorce action. At the outset of its discussion, the court noted defendant’s role in caring for the children prior to separation and considered the criminal history of plaintiff, which occurred at the outset of the parties’ relationship and well before the divorce. Although the court found that one factor, MCL 722.23(j), favored defendant because of her communication skills, a court need not give equal weight to all the factors but may consider the relative weight of the factors as appropriate to the circumstances. *Sinicropi*, 273 Mich App at 184. Factor j asks whether one parent will foster a relationship with the other parent; thus, the communication advantage cited by the court is only one of many issues to be considered under of this factor. The court found all the other factors to be equal. That a single factor favored defendant slightly, and only with respect to defendant’s communication skills, does not provide the clear and convincing evidence

that would be required to modify custody in this case. See *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008). The trial court properly weighed all the best-interest factors, including relevant facts from before the divorce action, and the court's best-interests determination was not against the great weight of the evidence.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Talbot
/s/ Deborah A. Servitto