STATE OF MICHIGAN

COURT OF APPEALS

LORI VAN ARSDOL,

Plaintiff-Appellee,

v

DAVID VAN ARSDOL,

Defendant-Appellant.

UNPUBLISHED
March 23, 2004

No. 250951
Macomb Circuit Court
LC No. 00-000932-DM

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying defendant's motion to change physical custody of the parties' three minor children and instead modifying parenting time and allowing plaintiff to retain physical custody. We affirm.

Defendant first argues that the trial court erred when it concluded that a custodial environment existed with plaintiff. We disagree.

"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 722.28. "The clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law." *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). Findings of fact are reviewed under the great weight of the evidence standard. *Id*. This Court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id*. at 5, quoting *LaFleche v Ybarra,* 242 Mich App 692, 695; 619 NW2d 738 (2000). Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. *Id*. *Foskett, supra* at 5.

Because the trial court concluded that there was an established custodial environment with plaintiff, the court could grant defendant's motion to change custody only upon clear and convincing evidence that the modification would be in the children's best interests. MCL 722.27(1)(c); *Foskett, supra*, 247 Mich App 5. MCL 722.27(1)(c) provides, in pertinent part:

> 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.

The evidence presented sufficiently supported the trial court's conclusion that an established custodial environment existed with plaintiff. Plaintiff had physical custody of the children under the May 2001 consent judgment of divorce,[1] and she was principally responsible for the children's day-to-day activities during the school year. To the extent defendant asserts a custodial environment existed with him based on circumstances preceding the judgment, he does so in error. A motion for a change of custody is reviewed on facts that occurred after the last preceding custody order. MCL 722.27(1)(c). Here, the last preceding custody order was the May 2001 consent judgment of divorce. The trial court properly focused on the period after the judgment of divorce.

Defendant asserts that although the children lived with plaintiff, they did not look to her for guidance, discipline, the necessities of life, and comfort. He bases this assertion on the fact that the children confided in him regarding events occurring while in plaintiff's custody that made them uncomfortable. Although the children may have confided in defendant and looked to him for some guidance, discipline, and comfort, there was testimony that the children also looked to plaintiff in this regard, and that she satisfied their needs. The parties presented conflicting information regarding the children's well-being, their behavior, and their relationships with each parent. This Court defers to the trial court on issues of credibility when reviewing the trial court's findings of fact. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). There was adequate support for the trial court's conclusion that an established custodial environment existed with plaintiff. *LaFleche, supra* at 695.

Defendant next claims that the trial court erred in failing to make an adequate record regarding the information it secured in its in-camera interview with the oldest child. Specifically, defendant argues that the trial court's procedure to use its secretary's notes as a record of the interview is insufficient to establish an adequate record for appellate review. However, there is no requirement that the trial court memorialize its interview in any particular fashion. *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002), vacating in part *Molloy v Molloy,* 247 Mich App 348; 637 NW2d 803 (2001).

Next, defendant asserts that the trial court committed reversible error when it failed to apply all of the best interests factors to each child individually. We disagree.

Defendant relies on this Court's statements in *Wiechmann v Wiechmann*, 212 Mich App 436, 439; 538 NW2d 57 (1995), and *Foskett, supra,* to the effect that "this Court applauds efforts to ensure that siblings remain in the same household . . . [h]owever, if keeping the children

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[1] Even if defendant correctly asserts that the children were with him until the fall of 2001, rather than May, the hearing on the motion to change custody occurred nearly two years after.

together is contrary to the best interests of an *individual* child, the best interests of *that* child will control." *Id*. at 440 (emphasis added).

Based on our review of the evidentiary hearings, we are satisfied that the trial court's findings were supported by the record when it assessed the best interests factors collectively. Defendant's argument focuses on Leo Niffeler's assessment of each child, and on this Court's statements in *Foskett, supra,* 247 Mich App 11-12. We do not agree that the trial court erred. Here, the trial court did not ignore the needs of the children as individuals, nor did the court ignore evidence or argument indicating that the best interests of the children diverged. Rather, the same issues were implicated in the consideration of the best interests factors with respect to each child, and the court naturally discussed the children collectively. While David was clearly most concerned with events occurring in his mother's custody, he did not express a desire to live separately from his siblings, or to be in defendant's custody.

In defendant's last claim of error, he asserts that the trial court erred in evaluating the best interests factors and in failing to change custody to defendant.

Under the Child Custody Act, MCL 722.23 *et seq*., the best interests of the child, as determined through evaluation of the factors listed in MCL 722.23, control the determination of custody. *Phillips v Jordan*, 241 Mich App 17, 21-22; 614 NW2d 183 (2000). A trial court must consider and explicitly state its findings and conclusions with respect to each of the factors. *Foskett, supra*, 247 Mich App 9.

MCL 722.23(b) examines "[t]he 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." See *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Defendant argues that trial court improperly evaluated best interest factor (b) in plaintiff's favor, because it relied extensively on plaintiff's status as the primary caretaker and defendant's failure to get the children to school on time. The trial court's findings were adequately supported. Plaintiff was the primary caretaker, and defendant conceded that he had not paid any child support. Further, evidence was submitted that defendant pawned at least one item belonging to one of the children. The trial court's conclusion regarding defendant and the children's educational needs was supported by evidence that the children were usually late on Wednesday mornings after they spent overnight parenting time with defendant on Tuesday, and defendant did not take the initiative to be informed of school activities. Because the testimony and evidence supported the trial court's findings of fact, the trial court did not err in evaluating this factor in favor of plaintiff. *Foskett*, *supra*, 247 Mich App 4-5.

MCL 722.23(c) examines "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." See *LaFleche, supra,* 242 Mich App 701. Defendant argues that the trial court improperly evaluated best interest factor (c) in favor of plaintiff. Here, the trial court found that this factor favored plaintiff because she had been gainfully employed since the parties' divorce, and defendant was unemployed, and had an arrearage. Additionally, evidence was submitted to establish that plaintiff had actually improved her employment status. In contrast, defendant provided no details regarding his plans to become gainfully employed and he even expressed an unwillingness to pay child support for the children. Indeed, even when defendant was employed,

he did not pay child support. Further, defendant presented no evidence that the children were denied any essentials while in plaintiff's custody. Consequently, the trial court properly evaluated this factor in plaintiff's favor.

MCL 722.23(e) examines "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." Defendant argues that the trial court improperly evaluated best interest factor (e) in plaintiff's favor because it concluded that plaintiff was gainfully employed and willing to keep the children in the same school district. Evidence was submitted regarding the children's daily routine in plaintiff's care whereas defendant failed to provide any details regarding the children's routine while in his care. Defendant further indicated that he intended to move within a year and might change the children's school district. Therefore, we are persuaded that the trial court's conclusion was supported by the record and did not preponderate in the opposite direction.

MCL 722.23(h) examines "[t]he home, school, and community record of the child." Defendant argues that the trial court improperly evaluated best interest factor (h) in favor of plaintiff because it improperly emphasized that defendant was late getting the children to school. We disagree. The children were typically late on Wednesday mornings after spending Tuesday night with defendant. Plaintiff provided positive evidence regarding her parental involvement and the children's progress and behavior in school. In sum, the trial court's findings were not against the great weight of the evidence and it did not abuse its discretion in awarding joint legal and sole physical custody to plaintiff. MCL 722.28.

Notwithstanding the trial court's specific findings, the gist of defendant's argument is that the court's focus was misplaced, and the great weight of the evidence favored a change of custody because of plaintiff's and her boyfriend's conduct in the presence of the children. Defendant relies heavily on the testimony of Leo Niffeler, who was appointed by the court to report whether an emergency change of custody was indicated. While defendant offered one characterization of plaintiff's and her boyfriend's conduct, plaintiff offered a more benign characterization, and offered the testimony of additional witnesses. It was for the court to determine the parties' credibility, the likelihood that objectionable behavior would continue, the effect of the behavior on the children, and defendant's suitability as a full-time parent as an alternative to plaintiff. Lastly, the court did not ignore the allegation regarding plaintiff's conduct that it determined to be detrimental to the children. The court required that plaintiff submit to random drug testing and admonished plaintiff that if she tests positive, custody will be changed.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio