STATE OF MICHIGAN

COURT OF APPEALS

MAX M. WARNSHOLZ, Plaintiff-Appellee,	UNPUBLISHED June 20, 2013
v	No. 309149 Marquette Circuit Court
LAURA S. LEPPANEN, Defendant-Appellant.	LC No. 11-049768-DC

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from an order awarding the parties equal custodial rights to their minor daughter, on the ground that the key factual finding was against the great weight of the evidence. For the reasons set forth in this opinion, we affirm.

The parties' sole child, born September 7, 2010, was born while the parties resided in Alaska. Though both plaintiff and defendant are originally from the Upper Peninsula of Michigan, the two dated while living in Alaska, a relationship which began during November 2009. On November 7, 2010, defendant left Alaska with the child—without informing plaintiff—and moved back to Michigan to live with her parents in Ishpeming, at whose home she was still residing at the time of the proceedings below. Defendant testified that she moved away from plaintiff because she feared for her and her daughter's safety.

Approximately seven weeks after defendant's flight from Alaska, plaintiff also relocated to the Upper Peninsula. During those seven weeks, he had no contact with his daughter. On January 14, 2011, defendant served plaintiff with a personal protection order, though it was rescinded after a hearing. From around this time until June 2, 2011, plaintiff saw his daughter one day a week; however, no court order was entered or custodial decision otherwise made. On June 2, 2011, the Marquette Circuit Court entered a temporary order that kept the child with defendant but awarded plaintiff parenting time every Wednesday and on alternating weekends.

A custody hearing was held on October 6, 2011, following which the trial court entered an order granting the parties joint legal and physical custody, with parenting time divided on an equal basis. The court effected this change after finding that no established custodial environment existed, explaining as follows:

> [The child] is one year old. She has been in her mother's primary custody for most of her short life, with the exception of about two months when the parties lived together. The parties separated when [the child] and her mother left Alaska abruptly and came to Marquette County in November 2010. The father came to the Upper Peninsula as well, living initially in Houghton County and then relocating to Marquette County. This custody proceeding was filed on January 28, 2011, when [the child] was about four months old. In light of [the child's] young age, the move from Alaska, and the changes in her schedule since litigation began, the Court finds no established custodial environment.

Defendant thereafter moved the court to amend its findings of fact regarding the custodial environment, but the court reiterated its reasoning and denied the motion. The final order regarding custody, parenting time, and child support, was entered on February 28, 2012.

"All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue. The great weight of the evidence standard applies to all findings of fact; the circuit court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction." *Pierron v Pierron*, 282 Mich App 222, 242-243; 765 NW2d 345 (2009) (citations omitted), aff'd 486 Mich 81; 782 NW2d 480 (2010).

Under Michigan law, 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).]

In *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008), this Court stated:

> An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence.

Of particular relevance to this case, "[t]he existence of a temporary custody order does not preclude a finding that a custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian." *Id.* at 706-707. As clearly stated in *Berger*, "[a] custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Id.* at 707.

On appeal, defendant argues that the trial court's explanation why there was no custodial environment contains "little factual support and does not sufficiently explain why the court found that a custodial environment did not exist with the Defendant/Appellant/Mother."

Our review of the record leads us to conclude that the trial court made the proper inquiry and findings regarding the establishment, or lack thereof, of a custodial environment. The record reveals that contrary to defendant's assertions, the trial court repeatedly addressed the factors determinative of the question as dictated by MCL 722.27(1)(c). Following defendant's arguments asserted on appeal during a hearing on defendant's motion to amend its findings, the trial court elaborated as follows:

> The issue is the Court's factual findings and a request to revisit that. In doing that, I did review the decision issued in this case. And I think it makes sense, in terms of further explanation of the Court's findings, to look at the statutory definition of the established custodial environment. There are a couple of phrases that are particularly relevant to this case. And the first is that the environment exists if, over an appreciable time, the child naturally looks to the custodian for guidance, discipline, et cetera. And the second part of that says, when a Court makes that decision, the Court should look at the age of the child and the physical environment, along with some other factors.
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> The case law is clear that an established custodial environment is a factual finding. You can't just tell an established custodial environment by looking at a court order or by looking at a calendar. You can't. I mean, you really have to look at the facts, and the Court needs to determine factually what is there. It is also clear from the case law that litigation doesn't prevent the finding of an established custodial environment, and it doesn't matter if it was the result of a temporary order, or the result of some circumstances. It's a factual issue that the Court determines.
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> What's particularly relevant in this proceeding, to this Court, is again the child's age, which is one of the factors. [The child] was about one at the time this proceeding concluded, or about 14 months approximately. She had lived in Alaska with both parents for approximately two months, had an abrupt departure, came . . . with the mother in Michigan, and since that time has had different patterns of spending time between the households. And so the litigation here is not mentioned because it specifically precludes the finding of an established custodial environment, but because it is one of the factors and it's one of the relevant factual consideration that that Court has a reason for why there has been the amount of change there had been for [the child] here.
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> The other thing is that the existence of a temporary order or the pending proceeding itself does not preclude it, and that's not what the Court meant by issuing this order, but that particularly in light of her age and the changes in her schedule, as well as the move, that for a one-year-old, under those circumstances and the facts of this particular case, the Court did not find that there was an established custodial environment.

This explanation addressed age, physical environment, and permanency of the relationship—all of which are factors to be considered in finding whether a custodial environment existed. See MCL 722.27(1)(c).

In arguing that the trial court's decision was against the great weight of the evidence, defendant repeatedly asserts that the parties' child has spent most of her life living primarily with her. Defendant apparently means to suggest that the child's residency with her was of sufficiently "significant duration" as to establish at least the beginnings of "permanency of the relationship." See *Berger*, 277 Mich App at 706; MCL 722.27(1)(c).

But defendant fails to appreciate the child's lack of cognizance given her young age, which at the time of the custody hearing was still measured in months, not years. Defendant's assertion that the parties' child "primarily and continuously" lived with her for "her entire life" is thus weakened. Indeed, the significance of a custodial environment's being one of "significant duration" follows from the principle that such an environment "fosters a relationship between custodian and child and is marked by security, stability, and permanence." See *Berger*, 277 Mich App at 706. While the parties' child did spend more time at defendant's residence, defendant overlooks that the child also resided at plaintiff's house, and that the parties shared custody for a substantial portion of the child's life. For these reasons, we conclude that the evidence does not clearly preponderate in the opposite direction of the trial court's finding in this regard.

Defendant further argues that the trial court's finding that the child had "changes to her schedule" is unsupported by the record. Again, defendant chooses to ignore the facts that weigh against her argument. The undisputed facts include that the child was hastily moved from Alaska to the Upper Peninsula, lived in both plaintiff's and defendant's separate homes, and had three different parental living arrangements before the court's final order—all in a time period of less than a year. Again, the evidence does not clearly preponderate against the trial court's finding that there was no established custodial environment.

Affirmed. Plaintiff being the prevailing party is entitled to costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto