

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE L. PARKYN,
Plaintiff-Appellee,

UNPUBLISHED
February 17, 2005

v

CHRISTOPHER J. PARKYN,
Defendant-Appellant.

No. 256800
Oakland Circuit Court
LC No. 2001-656666-DM

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce awarding physical custody of the parties' two minor children to plaintiff. We affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

Defendant first contends that the trial court erred in utilizing a preponderance of the evidence standard in making its custody ruling when the trial court made a factual determination that a joint custodial environment essentially existed with both parties. A trial court's interpretation or application of existing law is reviewed by this Court for clear error. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). This Court reviews findings of fact by the trial court under the great weight of the evidence standard. A trial court's factual findings will be sustained unless "the evidence clearly preponderates in the opposite direction." *Id.* at 5 (citation omitted). Discretionary rulings by the trial court, such as the determination on the issue of custody, are reviewed by this Court for an abuse of discretion. *Id.*

MCL 722.27(1)(c) states that the circuit court:

[S]hall 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.

It is well recognized that “[a]n established custodial environment can exist in more than one home.” *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000), citing *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989). This Court has previously opined that an underlying custody order is “irrelevant” in the determination of whether a custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). “In determining whether an established custodial environment exists, it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed.” *Id.* The principal concern is not “the reasons behind the custodial environment, but . . . the existence of such an environment.” *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

The trial court’s determination that an established custodial environment did not exist is internally inconsistent with its statement that both parties met the criteria established by MCL 722.27(1)(c). In *Foskett*, we addressed a very similar scenario. In that case, as in the instant one, the trial court found that the children looked to both the mother and the father equally for guidance, discipline and the necessities of life, yet despite that finding did not conclude that an established custodial environment existed in either household. *Foskett, supra* at 8. We then concluded that, in light of the trial court’s correct factual finding as to who the children looked to for support and guidance, an established custodial environment existed in both homes. *Id.* Thus, we concluded that the trial court erred in failing to find an established environment and in applying the incorrect burden of proof. *Id.* See, also, *Jack, supra* at 671.

In this case, the trial court employed the wrong burden of proof by applying the preponderance of the evidence standard and was, instead, required to demonstrate that a change of custody was justified by the stricter burden of proof of clear and convincing evidence. MCL 722.27; *Jack, supra*. This is because of its finding, which is supported by the evidence, that the children looked to both parents for comfort, guidance and support. This factual finding necessitated a conclusion that there was an established custodial environment with both parents. *Id.*

Defendant also asserts that the trial court erred in its factual findings and the weight accorded to four of the statutory best interest factors, specifically MCL 722.23 (e), (f), (h) and (j). To ascertain the best interests of the children in custody disputes, a trial court is required to consider all of the factors found within MCL 722.23(a) through (l). A trial court is required to consider and state its findings and conclusion on each of these factors. *Foskett, supra* at 9, citing *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991). It is well recognized that “the statutory best interest factors need not be given equal weight. Neither a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors.” *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998) (emphasis omitted).

Factor (e) focuses upon “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.” MCL 722.23(e). The trial court’s stated basis for ruling in favor of plaintiff on this factor was that “the children have strong bonds to Plaintiff’s extended family who watch the children while Plaintiff is working.” Factor (e) “exclusively concerns whether the family unit will remain intact,” *Fletcher v Fletcher*, 200 Mich App 505, 517; 504 NW2d 684 (1993), rev’d in part on other grounds 447 Mich 871, 884-885 (1994), and deals primarily with the “child’s prospects for a stable family environment.” *Ireland v Smith*, 451 Mich 457, 465;

547 NW2d 686 (1996). This Court has determined the stability of a child's home is subject to being undermined by "frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions." *Id.* at 465 n 9. In this case, the trial court stated with respect to factor (e) that "the children have strong bonds to plaintiff's extended family who watch the children while plaintiff is working." We are uncertain from this statement whether the trial court simply concluded that the children's close relationship with plaintiff's extended family would add to the permanence of that relationship to a greater extent if physical custody was with plaintiff, or whether it improperly considered plaintiff's child care situation. See *Ireland, supra*. We therefore instruct the trial court on remand to clarify its ruling under factor (e).

Defendant next asserts that the trial court's factual finding that the parties were equal on factor (f) is in error and should have favored defendant. Defendant contends that the overwhelming evidence indicated plaintiff's repeated misrepresentations of defendant's behavior and ability to parent the children demonstrated plaintiff's lack of moral fitness. Factor (f) relates to an individual's fitness as a parent. In order to evaluate parental fitness, a trial court is required to look at the parent-child relationship and the effect that the alleged conduct will have upon that relationship:

[T]he question under factor f is not "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. . . . [Q]uestionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function as a parent. [*Fletcher*, 447 Mich at 887 (emphasis omitted).]

While defendant asserts that plaintiff's dishonesty and purposeful misrepresentation of defendant's conduct impacts plaintiff's ability to function as a parent and promote a good relationship between defendant and the minor children, that issue was adequately addressed by the trial court in conjunction with factor (j), which was determined to be weighed in favor of defendant. As this issue was adequately addressed by the trial court, with reference to statutory factor (j), we cannot conclude that the trial court's factual finding on this factor is against the great weight of the evidence.

Defendant also asserts that the trial court erred in determining the parties to be equal on MCL 722.23(h), based on the trial court's failure to articulate concerns raised by defendant concerning inappropriate behavior exhibited by the parties' son in his school program. MCL 722.23(h) requires a court to consider "[t]he home, school, and community record of the child." While defendant noted an incident of aggression and a separate incident of inappropriate behavior by the child in school during the divorce proceedings, no evidence was presented by defendant that the parties had failed to address these incidents or that they were of a continuing nature. All reports presented to the court indicated that the minor children were performing adequately academically and socially, and that the incidents reported pertaining to the son's inappropriate behaviors at school had not been recurring or escalating. Despite the recognition

of isolated events of problematic behavior by the parties' son in school, the majority of the evidence presented indicated the parties' children were bright and well-functioning in their daily environments. The trial court's ruling of equality on this factor is not against the great weight of the evidence.¹

Finally, defendant asserts that the trial court did not adequately weigh factor (j) and the demonstrated inability and unwillingness of the plaintiff to promote a "close and continuing parent-child relationship between the child and the other parent" MCL 722.23(j). Defendant takes issue with the trial court's determination that plaintiff "has told the minor son negative things about Defendant" and "has exaggerated certain concerns . . . in an attempt to make Defendant appear in a poor light" with the trial court's statement of hope regarding a future change in "Plaintiff's attitude." The mere assertion by the trial court that it hoped plaintiff would recognize the error of her prior conduct and realize the importance of the children's relationship with defendant is neither contradictory to nor inconsistent with the trial court's determination in favor of defendant on this factor. A review of the lower court record substantiates the trial court's factual determination that defendant is favored on factor (j). As the trial court is not required to give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances, *McCain, supra* at 130-131, this Court cannot determine the trial court erred regarding the weight it attributed to this factor.

We affirm the trial court's decision with respect to best interest factors (f), (h) and (j), vacate its finding on factor (e), and reverse the trial court's ultimate custody decision because it was based upon the incorrect burden of proof. We therefore remand to the trial court for reevaluation of its custody award based on the existence of a joint custodial environment and the appropriate burden of proof, that being clear and convincing evidence. The trial court should also consider any new evidence relevant to the statutory best interest factors that has arisen since entry of the judgment of divorce. *Shelters v Shelters*, 115 Mich App 63, 68; 320 NW2d 292 (1982). We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Patrick M. Meter

/s/ Donald S. Owens

¹ We reject defendant's criticism of the trial court relative to factor (i). The record demonstrates that the court interviewed the children to determine their preference, and although it did not reveal their statements, it noted that it had "considered their input." The court then specifically indicated that "factors (e) and (i) are especially important to the case at bar." As defendant notes, there is no requirement that the trial court memorialize its interview in any particular way, *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002), and there is no indication in the record that the trial court went beyond the children's preference during the interview process. *Thompson v Thompson*, 261 Mich App 353, 365-366; 683 NW2d 250 (2004).