STATE OF MICHIGAN

COURT OF APPEALS

ROBERT C. VANCAMP,

Plaintiff-Appellee,

v

ALLYSON E. NOALL,

Defendant-Appellant.

UNPUBLISHED
May 13, 1997

No. 193610
Kent Circuit Court
LC No. 94-3364-DP

Before: Taylor, P.J., and Hood and Gribbs, JJ

PER CURIAM.

Defendant appeals as of right from an order awarding custody of the parties' minor child to plaintiff. We affirm.

The minor female child was born out of wedlock in January 1993. The parties never married and never lived together. Both plaintiff and defendant had children from previous relationships.

I

Defendant argues that the trial court's findings of fact regarding MCL 722.23; MSA 25.312(3) are against the great weight of the evidence. We disagree.

The Child Custody Act of 1970, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*, governs child custody disputes. *Booth v Booth*, 194 Mich App 284, 292; 486 NW2d 116 (1992). This Court reviews custody determinations de novo. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). When reviewing orders of child custody, an appellate court must affirm the orders unless the findings of fact were against the great weight of the evidence, the discretionary rulings constituted an abuse of discretion, or the legal rulings constituted clear legal error. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (Brickley, J), 900 (Griffin, J) (1994); *Soumis v Soumis*, 218 Mich App 27; 553 NW2d 619 (1996). This Court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Lumley v U of M Bd of Regents*, 215 Mich App 125, 135; 544 NW2d 692 (1996).

In a custody dispute between the parents, the best interests of the child as measured by the factors set forth in MCL 722.23; MSA 25.312(3) shall control. MCL 722.25; MSA 25.312(5). This standard cannot be abrogated, even in fairness to the parties. *Soumis*, *supra*. Where, as here, a change in custody would change the established custodial environment, the petitioning party must prove that the proposed change is in the best interest of the child by clear and convincing evidence. *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992).

In this case, the trial court found that defendant displayed a defiance to the court and that she would thwart visitation with plaintiff no matter what the court said. The court regarded some of defendant's testimony as "blatant perjury." The court found that defendant "has a history of failing to provide adequate care and supervision for her children, including her refusal to visit with [one of her other children]." The court concluded that the minor child had an established custodial environment with defendant and, thus, plaintiff was required to show by clear and convincing evidence that custody should be changed to him for a compelling reason. Based on the qualitative assessment of the Child Custody Act factors, MCL 722.23; MSA 25.312(3), the court held that plaintiff had sustained his burden of proof. The trial court found that most factors, a, d-h, k and l, do not favor either party, that factor c favors plaintiff, that factors b and j strongly favor plaintiff and are dispositive, and that no factor favors defendant.

Defendant first challenges the trial court's determination that factor a, the love, affection, and other emotional ties existing between the parties involved and the child, does not favor either party. Defendant claims that this factor favors her because the only evidence presented was her direct testimony that she loved her daughter very much. We disagree. Other evidence of defendant's love was her testimony that she sang to, read to, and provided clothing, food, and medical care to the child. Equally as compelling, however, is plaintiff's love for the minor child as demonstrated by his paternity suit, his tenacious efforts to maintain a relationship with his daughter despite defendant's efforts to the contrary, his insistence that defendant transport the child by using a child seat, and his purchase of several necessary items for the child. On balance, we agree with the court that this factor does not favor either party.

We also reject defendant's claim that there is no evidence that supports the trial court's finding that factor b, the 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, strongly favors plaintiff. The court concluded that "defendant has a history of failing to provide adequate care and supervision for her children." The court relied on the evidence that defendant was unaware of the cause of the child's skull fracture that she sustained while in defendant's care, that police intervention was necessary to search for one of defendant's other children, that defendant regularly left the minor child in the care of her other children, and that several times the child has wandered away from defendant's home. No one testified against plaintiff except defendant, and the court disregarded much of her testimony as unbelievable. "This Court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Lumley*, *supra*. The record supports the trial court's finding as to factor b.

Defendant also claims that the trial court placed excessive weight on factor c, the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, and other material needs. The trial court determined that plaintiff was in a better financial position than defendant. Contrary to defendant's claim, however, the trial court indicated that "excessive weight ought never be given to economic considerations."

Regarding factor d, the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity, the trial court found that this factor favors neither party. Defendant asserts that this finding is against the great weight of the evidence because the child "has lived exclusively with her mother since birth." It is undisputed that the child has lived with defendant. This factor does not address only the time the child has lived with one party, but how long the child has lived in a *stable, satisfactory* environment. The court found that defendant's care and custody of the child was not stable or satisfactory. Defendant fails to argue that that finding is against the great weight of the evidence. In any event, the record supports the trial court's finding as to this factor.

Regarding factor e, the permanence, as a family unit, of the existing or proposed custodial homes, the court found that this factor does not favor either party. Defendant claims that the trial court's finding is against the great weight of the evidence because "there is no evidence in the record that [defendant's] home is not permanent." This factor, however, does not only focus on defendant's home, but on a comparison of the projected permanency of the two competing homes. The evidence supports the court's finding that factor e does not favor either party, because neither home appears to be more or less permanent than the other.

Defendant next argues that, pursuant to *Bowers, supra* at 331, factor f, the moral fitness of the parties involved, weighs in her favor because plaintiff has an alcohol abuse problem. This case is distinguishable from *Bowers*. In *Bowers*, there was evidence that the father had evidenced a drinking problem, including two convictions of OUIL, that he was verbally abusive and threatening to the mother in front of the children, that he lied about his past alcohol record, that he lived with his child's baby-sitter while in California, and that he allowed his son to drink from his beer. *Id.* In this case, the record reveals that a court-ordered assessment of plaintiff's alcohol problem showed that plaintiff underwent therapy, his alcohol abuse is "in remission" and that his "progress is very good." The court also noted the lack of any evidence to undercut that assessment or to support defendant's position that plaintiff remains an unreformed alcoholic. The trial court's finding regarding this factor is not against the great weight of the evidence.

Regarding the parties' mental and physical health, factor g, the trial court found that this factor did not favor either party because the record showed no evidence of mental or health problems other than plaintiff's alcohol problem that was in remission. Again, *Bowers*, *supra*, is distinguishable. The same comments indicated for factor f apply here.

Defendant does not challenge the trial court's findings regarding factor h, the home, school, and community record of the child, and factor i, the reasonable preference of the child. In any event, the record supports the trial court's finding that those factors do not favor either party.

Regarding factor j, the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, the court found that this factor strongly favors plaintiff. Defendant relies on her testimony. However, the evidence presented by other witnesses supports the trial court's finding that defendant had stated that she would do whatever it takes, including moving out of the state, to prevent plaintiff from having contact with his daughter and that she displayed a defiant attitude to the court in the vein that she would continue to thwart contact despite that the court may order otherwise. This conclusion is not against the great weight of the evidence.

Regarding domestic violence, factor k, the trial court found that neither party engaged in domestic violence and, therefore, the factor did not favor either party. The only evidence opposing the trial court's finding that there was no domestic violence was defendant's testimony, which the trial court disregarded as incredible. There is no evidence that the court's finding is against the great weight of the evidence. *Lumley*, *supra*, 135.

In sum, the trial court's findings are not against the great weight of the evidence, and plaintiff established by clear and convincing evidence that the change in custody that the trial court ordered is in the best interest of the child.[1]

II

Defendant also argues that the trial court abused its discretion when it waived the 21-day automatic stay of MCR 2.614(A) without affording defendant notice and the opportunity to be heard consistent with *Lyons v Lyons*, 125 Mich App 626, 630; 336 NW2d 844 (1983) appeal after remand, 128 Mich App 203; 339 NW2d 875 (1983). This issue is moot in light of the time that has passed since the trial court's order transferring custody took effect. *Loyd v Loyd*, 182 Mich App 769, 783; 452 NW2d 910 (1990).

In addition, defendant's argument would fail on the merits. In a domestic relations action, an *order before judgment* for custody of a minor child may be enforced immediately after entry. MCR 2.614(A)(2)(e). Furthermore, in *Lyons*, *supra* at 630 n 5, this Court noted that compelling circumstances could justify a trial court dispensing with the automatic stay of its final child custody judgment.[2] Here, the court had compelling reasons to order the immediate transfer of custody to plaintiff. The trial court relied on defendant's threats of fleeing the state with the minor child, and on defendant's propensity to use the 21-day period to poison the relationship between the minor child and plaintiff. Moreover, MCL 722.27(f); MSA 25.312(7)(f) empowers a trial court in a child custody dispute to take any action considered by it to be necessary.

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] We reject defendant's claim that the "court's bias against [her]" colored its findings and conclusions. The record supports the court's findings and conclusions.

[2] Contrary to defendant's suggestion, there is no mandate that a court *must* give the parties notice and an opportunity to be heard before suspending the stay.