STATE OF MICHIGAN

COURT OF APPEALS

LISA M. LATHROP,

Plaintiff-Appellee,

v

DAVID M. LATIN,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 204514
Osceola Circuit Court
LC No. 88-004654-DP

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right the order granting the parties continued joint legal custody of their minor child and changing physical custody from defendant to plaintiff. We affirm.

Defendant first argues that plaintiff did not present clear and convincing evidence warranting a change of custody. When reviewing a child custody matter, this Court must affirm the decision of the trial court unless its factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear legal error with regard to a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). A trial court's findings regarding the existence of an established custodial environment and its findings on each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher*, *supra* at 879. The abuse of discretion standard applies to the trial court's discretionary rulings. To whom custody is granted is a discretionary dispositional ruling. *Fletcher*, *supra* at 880. In order to have an abuse in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Fletcher*, *supra* at 879-880.

MCL 722.27(c); MSA 25.312(7)(c) provides in pertinent part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to challenge 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 child's best interests are measured by the factors set forth in MCL 722.23; MSA 25.312(3).

Defendant challenges the trial court's finding on factor (c), which concerns the 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. Defendant argues that no basis existed for the court's conclusion that plaintiff, who was unemployed, had a slight advantage regarding her capacity because of her arrangement with her current husband, who was employed and earning an annual income of approximately $18,000. However, evidence was presented that the FBM Bank of Reed City had loaned money to plaintiff and her husband, a licensed builder, to enlarge their house and that plaintiff and her husband were reliable and responsible in taking care of financial matters. Also, plaintiff testified that a new loan had been approved for a family room addition and an expansion of the girls' bedroom, implying that they were not considered to pose a financial risk to loaning institutions. Plaintiff testified that since her husband was steadily employed, it was possible for her to be home with her two youngest children. Although plaintiff testified that the family sometimes had to rely on financial assistance from the government to supplement the family income, her testimony showed a fairly steady family income from her husband's employment as a builder. By comparison, defendant did not provide evidence of any income or steady employment. He testified that he had worked for Star, Inc. for about two and one-half to three years until the plant closed in 1996, that he worked for short periods at Evart Products, Allan Bickel Construction, and Fitzsimons Manufacturing, and that he left Fitzsimons Manufacturing because of a back injury and currently had a worker's compensation case pending. Considering this testimony, the trial court's finding was not against the great weight of the evidence. *Glover v McRipley*, 159 Mich App 130, 138; 406 NW2d 246 (1987).

Next, defendant challenges the trial court's finding on factor (d), which concerns the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. Defendant argues that since the court acknowledged that the minor child was doing well in her present environment, the court should have afforded an advantage to defendant. The evidence showed, however, that defendant had moved several times and was not involved in a stable relationship. He and the minor child lived with his parents from approximately 1988 to 1994, when he moved to Chase to live with his girlfriend. During this time, the minor child continued in Reed City schools and lived at times with defendant and his girlfriend, and at times with her grandparents. Defendant subsequently moved to Evart, where he lived for about one year. Defendant's next move was to Dailey's trailer park, about one mile west of Reed City, and then to a house that he was in the process of building. He had to move out because he was not allowed to occupy the residence until the decks and cupboards had been completed. Defendant then moved back to his parents' house. Defendant lived with his girlfriend for approximately two and one-half years, during which time they had a child. However, he and his girlfriend had separated. The trial court's finding that there was instability which precluded this factor from particularly advantaging the father was not against the great weight of the evidence.

Next, defendant challenges the trial court's finding on factor (e), which concerns the permanence, as a family unit, of the existing or proposed custodial home or homes. In *Fletcher*, *supra* at 884-885, the Court found that the trial court erred in considering acceptability, rather than

permanence, of the custodial unit. Adhering to that explanation, the Court in *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996), noting that the focus of factor (e) is the child's prospects for a stable family environment, explained:

> The stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of person residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions. [*Id*. at 465, n 9.]

Defendant argues that the trial court's finding was erroneous because it did not consider that plaintiff had cohabited and had children with various third-party males, indicating that her life history was characterized by a lack of permanence and moral turpitude. While defendant focuses on plaintiff's past history, the trial court concluded that her upheaval in terms of relationships seemed to have sorted itself out, and that she now had a permanent family unit. Permanence, as a family unit, of the proposed custodial home was evident from plaintiff's testimony that she and her present husband had lived together for three years before they were married and at the time of trial had been together for seven years. Moreover, plaintiff testified that they had a stable home which they were in the process of expanding. In contrast to plaintiff's relatively permanent home and marriage relationship, defendant had moved several times, was once again living with his parents, and had no certain future plans. The trial court's findings regarding this factor were not clearly erroneous.

Finally, defendant challenges the trial court's findings regarding factor (j), which concerns :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 or the child and the parents. Defendant argues that the evidence purporting to show an unwillingness on his part to facilitate a positive relationship between his daughter and plaintiff did not rise to the level of clear and convincing evidence. Defendant also argues that the trial court should have considered plaintiff's admission of wrongdoing with regard to a harassment charge that was brought against her in reference to defendant and his girlfriend. We disagree. Regarding defendant's willingness to encourage a close and continuing relationship between plaintiff and the minor child, the evidence showed a denial of visitation. Since July 9, 1995, defendant had denied plaintiff twenty visitation days with the minor child. The trial court's finding was supported by the evidence. Although the trial court did not mention wrongdoing on plaintiff's part regarding defendant's girlfriend when it considered this factor, there was no evidence that plaintiff ever deliberately kept the minor child away from her father and contrary to defendant's argument, the evidence showed that plaintiff pleaded not guilty to a harassment charge and agreed to a six-month *nolle prosequi*. Thus, the trial court did not err in not considering this evidence to be significant for a determination of factor (j).

The trial court determined that its analysis of factors (e) and (j) was sufficient to support a finding that "by clear and convincing evidence, the child would be better served with the placement with the mother." It did not make findings against the great weight of the evidence, commit a palpable abuse of discretion, or make a clear legal error on a major issue. We find that it exercised sound judgment in considering the quality of the evidence and in applying a clear and

convincing evidence standard of proof. *Heid v Aaasulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995); *Arndt v Kasem*, 135 Mich App 252, 257; 353 NW2d 497 (1984). Accordingly, the trial court did not err in finding that the parties were not equal on the statutory best interest factors and that plaintiff satisfied the clear and convincing standard of proof to justify a change in custody.

Defendant next argues that the trial court improperly admitted and considered testimony that was conclusory, vague, and unspecified regarding date, time, and place. The decision whether to admit evidence is within the sound discretion of the trial court and that decision will not be disturbed absent an abuse of discretion. Relevant evidence is admissible and irrelevant evidence is not. MRE 402. Even relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403. Relevant evidence is evidence that tends to make the existence of any fact at issue more probable or less probable than it would be without the evidence. MRE 401; *People v Brooks*, 453 Mich 511; 557 NW2d 106 (1996).

Every instance of evidence that defendant objected to as being vague and unspecified was potentially helpful in throwing light on a material point and could therefore be considered to be relevant. *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). When plaintiff testified that she tried to encourage her other daughter, of whom she had custody, to respect and love her father, and in that way tried to encourage a close and continuing parent-child relationship, the trial court overruled defendant's objection. In considering this evidence regarding plaintiff's willingness to encourage a continuing relationship with a noncustodial parent to be relevant in considering factor (j), the trial court did not abuse its discretion.

The trial court also allowed plaintiff to testify that defendant had made false accusations against her to the police and overruled an objection. In doing so, it acknowledged that plaintiff's statements were not specific but reminded defendant's counsel that the matter could be developed during cross-examination. Defendant had the opportunity to question plaintiff regarding the specifics of the allegations. Considering that evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence, MRE 401, the trial court did not abuse its discretion when it allowed evidence that might have had probative value with regard to factor (j).

Similarly, when the trial court admitted testimony regarding missed school days and defendant's denial of visitation to plaintiff, the court noted that this testimony was relevant to factor (j). The court did not abuse its discretion when it allowed this questioning, which it believed was "proper and [went] to the issues of willingness and ability."

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer