STATE OF MICHIGAN

COURT OF APPEALS

BRION R. WEST,

Plaintiff-Appellee,

v

LAURI L. SMALLMAN,

Defendant-Appellant,

and

JUDY WOZNIAK,

Defendant.

UNPUBLISHED
July 20, 2001

No. 223163
Wayne Circuit Court
LC No. 92-204605-DC

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant Laurie L. Smallman[1] appeals as of right from the trial court's order awarding plaintiff physical custody of the parties' minor child. We affirm.

I. Background and Procedural History

The relationship between plaintiff and defendant began when defendant was seventeen years old and plaintiff was twenty-seven. Pervasive drug abuse, alcohol consumption and domestic violence characterized the parties' early relationship. Despite their tumultuous association, the parties conceived and defendant gave birth to the minor child herein at issue on May 1, 1989. The parties separated when the child was two years old.

When the child began attending preschool, plaintiff and defendant shared joint legal and physical custody. However, defendant became the child's primary physical custodian by court

[1] When this case was originally initiated, defendants lived in Indiana with the minor child. Defendant Judy Wozniak (the mother of Lauri Smallman), had instituted guardianship proceedings in that state which were subsequently dismissed. Because defendant Judy Wozniak is not a party to this appeal, the term "defendant" herein references only Lauri L. Smallman.

order entered in October of 1994. Pursuant to this order, defendant had custody of the child for the school year while plaintiff enjoyed custody during the summer months.

After defendant obtained primary physical custody, she married Mr. William Smallman. Thereafter, defendant, the minor child, Mr. Smallman, and a number of children from Mr. Smallman's previous marriage all began living in one household. In the summer of 1997, while the child stayed in plaintiff's household for the summer, she divulged to her stepsister[2] that her stepbrother in defendant's home sexually abused her. When the sexual abuse occurred, the child was seven years old and her stepbrother was eleven. Upon learning of the sexual abuse, plaintiff immediately reported the allegations to the Family Independence Agency and an investigation ensued. Eventually, the stepbrother confessed to a portion of the abuse. He was removed from defendant's home and prosecuted in juvenile court. After completing a program for sex offenders, the stepbrother resumed living in the same household. When plaintiff objected to this renewed arrangement, defendant informed him that there was nothing that she could do.

Dissatisfied with defendant's response, plaintiff filed two emergency motions seeking physical custody. The second emergency motion[3] resulted in an extensive hearing relative to custody. The trial court found that plaintiff established, by the requisite clear and convincing evidence, that it was in the child's best interest to change primary physical custody from defendant to plaintiff. Defendant filed a timely claim of appeal challenging the trial court's order. We affirm.

II. Change of Custody

Defendant first argues that the trial court erred by granting plaintiff physical custody of their daughter. We disagree.

In the context of a child custody proceeding, we review a trial court's findings of fact to determine whether they are contrary to the great weight of the evidence, a trial court's discretionary rulings for a palpable abuse of discretion, and questions of law for clear error. MCL 722.28; MSA 25.312(8); *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). A trial court's findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Mogle, supra* at 196. An abuse of discretion exists when an unbiased person, "[c]onsidering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision." *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

A. The Trial Court's Findings on the Best Interest Factors

Where an established custodial environment exists, a trial court may not order a change of custody absent a showing, by clear and convincing evidence, that such a change is in the best

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[2] Plaintiff's daughter from a previous marriage.

[3] The first emergency motion is not contained in the lower court file and it is unclear if it was ever heard.

interest of the child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *LaFleche v Ybarra*, 242 Mich App 692, 696-697; 619 NW2d 738 (2000). Incumbent upon the trial court in making a determination regarding custody, is to make specific findings of fact on each of the enumerated factors contained in MCL 722.23(a) - (l); MSA 25.312(3)(a)-(l). *LaFleche, supra* at 700; *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). Although the trial court must make specific findings on each factor, the court need not assess equal weight to all factors. *McCain, supra* at 131.

MCL 722.23(a); MSA 25.312(3)(a) requires the trial court to consider the love, affection, and other emotional ties existing between the parties and the child. The trial court found that both parties were interested in the welfare of their child and thus, determined that this factor did not favor one party over the other. Both parties acknowledged that the child had a loving relationship with the other parent. Since there is ample evidence on the record supporting the trial court's finding as to this factor, the trial court's determination was not against the great weight of the evidence. *Mogle, supra* at 196.

MCL 722.23(b); MSA 25.312(3)(b) considers the capacity and disposition of the parties to provide the child with love, affection, and guidance, and to continue the education of the child in his or her religion. The trial court found this factor favored plaintiff. Bearing on this factor was testimony indicating that the child expressed a desire to have religious contact that defendant ignored or otherwise failed to heed. Although neither party attended church on a regular basis, plaintiff's wife often dropped the child off at church for services and picked her up afterward. To the contrary, defendant did not make any effort to find a church for the child to attend, despite repeated requests. Accordingly, the trial court opined and we agree, that defendant effectively denied her daughter the ability to obtain the guidance or comfort sought through a religious medium. As such, the trial court's decision that this factor favored plaintiff was not against the great weight of the evidence. *Mogle, supra* at 196.

MCL 722.23(c); MSA 25.312(3)(c) examines the capacity and disposition of the parties to provide the child with food, clothing, medical care or other remedial care and material needs. The trial court repeatedly stated that this factor was the most significant and that it favored plaintiff due to defendant's consistent failure to provide the child with proper counseling and medical care. From the evidence adduced at trial, it is abundantly clear that defendant registered the child for counseling only after the court ordered her to do so. Beyond that and despite the therapist's persistent reminders that continuity in treatment is paramount, defendant repeatedly canceled appointments, missed appointments, or simply "forgot" all together. Eventually, the therapist discontinued the child's therapy because of defendant's consistent failure to keep the scheduled appointments. In addition, when medical professionals informed defendant that she needed to have the child's eyes examined and certain blood tests conducted, defendant did not act for at least five months. A review of the record amply supports the trial court's finding that this factor favored plaintiff.

The trial court found MCL 722.23(d); MSA 25.312(3)(d) favored plaintiff. Factor (d) evaluates the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The trial court determined that there was nothing "to be gained by maintaining continuity during the school year in [defendant's household]." The trial

court recognized that it was in defendant's household where the child was sexually abused by her stepbrother, which caused his removal from the home and prosecution in juvenile court. After the stepbrother completed the sex offenders program, defendant acquiesced to the stepbrother's reintroduction into the household. The trial court found that these events contributed to the overall instability present in defendant's home. Plaintiff, plaintiff's wife, and defendant's husband, all testified that the child was unwilling to discuss the sexual abuse and her perspective on the stepbrother's reintroduction into her environment. Additionally, defendant testified that for over a year before trial, her daughter seemed unwilling to talk to defendant like she did previously. The trial court concluded that "[c]ontinuity in this case is not a good thing." The record sufficiently supports the trial court's finding and as such, the trial court's determination that this factor favored plaintiff was not against the great weight of the evidence. *Mogle, supra* at 196.

MCL 722.23(e); MSA 25.312(3)(e) considers the permanence, as a family unit, of the existing or proposed custodial homes. The trial court determined this factor favored neither plaintiff nor defendant. Defendant contends that the trial court should have found that this factor favors her because she was involved with her current husband for a longer period of time relative to the length of time plaintiff has been involved in his relationship[4]. The relatively insignificant difference in the length of each parties' respective relationships, however, did not obligate the trial court to find this factor in defendant's favor. The trial court's finding on this factor was not against the great weight of the evidence. *Mogle, supra* at 196.

Similarly, the trial court found MCL 722.23(f); MSA 25.312(3)(f), the moral fitness of the parties, did not favor either parent noting that both are "[s]till skidding at the edge of appropriateness in light of their past with regards to alcohol use." Both parties and their spouses experienced problems with alcohol and both parties had an extensive history of substance abuse. The court stated that plaintiff, despite medical warnings, appeared to drink in excess at least once a month to the point where he could have endangered himself or others. Notwithstanding, a review of the whole record establishes that both parties had a significant history of drug and alcohol abuse such that the trial court's ultimate decision that factor (f) does not clearly preponderate in plaintiff's or defendant's favor is not against the great weight of the evidence. Accordingly, we affirm the trial court's decision on this factor.

The trial court found that MCL 722.23(g); MSA 25.312(3)(g), the mental and physical health of the parties, on balance, favored plaintiff because "the situation[5]" in defendant's household was not psychologically healthy for the child. Defendant argues that the court overlooked or otherwise minimized the effect of plaintiff's multiple sclerosis ("MS"). On the contrary, the trial court specifically acknowledged plaintiff's disability. The trial court also noted

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[4] At trial, evidence established that defendant and her husband were married for five years as compared to plaintiff and his wife who were only married for two. Defendant also argues that she became romantically involved with her husband before plaintiff became romantically involved with his current wife thus suggesting that her relationship is more permanent.

[5] The "situation" referred to the sexual abuse that the child suffered at the hands of her step-brother who resumed living in the same household.

the glaring absence of any testimony from a medical professional suggesting that plaintiff's condition would in fact decline or that his disability would render him incapable of nurturing his child or otherwise meeting her needs. The court also found that defendant's background and her own personal problems would impede her ability to guide her daughter through the psychological aftermath resulting from the sexual abuse perpetrated by the child's stepbrother. Indeed, defendant acknowledged that she probably needed counseling herself to effectively deal with issues pertaining to her own upbringing. We hold that the trial court's finding that this factor, on balance, favored plaintiff was not against the great weight of the evidence. *Mogle, supra* at 196.

MCL 722.23(h); MSA 25.312(3)(h) evaluates the home, school, and community record of the child. The trial court found that this factor favored plaintiff. The trial court noted that the evidence indicated, albeit minimally, that the child's current school was better than the one she would attend if she lived with plaintiff. The trial court also determined that the environment available through plaintiff's residence was more favorable than that available through defendant's. Evidence presented at trial established that the MEAP scores from the school that the child attended at the time of trial were superior to those of the school that the child would attend if the court awarded plaintiff custody. The trial court considered these competing interests and determined that the environment available to the child in plaintiff's home outweighed any disparity in the quality of the competing school districts and that the child would derive a greater benefit from "the change of scenery [sic]" available in plaintiff's home environment. A review of the record supports the trial court's determination as to this factor.

The reasonable preference of the child is addressed under MCL 722.23(i); MSA 25.312(3)(i). The trial court indicated that it conducted an in camera interview with the child and that it ascertained and considered the child's reasonable preferences. The trial court, however, declined to state the child's preference on the record[6]. The trial court stated:

> The Court has taken into account the preference expressed by the child, if any in chambers, and I will not report that here. I will, however, remind the parties here that [her] wish, a dream come true, she described it, would be if her parents would stop fighting.

The trial court implied that the child expressed a preference but declined to divulge that preference on the record. Defendant's contention that the trial court was required to state the child's actual preference on the record is incorrect. Indeed, we agree with the observation in *Hilliard v Schmidt*, 231 Mich App 316, 326; 586 NW2d 263 (1998), "[t]he potential for misuse of the recorded statement, which was given in confidence by a distraught child, far outweighs any possible benefit to a parent's right to appeal." See also, *Fletcher, supra*, at 518. The trial court indicated that it conducted an in camera interview with the child, that the child stated a preference, and that the trial court considered that preference in its ultimate determination. This

[6] As a general rule, a trial court must state, on the record, whether a child was able to express a reasonable preference and whether the court considered the stated preference. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871 (1994). However, this does not require the court to "violate [the child's] confidence by disclosing [the] choice[]." *Id.* at 518.

is all that the law requires. Accordingly, we find that the trial court did not err in its determination as to factor (i).

MCL 722.23(j); MSA 25.312(3)(j) assesses the willingness and ability of each party to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. The trial court found that this factor favored neither party and, in fact, stated that, "[w]ith respect to this on a score of ten, each party gets zero." The evidence suggested that before the sexual abuse came to light, the parties were able to talk to each other and communicate to some degree. According to both plaintiff and defendant, the sexual abuse completely severed the lines of communication between the parties thus rendering it difficult at best for them to effectively engage in any meaningful discourse. A review of the record establishes that the evidence did not clearly preponderate in favor of one party or the other so as to render the trial court's finding on this factor against the great weight of the evidence. *Mogle, supra* at 196.

MCL 722.23(k); MSA 25.312(3)(k) requires the court to make a finding on whether there was any domestic violence, "[r]egardless of whether the violence was directed against or witnessed by the child". Although not necessarily dispositive, the trial court failed to specifically make a finding on factor (k). That was error. In addition, to the extent that the trial court insinuated that this factor favored plaintiff, we find that the evidence clearly preponderates in the opposite direction.

The trial court noted that the child witnessed the violence occurring between plaintiff and defendant. Although a child witnessing violent conduct *intuitively* magnifies the violent episodes, according to the statute, the court must make an independent finding of whether incidents of domestic violence occurred *irrespective* of whether the child actually witnessed the abuse. The trial court stated that:

> The court finds it slightly troubling but not overly significant, the act of violence alleged by Defendant on the part of the Plaintiff. I think this maybe excusable frustration with this newly discovered medical condition, and I don't sense, viewing the testimony as a whole, that there is any major or even a significant problem of violence on Mr. West's part.

This was error. First, no act of violence is "excusable." Second, contrary to the trial court's assertion, the record is abundantly clear as to the escalating, cyclic pattern of violence that permeated the parties' relationship. In fact, defendant testified that the violence began with plaintiff shoving her, then plaintiff's acts of violence escalated into punching her with a closed fist, and ultimately culminated in plaintiff discharging a rifle into a mattress upon which defendant laid. The record also indicated that aside from the physical violence, plaintiff also destroyed items in the home, threw things at defendant, and abused animals. On the contrary, there was not a scintilla of evidence indicating that defendant ever assaulted or otherwise abused plaintiff during the course of the parties' relationship. Absent any evidence whatsoever to suggest that defendant abused plaintiff or otherwise engaged in violent conduct toward him, the trial court's findings on this factor are contrary to the great weight of the evidence. *Mogle, supra* at 196. Accordingly, we hold that the trial court erred in its finding on this factor.

However, considering all of the factors as a whole, plaintiff established by the requisite clear and convincing evidence that a change of custody was in the child's best interest. *LaFleche,* at 696-697. As such, the trial court's ultimate decision to grant plaintiff custody of the parties' child was not a palpable abuse of discretion. *Mogle,* at 196.

B. Sufficiency of Findings

Next, defendant argues that the trial court erred by failing to articulate sufficient reasons for its conclusions on the best interest factors. We disagree.

In the cast at bar, a complete review of the record indicates that the trial court prudently considered each of the best interest factors and made specific findings on the record before granting plaintiff physical custody of the child. A trial court need not "'[c]omment [concerning] every matter in evidence or declare acceptance or rejection of every proposition argued.'" *LaFleche v Ybarra,* 242 Mich App 692, 700 (2000); 619 NW2d 738. (Citations omitted.) We find that the trial court's findings were adequate in this regard.

III. Parenting Time

Finally, defendant contends that the trial court erred by limiting defendant's parenting time in the summer to only those times where defendant could take vacation from work, arguing that she should have parenting time for the entire summer. The trial court stated that it did not want the child to "be shipped down to the Smallman's household only to find Mrs. Smallman at work." Thus, to compensate, the trial court ordered that defendant shall enjoy all of the child's scheduled holiday and other vacations from school.

Issues pertaining to custody and parenting time are discretionary rulings within the trial court's purview and will not be disturbed by this court absent a palpable abuse of discretion. *Winn v Winn,* 234 Mich App 255, 263; 593 NW2d 662 (1999). The trial court's decision to "swap" the parenting time such that plaintiff has the child during the academic year and defendant has the child on her vacation during the summer and on all holidays of significant duration, does not constitute a palpable abuse of discretion sufficient to justify reversal.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter