STATE OF MICHIGAN

COURT OF APPEALS

DENISE LANE,

Plaintiff-Appellant,

v

CHARLES COSBY II,

Defendant-Appellee.

UNPUBLISHED
December 13, 2002

No. 235806
St. Clair Circuit Court
LC No. 94-001198-DS

Before: Meter, P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a custody order concerning the parties' daughter, Chelsea Ann Lane. The order granted the parties joint legal custody but granted sole physical custody to defendant. We remand for further proceedings.

This Court must affirm custody orders and judgments of the trial court unless the trial court "made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28.

"[C]ustody disputes are to be resolved in the child's best interests." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). In making a child custody determination, a trial court must make specific findings of fact regarding each of twelve factors used in determining the best interests of the child. MCL 722.23; *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). The factors are not necessarily given equal weight. *McCain*, *supra* at 131.

Here, the trial court initially concluded that an established custodial environment existed with plaintiff, and this conclusion is not challenged on appeal. Under MCL 722.27(1)(c), if an established custodial environment exists, the court must not change this environment unless "there is presented clear and convincing evidence that it is in the best interest of the child." Plaintiff contends that no such clear and convincing evidence was presented and that physical custody of the child should remain with her. Specifically, plaintiff takes issue with the court's findings on several of the twelve best-interest factors from MCL 722.23.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff asserts that the court placed too much emphasis on the parties' respective incomes in evaluating factor (c), the parties' financial capabilities. However, the court properly considered facts indicating that plaintiff has been unable to support the child financially, while defendant has been the child's sole provider for over one year. Thus, the court did not err in finding that this factor favored defendant.

Plaintiff next claims that the trial court failed to indicate why it found defendant better able to provide the child with a stable and satisfactory environment, factor (d). The court, however, noted that plaintiff had "always relied on others to provide her with a place to live" and that she had recently lost her home when she ended a relationship with a romantic partner. By contrast, the court found that defendant had a more permanent place of residence and provided plaintiff and the child with a home when plaintiff lost hers. These findings were not against the great weight of the evidence, and the court did not err in finding that this factor favored defendant.

Plaintiff next challenges the court's findings with regard to factor (e), the permanence of the custodial home, noting that she provided the child with a permanent custodial home when she was living with her boyfriend for eight years. We conclude, however, that the court did not err in finding plaintiff's living arrangement more unstable than defendant's, given that plaintiff and the child lost their living space when plaintiff separated from her earlier romantic partner, whereas defendant had established a more permanent home adjacent to his relatives.

Plaintiff next mentions the court's findings with regard to factor (g), arguing that, contrary to the court's statement, she has never been treated for depression. She further contends that with respect to this factor, "the parties are equal or Defendant may have a slight advantage . . . ." However, plaintiff concedes on appeal that she was indeed depressed in 2000,[1] and evidence of her prior alcohol abuse was introduced at trial. Moreover, unlike with other factors, the court did not make an explicit statement favoring one party over the other with respect to factor (g). Accordingly, no error requiring reversal occurred with respect to this factor.

Lastly, plaintiff challenges the court's findings with respect to factor (h), the child's home, school, and community record. Plaintiff contends that "the parties are near equal or equal on this issue." The court found defendant better able to provide a continuation of a good educational environment for the child. We find no error with respect to this finding. Indeed, although plaintiff had once been the person who assisted the child with schoolwork, defendant's mother has since filled that role. Chelsea is currently attending a school near defendant's home. If plaintiff were to be awarded custody, the child would have to change schools and, at trial, plaintiff was unable to provide information on the proposed new school. Thus, the evidence on this factor supports the court's decision.

In light of the factual circumstances discussed above, we cannot conclude that the trial court "committed a palpable abuse of discretion or a clear legal error on a major issue" in

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[1] We cannot find error requiring reversal merely because the court stated that "plaintiff has been treated for depression" rather than stating "plaintiff has been afflicted with depression."

determining that clear and convincing evidence supported the award of physical custody to defendant.

However, our inquiry cannot stop here. Indeed, plaintiff contends on appeal that the trial court failed to consider awarding joint physical custody. Under MCL 722.26a(1), when there are "custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request."

Although plaintiff did not specifically request joint custody in her pleadings, the trial court had sufficient notice that plaintiff wanted the court to consider joint custody. Indeed, plaintiff specifically noted at the hearing that if the court did not award her sole physical custody, she wanted joint custody to be considered. Nevertheless, the court did not specifically consider the issue of joint custody on the record as required by MCL 722.26a(1).[2] Accordingly, clear legal error occurred, and the court must consider the issue of joint physical custody on remand.[3]

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns

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[2] We note that in its opinion denying plaintiff's motion for rehearing, the court stated that it "did address the request [for joint custody] by denying it for the reasons stated in the Opinion and the analysis of the factors under the Child Custody Act." We cannot agree with the assertion that the issue of joint custody had already been addressed. Indeed, in its opinion the court made no explicit findings regarding the issue of joint custody versus sole custody and did not explain why one was favored over the other.

[3] In response to plaintiff's arguments on appeal regarding the legal test for determining joint custody versus the legal test for determining sole custody, we note that joint and sole custody are merely two possible outcomes in any child custody dispute, which is decided on the basis of the child's best interests. See *Eldred, supra* at 142; see also MCL 722.26a(1)(a). In making a determination between sole or joint physical custody, there is no rigid, formulaic test that must be applied. See generally *McCain, supra* at 130. The court must make a determination based on the evidence presented and a consideration of the welfare of the child. *Id*. In considering joint custody, the court must also consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b).