STATE OF MICHIGAN

COURT OF APPEALS

JOELLE MARIE KING,

Plaintiff-Appellant,

v

RONALD RAY REDMOND,

Defendant-Appellee.

UNPUBLISHED
September 13, 2007

No. 273106
Clinton Circuit Court
LC No. 02-016020-DS

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting joint legal custody of the parties' minor child and granting primary physical custody of the child to defendant. We affirm.

Plaintiff claims that the trial court's findings of fact supporting the custody decision at issue were against the great weight of the evidence. We disagree. This Court reviews trial court custody "findings of fact to determine whether they are against the great weight of the evidence, the court's discretionary rulings for a palpable abuse of discretion, and questions of law for clear legal error." *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000); see also MCL 722.28. "Under the 'great weight of the evidence' standard, a trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction." *Mogle, supra*.

A modification of the established custodial environment of a child requires clear and convincing evidence that the change is in the best interests of the child. MCL 722.27(1)(c); *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005). When an established custodial environment does not exist, the trial court may change custody if it finds, by a preponderance of evidence, that the change is in the child's best interests. *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000).

Initially, the trial court stated that there was a written order in place governing child custody. However, the trial court noted that the manner in which the parties were raising the minor child and sharing responsibility created a "joint established custodial environment" regardless of the language of any order. The trial court found that there was clear and convincing evidence of a change in circumstances. The change in circumstances was based on: (1) the separation between the parties; (2) the subsequent personal protection orders between the parties; (3) altercations between the parties; and (4) criminal and child protective service charges

involving the parties. The trial court also noted that "both parties agreed during their closing arguments that there was proper change of circumstance to review the custody order."

"To determine the best interests of children in custody cases, the trial court must consider the . . . factors of § 3 of the Child Custody Act" and "consider and explicitly state its findings and conclusions with respect to each of these factors." *Bowers v Bowers*, 190 Mich App 51, 54-55; 475 NW2d 394 (1991). The twelve factors under MCL 722.23 are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (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.
>
> (c) 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.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (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 or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Plaintiff does not dispute the trial court's findings of fact with respect to factors (a) or (e), nor on the physical health portion of factor (g). Plaintiff does dispute the trial court's findings of fact on the remaining factors, claiming that the trial court erred when it found a factor to not

favor either party, because it should have favored plaintiff, or that it erred when it found a factor that favored defendant.

A. Factor (b) – Capacity to give love, guidance, affection, education, and religion, if any

Plaintiff claims that the trial court did not consider all of her actions to advance the child religiously when it determined that the capacity to provide for religion did not favor either party. But the trial court did consider this testimony and found it was a non-issue because there was nothing "to suggest that [defendant] would not permit this child to go to church or practice the faith." The trial court also found that there was not much evidence to suggest that plaintiff had been particularly active with her faith beyond sporadic church attendance. The record clearly supports this, as plaintiff admitted that she did not attend church regularly when she was with defendant, which she was for the majority of the child's life. Her claim that this was only because of derogatory remarks from defendant about her religion was the only potential negative mark against defendant on this issue, but the trial court as trier of fact was not required to find that her self-serving testimony was credible. Because the record supports the trial court's conclusions in this area, its findings on this factor with regard to religion were not against the great weight of the evidence. The trial court's discussion of this factor as relates to love, guidance, and affection, combined with factors (g) and (k) will be considered under factor (k).

B. Factor (c) – Capacity to provide food, shelter, clothing, medical care

Plaintiff claims that the trial court did not give proper weight to the fact that plaintiff was employed and could support herself and the child, while defendant could not. She claims that the trial court placed too much emphasis on her co-signing a lease for a drug dealer when she lived in defendant's house while defendant could not make the mortgage payments. She claimed the trial court also placed too much emphasis on her $2,000 debt for her degree without taking into account that this demonstrated her willingness to improve herself and her earning capacity. Plaintiff also claimed that the trial court did not place proper weight on the fact that she took care of the child's medical needs for most of his life.

The trial court recognized that the income situation for defendant was only temporary, until he had surgery, and the trial court found that both parties had had their share of financial problems. The trial court recognized that despite his temporary lack of employment, defendant was still able to provide a home and take care of his other children. In our view, this is the most important part of this factor to consider, whether a party has shown a capacity to provide for the child, regardless of circumstances, not simply which party has a higher income. Since both parties showed capacity to provide for the child, it was not against the great weight of the evidence for the trial court to find this factor favored neither party.

The trial court also found that, while medical duties were initially delegated to plaintiff, defendant had been taking care of them since he had primary custody. This is a reasonable interpretation of the record. So long as both parents show a willingness and concern with a child's medical care, it should not matter which one physically drives the child to individual appointments. Thus, the trial court's conclusion that this factor did not favor either party was also not against the great weight of the evidence.

C. Factor (d) – Length of time in good, stable environment

Plaintiff claims that the trial court gave defendant credit for more stability in living arrangements, and gave plaintiff less credit, than was warranted by the record, making the trial court's conclusion that this factor slightly favored defendant against the great weight of the evidence. Plaintiff counted a very short stay by defendant as he was in the process of moving as a separate residence, and tried to discount some of her moves as being the fault of defendant for instability in their relationship. But the trial court's conclusion was quite reasonable. The record showed that defendant had moved fewer times than plaintiff, which arguably provided a slightly more lengthy and stable home environment. It was not against the great weight of the evidence for the court to find that this factor slightly favored defendant.

D. Factor (f) – Moral fitness of parties

Plaintiff claims that the trial court's finding that this factor favored neither party was against the great weight of the evidence because there was weightier evidence regarding defendant's drinking and drug use than there was against plaintiff. But the trial court, as finder of fact, is in the best position to discern the relative veracity and weight of testimony. Mere quantity in witnesses does not determine truth, and this Court therefore defers to the trial court on issues of credibility. *Mogle, supra* at 201.

Plaintiff also claims that the incident in the van, where the child was riding outside of a car seat, should have favored her. But she admitted she also was in the vehicle, and it is not unreasonable for the trial court to conclude that both parents were equally at fault in that incident. Thus, it was not against the great weight of the evidence for the trial court to find that this factor favored neither party.

E. Factor (g) – Mental health of parties

Discussion of this factor is combined with factor (k) below.

F. Factor (h) – Home, school, community record

Plaintiff claims that the trial court should have found this factor favored her over defendant, because she was more involved with the child's school and dropped him off more frequently. However, both parties were involved with his education and when defendant was not working, he provided the majority of the transportation. The record supports the trial court's finding that this factor favored neither party.

G. Factor (i) – Preference of child

Plaintiff claims that the trial court should have considered the child's preference, as expressed by the child's therapist whom plaintiff had retained, to be with his mother. The trial court held an in-camera interview with the child and determined that he was too young to state a reasonable preference. While children as young as six have been found to be old enough to state a preference, *Treutle v Treutle*, 197 Mich App 690, 695; 495 NW2d 836 (1992), we cannot conclude that the trial court's factual finding was erroneous. The parties' child was less than six years old at the time of the interview and confided to his therapist that he was torn by the breakdown of his parents' relationship. The challenge to this factor is without merit.

H. Factor (j) – Help or hinder other parent

Plaintiff claims that it was against the great weight of the evidence to find that this factor favored defendant because she was just as flexible as defendant in giving him parenting time when he asked for it when she had custody, and because the trial court gave too much credence to statements she made when she was acting out of emotion, not recognizing that she would never actually carry out threats to keep the child from defendant. A documented threat to keep a child away from the other parent is certainly strong evidence of hindrance against a parent. There was also evidence that plaintiff swore at defendant concerning the child's communication with the judge. The only evidence offered that showed any interference by defendant with the child's relationship with plaintiff was a claim by the child's therapist that he told her that defendant had called plaintiff "a loser and a bitch" in his presence. Again, this Court defers to the trial court on issues of credibility. *Mogle, supra*. The trial court noted that the child's therapist did not evaluate defendant. Because of the trial court's ability to assess the credibility of the witnesses and the independent evidence of interference including telephone messages, it was not against the great weight of the evidence for the trial court to conclude that this factor favored defendant.

I. Factor (k) – Domestic violence

Plaintiff claims that it was against the great weight of the evidence for the trial court to conclude that this factor, along with factors (b) and (g), greatly favored defendant because of plaintiff's seeming inability to control herself when she got angry, resulting in her hitting and swearing at others in the child's presence when there was also testimony regarding violent acts by defendant and his children. Again, this Court defers to the trial court on issues of credibility. *Mogle, supra*. Further, the trial court heard not one, but two tape recordings of two different angry outbursts from plaintiff. The trial court noted the marked contrast between defendant's calm demeanor and plaintiff's out of control tirade on the 911 tape. The trial court's conclusions were also buttressed by the psychological evaluations of the parties wherein plaintiff's anger issues were also noted. Given that documentation, along with the other testimony of outbursts by plaintiff, it was not against the great weight of the evidence for the trial court to conclude that this factor weighed against plaintiff for factor (k), domestic violence in the child's presence, factor (g) for mental health, because it seemed apparent that plaintiff could not control her anger, and for factor (b), capability to care for the child, because it seemed that when she was angry, plaintiff was unable to place the child's needs ahead of her own.

J. Factor (l) – Any other issue the trial court considers relevant

Plaintiff claims that the trial court's finding that this factor slightly favored defendant because of an incident where Child Protective Services (CPS) was called to her home was against the great weight of the evidence because the problem at issue, the condition of the home, was not entirely her fault. Plaintiff also claims other factors should have counted against defendant, such as his taking the child on his motorcycle at a young age, his lack of personal supervision of the child when he was in his custody, and his leaving the child in the care of Danny Hugger while he was in court when the child had not seen Hugger in a year.

CPS being called to deal with a parenting deficiency is a legitimate concern for the trial court. It would be equally valid to be concerned about safety issues, such as with the

motorcycle, though there is nothing to suggest that having the child ride with defendant happened more than once or twice. Virtually every parent has to arrange for a babysitter from time to time, and plaintiff does not attack Hugger's responsibility level or qualifications, only the duration of contact. Therefore, it was not against the great weight of the evidence for the trial court to find that this factor, a factor that by its open-ended nature is discretionary, slightly favored defendant.

We conclude that the trial court's findings regarding the existence of established custodial environments and each custody factor did not clearly preponderate in the opposite direction, *Fletcher v Fletcher*, 447 Mich 871, 879, 900; 526 NW2d 889 (1994), and that the trial court's grant of physical custody to defendant was not an abuse of discretion, *id*. at 880.

K. Attorney's Fees on Appeal for Defendant

Defendant has requested that plaintiff pay defendants' appellate costs, per MCR 3.206(C)(2), because he is unable to do so, while plaintiff is employed and is able to do so. See MCR 3.206(C)(2)(a) (allowing for an award of attorney fees and expenses in domestic relations matters if "the party is unable to bear the expense of the action, and . . . the other party is able to pay"). It appears from the record that defendant is likely unable to pay even a small portion of his appellate costs. It is also clear that plaintiff was gainfully employed and, thus is likely able to pay some, if not all, of defendant's costs on appeal. Therefore, we remand this case to the trial court to determine the amount of defendant's attorney fees, if any, plaintiff should be required to pay. See *Wiley v Wiley*, 214 Mich App 614, 616; 543 NW2d 64 (1995) (remanding to the trial court for a determination of the amount of appellate fees and costs to be awarded "the trial court is in a better position to determine the reasonableness and necessity of such an award").

Affirmed and remanded to the trial court to consider awarding attorney fees to defendant.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello