

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH J. STEVENS,

Plaintiff-Appellee,

v

MICHELLE BRADLEY WATTS,

Defendant-Appellant,

and

CLARENCE WATTS,

Defendant.

UNPUBLISHED

November 17, 2009

No. 287017

Wayne Circuit Court

Family Division

LC No. 05-531145-DC

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Defendant Michelle Bradley Watts¹ appeals as of right the order granting plaintiff sole physical custody of the parties' daughter. Because we conclude that the trial court's factual findings on factors (f), (g), (i), and (l) were not clearly erroneous and that the trial court's award of sole physical custody of the parties' daughter to plaintiff was not an abuse its discretion, we affirm.

The trial court found that the parties' daughter Kennedy had an established custodial environment, as defined in MCL 722.27(1)(c), with defendant. If there exists an established custodial environment, a party seeking a change of custody is required to show by clear and convincing evidence that a change of custody is in the child's best interest. MCL 722.27(1)(c); *Berger v Berger*, 277 Mich App 700, 710; 747 NW2d 336 (2008). When making a determination regarding a child's best interest, a trial court is required to state its factual findings

¹ Defendant Clarence Watts was not a party to the custody dispute at issue. All references in this opinion to "defendant" are to Michelle Bradley Watts.

and conclusions on each best interest factor listed in MCL 722.23. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007).

On appeal, defendant claims that the trial court clearly erred in finding that factors (f), (g), and (l) favored plaintiff and in refusing to consider Kennedy's preference under factor (i).² We must affirm the trial court's factual findings unless the findings are against the great weight of the evidence. MCL 722.28; *Berger, supra* at 705. A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Berger, supra* at 705. We review a trial court's ultimate custody decision for an abuse of discretion. *Id.* "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.*

Factor (f) concerns "[t]he moral fitness of the parties involved." MCL 722.23(f). The trial court stated, "This factor favors [plaintiff], when it comes to court proceedings and following court orders the court is very disappointed and the mother appears to be without morals." Defendant argues that there was no evidence to support this conclusion and claims that the court's conclusion was based on its "bias or intense dislike" of defendant.

In particular, defendant points to a colloquy during a sidebar conference in which the trial court commented that it was "surprised" by defendant's clothing. Defendant was wearing a shawl over her head, and the court noted that defendant was transforming herself "into a bride or a Virgin Mary." The trial court took no action with respect to the shawl, concluding the conference by stating, "Okay. Well actually we don't allow hats in court except for religious. . . . Let's -- okay. . . . Back to the facts." Contrary to defendant's contention, the trial court's comment that defendant was transforming herself into "a Virgin Mary" did not evince a bias or intense dislike of defendant. Rather, the court was taking note of an aspect of defendant's behavior that appeared to be out of the ordinary and unexplained. Further, the court did not highlight defendant's unusual dress when discussing the moral fitness of the parties.

"Factor f (moral fitness) . . . relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship." *Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994) (emphasis in original). As the trial court noted throughout its opinion, there was evidence that defendant violated numerous court orders, coached Kennedy into developing an antagonistic attitude toward plaintiff, denigrated plaintiff in Kennedy's presence, and listened to recordings of conversations Kennedy had with plaintiff and a social services professional. Defendant's conduct, which appears to subjugate Kennedy's best interest to defendant's personal interest in keeping Kennedy away from plaintiff, certainly speaks to a lack of moral fitness as a parent, with possible serious impact upon the parent-child relationship. *Fletcher, supra* at 887. There is evidence to support the trial court's finding that factor (f) favored defendant, and no evidence from which to conclude that trial court's finding was merely a result of bias toward defendant.

² The trial court found that factors (d) and (e) favored defendant and that neither party was favored on factors (a), (b), (c), (h), and (k).

Citing a report by the court-appointed evaluator, Dr. Robert E. Erard, defendant also argues that the trial court ignored plaintiff's own lack of morality including plaintiff's "history of excessive drinking, DUI arrest, history of venereal disease, and multiple live-in relationships." In his report, Dr. Erard noted that plaintiff had a history of excessive drinking in college, was arrested for driving on a suspended license, and was in excellent health despite the existence of venereal disease in the past. Nothing in the report indicated that plaintiff was engaged in any present conduct that called into question his moral fitness to be a parent to Kennedy.

Factor (g) concerns "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court noted defendant's use of recording devices, attire, and "affect and conduct while court is on," when concluding that it was "bothered by [defendant's] mental health." Defendant argues that Dr. Erard's report demonstrates that she does not have any mental health issues.

Dr. Erard's report noted that defendant was "inclined to view herself as an important person who is entitled to special consideration in having her needs met. Her lack of humility and tendency to put her own needs above those of other people are likely to lead to difficulties in her relationships." However, Dr. Erard also noted that "[s]he has a psychologically stable makeup and is rarely disturbed or overwhelmed by stress or emotional overload." Dr. Erard's report was based on a series of clinical assessments performed over a year before the evidentiary hearings.

Although Dr. Erard failed to uncover any clinical mental health issues suffered by defendant, the trial court had the opportunity to observe defendant on a series of dates following Dr. Erard's report. It specifically referred to defendant's disturbing behavior before it—e.g., her fixation on recording conversations, her unusual dress, and her affect and conduct while in court—in its findings for factor (g). The evidence does not clearly preponderate in the opposite direction of the trial court's finding.

Defendant also argues that the trial court's finding that Kennedy had an established custodial environment with her controverts the court's finding regarding her mental health. We are unable to discern what impact the established custodial environment finding should have on findings with respect to factor (g), and defendant fails to make a coherent argument.

Factor (i) concerns "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). The trial court stated:

This factor will be considered in the court's decision. But the court is unclear as to whether or not [defendant] interfered with the child's ability to be candid in talking with the court. Because the court is aware that poor Kennedy is responsible to tape record meetings with therapists, meetings with guardian ad litem. And those Kennedy said that she wasn't recording, I didn't conduct a search, and I'm not satisfied that Kennedy is able to have a conversation with an adult, even Child Protective Services, her therapist, or a court-appointed guardian ad litem without [defendant's] interference and the requirement that the child report back to mom what happened.

Defendant argues that the trial court erred when it "refus[ed] to consider" Kennedy's preference by "finding that Kennedy was either too young or immature to express her

preference.” Defendant misapprehends the court’s statement. Although the trial court expressed skepticism whether Kennedy’s preference was influenced by defendant, the court expressly stated that it would consider Kennedy’s preference. There was no clear error in the trial court’s findings regarding factor (i).

Factor (l) concerns “[a]ny other factor considered by the court to be relevant to a particular child custody dispute.” MCL 722.23(l). The trial court stated, in part, that “[defendant] is obsessed with audiotaping everything. And her obsession with audiotaping affects . . . [factor (l)], . . . because there is a risk of harm to the child, requiring the child to continually tape everything and report back to mom.” Defendant claims there was no credible evidence that she was obsessed with recording conversations or that her recording of conversations harmed Kennedy.

Defendant testified, “I record conversations. I love it. . . . I would definitely record . . . ninety-eight percent of [plaintiff’s] conversations.” She owned three or four recorders. Kennedy carried a recorder in her purse, and defendant listened to conversations recorded by Kennedy between Kennedy and plaintiff and between Kennedy and the guardian ad litem. It is fair to conclude that any propensity by Kennedy to record conversations is, at least, a direct result of defendant’s encouragement and her willingness to listen to recorded conversations. The trial court’s finding that defendant was obsessed with recording conversations and that this obsession was harmful to Kennedy was not clearly erroneous.

In light of our conclusion that the trial court’s findings on factors (f), (g), (i), and (l) were not clearly erroneous, there is no basis for us to conclude that the trial court abused its discretion in awarding plaintiff sole physical custody of Kennedy. The trial court’s analysis of the best interest factors revealed that defendant engaged in a variety of troubling behavior with respect to Kennedy and that it would be difficult or impossible for plaintiff to maintain a positive relationship with Kennedy if defendant maintained primary custody. Conversely, there is no indication that plaintiff had sought or would seek to undermine Kennedy’s relationship with defendant. Accordingly, we affirm the trial court’s order awarding plaintiff sole physical custody of Kennedy.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly