STATE OF MICHIGAN

COURT OF APPEALS

JASON WILLIE RICHARDSON, Plaintiff-Appellee,	UNPUBLISHED March 10, 2016
v	No. 327771 Oakland Circuit Court Family Division
SONYA OLIVIA KENNEDY, Defendant-Appellant.	LC No. 2014-818832-DC

Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion and order granting plaintiff sole legal and physical custody. We affirm.

Plaintiff and defendant met and began dating around June 2011. Their daughter was born on February 25, 2012. Plaintiff and defendant never married, but lived together with the minor child until January 2014. Plaintiff also has primary custody for two other daughters from a previous marriage. In April 2014, plaintiff filed a complaint for custody and parenting time, requesting sole legal and physical custody of the child. On June 4, 2014, the court entered an order granting temporary joint legal and physical custody to both parties. However, following custody hearings on February 3, 2015, and March 5, 2015, the court entered an opinion on May 15, 2015, adopting the Friend of the Court (FOC) recommendation and awarding plaintiff sole legal and physical custody of the child.

Defendant first argues that the trial court committed clear legal error and violated defendant's Second Amendment right by punishing defendant for lawful possession of a firearm in its analysis for custodial best-interest factor (l).[1] We disagree.

In general, this Court reviews constitutional issues de novo. *Nash v Salter*, 280 Mich App 104, 109; 760 NW2d 612 (2008). However, this Court must affirm all child custody orders

[1] MCL 722.23(l) states: "Any other factor considered by the court to be relevant to a particular child custody dispute."

and judgments "unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Pierron v Pierron* (*Pierron II*), 486 Mich 81, 85; 782 NW2d 480 (2010). "The clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

Although the Second Amendment confers an individual right to keep and bear arms, defendant misconstrues how the court considered her firearm possession in its factor (l) analysis. The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." US Const, Am II. In *Dist of Columbia v Heller*, 554 US 570, 595; 128 S Ct 2783; 171 L Ed 2d 637 (2008), the United States Supreme Court held that the Second Amendment confers an individual right to keep and bear arms. Further, the Second Amendment applies to the states through the due process clause of the Fourteenth Amendment. *McDonald v City of Chicago, Ill*, 561 US 742, 749, 791; 130 S Ct 3020; 177 L Ed 2d 894 (2010).

Despite defendant's argument to the contrary, the court did not penalize her lawfully exercising her Second Amendment right when it analyzed factor (l). Instead, the court expressed its concerns with what it considered to be defendant's reckless behavior with the gun. Specifically, the court determined that defendant's possession of the weapon around small children was dangerous and reckless. In so doing, the court discussed plaintiff's testimony that defendant once left her purse on the floor with the gun inside while the minor child was crawling around, and the testimony of his mother, Roberta Maxine Collier Richardson, that defendant wore the gun under her shirt to defendant's first birthday party.[2]

Further, the record supports the court's factual findings under factor (l). Although defendant claimed the minor child was not present when the purse was on the floor with the gun inside, plaintiff introduced into evidence a photograph of the purse on the floor with the gun inside, and testified, in contrast, that the minor child was there that day. In addition to the findings the court made in its analysis under factor (l), the record contains further evidence that defendant exhibited reckless behavior with her firearm. Plaintiff testified that defendant pointed the gun at him while he was holding the minor child, and made Facebook posts alluding to use of

[2] In her brief, defendant relates the facts to those at issue in *Palmore v Sidoti*, 466 US 429; 104 S Ct 1879; 80 L Ed 2d 421 (1984). This case is distinguishable from *Palmore*. In that case, the United States Supreme Court overturned the decision of a Florida trial court which deprived a mother of custody because she entered into an interracial marriage. *Palmore*, 466 US at 432-434. As stated by the Court, "[t]he Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child," but instead made its determination solely based on race. *Id.* at 432. Here, the trial court did not weigh factor (l) in plaintiff's favor because defendant has a license to carry a concealed weapon. Instead, the court took into consideration defendant's reckless behavior with the firearm.

the weapon. Also, the court did not rely solely on evidence related to defendant's firearm to make its determinations under factor (l). It also discussed defendant's efforts to frustrate plaintiff's relationship with the minor child through excessive phone calls and hostility toward plaintiff. Thus, the court did not commit clear legal error or infringe upon defendant's Second Amendment right when it considered defendant's actions with her firearm in its findings and analysis under factor (l).

Next, defendant argues that the trial court abused its discretion by awarding plaintiff sole legal and physical custody of the minor child and formulating a parenting time plan not in the minor child's best interests, because the court's findings of fact and analysis regarding the best-interest factors were against the great weight of the evidence. We disagree.

This Court must affirm all child custody orders and judgments "unless the trial judge 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; *Pierron* (*Pierron II*), 486 Mich at 85. A court's findings of fact related to each of the best-interest factors are subject to the great weight of the evidence standard. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). A trial court's findings of fact are against the great weight of the evidence if "the evidence clearly preponderates in the opposite direction." *Id*. at 474. This Court must defer to the credibility determinations made by the trial court. *Id*. at 474-475. Further, this Court reviews a trial court's ultimate decision regarding custody for an abuse of discretion. *Id*. at 475; *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012), citing *Berger*, 277 Mich App at 705. "An abuse of discretion with regard to a custody issue occurs '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.'" *Mitchell*, 296 Mich App at 522, quoting *Berger*, 277 Mich App at 705.

Child custody is governed by the Child Custody Act at MCL 722.21 *et seq*. *Berger*, 277 Mich App at 705. A court's decision regarding custody should reflect the best interests of the child involved. *Id*., citing MCL 722.26(1). Before making its custody determination, the trial court must determine whether an established custodial environment exists. *Demski v Petlick*, 309 Mich App 404, 405; ___ NW2d ___ (2015). "[W]hen a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Demski*, 309 Mich App at 446, quoting *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000).

Once the trial court has made this threshold determination, it should weigh the best-interest factors to make a custody decision. *Id*. When making a custody determination, the court must state findings of fact and conclusions for each factor. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). The court need not consider every piece of evidence. *Id*. Further, the court may give greater weight to some factors over others when making its determination. *Berger*, 277 Mich App at 712.

MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

In its opinion and order, the trial court first determined than an established custodial environment existed with both plaintiff and defendant. Thus, the moving party must show by clear and convincing evidence that a change in custody would be in the minor child's best interest. Then, the trial court analyzed each of the custodial best-interest factors, and weighed factors (a), (d), and (e) in favor of both parties; factors (h), (i), and (k) in favor of neither party; and factors (b), (c), (f), (g), and (j) in plaintiff's favor. Finally, although the court did not explicitly weigh factor (l) in either party's favor, it found that defendant exhibited "reckless and dangerous" behavior with her firearm, and that her inability to control her behavior was affecting her ability to properly parent the minor child. On appeal, defendant contests the court's findings and analysis regarding factors (b), (c), (d), (f), (g), (j), (k), and (l). Specifically, defendant argues that factors (b), (c), (d), (f), (g), and (k) should have been weighed in her favor, factor (j) should

not have favored either party, and factor (l) should not have favored plaintiff because the court's determinations discriminated against defendant in violation of the Second Amendment.

I. MCL 722.23(b)

Factor (b) involves "[t]he 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." MCL 722.23(b). In its opinion and order, the trial court weighed factor (b) in plaintiff's favor, and found that, although both parties testified to loving the minor child, plaintiff takes the minor child to church, while defendant failed to attend the minor child's baptism. Further, the court concluded that defendant's actions at the daycare center suggested that she may find it difficult to interact with the minor child's school officials in the future.

The record supports the court's findings regarding factor (b). Plaintiff testified that he loves the minor child. Defendant testified that she makes sure the minor child has everything she needs. Further, Shantell Loving, the girlfriend of defendant's brother, testified that defendant is a caring mother who plays with the minor child and teaches her things. However, despite defendant's capacity and disposition to provide the minor child with love, affection, and guidance, the record demonstrates that she may not have the capacity and disposition to continue the minor child's education and raise the minor child in her religion. Defendant testified that she did not attend the minor child's baptism because she did not agree with where the baptism took place. Plaintiff testified that, when he and defendant lived together, defendant never attended church with him and his daughters. Moreover, defendant made a scene at the minor child's daycare center with the police during plaintiff's parenting time. As a result, the minor child is no longer welcome at the daycare center. Therefore, the court's determination that factor (b) weighed in plaintiff's favor was not against the great weight of the evidence.

II. MCL 722.23(c)

Factor (c) involves "[t]he 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." MCL 722.23(c). "[T]his factor looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income. *Berger*, 277 Mich App at 712.

The trial court weighed this factor in plaintiff's favor. In making this determination, the court concluded that both plaintiff and defendant had the ability to provide the minor child with food, clothing, and housing, but that it found "troublesome the circumstances in which Mother seeks medical attention." Specifically, the court said that it examined the photographs of the minor child defendant introduced to show the injuries the minor child supposedly suffered in plaintiff's care, and failed to see the lacerations, contusions, or chipped teeth defendant claimed the pictures depicted.

The record supports the court's determinations regarding factor (c). Thus, the court's findings were not against the great weight of the evidence. Although not discussed by the court to support its conclusion regarding factor (c), plaintiff placed the minor child on his medical insurance at birth. The court's observations regarding the pictures defendant introduced into

evidence of the minor child's alleged injuries while in plaintiff's care also support its conclusion that defendant may seek unnecessary medical attention for her. Further despite claiming that she dropped domestic violence charges against plaintiff because she wanted him to be a part of the minor child's life, defendant testified that she is always hurt, bruised, or injured while in plaintiff's care. It is difficult to reconcile these two claims.

III. MCL 722.23(d)

For factor (d), the court must consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The court weighed factor (d) in neither party's favor because it concluded that no pattern of housing instability existed for plaintiff or defendant. Defendant argues that the court should have weighed factor (d) in her favor because the minor child lived with her from birth until the court's custody determination.

The record supports the court's conclusion that factor (d) favors neither plaintiff nor defendant. Defendant and the minor child moved in with plaintiff in April 2012, just two months after she was born. They all lived in the same home until plaintiff moved out with his two older daughters in January 2014. During the time they lived together, plaintiff helped to feed, bathe, and clothe the minor child, and watched her while defendant was at work. When plaintiff moved out of the home they shared, he moved in with Roberta, on a temporary basis, and bought his own house in November 2014. At the new house, each of his three daughters have their own rooms. Defendant also has her own home, which her brother Michael Evans described as "nice."

Plaintiff was unable to see the minor child during the time defendant had a PPO against him from the end of January 2014 to March 2014. However, following the court's June 2014 temporary custody and parenting time order, plaintiff has had parenting time with her every Saturday at 5:00 p.m. to Wednesday at 7:00 a.m. or 7:30 a.m. Thus, the court's decision to weigh factor (d) in neither party's favor was not against the great weight of the evidence.

IV. MCL 722.23(f)

Under factor (f), the court must consider "[t]he moral fitness of the parties involved." MCL 722.23(f). "[U]nder factor f, the issue is not who is the morally superior adult, but rather the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Berger*, 277 Mich App at 713 (quotation marks and citation omitted).

The court weighed factor (f) in plaintiff's favor, and concluded that "Mother has used the judicial process and police intervention unnecessarily in order to manipulate her domestic situation." In making this conclusion, the court found that defendant obtained a PPO against plaintiff that it later found not to be credible. The court also found that defendant admitted to insulting plaintiff. In her brief on appeal, defendant argues that this factor should have favored her because plaintiff smokes marijuana and is physically and verbally abusive.

The record supports the court's findings and determinations under factor (f). Defendant testified that she obtained a PPO against plaintiff on January 27, 2014, and that the PPO was

lifted at the end of February or in March. Testimony revealed that defendant also called the police to the minor child's daycare center during plaintiff's parenting time, and to Roberta's home on New Year's Eve during plaintiff's parenting time. Further, defendant admitted that she told plaintiff she wanted him to die, that she has called plaintiff a child molester and deadbeat, and that she believed each to be true except for the child molester comment. Despite defendant's testimony to the contrary, plaintiff testified that he has never hit defendant. This Court must defer to the credibility determinations made by the trial court. *McIntosh*, 282 Mich App at 474-475. Defendant's obsession with interrupting plaintiff's parenting time demonstrates that she may lack the moral fitness to properly provide for the minor child. Therefore, the court's findings and determinations regarding factor (f) are supported by the record and were not against the great weight of the evidence.

V. MCL 722.23(g)

Factor (g) involves the "[t]he mental and physical health of the parties involved." MCL 722.23(g). The court weighed factor (g) in plaintiff's favor, concluding that defendant was often unable to control her actions, even when ordered by the court to do so, that defendant's attitude toward plaintiff made it difficult for her to act rationally regarding the minor child, and that it was unclear whether defendant's allegations were grounded in reality. To support its conclusions, the court found that defendant telephoned plaintiff excessively, admitted to calling plaintiff derogatory names, and referred to plaintiff as a deadbeat even though he had never been ordered to pay child support. In her brief, defendant argues that factor (g) should not have favored either party because plaintiff presented no expert evidence she suffers from mental health issues.

The court's conclusions regarding factor (g) are supported by the record. Although defendant testified that the psychologist who performed her examination did not prescribe any medications or suggest that she attend therapy, the testimony and evidence admitted at the hearing affirm the court's concerns regarding defendant's mental health. Plaintiff testified that he addressed defendant's excessive contact with the court in July 2014 because defendant was calling him so much he was getting into trouble at work. He said that defendant called almost 100 times in one day, and that she would call him a deadbeat. When defendant testified at the custody hearing that plaintiff owes her child support but refused to pay, the court interjected and said that the court never ordered plaintiff to pay child support, and would most likely never do so. Defendant also introduced pictures at trial that she claimed showed injuries the minor child suffered while in plaintiff's care, but the court said that it examined the pictures and determined the pictures failed to depict any injuries. This evidence supports the court's determination that factor (g) favors plaintiff. Thus, the court's findings were not against the great weight of the evidence.

VI. MCL 722.23(j)

Factor (j) involves "[t]he 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." MCL 722.23(j). The court weighed factor (j) in plaintiff's favor, finding that defendant called plaintiff a deadbeat even though he had never been ordered to pay child support, and that defendant's failure to adhere to the agreed upon holiday parenting time

schedule, and efforts to use the police to interrupt plaintiff's parenting time, demonstrated her unwillingness to foster a relationship between plaintiff and the minor child. In her brief, defendant argues that the court should not have weighed this factor in either party's favor.

The court's findings and determination regarding factor (j) are more than adequately supported by the record. Defendant admitted to calling plaintiff a number of derogatory terms including a deadbeat and a "church devil" on many occasions. She even said that she believed plaintiff was all of the things she called him, except a child molester. Although defendant said she and plaintiff could co-parent and that she wanted plaintiff in the minor child's life, her actions demonstrate the opposite. Testimony at the hearing revealed that defendant called the police to the minor child's daycare center and to Roberta's home on New Year's Eve during plaintiff's parenting time. Further, defendant obtained a PPO against plaintiff which prevented him from seeing the minor child from January 2014 to March 2014. In contrast, plaintiff testified that, although he was concerned with defendant's behavior toward him, he was willing to encourage a relationship between the minor child and defendant. Further, when asked why he had not gotten a PPO against defendant, plaintiff said, "That's my fault. Benefit of the doubt. Just trying to be, like, I just want to be co-parents, and it's just not working. That's my main object – [the minor child] is what we need to be looking at. Just want to be co-parents, but it's obvious she don't want to do that. She wants control." From the court's conclusion, it appears that it considered plaintiff's testimony regarding his willingness to encourage a relationship between defendant and the minor child more credible than defendant's testimony. Again, this Court must defer to the credibility determinations made by the trial court. *McIntosh*, 282 Mich App at 474-475. Therefore, the court's findings and determinations regarding factor (j) were not against the great weight of the evidence.

VII. MCL 722.23(k)

Under factor (k), the court must consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The court did not credit factor (k) in either party's favor because each party claimed the other had committed acts of domestic violence. In making its determination, the court found that plaintiff testified defendant pointed her gun at him and that he never hit defendant. The court also found that defendant testified plaintiff was abusive. Defendant argues the court should have weighed factor (k) in her favor because she testified that plaintiff "busted" her lip during their relationship, and that the minor child suffers injuries while in plaintiff's care.

The evidence in the lower court record related to domestic violence is abundant and contradictory, but it supports the court's findings and determinations under factor (k). At the custody hearing, defendant testified that she got a PPO against plaintiff because he pushed and shoved her when they lived together, and three of the physical confrontations occurred in front of the minor child. Yet, the court ultimately lifted the PPO against plaintiff just one or two months after it was granted.

Defendant also said that she got the domestic violence charges against plaintiff that arose out of the PPO dismissed because she wanted plaintiff to have a relationship with the minor child, but then testified that she gets injured while in plaintiff's care. However, according to the court, the pictures defendant introduced of the minor child's alleged injuries did not actually

depict any injuries at all. In contrast, plaintiff testified that he never hit defendant, and that defendant lied to get the PPO against him. He also said that defendant pointed her firearm at him while he was holding the minor child when she was just two or three months old. Thus, the court's findings under factor (k) and decision not to weigh the factor in either party's favor were not against the great weight of the evidence.

VIII. MCL 722.23(l)

Factor (l) allows the trial court to discuss "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). Here, the court did not explicitly weigh factor (l) in either party's favor, but focused on its concerns regarding defendant's behavior. The court concluded that defendant exhibited "reckless and dangerous" behavior with her firearm. In so doing, the court found that Roberta testified defendant wore her gun under her shirt at the minor child's first birthday party, and plaintiff testified that defendant left the gun in her purse while the minor child crawled around. Further, the court determined that defendant's excessive phone calls to plaintiff and hostility towards him demonstrates "that Mother is unable to control her behavior," and this is "hampering her ability to properly parent her child." Defendant argues that the court implicitly credited factor (l) to plaintiff, and erred in doing so because it infringed upon her Second Amendment right. She asserts the court should not have weighed the factor in either party's favor.

As discussed above, the record supports the court's factual findings under factor (l), and the court did not unconstitutionally discriminate against defendant for exercising her right to bear arms. Thus, the court's findings and conclusions regarding factor (l) were not against the great weight of the evidence.

Defendant argues only that the court's decision to grant plaintiff sole legal and physical custody and enforce a parenting time plan against the minor child's best interests was an abuse of discretion because its findings of fact regarding the best-interest factors were against the great weight of the evidence. However, the court's findings under each of the best-interest factors were supported by the evidence. Therefore, the court did not abuse its discretion by adopting the FOC recommendation and granting plaintiff sole legal and physical custody of the minor child.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Joel P. Hoekstra