STATE OF MICHIGAN

COURT OF APPEALS

CRYSTAL LYNN HELLER, Plaintiff-Appellee,	UNPUBLISHED March 8, 2016
v	No. 328433 Marquette Circuit Court
JAY ALLEN ALMY, Defendant-Appellant.	LC No. 13-051183-DS

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right the order of the trial court denying his motion for primary physical custody and altering the parenting time schedule for the parties' minor child. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties began dating in 2007 and moved into defendant's home in Marquette County sometime in 2008. Their child was born in April 2009. They continued to live together until December 2012, when plaintiff and the child moved to an apartment in Marquette. Plaintiff alleged that defendant had physically assaulted her, and defendant was arrested for domestic violence, although the charge was ultimately dismissed. In January 2013, plaintiff brought a complaint for child support against defendant. In connection with those proceedings, an order was entered in October 2013 establishing joint legal and physical custody of the child. A parenting time schedule was also ordered in which the child would stay with defendant from Thursday to Monday three weeks of the month and from Thursday to Saturday the fourth week of the month.

In early 2014, plaintiff and the child moved back in with defendant due to financial difficulties. Defendant welcomed the move because it allowed him to be around his child full-time. While the parties disagree over the nature of their relationship during this time, they filed an agreement to suspend child support payments as they were considering prolonging their living arrangement out of consideration for their child.

In October 2014, however, plaintiff decided to move to Escanaba to pursue an opportunity for employment and housing.[1] After the move, plaintiff continued to drive the child to the school she was attending near defendant's home. Plaintiff said that she tried to follow the parenting time schedule during this time but considered it "a guideline." Defendant alleged that there were six weekends in the fall of 2014 where he did not receive parenting time with the child as ordered.

In late December 2014, the relationship between the parents deteriorated significantly. The child allegedly reported to two family members that defendant had touched her inappropriately. After becoming aware of these allegations, plaintiff informed Child Protective Services (CPS), enrolled the child in an Escanaba school, and stopped facilitating visits between defendant and the child. Initially unaware of the allegations, defendant brought a motion for primary physical custody of the child. After being informed by plaintiff that a CPS investigation pertaining to the child was ongoing, the court restricted defendant's parenting time to supervised visits pending the completion of the investigation.

The child, plaintiff, and two of plaintiff's sons were interviewed for the investigation. The child did not report sexual abuse by defendant during her forensic interview. In March 2014, a CPS report concluded that there was "insufficient evidence to support the allegations of sexual abuse against [defendant]."

In June 2015, the trial court held a hearing on defendant's motion to change custody. The parties' contentious relationship was highlighted by a series of text messages admitted into evidence by defendant. As for their relationship with the child, both parties testified to loving their child very much and to engaging in appropriate activities when they were with her. Defendant thought he should be awarded primary custody because the child would be "safest" with him. Plaintiff recommended that the parties continue as joint custodians and requested "reasonable parenting time."

The trial court found that an established custodial environment existed with both parties, and thus evaluated whether clear and convincing evidence had been presented that a change of custody was in the child's best interests. The court found the parties equal on all factors except for two that it found to favor defendant. After review of the best-interest factors, the trial court concluded that clear and convincing evidence had not been presented that a change of custody was in the child's best interests. The court did, however, find that there were "adequate circumstances" to modify the parenting time schedule, given that the child was then in school. Accordingly, the court reduced defendant's parenting time to three weekends out of every four during the school year with a weekend running from Friday to Sunday. The court also increased defendant's parenting time in the summer by ordering alternating weeks of parenting time. This appeal followed.

[1] The court found that the distance of the move was 56 miles.

II. CHANGE OF CUSTODY

Defendant first argues that the trial court erred in determining that an established custodial environment existed with plaintiff, and further erred in determining that a change of custody was not in the child's best interests. We disagree.

A trial court's order resolving a child custody dispute "shall be affirmed on appeal 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. "A trial court's factual finding is against the great weight of evidence when "the evidence clearly preponderates in the opposite direction." *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995). "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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998).

In evaluating defendant's motion, the trial court first considered whether an established custodial environment existed with either or both parents. "When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The Child Custody Act (CCA), MCL 722.21 *et seq*., states that an established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

An established custodial environment "is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger*, 277 Mich App at 706. When determining if an established custodial environment exists, "the focus is on the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). A child may have an established custodial environment with both parents. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

In this case, the evidence established that the child had resided with plaintiff her entire life, apart from the time spent in defendant's care. In describing her relationship with the child, plaintiff stated, "We have an awesome relationship. She comes to me with her fears. She tells me about her happy days." Plaintiff summarized her interactions with the child as follows: "We play, we joke, we have fun, we talk. And I always just try to let her know that she's smart, and she's kind, and she's beautiful, and she's going to be successful." Plaintiff testified to earning a steady income and residing in a home where the child has her own bedroom. Defendant acknowledged that plaintiff was able to maintain the child's discipline and necessities of life. Accordingly, the trial court's finding that the child looks to plaintiff for guidance, discipline, necessities of life, and parental comfort was not against the great weight of the evidence. *Smith*, 214 Mich App at 242

Defendant argues that plaintiff's failure to provide the child with a stable physical environment precluded a finding that an established custodial environment existed with her. It is true that an established custodial environment has been defined as comprising a stable physical environment, *Berger*, 277 Mich App at 706, and that the trial court found plaintiff's stability to be lacking "over the years" due to her relocations and relationship changes. Yet, when making an established custodial environment determination, "the focus is on the circumstances surrounding the care of the children in the time preceding trial . . . ." *Hayes*, 209 Mich App at 388. Here, plaintiff testified to moving to Escanaba, in October 2014, for work and the opportunity to own a home. Her testimony at the June 2015 custody hearing showed that she had the same job as when she moved and was in the process of purchasing a home through a land contract. She further testified to becoming engaged in February 2015 and that she had "never been more stable in [her] life." Thus, plaintiff was providing the child a stable physical environment at the time of the custody hearing and had done so for, at a minimum, several months beforehand. We conclude that the evidence did not clearly preponderate against the trial court's finding that an established custodial environment existed with plaintiff as well as defendant. *Smith*, 214 Mich App at 242.

Because the trial court found that an established custodial environment existed, defendant was required to show, by clear and convincing evidence, that a change in that environment was in the child's best interests. MCL 722.27(1)(c); *Pierron*, 496 Mich at 92. "Generally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in [MCL 722.23]." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Those factors are as follows:

> (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. [MCL 722.23.]

"A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors." *Foskett*, 247 Mich App at 9. However, a trial court is not required to treat the best interest factors as a mathematical formula, and may give more or less weight to any particular factor as appropriate to the circumstances. See *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998).

Here, the trial court determined that the factors all weighed equally, apart from (d), which it found to slightly favor defendant, and (l), which it found to strongly favor defendant. Despite the finding that some factors favored defendant, the trial court found its best-interest analysis insufficient to disrupt the established custodial environment. We find no error in this conclusion. See *Id*. Although defendant argues that the trial court's denial of his motion for primary physical custody was against the great weight of evidence because it relied on plaintiff's incredible testimony, we defer "to the trial court's credibility determinations given its superior position to make these judgments," *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

Moreover, apart from defendant's claim that the trial court found plaintiff too credible, defendant does not explain how he had met his burden to show by clear and convincing evidence that a change of custody was in the child's best interests. At the hearing, defendant testified that he thought the child would be "safest" with him without elaborating why that was so. While defendant stated that plaintiff uses marijuana and pain pills, he also stated that he would be properly classified as a "functioning alcoholic." Defendant also testified that the child said she would like to return to her old school, but plaintiff testified that the child was adapting well to her new school. Plaintiff testified that the child was taking piano and gymnastic lessons in Delta County, that there were other children in their neighborhood, and that two of the child's siblings resided in her home. Defendant, on the other hand, stated that his home is "pretty much quiet and secluded." On balance, we do not find the trial court's best-interest determinations to be against the great weight of the evidence, nor its ultimate conclusion to be an abuse of discretion or an error of law. MCL 722.28.

IV. MODIFICATION OF PARENTING TIME

Finally, defendant argues that the trial court's modification of the parenting schedule was in effect a grant to plaintiff of primary physical custody of the child. We disagree. "Modifications in parenting time are not necessarily changes in custody." *Rains v Rains*, 301 Mich App 313, 340; 836 NW2d 709 (2013). "If the required parenting time adjustments will not

change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Pierron*, 486 Mich at 86. "[I]f the modification would not constitute a change in an established custodial environment, the party proposing the change must show by a preponderance of the evidence that the change is in the child's best interests." *Rains*, 301 Mich App at 340.

In this case, the trial court did not explicitly determine whether the parenting time modification would constitute a change in custody. However, while we note that the reduction in defendant's parenting time during the school year is significant, it also appears that he will have increased parenting time over the summer; further, he will still have parenting time with the child nearly every week of the school year and on alternating weeks during the summer. We do not find that this schedule is likely to change the person to whom the child looks for guidance, discipline, the necessities of life, and parental comfort. *Rains*, 301 Mich App at 341. Thus, the parenting time modification does not amount to a change in custody as defendant contends. *Pierron*, 486 Mich at 86.

Defendant also suggests that the court abused its discretion by granting plaintiff more parenting time when the court did not find any of the custodial best-interest factors in her favor. Although "the child's best interests governs a court's decision regarding parenting time," the analysis is not identical to the one required by a custody decision. *Shade v Wright*, 291 Mich App 17, 31-32; 805 NW2d 1 (2010). For instance, MCL 722.27a(6) lists additional factors that a court may consider when determining parenting time, including "[t]he inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time." MCL 722.27a(6)(e). In addition, "parenting time decisions may be made with findings on only the contested issues," whereas "[c]ustody decisions require findings under all of the best interest factors." *Shade*, 291 Mich App at 31-32.

Here, considering the distance between the parties and the necessity for consistent school attendance, the trial court found that having one home during the school week was in the child's best interest.[2] That was an appropriate factor for the court to consider under MCL 722.27a(6)(e). *Shade*, 291 Mich App at 31-32. Also, because the modification does not amount to a change in custody, the court was only required to find by a preponderance of the evidence that the modification was in the child's best interests. *Rains*, 301 Mich App at 340. Under those circumstances, it we do not find that the court's ruling "evidences a perversity of will, a defiance

[2] We note that the trial court determined that plaintiff had violated the existing custody arrangement by unilaterally moving the child to a new school. However, the trial court then heard evidence concerning the child's adaptation to and happiness with the new school. We do not find that the trial court erred by keeping the focus on the child's current best interests rather than the plaintiff's violation. *Diez v Davey*, 307 Mich App 366, 390-391; 861 NW2d 323 (2014) ("[T]he focus [of parenting time] is on the best interests of the children, and generally parenting time must be granted in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.) (citation omitted). See also MCL 722.27a (1).

of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705. The decision was therefore neither against the great weight of the evidence nor an abuse of discretion.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan