STATE OF MICHIGAN

COURT OF APPEALS

RITA HOLLIS, Plaintiff-Appellee,	UNPUBLISHED December 6, 2012
v	No. 306090 Clinton Circuit Court
JASON MILLER, Defendant-Appellant.	LC No. 10-022075-DZ

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting grandparenting time with defendant's minor child to plaintiff under MCL 722.27b(4). We reverse because plaintiff failed to introduce any evidence supporting that the lack of grandparent visitation raised a substantial risk of harm to the minor child.

Defendant and Lindsay Rue, plaintiff's daughter, had a child together and the couple never married. They separated when the child was between one and a half and two years old. Defendant has had sole legal and physical custody of the child since the child was about two-years old and a no-contact order prevents Rue from seeing the child. However, Rue's family, including plaintiff, have been active in the child's life to varying degrees until, in late 2009 or early 2010, defendant began denying plaintiff visitation with the child. Plaintiff subsequently filed a complaint with the trial court seeking grandparenting time. Over four days, the trial court conducted an evidentiary hearing on the matter.

Plaintiff's witnesses testified she has maintained a close and continuous relationship with the child since the child's birth. Additional testimony supported that plaintiff and her family prevented Rue from having any contact with the child during the child's visitation with plaintiff. However, plaintiff was the only witness who testified concerning whether a future lack of contact with plaintiff and her family might impact the child. All the other witnesses merely testified to the apparently close bond between plaintiff and the child. Even plaintiff's husband failed to testify about any effect on defendant's child; instead he testified about the effects that the lack of contact had on the other children. Plaintiff herself expressed only that she believed the child was suffering emotional harm; she admitted she had no personal knowledge of whether that was true.

In response, defendant presented testimony that the child would act out after visits and that since the visits had ceased, the acting out had lessened. There was also testimony that the child seemed calmer and better adjusted since the visits stopped. Defendant also presented the testimony of Kay Pratt, the child's therapist, and Dr. Stephen Guertin. Both testified that having no contact with plaintiff was unlikely to cause any harm to the child. After hearing all the evidence, the trial court issued an order granting grandparenting time to plaintiff and this appeal followed.

Defendant first argues that the trial court erred in determining that plaintiff met her burden of establishing no contact was a substantial risk of harm to the child. We agree.

"'Orders concerning [grand]parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.'" *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007), quoting *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). Under the great weight of the evidence standard, this Court gives deference to the trial court's findings "unless the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994)(internal quotation omitted).

A trial court must give deference to a fit parent's decision regarding grandparenting time. *DeRose v DeRose*, 469 Mich 320, 333-334; 666 NW2d 636 (2003). *DeRose* found the prior version of MCL 722.27b to be unconstitutional because the statute, as previously written, did not provide for deference to a parent's decision. *Id.* at 333. MCL 722.27b governs grandparenting time and was amended after *DeRose* to include subsection 4(b), which states:

> In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion.

The statute now raises a presumption that a fit parent's decision to deny grandparenting time does not, in and of itself, create a substantial risk of harm. *Keenan v Dawson*, 275 Mich App 671, 682; 739 NW2d 681 (2007). However, the grandparent may meet his or her burden of rebutting that presumption by showing by a preponderance of the evidence that there is a substantial risk of harm in denying grandparenting time. *Id.*

Defendant does not challenge the trial court's best interest findings and only asserts that, contrary to the trial court's ruling, plaintiff failed to meet her burden of establishing that the denial of grandparenting time created a substantial risk of harm to the child. We agree. While making its ruling the trial court found there was a close and continuous bond between the child

and plaintiff and plaintiff's family. The trial court then addressed the substantial risk of harm and stated:

> The Court will also note that it was—in terms of substantial risk of emotional well-being to the child, that the apparent deliberate act of the father, not only to sever any communications and—and time with the maternal family and the child, in and of itself in the Court's opinion, was not based in—on any reasonable determination. Again, I haven't heard all the facts. I recognize there are witnesses yet to come. But the Court is not convinced that there was any basis as we sit here, and based on the evidence I've heard thus far, for the father to take the action that he did. The Court is further troubled by the fact that in addition to severing contact, that in recognition of the Court's ability to take judicial notice of it—of its files, a tactic utilized by the father, that the Court ultimately determined to be inappropriate was the—the misuse of the personal protection order that after the Court heard testimony, the Court felt it was entirely inappropriate and baseless for the father to take that course of action in an effort to deny the petitioner and her family contact with the minor child.
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> Furthermore, the Court finds that the father's—there's been testimony, again I haven't' heard from the father yet on this point, but as the—the evidence stands here today, the testimony of the petitioner that when she questioned the father as to why he could not have—why she could not have continuing contact with [the child], the father, instead of answering himself, having communication adult to adult, utilized the child by telling the child to tell grandma why [the child] couldn't have contact. And that, in the Court's opinion, is a serious risk of harm and demonstrates—as the facts stand here today, that the—the father's decision runs afoul of the concerns that were very prominent in the legislature when it enacted 722.27b.

Although the trial court's finding that the child had had a close and continuous relationship with plaintiff was not against the great weight of the evidence, the trial court did abuse its discretion in determining that plaintiff had met her burden. Plaintiff was required to produce sufficient evidence that the denial of contact would result in a substantial risk of harm to the child to overcome the presumption that defendant's denial of grandparenting time would not result in a substantial risk of harm. MCL 722.27b(4)(b). The trial court did not give the required deference to defendant's decision, *DeRose*, 469 Mich at 333-334, but rather shifted the burden to him to justify it.[1]

[1] The dissent suggests that the findings in the trial court's written opinion are sufficient to satisfy the standard. While somewhat more detailed, the trial court's written opinion did not make findings beyond those made from the bench and the added detail does not provide a basis to conclude that a denial of grandparenting time creates a substantial risk of harm to the child. Moreover, the written opinion's legal analysis is limited to a discussion of the appropriate amount of grandparenting time under the best interest factors. The opinion specifically states

Plaintiff's evidence in support of a finding that there was a substantial risk of harm to the child consisted of testimony from friends and relatives.[2] However, while a number of witnesses testified about the close relationship plaintiff and her family had had with the child, none could provide personal observations of how the later lack of contact had affected the child. Thus, these witnesses could not testify that the lack of contact with plaintiff posed a substantial risk or harm to the child. In her own testimony, plaintiff stated that she believed the child was suffering emotional harm because he did not know why contact had ceased. However, plaintiff also admitted that she had no personal knowledge of the child's reaction to the absence of contact. Her husband testified about the negative effect the lack of contact was having on the other grandchildren. However, he also could not state how the lack of contact affected defendant's child.

Plaintiff's trial counsel argued that the abrupt termination of contact created a substantial risk of emotional harm. But no evidence supported that termination of contact actually did cause emotional harm, or created a substantial risk of harm. Additionally, plaintiff's trial counsel argued that plaintiff and plaintiff's family were the only connection the child had with his mother. Again however, no evidence was presented to establish how this equated to a substantial risk of harm for the child. This is particularly notable because the child's therapist testified that the lack of grandparental visitation was not likely to cause any harm. Plaintiff thus failed to produce evidence establishing a substantial risk of harm.

Plaintiff's entire argument was that a child needs a loving grandparent and some access to the maternal side of the family. However, if that were sufficient to overcome the presumption in favor of the defendant's decision, it is hard to imagine a case when the presumption would not be overcome. This would not be consistent with the Legislature's decision to set up a presumption that denial of grandparenting time by a fit parent does *not* create a substantial risk of harm. A trial court may not merely conclude that "grandparenting is good, therefore it should occur." *Keenan*, 275 Mich App at 682.[3]

Although the trial court is in the best position to determine credibility, the trial court's findings in this case are against the great weight of the evidence. *Fletcher*, 447 Mich at 879. Plaintiff presented no testimony or evidence on how the child was being or would be harmed by no contact. Defendant, on the other hand, presented testimony from two witnesses that the child was not being harmed by having no contact with plaintiff and her family. Given the lack of evidence presented by plaintiff, the trial court's finding that there was a substantial risk of harm was against the great weight of the evidence.

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that the threshold decision concerning substantial harm was made at the September 14, 2010 hearing.

[2] We are concerned that plaintiff also introduced evidence critical of defendant's parenting, despite the fact that plaintiff conceded defendant was a fit parent. Such evidence could be relevant if tied to the standard, but plaintiff made no such argument here.

[3] The *Keenan* Court upheld a trial court's finding that the presumption had been overcome, but in that case the grandparents produced expert testimony that denial of visitation posed a substantial risk of harm to the child. 275 Mich App at 682-683.

Because the trial court erred in determining that plaintiff met her burden, we need not address defendant's remaining issue.

We reverse the trial court's opinion.[4] We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher

[4] The dissent takes the view that this case must be remanded for the trial court to consider new information on the grounds that this is a custody case, citing *Fletcher*, 447 Mich at 888-889. However, this is not a custody case; it is an action for grandparenting time. Defendant, the child's father, has had sole custody since 2006 and no action to change custody has been filed.