STATE OF MICHIGAN

COURT OF APPEALS

ROBERT WATROUS, Plaintiff-Appellee,	UNPUBLISHED May 24, 2012
v	No. 306744 Ionia Circuit Court
JESSICA WATROUS, Defendant-Appellant.	LC No. 2009-027274-DM

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from the parties' judgment of divorce. All issues raised on appeal involve the custody of the parties' two children. The court granted primary physical custody of the children to plaintiff and joint legal custody to both parties. We affirm in part but remand for the court to make specific findings with respect to MCL 722.26a(1)(b).

Defendant first argues that the trial court erred in approving the conciliator's recommendation regarding custody because it did not comport with the requirements of MCR 3.215. The trial court adopted the conciliator's recommendation, issuing an interim order for custody based on that recommendation on August 25, 2010. Because this issue involves the choice, interpretation, or application of law, we review for clear legal error. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Clear legal error occurs where the trial court has incorrectly chosen, interpreted, or applied the law. *Fletcher*, 447 Mich at 881.

Defendant details at length the procedural requirements of MCR 3.215 but fails to explain how MCR 3.215 precludes use of a conciliator's recommendation and the results of a conciliation conference in crafting an interim custody order, or how she was prejudiced by the court's action. Thus, the issue is not properly presented for review. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Moreover, any potential error in the interim order was cured by the subsequent evidentiary hearing held October 14 and November 29, 2010. Further, defendant exercised her right to appeal the referee's recommendation and resulting order, and the trial court held a de novo hearing on February 14, 2011 before issuing a final custody order in the case. Thus, defendant took advantage of every procedural safeguard available, and has not shown that any prejudice resulted from the August 25, 2010 interim order. See *Kessler v Kessler*, 295 Mich App

54, 59; ___ NW2d ___ (2011)(noting that a clear error in a child custody proceeding requires remand unless the error was harmless).

Defendant next argues that an established custodial environment existed only with her before the August 25, 2010 interim custody order and subsequent evidentiary hearing. Whether an established custodial environment exists is a question of fact that must be affirmed unless the finding goes against the great weight of evidence. MCL 722.28; *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). "A finding is against the great weight of evidence if the evidence clearly preponderates in the opposite direction." *Berger*, 277 Mich App at 706.

The Child Custody Act provides, in relevant part as follows:

> The custodial environment of a child is established 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. . . . [MCL 722.27(1)(c)]

An established custodial environment "is both a physical and psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger*, 277 Mich App at 706. And where a child looks to both the mother and father for guidance, discipline, the necessities of life, and parental comfort, an established custodial environment may exist with both parents. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

In this case, the trial court found that "there was an established custodial environment for the children with both parents and that both parents were very actively engaged in the regular day to day caretaking of the children." Both prior to moving to Oklahoma and while living in Oklahoma, defendant testified that she was heavily involved in the oldest child's education, attending meetings at school, taking her to and from school, and helping her with homework. Defendant further testified that she and the child are "very close," and that she has been able to give both of her children love, affection, and guidance. The evidence also shows that when defendant moved the children to Oklahoma, plaintiff followed and lived near defendant's residence in order to attempt to reconcile with defendant and to be closer to his children. Plaintiff asserted that while in Oklahoma, he frequently dropped off and picked up his oldest child from school. Further, he testified that both children spent approximately 4 to 5 nights per week with him, and that he saw his children on a daily basis. Plaintiff also had primary physical custody of the children since the August 25, 2010 interim order, and he testified that he had taken a large role in his oldest child's education during that time, helping her with her homework and having daily interactions with her teacher. Given the testimony from both sides, the trial court's finding of an established custodial environment with both parents was not against the great weight of evidence.

Next, defendant argues that the conciliator's recommendation, which formed the basis for the August 25, 2010 interim order, should not have been given interim effect pursuant to MCR 3.215(G) because it modified custody. Under MCR 3.215(G), the trial court may generally give effect to a referee's recommendation on an interim basis, pending a judicial hearing. Defendant

argues that the trial court erred in approving orders based on conciliator and referee recommendations, because MCR 3.215(G)(3) prohibits giving effect to an order that alters the established custodial environment. Defendant argues that the order effected a complete reversal of the children's established custodial environment. This argument seems premised on the assertion that no established custodial environment existed with plaintiff. However, as concluded above, the court did not err in finding to the contrary.

Further, the plain language of MCR 3.215(G) belies defendant's argument:

> (1) Except as limited by subrules (G)(2) and (G)(3), the court may, *by an administrative order or by an order in the case*, provide that the referee's recommended order will take effect on an interim basis pending a judicial hearing. The court must provide notice that the referee's recommended order will be an interim order by including that notice under a separate heading in the referee's recommended order, or by an order adopting the referee's recommended order as an interim order.
>
> (2) The court may not give interim effect to a referee's recommendation for any of the following orders:
>
> (a) An order for incarceration;
>
> (b) An order for forfeiture of any property;
>
> (c) An order imposing costs, fines, or other sanctions.
>
> (3) The court may not, *by administrative order*, give interim effect to a referee's recommendation for the following types of orders:
>
> (a) An order under subrule (G)(2);
>
> (b) An order that changes a child's custody;
>
> (c) An order that changes a child's domicile;
>
> (d) An order that would render subsequent judicial consideration of the matter moot. [Emphasis added.]

Although prohibited from giving interim effect to a referee's recommendation with regard to a change in custody through *an administrative order*, there exists no prohibition against *an order* in the case being issued for such a purpose. Thus, the trial court did not err in giving interim effect to the conciliator and referee recommendations.

Finally, defendant argues at length that the trial court's findings of fact with regard to numerous statutory best-interest factors, MCL 722.23, were against the great weight of evidence, and the ultimate custody decision represented a palpable abuse of discretion. We review a trial court's findings with regard to each statutory best-interest factor under the great weight of evidence standard. *Fletcher*, 447 Mich at 879. The ultimate grant of custody, however, is a

discretionary dispositional ruling subject to the "palpable abuse of discretion" standard. *Id.* at 879-880. Therefore, the trial court's custody decision is entitled to the "utmost level of deference." *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006).

In resolving a custody dispute, the child's best interests are of paramount importance, and a dispute should be resolved in such a way that promotes the child's best interests and welfare. *In re AP*, 283 Mich App 574, 592; 770 NW2d 403 (2009). Accordingly, courts must consider, evaluate, and determine the following 12 best-interest factors in resolving the dispute:

> (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.

Further, when faced with an issue of joint legal custody, the trial court must also consider whether the parents "will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b); *Shulick*, 273 Mich App at 328.

Defendant agrees with the trial court's findings of fact regarding factors (a), (g), and (*i*), but challenges the trial court's findings with respect to the remaining factors as against the great weight of evidence.

With respect to factor (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), the trial court found the factor to favor plaintiff. In support of this finding, the trial court noted plaintiff's regular attendance of church with the children, as well as the negative effect that defendant's extramarital affair would have on her ability to provide guidance.

While the testimony presented shows that both parents are capable of giving the children love, affection, and guidance, plaintiff testified that he also attends church with the children on a regular basis. Although defendant testified that she facilitated church attendance in Oklahoma by making arrangements for a friend of the family to take her oldest child, she herself did not attend. Further, defendant's extramarital relationship, and her handling of it with the conciliator, raises issues with regard to her ability to provide the children adequate guidance. She admitted to having a continuing relationship with a man in Arizona despite previously telling the conciliator otherwise. We conclude that the trial court's finding that factor (b) favored plaintiff was not contrary to the great weight of evidence.

Factor (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) favors plaintiff, consistent with the trial court's finding. Defendant argues on appeal that plaintiff's higher income was given inappropriate weight in making a finding on this factor. However, plaintiff has been gainfully employed since shortly after returning to Michigan from Oklahoma, working as a CNC Operator Programmer for Mersem. He began receiving benefits on December 1, 2010, which also applied to the children. By contrast, defendant has not worked since August 2009, in spite of the fact that she possesses a certificate in medical billing and coding. She admitted at the evidentiary hearing that "[t]here's no reason why I can't work. I choose to stay home with my children." While certainly an admirable choice in many respects, defendant has failed to demonstrate, as a single parent, a disposition toward providing the basic necessities to her children, instead relying on the assistance of her mother and grandmother. Further, defendant has previously refused to provide plaintiff with copies of the children's immunization records, indicating an unwillingness to ensure that the children receive the medical care they need. We conclude the trial court's finding that factor (c) favored plaintiff was not against the great weight of evidence.

In weighing factor (d) (the length of time the children have lived in a stable, satisfactory environment, and the desirability of maintaining continuity) the trial court found that there was "too much unrest" to score the factor in favor of either party. In August 2009, defendant moved the children with little notice from Saranac to her grandmother's house in Elk City, Oklahoma. Prior to that time, the children had lived in Michigan since birth. Plaintiff moved to Oklahoma on December 1, 2009 and lived in a trailer near defendant's residence. Plaintiff testified that

during that period, the children stayed with him approximately 4 to 5 nights per week. The family returned to Michigan in March 2010, and the court issued an ex parte order prohibiting the children's removal from Michigan. However, a month later, the court changed the arrangement and ordered the children returned to Oklahoma so that the oldest child might finish the school year in the same school. Contrary to defendant's argument, the trial court's finding that the level of unrest in the living situation prevented scoring factor (d) in favor of either party was not against the great weight of evidence.

With regard to factor (e) (the permanence, as a family unit, of the existing or proposed custodial home or homes), defendant makes the bare assertion that it "favors both parties equally." However, defendant provides no factual basis for this assertion, and "[t]his Court will not search the record for factual support for a party's claim." *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009).

Regarding factor (f) (the moral fitness of the parties involved), although defendant correctly points out that plaintiff tested positive for marijuana and admitted to past use, defendant herself tested positive for opiates, and that test also indicated that she may have used a masking agent. Further, as discussed above, defendant's extramarital affair weighs in favor of plaintiff, as do the alarmist, untruthful statements she admitted to posting on MySpace. Thus, the trial court's finding in favor of plaintiff with regard to factor (f) was not against the great weight of evidence.

With regard to factor (h) (the home, school, and community record of the children) the trial court found that the factor favored both parties equally. Specifically, the trial court noted the heavy involvement of both parents in their oldest child's schooling. The trial court's finding that factor (h) should favor neither party was not against the great weight of evidence. Testimony showed that the child excelled in Saranac schools before moving to Oklahoma, and in Elk City schools while living in Oklahoma with defendant. Further, upon returning to Michigan and being enrolled in Belding schools by plaintiff, the oldest child has continued to excel. Given the testimony indicating that the parties' oldest child has succeeded in all school environments in which she has been placed, the trial court's finding was not against the great weight of evidence.

Factor (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) favors plaintiff, as the court found. In May 2010, plaintiff went to Oklahoma from Michigan with the intention of seeing his children, but defendant refused to allow him to visit, in spite of his previous attempts to communicate and schedule the visit. Defendant testified that plaintiff told her to "go back to Oklahoma if [she] ever wanted to see the kids again." Plaintiff denied this, however. Further, while in his custody, plaintiff has facilitated nightly phone calls between the children and defendant. Given defendant's obstructive behavior and plaintiff's facilitation of regular contact between the children and defendant, finding factor (j) to weigh in favor of plaintiff was not against the great weight of evidence.

In evaluating factor (k) (domestic violence) the trial court noted that because of credibility issues regarding defendant's testimony, no findings of fact could be made. This was not contrary to the great weight of evidence.

Finally, defendant argues that the court erred in failing to make findings of fact with regard to the ability of the parties to cooperate and generally agree concerning important decisions affecting the welfare of the children under MCL 722.26a(1)(b). We agree.

The March 18, 2011 ex parte order does not make any findings with respect to MCL 722.26a(1)(b). It affirmed the FOC recommendation with two changes that do not address this matter. The FOC recommendation also does not address the matter. The failure of the court to make specific findings under MCL 722.26a(1)(b) requires remand. *Molloy v Molloy*, 243 Mich App 595, 607; 628 NW2d 587 (2000), vacated in part on other grounds, 466 Mich 852 (2002).

Affirmed in part, and remanded for findings under MCL 722.26a(1)(b). We retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause