

STATE OF MICHIGAN
COURT OF APPEALS

CECILY DORAN GARRITY,

Plaintiff-Appellant,

v

MATTHEW ISAAC JANGER,

Defendant-Appellee.

UNPUBLISHED

May 17, 2012

No. 306956

Washtenaw Circuit Court

LC No. 10-001423-DM

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce, which granted the parties joint legal and physical custody of the three children. Specifically, the judgment of divorce ordered that the children would live with defendant, who resides in Bar Harbor, Maine, during the school years and with plaintiff, who resides in Ann Arbor, Michigan, during the summers. We affirm.

“This Court must affirm all custody orders unless the trial court’s findings of fact 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.” *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We review a trial court’s findings on the existence of an established custodial environment and on the statutory best interest factors under the great weight of the evidence standard. *Id.* Thus, we must affirm the findings unless the evidence clearly preponderates in the opposite direction. *Id.* We review a trial court’s award of custody for an abuse of discretion. *Id.* Thus, we must affirm the award unless it was “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.*

On appeal, plaintiff argues that the trial court erred in finding that the children did not have an established custodial environment with her. She further claims that because the children had an established custodial environment with her, the trial court erred in using the preponderance of the evidence standard to determine the custodial placement that was in the best interests of the children.

A custody dispute is to be resolved in the best interests of the child. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). A trial court determines the best interests of a child by weighing the 12 statutory best interest factors listed in MCL 722.23. *Id.* However, before a trial court may address the statutory best interest factors, it must determine whether the child has

an established custodial environment. *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009). 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. 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 one of significant duration, both physical and psychological, that fosters a relationship between the custodian and child and is marked by security, stability, and permanence. *Berger*, 277 Mich App at 706. Repeated changes in physical custody and uncertainty created by an upcoming custody trial may destroy a previously established custodial environment. *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993).

Plaintiff asserts that the trial court erred in relying on *Bowers* because the children, unlike the daughter in *Bowers*, lived under the same custody order from the beginning of the divorce proceedings until the trial court ordered in August 2011 that they live in Maine with defendant during the school years. The facts of the present case are different than the facts presented in *Bowers*. However, simply distinguishing the facts of the present case from the facts of *Bowers* begs the ultimate question whether the changes experienced by the children after defendant moved to Maine created an uncertainty that precluded the children from looking to plaintiff alone for guidance, discipline, the necessities of life, and parental comfort. *Id.* at 326.

Defendant moved to Maine in the summer of 2009. At the time, plaintiff and the children intended to move the following summer. Thus, until the children were informed in April 2010 that plaintiff and defendant were divorcing, the children never expected a permanent arrangement where they did not live with both parents. The children spent several weeks in the summer of 2010 with defendant in Maine, and they returned to Ann Arbor to live with plaintiff at the beginning of the school year. But, the children were aware of the possibility that they might have to return to Maine to live with defendant. In addition, since he moved to Maine, defendant talked with the children almost every day and saw them almost every month. Under these circumstances, the trial court's finding that the children did not have an established custodial environment with either plaintiff or defendant was not against the great weight of the evidence. The evidence allowed a finding that, after the children learned in April 2010 that plaintiff and defendant planned to divorce, which ended the expectation that they would live with both parents in Maine, there was no appreciable time that the children looked to plaintiff or defendant alone for guidance, discipline, the necessities of life, and parental comfort. *Id.* The relationship was marked with uncertainty. Accordingly, we affirm the trial court's finding that the children did not have an established custodial environment with either parent. Because there was no established custodial environment, the trial court properly utilized the preponderance of the evidence standard to determine the custodial placement that was in the children's best interests. *Id.* at 324.

Plaintiff also argues on appeal that many of the trial court's findings on the best interest factors were against the great weight of the evidence. She challenges the trial court's findings on factors (b), (c), (d), (e), (f), (g), (h), and (j).

The trial court found that on factor (b), "[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), defendant was favored as to love and guidance. It found that plaintiff did not have the disposition to give the children love and guidance as opposed to doing her job. Plaintiff specifically challenges this statement. The custody evaluator reported that plaintiff acknowledged that she worked long hours, sometimes more than 9-1/2 hours per day, and that her schedule was hard on the children. Plaintiff said that she would change her schedule. However, the custody evaluator also reported that plaintiff had not substantially changed her schedule in the 1-1/2 years since defendant moved to Maine, even though plaintiff knew that the evaluator and the trial court would be scrutinizing her work schedule. There was no testimony from either of the children's current babysitters that after plaintiff received the psychological evaluation, which criticized her work schedule, plaintiff made any changes to her schedule. The testimony from the babysitters was that plaintiff did not come home from work until 7:00 or 7:30 p.m., by which time the children may have finished supper and completed their school work. Based on plaintiff's long work hours and her failure to change those hours after they were criticized, the trial court's finding that plaintiff did not have the disposition to give love and affection to the children as opposed to doing her job was not against the great weight of the evidence.

Plaintiff additionally makes other challenges to the trial court's finding on factor (b). She claims that the evidence does not support the trial court's statement that she maintained her father as a care provider after discovering that he was being cruel to the parties' son. Although it does not appear that the trial court's concern about plaintiff maintaining her father as a care provider was of much import to its ultimate finding on factor (b), the trial court's concern was not against the great weight of the evidence. Although plaintiff testified that she discovered "early on" that her father was very good with the parties' daughters but was not effective with the son, plaintiff did not ask her father to move out of the marital home until October 2009. Plaintiff also claims that defendant had "demonstrated a pattern of playing by his own rules," as illustrated by the times where defendant stayed in the houses of others and left messes. However, the trial court specifically commented on some of this behavior by defendant and stated that the behavior concerned it. Finally, plaintiff states that defendant demonstrated that he was not a credible witness or a reliable source of information when he made misrepresentations in his pleadings and briefs and gave inaccurate information to the custody evaluator. It appears that plaintiff wants this Court to make a credibility determination against defendant, but we decline to do so. See *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). We affirm the trial court's finding on factor (b).

The trial court found that defendant was "somewhat favored" on factor (c), "[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). Plaintiff challenges the trial court's statement that it was concerned about her money management. The evidence supports plaintiff's assertion that it was defendant who paid the bills during the marriage. However, the trial court

was not concerned with the parties' money management during the marriage; rather, it was concerned with plaintiff's money management after she became responsible for paying the bills. Plaintiff does not contest any of the trial court's specific statements about her money management. Accordingly, plaintiff has failed to show that the trial court's finding on factor (c) was against the great weight of the evidence.

The trial court found that factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), favored defendant. Plaintiff claims that, based on *Kessler v Kessler*, 295 Mich App 54; ___ NW2d ___ (Docket No. 302492, issued December 6, 2011), the trial court's finding that factor (d) favored defendant was clear legal error because the environment in Maine was not relevant when the children had never lived there for more than three consecutive weeks. However, the trial court's finding was not based on the children's environment in Maine. Rather, the trial court looked at the children's current environment in Ann Arbor and found that, even though the children enjoyed the community, it was not desirable to maintain the environment because plaintiff failed to accept the son's "real problems" and would use babysitters to parent the children. The trial court's finding was not based on an irrelevant factor.

We agree with plaintiff that the trial court's statement that the son did not have any friends in Ann Arbor may not be completely accurate. Nonetheless, the evidence did not establish that the son had any good friendships in Ann Arbor. Thus, any inaccuracy in the trial court's statement about the number of the son's friends cannot be said to have affected the trial court's finding on factor (d). We affirm the trial court's finding that factor (d) favored defendant.

The trial court found plaintiff and defendant to be equal on factor (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e). The focus of factor (e) is the child's prospect for a stable family environment. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). Plaintiff makes no argument that the evidence showed that the stability of the home environment proposed by defendant was any less stable than her home environment. Accordingly, plaintiff has not shown that the trial court's finding on factor (e) was against the great weight of the evidence.

The trial court found that neither party was favored on factor (f), "[t]he moral fitness of the parties involved," MCL 722.23(f). Plaintiff argues that the trial court's finding was against the great weight of the evidence because the record was replete with evidence that defendant was untruthful throughout the divorce proceedings. Factor (f) does not concern who is the morally superior parent; rather, it concerns "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994). Here, plaintiff does not identify any conduct by defendant, except his alleged untruthfulness, that would make him morally unfit to parent the children. She makes no argument that defendant's untruthfulness would have a significant influence on his ability to care and provide for the children. Accordingly, plaintiff has failed to show that the trial court's finding on factor (f) was against the great weight of the evidence.

The trial court found that defendant was favored on factor (g), "[t]he mental and physical health of the parties involved," MCL 722.23(g). Contrary to plaintiff's argument, the trial court

did not ignore defendant's MMPI-2 results. The trial court acknowledged the interpretations of the results, but chose not to give much weight to the results as defendant had never displayed vile or ferocious anger. Rather, the trial court gave weight to plaintiff's psychological condition. Plaintiff had been diagnosed with Generalized Anxiety Disorder, but she did not view herself as an anxious person. According to the custody evaluator, plaintiff's denial of her "high level of anxiety" could prevent her from protecting the son from her own anxieties and, thereby, exacerbate the son's anxieties. The custody evaluator admitted that defendant was only "[m]arginally" psychologically healthier than plaintiff. But, she also stated that "anything that will support [the son]" is important. Based on this evidence, it was not against the great weight of the evidence for the trial court to be more concerned about plaintiff's mental health. We affirm the trial court's finding that factor (g) favored defendant.

The trial court found that factor (h), "[t]he home, school, and community record of the children," MCL 722.23(h), favored defendant. Plaintiff contests the trial court's finding that there had not been a consistent reduction in the acting-out behavior of the son. The trial court acknowledged the testimony of plaintiff and several witnesses that the son's behavior had improved. However, there was also testimony that the son continued to have outbursts. A babysitter testified to an outburst by the son, during spring break, where the son called her names and threw objects at her. Defendant testified that just a couple weeks before trial, during a Skype conversation with the daughters, he heard the son slam doors and threaten to kill plaintiff. Based on the evidence of recent outbursts by the son, the trial court's finding that there was not a consistent reduction in the son's behavior was not against the great weight of evidence. We affirm the trial court's finding on factor (h).

The trial court found that the parties were equal on factor (j), "[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). In arguing that the trial court's finding was against the great weight of the evidence, plaintiff cites no evidence that defendant would not follow the parenting plan, would not allow her to have regular Skype and telephone conversations with the children, or would not consult with her on important decisions regarding the children. There was also no evidence to suggest that during any of the children's visits to Maine defendant deliberately prevented plaintiff from having regular contact with the children. Accordingly, plaintiff has failed to show that the trial court's finding on factor (j) was against the great weight of the evidence.

Because plaintiff has failed to establish that any of the trial court's findings on the best interest factors were against the great weight of the evidence, we affirm the trial court's decision that the custodial placement that is in the best interests of the children is them living with defendant in Maine during the school years.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter