

STATE OF MICHIGAN
COURT OF APPEALS

BRITTANY LEE SIMON,

Plaintiff-Appellant,

v

STEVEN MICHAEL SIMON,

Defendant-Appellee.

UNPUBLISHED

July 24, 2012

No. 308528

Clinton Circuit Court

LC No. 09-021720-DM

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

TALBOT, J (*dissenting*).

I respectfully dissent from the majority's decision to affirm the trial court's grant of additional parenting time to defendant based on the failure of the trial court to specifically determine that such an expansion is in the best interests of the minor children and the inconsistency inherent in increasing defendant's parenting time while simultaneously granting plaintiff sole legal custody.

The parties are the parents of two minor children. In the judgment of divorce, the parties were awarded joint legal custody, with plaintiff having sole physical custody. Plaintiff sought sole legal custody and a decrease in defendant's parenting time due to his alleged failure to fully exercise his parenting time and difficulties encountered between the parties' regarding their ability to communicate and cooperate on parenting decisions stemming from their acrimonious relationship.

After finding the existence of a proper cause or a change of circumstances to permit the consideration of a change of custody, the trial court determined that the children's established custodial environment was with plaintiff. Finding the existence of clear and convincing evidence to support the requested custody change, the trial court reviewed and commented on each of the best interest factors.¹ Specifically, the trial court determined that the parties were equal on six of the identified factors² and that plaintiff was favored on four of the factors.³ The trial court found

¹ MCL 722.23.

² Factors a, d, e, f, g and k.

³ Factors b, c, h and j.

the factor pertaining to the children's reasonable preferences to be inapplicable due to their youth.⁴ Although the trial court failed to fully explicit its ruling on the catch-all factor, it implied a more favorable disposition toward plaintiff on the matters considered under that factor.⁵ Addressing the issue of parenting time, the trial court implicitly denied plaintiff's request to reduce defendant's parenting time with the children and instead elected to increase his parenting time to permit him an additional overnight on Wednesdays with the children while eliminating his afternoon parenting time on Thursdays. It is this decision that plaintiff appeals contending that it is inherently inconsistent for the trial court to increase defendant's parenting time while granting her sole legal custody and that such a determination was contrary to the great weight of the evidence based on the trial court's determinations on the best interest factors.

"Orders regarding parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. A court commits legal error when it incorrectly chooses, interprets, or applies the law."⁶ Parenting time is governed by statute, which provides:

Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.⁷

Permissive guidelines or factors have been statutorily delineated for trial courts to consider in determining parenting time.⁸ In this instance, the trial court did not specifically address the suggested statutory factors specifically identified for parenting time. Because the issue of parenting time was inextricably intertwined with the issue of legal custody, the trial court addressed only the best interest factors as required for custody determinations.

The trial court accepted the contention that the parties' relationship was particularly acrimonious and negatively impacted their ability to communicate and jointly parent the minor children as evidenced by its statements in ruling on certain of the best interest factors⁹ and the ultimate decision to award plaintiff sole physical and legal custody. Yet, despite acknowledging the significance of the communication problems and animosity demonstrated between the

⁴ Factor i (reasonable preference of the children).

⁵ Factor l (any other factor considered relevant).

⁶ *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005) (citation omitted).

⁷ MCL 722.27a(1).

⁸ MCL 722.27a(6).

⁹ MCL 722.23(b), (j), and (l).

parties, the trial court increased defendant's parenting time. There are two problems inherent in the trial court's ruling.

First, it is statutorily required that "[p]arenting time . . . be granted in accordance with the best interests of the child[ren]."¹⁰ In this instance, parenting time was granted in an effort to minimize conflict between the parents without a sufficient determination or showing that the new schedule would be in the children's best interests. As such, the trial court failed to recognize that the interests of the children comprise the controlling factor in the determination of parenting time.¹¹ While it can be assumed that limiting the frequency of negative interactions between the parents will inure to the benefit of the minor children it is not the equivalent of a determination by the trial court that the proposed parenting time schedule is in the children's best interests. Further, the trial court's ruling does nothing to resolve the problems between the parties and only allows them to avoid overt conflicts that typically occurred during parenting time exchanges. It would have been preferable for the trial court to require the parties to participate in some form of counseling or facilitation to teach them to deal more effectively with their disagreements pertaining to the children in order to obtain a long term resolution to their poor communication and control the expression of their personal animosity.

Second, the trial court's ruling is internally inconsistent. "A trial judge sitting as a factfinder . . . is not permitted to reach 'compromise' verdicts such as this one."¹² The trial court determined that the parties were unable to effectively communicate and could not agree to the extent that it granted plaintiff sole legal custody in addition to its prior grant of sole physical custody. In making this determination, the trial court evaluated the best interest factors and found the parties either equal or favoring plaintiff on the majority of the factors. Defendant was favored on none of the factors. Despite these rulings, the trial court increased defendant's parenting time to six overnights every 14 days or roughly 43 percent of the overnight periods available, resembling a schedule more closely associated with a joint custody arrangement. Such an increase in parenting time would be improperly effectuated as it could be construed as a change in the children's custodial environment without adherence to the proper procedure and standard of review.¹³ Once again, this determination was erroneous because it was not made premised on the best interests of the children, but rather for the convenience and avoidance of conflict of the parents.

Consequently, I would remand this matter to the trial court for further review.

/s/ Michael J. Talbot

¹⁰ MCL 722.27a(1).

¹¹ *Thames v Thames*, 191 Mich App 299, 305-306; 477 NW2d 496 (1991).

¹² *Wayne Co Prosecutor v Detroit Recorder's Court Judge*, 177 Mich App 762, 765; 442 NW2d 771 (1989).

¹³ See *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008).