STATE OF MICHIGAN

COURT OF APPEALS

KELLI LOUISE CHRISTMAS,

Plaintiff-Appellee,

v

DOUGLAS L. MESSINGER,

Defendant-Appellant.

UNPUBLISHED
February 11, 2003

No. 243453
Muskegon Circuit Court
LC No. 99-003937-DS

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order that granted the parties joint legal and physical custody of their son Caid Cougar Messinger. Defendant had filed a motion for custody seeking primary custody of the child, and plaintiff had filed a countermotion, also seeking primary custody. We affirm.

Plaintiff first argues on appeal that the trial court's findings of fact as to the best interest factors to be considered in custody disputes, set out in MCL 722.23, were against the great weight of the evidence, and that the trial court abused its discretion when it found that clear and convincing evidence existed that a change in the established custodial environment with defendant was in the best interests of Caid. We disagree.

In its opinion and order, the trial court first found that there was an established custodial environment with defendant. With regard to the best interest factors set out in MCL 722.23, the trial court found that four of the factors favored plaintiff, one favored defendant, and seven favored neither party over the other. Defendant challenges only the findings regarding the four factors favoring plaintiff. Accordingly, we will limit our review to those factors.

The first factor that the trial court found to favor plaintiff over defendant was factor "a," which factor concerns the love, affection, and other emotional ties existing between the parties involved and the child. MCL 722.23. The trial court found that both parties cared deeply about their son and were bonded to him, and that defendant and Caid had strong emotional ties. The court, however, noted that questions had been raised at the evidentiary hearing by both plaintiff and by the report of Dr. Auffrey, which doctor had conducted court-ordered psychological evaluations on the parties, regarding whether defendant "over-parented" his son. The court further found that plaintiff's approach to child rearing was more relaxed than defendant's because plaintiff was more comfortable with giving her children freedom to be themselves.

Moreover, the court expressed concern about the fact, admitted by defendant at the hearing, that defendant regularly slept in the same bed with his son and the fact, also admitted by defendant at the hearing, that Caid continued to request assistance from defendant with his personal hygiene. Based on these findings, the trial court found that this factor favored plaintiff.

Virtually all of the witnesses testified as to the love and affection between each of the parties and Caid. Plaintiff, however, testified that she believed that defendant did too much for Caid and was too accommodating of him, and further advised the court that, because defendant always gave Caid what he wanted, she frequently found Caid to be very demanding when he returned to her custody. Joseph Auffrey, the psychologist who performed court-ordered psychiatric evaluations on each of the parties, noted that defendant seemed to "over-parent," while plaintiff had a more relaxed parenting style. Psychologist Lorraine LaFerriere, defendant's treating psychologist, stated on the other hand that she believed that the preponderance of what defendant did with his son was "excellent." Dr. LaFerriere further stated that she did not think that defendant was harming his son by continuing to sleep in the same bed with him, advising the court that it was not unusual for children in shared custody arrangements to develop night phobias, and stating that it could be reassuring for a child to know that he could climb into bed with a parent. Dr. LaFerriere did, however, admit that permitting a child to continue to sleep with one or both of his parents at Caid's age could make a child less independent. In light of this evidence, and bearing in mind a trial court's findings as to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction, *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994), we conclude that the trial court's findings with regard to factor "a" were not against the great weight of the evidence.

The second factor that the trial court found favored plaintiff over defendant was factor "g," which factor concerns the mental and physical health of the parties involved. MCL 722.23. With regard to this factor, the trial court first noted that both parties appeared to be in good physical health, and found that this part of this factor favored neither party. The trial court noted, however, that defendant had a history of depression, and that defendant was currently in counseling to deal with issues concerning parenting-time and custody. Moreover, the trial court stated that it found defendant's emotional behavior in court and when meeting with the friend of the court worker assigned to the case, in both of which instances defendant had repeatedly broken down in tears, to be troubling, and cited the friend of the court worker's findings, testified to at the hearing, that defendant appeared to be manipulating plaintiff with his emotional behavior. Further, the trial court noted that defendant appeared to have no life or interests outside of Caid, and stated that this type of parenting put a burden on Caid which was of concern to the court. The trial court found plaintiff, on the other hand, to be very reasonable in her approach to the shared responsibility of raising Caid. For these reasons the trial court found this factor to favor plaintiff.

At the hearing, substantial evidence was introduced suggesting that defendant was much more prone to mental or psychological impairments than was plaintiff. Dr. LaFerriere testified that she had been treating defendant regularly since November 2001, and that she had diagnosed defendant with an adjustment disorder involving anxiety and depression related to the custody dispute. Dr. Auffrey, while stating in his report that defendant was not suffering from any significant clinical depression, anxiety condition, psychosis, or organic dysfunction, nonetheless noted that defendant showed clinical, historical, and psychometric evidence of a histrionic

personality. The friend of the court worker testified that in his meeting with the parties he had found defendant to be manipulative, using nagging, cajoling and emotional outbursts to manipulate plaintiff. Plaintiff advised the court that defendant harassed her and used emotional manipulation and guilt trips to force her to give up additional parenting time to defendant.

With regard to plaintiff's mental health, on the other hand, no evidence was presented at the hearing to suggest that there were any concerns about plaintiff's mental health. Indeed, Dr. Auffrey stated in his report that plaintiff did not present any evidence of acute psychopathology or significant personality disturbance, and that there was no reason to believe that plaintiff's parenting abilities were compromised by any ongoing mental health problems.

Based on this evidence it seems clear that, while neither party has any significant mental or psychological impairment, defendant was clearly suffering from at least some form of anxiety and depression severe enough to cause him to seek professional assistance, while plaintiff was free from such symptoms. The evidence presented at the hearing concerning defendant's manipulative behavior simply adds to the overall picture of defendant as being slightly less mentally healthy than plaintiff. Accordingly, we find that the evidence presented regarding this factor, taken as a whole, does not clearly preponderate in favor of defendant. Therefore, the trial court's finding that this factor favors plaintiff over defendant was not against the great weight of the evidence.

The trial court also found that factor "j" strongly favored plaintiff over defendant, which factor concerns 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. MCL 722.23. The trial court found that plaintiff had made every attempt to accommodate defendant, granting defendant more parenting time, including overnights, whenever requested by defendant. The court found that plaintiff did this because she wanted her son to have a strong relationship with his father. The court further noted that it did not find plaintiff to be motivated by any desire either to neglect her son or to try to monopolize his time and affections. The trial court found that defendant, on the other hand, showed a pattern of attempting to dominate his son's life to the detriment of the child's relationship with plaintiff. The trial court further noted that evidence had been presented at the hearing that not only did defendant belittle plaintiff both face-to-face and to his son, but also that defendant was mentally abusive to plaintiff both in and outside of the parties' relationship. In addition, the court again stated that it found defendant to be manipulative. Based on these findings, the trial court found that factor "j" favored plaintiff.

Plaintiff introduced significant evidence that not only was defendant uncooperative with regard to the sharing of parenting time, but that defendant was also actively engaging in behavior intended to undermine plaintiff's relationship with Caid. Plaintiff testified that defendant had constantly requested additional parenting time with Caid, despite the fact that plaintiff had willingly granted defendant more than equal parenting time, and that defendant used emotional manipulation and guilt trips to force her to concede ever-increasing amounts of time with Caid to defendant. Plaintiff stated that on more than one occasion defendant had had Caid call plaintiff crying and begging to be allowed to stay longer with defendant. Plaintiff further testified that defendant had made Caid afraid to sleep in a bunk bed at plaintiff's home, and that after Caid had been with his father for a few days Caid would seem scared when he had to return to plaintiff's home, as if he did not think plaintiff could take care of him. The friend of the court worker testified that he had found plaintiff to be more flexible than defendant in trying to resolve

the differences between the parties, and stated more than once that he had seen no evidence of any willingness on defendant's part to cooperate with plaintiff on joint-parenting. The worker further described for the court how defendant had used emotional behavior during negotiations between the parties in order to win concessions from plaintiff, and how defendant had constantly demanded more from plaintiff every time she did make a concession.

Defendant, on the other hand, presented evidence that he was willing and able to facilitate and encourage a close and continuing relationship between plaintiff and the parties' son. Testifying on his own behalf, defendant stated that he had tried to encourage the relationship between plaintiff and Caid. However, defendant also admitted that he had had Caid call plaintiff in tears to request additional parenting time for defendant. Moreover, Dr. LaFerriere, testifying on behalf of defendant, stated that she had worked with defendant on such issues as how to avoid making Caid feel like he had to choose between the parties, how to help Caid love both parents, and how to avoid being critical of plaintiff in front of Caid. The fact that Dr. LaFerriere and defendant had worked on these issues, while indicating a desire on defendant's part to change, nonetheless also suggests that defendant was having difficulty refraining from interfering in plaintiff's relationship with Caid.

With regard to plaintiff, in contrast, the witnesses were virtually unanimous that plaintiff had made every effort to cooperate with defendant on joint parenting, and that plaintiff had encouraged a strong relationship between defendant and the parties' son. Not only did plaintiff herself testify as to her history of cooperation with defendant, but the friend of the court worker, as well, an uninterested party with no motivation to lie or embellish, informed the court of plaintiff's ability and willingness to cooperate and pointed out that this cooperative attitude had continued even in the face of what he saw as a complete lack of cooperation from defendant.

Looking at this evidence as a whole, we have no question but that the trial court's finding that factor "j" favored plaintiff over defendant was not against the great weight of the evidence.

Finally, the trial court found factor "k" to favor plaintiff over defendant, which factor concerns domestic violence. MCL 722.23. The trial court noted that defendant had been convicted of domestic violence against plaintiff.

Defendant argues that, because plaintiff admitted at trial that defendant was a good father who loved his son very much, and because plaintiff has had no qualms about permitting defendant to have joint physical custody of Caid, defendant's conviction for domestic abuse against plaintiff should not be enough to cause this factor to weigh against defendant and in favor of plaintiff. Defendant, however, has provided no legal or statutory authority to support this argument. Moreover, it is undisputed that defendant was in fact convicted of domestic assault against plaintiff, and that this precipitated the parties' separation. In addition, plaintiff testified at the hearing that on two additional occasions defendant had hit her. In light of this evidence, and given defendant's failure to provide any support for his argument, we hold that the trial court's finding that this factor favored plaintiff was not against the great weight of the evidence.

Thus, having determined that the trial court's findings of fact as to the best interest factors were not against the great weight of the evidence, we now turn to whether the trial court's findings of fact supported the court's conclusion that a change in established custodial environment was in Caid's best interests.

With regard to this question, this Court has held that a custody award may be modified on a showing of proper cause or change of circumstances which establishes that the modification is in the child's best interest. MCL 722.27(1)(c), *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). However, when a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that the change is in the child's best interest. MCL 722.26a, *Mixon v Mixon,* 237 Mich App 159, 163; 602 NW2d 406 (1999).

As stated above, the trial court found that an established custodial environment existed with defendant. The trial court then found that of the best interest factors set out in MCL 722.23, four factors favored plaintiff, one favored defendant, and seven favored neither party over the other. Ultimately, the trial court found by clear and convincing evidence that it was in Caid's best interests to change the existing custodial arrangement from one dominated by defendant, to the substantial exclusion of plaintiff, to one of joint custody and balanced parenting time.

We note that the trial court's findings of fact as to the best interest factors, in and of themselves, indicate that a change in Caid's established custodial environment was appropriate. Defendant, however, argues that the mere fact that the trial court found four factors to favor plaintiff, while finding only one to favor defendant, is insufficient to justify a change in the established custodial environment. In support of this argument, defendant cites *Hall v Hall,* 156 Mich App 286; 401 NW2d 353 (1986), and *Duperon v Duperon,* 175 Mich App 77; 437 NW2d 318 (1989), as well as MCL 722.27, for the proposition that more than a marginal improvement in a child's life is required to justify a change under the clear and convincing evidence standard However, neither the statute nor the cases cited by defendant stand for this proposition. Accordingly, defendant's argument cannot stand.

In finding by clear and convincing evidence that a change in the established custodial environment was in Caid's best interests, the trial court, while recognizing that defendant had much to offer Caid and that Caid was receiving benefits from his relationship with defendant, noted its concern that defendant would continue to undermine Caid's relationship with plaintiff to the detriment of that relationship if the status quo with regard to custody remained unchanged. Looking at the testimony presented at the evidentiary hearing on this question, substantial evidence was presented that indicated that defendant, at best, was monopolizing parenting time with Caid and, at worst, was actively working to undermine plaintiff's relationship with the child. Not only plaintiff, but also the friend of the court worker, a neutral witness with no reason to favor one party over the other, testified that defendant sought ever-increasing amounts of parenting time and used emotional manipulation tactics to force plaintiff to give in to his demands. Moreover, even defendant's own witness, Dr. LaFerriere, gave testimony that indicated defendant was having difficulty refraining from interfering in plaintiff's relationship with Caid. Based on this evidence, we find that the trial court's finding that defendant might interfere with plaintiff's relationship with Caid if the status quo with regard to the established custodial environment was not altered was not against the great weight of the evidence.

We believe that the trial court's findings of fact regarding the best interest factors, together with the trial court's finding as to defendant's potential for interference with Caid's relationship with plaintiff, were sufficient to support the trial court's conclusion that a change in the established custodial environment was in Caid's best interests. Accordingly, the trial court

did not abuse its discretion when it granted the parties joint legal and physical custody of their son.

Defendant next argues on appeal that the trial court's finding that it was in Caid's best interest to change school systems in order to attend the same school as his two older siblings, who were the products of plaintiff's prior relationships, was against the great weight of the evidence. Once again, however, we disagree.

This Court has stated that in most cases it will be in the best interests of a child to keep brothers and sisters together. However, if keeping the children together is contrary to the best interests of an individual child, then the best interests of that child will control. *Wiechmann v Wiechmann,* 212 Mich App 436, 440; 538 NW2d 57 (1995).

The trial court found that both the Mona Shores school district, where Caid attended preschool and kindergarten, and the Reeths-Puffer school district, where Caid's older siblings attended school, were substantially equal. The trial court further found that the fact that Caid had attended kindergarten in Mona Shores was not controlling on the question of where he should attend school in the future. Finally, the trial court found that it was in Caid's best interests to attend the same school as his siblings. Accordingly, the trial court ordered that plaintiff would choose the school district in which Caid would attend school

We conclude that the trial court's finding that it was in Caid's best interest to attend the same school as his siblings was not against the great weight of the evidence. At trial both parties expressed satisfaction with the Mona Shores school district, where Caid attended kindergarten. However, the parties differed on the district in which they wished to have their child attend school in the future. Defendant expressed a strong desire for Caid to continue to attend school in the Mona Shores school district so that Caid could continue attending school with his friends. Plaintiff, on the other hand, expressed an equally strong desire to have Caid change to the Reeths-Puffer school district so that all of her children could attend the same school. Plaintiff advised the court that the Twin Lakes Elementary School, to which she wished to transfer Caid, was a highly rated school. The only neutral witness testifying on this issue, the friend of the court worker, advised the court that he believed a change in school districts would have no negative effect on Caid because young children change rapidly and can quickly adapt to new environments.

Thus, evidence was presented supporting both school districts as the favored choice. However, given that trial courts, as stated above, will find that it is in a child's best interests to keep all siblings together unless it is affirmatively shown that it is not in a child's best interests to do so, and given that the evidence in favor of each choice of school was approximately equal, we hold that the trial court's finding that it was in Caid's best interests to attend the same school as his siblings was not against the great weight of the evidence. Accordingly, the trial court did not err in granting plaintiff the right to select which school the parties' son would attend.

Defendant's final argument on appeal is that the trial judge acted improperly during the course of the evidentiary hearings by expressing a preference for mothers over fathers as custodial parents, and that, therefore, the trial court's findings were against the great weight of the evidence. Once again, we disagree.

We note that defendant cited no case law or statutes in presenting his argument on this issue. This Court has stated that where a party fails to brief the merits of an allegation of error, or where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned by this Court. *Ewing v Detroit*, 252 Mich App 149, 169; 651 NW2d 780 (2002). In any event, we found no evidence in the record to support defendant's contention of improper action. Accordingly, we find that defendant has abandoned this issue and this Court need not address this issue.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio