STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL KENT WAGNER,

Plaintiff-Appellant,

v

JENNIFER ANN WAGNER,

Defendant-Appellee.

UNPUBLISHED
October 30, 2008

No. 282724
Livingston Circuit Court
LC No. 05-037062-DM

Before: O'Connell, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Plaintiff father appeals as of right the lower court order granting defendant mother sole physical and legal custody of the parties' three minor children. We affirm.

Plaintiff and defendant were married on January 22, 1994 and divorced on November 21, 2005. The Judgment of Divorce (JOD) provided for joint legal and physical custody of their three minor children, Daniel (DOB 7/27/95), Alexander (Alex) (DOB 1/14/99) and Christiana (Tiana) (DOB 6/15/01). The parties shared custody of the children consistent with the JOD throughout the 2005-2006 school year. However, by July 2006, neither party lived in the children's former school district. Consequently, each party enrolled the children in schools near their respective homes. Being unable to resolve their disagreement about where the children would attend school for the 2006-2007 school year, and also disagreeing about the proper treatment for Alex's ADHD, the parties each sought a change of custody.

Generally, a party seeking a change in custody has the initial burden of establishing, by a preponderance of the evidence, that either proper cause or a change of circumstances exists. MCL 722.27(1)(c). A change of circumstances exists if "the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007), quoting *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003). Upon finding a change in circumstances, a trial court must next determine whether an established custodial environment exists; if so, it may not change that environment unless it finds clear and convincing evidence that a change of custody is in the child's best interest. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 527-528; 752 NW2d 47 (2008); *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Once a trial court determines whether an established custodial environment exists, it must then consider whether it is in the children's best interests, as measured by the twelve factors set forth in MCL 722.23, to change custody. *Fletcher v Fletcher*, 447 Mich 871,

881; 526 NW2d 889 (1994); *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). Those factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and the disposition of the parties 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.
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> (d) The length of the time the child has lived in a stable satisfactory environment, and the desirability of maintaining continuity.
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> (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.
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> (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 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 factors considered by the court to be relevant to a particular child custody dispute. [MCL 722.23]

When making a custody determination, the trial court must make findings of fact as to each of these factors. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001); *Daniels*, *supra*. The trial court is not required to give each factor equal weight; rather, the overwhelmingly predominant factor in each case is the welfare of the child. *Winn v Winn*, 234 Mich App 255, 263; 593 NW2d 662 (1995); *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998).

In the instant case, the parties stipulated that a change of circumstances existed, and plaintiff is not challenging the trial court's conclusion in accordance with that stipulation. The trial court next determined that the children had an established custodial environment with both

parents. Again, plaintiff is not challenging that finding. Rather, plaintiff argues on appeal that the trial court clearly erred in its evaluation of the best interest factors and, as a result, abused its discretion in awarding defendant sole physical and legal custody of the children. On the record presented, we disagree.

This Court must affirm a trial court's custody order unless the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. MCL 722.28; *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005). A factual finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Fletcher*, *supra* at 879; *Vodvarka*, *supra* at 507. When reviewing the trial court's findings of fact, this Court defers to the trial court on issues of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000); *Harper v Harper*, 199 Mich App 409, 414: 502 NW2d 731 (1993). To whom custody is granted is a discretionary dispositional ruling, which should be affirmed unless it represents a palpable abuse of discretion. *Fletcher*, *supra* at 879-880. A trial court's decision in child custody cases is entitled to the utmost level of deference, and therefore, it constitutes an abuse of discretion only if it is '"so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id*., quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959); *Shulick v Richards*, 273 Mich App 320, 323-326; 729 NW2d 533 (2006).[1]

The trial court determined that, as to Daniel, factors b, c, d, and j, favored defendant, factors h and i favored plaintiff, and factors a, e, f, g, and k favored neither parent, and that, as to Alex and Tiana, factors a, b, c, d, h, and j favored defendant, no factors favored plaintiff, and factors e, f, g, and k favored neither parent. The trial court also concluded, under factor l, that it was in the children's best interest that they remain together. The trial court thus concluded that defendant had demonstrated, by clear and convincing evidence, that a change in custody from joint physical and legal custody to sole legal and physical custody with defendant was in each child's best interests.

Plaintiff challenges the trial court's evaluation of factors a, b, c, d, h and j. We note, however, that much of plaintiff's argument centers on his objection to the trial court's assessment of the credibility of the witnesses, and specifically to the trial court's crediting the

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[1] In *Shulick*, this Court held that the formulation of the abuse of discretion standard quoted above, which was first set forth in *Spalding*, *supra* at 384-385, and was later cited by *Fletcher*, *supra* at 879-880, remains applicable in child custody cases, despite the Supreme Court's later adoption, in *Maldanado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), of the abuse of discretion standard set forth in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) as the "default" formulation of that standard. This Court explained that the Legislature's inclusion of the world "palpable" – the same word used by the Supreme Court in *Spalding* – in the statutory formulation of this Court's standard of review in custody cases set forth in MCL 722.28, "signal[ed] its adoption of the standard as articulated in *Spalding*" for these cases. *Shulick, supra* at 324-325.

"decidedly self-serving" testimony of defendant and her mother, over the testimony of plaintiff and his wife Angela. Plaintiff also objects to the weight and credibility given to the various teachers and others who testified. Plaintiff's protests in this regard are unpersuasive. The trial court was in the best position to judge the demeanor and credibility of the witnesses appearing before it, and this Court defers to the trial court's assessment. MCR 2.613(C); *Mogle*, *supra*; *Harper*, *supra*; *Pelton v Pelton*, 167 Mich App 22, 26; 421 NW2d 560 (1988).

Turning specifically to the challenged factors, plaintiff first argues that the evidence clearly preponderates against the trial court's conclusion that factor a favored plaintiff as to Alex and Tiana and favored neither party as to Daniel. Plaintiff argues, instead, that the evidence supported a determination the parties were equal on this factor as to Alex and Tiana, and that it favored plaintiff as to Daniel. On the record presented, we disagree.

Testimony established that defendant was the primary caregiver for the children until the parties' divorce in November 2005; plaintiff's involvement in the children's life during this period of time was minimal. From November 2005 until September 2006, the children spent approximately equal time with both parents. During the 2006-2007 school year, the children spent more time with plaintiff than with defendant, but defendant remained involved in the children's lives to a significant degree. The trial court heard testimony that, although they have strong emotional ties to each of their parents, Alex and Tiana missed defendant greatly when away from her and experienced emotional distress when the time approached for them to return to plaintiff's home from defendant's home. There was also testimony that Alex was more comfortable with defendant, especially in dealing with his emotions regarding his bowel control issues, and that defendant was better able to accommodate Alex and Tiana's emotional and behavioral needs. Regarding Daniel, testimony indicated that he expressed a strong preference to reside with plaintiff. However, there was also ample testimony that Daniel had emotional ties with each of his parents, and they with him. Indeed, plaintiff acknowledged that each of the children had very strong emotional ties to both him and defendant. Thus, we do not find that the evidence preponderates against the trial court's finding that factor a favored defendant as to Alex and Tiana, and favored neither party as to Daniel.

Plaintiff next argues that the evidence clearly preponderates against the trial court's conclusion that factors b, c, d and j favored defendant as to all three children. Plaintiff argues, instead, that the evidence supported a determination the each of these factors favored him. On the record presented, we disagree.

Regarding factor b, plaintiff asserts that the trial court erred in considering the parties' disagreement over treatment of Alex's ADHD and undervalued plaintiff's history of furthering the children's religious development in contrast to defendant's single comment that she would take the children to church when able to do so. In finding that factor b favored defendant, the trial court noted defendant's efforts, and plaintiff's lack of effort, in seeking out and pursuing advice and assistance from appropriate professionals regarding Alex's ADHD diagnosis. There was ample testimony in the record from defendant, school personnel and medical professionals about defendant's efforts in this regard. There was also testimony favoring defendant regarding the parties' respective capacity and disposition to provide for the children's emotional needs, disciplinary needs and medical needs. And, while plaintiff certainly was more involved than defendant in the children's religious upbringing after the divorce, defendant had a demonstrated history of involvement in the church and of raising the children in their religion, and she

professed a willingness to continue to attend to their religious development. Assessing the credibility of the witnesses appearing before it and weighing their testimony, the trial court concluded that factor b favored defendant. On the record presented we do not conclude that the evidence preponderates against this finding.

Next, considering factor c, plaintiff asserts that the trial court faulted him too much for his desire to address Alex's ADHD by cognitive and behavioral methods first before consenting to medication. However, there was testimony and evidence, which the trial court chose to credit, indicating that Alex was not performing academically to his full potential in the absence of medication. There was also evidence indicating that plaintiff did not feel it necessary to administer medication to the children that had been prescribed for them, including medication for allergies and asthma. And, despite Daniel and Alex having been diagnosed with mild asthma, plaintiff and Angela admittedly smoked in the car with them present. The parties' financial histories and current situations being equally unstable, we do not conclude on this record that the evidence preponderates against a finding the defendant has the greater disposition to meet the children's medical and other needs.

Plaintiff next asserts that the trial court inappropriately ascribed a hostile, combative role to Angela, not supported by unbiased witnesses, when evaluating factor d. Instead, plaintiff urges, the trial court should have focused on the stability that would have been afforded the children by keeping them primarily with plaintiff and Angela, in the same community and school in which they spent the previous academic year, rather than placing them in a new home and new school district with defendant, who relies on her parents for support. Plaintiff fails to recognize that, as the trial court noted, Angela's demonstrated lack of respect for defendant as the children's mother, which Angela acknowledged on the stand, together with his and Angela's attempt to undermine defendant's parenting skills and intentions, have a negative impact on the children, and thus on the determination whether plaintiff's home is satisfactory. Further, plaintiff discounts his impending move, to a home not yet purchased, as well as the children's difficulties with Angela's son, Austin. On the record presented, we do not conclude that the evidence clearly preponderates against the trial court's conclusion that factor d favored defendant.

As for factor j, again plaintiff asserts that the trial court improperly assessed Angela's testimony and demeanor, and that it penalized him for unilaterally enrolling the children in Holly Academy without defendant's consent, but failed to note that defendant enrolled the children in Pinckney schools without plaintiff's consent. Even were we to agree with plaintiff that the trial court improperly assessed the parties' respective conduct relating to the children's school enrollment, we would not conclude that the evidence preponderates against the trial court's determination that this factor favors defendant. Certainly, there was testimony that the conduct of plaintiff and Angela in certain regards undermined defendant's relationship with the children. Again, we note that Angela admittedly lacks respect for defendant as the children's mother, and her conduct amply demonstrated this. In contrast, there was no evidence whatsoever that defendant did or said anything to undermine plaintiff's relationship with the children. Rather, it is undisputed that defendant repeatedly acted to foster the children's relationship with plaintiff and to ensure that plaintiff would have ample opportunity, and an appropriate venue, to exercise parenting time. On this record, we do not conclude that the evidence presented preponderates against the trial court's finding that factor j favored defendant.

Plaintiff next argues that the evidence clearly preponderates against the trial court's conclusion that, as to Alex and Tiana, factor h favored defendant.[2] According to plaintiff, the trial court undervalued the excellent performance of Alex and Tiana at Holly Academy in its evaluation of factor h; had it properly considered their school record, it certainly would have determined that this factor favored plaintiff. However, as noted by the trial court, the children's school records were consistently excellent throughout their young lives, and there was no reason to believe that custody by either parent would have a deleterious effect on their school performance. Further, there was evidence indicating that Alex was struggling a bit in certain academic areas at Holly Academy, in the absence of accommodations for his ADHD. Additionally, testimony indicated that the children's emotional behavior had deteriorated after they moved to plaintiff's home and that they often suffered emotional distress when leaving defendant's home to return to plaintiff's home at the conclusion of defendant's parenting time. That the trial court gave this testimony greater weight than testimony indicating that all was well in plaintiff's home does not lead us to conclude that the evidence preponderates against the trial court's conclusion that, as to Alex and Tiana, factor h favored defendant.

Finally, plaintiff argues that the trial court undervalued testimony offered by social worker Stephen Bon and guardian ad litem Heather Sutphin, on the basis that those opinions gave undue consideration to maintenance of the children's school performance. Certainly, these witnesses placed significant emphasis on the children's continued school performance in recommending that plaintiff be awarded primary custody. Indeed, Bon indicated that were defendant to move to Fenton or agree to drive the children to Holly Academy, his recommendation that plaintiff be awarded custody might change. And, an important issue to Sutphin – that of Daniel parenting the younger children – was determined by Bon to be a result of Daniel's own personality and not a result of defendant's actions. Even were we to agree with plaintiff that the trial court improperly undervalued the testimony of these two witnesses, we would not conclude that the evidence presented by them preponderates against the trial court's evaluation of the best interest factors.

Our review of the record indicates that the trial court carefully analyzed the evidence before it relative to all twelve statutory best interest factors in making its custody determination, and that the evidence presented does not clearly preponderate against the trial court's findings. Consequently, we conclude that the trial court's discretionary decision awarding defendant custody was not an abuse of discretion.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher

[2] The trial court determined that, as to Daniel, factor h favored plaintiff.