STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE CAROL ROGUSKA, Plaintiff-Appellee,	UNPUBLISHED September 29, 2009
v	No. 291352 Mackinac Circuit Court
RANDY RAYMOND ROGUSKA, Defendant-Appellant.	LC No. 2007-006396-DM

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from the order of the trial court granting primary physical custody of the parties' minor children, Jeff, Dana, and Grace, to plaintiff. The parties were granted joint legal custody. Because the trial court did not err in rejecting the parties mediated agreement regarding the custody of the children, properly found that no custodial environment existed with respect to one of the parties' children, applied the proper standard in evaluating the child custody factors, and because its findings on each factor were not against the great weight of the evidence, we affirm.

All custody orders must be affirmed on appeal unless the trial court's findings 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. MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Id.* at 706. The abuse of discretion standard applies to the trial court's discretionary rulings, such as to whom custody is granted. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The great weight of the evidence standard applies to all findings of fact, and a trial court's fact-finding on each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Sincropi v Mazurek (On Remand)*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

Defendant first argues on appeal that the trial court erred by rejecting the parties mediated agreement regarding the custody of the children. We disagree.

The parties participated in domestic relations mediation as governed by MCR 3.216 *et seq*. The mediation procedure provisions provide, in part:

> If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording. After a settlement has been reached, the parties shall take steps necessary to enter judgment as in the case of other settlements. [MCR 3.216(H)(7).]

The parties negotiated a mediation settlement agreement that was signed by the mediator, both parties, and their attorneys. The trial court held a divorce hearing and heard testimony that an agreement existed regarding custody, parenting time, property and child support. The parties also stated that the consent judgment was consistent with the mediated agreement. However, during the divorce hearing, plaintiff twice testified that she thought defendant was lying during the mediation. The trial court rejected the mediated agreement regarding custody, only, and the court set a trial date to resolve the same.

Even when a divorce agreement exists, a hearing is required to place proofs on the record that the agreement contains the terms of the settlement and the parties' signatures. *Wyskowski v Wyskowski*, 211 Mich App 699, 702; 536 NW2d 603 (1995). This acknowledgment of the settlement's terms and the parties' signatures allows the trial court to exercise its discretion in an informed manner. *Id*. While a court must enforce contractual agreements as written, absent some highly unusual circumstance such as a contract in violation of law or public policy, contract law does not govern child custody matters. *Brausch v Brausch*, 283 Mich App 339, 350; ___ NW2d ___ (2009).

A trial court is not bound by the parties' agreements regarding child custody. *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994). If the parents agree, a court shall award joint custody unless the court finds by clear and convincing evidence that a joint custody agreement is not in the best interests of the children. MCL 722.26a(2). Regardless of the existence of a mediated agreement, the Child Custody Act (CCA), MCL 722.21 *et seq*., requires a trial court to determine independently the custodial placement that is in the best interests of the children, because the statutory best interest factors are paramount whenever a court enters an order affecting child custody. *Rivette v Rose-Molina*, 278 Mich App 327, 332-333, 750 NW2d 603 (2008), citing *Harvey v Harvey*, 470 Mich 186, 187-188; 680 NW2d 835 (2004). Nothing in the CCA gives any party the power to exclude the legislatively mandated "best interests factors" from the trial court's deliberations when a custody dispute reaches the court. *Id*. at 193.

Defendant contends that the trial court did not have sufficient information to disregard the custody and parenting time agreement reached by the parties at mediation. However, the record indicates that the trial court heard plaintiff's suggestion that fraud was perpetrated in obtaining the mediated agreement and that the parties could not communicate effectively. The trial court found plaintiff's representations on this issue credible, and also took into account the fact that plaintiff had a personal protection order in place against defendant and was requesting an extension of the same. The trial court indicated that it rejected the parties' agreement on custody and parenting time based on the clear and convincing evidence, including the credible testimony of plaintiff at the divorce hearing and at the custody trial. The trial court also noted

that plaintiff no longer planned to move from Mackinac Island to Grand Rapids to be closer to defendant, which made joint physical custody nearly impossible. Recognizing that parties cannot, by agreement, usurp the trial court's authority to determine the children's best interests in entering custody orders (see *Harvey, supra*, at 193-194), we find no error in the trial court's determination that, based upon the evidence before it, the parties prior agreement did not necessarily represent the best interests of the children. The trial court did not act erroneously while exercising its discretion or applying the law to set aside the custody portion of the mediated agreement.

Next, defendant argues that the trial court erred in not finding that an established custodial environment existed for Jeff with defendant, and, consequently, applied an erroneous burden of proof. We disagree.

The trial court must make a specific finding regarding the existence of a custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the children's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). According to MCL 722.27(1)(c), a custodial environment is established if:

> [O]ver 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.

An established custodial environment is a physical and emotional connection of significant duration, where the relationship between the custodian and the child is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). An established custodial environment can exist simultaneously in more than one home. *Rittershaus, supra* at 471.

The first step in considering a change in custody is to determine whether an established custodial environment exists; it is only then that the trial court can determine which burden of proof is applied. *Curless v Curless*, 137 Mich App 673, 676; 357 NW2d 921 (1984). If the trial court finds that an established custodial environment exists, it cannot change custody unless it finds clear and convincing evidence that a change in custody is in the children's best interests. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). This higher standard is intended to ensure that children are not subjected to disruptive changes in custody except in the most compelling cases. *Baker, supra* at 576-577. Where no established custodial environment exists, the trial court must determine custody by a preponderance of the evidence standard. *Underwood v Underwood*, 163 Mich App 383, 390; 414 NW2d 171 (1987).

Defendant argues that the trial court clearly erred in not making a specific finding regarding whether a custodial environment existed for each child with either parent. The argument appears primarily focused upon the parties' son Jeff. However, the trial court did address the existence of an established custodial environment in its decision:

> Neither party addressed whether or not an established custodial environment exists with either or both parents. There has not been a previous "final" custody order regarding these children as this is the original action. The parties have stipulated to interim orders regarding parenting time which do not ripen into an established custodial environment. Thus, the court must decide custody in this case based on the preponderance of the evidence standard.

By implication, the trial court found that no statutory established custodial environment existed for any child with either parent, and then proceeded in its custody determination utilizing the preponderance of the evidence standard. We find no error in this finding or the standard employed.

The testimony at trial established that the parties were married in 1987 and separated in June 2007. Jeff, the parties' oldest minor child, resided primarily with defendant from the separation until the first day of school in 2007, when he arrived at plaintiff's home. Jeff then left to reside with defendant in another city in November 2007. Plaintiff saw Jeff only rarely after November 2007, until the summer of 2008 when Jeff came to live with her. Defendant stated that it was Jeff's decision not to visit plaintiff between November 2007 and spring 2008.

At the end of August 2008, Jeff returned to defendant. The divorce trial began in October 2008. Plaintiff said that she had not been allowed to visit Jeff on visitation weekends and had only seen him for three lunches since school started in 2008.

It appears that Jeff spent a significant amount of time residing with defendant after the parties separated, and that tension existed in Jeff's relationship with plaintiff for a time following the separation. Jeff also, however, spent an appreciable amount of time residing with plaintiff. Jeff's physical custody appeared to be a fluid situation based on the extreme tension and emotion of the pending divorce and the changing locations of the parties.

Where there are repeated changes in physical custody and there is uncertainty created by an upcoming custody trial, a previously established custodial environment may be destroyed and the establishment of a new one may be precluded. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Here, because of the multitude of changes in Jeff's residence between the time of the parties' separation and the divorce trial, the trial court's finding that no established custodial environment for Jeff existed with either party was appropriate, and the evidence did not clearly preponderate in the opposite direction. *Berger*, *supra* at 706. Accordingly, the trial court utilized the correct burden of proof (a preponderance of the evidence) in its custody determination regarding Jeff. *Underwood*, *supra* at 390.[1]

Next, defendant argues that the trial court erred in its findings regarding certain child custody factors. We disagree.

---

[1] Defendant does not contend that he had an established custodial environment with the parties' daughters.

Custody disputes are to be resolved in the best interests of the children, as measured by the 12 factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor; the failure to do so is reversible error. *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). A trial court's findings with respect to each child custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Berger*, *supra* at 705. In reviewing these findings, we defer to the trial court's determination of credibility. *Sinicropi*, *supra* at 155. A trial court's custody decision is also entitled to the utmost level of deference. *Berger*, *supra* at 706.

Here, the trial court found the parties equal on nine factors, found that factors (j) and (l) favored plaintiff, and took into consideration what the children said for factor (*i*). Defendant first challenges the trial court's findings on 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. The trial court judged this factor in favor of plaintiff, although it noted that both parties had struggled in this area. Defendant points out that the trial court's findings were contrary to an expert's opinion that plaintiff's moods and behavior were significantly affected by thoughts of the children spending time with defendant.

The expert's report characterized plaintiff as engaged in a campaign against defendant, and stated that plaintiff appeared to adopt a strategy to gain custody by disqualifying defendant as a viable parent. The expert also said that defendant had inappropriately shared harmful information about plaintiff with the children, and responded to questions in a manner transparently intended to present himself as unrealistically free from virtually any negative emotions. The expert addressed the child custody factors from a psychological perspective, but believed that there were only ten child custody factors, and did not offer an opinion on factors (j) and (k).[2]

Evidence on factor (j), aside from the expert report, consisted of statements by plaintiff that she observed defendant praying with the children for her to stop the "sinful" divorce. Plaintiff also stated that defendant had called her "an evil witch possessed by Satan" in front of the children, and that defendant harassed her on visitation exchanges by calling her names like "selfish" and "evil".

Defendant agreed that he told plaintiff that she was sick, needed help, was selfish, was causing mass destruction in the family, and that he called plaintiff an evil witch in front of the children. Defendant also admitted to having the children pray with him that plaintiff's heart and soul would be converted, and indicated that the relationship between plaintiff and the boys changed for the worse as a result of plaintiff's decision to divorce. Defendant further testified that he did not believe that plaintiff was in her right mind at the time of trial, and that what she was doing was wrong. With respect to visitation, defendant stated that plaintiff's cooperation in parenting time was varied and that he felt he had to work for parenting appointments. Defendant

---

[2] The trial court said, "This lack of knowledge on the expert's part causes some concern for the court when evaluating his opinion."

also stated that he encouraged, and did not interfere with their sons visiting plaintiff, but acknowledged that they saw plaintiff only sparingly.

The trial court noted: "[P]laintiff, particularly in the early stages of the divorce proceedings, harbored tremendous resentment for the defendant which affected her ability to encourage a relationship between the defendant and the children." The trial court also mentioned defendant's comments and heated discussions in front of the children, and indicated that the result of defendant's approach was that the children tended to blame plaintiff for the divorce. The trial court concluded that defendant's actions, including the prayers, interfered with plaintiff's ability to relate with the children in a post-divorce setting.

Based upon the evidence, it was reasonable to believe that defendant would continue to struggle in supporting plaintiff's efforts at parenting her children independent of the marriage. Both the expert report and the trial testimony indicated that defendant viewed the divorce as entirely plaintiff's fault, and if there was mention of him being at fault or speaking/acting inappropriately toward plaintiff, defendant generally explained such behaviors as having been "provoked" by plaintiff. Clearly, defendant had a difficult time accepting the divorce and often verbalized to the children that the dissolution of the marriage was entirely on plaintiff's shoulders. The findings of the trial court regarding factor (j) were not against the great weight of the evidence, and the evidence did not clearly preponderate in the opposite direction on this factor. *Berger*, *supra* at 705.

Defendant also disputes the trial court's findings on factor (l), any other factor considered by the court to be relevant to a particular child custody dispute. The trial court found that there was a great deal of evidence that did not fit squarely within the other child custody factors and considered this evidence in its findings as to factor (l). The trial court found that this factor favored plaintiff based on defendant's portrayal of himself as a victim in front of the children by the nature of his prayers with them about plaintiff and the divorce. Furthermore, the trial court, in analyzing factor (l) in plaintiff's favor, was troubled by defendant's intrusive and concerning behavior (preventing plaintiff from sleeping, punching a wall/tipping over a table next to plaintiff during an argument, threatening suicide, and other controlling behavior). The trial court did not allege that the described behavior took place in the presence of the children. However, the trial court did state that defendant's suicidal threats to plaintiff and his continued desire to reconcile the relationship, despite the impending divorce, made it unlikely that defendant's home would be a healthy environment for the children. These findings by the trial court were not against the great weight of the evidence and the evidence did not clearly preponderate in the opposite direction. *Id.*

While defendant argues that the circuit court misstated the testimony of the two experts, he made no indication of where these alleged errors occurred. The trial court noted that the experts both had equally likely hypotheses to explain the behavior of the parties and their children.

Defendant also disputes the trial court's findings on factor (g), the mental and physical health of the parties involved. The trial court found that this factor favored neither party because the psychological evaluations indicated that both parties functioned within normal ranges. Defendant contends that the trial court ignored findings that plaintiff was found to be motivated by anger and unwillingness to admit personal faults, and maintains that the children were at risk

for psychological harm when with plaintiff because she was polluting their minds. The evidence showed, however, that both parties had involved their children in the dispute and that defendant implausibly denied any fault or negative emotions. Because both parties functioned within normal limits, both involved their children in the dispute, and both had difficulty admitting personal faults, the trial court's finding that this factor favored neither party was not against the great weight of the evidence. *Id*. Ultimately, because the evidence supported the trial court's findings concerning the best interest factors, it did not abuse its discretion in awarding primary physical custody to plaintiff.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra