

STATE OF MICHIGAN
COURT OF APPEALS

AMANDA EVANS,

Plaintiff-Appellant,

v

STEVEN MATHIS,

Defendant-Appellee.

UNPUBLISHED

July 1, 2010

No. 295019

Genesee Circuit Court

Family Division

LC No. 09-287211-DC

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In this custody case, plaintiff appeals as of right from the trial court's order granting the parties joint legal and joint physical custody of the parties' minor child. Because the trial court's factual findings are not against the great weight of the evidence, and the trial court did not err in its decision regarding the school district in which the minor child should be enrolled, we affirm.

Plaintiff first argues that the trial court's factual findings with regard to the best interest factors set forth in MCL 722.23(c), (f), (g), and (h), are against the great weight of the evidence. We disagree.

We must affirm custody orders 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; *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007). The clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). In accord with the great weight of the evidence standard, we will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id.* Further, the trial court's determination on the issue of custody is reviewed for an abuse of discretion. *Id.*

In a child custody dispute, the trial court must "establish the rights and duties as to the child's custody, support, and parenting time in accordance with" the Child Custody Act. MCL 722.24(1). Even in an original custody determination, as is the case here, the trial court must consider whether an established custodial environment exists by virtue of temporary custody orders or a parenting arrangement agreed to by the parties. *Jack v Jack*, 239 Mich App 668, 670-671; 610 NW2d 231 (2000); *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991).

In this case, the parties do not dispute the trial court's finding that there is an established custodial environment with both parents. Consequently, in circumstances in which an established custodial environment exists with both parents, the party seeking to modify the custody arrangement must show by clear and convincing evidence that a change in custody is warranted. *In re AP*, 283 Mich App 574, 602; 770 NW2d 403 (2009); *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). In resolving the dispute, the trial court may award custody to one or more of the parties and provide reasonable parenting time according to the best interests of the child. MCL 722.27(1)(a), (b); MCL 722.27a(1).

In weighing the statutory best interest factors found in MCL 722.23, the trial court must make a factual finding regarding each of the factors to determine the custody arrangement. *Grew v Knox*, 265 Mich App 333, 337; 694 NW2d 772 (2005); *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); MCL 722.23; MCL 722.27. While the trial court must state its factual findings and conclusions on each best interest factor, the court need not include consideration of every piece of evidence entered and argument raised at trial. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005).

Regarding factor (c), MCL 722.23(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," the trial court found that this factor weighed slightly in defendant's favor. The trial court noted plaintiff's excellent work history and how she was the primary breadwinner during the time the parties lived together, but at the time of trial, was unable to work because of health concerns. The trial court also stated:

If it were not for plaintiff's health problems, she would clearly come out on top regarding the ability to provide for the child's necessities of life. However, the Court has concerns as to when, and under what circumstances, plaintiff will be able to do so. Defendant, although he has lesser qualifications than does plaintiff, is healthy and currently working. It is for this reason alone that this factor weighs slightly in his favor.

It is undisputed that, at the time of trial, plaintiff was not working and did not have immediate plans to return to work because of her health condition. Conversely, defendant was employed and attending school at the time of trial. Plaintiff argues that she planned to return to work and that her employer was willing to rehire her. Nevertheless, at the time of trial, there was no information on when this would take place. Further, despite plaintiff's sustained work history, the record supports the trial court's findings that defendant, unlike plaintiff, was healthy and currently working at the time of trial. Thus, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in slightly favoring defendant on this factor.

Regarding factor (f), MCL 722.23(f), "[t]he moral fitness of the parties involved," the trial court found that "[b]oth parties are morally fit." Plaintiff argues that this finding was against the great weight of the evidence because of defendant's history of marijuana use and defendant's inconsistent and exaggerated testimony, which plaintiff contends shows that defendant was untruthful and that the trial court erred in assessing his credibility. With regard to defendant's marijuana use, defendant testified that while he had previously smoked marijuana,

he had ceased in early 2009. Moreover, his court ordered drug test for this matter was negative. Further, plaintiff also admitted to having previously tried marijuana. Thus, the trial court's findings were not against the great weight of the evidence.

Plaintiff also claims that defendant provided inconsistent and exaggerated testimony on issues that included who transported the child to school; whether defendant was unaware of plaintiff's complaints about the child's hygiene; plaintiff's failure to inform defendant when the child is sick; defendant's issues with plaintiff's parents; and, defendant's claims that plaintiff disparages him in front of the child. Nevertheless, "[a]n appellate court recognizes . . . the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Plaintiff goes to great lengths to parse the transcript to support her argument. However, our purpose is not to consider plausible alternative interpretations of the evidence presented, rather, the test is whether the trial court's findings were against the great weight of the evidence. In each instance where plaintiff complains of defendant's inconsistent testimony, alternative interpretations of the testimony are possible. Further, plaintiff agreed at trial that aside from the marijuana issue, the parties were equal on their moral fitness. Thus, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in finding the parties equal on this factor.

Regarding factor (g), MCL 722.23(g), "[t]he mental and physical health of the parties involved," the trial court found:

The single most significant issue in this case is plaintiff's physical health. Plaintiff suffers from Crohn's disease, which is the inflammation of the intestines, and can affect the entire digestive system. Symptoms include: abdominal pain, diarrhea, rectal bleeding, weight loss and fever. Due to a problem in absorbing nutrients, [plaintiff] is frequently fatigued. In November 2007, she underwent surgical removal of a part of her intestines and also a colostomy. Further issues for plaintiff involve: adrenal insufficiency, arthritis, [hypocalcemia], osteopenia, and migraine headaches.

The parties differ in terms of how these medical problems affect plaintiff's ability to parent. Plaintiff acknowledges the seriousness of her condition, but believes that she can still function. Further, she views her[self] . . . as "getting a handle" on her health, and that she will ultimately be able to incorporate it into a normal life. She plans to go back to work. Until then, she plans to rely upon the help of her parents to tend to the child.

Defendant believes that plaintiff is putting an inappropriate gloss on her issues. He testified that he has seen plaintiff's condition on a daily basis when they cohabitated, and that she is a very sick person that is often incapacitated. He believes strongly that plaintiff's problems negatively impact the child, both because of plaintiff's inability to perform the practical necessities, and also the emotional impact of having an ill parent.

This issue is clearly a cause of contention that has resulted in orders that bar the parties from addressing plaintiff's health issues with the child.

The Court finds that plaintiff has significant medical issues that do impact her ability to parent and that it is a significant factor.

Plaintiff argues that the trial court's findings are against the great weight of the evidence because it credited defendant's exaggerated testimony about plaintiff's health condition. Plaintiff contends that the evidence shows, at the time of trial, she had a handle on her health condition and her health had not significantly impacted her ability to parent. Plaintiff was able to transport the child to and from school, as well as assist her with schoolwork, and to volunteer in the child's classroom. Plaintiff also argues that she should not be penalized for any minor effects that her health condition will have on the child.

However, the record shows that plaintiff had a serious medical condition that had previously hospitalized her for days at a time. Although plaintiff's condition may improve, at the time of trial, plaintiff did not demonstrate a history of good health. Rather, her physical condition impacted when plaintiff could supervise the child playing outside and forced her to leave her job. Moreover, defendant also provided testimony about how plaintiff's health has affected the child emotionally and has affected plaintiff's ability to provide practical necessities. Furthermore, plaintiff's argument regarding defendant's credibility is unfounded because the trial court is in the best position to judge credibility. *Zeeland Farm Services, Inc*, 219 Mich App at 195. Thus, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in favoring defendant on this factor.

Regarding factor (h), MCL 722.23(h), "[t]he home, school, and community record of the child," the trial court found: "The child is doing extremely well in school according to letters provided by the child's teacher and school counselor. This is an important factor as the Court is hesitant to disrupt a successful school situation. The Court is cognizant of plaintiff's contention that Linden Schools are superior."

Although the trial court did not explicitly state which party was favored by its findings on this factor, plaintiff contends that defendant was favored and this was error. Regardless, the trial court's findings were not against the great weight of the evidence. There is no dispute that the child enjoyed a successful year in kindergarten in the Kearsley School District. However, plaintiff contends that she was largely responsible for this success. Even if this were the case, plaintiff has failed to show that the trial court's findings were in error. Because of the child's success in the Kearsley School District, the trial court was disinclined to order a custody arrangement that would remove the child from the Kearsley School District. The trial court also acknowledged plaintiff's position regarding the superiority of the Linden School District. The trial court weighed the benefits of the child remaining in a successful school situation over the perceived superiority of the Linden School District. Again, because the evidence does not clearly preponderate in the opposite direction, plaintiff has failed to establish that these findings were against the great weight of the evidence.

Plaintiff also argues that the trial court erred in ordering the child to attend school in the Kearsley School District. We disagree.

When the parties share joint legal custody, they share the decision-making authority with respect to the "important decisions affecting the welfare of the child." MCL 722.26a(7)(b); *Lombardo v Lombardo*, 202 Mich App 151, 157; 507 NW2d 788 (1993). When a dispute arises

between joint custodial parents concerning important decisions affecting the welfare of the child, such as education, the trial court must determine the best interests of the child. *Id.* at 159-160. A decision concerning the child's schooling and education is an important decision affecting the welfare of the child. *Shulick v Richards*, 273 Mich App 320, 327; 729 NW2d 533 (2006) (stating that "educational decisions are clearly 'important decisions affecting the welfare of' the children"). Accordingly, "where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child." *Lombardo*, 202 Mich App at 159.

The parties disagreed regarding whether the child should attend school in the Kearsley School District or the Linden School District. The trial court, in making a decision between Kearsley and Linden School Districts, noted that "[b]oth parties are adamant regarding their school preferences. Each party lives approximately 30 minutes by car from the other school district." The trial court concluded that the child should remain enrolled in the Kearsley School District for two reasons. It stated:

First, because of plaintiff's health concerns, defendant is the only one who can be guaranteed to consistently see to the logistics of the child's school schedule. Linden schools would be overly burdensome to him and unworkable for the child. Second, the child has demonstrated success and is already settled in the Kearsley School District. These factors outweigh the plaintiff's position that Linde[n] Schools are superior.

These findings were not against the great weight of the record evidence. Although plaintiff has a different view regarding the severity of her medical condition and the effect that switching schools would have on the child, the trial court provided a reasoned conclusion for its decision that is supported by the evidence of record. Plaintiff has failed to show that the trial court's decision was in error.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering