STATE OF MICHIGAN

COURT OF APPEALS

WENDI SUE CARPENTER, Plaintiff-Appellant,	UNPUBLISHED November 16, 2010
v	No. 296924 Ottawa Circuit Court
ERIC BLANCHARD CARPENTER, Defendant-Appellee.	LC No. 09-063448-DC

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

This appeal involves an interstate child custody dispute under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.* Following a bench trial, the trial court determined that an established custodial environment did not exist with either party. The court awarded the parties joint legal custody of their two minor children, but awarded sole physical custody to defendant, who lives in Colorado. The court awarded plaintiff, who lives in Michigan, extended parenting time with the children during the summer, two weeks in October, the children's entire Christmas break, and alternating spring breaks, as well as "reasonable access" to the children by telephone or electronic means while the children were in defendant's care. Plaintiff appeals as of right, challenging the trial court's award of sole physical custody to defendant and the parenting time order. Because there were no errors warranting relief, we affirm the trial court's custody and parenting time decisions. However, we remand this case for the limited purpose of providing specific terms for the award of "reasonable access" to the children by telephone or electronic means.

We must affirm a trial court's custody and parenting time orders unless the trial court "made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; see also *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Under the great weight of the evidence standard, we must affirm the court's factual findings unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). In examining the evidence, this Court will defer to the trial court's credibility determinations. *Berger*, 277 Mich App at 705. The palpable abuse of discretion standard applies to the trial court's custody or parenting time award. *Id.* at 705. A court abuses its discretion under this standard when its decision is "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* at 705. Clear

legal error occurs when a trial court "incorrectly chooses, interprets, or applies the law." *Id.* at 706.

Plaintiff first argues that the trial court erred when it found that neither party had established a custodial environment with the children. Specifically, she argues that the evidence established that she had an established custodial environment.

The determination whether an established custodial environment exists is the first step in resolving a custody dispute because it governs the burden of proof. If a child has an established custodial environment, that environment may not be changed absent a showing by clear and convincing evidence that a change is in the child's best interests. MCL 722.27(1)(c). Conversely, if an established custodial environment does not exist, a preponderance of the evidence standard governs the trial court's custody decision. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981).

> An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. . . . A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order. An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort. [*Berger*, 277 Mich App at 706-707 (citations omitted).]

Whether there is an established custodial environment is a question of fact. *Id.* at 706.

In this case, the record supports the trial court's finding that, historically, the children had an established custodial environment with both parties, but that their situation changed when plaintiff left the family home in Colorado and returned to Michigan with the children in December 2008. Although plaintiff primarily had physical custody of the children after this move, there was evidence that their physical environment became unstable because of changes in the parties' parenting time, which included significant parenting time with defendant in Colorado in the summer of 2009, and substantial additional time toward the end of December 2009. There was also evidence that plaintiff attempted to psychologically and spiritually manipulate the children after she left Colorado by sharing claimed prophesies or visions with them in a manner that tended to damage their view of defendant.[1] There was also evidence that the children were thrust into situations affecting their psychological stability, such as being taken by plaintiff to a

[1] The record indicates that the trial court considered the merits of plaintiff's professed spiritual gift of prophesy or visions with neutrality, consistent with *Fisher v Fisher*, 118 Mich App 227, 234; 324 NW2d 582 (1982). The court determined that plaintiff's "prophetic words" were contrary to her previously-held convictions and more consistent with an attempt to justify her actions.

safe house for abused women and children in October 2009, without justification. The trial court accepted the testimony of Steven DeGroot, a psychologist hired by plaintiff to counsel the children after defendant's extended parenting item ended in the summer of 2009, that the children's emotional state was deteriorating due to the polarizing effects of the custody dispute, but the court concluded that plaintiff was more at fault for the polarization. Giving deference to the trial court's superior opportunity to evaluate the credibility of plaintiff and other witnesses, the trial court's findings are not against the great weight of the evidence. *Berger*, 277 Mich App at 705.

Although the trial court did not comment specifically on the children's journals when evaluating whether an established custodial environment existed, it recognized that the children had made negative comments about defendant. Its inference from the evidence that plaintiff had manipulated the children and, specifically, that the children temporarily acquiesced to plaintiff's attempt to demonize defendant, is consistent with the journals. In any event, the trial court was not required to comment on each item of evidence. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). Considering all of the evidence, the trial court's finding that the instability created by the custody dispute precluded either party from establishing a custodial environment marked by qualities of security, stability, and permanence is not against the great weight of the evidence.[2] See *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984); see also *Berger*, 277 Mich App at 706.

Plaintiff next challenges the trial court's findings regarding six of the statutory best interest factors stated under MCL 722.23. We review these findings under the great weight of the evidence standard. *Berger*, 277 Mich App at 705.

Plaintiff first challenges the trial court's finding that factor (b) strongly favors defendant. Factor (b) is "[t]he capacity and disposition of the parties involved 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." MCL 722.23(b). The trial court found that this factor favored defendant primarily because of his greater capacity to provide proper guidance for the children. However, the trial court also questioned plaintiff's ability to educate and raise the children in their religion or creed in light of testimony that plaintiff's claimed prophesies were not in accord with scripture. The court gave weight to evidence that plaintiff either lacked a moral compass to be truthful or the ability to distinguish fact from fiction.

The trial court found that several incidents supported its determination that plaintiff's inability to tell or discern the truth undermined her ability to guide the children as they developed and grew older. It found no guidance concerns with defendant. We disagree with plaintiff that

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[2] Although we find no error in the trial court's determination that an established custodial environment did not exist with either party, we note that the trial court also stated that even if an established custodial environment existed only with plaintiff, clear and convincing evidence supported its decision to award sole physical custody of the children to defendant. Thus, the determination whether an established custodial environment existed did not effect the trial court's ultimate custody decision.

defendant's limitations on the children's cell phone use, or the circumstances of the parenting time dispute in August 2009, establishes any error in the trial court's assessment of factor (b). Giving appropriate deference to the trial court's credibility determinations, the evidence does not clearly preponderate against the court's conclusion that factor (b) strongly favors defendant.

Plaintiff next challenges the trial court's finding that factor (d) favors defendant. Factor (d) is "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). This factor "calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ('the desirability of maintaining continuity')." *Ireland v Smith*, 451 Mich 457, 465 n 8; 547 NW2d 686 (1996). The stability of a child's home may be undermined in various ways; these include frequent moves, a succession of persons residing in the home, live-in romantic companions, or other potential disruptions. *Id.* at 465 n 9. Here, in making its determination, the trial court relied on plaintiff's conduct in changing churches after returning to Michigan, the fact that the children had to re-enroll in school after returning to Michigan, plaintiff's introduction of the children to her new boyfriend in the midst of the custody dispute, the turmoil that the children experienced because of plaintiff's inappropriate actions, such as plaintiff's unnecessary flight to a safe house and her emotional and spiritual pressure. Conversely, the court found that defendant's home environment was emotionally stable. Again, giving appropriate deference to the trial court's credibility determinations, we are not persuaded that the evidence clearly preponderates against the trial court's findings or decision to score factor (d) in favor of defendant.

We next consider plaintiff's challenge to the trial court's finding that factor (j) strongly favors defendant. Factor (j) is the "[t]he 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." MCL 722.23(j). Plaintiff argues that the trial court should have found that factor (j) did not favor either party, because of the contentious nature of the proceedings. We conclude, however, that plaintiff has not established anything about the parenting time dispute that arose in August 2009, or other circumstances that would preclude the trial court from finding that defendant promoted her relationship with the children. Indeed, there was evidence that the August 2009 dispute did not prevent plaintiff from ultimately receiving her parenting time with the children. She was also permitted to attend a birthday party for one child in Colorado that defendant had arranged. Conversely, the trial court could reasonably find from the evidence that plaintiff had engaged in a campaign to damage the children's relationship with defendant and drive him from their lives. The evidence does not clearly preponderate against the trial court's finding that factor (j) strongly favors defendant.

Plaintiff also challenges the trial court's finding that the "moral fitness" factor, MCL 722.23(f), favors defendant. The moral fitness factor, like other statutory factors, must relate to parental fitness. *Fletcher*, 447 Mich at 886-887. The material question concerns "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Id.* at 887. The type of morally questionable conduct relevant to this factor includes "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors" *Id.* at 887 n 6.

We note that, contrary to plaintiff's testimony at trial that defendant was abusive toward her, which the trial court found was not credible, plaintiff argues on appeal that both parties are good and faithful people, who should have been weighed equally with respect to moral fitness. The trial court weighed this factor in favor of defendant based on its determination that plaintiff lacked credibility and was willing to use any means necessary to undermine defendant's relationship with the children. Although these were considerations in the trial court's analysis of best interest factors (b) and (j), there is some natural overlap between best interests factors. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Therefore, it was appropriate for the trial court to weigh this factor in favor of defendant without expounding on the problems that it identified with plaintiff's lack of truthfulness and other conduct in its assessment of factors (b) and (j). And considering that the concerns identified in the court's analysis of factors (b) and (j) also impact plaintiff's moral fitness, the evidence does not clearly preponderate against the trial court's finding that factor (f) favors defendant.

The next factor challenged by plaintiff is "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court weighed the parties equally with respect to this factor, but gave defendant a slight advantage because plaintiff was responsible for the children's excessive absences from school after September 2009. It found that school absences were not a problem when the children were part of an intact family unit. Considering the evidence that the absences continued, even after a truancy officer became involved, and plaintiff's failure to demonstrate that medical documentation supported the children's repeated absences, most of which occurred on the same day, we are not persuaded that the evidence clearly preponderates against the trial court's finding that factor (h) slightly favors defendant.

Lastly, plaintiff has not established any factual or legal error by the trial court with respect to factor (l), which is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). Factor (l) is a catch-all provision. *Ireland*, 451 Mich at 464 n 7. It is appropriate for a trial court to use this factor to comment on various matters or arguments raised at trial, without expressly weighing it in favor of either party. *McIntosh*, 282 Mich App at 482-483. Here, the trial court did not weigh this factor in favor of either party, but rather used it to comment on the lack of evidence to "suggest" that a "split" custody arrangement would be proper and that "[p]laintiff's attempts to dislodge Defendant from the children's lives have been adequately addressed in prior factors." In its analysis of the best interest factors, the court ultimately treated factor (l), like the domestic violence factor in MCL 722.23(k), as a factor that did not apply to the case. Plaintiff has not identified any missing relevant factor that should have been weighed separately under factor (l). Thus, she has not shown either a clear legal error or that the "great weight of the evidence" clearly preponderates against the trial court's assessment of factor (l). *Berger*, 277 Mich App at 705-706.

To the extent that the substance of plaintiff's argument is directed at how the trial court ultimately applied the various best interests factors, including the children's reasonable preferences under MCL 722.23(i), to award sole physical custody to defendant, we review the trial court's ultimate custody decision for a palpable abuse of discretion. *Berger*, 277 Mich App at 705. A child's reasonable preference under MCL 722.23(i) is only one factor to be evaluated in determining the child's best interests. *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992). Further, a trial court need not give equal weight to each factor. *McCain v*

McCain, 229 Mich App 123, 131; 580 NW2d 485 (1998). The overriding concern is the child's best interests. *Fletcher*, 229 Mich App at 28.

Here, plaintiff has not established any error in the trial court's best interest findings. Based on those findings, the trial court's decision to award sole physical custody of the children to defendant was not a palpable abuse of discretion, even under a higher clear and convincing evidence standard. Accordingly, we must affirm the trial court's custody decision. MCL 722.28.

Plaintiff next argues that the trial court erred by failing to award her sufficient parenting time to promote a continuation of the relationship that she had with the children. MCL 722.27a governs the trial court's award of "reasonable parenting time." See *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). MCL 722.27a(1) requires that parenting time be awarded in accordance with the child's best interests and "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(6) lists several factors for a court to consider in awarding parenting time, but the overriding consideration is the child's best interests. *Deal v Deal*, 197 Mich App 739, 741-742; 496 NW2d 403 (1993).

Rather than award plaintiff monthly parenting time, the trial court awarded her extended blocks of parenting time consistent with the children's school schedule. Additional parenting time was permitted as the parties agreed. Plaintiff was also awarded "reasonable access" to the children by telephone or electronic means while they were in defendant's care. We find no palpable abuse of discretion in the parenting time schedule. The blocks of parenting time for summer and other school breaks, combined with plaintiff's reasonable access to the children by telephone or electronic means, fosters the children's best interests. Plaintiff was awarded parenting time in "a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). As whole, it is reasonable under the circumstances of the case.

We agree with plaintiff, however, that the trial court erred when it refused her request for specificity of the ordered "reasonable access" by telephone or electronic means. A trial court may craft a parenting time schedule with sufficient flexibility to accommodate the schedules of the parties and the children. See *Pickering*, 268 Mich App at 6. But MCL 722.27a(7) provides that "[p]arenting time shall be granted in specific terms if requested by either party at any time." "Specific" means "[e]xplicitly set forth; particular; definite." *Pickering*, 268 Mich App at 6, quoting *American Heritage Dictionary, Second College Edition* (1982).

In this case, although the trial court expressed a preference to see "how this thing shakes out" before attempting to craft a specific schedule of each party's telephone contact, because a request for specific terms of parenting time may be made at any time, and because the telephone and electronic access to the children was a material aspect of the parenting time order, the trial court committed a clear legal error on a major issue by declining plaintiff's request to establish specific terms for the award of "reasonable access." MCL 722.28. However, we disagree with plaintiff's additional claim that the trial court committed clear legal error by not specifying more regular time for the children to be placed in her care during the school year. A request for more parenting time is not a request for specific parenting time. Therefore, we affirm the trial court's parenting time order, but remand this case to the trial court for the limited purpose of providing

specific terms for the "reasonable access" by telephone or electronic means. The trial court may consider updated information and conduct any additional hearings or other proceedings it deems necessary to properly make this determination. *Ireland*, 451 Mich at 468-469.

Affirmed, but remanded for further proceedings concerning the parenting time award of "reasonable access" by telephone or electronic means in accordance with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, neither party may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello