STATE OF MICHIGAN

COURT OF APPEALS

NOEL LYNN KULIK, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED December 4, 2014
v	No. 322105 Oakland Circuit Court
DEREK ADAM EINHORN, Defendant/Counter-Plaintiff-Appellee.	Family Division LC No. 2012-802376-DP

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders awarding the parties joint legal and physical custody of the parties' minor child (born October 2012) and equal parenting time.[1] We affirm.

I. ESTABLISHED CUSTODIAL ENVIRONMENT

A. STANDARD OF REVIEW

Plaintiff first contends that the trial court erred in finding that there was an established custodial environment with both parties. The great weight of the evidence standard applies to the trial court's findings of fact. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "Thus, a trial court's findings regarding the existence of an established custodial environment . . . should be affirmed unless the evidence clearly preponderates in the opposite direction." *Id.*

B. ANALYSIS

MCL 722.27(1)(c) provides:

[1] Although plaintiff appeals from the child support award, she raises no argument on appeal pertaining to child support.

> The custodial environment of a child is established if over 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.

In other words, 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." *Berger*, 277 Mich App at 706. It may exist with both parents, one, or neither. *Id.*

Here, the trial court found that an established custodial environment existed with both parties. We find no error in the trial court's finding. Although plaintiff primarily cared for the minor child when she was born, defendant began exercising parenting time in December 2012 or January 2013. Beginning in May 2013, defendant cared for the child during his parenting time on Tuesday evenings, Thursdays overnight and Fridays, and alternate Sundays. Defendant has a bond with the child, feeds her, bathes her, takes her to swim classes, provides a room for her, comforts her, and loves her. He took the child to her first doctor's appointment and has taken her to urgent care. He also plays with her and changes her.

Based on the foregoing, we find no error in the trial court's established custodial environment finding. While plaintiff has an established custodial environment with the child, so too does defendant. The trial court was not in error.

II. CUSTODY DETERMINATION

A. STANDARD OF REVIEW

Plaintiff next contends that the change to joint physical custody and 50/50 parenting time altered the established custodial environment of the child and the trial court erred in finding that the modification was in the child's best interests. We affirm all custody orders unless the trial court's factual findings are against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error regarding a major issue. *Berger*, 277 Mich App at 705. The trial court's findings regarding each best interest factor, MCL 722.23, will be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* We defer to the trial court's credibility determinations, and the trial court has the discretion to accord varying weight to the best interest factors. *Id.* We review a trial's court's discretionary rulings—such as its award of custody—for an abuse of discretion. *Id.* The trial court's custody decision warrants the utmost level of deference. *Id.* at 705-706. We review questions of law for clear legal error, which occurs when a court incorrectly chooses, interprets, or applies the law. *Id.* at 706.

B. ANALYSIS

A modification of a custody order must be in the child's best interests. *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010). If the proposed modification will alter the established custodial environment, the movant must show by clear and convincing evidence that

it is in the child's best interest. *Id.* If, however, the proposed change will not alter the established custodial environment, then the movant must establish only by a preponderance of evidence that the change is in the child's best interest. *Id.*

The January 9, 2013 order gave the parties temporary joint legal custody. Although the order did not specify, it appears that plaintiff was given primary physical custody based on the parenting time schedule. Defendant was seeking joint legal and physical custody. Given that there was an established custodial environment with both parties, the modification of the order would not require altering the established custodial environment. Under joint physical custody and equal parenting time, the child would continue to be cared for, loved, and comforted by both parties. See MCL 722.27(1)(c); *Berger*, 277 Mich App at 706. Accordingly, defendant was required to show that the change was in the child's best interests by a preponderance of the evidence. See *Shade*, 291 Mich App at 23.[2]

The trial court found that the parties were equal on all applicable best-interest factors. Plaintiff, however, argues that factors (b) and (d) favored her. 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). Contrary to plaintiff's assertion, there was evidence that defendant had the capacity and disposition to—and did—provide love, affection, comfort, and care to the child. Defendant testified that he had a bond with his daughter, comforted her, and loved her. Thus, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored the parties equally. See *Berger*, 277 Mich App at 705.

Factor (d) is the "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). As discussed *supra*, the child spent time with defendant on Tuesday evenings, Thursdays overnight and Fridays, and alternate Sundays. Defendant provided a stable, satisfactory environment. Again, the trial court did not err in finding that it was desirable to maintain the continuity of both environments. The evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored the parties equally. See *Berger*, 277 Mich App at 705.[3]

Moreover, while the trial court did not explicitly find that factor (*l*) (any other relevant factor), favored defendant, in discussing this factor, it stated that defendant made significant efforts to be an equal part of the child's life while plaintiff tried to control defendant's relationship with the child as a result of her resentment. The court found that plaintiff did not

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[2] While the trial court applied the higher standard of clear and convincing evidence, the trial court's ultimate custody determination was not an abuse of discretion. See *Berger*, 277 Mich App at 705.

[3] Plaintiff mentions, without argument, that the trial court's finding regarding factor (e) (the permanence, as a family unit, of the existing or proposed custodial home or homes), MCL 722.23(e), was against the great weight of the evidence. There was no testimony regarding the permanence of either party's home.

even notify defendant when she was in labor, and defendant was not allowed to see his child for the first time in the hospital. Taking this finding into account, defendant established by a preponderance of the evidence that the change was in the child's best interests. The trial court did not abuse its discretion. See *Berger*, 277 Mich App at 705.

III. PARENTING TIME

A. STANDARD OF REVIEW

Lastly, plaintiff contends that the trial court erred in entering the parenting time schedules. "[A]ppellate review of parenting-time orders is de novo, [but] this Court must affirm the trial court unless its findings of fact 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." *Berger*, 277 Mich App at 716.

B. ANALYSIS

The best interest of the child govern parenting time determinations. *Berger*, 277 Mich App at 716. "Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Shade*, 291 Mich App at 31.

Plaintiff's assertion that the trial court improperly delegated its decision-making authority to the Friend of Court (FOC) lacks merit. The trial court considered the best-interest factors and the parenting time factors and determined that a 50/50 parenting time schedule was in the child's best interests. The trial court left the parties to determine which days they would exercise their parenting time. The parties voluntarily went to the FOC for help with this determination. When the parties could not agree, the FOC created two schedules. In adopting the recommendations, the trial court did not improperly delegate its authority.

Plaintiff contends that the schedule is not equal and that it is not age and developmentally appropriate.[4] Contrary to plaintiff's assertion, both parties received five consecutive overnights in each two week period. While plaintiff will not receive Friday parenting time during the day, and defendant therefore has more consecutive time with the child, that is because defendant does not work on Fridays and plaintiff does. Although plaintiff does not have the exact same time as defendant, it is not clear how this would be possible given her work schedule. Also, defendant will no longer have Fridays once the child attends school.

Plaintiff highlights that the FOC referee characterized the schedule as "arbitrary."[5] However, it appears that the referee merely was alluding to the selection of which days each

[4] Our analysis is limited to the second schedule. The first schedule, which applied before the child was two years old, is moot now that the child has turned two.

[5] It appears that the referee was referring to the first schedule. When referencing the second schedule, the referee stated that she "was just trying to throw something out there."

party received. Further, aside from the fact that defendant is able to spend his Friday parenting time with the child, the schedule gives the parties essentially equal parenting time. Also contrary to plaintiff's assertion, the trial court considered the age of the child, as well as expert testimony. The fact that two different schedules were entered indicates that the child's age was taken into account. Moreover, the child is no longer an infant, so plaintiff's expert testimony about what is appropriate for a child under 18 months old is moot. The trial court also suggested that the child had multiple primary caregivers, including defendant, which suggests the court did not credit the expert's testimony regarding overnights away from plaintiff.

Further, the expert testified that long days with multiple, consecutive, overnights could begin at two years old. Merely because plaintiff highlights evidence favorable to her does not mean that the trial court erred. As the trial court found, plaintiff's expert never met with the child nor defendant, had no personal knowledge of the parties in this case, and all information the expert "obtained was relayed to her by Plaintiff Mother."

We discern no clear legal error on a major issue or abuse of discretion that warrants reversal of the parenting time order. See *Berger*, 277 Mich App at 716.

IV. CONCLUSION

We find no error in the trial court's established custodial environment analysis, custody determination, or parenting time decision. We have reviewed all remaining claims in the parties' briefs and find them to be without merit. We affirm.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Talbot