STATE OF MICHIGAN

COURT OF APPEALS

SHAWNA MARIE SHIVELY, Plaintiff-Appellant,	UNPUBLISHED November 17, 2015
v	No. 327247 Ionia Circuit Court Family Division
LANCE WAYNE WILLARD, Defendant-Appellee.	LC No. 2013-029775-DS

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

In this child custody dispute, Mother Shawna Marie Shively appeals as of right the April 20, 2015 order appointing her child's paternal grandmother, Debra Andrews, the child's third-party custodian. We affirm.

I. BACKGROUND

Mother and father, Lance Wayne Willard, are the unmarried parents of a minor child born September 6, 2012, who is the subject of the litigation in this case. The child has been the subject of numerous Children's Protective Services reports and was at one point a ward of the court. Both parents have been incarcerated during her brief life. Father was sentenced to 10 months incarceration for assaulting mother when the child was two months old. Mother was most recently sentenced to a jail term from June 2014 to November 2014 for violation of probation for a larceny conviction. While mother was initially awarded sole physical custody, the last court order in place before the order granting paternal grandmother third-party custody gave father sole physical custody. At that time, father resided with his mother, Andrews. That order, entered on August 6, 2014, arose from father's petition filed when mother was incarcerated in June 2014. Father, also obtained a no contact order. Mother sought parenting time and custody after her 2014 release. The matter was referred to a referee. On January 8, 2015, the court ordered supervised parenting time for mother with Andrews as the supervisor until the no contact order expired. The referee found that the child suffered from the effects of her prior drug exposure and was receiving early-on services. Mother appealed the order.

Prior to the circuit judge hearing to review the January 8 order, mother and Andrews engaged in a verbal altercation in front of the minor child after mother's request to leave with the

child was refused. An Ionia Friend of the Court Specialist reviewed the incident and suggested to the court that a different parenting supervisor be appointed.

On March 27, 2015, the circuit judge held a de novo hearing to address mother's motion for reconsideration of the January 8 order. The court noted that at the time of that hearing father was incarcerated for a probation violation and that Andrews had been taking care of the minor child since the father's arrest. Instead of granting physical custody to mother, as mother had requested, paternal grandmother Andrews was appointed temporary third-party custodian of the minor child. The court found that an established custodial environment existed with Andrews and that it was in the minor child's best interests to remain with Andrews until further order of the court. Mother was again granted supervised parenting time, this time with Patricia Hart, an independent parenting time supervisor, overseeing the visits. Mother appeals the court's appointment of Andrews as the custodian of her minor child.

II. STANDARD OF REVIEW

All orders and judgments of the circuit court concerning child custody and parenting time are to be affirmed unless the 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; *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005).

III. CHILD CUSTODY ANALYSIS

A. JURISDICTION

Mother first argues that the trial court did not have the jurisdiction to enter an order transferring custody to Andrews. We disagree.

Mother's argument is based on her misapplication of MCL 722.26c(1). That statutory section provides for the circumstances under which a third person may initiate a custody action. In this case, Andrews, the third person, did not initiate a custody action. The court, on its own motion, placed the minor child with Andrews. The trial court's authority to award Andrews custody in this case is found in MCL 722.27(1)(a). MCL 722.27(1)(a) provides, in part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age....

In *In re Anjoski*, 283 Mich App 41, 63; 770 NW2d 1 (2009), this Court held that "once a custody dispute has been properly initiated, it is within the court's authority to award custody of the child to a third party pursuant to MCL 722.27(1)(a) if it is appropriate to do so under the particular facts of the case."

At the time of the March 27, 2015 hearing, the minor child's father was incarcerated for a probation violation and mother's request changed from one for unsupervised visitation to a request for sole physical custody. Mother acknowledges that her request for the minor child to be placed with her created a "custody dispute" between her and father. Because a custody dispute had been initiated, the trial court had the authority to award Andrews, a third-party, custody of the minor child under MCL 722.27(1)(a). *Anjoski*, 283 Mich App at 63.

B. CUSTODIAL PRESUMPTION

Mother next argues that the trial court mistakenly applied a custodial presumption in favor of Andrews instead of applying a presumption in favor of mother as the minor child's natural parent. Again, we disagree.

MCL 722.25(1) states:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is shown by clear and convincing evidence.

In *Heltzel v Heltzel*, 248 Mich App 1, 27; 638 NW2d 123 (2001), this Court explained that because of the constitutional nature of a parent's liberty interest in her child, a "strong presumption exists . . . that parental custody serves the child's best interests." MCL 722.25(1) however, grants the court authority to award custody to a third-party, in spite of the parental presumption, when custody to a parent would be contrary to the child's best interests.

MCL 722.27(1)(c) further provides in part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
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> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age.... The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. 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.

Once a child-custody action is before the court, the court has authority to modify or amend its prior orders concerning custody based on proper cause shown or a change in circumstances, such as incarceration of the custodial parent. The parental presumption does not require that in circumstances like this that custody must be given to mother.

C. THIRD-PARTY CUSTODY

The Court found that an established custodial environment existed with Andrews. In *Heltzel*, the Court held that

> custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person. [248 Mich App at 27].

"Whether an established custodial environment exists is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). The fact that the prior custody order awarded custody to father does not preclude the existence of an established custodial environment with Andrews with whom father lived when he was given custody. The court found, and the record supports, that Andrews had been the primary caretaker of the child for 18 months of the child's 30 months of life. The trial court also found that the minor child looked to Andrews and that Andrews provided a stable and safe environment for the child. The fact that both parents were jailed for significant portions of the child's life, and mother had a substance abuse problem throughout the child's life, provides additional support for the court's finding. We cannot conclude from this record that the trial court's finding of an established custodial environment with Andrews was "against the great weight of the evidence." *Id*.

The trial court also found that the best interests factors in MCL 722.23 favored placement of the minor child with Andrews. MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
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> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The 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.
>
> (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.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(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.

(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 and encourage 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 factor considered by the court to be relevant to a particular child custody dispute.

The trial court found that factors (a) and (c) were equal between mother, father, and Andrews, that factors (g) and (k) equally favored mother and Andrews, that factor (b) favored Andrews, and that factors (h) and (i) did not apply in this case.

Mother argues that the trial court should not have considered the "marginal" benefits the minor child may have had under factors (d), (e), and (j)[1] individually based on *Heltzel*'s warning "that it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him." *Heltzel*, 248 Mich App at 28. However, *Heltzel*'s requirement that more than a marginal benefit be shown before placing children with a third-party is to be applied in the context of a trial court's consideration of all the relevant best-interest factors. *Id*. at 27-28. Thus, the trial court was allowed to consider each factor's "marginal" benefit in the context of the other best-interest factors when it made its ultimate conclusion regarding custody. *Id*. The court did so in this case and made a determination that in these emergent circumstances that appointing Andrews as temporary custodian was in the minor child's best interests.

[1] Mother does not raise any additional challenge to the trial court's findings regarding factor (j), and trial court's finding that best-interest factor (j) favored Andrews was not against the great weight of the evidence. MCL 722.28.

Mother also argues that several of the trial court's findings of fact were against the great weight of the evidence. In regards to factor (d), mother correctly notes that there was no evidence that she "moved from house to house, from boyfriend to boyfriend, or from town to town." However, the issue is not mother's stability but the child's. Even if the court's focus was on the stability of Andrews and mother, the record supports the court's finding that mother's longest non-custodial residence of 4 1/2 months paled in comparison to Andrews' years of residence in a single home. Most importantly, the child lived with or was cared for by Andrews at Andrews' stable residence for most of her life. The trial court's finding that best-interest factor (d) favored Andrews was not against the great weight of the evidence. MCL 722.28.

Concerning factor (e), mother argues that "[t]he fact that a parent has been incarcerated does not indicate whether he or she can provide a permanent home suitable for a child." We agree. However, mother had a very brief history of residential or employment stability in the context of her very recent incarceration, such that the trial court's finding that mother's proposed custodial home lacked permanence was not erroneous. The trial court's finding that best-interest factor (e) favored Andrews was not against the great weight of the evidence. MCL 722.28.

Regarding factor (f), mother argues that the trial court erred because it did not find "*any* reason that the [mother's] criminal history would affect the [minor child] in any way." Mother was convicted of larceny and chose to use marijuana in violation of MCL 333.7404(2)(d). It is noteworthy that the minor was discovered to have had methamphetamines in her system at five months of age when she lived with mother and her maternal grandmother. Mother's continued use of marijuana was relevant to her moral fitness as a parent, particularly where that behavior had affected the child in the past. *Fletcher v Fletcher*, 447 Mich 871, 887 n 6; 526 NW2d 889 (1994). The trial court's finding that best-interest factor (f) favored Andrews was not against the great weight of the evidence. MCL 722.28.

IV. CONCLUSION

The trial court found and we do not disagree, that custody to a third-party in this instance was appropriate where the existence of an established custodial environment and the best interests factors, taken together demonstrated that the child's best interests were served by placement with Andrews. *Heltzel*, 248 Mich App at 27. The trial court did not clearly err in concluding that there was clear and convincing evidence that it was in the minor child's best interests to place the child in Andrews' custody as a "safety net" while the mother and father worked on their issues to become better parents for the minor child. The court's conclusion was consistent with the Supreme Court's requirement that the trial court find by clear and convincing evidence that it was "not in the child's best interests under the factors specified in MCL 722.23 for the parent to have custody." *Hunter*, 484 Mich at 265. We also do not find that the court's decision was "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" as required for a finding that the trial court's conclusion was an abuse of discretion. *Berger*, 277 Mich App at 705.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray