STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH BRYAN EGAN, Plaintiff-Appellant,	UNPUBLISHED June 28, 2016
v	No. 330110 Marquette Circuit Court Family Division
MELISSA LEHTOMAKI, Defendant-Appellee.	LC No. 12-050646-DC

Before: STEPHENS, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Plaintiff, Joseph Eagan, appeals by right an order granting defendant, Melissa Lehtomaki's, motion for modification of custody, resulting in defendant's sole physical and legal custody of the parties' minor child, CE. For the reasons stated below, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The minor child was born in 2011 and the parties separated in 2012, at which time defendant raised allegations that, among other things, plaintiff behaved in an inappropriate, sexual way toward CE. An investigation by Child Protective Services (CPS) failed to substantiate the allegations and, after several months of services, the CPS case was closed in early 2013. In October of that year, the court entered a stipulated custody order giving the parties joint legal and physical custody of CE. The order provided that CE would live with defendant during the week and attend school in Marquette and that plaintiff would pick her up at 6:00 p.m. on Friday and return her by 5:00 p.m. on Sunday. The parties lived together on-and-off from October 2013 until July 2014, when they separated again. After a period of instability in his living arrangements, plaintiff moved back in with his mother in mid-August 2014 and began to exercise the weekend parenting time provided for in the custody order.

In early May 2015, defendant filed an ex parte motion to suspend plaintiff's parenting time in response to a disclosure by CE of sexual abuse by plaintiff. The court granted the motion. Two days later, plaintiff filed a motion to modify the parenting-time terms of the parties' custody order to obtain more parenting-time with CE and more assistance with transportation to and from parenting-time from defendant. After a joint hearing on the two motions, the court allowed plaintiff to have non-overnight parenting time on Sunday, supervised by his mother, and scheduled a June 18, 2015 follow-up hearing on plaintiff's motion for

parenting-time modifications, under the assumption that the CPS and law enforcement investigations of the most recent allegations against plaintiff would be concluded by then. However, this follow-up hearing was cancelled by stipulation of the parties after defendant obtained new counsel.

Subsequently, defendant filed a motion to modify custody, alleging among other things that CE suffered sexual abuse while in plaintiff's care and that she was in danger of further sexual abuse. At the evidentiary hearing on the motion, several witnesses testified, including the parties. Defendant reiterated the allegations surrounding the parties' original breakup in 2012 and the revelations of May 2015 that led to her ex parte motion and, eventually, to her motion to modify the existing custody order. Plaintiff systematically denied each of defendant's allegations. He stressed that he had cooperated fully with the CPS and law enforcement investigations and that none of defendant's allegations had been substantiated or resulted in the filing of criminal charges.

After determining that proper cause or a change of circumstances existed, the trial court rendered its findings in detail on the record, concluding that an established custodial environment existed with defendant. The court then conducted a best-interest analysis and concluded, based on its findings of fact and credibility determinations, that a preponderance of the evidence indicated that the proposed change in custody would be in CE's best interests. In a corresponding order, the court granted defendant's motion to modify custody to award her sole physical and legal custody and continued plaintiff's once weekly, supervised parenting time. It is from this order that plaintiff now appeals.

II. ANALYSIS

Plaintiff contends on appeal that the trial court erred when finding that CE had an established custodial environment with defendant but not plaintiff, which affected the burden of proof with respect to a change of custody analysis, and that the trial court's findings regarding the statutory best interest factors were against the great weight of the evidence. We disagree.

The Child Custody Act, MCL 722.21 *et seq*., governs custody disputes, is intended to promote the best interests of the child, and is to be liberally construed. MCL 722.26(1). In order to modify an existing custody order, the moving party must first show by a preponderance of the evidence that proper cause or a change of circumstances exists to modify the order.[1] *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). The court must then consider whether there is an established custodial environment, which in turn determines the movant's burden of proof for changing custody. *Id*. A party seeking to change an established custodial environment must prove by clear and convincing evidence that such change is in the best interests of the child. MCL 722.27(1)(c). If there is no established custodial environment, *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995), or if the court determines that the established custodial environment is with the moving party, the moving party's burden of

[1] Plaintiff does not raise a cognizable challenge to the trial court's determination that proper cause or a change of circumstances existed to revisit the existing custody order.

proof on the best-interest factors is a preponderance of the evidence, *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001).

This Court reviews a trial court's determination regarding the existence of an established custodial environment and its findings regarding the best-interest factors under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705, 715; 747 NW2d 336 (2008). "[U]nless the evidence clearly preponderates in the opposite direction," we will affirm the trial court's findings. *Id.* at 705. Our analysis of the trial court's findings is informed by an accepted deference "to the trial court's credibility determinations." *Id*.

This Court affirms all custody orders "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "An abuse of discretion exists when the trial court's 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." *Berger*, 277 Mich App at 705.

A. ESTABLISHED CUSTODIAL ENVIRONMENT

MCL 722.27(1)(c) provides in pertinent part that:

> 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.

"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. If the trial court determines that an established custodial environment in fact exists, it makes no difference whether that environment was created by a court order, without a court order, or in violation of a court order. *Hall v Hall*, 156 Mich App 286, 288-289; 401 NW2d 353 (1986).

Plaintiff contends that CE had an established custodial environment with both parents because the October 2013 stipulated custody order granted the parties joint legal and physical custody, the parties lived together for a while after the October 2103 order, and when they later separated, plaintiff exercised the specific parenting time awarded by the order. As noted above, a custodial environment is established by the custodial relationship between the parent and the child, not by court order. See, *id*. See also *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993) ("Custody orders, by themselves, do not establish a custodial environment."). Further, plaintiff's contention that the trial court erred by basing its determination on CE's age and the fact that she resided primarily with defendant is unpersuasive because these are among the type of facts considered when determining whether a custodial environment is established. MCL 722.27(1)(c); *Berger*, 277 Mich App at 706.

The record evidence does not clearly preponderate against the trial court's finding that CE had an established custodial environment with defendant alone. The child was four and a half years old at the time of the evidentiary hearing, and the record shows that, for the 15 months prior to the hearing, defendant provided CE with a stable home, education, and healthcare. Plaintiff testified that he tried to be involved in CE's education and healthcare, only to be hindered by defendant. However, plaintiff's testimony reveals that he did not know where CE attended Head Start, did not know her teacher, and had not attempted to contact the school. To the extent that plaintiff may have been involved in CE's doctor visits after he and defendant broke up in 2012, such involvement ceased after plaintiff and defendant broke up again in July 2014. Plaintiff's testimony about the one call he made to CE's doctor suggests that his query was primarily focused on determining the veracity of defendant's reason for cancelling his parenting time.

Again, "[w]hether an established custodial environment exists is a question of fact that [this Court] must affirm unless the trial court's finding is against the great weight of the evidence." *Berger*, 277 Mich App at 706. Given this standard of review, the record, and this Court's deference to the trial court's special opportunity to judge the credibility of the witnesses, it cannot be said that the evidence preponderates in the opposite direction of the trial court's ruling.

B. BEST INTERESTS

After determining that proper cause or a change of circumstances existed and that CE's established custodial environment was with defendant, the court was required to consider the statutory factors listed in MCL 722.23 to determine whether defendant proved by a preponderance of the evidence that modification of the existing custody order was in CE's best interests. *Foskett*, 247 Mich App at 1. In an opinion from the bench, the trial court found the parties "relatively equal" with regard to factors (a), (b), (c), (e), and (j), considered CE too young to make any findings under factors (h) and (i), and made no findings under factors (g), (k), or (*l*).[2] However, the court found that factors (d), the length of time the child has lived in a stable, satisfactory environment and the desirability of its continuation, and (f), the moral fitness of the parties, favored defendant. Without naming any specific factor, plaintiff takes issue with the trial court's factual findings relevant to the latter two factors.

With regard to factor (d), the court reasoned that defendant had provided greater long-term stability and a satisfactory environment for CE than plaintiff had. Defendant provided a home for the child at the same address for three and a half years, while plaintiff lived there on and off from October 2013 until July 2014, camped, and stayed with friends for four to six weeks thereafter before finding more stable housing with his mother. Given this record, it cannot be said that the evidence clearly preponderates against the trial court's decision. *Berger*, 277 Mich App at 705.

[2] The trial court's written order purported to make findings, without elaboration, as to factors (g) and (k). Those findings are not challenged on appeal.

With regard to factor (f), the court found, based on defendant's testimony and the testimony of her corroborating witnesses, "that more likely than not, [plaintiff] has engaged in some of the aberrant and inappropriate sexual behaviors and acting out and fantasies that have been described here on the record . . . ." Finding defendant "to be credible in her testimony of these events and observations," the court stated that "those findings[,] regardless of other findings in the case to which the Court gives great weight, clearly favor making [defendant] the primary custodial parent here."

The court's comments make it clear that the court based its conclusions regarding the parties' relative moral fitness on its credibility determination. Plaintiff's claim that the trial court based its credibility decision simply on defendant's courtroom demeanor is belied by the court's explanation that, in making its credibility determination, it observed all the witnesses, taking into account their interests, considered the circumstantial evidence, and evaluated the entire record. Further, plaintiff's contention that the trial court failed to consider his credibility ignores that, implicit in the court's conclusion that defendant is "a credible witness and credible recounter of the events that occurred in her relationship with" plaintiff, is the conclusion that plaintiff was not a credible witness with respect to these events and circumstances.

At the heart of plaintiff's argument on factor (f) is his contention that the trial court should have believed him rather than defendant with regard to this best-interest factor. Plaintiff stressed in his testimony before the trial court, and reiterates in his brief to this Court, that defendant's allegations that he behaved inappropriately toward CE were never substantiated, that he has never been charged with a sex crime, and that defendant presented no corroborating evidence of his alleged misconduct.[3] Further, plaintiff asserts that he gave the trial court plausible reasons why defendant would make such allegations against him, while also testifying to defendant's "significant substance abuse issues" and his concern "regarding her significant others."

Plaintiff's attack on the trial court's credibility determinations and the weight it assigned to factor (f) is without merit. The moral fitness factor relates to the fitness of the person as a parent, not to one parent's moral superiority over the other. *Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994). Although our Supreme Court has not "promulgated standards of moral conduct," it has referred with approval to a list of conduct that "represents the type of morally questionable conduct relevant to one's moral fitness as a parent." *Id*. at 887 n 6. Included on the list is precisely what plaintiff was accused of in the instant case—"sexual abuse of children . . . ." *Id*. The court heard testimony that plaintiff had expressed various fantasies about engaging in sexual conduct with children, that the parties' child had told defendant about plaintiff's inappropriate conduct with her, that the child had redness and swelling in the vaginal area and frequent urinary tract infections, and that plaintiff had engaged in other disturbing sexual behaviors that implicated his fitness as a parent. The court heard plaintiff systematically deny any such fantasies or inappropriate behavior toward CE or others and assert that defendant

[3] Plaintiff concedes that corroborating evidence was not required for defendant to meet her burden of proof and the trial court to make factual findings on the challenged issue.

fabricated the allegations out of vengeance. It is within the trial court's power to weigh conflicting evidence, and we "defer[] to the ability of the trial court to determine the credibility of conflicting witnesses." *Barringer v Barringer*, 191 Mich App 639, 643; 479 NW2d 3 (1991). Accepting the trial court's credibility decision in light of supporting evidence, we conclude that the trial court's finding regarding factor (f) was not against the great weight of the evidence.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher