STATE OF MICHIGAN

COURT OF APPEALS

ASHLEY LYNNE KEESLER, Plaintiff/Cross Defendant-Appellant,	UNPUBLISHED March 16, 2017
v	No. 335407 Wexford Circuit Court Family Division
THOMAS RAY KEESLER, Defendant/Cross Plaintiff-Appellee.	LC No. 2015-026174-DM

Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiff-mother appeals as of right from the parties' divorce judgment, contesting the trial court's awarding both parties joint physical and legal custody of their child. The trial court divided parenting time equally on an alternating four day, three day rotation. We affirm.[1]

Plaintiff initially argues that the trial court erred in determining that an established custodial environment existed with both parents. An established custodial environment exits " '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' . . . consider[ing] the 'age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship . . . .' " *In re AP*, 283 Mich App 574, 601; 770 NW2d 403 (2009), quoting MCL 722.27(1)(c). Such an environment can exist with one parent or both. *Id.* at 601-602.

[1] We must affirm custody orders entered by a trial court unless we conclude "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. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

In this case, the trial court was presented with conflicting testimony about the involvement of the parties in the care and custody of their child. After considering the record, we agree with the trial court, which concluded that ample evidence suggested that the child looked to both parents to provide "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Although the parties had disparate views on defendant-father's involvement in the child's life prior to the parties' separation, there is evidence showing that the child was cared for by both parents during the child's first three months. Plaintiff cared for the child while defendant worked, but when home, defendant helped prepare meals, played with the child, and changed his diapers. After the separation, defendant quickly filed an emergency motion because plaintiff was not allowing him to see the child. Defendant consistently exercised his parenting time established by the order resulting from his emergency motion. Defendant testified that the child was attached to both plaintiff and himself, and a Child Protective Services worker testified that defendant was very attentive and interactive with the child during parenting time. The testimony also established that defendant's home provided an appropriate environment for the child. Dr. Byron Barnes, a psychologist that tested both parents, opined that defendant is "an appropriate, warm, nurturing, appropriate caregiver."

To the extent that the trial court's findings and conclusions were based on credibility determinations,[2] we defer to its superior position to make such assessments. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). The trial court's determination that an established custodial environment existed with both parties was not erroneous.

Plaintiff next argues that the trial court clearly erred in its determination on several of the best interest factors. The best interest factors relevant to this appeal are:

> (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.
>
> * * *

[2] The hearing referee commented early on that she was suspicious that one of the parties was not being truthful about the family dynamic given the large discrepancy in their versions of the circumstances.

(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. [MCL 722.23.]

The trial court found that factor (c) ("capacity and disposition . . . to provide . . . material needs") favored defendant because he worked two jobs before obtaining a promotion that allowed him to work only one, while plaintiff has been voluntarily unemployed, "living with her parents and making do with selling" items on E-Bay. This determination is reasonable, well supported by the evidence, and consistent with case-law.

In *McCain v McCain*, 229 Mich App 123, 126-127; 580 NW2d 485 (1998), we determined that it was not erroneous for the trial court to have determined that factor (c) favored the defendant-father when the plaintiff was willfully under-employed, though capable of providing for her children. We determined that it was not against the great weight of the evidence "to determine that [the plaintiff's] actions did not reflect a disposition to provide for the material needs of the children even though the capacity is clearly present." *Id.* at 126 (internal quotations omitted). The same is true here. While a court should not place "excessive reliance on the economic circumstances of the parties" when considering factor (c), *Dempsey v Dempsey*, 409 Mich 495, 497-498; 296 NW2d 813 (1980), nothing in the trial court's articulation of the factors suggests that economic considerations overwhelmed all other best-interest factors. As such, the trial court's determination that factor (c) favored defendant was not clearly erroneous.

Next, plaintiff claims that the trial court erred in determining the parties were equal with respect to factor (d) ("the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity") and, in some respects, tangentially challenges the same determination under factor (e) ("[t]he permanence, as a family unit, of the existing or proposed custodial home").[3] However, we find no error in the trial court's conclusion that neither party "has either a current or predictable lifestyle stability that will . . . give one an advantage over the other." This is consistent with evidence on the present circumstances of this recently separated couple. Their environments were in flux when the court ruled. Moreover, the fact that they had only recently settled into new home environments strongly suggests that those environments were not stable.

The trial court noted that the facts articulated in factor (g) ("[t]he mental and physical health of the parties involved") "also play very much into" factor (j) ("[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child

[3] See *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996) (observing that "there clearly is a degree of overlap between" the two factors).

relationship between the child and the other parent") and determined that defendant fared better under these factors. Plaintiff took, by some counts, over 200 pictures of the child, some of which were at best insensitive to the child's personal integrity, in an attempt to document what she believed were uncommon injuries sustained by the child while in defendant's care. Testimony from CPS workers indicated that the sheer number of pictures was unusual.

Additionally, Dr. Barnes testified that, in his opinion, plaintiff needed to work with someone who could help her to understand that she cannot parent when the child is not in her possession, and "to have a more realistic understanding of what really constitutes abuse and neglect." Barnes explained that plaintiff's psychological testing "raised some pretty serious concerns about her ability to regulate and control her emotional and/or behavioral responses. . . . The data would indicate difficulties with regulation. Difficulties with control. Getting upset, being reactive, and responding impulsively." By contrast, Barnes opined that defendant has "[g]ood impulse control capacity," that he "[t]ook responsibility," and that he was "credible, very forthcoming." Again, deferring to the trial court's credibility determinations, we conclude that it did not clearly err when it determined that factors (g) and (j) favored defendant.

Plaintiff also argues that the trial court erred in determining that factor (k) (domestic violence) favored neither party. She notes that defendant admitted he had once restrained her and damaged their home. The trial court also noted the admission. But the trial court explained that it believed "much of what Ms. Keesler said in terms of the ruining of the pictures[4] and so forth was not credible." The fact that defendant made his admission is consistent with Barnes's testimony that he "[t]ook responsibility." And the trial court was not required by law or reason to conclude that defendant's admission substantially outweighed the rest of the evidence on the volatility of the parties' domestic relationship, even though each denied the domestic violence allegations made by the other. Weighing competing evidence in light of credibility determinations is fundamental to the trial court's function. The trial court did not clearly err when it determined that neither party would be favored under factor (k).

Finally, with respect to factor (*l*) (the catch-all factor), plaintiff argues that the trial court erred when it concluded that, although her decision not to work, compared with defendant's work schedule, favored her, it did not "outweigh the other factors which play in favor of" defendant. As this argument concerns the trial court's ultimate disposition, we conclude that the trial court did not err in its determination that factor (*l*) favored plaintiff.

Plaintiff claims that the award of joint custody and the accompanying parenting time award "effectively designated a third party caregiver as having paramount rights to the child over the natural parent." Defendant is working and will require aid in caring for his child, but childcare arrangements should be evaluated based on the circumstances of individual cases, *Ireland v Smith*, 451 Mich 457, 467-468; 547 NW2d 686 (1996), not with an eye toward which parent is more readily available. The trial court concluded that, even considering defendant's work schedule, there was no principled reason that the parties could not share joint legal and

[4] Contradictory testimony was provided by the parties about defendant's allegations that plaintiff had damaged paintings once owned by his great-grandmother.

physical custody. "It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1). Given the trial court's determination on the best interest factors, which were not erroneous and most of which favored defendant, plaintiff has failed to show that the trial court's ultimate decision was an abuse of discretion.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola