STATE OF MICHIGAN

COURT OF APPEALS

CORY ALAN LESSARD, Plaintiff-Appellant,	UNPUBLISHED June 13, 2017
v	No. 336156 Marquette Circuit Court
ABRIELLE MAE LONDO, Defendant-Appellee.	LC No. 16-054368-DP

Before: GADOLA, P.J., and TALBOT, C.J. and GLEICHER, J.

PER CURIAM.

At issue in this case is the custody of a now 16-month-old baby. She was conceived during her parents' brief tryst while both transiently resided in Florida. Mother and father now live five hours apart, necessarily limiting the noncustodial father's contact with his child. The father filed suit seeking custody of his daughter based on a laundry list of complaints regarding his former girlfriend. The circuit court determined that it was in the child's best interest to remain with her mother while gradually increasing her visits with her father. We affirm this judgment.

I. BACKGROUND

Cory Lessard and Abrielle Londo met on the Internet and shared a brief romantic relationship. Both were living in Florida, where Lessard was stationed for training with the United States National Guard. Lessard claimed that he broke up with Londo when he discovered that she had lied about her career path and was working as a topless dancer. Londo asserted that she ended the relationship when she learned that Lessard had another girlfriend. Londo did not realize she was pregnant until after the two severed ties. Londo returned to her hometown of Marquette where her parents could assist with the baby. Lessard was subsequently stationed in Duluth, Minnesota.

EL was born on February 4, 2016. Londo refused to name Lessard as EL's father on the birth certificate and admitted that initially she did not want Lessard to have contact with their child. Londo eventually relented and allowed Lessard two supervised visits with EL; however, she cancelled several others. Ultimately, Lessard filed suit, seeking custody.

At the hearing, Lessard presented evidence regarding Londo's checkered past. Londo had worked as a topless dancer and posed nude in a pornographic magazine. Londo admitted prior abuse of cocaine. Although Londo is a licensed phlebotomist, she had not regularly worked in that field. Londo conceded that she had been on a "bad path," but insisted that her pregnancy saved her life. However, following EL's birth, Londo moved back to Florida to take a low-paying job and shared an apartment and childcare responsibilities with a friend who worked as a stripper. Londo returned to Marquette after contracting a kidney infection. She then began a relationship with a man who physically assaulted her during a drunken argument. On another occasion, Londo was caught with an open intoxicant while a passenger in a vehicle. Londo also had a history of mental illness, including post-traumatic stress disorder, stemming from a serious motor vehicle accident in 2006. At the time of the hearing, Londo was unemployed, but she had an interview at a bar and grill scheduled later in the week. Londo's parents continued to assist with childcare. Londo's father is a deacon with the Catholic Church and Londo intended to raise EL in that faith.

Lessard presented evidence that he is a full-time National Guard member, earning $50,000 annually. He spent five years in the Army as a sniper and has multiple decorations from his tour in Iraq. Lessard also has an expert infantry badge and a series of certifications that allow him to be a civilian first responder or firefighter. Lessard conceded that he initially suggested that Londo have an abortion. Once he felt the baby kick, Lessard changed his mind. Lessard had yet to pay any child support, citing Londo's withholding of parenting time. Lessard asked for sole legal custody of EL because he and Londo could not communicate or agree on significant issues related to their child. He also sought primary physical custody. Lessard opined that EL would be fine with the transition because she was "in the most adaptable stage of [her] life."

The circuit court denied Lessard's attempt to change EL's physical custody, but awarded the parties' joint legal custody. The court noted that EL had an established custodial environment with her mother and Lessard bore a heavy burden to prove that a change was in the child's best interest. The court considered the best interest factors of MCL 722.23 and found that factor (a) weighed in Londo's favor. The court determined that factors (b), (c), and (d) weighed equally. The court did not expressly make conclusions regarding factors (e), (f), (g), or (j), although it seemed to weigh factor (e) in Londo's favor and treat the parties equally as to the others. And the court found irrelevant factors (h), (i), and (k). The court merged its analysis of the proper parenting time schedule with its analysis of the catch-all factor (*l*), and determined that Lessard would initially be granted supervised visits of increasing length as EL aged, eventually transitioning into unsupervised visits.

II. CUSTODY RULING

Lessard challenges the circuit court's custody ruling, as well as its underlying findings with respect to best-interest factors (c), (d), (f), (j), and (*l*) of MCL 722.23.

> Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. *Fletcher v*

> *Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A clear legal error occurs when the circuit court "incorrectly chooses, interprets, or applies the law. . . ." *Id*. at 881. [*Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014).]

We must affirm all custody orders on appeal unless the lower court's findings 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. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). "Under the great weight of evidence standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction." *Pierron*, 486 Mich at 85 (quotation marks and citation omitted). We must also defer to the circuit court's assessment of witness credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

When faced with a request to change custody, the court must first determine whether the proponent has "established a change of circumstances or proper cause for a custodial change under MCL 722.27(1)(c)." *Kubicki*, 306 Mich App at 540, citing *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Only if this threshold is met will the court consider whether the requested change in custody would alter the child's established custodial environment and whether such change would be in the child's best interests. *Kubicki*, 306 Mich App at 540. If the proposed modification would change the child's established custodial environment, the moving party must provide clear and convincing evidence that modification would be in the child's best interests. *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000).

Here, the circuit court first determined that EL's established custodial environment was with her mother and maternal grandparents, and Lessard does not challenge that ruling. The court never made the threshold consideration whether Lessard established a change in circumstances or proper cause to change custody. We need not remand for reconsideration, however, as the circuit court correctly weighed the best-interest factors and determined that no change in custody was warranted in this case.

The Child Custody Act, MCL 722.21 *et seq*., governs child custody disputes. A child's established custodial environment should not be changed unless there is clear and convincing evidence that it is in the best interest of the child. MCL 722.27(1)(c). In evaluating the child's best interests, the court must consider the factors set forth in MCL 722.23 of the CCA. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). These factors are:

> (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. [MCL 722.23.]

The circuit court found the parties equal as to factor (c), the capacity to provide for EL. Lessard correctly notes that the circuit court erred in finding that Londo was employed at an assisted living facility. Londo plainly testified that she was then unemployed. Yet this error is not outcome determinative. Factor (c) "looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Londo was looking for work and had an interview scheduled later that week. She is a licensed phlebotomist who could seek work in that field as well. And Londo had the assistance of her parents. Moreover, Lessard left Londo solely responsible for EL's financial needs for nine months as he had not paid child support despite his fulltime employment. Accordingly, we discern no error in this regard.

Factor (d) weighs the length of time the child has lived in a stable, satisfactory home. The court sagely found that EL had not had a stable home in her short nine-month life. EL had lived with her mother in her grandparents' home, moved to Florida with her mother, returned to her grandparents' Marquette home, and then moved into an apartment with her mother. As noted by the court, there is no evidence that any of these homes were unsatisfactory and the one constant had been her mother. Lessard also had not demonstrated stability. He had lived in Florida, but was then transferred to Duluth. There was no certainty in the permanence of his

assignment. And EL had never been in Lessard's care to create a stable, satisfactory home. Accordingly, the court did not err in finding the parties equal under this factor.

The court did not reach an express conclusion regarding factor (f), the moral fitness of the parties, but appears to have deemed the parties equal. Lessard contends that this factor should have weighed in his favor given Londo's admissions and the court's determinations regarding her past. Lessard further emphasizes evidence arising after EL's birth establishing Londo's continued questionable conduct.

Factor (f) "relates to a person's fitness as a *parent*." *Fletcher*, 447 Mich at 887 (emphasis in original). As held by the Supreme Court in *Fletcher*:

> [C]ourts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is not "who is the morally superior adult;" the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*. [*Id*. (emphasis in original).]

The circuit court was in a superior position to hear Londo's testimony and evaluate first-hand Londo's credibility when she asserted that she had completely changed her life since becoming pregnant. Londo's historic conduct has no effect on her current relationship with her child. Although Londo excessively consumed alcohol on at least one occasion since EL's birth and had illegally carried an open intoxicant while a passenger in a car, EL was not present during those incidents. EL also was not present when Londo's boyfriend physically assaulted her. Moreover, Londo ended the relationship and her assailant was in jail at the time of the custody hearing. Overall,

> Because the trial court's reasoning is rationally related to the testimony it found credible and to the reasonable inferences drawn from the testimony, [Lessard] fails to overcome the deference due to the trial court's superior fact-finding ability and its determination regarding the relative weight to assign testimony as appropriate under the circumstances. [*Berger*, 277 Mich App at 715.]

Lessard contends that the court should have weighed factor (j), willingness to foster the child's relationship with the other parent, in his favor as Londo had attempted to keep EL from him. The court again did not make a specific finding with regard to this factor, but appeared to find the parties equal. Lessard mischaracterizes the circuit court's factual findings under this factor as being one-sided in his favor. Indeed, the court acknowledged that Londo had tried to withhold EL from Lessard in the past. While pregnant, Londo advised Lessard that she was cutting off all contact until after the child was born. Londo refused to name Lessard as EL's father on her birth certificate because she did not want him to have any legal rights. Londo sent Lessard text messages expressing her distress at Lessard seeing their child and her dislike for him personally. However, the court also credited Londo's testimony that she had come to realize that EL needed a relationship with her father. The court reviewed more recent text messages in

which Londo shared information and pictures of EL with Lessard. The court noted that Londo had allowed Lessard to speak to the baby over Facetime. Given this record, we cannot conclude that the court's finding preponderated against the evidence.

In considering the catch-all factor (*l*), the court noted that the parties separated before EL's birth and were living a considerable distance apart, which led to a lack of contact between EL and Lessard. The court stated, "And . . . that I think is kind of a big factor in this case, in terms of where we go from here." Lessard again mischaracterizes the circuit court's findings under factor (j) and contends that Londo's impeding his relationship should tip the scales under factor (*l*) in his favor. Ultimately, given EL's young age, the realities of Lessard's long-distance relationship with his child, and the minimal time he had spent with her, the court's conclusion on factor (*l*) is not against the great weight of the evidence.

The circuit court's custody determination was well within its discretion. After reviewing the totality of the best-interest factors, the court rendered a judgment that was in EL's best interest. EL has an established custodial environment with Londo and Londo has been EL's primary caretaker since birth. Lessard has never lived in the same city as his daughter. Because of his proximal distance, Lessard has not yet developed a parent-child bond with his baby. Under these circumstances, we cannot conclude that the circuit court abused its discretion in maintaining EL's physical custody with Londo while requiring the parties to work together to make decisions for their child.

III. PARENTING TIME

Lessard also challenges the limited parenting time awarded him by the court. Like all issues involving child custody, "[o]rders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005).

MCL 722.27a(3) provides that "[a] child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." As with custody determinations, "MCL 722.27a(1) provides that '[p]arenting time shall be granted in accordance with the best interests of the child.' " *Shade v Wright*, 291 Mich App 17, 29; 805 NW2d 1 (2010).

> 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. Except as otherwise provided in this section, parenting time shall be granted to a parent 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).]

Specific best-interest factors that may be considered when resolving a parenting-time dispute are set forth in MCL 722.27a(7):

> (a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

The court's award of limited, "supervised" parenting time to be gradually increased over time is well supported by the record evidence. At the time of the hearing, EL was only nine months old. She had met Lessard only twice. Lessard did not yet know his daughter and therefore had difficulty reading the child's cues. As a result, Lessard did not know how to respond when EL became fussy.

The circuit court reasonably crafted a parenting-time schedule to allow EL and Lessard to become acquainted with minimal trauma to the child. The court granted Lessard parenting time at least one weekend each month. Lessard was required to respect EL's nap schedule and allow Londo's presence to make the child comfortable. As EL grows, so too will her stamina, allowing for longer parenting-time sessions when Lessard travels to Marquette. EL will also become more comfortable with her father, warranting local visits alone with Lessard. And eventually EL will be old enough to tolerate regular five-hour road trips to Duluth to spend more extended time with Lessard in his home.

Lessard did present several articles to the circuit court which he contends support a more liberal grant of parenting time. The court considered these articles, but noted that the children studied were older than EL or had previously lived with both parents. In any event, the court

was required to specifically craft a parenting-time schedule that suited the best interests of *this* child, not a hypothetical child of EL's general age. We discern no error in the circuit court's parenting-time award.

We affirm.

/s/ Michael F. Gadola
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher