STATE OF MICHIGAN

COURT OF APPEALS

CHESTER LEVI HERSHA, SR., Plaintiff/Counter Defendant-Appellee,	UNPUBLISHED March 13, 2018
v	No. 339643 Emmet Circuit Court
REBECCA ANN HERSHA, Defendant/Counter Plaintiff-Appellant.	LC No. 16-105480-DM

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals by right from her judgment of divorce, challenging the trial court's determination that primary physical custody of the parties' two minor children should be awarded to plaintiff. We affirm.

I. BACKGROUND

The parties were married in 1999. They adopted their first child in 2005 and defendant gave birth to a second child in 2006. From 1999 to 2015, the parties lived in Sault Ste. Marie. In the summer of 2015, they moved to Levering. The events giving rise to the divorce occurred in September 2016. Defendant had expressed suicidal statements to plaintiff, which defendant later attributed to an adverse reaction to an anti-depressant she began taking around that time. The parties met with a Community Mental Health therapist who determined that defendant did not meet the criteria for an involuntary psychiatric hospitalization and defendant declined to be hospitalized. Defendant indicated that she stopped taking the anti-depressant that caused the adverse reaction. According to plaintiff, a few days later defendant again expressed suicidal ideation. Defendant denied this, but she did decide to leave the marital home that day. Defendant said she determined that the home was no longer "safe," citing the "nightmares" her children were having. She also maintained that the home was not safe because she and plaintiff "fought constantly" and plaintiff had "mentally and verbally abused [her] for years." Defendant clarified that plaintiff had not physically abused defendant or their daughters.

That evening, with the aid of the family's "respite worker" and the worker's husband, defendant took the children from the marital home over plaintiff's protest. Plaintiff called the

police and a report was made. Defendant took the children to her mother's home in Sault Ste. Marie. Defendant was not in communication with plaintiff and therefore plaintiff did not know where his family was. Five days later, plaintiff filed for divorce and obtained an ex parte order for immediate return of the children and for temporary custody. When defendant did not return the children, a second ex parte order was entered. The children were returned to plaintiff's care after the second order.

Defendant filed a counter-claim for divorce and a motion seeking primary physical custody of the children. After a referee hearing, defendant was granted supervised parenting time for three hours every other weekend. In January 2017, an evidentiary hearing on defendant's motion was held before a referee. Both parties testified. The referee took the matter under advisement and issued a proposed order granting plaintiff primary physical custody. Defendant objected, and a bench trial on the matters of custody and spousal support was held approximately seven months after plaintiff received temporary custody.[1] It was established that the children, both of whom have special needs, were doing well in plaintiff's care. One of the children was regularly attending speech therapy, occupational therapy, and counseling. Plaintiff was responsible for taking the child to the appointments and therapists had not had contact with defendant since she left the marital home. The family's case manager testified that it was decided at a recent "IEP meeting" that the child would attend a different school more suited for her needs. Plaintiff attended the meeting and he testified to the benefits of the new school. Defendant did not attend that IEP meeting. Plaintiff also said that the children were doing well socially, as they had a good friend in the Levering area and were attending church and church activities with plaintiff.

At the time of trial defendant was still living in Sault Ste. Marie with her mother. She testified that she and the children could live there indefinitely, although she planned to eventually move to an apartment. She maintained that she had not taken anti-depressants since leaving the marital home and was "no longer depressed." Defendant attributed her improved condition to no longer living with plaintiff. Defendant's mother and a friend also testified to her positive demeanor. Defendant had been seeing a clinical psychologist for a few months. The psychologist testified that she had diagnosed defendant with "adjustment disorder with depressed mood." The psychologist said that defendant was doing "amazingly well" and she did not have concerns regarding defendant's mental health. The psychologist had not reviewed defendant's mental health records. Defendant complained of limited phone contact with the children and that the children were on "speakerphone" for the calls. The nature of her parenting time visits was also explored by the parties.

The trial court issued a written opinion determining that an established custodial environment existed with only plaintiff. Thus, for defendant to change that environment, the

[1] The parties stipulated to the trial court relying on the testimony and exhibits produced at the referee hearing. Contrary to defendant's assertion on appeal, it is apparent that the trial court relied on that evidence in reaching its custody decision. Accordingly, we will discuss the parties' testimonies without specifying whether a statement was made at the hearing or at trial.

trial court reasoned, she would need to present clear and convincing evidence that the change would be in the children's best interests. The trial court then turned to its best-interest analysis, finding that four factors weighed in plaintiff's favor and that the remaining factors were neutral. The trial court concluded that there was not clear and convincing evidence presented to show that a change in custody would be in the best interests of the children. "To the contrary," the trial court found that "the preponderance of the evidence shows that the best interests of the children are served by having them remain in the physical custody of Plaintiff."

II. ANALYSIS

An Established Custodial Environment Existed Only With Plaintiff. Defendant first argues that the trial court erred by not finding that an established custodial environment existed with both parents. A trial court's order resolving a child custody dispute "shall be affirmed on appeal 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. "Whether a custodial environment is established is a question of fact." *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1995). A trial court's factual finding is against the great weight of evidence when "the evidence clearly preponderates in the opposite direction." *Id*. at 242.

Child custody disputes are governed by the Child Custody Act, MCL 722.21 *et seq*. MCL 722.27(1)(c) provides in pertinent part that the trial court shall not issue an 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." MCL 722.27(1)(c). The trial court should also consider 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." *Id*. Stated differently,

> [a]n 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 v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

A child may have an established custodial environment with both parents. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

In this case, the trial court found that for an "appreciable time," since plaintiff had received temporary custody of the children, the children had looked exclusively to plaintiff "for guidance, discipline, parental comfort and the necessities of life." Defendant emphasizes the amount of time that she lived with the children before the separation. Yet, under the facts of this case, we cannot say that the trial court's finding that seven months was an appreciable amount of time was against the great weight of the evidence. Defendant left the marital home under alarming circumstances. As a result, plaintiff was awarded temporary custody of the children

and was solely responsible for attending to their needs for over half of a year. The testimony established that the children were doing well in plaintiff's care and that he was involved in their services and schooling. In contrast, the children were seeing defendant twice a month for three hours at a time. Defendant does not dispute the trial court's finding that she "has made minimal efforts to contact the school or counselors." Further, defendant admitted that she was invited by the children to attend their church programs and that she did not attend.

The parties' custodial positions were in large part mandated by the trial court's temporary custody order. Defendant relies on *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2001), where this Court stated that "the fact that the children's primary residence remained defendant's home after the parties separated did not extinguish the custodial environment that existed with plaintiff." But, "[w]hether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria." *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). It is "irrelevant" that the established custodial environment may have been created by a temporary custody award. *Id.* at 388. When determining if an established custodial environment exists, "the focus is on the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment." *Id.*

As noted, the trial court applied the statutory criteria and found that an established custodial environment existed with only plaintiff. While defendant takes issues with numerous isolated statements made by the trial court in that analysis, she does not expressly argue that the statutory criteria applied to her relationship with the children. Indeed, the children had spent a very limited amount of time with defendant in her new "physical environment," as they had been living exclusively with plaintiff since they were returned to his care. MCL 722.27(1)(c). In short, defendant has not carried her burden of showing that the trial court's finding that a custodial environment did not exist with her was against the great weight of the evidence.

The Trial Court's Best-Interests Determination Was Not Against the Great Weight of the Evidence. Next, defendant challenges the trial court's finding that the children's best interests would be served by plaintiff retaining physical custody. "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

The trial court may, for the best interests of the child, "[a]ward the custody of the child to 1 or more of the parties involved." MCL 722.27(1)(a). MCL 722.23 defines the " 'best interests of the child' " as "the sum total of the" factors set forth in MCL 722.23(a)-(*l*). "In child custody cases, the family court must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them." *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007). "[T]he trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705. The trial court's "ultimate finding regarding a particular [best-interest] factor is a factual finding that can be set aside if it is against the great weight of the evidence." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

Defendant argues that the trial court erred in weighing the following best-interest factors:

> (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.
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> * * *
>
> (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. [MCL 722.23.]

First, the trial court found that factor (d) weighed in plaintiff's favor partly because "the father has maintained good communication with the schools for the children and the teachers and counselors who are assisting them with their special needs." Defendant contends that the trial court failed to acknowledge the therapists' testimony regarding one of the child's missed and cancelled appointments. While there was testimony to that effect, the number of missed and cancelled appointments was not to a critical degree. The service providers themselves did not have an issue with the child's attendance. The trial court also found under this factor that, considering the children's special needs, there was a "high degree of desirability" in maintaining their current environment. Defendant maintains that the children can receive all of their current services in Sault Ste. Marie, as they did when they previously lived there. Even assuming that is true, that does not defeat the trial court's finding that maintaining the current services and environment was highly desirable. For those reasons, the trial court's finding that factor (d) weighed in plaintiff's favor was not against the great weight of the evidence.

Next, the trial court found that factor (e), concerning the permanency of the custodial homes, favored plaintiff because he was residing in the marital home while defendant was living with her mother and might move to an apartment in the future. Defendant takes issue with the trial court's reasoning because "[a]nyone may at some point move in the future." But defendant testified that "[e]ventually I will get my own apartment." Thus, her move to an apartment was more than an abstract possibility; it was her plan. The trial court did not err in taking that into consideration and its finding was not against the great weight of the evidence.

Regarding factor (g), the parties' health, the trial court found that this factor weighed in plaintiff's favor because of defendant's "inability on occasion to manage her diabetes

appropriately,[2] her suicidal episode, and her history of mental health issues." Defendant focuses on the testimony regarding her improved health since the separation. Specifically, defendant argues that the trial court improperly ignored her psychologist's testimony regarding her mental health. While the trial court noted that the psychologist had not reviewed defendant's complete mental-health records, there is no indication that the trial court disregarded her testimony. Rather, it appears that the trial court focused on how the parties' health issues affected their ability to care for their children, which was a reasonable focus since the trial court was ultimately determining the children's best interests. Defendant's past health issues are plainly relevant to her ability to care for the children. Although defendant maintains those issues no longer exist, it cannot be said that the evidence clearly preponderates against the trial court weighing this factor in plaintiff's favor.

For factor (h), the trial court found that the children "have been doing well" in their current school system and noted the plans for one of the children to transfer to a new school "that will better meet her special needs." The trial court also noted that "[t]estimony from the children's therapist and case manager established that the children are doing well in their home, school and community." Defendant again highlights the testimony regarding the child's missed therapy appointments, which as indicated, we find inconsequential. Defendant also repeats her position that the children can receive all of their current services in Sault Ste. Marie. Again, assuming that is true, the trial court was not precluded from considering that the children were *currently* doing well in their home, school, and community. For those reasons, the trial court's finding that factor (h) weighs in plaintiff's favor was not against the great weight of the evidence.

Next, defendant disputes the trial court's finding that factor (i), the reasonable preference of the child, did not weigh in either party's favor. We have reviewed the transcript of the trial court's *in camera* meeting with the children. The trial court's finding that this was a neutral factor was not erroneous.

Lastly, defendant challenges the trial court's finding that neither party was favored under factor (j). Defendant notes her limited phone contact with the children and points out that the children were on speakerphone, presumably with plaintiff listening, during the calls. In support of this assertion, defendant presented a handwritten record of her phone calls with her children, and the trial court found that the record was not credible. "Because Defendant tried to pass this document off for something which it clearly is not," the trial court reasoned, "this affects the credibility of her claims in this regard." Still, the trial court found that defendant's phone contact with the children "has been quite restricted and to some extent interfered with by Plaintiff listening in to all of the telephone calls. It is unclear why he feels this is necessary." Thus, the trial court did not ignore plaintiff's behavior regarding the phone calls.

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[2] Plaintiff described an incident where he found defendant "passed out in her chair" and "couldn't get her to wake up." He claimed that emergency personnel determined that defendant's "sugar had bottomed out at 16" and transported defendant to the emergency room. Plaintiff said that there were two additional times when defendant "had extremely low blood sugar."

Defendant points to other pieces of evidence that reflect poorly on plaintiff's willingness to cultivate a parental relationship between the children and defendant. The trial court, however, determined:

> Defendant's conduct in taking the children from the marital home, based on what appears to be a spur-of-the-moment decision, and the fact she did not discuss this with Plaintiff or communicate her whereabouts thereafter, shows she may not cooperate in providing him with parenting time. As noted, the Court was required to issue an ex-parte order for the return of the children, and Defendant did not comply with that Order.

The trial court concluded that "[t]he parties clearly do not communicate well with each other. It appears that the fault for this is mutual." Accordingly, the trial court's finding that factor (j) was a neutral factor was not against the great weight of the evidence.

Defendant does not address the trial court's ultimate findings that there was not clear and convincing evidence that a change in custody would be in the children's best interests or that the preponderance of the evidence showed that the children's best interests are served by having them remain in the physical custody of plaintiff. Thus, she fails to demonstrate that she is entitled to appellate relief. In any event, after a thorough review of the record, we cannot say that the trial court's findings were against the great weight of the evidence or that its ultimate custody decision was an abuse of discretion.

Defendant's Notes Were Inadmissible Hearsay. Finally, defendant argues that the trial court erred by excluding certain statements made by the children as inadmissible hearsay. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *Varran v Granneman*, 312 Mich App 591, 621; 880 NW2d 242 (2015). " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless it falls within an exception provided for by the rules of evidence. MRE 802.

Defendant sought to introduce statements made to her by the children indicating that plaintiff had improperly influenced the children. We agree with defendant that the statements were not hearsay because they were not being offered to prove the truth of what the children said. Our review of the transcript, however, shows that defendant sought to introduce these statements through her "notes" of the children's statements. While the children's statements were not hearsay, defendant's written notes of those statements were hearsay in the sense that they would be used to show that the children actually made those statements. See *People v Jenkins*, 450 Mich 249, 256-257; 537 NW2d 828 (1995). Defendant did not establish that she had an "insufficient recollection" of the children's statements such that her notes would be admissible as a recorded recollection under MRE 803(5) and has not argued that the notes would be admissible under any other rule. The trial court was aware of the issue posed by the written notes, as it referred to them as "double hearsay." Because defendant does not address this aspect of the trial court's ruling, she fails to demonstrate that the trial court abused its discretion.

Affirmed.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Brock A. Swartzle