

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD BEUKEMA,

Plaintiff-Appellee/Cross-Appellant,

v

LEAH LABAR,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
May 17, 2018

No. 340072
Kent Circuit Court
LC No. 09-012102-DC

Before: RONYANE KRAUSE, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In this custody dispute, defendant, Leah Labar, appeals by right the trial court order awarding plaintiff, Richard Beukema, sole legal custody of the parties' minor daughter MB. In the same order, the trial court denied plaintiff's motion for attorney fees. Plaintiff filed a cross-appeal regarding the trial court's denial of attorney fees. We affirm.

I. LEGAL CUSTODY

Defendant contends that the trial court's findings with respect to the statutory best-interest factors were against the great weight of the evidence, that the trial court abused its discretion, and that the court erred as a matter of law in awarding legal custody to plaintiff.

An 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. A factual finding is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (quotation marks and citation omitted).

"Section 7 of the Child Custody Act, MCL 722.21 *et seq.*, allows a trial court to 'modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances,' as long as the modification would be in the child's best interests." *McRoberts v Ferguson*, 322 Mich App 125, 131; ___NW2d___ (2017), quoting MCL 722.27(1)(c).

In this case, the trial court found that the constant contention, acrimonious relationship, and inability to co-parent had a detrimental impact on MB and amounted to proper cause to

revisit the issue of legal custody. The trial court's finding of proper cause was not against the great weight of the evidence. "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003).

In this case, the record was replete with evidence that the parties could not parent together. They had difficulty making simple decisions regarding important issues such as medical care, social activities, and parenting-time exchanges. For example, on one occasion when MB was referred to an ENT specialist, defendant and plaintiff sent numerous e-mails, and defendant canceled multiple appointments before MB finally had an appointment with the specialist. In addition, the parties could not cooperate on selecting a therapist for MB. The parties' inability to co-parent was detrimental to MB, and the trial court's finding that it amounted to proper cause to revisit custody was not against the great weight of the evidence.

Having found proper cause, the trial court was required to determine the appropriate burden of proof. To do this, the trial court needed to determine whether there was an established custodial environment with defendant, with plaintiff, or with both parents. See *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). In the event that there is an established custodial environment, a trial court cannot change that environment absent clear and convincing evidence that a change in custody is in the best interests of the children. *Id.* at 670-671. "Where no established custodial environment exists, the trial court may change custody if it finds, by a preponderance of the evidence, that the change would be in the child's best interests." *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000).

This Court has explained that:

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

In this case, the trial court found that there was an established custodial environment with both parents. The record showed that both parents were actively involved in every aspect of MB's life. MB had a loving and healthy relationship with both parents. Merrill Graham, MB's counselor, testified that MB loved both of her parents and that she had a strong bond with plaintiff. MB looked to plaintiff for encouragement and considered plaintiff to be a consistent presence in her life. In addition, both plaintiff and defendant testified that the other parent loved MB and provided proper care for MB. The trial court's finding that there was an established custodial environment with both parents was not against the great weight of the evidence.

Having properly concluded that there was an established custodial environment with both parents, the trial court was required to determine whether plaintiff proved by clear and convincing evidence that a change in legal custody was in MB's best interests. See *Jack*, 239 Mich App at 671; MCL 722.27(1)(c).

“To determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in [MCL 722.23] applying the proper burden of proof.” *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The Child Custody Act (CCA), MCL 722.21 *et seq.*, defines the best interests of a child as a “sum total of” 12 best-interest factors. MCL 722.23.

In this case, the trial court weighed Factors (a), (b), (c), (d), (e), (g), and (l) evenly. The trial court weighed Factors (f), (j), and (k) in favor of plaintiff, and it weighed Factor (h) in favor of defendant. The trial court indicated that it considered Factor (i), preference of the child, in making its determination, but it did not indicate that either party had a preference under Factor (i). Defendant challenges the trial court’s findings and conclusions with respect to all of the best-interest factors except for Factor (l).

Factor (a) concerns the “[t]he love, affection, and other emotional ties existing between the parties involved and the child,” and Factor (b) concerns “[t]he 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.” MCL 722.23. The trial court found that these factors weighed evenly for both parents.

The trial court’s findings as to Factors (a) and (b) were not against the great weight of the evidence. The record evidence clearly showed that MB had a strong bond with both parents. Both parents were actively involved and invested in MB’s life. Both parents admitted that the other parent loved MB; defendant testified that plaintiff was a great father, and plaintiff testified that defendant was a good mother. Graham testified that MB had a strong bond with plaintiff. MB spent her entire life with both parents, and it was clear that both parents provided a loving and nurturing home for her. MB was doing well in school; defendant testified that she brought MB to church, and plaintiff testified that he tried to instill Christian values in MB. The record clearly supported the trial court’s finding that both parents had love and affection for MB, and that they both had the capacity to provide love, affection, and guidance with respect to religion and education.

Factor (c) concerns “[t]he 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.” MCL 722.23. This Court has explained that,

Factor c does not contemplate which party earns more money; it is intended to evaluate the parties’ *capacity* and *disposition* to provide for the children’s material and medical needs. Thus, this factor 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*, 277 Mich App at 712.]

In this case, the trial court weighed this factor evenly. This finding was not against the great weight of the evidence. While defendant had a greater earning capacity than plaintiff, the record showed that both parents provided for MB. Both parents had a home for MB, and both parents provided material necessities for MB. With respect to medical care, defendant provided health insurance for MB, and she testified that she always paid the copays for medical treatment.

But the record showed that defendant refused to cooperate with plaintiff on recommendations from MB's physician. Defendant repeatedly canceled a referral to an ENT specialist, and she initially declined to take MB to a dermatologist. Defendant also resisted bringing MB to an optometrist. It was apparent that defendant would substitute her knowledge as a nurse over the opinion of medical professionals who had more knowledge than she had. Similarly, plaintiff was uncooperative with respect to selecting a therapist. When defendant selected a therapist for MB, plaintiff refused to allow MB to see the therapist. After complaining that defendant selected a therapist without any input from him, plaintiff then selected Merrill Graham to be MB's therapist without any input from defendant. The trial court did not err in weighing Factor (c) evenly.

Factor (d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23. Factor (e) requires consideration of "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23. The trial court weighed these factors evenly.

The trial court's findings with respect to Factors (d) and (e) were not against the great weight of the evidence. The record showed that MB lived with both parents her entire life. Both parents lived in homes and provided a stable, satisfactory environment. Both parents had blended families, and there was nothing to support that MB had not adapted to the blended families. Graham's testimony supported that MB enjoyed a healthy and stable environment with both parents. While defendant initially moved on several occasions, the moves followed defendant's and plaintiff's breakup. Defendant remained in the same school district and purchased a home. Defendant later married and bought another home in the same school district. Although plaintiff only moved twice, plaintiff purchased a home outside MB's school district. On this record, the trial court's findings with respect to Factors (d) and (e) were not against the great weight of the evidence.

Factor (f) is "[t]he moral fitness of the parties involved." MCL 722.23. Our Supreme Court has explained that a parent's "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*." *Fletcher*, 447 Mich at 887. "Examples of such conduct include, but are not limited to, verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Berger*, 277 Mich App at 712-713 (quotation marks and citation omitted). "[C]ourts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship." *Fletcher*, 447 Mich at 887. "Thus, under factor f, the issue is not who is the morally superior adult, but rather the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Berger*, 277 Mich App at 713 (quotation marks and citation omitted).

In this case, the trial court found that Factor (f) weighed strongly in favor of plaintiff. The trial court's finding was not against the great weight of the evidence. There was significant evidence to show that defendant engaged in a pattern of destructive conduct that posed a potential detriment to MB's relationship with both plaintiff and defendant. Specifically, numerous e-mails, text messages, and voice mail messages were admitted at the evidentiary hearing that showed that defendant perpetrated significant verbal abuse against plaintiff. Defendant used vulgar and abusive language against plaintiff on numerous occasions.

Defendant admitted that she insulted, demeaned, and berated plaintiff on numerous occasions; she admitted that she called plaintiff names, berated him, insulted him, questioned his intelligence, and mocked his physical disfigurement. Defendant testified that she did not engage in verbal abuse against plaintiff in MB's presence, but the trial court could have reasonably concluded that MB was aware of the contempt that defendant had for plaintiff. Indeed, on one of the voice mail messages in which defendant verbally abused plaintiff, MB's voice was audible in the background. In addition, defendant was convicted of domestic violence after she physically assaulted plaintiff. Plaintiff testified that MB was within hearing distance at the time of the altercation and stated that defendant was loud when she attacked him. On this record, the trial court could have concluded that defendant's pattern of destructive behavior posed a potential detriment to the parent-child relationship, and the trial court did not err in weighing this factor strongly in favor of plaintiff.

Factor (g) addresses "[t]he mental and physical health of the parties involved." MCL 722.23. The trial court weighed this factor evenly. The trial court's finding with respect to this factor was not against the great weight of the evidence. The record showed that although plaintiff had a physical disability, this did not impact his ability to provide appropriate parental care for MB. There was no evidence that defendant had any physical disability. In regard to mental health issues, neither party had a psychiatric diagnosis. The trial court did not err in weighing this factor evenly.

Factor (h) concerns "[t]he home, school, and community record of the child." MCL 722.23. The trial court found that this factor weighed slightly in favor of defendant. The trial court's finding was not against the great weight of the evidence. The record showed that MB was primarily involved in the Rockford community and that she attended school in Rockford. Defendant lived in Rockford; plaintiff purchased a home in Lowell. Thus, the record supported the trial court's finding that this factor weighed slightly in favor of defendant.

Factor (i) concerns the preference of the child. See MCL 722.23. The trial court indicated that it conducted an interview with MB and "considered her preferences in making my determination regarding custody and parenting time." The trial court considered this factor, and there is nothing to support that the trial court erred in doing so.

Under Factor (j), the court must consider "[t]he 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. The trial court weighed this factor in favor of plaintiff.

The trial court's finding with respect to Factor (j) was not against the great weight of the evidence. As discussed above with respect to Factor (f), there was a substantial amount of evidence that defendant was verbally abusive and displayed a pattern of demeaning conduct against plaintiff. Defendant admitted to engaging in the abuse, and she agreed that she was not a "morally fit" person with respect to her relationship with plaintiff. Moreover, defendant's conduct was not isolated. Instead, the record showed that defendant engaged in a continuing pattern of abusive behavior toward plaintiff. In addition, defendant physically assaulted plaintiff, and plaintiff testified that MB was within hearing distance at the time of the assault. Defendant then violated the terms of her probation by sending plaintiff e-mail messages. Plaintiff testified

that police advised him to have someone accompany him when he had to be in defendant's presence. The trial court could have reasonably concluded that MB could perceive defendant's hostility toward plaintiff, and that this had a detrimental impact on defendant's ability to facilitate a strong bond between plaintiff and MB. In contrast, there was no evidence that plaintiff engaged in similar behavior. The trial court did not err in weighing Factor (j) in favor of plaintiff.

Factor (k) concerns domestic violence. See MCL 722.23. The trial court found that plaintiff should receive strong preference under this factor. The trial court's finding with respect to Factor (k) was not against the great weight of the evidence. Defendant engaged in a pattern of verbal and emotional abuse against plaintiff, and she physically assaulted plaintiff. Defendant was convicted of domestic violence, and she agreed that she violated the terms of her probation. In contrast, plaintiff did not engage in any domestic violence against defendant. The trial court's finding with respect to this factor was not against the great weight of the evidence.

Factor (l) concerns "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23. The trial court noted that MB had step-siblings in both families, and it found that this factor did not favor either. Defendant does not specifically challenge the trial court's finding with respect to Factor (l); there is nothing in the record to show that the trial court's finding was against the great weight of the evidence.

In sum, the trial court's findings with respect to the best-interest factors were not against the great weight of the evidence, and defendant has not shown that the trial court otherwise abused its discretion or committed an error of law on a major issue. Accordingly, the trial court did not err in awarding legal custody to plaintiff.

II. ATTORNEY FEES

On cross-appeal, plaintiff argues that the trial court erred in denying his request for attorney fees and erred in failing to hold an evidentiary hearing on the issue of attorney fees.

We review a trial court's decision whether to grant attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "Similarly, a trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion." *People v Unger (On Remand)*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). "An abuse of discretion occurs when the result falls outside the range of principled outcomes." *Cassidy v Cassidy*, 318 Mich App 463, 479; 899 NW2d 65 (2017). "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error." *Reed*, 265 Mich App at 164.

In this case, on February 2, 2016, plaintiff objected to a January 2016 Friend of the Court (FOC) report and recommendation following his request for increased parenting time. Then, on May 19, 2016, plaintiff moved for sole legal custody and attorney fees. The trial court held an eight-day evidentiary hearing that commenced on June 8, 2016 and ended on February 20, 2017. On August 31, 2016, plaintiff moved to show cause for contempt. In part, plaintiff requested \$2,500 in attorney fees.

The trial court did not hold a hearing on plaintiff's motion to show cause and instead stated that it would treat the motion as part of the evidentiary hearing. In its opinion and order

awarding plaintiff sole legal custody and revising parenting time, the trial court denied plaintiff's request for attorney fees. The trial court noted that plaintiff failed to present sufficient evidence to show he was entitled to attorney fees under MCR 3.206(C).

MCR 3.206(C) governs the award of attorney fees and expenses in a domestic relations action, and the court rule provides:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

On cross-appeal, plaintiff first argues that the trial court erred in denying his request for attorney fees pursuant to MCR 3.206(C)(2)(a) because he proved that he was unable to bear the expense of the action and that defendant was able to pay his attorney fees.

The trial court did not abuse its discretion in finding that plaintiff was not entitled to attorney fees under MCR 3.206(C)(2)(a). The trial court found that there was insufficient evidence to show that plaintiff was entitled to attorney fees. This was a factual finding, and we cannot conclude that the finding was clearly erroneous. See *Reed*, 265 Mich App at 164. Specifically, both parties had income. Although defendant had a higher earning potential, plaintiff did not demonstrate that he was unable to pay his attorney fees. Defendant testified that she had an annual salary of approximately \$80,000; she did not state whether this was her gross or net income. Defendant also received approximately \$860 per month of plaintiff's Social Security Disability Insurance (SSDI) benefits to which MB was entitled. But although the trial court modified parenting time to provide a five day rotating schedule, the record was unclear as to whether plaintiff would receive more of the SSDI benefits.

Plaintiff testified that he received a fixed income of about \$2,600 per month. This fixed amount included SSDI benefits and an amount from a settlement for injuries he suffered during previous employment. Plaintiff did not disclose the terms of his settlement agreement. Both parties were homeowners and lived in blended families, but the parties' household incomes were unclear. Plaintiff testified that he refinanced his home to pay for his attorney fees, but he did not introduce any evidence to show what his attorney fees were in comparison to his income and assets. In addition, plaintiff indicated that he did not seek out any type of work that he could physically perform to earn additional income because his job was being a father. On this record, the trial court's factual finding was not clearly erroneous, and the trial court did not abuse its discretion in denying plaintiff's request for attorney fees.

Plaintiff contends that the trial court failed to apply the framework set forth in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). This argument lacks merit. In *Khouri*, after determining that a party was entitled to case-evaluation sanctions, the Court provided a framework for determining whether an attorney fee was reasonable. See *id.* at 528-530. In contrast, this case does not concern case-evaluation sanctions, and the trial court did not abuse its discretion in denying plaintiff's request for attorney fees under MCR 3.206(C)(2)(a). Accordingly, the reasonableness framework set forth in *Khouri* is inapplicable in this case.

Next, plaintiff argues that the trial court erred in declining to award him attorney fees under MCR 3.206(C)(2)(b), and he argues that he incurred attorney fees because of defendant's bad conduct.

Plaintiff is incorrect that the trial court found that defendant violated the trial court's 2014 order. Although the trial court found that there were numerous examples of defendant's negative behavior and that it was "impossible to believe that [MB] does not sense her mother's hatred of her father," the trial court did not make an explicit finding that defendant violated the 2014 trial court order. Instead, the trial court made findings of fact on the statutory best-interest factors.

Moreover, plaintiff cannot show a causal connection between fees incurred and defendant's allegedly improper behavior. See *Reed*, 265 Mich App at 164. The trial court decided plaintiff's motion to change legal custody in conjunction with plaintiff's objection to the January 2016 FOC report, in which he requested increased parenting time. Plaintiff's request for increased parenting time was not based on any alleged wrongful conduct by defendant. Thus, plaintiff cannot show that the attorney fees he incurred in connection with the evidentiary hearing were related to defendant's alleged violations of the previous court order. Furthermore, as noted above, although the evidence showed that defendant engaged in acrimonious behavior, there was no explicit finding that defendant violated the trial court order. Additionally, there was evidence that plaintiff also engaged in conduct that was a hindrance to the parties' ability to co-parent. For example, the trial court found that plaintiff erected barriers to obtaining a therapist for MB. Thus, the trial court could have reasoned that both parties had some responsibility with respect to the court proceeding and related attorney fees. In sum, the trial court did not abuse its discretion in denying plaintiff's request for attorney fees under MCR 3.206(C)(2)(b).

Next, plaintiff argues that the trial court erred in failing to conduct an evidentiary hearing on his request for attorney fees despite his multiple requests for attorney fees throughout the proceeding. Plaintiff's argument lacks merit. After plaintiff moved to change custody and requested attorney fees, the trial court held an eight day evidentiary hearing. Plaintiff does not contend that the trial court prevented him from presenting evidence on his request for attorney fees at the hearing. Moreover, given that the trial court did not abuse its discretion in holding that plaintiff was not entitled to attorney fees under MCR 3.206(C)(2), we find no need for the trial court to hold a hearing to determine reasonableness of attorney fees. See *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002) ("Generally, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed.").

Plaintiff argues that he requested attorney fees in relation to numerous other previous motions that he filed and seems to argue that the trial court erred in failing to grant his requests

for attorney fees in each of these motions. These arguments lack merit. Plaintiff filed previous motions in which he requested attorney fees. The record indicates that plaintiff failed to timely file a claim of appeal with respect to a motion he filed on July 28, 2015. See MCR 7.202(6)(a)(iv); MCR 7.203(A)(1); MCR 7.204(A)(1)(a). With respect to several other motions, the trial court apparently reserved its ruling on the attorney fee issue and incorporated its ruling into the August 18, 2017 opinion and order. As discussed above, the trial court did not abuse its discretion in denying attorney fees in that opinion and order; therefore, plaintiff cannot show that the trial court abused its discretion in denying attorney fees with respect to the individual motions.

In sum, the trial court did not abuse its discretion in denying plaintiff's request for attorney fees or in declining to hold a separate evidentiary hearing to address the issue of attorney fees.

We affirm. Neither party having prevailed in full, we do not award costs. MCR 7.219.

/s/ Amy Ronayne Krause

/s/ Jane E. Markey

/s/ Michael J. Riordan