STATE OF MICHIGAN

COURT OF APPEALS

DANIELLE NICOLE BOGUE, formerly known as DANIELLE NICOLE SWINSON, Plaintiff-Appellee,	UNPUBLISHED April 16, 2019
v	No. 346301 Gladwin Circuit Court Family Division
KYLE DEAN SWINSON, Defendant-Appellant.	LC No. 16-008762-DM

Before: BORRELLO, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant-father appeals the trial court's order denying his motion to change custody of the parties' minor daughter, NS. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties marred in 2011, and NS was born in 2012. When the parties divorced in July 2017, they were awarded joint legal custody and plaintiff-mother was awarded physical custody. Defendant was awarded liberal parenting time.

In June 2018, defendant filed a motion to change custody, requesting full physical custody and a "51%/49%" legal-custody arrangement in his favor. As established at the July 2018 referee hearing, plaintiff had quit her job and moved from Midland to the Gladwin area.[1] Plaintiff informed defendant of the move, although she did not provide her new address. Plaintiff and NS had moved in with plaintiff's boyfriend, whom she had known for about three months. Plaintiff had also removed NS from daycare without defendant's consent or knowledge. At the hearing, plaintiff explained that she was motivated to leave Midland because she did not

[1] The move did not violate the geographic restrictions found in the judgment of divorce.

know anyone in the area and defendant's family members were "very antagonistic with me." Plaintiff said she anticipated obtaining new employment soon and had begun receiving public assistance in the meantime. She admitted to driving with a suspended license.

The referee recommended that defendant's motion be granted. Plaintiff objected to the recommendation, and the trial court subsequently held a de novo hearing in October 2018.

At the de novo hearing, plaintiff testified that she recently obtained employment and that she now had a restricted license. She and NS were still living with the boyfriend. Plaintiff had enrolled NS in Gladwin Public Schools without defendant's consent. Defendant wanted the child to attend Midland Public Schools, as previously agreed to by the parties. Defendant was still living in a one-room garage on his parent's property, despite testifying at the referee hearing that he would soon be moving into a trailer. Defendant also testified that he was in relationship with a married woman who had an "open relationship" with her husband.

In a written opinion and order, the trial court denied defendant's motion to change custody.[2] The trial court found that there was a sufficient change of circumstances to revisit the custody order and that an established custodial environment existed with both parents. However, after making findings as to each best-interests factor, the court determined that defendant had not shown by clear and convincing evidence that a change in custody was in the child's best interests. The court also found that it was in the child's best interests to attend Gladwin Public Schools.

II. DISCUSSION

Defendant argues that the trial court's findings on several best-interests factor were against the great weight of the evidence. Although one finding may have been questionable, we find no cause to reverse the trial court's custody determination.

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. We review the trial court's findings regarding the best-interest factors under the "great weight of the evidence" standard. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). A finding is against the great weight of evidence when "the evidence clearly preponderates in the opposite direction." *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). We review the court's ultimate custody decision for an abuse of discretion. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

Defendant was required to prove by clear and convincing evidence that modifying the established custodial environment was in the child's best interests. MCL 722.27(1)(C); *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). MCL 722.23 defines the " 'best interests

[2] The trial court also denied plaintiff's motion to change parenting time, which she does not challenge on appeal.

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). As a general rule, we defer to the trial court's credibility determinations, "and the trial court has discretion to accord differing weight to the best-interest factors." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The trial court found that 7 of the 12 best interest factors did not favor either party, that 1 favored defendant, that 1 favored plaintiff, and that the remaining 3 were not applicable. Defendant argues that the trial court erred in weighing the following best-interests factors:

> (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.
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> * * *
>
> (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.[3]]

Defendant first argues that the trial court erred in finding that factor (c) favored neither party. However, the evidence does not clearly preponderate against that determination. Both parties had employment, both had adequate income to support NS, and both had resources for health insurance through employment, although plaintiff's would not be available until after she completed her probationary period.[4] Moreover, although plaintiff was making less money in her new position, she testified that she was able to save more money given that her expenses had been reduced after moving to Gladwin. She further testified that her public assistance was only temporary.

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[3] Defendant also presents arguments regarding factor (h), "[t]he home, school, and community record of the child." MCL 722.23(h). But we decline to address these arguments because the trial court found that factor (h) favored defendant.

[4] Defendant represents on appeal that plaintiff lost her job after the de novo hearing. However, our review "is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

Defendant also challenges the court's finding that factor (d) favored neither party. Both parties had precarious living conditions. Defendant lived in a partially finished garage that had one room. The closest bathroom was in his parent's home. In addition, defendant conceded that the trailer he was renovating was far from being habitable. On the other hand, plaintiff had been living with her boyfriend of less-than-one year. While plaintiff's housing depended on the continuance of the relationship, the trial court found that NS had her own bedroom and a bathroom in the home. The court also found that there was no indication that the home was unsuitable. Defendant takes issue with this statement, arguing that he was unable to inspect the home's condition and present evidence about it in court. However, this contention does not address any potential error by the trial court; rather, it concerns defendant's own failure to properly raise this concern and argument before the trial court. In sum, the trial court's finding that this was a neutral factor was not against the great weight of the evidence.

Next, defendant argues that the trial court erred in finding that factor (e) favored neither party. Yet there was evidence that both custodial homes lacked permanence. Plaintiff had been with her boyfriend for less than one year and defendant was involved with a married woman who had an open relationship with her husband. Moreover, defendant had introduced NS to the married couple and had stayed overnight with the child at the couple's home. On one occasion, defendant permitted NS to sleep in the same bed with him and the woman at his home. Thus, the trial court did not err by inferring that both parties were in precarious positions and had placed NS in potentially confusing situations. Defendant argues that the trial court erred in indicating that his relationship with the married woman lacked permanence because there was no testimony concerning the length of the relationship. Although the record is silent as to the length of time that defendant had been dating the married woman, the unusual nature of the relationship supported the trial court's inference that the relationship could end abruptly. Moreover, we note that the trial court made the same finding with respect to plaintiff and her boyfriend. For those reasons, the evidence did not clearly preponderate against the trial court's finding.

Finally, defendant argues that the trial court erred in weighing factor (f) in plaintiff's favor. Defendant takes particular issue with the trial court's finding that he "engages in relationships that are manipulative, previously with the mother and now with a married woman and her husband." We agree with defendant that there was no testimony concerning any direct or indirect manipulation between defendant and the married woman and her husband. However, defendant does not challenge the trial court's finding with respect to plaintiff. Indeed, plaintiff testified that defendant regularly inquired into her sex life and relationships, asserting that he was "entitled" to that information. Defendant also highlights the evidence against plaintiff's moral fitness. As the trial court noted, plaintiff has a history of drunk driving and knowingly driving with a suspended license. All things considered, perhaps this factor should not have weighed in either party's favor. We disagree with defendant, however, that the evidence clearly preponderated in his favor.

Even assuming that the trial court erred in weighing factor (f) in plaintiff's favor, we see no basis to reverse the trial court's custody determination. While plaintiff's decision to abruptly quit her job and move from Midland provided cause to revisit the custody determination, her situation had stabilized by the time of the trial court's decision. Significantly, defendant has not disputed plaintiff's testimony that the child is "thriving" in her new environment. In sum,

defendant fails to establish that the trial court's custody determination was an abuse of discretion.

Affirmed.

/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan