STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW J. SOLTES (Deceased),

Plaintiff,

and

OTTO P. SOLTES and KAREN E. TESORERO,

Intervening Petitioners-Appellees,

v

HEATHER A. LAROCHE,

Defendant-Appellant.

UNPUBLISHED
April 15, 2021

No. 354411
Oakland Circuit Court
Family Division
LC No. 2009-765677-DC

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

PER CURIAM.

In this action for grandparenting time, defendant appeals as of right the circuit court's order awarding intervening petitioners grandparenting time with defendant's minor child, RL. We affirm.

I. FACTUAL BACKGROUND

Intervening petitioners are the parents of plaintiff, Matthew J. Soltes, deceased, who is the father of RL. Plaintiff and defendant never married, and plaintiff exercised regular parenting time with RL from 2010 until plaintiff's death in April 2019. Plaintiff and defendant had a tumultuous relationship and many disputes arose regarding custody and parenting time during this period. After plaintiff's death, defendant consistently denied intervening petitioners' requests to spend time with RL. For this reason, intervening petitioners filed a joint motion for grandparenting time. After conducting an evidentiary hearing, the circuit court determined that defendant was an unfit parent. The circuit court also noted in the alternative that it found that intervening petitioners rebutted the presumption that defendant was a fit parent, and that defendant's decision to deny

grandparenting time would create a substantial risk of harm to RL's mental, physical, or emotional health. The circuit court further denied defendant's request to interview RL, who was approximately 10 years old at the time, regarding her reasonable preference concerning grandparenting time. On the basis of the above, the circuit court granted intervening petitioners' request for grandparenting time. This appeal followed.

II. STANDARDS OF REVIEW

"Orders concerning grandparenting time must be affirmed on appeal unless the trial 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." *Zawilanski v Marshall*, 317 Mich App 43, 48; 894 NW2d 141 (2016) (citation, quotation marks, and brackets omitted). A trial court's findings of fact are against the great weight of the evidence when the evidence "clearly preponderates in the opposite direction." *Id*. (citation, quotation marks, and brackets omitted). "A trial court abuses its discretion on a custody matter when its decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*. (citation and quotation marks omitted). "A court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id*. (citation and quotation marks omitted).

III. JURISDICTION, WAIVER, AND MOOTNESS

As a preliminary matter, we first note intervening petitioners' argument that defendant's entire appeal is barred because defendant consented to the grandparenting-time schedule included in the circuit court's July 13, 2020 order regarding grandparenting time. In doing so, intervening petitioners liken the circuit court's July 13, 2020 order regarding grandparenting time to a consent judgment, order, or decree. Intervening petitioners' argument lacks merit.

"A consent judgment is a settlement or contract that becomes a court judgment when the judge sanctions it." *Acorn Investments Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 354; 852 NW2d 22 (2014) (quotation marks omitted). "A consent judgment is different in nature from a judgment rendered on the merits because it is primarily the act of the parties rather than the considered judgment of the court." *Clohset v No Name Corp*, 302 Mich App 550, 565; 840 NW2d 375 (2013) (citation omitted). The circuit court's July 13, 2020 order regarding grandparenting time was not a consent judgment, order, or decree because it was not the product of an agreement or settlement between the parties. The parties agreed to a grandparenting-time schedule only after the circuit court rendered a judgment on the merits regarding whether grandparenting time was warranted. Indeed, after the circuit court rendered its decision on the merits, defendant's attorney requested that the circuit court stay the implementation of a grandparenting-time schedule in order to allow defendant to pursue an appeal. The parties addressed the grandparenting time schedule only after the circuit court denied defendant's request for a stay. Accordingly, the circuit court's July 13, 2020 order regarding grandparenting time is not a consent judgment, order, or decree, and intervening petitioners' assertion to the contrary lacks merit.

Intervening petitioners also assert that defendant has waived any challenge to the circuit court's July 13, 2020 order regarding grandparenting time under the doctrine of invited error. According to intervening petitioners, defendant adopted the position that grandparenting time was

appropriate when defendant testified that RL should spend time with intervening petitioners. Again, intervening petitioners' argument lacks merit.

"Invited error is typically said to occur when a party's own affirmative conduct directly causes the error." *Cassidy v Cassidy*, 318 Mich App 463, 476; 899 NW2d 65 (2017) (citation and quotation marks omitted). "Appellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *Id*. (citation omitted). The doctrine of invited error is inapplicable. During defendant's testimony, defendant acknowledged that preventing RL from spending time with intervening petitioners may be harmful to RL. However, defendant never took the position that awarding intervening petitioners grandparenting time was appropriate. On the contrary, defendant maintained that a grandparenting-time award was not warranted. Thus, the doctrine of invited error is inapplicable and waiver did not occur.

Finally, intervening petitioners argue that appellate review of the issues presented on appeal is partially barred by mootness. In so arguing, intervening petitioners assert that it is not possible to grant appellate relief in regard to those instances of grandparenting time that have already occurred. We again disagree.

"[A]n issue becomes moot when an event occurs that renders it impossible for the reviewing court to grant relief." *C D Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 406; 834 NW2d 878 (2013) (citation omitted). Although certain instances of grandparenting time have passed, several aspects of the grandparenting time schedule are ongoing and are set to occur each year. Thus, no event has occurred that renders it impossible for this Court to grant relief. Accordingly, this issue is not moot.

IV. PARENTAL FITNESS

Moving to defendant's arguments on appeal, defendant first contends that the circuit court's finding that defendant was an unfit parent was contrary to the great weight of the evidence. We disagree.

"Parents have a constitutionally protected right to make decisions about the care, custody, and management of their children." *Geering v King*, 320 Mich App 182, 188; 906 NW2d 214 (2017) (citation omitted). Accordingly, courts must presume in a proceeding regarding grandparenting time that "a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.27b(4)(b). A fit parent is a parent who "adequately cares for his or her children[.]" *Geering*, 320 Mich App at 191. In a child custody case, "a natural parent's fitness is an intrinsic component of a trial court's evaluation of the best[-]interest factors in MCL 722.23." *Falconer v Stamps*, 313 Mich App 598, 641; 886 NW2d 23 (2015) (citation and quotation marks omitted). "Implicit in an award of custody is the tacit decision of the trial court that the parent is fit." *Id*. at 642. "Absent a challenge to the circuit court's custody decision, it is presumed that plaintiff is a fit parent and there is a presumption that fit parents act in the best interests of their children." *Id*. (citation and quotation marks omitted).

In the instant matter, defendant was awarded custody of RL before intervening petitioners instituted an action for grandparenting time. Thus, it was presumed that defendant was a fit parent. Although the parties did not dispute defendant's parental fitness, the circuit court reassessed defendant's fitness as a parent on its own initiative. In doing so, the circuit court determined that defendant was an unfit parent because defendant was not able to provide for RL's emotional needs. The circuit court's finding was not contrary to the great weight of the evidence.

Initially, we note that the record reflects that defendant loves RL and is able to provide for RL's material needs on a daily basis. Multiple witnesses classified defendant as a good mother. Thus, the only evidence of record indicating that defendant was an unfit parent pertained to defendant's inability to provide for RL's mental and emotional needs following plaintiff's death.

The record further reflects, however, that RL had a close relationship with plaintiff throughout plaintiff's life. Notably, RL shared hobbies with plaintiff and spent significant periods of time with plaintiff and his family members. RL was aware of plaintiff's cancer diagnosis and helped care for plaintiff after his cancer treatments. Multiple witnesses testified that, after plaintiff's death, RL's demeanor changed such that RL appeared reserved. Despite the evidence to the contrary, defendant testified that she did not believe that RL suffered mentally or emotionally after plaintiff's death. Defendant did not arrange for RL to attend plaintiff's funeral and did not enroll RL in counseling. Additionally, RL did not have any pictures of plaintiff in her bedroom in defendant's home. Furthermore, the record reflects that RL was reluctant to express her feelings about plaintiff or show affection for plaintiff's family members in defendant's presence. Dr. Sarah Brotsky, a licensed clinical psychologist and expert witness, attributed RL's behavior to a fear of loss that culminated in RL's reluctance to disappoint defendant by showing affection for plaintiff's family members. For these reasons, multiple witnesses opined that defendant did not wish to preserve plaintiff's memory for RL.

The record also reflects that defendant failed to provide for RL's mental and emotional needs by preventing RL from spending time with intervening petitioners. Dr. Brotsky testified that, following plaintiff's death, the immediate loss of contact with RL's father and grandparents created a substantial likelihood that RL would suffer mental or emotional harm in the future. Furthermore, defendant acknowledged that maintaining a relationship with intervening petitioners served RL's best interests. Nevertheless, defendant testified that she has never reached out to intervening petitioners in order to arrange for them to spend time with RL after plaintiff's death. Defendant also testified that RL spent a total of 10 to 12 hours with intervening petitioners over the course of approximately seven months that had elapsed since plaintiff's death. On these occasions, defendant prevented RL from spending time alone with intervening petitioners and only arranged for visits to occur after negotiating through the friend of the court. Moreover, defendant may have negatively impacted RL's opinion of intervening petitioners by allowing RL to find out about the proceedings regarding grandparenting time.

Based upon the foregoing, the circuit court's finding that defendant failed to adequately care for RL by neglecting RL's mental and emotional needs was not contrary to the great weight of the evidence because the evidence did not clearly preponderate in the opposite direction.

V. FIT-PARENT PRESUMPTION

Relatedly, defendant challenges the circuit court's alternative finding that intervening petitioners rebutted the fit-parent presumption.

As noted, "[p]arents have a constitutionally protected right to make decisions about the care, custody, and management of their children." *Geering*, 320 Mich App at 188 (citation omitted). This right is not absolute because "the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor . . . ." *Id*. (citations and quotation marks omitted). Nevertheless, the United States Constitution recognizes a presumption that fit parents act in the best interest of their children and that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of fit parents to make the best decisions concerning the rearing of their children." *Id*. (citations, quotation marks, and brackets omitted).

MCL 722.27b allows grandparents to seek grandparenting time in certain situations. MCL 722.27b(4)(b) protects a parent's constitutional right to make decisions about the care, custody, and management of their children by including a rebuttable presumption that "a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.27b(4)(b). In order to rebut this presumption, a grandparent "must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health." *Id*. If the grandparent does not overcome the presumption, the court shall dismiss the action for grandparenting time. *Id*. If a grandparent successfully rebuts the presumption,

> the court shall consider whether it is in the best interests of the child to enter an order for grandparenting time. If the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. [MCL 722.27b(6).]

This Court has recognized that a circuit court may not simply conclude that "grandparenting [time] is good, therefore it should occur." *Keenan v Dawson*, 275 Mich App 671, 682; 739 NW2d 681 (2007).

The circuit court's finding that intervening petitioners rebutted the fit-parent presumption was not contrary to the great weight of the evidence for all of the reasons outlined in section IV of this opinion. Once again, the record reflects that RL had a close relationship with plaintiff throughout plaintiff's life, that RL shared hobbies with plaintiff and spent significant periods of time with plaintiff and his family members, and that defendant failed to support RL's mental and emotional needs following plaintiff's death. Defendant did not believe that RL suffered mentally or emotionally after plaintiff's death, resulting in her failure to even arrange for RL to attend her father's funeral. Thereafter, RL experienced not only a sudden loss in the form of the death of her father, but also a sudden loss of contact with her paternal grandparents. Over the course of seven months following plaintiff's death, RL spent a total of 10 to 12 supervised hours with intervening petitioners.

In light of the foregoing evidence, Dr. Brotsky testified that RL experienced trauma related to plaintiff's death and the sudden loss of contact with plaintiff's family that had a substantial

likelihood of resulting in anxiety, depression, interpersonal problems, or post-traumatic stress disorder. Dr. Brotsky opined that RL may have developed a fear of loss as evidenced by RL's reluctance to disappoint defendant by showing affection for plaintiff's family. Dr. Brotsky went on to state that it is important for children to preserve the legacy of a deceased parent. For these reasons, Dr. Brotsky concluded that precluding grandparenting time would create a substantial risk of harm to RL's mental, physical, or emotional health.

In sum, the circuit court's finding that intervening petitioners rebutted the fit-parent presumption was not contrary to the great weight of the evidence. This was not an instance in which the circuit court simply concluded that "grandparenting [time] is good, therefore it should occur." *Id*. Rather, intervening petitioners presented specific evidence that defendant's decision to deny grandparenting time created a substantial risk of harm to RL's mental, physical, or emotional health.

VI. REASONABLE PREFERENCE

Plaintiff lastly contends that the circuit court's finding that RL lacked the capacity to form a reasonable preference regarding grandparenting time was contrary to the great weight of the evidence. We disagree. The circuit court did not abuse its discretion when it declined to interview RL in order to determine RL's reasonable preference regarding grandparenting time.

In considering whether grandparenting time is appropriate, there exists a rebuttable presumption that "a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.27b(4)(b). If a grandparent successfully rebuts this presumption, the court shall consider whether it is in the best interests of the child to enter an order for grandparenting time. MCL 722.27b(6). In determining the best interests of a child, the court shall consider all of the following:

> (a) The love, affection, and other emotional ties existing between the grandparent and the child.
>
> (b) The length and quality of the prior relationship between the child and the grandparent, the role performed by the grandparent, and the existing emotional ties of the child to the grandparent.
>
> (c) The grandparent's moral fitness.
>
> (d) The grandparent's mental and physical health.
>
> (e) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.
>
> (f) The effect on the child of hostility between the grandparent and the parent of the child.
>
> (g) The willingness of the grandparent, except in the case of abuse or neglect, to encourage a close relationship between the child and the parent or parents of the child.

(h) Any history of physical, emotional, or sexual abuse or neglect of any child by the grandparent.

(i) Whether the parent's decision to deny, or lack of an offer of, grandparenting time is related to the child's well-being or is for some other unrelated reason.

(j) Any other factor relevant to the physical and psychological well-being of the child. [MCL 722.27b(6)(a)-(j).]

In the instant matter, defendant argues that the circuit court clearly erred when it failed to consider all of the best-interest factors under MCL 722.27b(6). Specifically, defendant argues that the circuit court abused its discretion when it declined to interview RL regarding her reasonable preference under MCL 722.27b(6)(c). We disagree.

"The term 'reasonable preference' has been defined by this Court as a standard that 'exclude[s] those preferences that are arbitrary or inherently indefensible.' " *Maier v Maier*, 311 Mich App 218, 224; 874 NW2d 725 (2015) (citations omitted). "A preliminary question is always whether the child has the capacity to form a reasonable preference and, if so, whether the child has actually formed a preference." *Id*. "A child over the age of six is presumed to be capable of forming a reasonable preference." *Id*. (citation omitted). "Just as adults may lack the capacity to give competent testimony because of infirmity, disability, or other circumstances, so may a child's presumed capacity be compromised by circumstances peculiar to that child's life." *Id*. at 225.

In the instant matter, the circuit court found that RL was not of a sufficient age to express a preference regarding grandparenting time. Although the circuit court framed its ultimate determination in the context of RL's age, the circuit court contemplated RL's capacity to form a preference by considering RL's awareness of the prior hostility between plaintiff and defendant and the trauma that RL suffered after plaintiff's death. The circuit court's finding was supported by the record.

As noted by the circuit court, RL was 10 years old on the date of the evidentiary hearing. Thus, there was a presumption that RL was capable of forming a reasonable preference. Nevertheless, the evidence of record showed that RL was reluctant to speak about plaintiff and was hesitant to show affection for plaintiff's family members in defendant's presence. Dr. Brotsky opined that RL may have developed a fear of loss such that RL did not want to disappoint defendant by showing affection for plaintiff's family. Furthermore, defendant allowed RL to become aware of the grandparenting time proceedings by speaking about them in RL's presence. Thus, the evidence indicated that RL's capacity to express a preference was compromised by defendant's influence over RL and RL's fragile emotional state following plaintiff's death. Accordingly, the circuit court fulfilled its statutory duty by contemplating RL's ability to form a reasonable preference under MCL 722.27b(6)(c), and the circuit court's finding was not contrary to the great weight of the evidence.

Affirmed.

/s/ Jane M. Beckering
/s/ /Karen M. Fort Hood
/s/ Michael J. Riordan