STATE OF MICHIGAN

COURT OF APPEALS

DARLA MARIE ARUTOFF,

Plaintiff-Appellant,

v

MARTIN JOSEPH ARUTOFF,

Defendant-Appellee.

UNPUBLISHED
June 23, 2011

No. 300351
Oakland Circuit Court
LC No. 2009-766451-DM

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Plaintiff appeals by right the judgment of divorce granting the parties joint legal custody, and granting defendant primary physical custody, of the parties' children. Although the trial court committed certain factual errors, we affirm its ultimate rulings in this case.

I

Plaintiff first argues that the trial court erred by finding that the children had an established custodial environment with both parties and, as a result, applied the wrong evidentiary standard. We disagree. We review a trial court's factual findings regarding a child's established custodial environment under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705-706; 747 NW2d 336 (2008). Such findings must be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*. Whether the appropriate evidentiary standard was applied is a question of law that we review de novo. *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009).

To change a child's established custodial environment, a court must find by clear and convincing evidence that the change is in the child's best interests. MCL 777.23(1)(c). In cases where the relief sought would not constitute a change in the child's established custodial environment, however, the preponderance of the evidence standard applies. *Pierron v Pierron*, 486 Mich 81, 89-90; 782 NW2d 480 (2010).

Regarding the existence of an established custodial environment, the trial court stated, "[T]here is . . . joint legal custody, so I do have to find by clear and convincing evidence if I wish to change that . . . ." Plaintiff argues that the trial court's reasoning was clearly erroneous. As plaintiff points out, "[c]ustody orders, by themselves, do not establish a custodial environment." *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). Indeed, "[t]he existence of

a . . . custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian." *Berger*, 277 Mich App at 706-707. Instead, the court must examine the relationship the child has with each parent. *Bowers*, 198 Mich App at 325. As guidance, MCL 722.27(1)(c) provides in relevant part:

> 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. 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.

We agree that the trial court's reasoning was flawed insofar as the court appears to have relied solely on the custody order to reach its conclusion regarding the children's established custodial environment. Nevertheless, we cannot conclude that the court's ultimate conclusion was against the great weight of the evidence. Although the children reside with plaintiff on a regular basis, they visit defendant for eight weeks during the summer. Defendant provides them food and clothing while in his care, and has arranged counseling for the parties' oldest daughter. He has provided an individual bedroom for each child, and he disciplines his children by taking away privileges or grounding them. This evidence indicates that the children naturally look to defendant while in his care for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c). Although plaintiff has served as the children's primary caregiver and defendant lives in another state, this does not preclude a finding of a duel custodial environment. Moreover, contrary to plaintiff's assertion, it appears from the record that defendant exercises his parenting-time rights more than sporadically. As this Court has observed on numerous occasions, "[a]n established custodial environment may exist with both parents . . . ." *Berger*, 277 Mich App at 707; see also *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

At any rate, even if the trial court had erred with respect to its determination concerning the children's established custodial environment, it is apparent from the record that the court correctly applied the clear and convincing evidentiary standard before changing the children's custody arrangement in this case. We perceive no error in the trial court's determination that the children had an established custodial environment with both parents or in its application of the clear and convincing evidentiary standard.

II

Plaintiff also argues that the trial court erred in its analysis of the best interests of the children. Again, we disagree. We review a trial court's factual findings in a child custody case under the great weight of the evidence standard. *Berger*, 277 Mich App at 705. The court's findings concerning each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). We review the trial court's ultimate award of custody for an abuse of discretion. *Id*.

In resolving custody disputes, a trial court must consider the statutory best-interest factors set forth in MCL 722.23, which provides:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

The trial court determined that the parties were equally situated with respect to factors a and j, and plaintiff does not appeal the court's findings in this regard. Instead, plaintiff challenges the trial court's findings with regard to factors b, c, d, e, f, h, i, and k. Plaintiff also argues that the trial court erred by failing to make specific findings with respect to factor g.

With regard to factor b (the parties' capacity to provide the children love and affection), the trial court stated:

> The children are completely void of religion, I believe. I think again, the parties do . . . what they can do to provide love and affection, but guidance? I don't know. I mean you look at the other children, at least [defendant's] other children, and obviously, there's issues there. You look at Holly and there's a huge issue there. You look at Charlotte and there's an issue, and poor Jesse just wants to play baseball, and [plaintiff] doesn't even let him play baseball a lot. I mean it's ridiculous.
>
> The capacity and disposition of the parties, so that's kind of equal[.]

Plaintiff argues that the trial court erred by finding that the parties were equal with regard to this factor, and should have found that the factor favored plaintiff because defendant verbally abused the children, threatened to burn down the house, and set the living room curtains on fire. We disagree. The record provides insufficient evidence that defendant verbally abused the children. If anything, the record indicates that plaintiff had a tendency to yell at the children and was in need of education or training concerning her parenting strategies. Further, as defendant points out, plaintiff exposed the children to an abusive, live-in partner over a four-year period. The trial court's findings regarding this factor were not against the great weight of the evidence.

With regard to factor c (the parties' capacity to provide the children food, clothing, and medical care), the trial court stated:

> This one clearly favors [defendant]. . . . Holly has this terrible problem that's manifested itself for years and [plaintiff] didn't do anything about it. Her first cutting incident, . . . which could have been suicidal, and [plaintiff] said . . . she didn't take it seriously. . . . This child is trying to kill herself. . . . She's screaming for help, and nobody gets her the help that she needs. And then she does try to kill herself, and [plaintiff] doesn't even tell [defendant]. . . . [Plaintiff] lives with a guy. They make $600 a month, $7,200 a year. She's getting $900 in Social Security benefits for the children. They're living with nine people in a 1,200 square foot house. Yeah, maybe the kids get the minimum, but they're not getting what they need. That favors [defendant].

Plaintiff argues that the trial court clearly erred by finding that this factor favored defendant. Again, we disagree. Plaintiff has been in the best position over the past several years to see that the parties' oldest daughter is receiving the care she needs, and the parties' oldest daughter has engaged in her self-destructive behaviors while in plaintiff's care. Additionally, the trial court properly gave significance to the fact that plaintiff has failed to communicate the daughter's condition to defendant. Plaintiff emphasizes that defendant stopped counseling for their oldest daughter, apparently because he could not afford it, and then used the money to buy the children computers and take them to an amusement park. The trial court told defendant that the computers and amusement park trip were foolish expenses, but it properly considered a wider range of incidents in ruling on this factor. With regard to the counseling, the record indicates that it was plaintiff, not defendant, who spoke with the parties' oldest daughter and decided that she could go without counseling. Moreover, it is clear that plaintiff did not keep defendant informed regarding the seriousness of their daughter's condition. During the most recent summer, defendant arranged counseling for the oldest daughter. He has also promised to arrange

counseling for all three children, which he will be able to afford through government assistance if he obtains custody. Given the totality of the evidence, we cannot say that the trial court's findings regarding factor c were against the great weight of the evidence.

With regard to factor d (the stability and continuity of the home environment), the trial court stated:

> [P]utting four kids in a basement with sheets as dividers is not a satisfactory environment for children, putting nine people in a 1,200 square-foot house isn't a satisfactory environment for children. Clearly, [defendant] at least has a home. He's been in the home for awhile. [Plaintiff has] moved three times. She's had three men in and out of her life since . . . 2002, [and] one of them abused her. So that favors [defendant].

Plaintiff argues that this factor favored her because the children have never lived in defendant's home for a continuous time, the parties' homes are practically identical, and the trial court imposed a double standard when it placed weight on the fact that plaintiff lives with another man but gave no consideration to the fact that defendant lives with another woman. We cannot agree. The children live with defendant for a significant time during the summer. Further, the record establishes that the parties' homes are not identical. Defendant's home is larger, less crowded, and includes a separate bedroom for each child.

The court observed that while plaintiff has had multiple live-in partners, defendant has had just one. We agree with plaintiff that this fact, standing alone, was not of substantial value in the court's overall analysis of factor d. What plaintiff fails to acknowledge, however, is that one of her live-in partners was abusive. And given the abusive nature of this relationship, we cannot say that the trial court imposed an impermissible double standard. Quite simply, plaintiff exposed the children to an abusive live-in partner but defendant did not. We cannot conclude that the trial court's findings concerning this factor were against the weight of the evidence.

With regard to factor e (the permanence of the proposed custodial home), the trial court stated:

> [Plaintiff] has had two children with a man she's not married to. She's living with those two children plus two of his children plus her three children, exposing her children to a man she's not married to. [Defendant is] in that same situation, but at least he doesn't have any children with the other lady, but . . . [plaintiff has] moved several times. We don't know where she's going to be living. . . . [Defendant has] been in his home for a period of time and it's got bedrooms for the kids . . . . [A]t least [defendant's home is] stable and each kid has his own bedroom and [defendant has] a plan.

Plaintiff argues that the trial court erred by finding that this factor favored defendant. However, she provides very little actual argument on this point. The evidence favoring defendant in this regard was overwhelming. Plaintiff has not provided a stable home for the children. She has moved repeatedly and her home environment is crowded and chaotic as

compared to the environment and living arrangements in defendant's home. The trial court's findings concerning factor e were not against the great weight of the evidence.

With regard to factor f (the moral fitness of the parties), the trial court stated:

> [Plaintiff] has children with an unrelated member of the opposite sex [who] is living with them in the home, and that is not in my opinion morally right. I don't' like [defendant] living with an unrelated member of the opposite sex. They don't' have children. . . . It's [a] long-term relationship for [defendant]. . . . [Plaintiff] is serially monogamous. She goes from man to man. That favors [defendant].

We agree with plaintiff that the trial court erred by determining that factor f favored defendant. This Court has repeatedly stressed that a parent's cohabitation with a member of the opposite sex is an insufficient ground for a finding of moral unfitness under factor f. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 456 n 24; 705 NW2d 144 (2005); *Truitt v Truitt*, 172 Mich App 38, 46; 431 NW2d 454 (1988). As plaintiff correctly points out on appeal, she and defendant were *both* living with a member of the opposite sex. It is therefore difficult to understand how the trial court could have determined that the parties were not equally situated with regard to factor f. We conclude that the trial court's findings on this factor were against the great weight of the evidence.

With regard to factor g (the mental and physical health of the parties), plaintiff argues that the trial court erred by failing to make any findings. Although we agree that the trial court did not provide a statement regarding this factor on the record, the parties appear equally situated with regard to this factor, and any error in the trial court's omission was harmless. Both parties appear to have anger issues. Defendant threatened to burn down the house and went so far as to set the living room curtains on fire. Plaintiff has repeatedly yelled at the children and exposed them to an abusive live-in partner for four years. Plaintiff also has a history of mental health problems. We simply cannot say that the trial court's failure to articulate specific findings with respect to factor g was decisive to the outcome of this case.

With regard to factor h (the home, school, and community record of the children), the trial court stated:

> [T]hese children are not doing great in school. They've all got problems in school. [Defendant is] not a star by any stretch of the imagination. Children should not be smoking. They run over to [defendant's] daughter's house, and she smokes and drinks there. She's got issues; you've got to deal with those issues. So I think that factor favors [defendant].

We agree with plaintiff that the trial court erred by finding that factor h favored defendant. It is true that, while in plaintiff's care, the children have suffered in school and the parties' oldest daughter has had difficulty socializing with her peers. However, defendant has never handled school-related or community-related activities with the children, largely because he only has the children during the summer months. In addition, as the trial court noted on the record, the children have had several home and community-based problems while living with

defendant as well as with plaintiff. Contrary to the trial court's findings, the record evidence established that the parties were roughly equal with respect to factor h. We conclude that the trial court's findings concerning factor h were against the great weight of the evidence.

With regard to factor i (the reasonable preference of the children), the trial court stated, "These children love both of their parents. These children are confused. These children need help. I'll consider that in my decision . . . ." Plaintiff argues that the trial court's statements suggest that the parties were equal with respect to this factor. We find nothing to suggest that the trial court did not mean precisely what plaintiff argues—i.e., that the parties were equal with regard to factor i. "As a general rule, a trial court must state on the record whether children were able to express a reasonable preference and whether their preferences were considered by the court, but need not violate their confidence by disclosing their choices." *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871 (1994). We conclude that the trial court's statements were appropriate in light of the existing law on this matter, and we perceive no evidence to suggest that the court did not properly weigh or consider the children's preferences. No error occurred in this regard.

With regard to factor k (domestic violence), the trial court stated, "Domestic violence, I mean there's testimony on both sides, I think that's equal." Plaintiff argues that the trial court erred by finding the parties equal on this factor because defendant threatened to burn the house down, screamed at plaintiff at a shopping mall, and threw his shopping bags at her. Defendant then left plaintiff at the mall with the children in the winter, forcing them to walk four miles to their home. While we acknowledge these incidents, it is also significant that plaintiff has repeatedly yelled at the children and exposed them to an abusive relationship. We cannot conclude that the trial court's findings with respect to factor k were against the great weight of the evidence.

In child custody cases, the trial court enjoys broad discretion to explore every aspect of the litigants' circumstances so that its ultimate custody decision will reflect the best interests of the children. *Berman v Berman*, 84 Mich App 740, 745; 270 NW2d 680 (1978). Although the trial court failed to make specific findings concerning factor g, and made findings against the great weight of the evidence concerning factors f and h, the fact remains that three of the factors clearly favored defendant while none of the factors favored plaintiff. On the record before us, we simply cannot conclude that the trial court's ultimate custody decision constituted an abuse of discretion. See *McIntosh*, 282 Mich App at 475.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad