STATE OF MICHIGAN

COURT OF APPEALS

KELLY MCLAUGHLAN,

Plaintiff-Appellant,

v

KELLY BUNTING,

Defendant-Appellee.

UNPUBLISHED
September 27, 2011

No. 301060
Genesee Circuit Court
LC No. 05-264298-DC

Before: SERVITTO, P.J., and MARKEY and K.F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order awarding defendant sole physical custody of the minor child and continuing joint legal custody. We affirm.

I. FACTUAL BACKGROUND

The parties were never married. They had an "on again, off again" relationship for a five year period while plaintiff was married to his wife, Cindy. Plaintiff and Cindy, who have other grown children, attended counseling and are still married. Cindy works and plaintiff receives disability income. Defendant, who is fifteen years plaintiff's junior, has a two-year-old child from another relationship. She works part-time at a bank and also attends college.

The parties previously reached an agreement whereby the child would spend one week with plaintiff and Cindy and the next week with defendant. This week-on week-off arrangement worked for awhile but became problematic when the child was getting ready to begin kindergarten. Plaintiff and defendant lived approximately one hour away from one another, and they agreed that having the child commute to and from school for an hour each day on the weeks he was living out-of-district would be unfair to him. However, they could not agree on which school district the child should attend. While prior hearings focused on which school district the child would attend, the ultimate issue was really one of custody, and plaintiff's motion for a determination of school district was treated as a motion for a change of custody. The trial court found that an established custodial environment existed with both parents. It then analyzed the statutory best interest factors and determined that defendant should have sole physical custody of the child. Plaintiff appeals, arguing that: 1) the trial court erred in finding that a custodial environment existed when, in fact, the child's custodial environment was with plaintiff; and 2) the trial court erred in evaluating the statutory best interest factors.

II. STANDARDS OF REVIEW

"This Court must affirm all custody orders unless the trial court's findings of fact 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." MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court's findings regarding the existence of an established custodial environment are reviewed under the great weight of the evidence standard and must be affirmed unless the evidence clearly preponderates in the opposite direction. *Berger*, 277 Mich App at 705-706. Likewise, we review a trial court's findings regarding the statutory best-interest factors to determine whether they are against the great weight of the evidence. *Id.* at 705. "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Id.* A trial court's discretionary rulings, such as which party shall be awarded custody, are reviewed for an abuse of discretion. *Id.* A trial court's custody determination is entitled to the utmost level of deference, and an abuse of discretion exists with respect to such a determination only where the 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.* at 705-706.

III. LEGAL PRINCIPLES

Under the Child Custody Act ("CCA"), MCL 722.21 *et seq.*, parents who share joint legal custody of a child "'shall share decision-making authority as to the important decisions affecting the welfare of the child.'" *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.26a(7)(b). "However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child." *Pierron*, 486 Mich at 85. "When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment." *Id.* An established custodial environment exists "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). Courts should also consider "[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship[.]" *Id.*

> 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*, 277 Mich App at 706.]

A court may not "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." MCL 722.27(1)(c). "Under such circumstances, the trial court must consider all the best-interest factors [set forth in MCL 722.23] because a case in which the proposed change would modify the custodial environment is essentially a change-of-custody case." *Pierron*, 486 Mich at 92-93.

IV. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff contends that the trial court erred in finding that an established custodial environment existed with both parties. We disagree.

The parties agreed that the week-on-week-off parenting schedule was not in the child's best interests because it would have required him to spend extensive time traveling to and from school every other week. Thus, both parties sought full physical custody of the child with parenting time granted to the other parent. Plaintiff contends that awarding him sole physical custody would not have changed the child's established custodial environment because that environment existed with him rather than with both parties, as the trial court determined. As such, he argues that the heightened clear and convincing evidence standard was inapplicable and that he was required to show only by a preponderance of the evidence that awarding him custody was in the child's best interests.[1] See *Pierron*, 486 Mich at 89-90. Plaintiff's argument lacks merit.

The record shows that the child's established custodial environment was with both parties. In its September 2, 2010, order, the trial court recognized that the parties had shared joint legal and physical custody of the child for more than three years and that the court had previously determined that his established custodial environment was with both parties. The court made this determination following the March 2007 evidentiary hearing. At that time, defendant had sought sole physical custody of the child and plaintiff had sought to continue the week-on-week-off parenting arrangement. The trial court determined that defendant failed to present clear and convincing evidence showing that she should be awarded sole physical custody. Thus, the record shows that the child's established custodial environment was with both parties. The evidence presented during the trial at issue in this appeal did not demonstrate that the child's established custodial environment had changed. The parties were still exercising week-on-week-off parenting time, and both parties provided care, guidance, and discipline for him.

Although plaintiff concedes that the parties shared equal parenting time, he essentially argues that he did more for the child and that the child looked to him for his basic needs. Plaintiff argues that he was the parent who provided for the child's educational needs by enrolling him in preschool. The record shows, however, that plaintiff did so without defendant's knowledge or consent and only after the referee issued his August 5, 2009, recommendation directing that the child attend school in the district in which defendant resides. Plaintiff argues that the trial court committed a clear factual error by determining that defendant was unaware of the child's enrollment in preschool. He contends that the parties' discussion of preschool at the June 2009 referee hearing evidenced defendant's knowledge of the child's enrollment. Even if the parties discussed preschool at the June 2009 hearing, their discussion would not show that defendant was aware that plaintiff enrolled the child in preschool in August 2009. Moreover,

[1] Unlike in *Pierron*, in which the Court determined that enrolling the children in a school 60 miles from the plaintiff's home did not change their established custodial environment, this case involves parents who exercised 50/50 parenting time, which they sought to discontinue to avoid the child's having to spend extensive amounts of time traveling to and from school.

plaintiff did so in violation of the referee's recommendation indicating that the child shall attend school in defendant's district. When neither party objected to the recommendation, the trial court entered an order implementing it on September 2, 2009. Plaintiff apparently knew that his actions violated the recommendation and order because, on September 22, 2009, after he enrolled the child in preschool in Marlette, he filed a "motion regarding school district," seeking to change the child's school district to the Marlette district. In any event, except for a brief period in the spring of 2010, the child attended preschool only two days a week, every other week. Such limited enrollment does not show that the child's established custodial environment was with plaintiff rather than with both parties.

Similarly, the fact that plaintiff took the child to counseling did not alter the child's established custodial environment. Plaintiff took the child for counseling with Elise Finch-Sophiea in October 2009 on the advice of his attorney and after he filed his motion to change the child's school district. Thus, the circumstances that led to the child's counseling suggest that the decision to seek counseling may have been for litigation purposes. Defendant's testimony that she was unaware until February 2010 that the child was seeing a counselor tends to support this notion. At any rate, Finch-Sophiea counseled the child only twice a month during plaintiff's parenting time. The fact that plaintiff took the child to counseling does not show that he looked to plaintiff rather than to both parties for guidance, discipline, parental comfort, and the necessities of life.[2]

[2] We are disturbed by Sophiea's testimony, including her allegation that the child was "extremely emotionally abused" by defendant. Sophiea began treating the child in October 2009, but made no attempt to contact defendant until February 2010. Sophiea concluded that the child had an unhealthy hatred for his younger brother and his mother because of the disparate way in which defendant treated the boys, showing obvious favoritism to the younger child. Sophiea's conclusions were based, at least in part, on Sophiea's observations of the two children in the counselor's playroom. Incredibly, this observation of defendant's other child, who has no legal relationship with plaintiff, was done without defendant's knowledge or consent, raising serious professional ethical concerns. Sophiea's opinions about the siblings' interaction led to a period of time in the spring of 2010 when defendant was allowed only supervised visits with the child. Sophiea was also unapologetic for referring defendant to CPS in November 2009 based on allegations that defendant had an unsanitary home, left "toxic chemicals" (Comet wipes) within a child's reach, had no healthy food in the home, and forced the child to sleep on a mattress on the floor. These allegations were based on plaintiff's statements to her and his photographs of defendant's home. The investigating Child Protective Services worker visited the home on three occasions and found no cause for concern. The children appeared to be well cared for, the home was clean, there was adequate food, and the child was sleeping on a mattress on the floor because the bed frame was broken. Sophiea also demonstrated bias in referring to plaintiff's house as "house" or "home" and referring to defendant's home as "a trailer" and then subsequently denying that she had done so. Sophiea testified that she was "99.9 percent" sure that there was no possibility that plaintiff had manipulated or brainwashed the child or that alienation of affection played a role in the child's statements that he hated his mother. We take this opportunity to remind professionals in child custody cases of their ethical obligations.

Further, plaintiff argues that the trial court erred by failing to adhere to the testimony and recommendations of Lynne Taft, the child's Guardian Ad Litem ("GAL"). Taft's testimony, however, pertained more to the child's best interests rather than to his established custodial environment. Accordingly, the trial court did not err by failing to accord her testimony more weight.

The trial court's finding that an established custodial environment existed with both parties is not contrary to the great weight of the evidence.

V. STATUTORY BEST INTEREST FACTORS

Plaintiff argues that the trial court's findings with respect to best-interest factors (b), (c), (d), (e), (g), (h), (j), and (l) are against the great weight of the evidence and that the court erred by failing to interview the child and determine whether he is mature enough to indicate a preference with respect to factor (i). We disagree.

Factor (b) required the trial court to assess "[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(b). The trial court determined that this factor is equal and noted that plaintiff had raised three other children while defendant is currently raising a younger child, as well as the child at issue in this appeal, on her own in addition to working and going to school. The trial court did not err in determining that this factor is equal. Plaintiff's wife testified that the child is always happy to see plaintiff and go with him when plaintiff picks him up. She maintained that the bond between them is very strong and characterized the child as "daddy's boy." Defendant's father observed the child express affection toward defendant and tell her that he loves her. Defendant works part time in addition to attending school and obtained student loans and grants to allow her to be able to spend more time with her children. She completed a parenting class to learn how to better handle the child's attention-seeking behavior, such as his yelling. No testimony was presented regarding either party's religion. Thus, the trial court's determination that factor (b) is equal is not against the great weight of the evidence.

Factor (c), MCL 722.23(c), required the trial court to assess "[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." The record supports the trial court's determination that this factor is equal. Neither party relies on public assistance for the child's support. Both parties provide health insurance for the child, although plaintiff's wife, rather than plaintiff, insures the child through a policy that her employer provides. Plaintiff collects Social Security disability benefits ("SSI") each month, and, at the time of trial, defendant worked part time and used student loans to help pay living expenses. She expected to graduate with honors in May 2011 and receive a bachelors degree in business administration. Thereafter, she hoped to work full time in her field.

Sophiea's allegations had grave consequences – investigations by CPS and supervised visitation, yet the allegations were based primarily on statements plaintiff made and without any contact with defendant.

At the time of trial, plaintiff had lived in a farmhouse in Marlette for 4-½ years. He moved to Marlette from his previous residence because he and his wife could no longer afford it and had twice declared bankruptcy. Plaintiff's parents paid the balance of the mortgage on the Marlette home. At the time of trial, defendant had lived in her apartment in Davison for nearly six months. Although plaintiff contends that defendant kept only "junk" food in her home, both her father and Child Protective Services ("CPS") investigator Donovan Jones testified that she kept adequate, appropriate food in the home.

The child's medical care was a primary issue during trial. Plaintiff's wife testified that plaintiff takes care of the child when he is sick and takes him to the doctor. Defendant was not questioned regarding whether she ever takes the child to doctor appointments. Although plaintiff and his wife maintained that the child frequently suffers from constipation, defendant did not believe that he has a problem with his bowel movements. Defendant testified that if he had such a problem, she would take him to a doctor and talk to plaintiff about it. On one occasion, plaintiff and his wife took the child to the hospital to remove a sliver that neither defendant, her father, plaintiff, nor his wife could remove. Plaintiff and defendant agreed that if the child is diagnosed with ADD or ADHD, they would try methods of treatment other than medication and did not want to make a "Ritalin kid" out of him. Thus, the trial court's finding that factor (c) is equal is not against the great weight of the evidence.

Factor (d) required the trial court to evaluate "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). With respect to this factor, the trial court stated:

> The parties have had shared physical custody for over three (3) years. The litigation over custody has been continuing for over 17 months with allegations, counter-allegations, complaints to the Friend of the Court, a protective service investigation and a referral by one (1) parent to a psychologist.
>
> The concerns of the minor child's anger and possible hitting of his younger sibling should never be taken lightly. The lack of communication and working with each other as loving, responsible parents has certainly contributed to some of the issues the child may have been having.
>
> This factor is equal[.]

Plaintiff argues that the trial court's findings must be set aside because they do not relate to the permanence or stability of the family environment, which factor (d) addresses. We disagree. The parties' inability to communicate and work together is not dissociated from the child's home environment, and the parties' constant litigation injects instability into the child's life. The evidence showed that while at plaintiff's home, the child was taught a song about not wanting to go to his mother's house and watched a video that plaintiff had recorded of defendant arriving to pick up the child. Moreover, while at defendant's home, defendant discussed the court proceedings with the child. The parties' behavior speaks to the child's environment and whether his environment is stable and desirable.

In any event, the evidence showed that both parties' homes were stable and satisfactory. Plaintiff had lived in his home for 4-½ years, and Lynne Taft, the GAL, testified that plaintiff's home is an older farmhouse with a place for the child to play outside. At the time of trial, defendant had been in her apartment for nearly six months. Although Taft testified that defendant's apartment was not as "kid-friendly" as plaintiff's house and that there were no toys there, Taft acknowledged that defendant had just moved into the apartment when she visited. CPS investigator Jones visited defendant's home on three occasions and saw no need for concern. In addition, defendant's father supervised defendant's visitation for a period of time and observed the children playing in the home. Thus, the trial court's determination that factor (d) is equal is not against the great weight of the evidence.

Under factor (e), the trial court assessed "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court simply concluded, "[t]he parties are equal[.]" Although the trial court offered no analysis, its determination that the parties are equal does not contravene the great weight of the evidence. Plaintiff, although married for nearly 28 years at the time of trial, was involved in an extramarital affair with defendant for five years, which resulted in the child's conception and birth. Plaintiff's affair created familial problems. When the child was one or two years old, he attended counseling with plaintiff and plaintiff's family. For her part, defendant had a relationship with her younger child's father "on and off" for two years after the child at issue in this appeal was born. The younger child's father is no longer involved with defendant and never visits his child. Accordingly, the trial court's determination that factor (e) is equal is not against the great weight of the evidence.

Factor (g) required the trial court to assess "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court determined that this factor favors defendant because she is working and furthering her education while plaintiff collects SSI and has physical back problems. Plaintiff was 46 years old at the time of trial and suffers from degenerative disc disease and arthritis. He has difficulty standing and sitting for long periods of time. Defendant was only 31 years old at the time of trial, and no evidence was presented that she suffered from any health problems. Because the evidence does not clearly preponderate in the opposite direction, we affirm the trial court's findings.

Factor (h) required the trial court to assess "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court determined that this factor is equal and noted that plaintiff took advantage of defendant by enrolling the child in preschool in Marlette without her knowledge or concurrence. As previously discussed, the trial court's finding that defendant was unaware of the child's enrollment was not against the great weight of the evidence.

Plaintiff argues that focusing on his actions rather than on the child shifts the focus away from the child's best interests. Jill Bell, the preschool director, testified that the child performed well academically but struggled socially because he attended preschool only four days each month for most of the school year. She claimed that his increased attendance toward the end of the year made a tremendous difference in helping him make social connections. Bell opined that regardless of which school district the child attends, he should attend kindergarten for a full day rather than a half day. Thus, the evidence showed that full-day kindergarten, regardless of

whether the child is enrolled in Marlette or Davison schools, is in the child's best interests. Accordingly, the trial court did not err in determining that this factor is equal.

Factor (i) required the trial court to consider "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i); *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2009). The trial court did not consider this factor because it did not interview the child. Plaintiff argues that the court erred by failing to interview the child to determine whether he was old enough to express a preference. We disagree. This Court has previously determined that a child as young as six can be capable of expressing a preference and that a trial court's failure to conduct an interview may be error requiring reversal. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). However, we are not convinced that the trial court erred in determining that the child was not of sufficient age to express a preference given the circumstances here. Additionally, a child's preference is only one of the many factors to be considered in determining the child's best interests and does not outweigh those other factors. *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992). As such, even if the child had expressed a desire to live with plaintiff, it is clear by the totality of the trial court's findings that the ultimate determination would not have been different. Finally, the GAL testified that she interviewed the child and asked him "in a number of subtle ways" who he wanted to live with, but he "shut down" and would not express a preference.

Factor (j) required the trial court to 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(j). The trial court's determination that this factor favors defendant is not against the great of the evidence. The evidence showed that plaintiff photographed defendant's home and attempted to use the photos against her during trial. Plaintiff also showed the pictures to the child's counselor, which prompted a CPS referral that was unsubstantiated. While at plaintiff's home, the child was taught a song about not wanting to go to defendant's house. Moreover, plaintiff testified during trial that he will continue to file complaints with the Friend of the Court if defendant violates court orders. Defendant testified that plaintiff is a good father to the child but that his behavior toward her inhibits their level of communication. Notwithstanding plaintiff's treatment of defendant, she proposed a parenting time schedule that provided both parties with equal parenting over the course of a year. Thus, the trial court's determination regarding factor (j) is not against the great weight of the evidence.

Finally, factor (l) required the trial court to address "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The trial court determined that this factor favors defendant based in part on plaintiff's enrolling the child in preschool and taking him to counseling without defendant's knowledge or consent. As previously discussed, the trial court properly determined that plaintiff took unfair advantage of defendant by enrolling the child in preschool in the Marlette school district. Regarding the child's counseling, the record supports the trial court's determination that plaintiff did not advise or consult defendant before taking the child to counseling. Defendant testified that plaintiff mentioned only "in passing" that he was thinking of taking the child to counseling. She maintained that he did not speak to her again about the matter before the child's first appointment in October 2009 and did not know that he was attending counseling until February

2010. To the extent that the counselor testified that defendant was aware of the child's counseling, this Court defers to the trial court's determinations regarding credibility. *Berger*, 277 Mich App at 705.

In addition, the trial court's determination that plaintiff used his SSI status to gain an advantage in this custody dispute did not contravene the great weight of the evidence. Plaintiff testified that, as a mother, defendant is a "four" on a scale of 1 to 10. He opined that defendant needed to "start putting [the child] first," and that, when in her care, the child should spend less time with babysitters and "places other than home." Plaintiff further stated, "I just think a child should be raised at home." The trial court pointed out that defendant is young and is trying to earn a living working 25 hours a week and going to school. The court then stated to plaintiff, "because of your situation, you don't have to." Plaintiff responded, "[a]bsolutely." Accordingly, the trial court did not err in determining that plaintiff has used his SSI status to his advantage.

Further, with respect to the two school districts, the parties agreed to allow the trial court to conduct its own Internet research. The trial court also incorporated by reference the referee's findings made after the February 2010 hearing, indicating that the Davison schools offer "as much or more in most areas and their proximity to Northern Oakland County is a plus in terms of education, music, and art." The parties stipulated to admit as evidence the DVDs of the two previous referee hearings. Thus, the trial court's findings regarding factor (l) are not contrary to the great weight of the evidence.

VI. CONCLUSION

The trial court's finding that an established custodial environment existed with both parties is not contrary to the great weight of the evidence. Additionally, the trial court did not abuse its discretion in determining that it was in the child's best interests to award sole physical custody to defendant and to continue joint legal custody.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly