STATE OF MICHIGAN

COURT OF APPEALS

ALISA DIONNE EKDAHL, Plaintiff-Appellant,	UNPUBLISHED September 22, 2011
v	No. 302029 Saginaw Circuit Court
PATRICK EKDAHL, Defendant-Appellee.	LC No. 09-005828-DS

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant sole physical and legal custody of the parties' minor child. For the reasons stated in this opinion, we affirm the circuit court's award of physical custody to defendant, but vacate the trial court's award of sole legal custody and remand for findings regarding legal custody.

I. FACTUAL BACKGROUND

Defendant is currently on active duty in the United States Air Force and was stationed at Langley Air Force Base in Virginia at the time of the custody trial. Plaintiff resides with her mother in Saginaw, Michigan. The parties met while defendant was stationed in Idaho, and were married shortly thereafter. In May 2007, the parties moved to Arizona after defendant was transferred. The parties' child was born June 25, 2007. The parties lived together with the child for approximately one year. Then in June 2008 defendant was deployed to Korea for a year.

After defendant left for Korea, plaintiff remained in Arizona with the child for a few months, and then moved to Saginaw to live with her sister. Plaintiff stayed with her sister for three months and then, at the request of defendant, moved back to Arizona to live with defendant's cousin. This living arrangement was short lived and in January 2009, plaintiff returned to Michigan. Plaintiff has lived with her mother ever since.

Defendant returned from his deployment in June 2009, and was stationed at Langley Air Force Base in Virginia. Upon his return, defendant filed a complaint for divorce in Colorado.

Shortly thereafter, plaintiff filed a complaint for support and a complaint for custody in Saginaw County.[1] Plaintiff also filed a complaint for divorce in Saginaw County.

On October 14, 2009, the Saginaw Circuit Court entered a judgment of support against defendant, but left the matter of parenting time to be resolved by further order of the court. On October 27, 2009, a telephone hearing was held between the Saginaw Circuit Court and the Colorado court to determine which state would have jurisdiction over the parties' claims. It was agreed that Colorado would have jurisdiction to grant the divorce and that Michigan would be the home state with jurisdiction for custody, child support, parenting time and domicile. A Decree of Dissolution of Marriage was entered by the Colorado court on October 29, 2009.

On November 30, 2009, the circuit court entered a temporary custody order granting defendant custody of the child from December 2, 2009, to December 22, 2009. The court also referred the issue of parenting time, custody, and domicile to a child custody specialist. On January 26, 2010, the child custody specialist submitted her investigation and report recommending that the parties be granted joint legal custody, but that plaintiff be granted sole physical custody. Defendant objected to the custody and parenting time recommendations and the matter was set for trial.

After a three-day trial, on December 29, 2010, the circuit court issued a written Opinion and Order on custody and visitation. The circuit court concluded that the child looked to both parents for security, guidance, discipline, and the necessities of life, determined that there was no established custodial environment with either parent, and that the appropriate burden of proof for consideration regarding any change in custody was the preponderance of the evidence. However, the court also stated that it applied the clear and convincing evidence standard in evaluating the best interest factors. The court concluded that it was in the child's best interests for defendant to be granted sole legal and physical custody.

Plaintiff now appeals the order of the circuit court, arguing that the circuit court erred when it determined that no established custodial environment existed with her. Also, plaintiff argues that the circuit court's findings of fact on many of the statutory best interest factors are against the great the weight of the evidence, and that the circuit court abused its discretion in granting defendant sole physical and legal custody. Alternatively, plaintiff argues that even if the circuit did not err in granting defendant sole physical custody, the court abused its discretion when it granted defendant sole legal custody.

II. STANDARD OF REVIEW

MCL 722.28 provides that in child custody disputes, "all orders and judgments of the circuit court 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." Our Supreme Court has explained that MCL 722.28 "distinguishes among three types of findings and assigns standards of review to each." *Fletcher v Fletcher*, 447 Mich 871,

[1] Plaintiff's custody and support actions were later consolidated by the circuit court.

877; 526 NW2d 889 (1994). Findings of fact, including those on the existence of an established custodial environment and on each of the best interest factors, are reviewed under the great weight of the evidence standard. *Id*. at 878; *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. *Fletcher*, 447 Mich at 879. "An abuse of discretion exists when the trial court's 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." *Berger*, 277 Mich App at 705. "Clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. *Fletcher*, 447 Mich at 881.

These standards of review are amongst the most stringent in our law. The reason they are utilized in these cases is rather obvious. First, most divorce, custody and other similar family law cases are fact intensive, as what the facts are found to be in a particular case is left to the trial court to determine. After all, it is the trial court that views the witness while testifying, plainly viewing all of the nuances that come with live testimony-signs of nervousness, hesitancy, confidence, etc. We as an appellate court cannot get a feel for any of these important facets of witness testimony. Second, there are hardly any bright-line legal issues involved in these cases, with most issues guided by general statutory law to be filled in by discretionary calls properly left to the trial courts.

III. ANALYSIS

"[W]hen considering an important decision affecting the welfare of the child, the trial court must first determine whether the proposed change would modify the established custodial environment of that child." *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). If an established custodial environment exists, "then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests." *Id*.; see also MCL 722.27(1)(c). If no established custodial environment exists, "the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Id*. at 93.

A. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff argues that the circuit court erred when it determined that no established custodial environment existed, and that instead the trial court should have found that an established custodial environment existed with her, which would instead have required application of the clear and convincing evidence standard.

Established custodial environment is defined by MCL 722.27(1)(c), which provides in relevant part:

> [t]he 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.

In this case, the circuit court determined that no established custodial environment existed. However, this seems to be contradicted by the court's own findings:

> [a]fter hearing the testimony in this case, the Court concludes that this child looks to security, stability, guidance and discipline, as well as the necessities of life and parental comfort coming from both parents. The Court had an opportunity to watch this child interact between both parents and she did not appear to be uncomfortable with either one. This Court believes that the child looks to both parents both in a physical and psychological sense. The Court, therefore, concludes that there is no established custodial environment for one parent over the other.

These findings seem to support the conclusion that an established custodial environment existed with both parents. See *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). Nonetheless, because the circuit court explicitly based its findings on the clear and convincing evidence standard, any error made with respect to the existence of an established custodial environment would have been legally harmless.

B. BEST INTEREST FACTORS

Plaintiff's major challenge is to the circuit court's findings on the best interest factors, arguing that they were against the great weight of the evidence, and that the circuit court abused its discretion when it awarded defendant sole physical and legal custody. In determining the best interests of a child, the court must review the best interest factors listed in MCL 722.23, "as well as whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." *Wilcox v Wilcox (On Remand)*, 108 Mich App 488, 495; 310 NW2d 434 (1981); see also MCL 722.26a(1). When ruling on a custody motion, the circuit court must expressly evaluate each best interest factor (though some may not have relevance to a particular case) and state its reasons for granting or denying the custody request on the record. MCL 722.26a; *Meyer v Meyer*, 153 Mich App 419, 426; 395 NW2d 65 (1986).

In this case, the circuit court considered all the best interest factors and determined that the parties were equal in regards to factors (a), (b), (h), (i) and (k). The circuit court determined that defendant had an advantage in factors (c), (d), (e), (f), (g), and (j). Plaintiff argues that the circuit court's findings in regards to factors (a), (b), (c), (d), (e), (f), (g), (h), (j), and (l) are against the great weight of the evidence. As will be discussed in further detail, we agree that the circuit court's finding under factor (f) were against the great weight of the evidence. In all other respects, however, the circuit court's determinations are supported by the record and do not clearly preponderate in the opposite direction. See *Berger*, 277 Mich App at 706.

Factor (a) is "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The circuit court found the parties equal on this factor. Plaintiff argues that she has a clear advantage because she has spent more time with the child. Plaintiff also argues that the trial court erred because it improperly took into account plaintiff giving up custody of her three children from her prior marriage, and plaintiff claiming that she was raped while living in Arizona, which resulted in another pregnancy. We agree that these

were improper considerations. However, the evidence still supports a finding that the parties were equal in this factor.

The testimony established that defendant lived with the child for the first year of the child's life, and that he has exercised parenting time and bonded with the child since returning from Korea. Defendant's absence due to military deployment cannot be used against him when weighing this factor. See MCL 722.27(1)(c) ("If a motion for change of custody is filed after a parent returns from active military duty, the court shall not consider a parent's absence due to that military duty in a best interest of the child determination."). There was no dispute that both parties had good relationships with the child. Therefore, we agree that the parties were equal.

Factor (b) is "[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 circuit court found the parties equal on this factor. Plaintiff argues the defendant lacks the ability to set appropriate boundaries for the child, as evidenced by his allowing the child to webcam with plaintiff unsupervised. This does not demonstrate an inability to set appropriate guidelines, but instead shows that the parties have a reasonable difference in opinion on whether the child is old enough to webcam by herself.

Also, plaintiff argues that she should be favored on this factor because she takes the child to church and defendant does not believe in any religion. Defendant did testify that he does not believe in organized religion. However, plaintiff's testimony that she takes the child to church was contradicted by plaintiff's mother. When asked if plaintiff goes to church with the children, plaintiff's mother responded, "[s]he's been really struggling with her walk of faith because all of the things that have happened to her and she's trying to work it through . . . . Right now she is saying that's not for her." Therefore, the circuit courts findings with respect to factor (b) are not against the great weight of the evidence.

Factor (c) is "[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(c). The circuit court found defendant to have a slight advantage due to his higher income and because he had fewer children in his care. Plaintiff argues that the circuit court's determination was against the great weight of the evidence.

Disparity of income can be a relevant consideration when making a custody determination, *Pierron*, 486 Mich at 90, and the circuit court correctly noted that plaintiff works approximately 30 hours a week and makes $7.50 an hour. Plaintiff also has five children and pays child support to her first husband for their three children. Plaintiff is in substantial arrears, and currently has her child support payments garnished from her pay check. Defendant, on the other hand, has only one child and receives over $3,600 a month in total compensation from the military. Defendant also has a family care plan and medical insurance. Therefore, the evidence does not preponderate against the trial court's finding that defendant had an advantage on factor (c).

Factor (d) is "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The circuit court found

defendant to be favored in this factor. The circuit court noted that "no matter whom the child has been with, both parents have moved numerous occasions." However, the circuit court stated "that with the care plan provided by the military, the structure provided by Defendant and the fact that this is the only child Defendant has to care for, that Defendant provides the most satisfactory environment for maintaining continuity in the child's life." The circuit court also stated that the child "would not be faced with her step-siblings coming and going along with her coming and going with the mother if she were to reside with Defendant."

Plaintiff argues[2] that the circuit court improperly considered the child's half-siblings to be a distraction, and that instead the facts show that the child developed strong bonds with her half-siblings, and that those bonds are important. To this end, the testimony revealed that the children had bonded and there were no problems between the child and her half-siblings. "The sibling bond and the potentially detrimental effects of physically severing that bond should be seriously considered in custody cases where the children likely have already experienced serious disruption in their lives as well as a sense of deep personal loss." *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). With that said, we do not believe that the circuit court looked at the presence of the child's half-siblings in her life as being detrimental. Rather, the court seems to have been focused on how the comings and goings of the children creates some instability in the life of the child in issue. On this basis, the circuit's determination that defendant had an advantage with respect to factor (d) was not against the great weight of the evidence.

Factor (e) is "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The exclusive focus under this factor is whether the family unit will stay intact. *Ireland v Smith*, 451 Mich 457, 462; 547 NW2d 686 (1996). The circuit court found defendant to be favored on this factor. We agree with plaintiff that the circuit court focused on some irrelevant factors in making its determination, but as to the appropriate factors, they were not against the great weight of evidence.

At the time of trial, plaintiff had been living with her mother in Saginaw for almost two years. Plaintiff's sister lives in Saginaw. The record shows that plaintiff's two youngest children, including the child in issue, have bonded. Defendant had been living in Virginia for the past 18 months, and his closest relative were four hours away.

The circuit court noted these factors but determined that plaintiff's custodial home lacked permanence. "Hers is one that is dynamic, changing with each relationship," the court asserted. The court focused its concern of plaintiff's judgment in "giving up her three children from her first marriage, getting involved in a relationship with Defendant and having a child, and then while she is married to Defendant, going on a date where she claims she was raped which then resulted in the product of a fifth child." The court then stated, "[p]laintiff also revealed she had

[2] To the extent plaintiff argues that this factor favors her because she has had the child longer, defendant's absence due to his military deployment cannot be used against him when weighing this or any other factor. MCL 722.27(1)(c).

had an abortion, which provides further evidence of her inability to form appropriate relationships."

We agree that plaintiff's abortion and her "date rape" were improper considerations under this factor. However, plaintiff's relationship with her three other children – and her giving their custody to the father – is directly related to the permanence of the family unit as it relates to the stability for the parties' child. *Ireland*, 451 Mich at 465. It is evidence of the potential for this child's family unit to be destroyed if plaintiff makes a similar choice in the future.

Based on these facts, the circuit court's determination that defendant had an advantage on this factor is not contrary to the great weight of the evidence. Although the circuit court took into account some improper and irrelevant considerations when weighing this factor, the proper factors it did consider were supported by the evidence and thus we must affirm this finding.

Factor (f) is "[t]he moral fitness of the parties involved." MCL 722.23(f). The circuit court determined that this factor favored defendant. In making its determination the circuit court agreed with the child custody specialist "that there are concerns with both parents." Both parties admitted that they had used alcohol in the past, and defendant testified that both parties had watched pornography. Plaintiff denied ever looking at pornography, but defendant introduced a series of instant messages from plaintiff in which she stated that she was drunk and watching pornography.

After reviewing these facts, the circuit court determined that defendant had a clear advantage. The circuit court stated it was "not so much concerned with the fact that [plaintiff] was watching pornography, but is more concerned with the fact that she said she was never involved with it and yet evidence was produced that she, in fact, was watching it." Although this fact supported the trial court's credibility determination, it should not have been considered in weighing this factor. In *Fletcher*, 447 Mich at 886-887, our Supreme Court explained as follows:

> [f]actor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* 'who is the morally superior adult'; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. [Emphasis in original.]

The circuit court failed to explain how lying about watching pornography affected the parent-child relationship when the child had no involvement with or knowledge of the lie.

Factor (g) is "[t]he mental and physical health of the parties involved." MCL 722.23(g). The circuit court determined that this factor favored defendant. Defendant testified that he was in good health and suffered from no mental illness, and there was no testimony that plaintiff suffered from any physical health problems. However, the circuit court's ultimate conclusion on this factor did not rest on the parties' physical health; rather, it rested on the parties' mental health. Defendant testified that plaintiff was suicidal when they lived together and that he talked

plaintiff out of harming herself on numerous occasions. While plaintiff denied ever being suicidal, the circuit court found defendant's testimony more credible. As noted, we defer to the credibility determinations of the circuit court, *Berger*, 277 Mich App at 705; see also MCR 2.613(c), and therefore the circuit court's determination that defendant had an advantage was not against the great weight of the evidence.

Factor (h) requires consideration of "[t]he home, school, and community record of the child." MCL 722.23(h). The circuit court found the parties to be equal in this factor. The child attends daycare in Michigan when she is with plaintiff, and it is reported that the child is doing well in her present daycare setting. Also, the child attends daycare in Virginia when she is with defendant, and defendant testified that the child is also doing well.

Plaintiff argues that this factor favors her because the child attends church in Saginaw and has a regular daycare provider and primary physician in Saginaw. Plaintiff also argues that the child has spent more time in Saginaw and naturally has stronger community ties there. To the extent the child has been in Saginaw longer due to defendant's deployment in Korea, we again reiterate that this cannot be used against him in weighing this factor. MCL 722.27(1)(c). Also, that the child has a primary physician in Saginaw and not in Virginia is not pertinent to evaluating the home, school, and community record of the child. Finally, although plaintiff testified that she takes the child to church, there was indication from plaintiff's mother that plaintiff does not attend church. Therefore, and in light of the trial court's credibility determination, the circuit court determination that the parties were equal was not against the great weight of the evidence.

Factor (j) is "[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 circuit court determined that this factor favored defendant, and the circuit court's determination is not against the great weight of the evidence. The evidence revealed that plaintiff showed an unwillingness to compromise and communicate with defendant over parenting time. Additionally, defendant testified that plaintiff and the child were frequently unavailable for their weekly webcam sessions. According to defendant, whenever he asked plaintiff when his daughter would be available for the webcam, plaintiff responded that she was not available and would not give him an alternative time. Also, defendant testified that when he does webcam with the child, plaintiff coaches the child and will not let her answer his questions. Based on all the evidence, the circuit court's determination that defendant was at an advantage in this factor is not against the great weight of the evidence.

Factor (l) is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). Plaintiff argues that it was inconceivable that the circuit court failed to consider the bond between the child and her younger half-sister under this factor. Plaintiff argues that the circuit court ignored the importance of sibling bonds and the negative effects of destroying them. The circuit court, however, did consider the child's relationship with her siblings under factor (d).

IV. CONCLUSION

In summary, we hold that the circuit court's findings are in large part supported by the record and not against the great weight of the evidence. However, its findings regarding factor (f) (the moral fitness of the parties) was against the great weight of the evidence. One error on the best interest factors does not require reversal when the remaining factors and ultimate finding is supported by the record and law. *Mann v Mann*, 190 Mich App 526, 537-538; 476 NW2d 439 (1991).

However, a remand is necessary because the circuit court failed to explain on the record why defendant should be granted sole *legal* custody. MCL 722.26a; *Meyer*, 153 Mich App at 426. The court considered all the best interest factors, but its analysis primarily related to physical custody, not legal custody. The trial court did not make any findings regarding whether the parties can and will cooperate and agree on important decisions affecting the welfare of the child, MCL 722.26a(1)(b), and the failure to do so requires a remand. *Molloy v Molloy*, 243 Mich App 595, 607; 628 NW2d 587 (2000), vacated in part on other grounds, 466 Mich 852 (2002). For these reasons we vacate the order awarding sole legal custody and remand the matter to the circuit court for it to explain why a grant of sole legal custody to defendant is in the best interest of the child, if that remains the court's conclusion.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray