# STATE OF MICHIGAN

# COURT OF APPEALS

UNPUBLISHED
September 22, 2011

In the Matter of D. BURNS, Minor.

No. 302623
Wayne Circuit Court
Family Division
LC No. 08-483501-NA

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Respondent-mother appeals as of right from an order awarding sole physical custody of the minor child to respondent-father. We affirm.

Respondent-mother had physical custody of the child until November 2008, when the child and his half-siblings were removed from her care pursuant to a petition filed by the Department of Human Services alleging domestic violence between respondent-mother and her then live-in partner. None of the petition's allegations involved respondent-father and the child was placed in his home. The court subsequently assumed jurisdiction over the child and his half-siblings and ordered respondent-mother to participate with services to work toward reunification. The child remained in a placement with respondent-father. While respondent-mother was working on completing her treatment plan, respondent-father moved for change of custody, seeking sole physical custody of the child. Over one year after the child came under the court's jurisdiction, respondent-mother completed the terms of her treatment plan and was no longer involved with her live-in partner, and the child's half-siblings were returned to her custody. Respondents, after court-ordered mediation, subsequently agreed to a shared custodial arrangement for the child in which the child would spend two nights per week with respondent-mother. Unfortunately, the parties were unable to abide by the terms of the mediation agreement. The court then proceeded to conduct a custody hearing, wherein it considered the best-interest factors under the Child Custody Act, MCL 722.21 *et seq*., and awarded sole physical custody of the child to respondent-father. Respondent-mother appeals the custody order.

Respondent-mother's sole argument on appeal is that the trial court erred in awarding sole physical custody of the child to respondent-father because the great weight of the evidence failed to support the court's findings weighing the best-interest factors under MCL 722.23 in respondent-father's favor. We disagree.

The trial court's findings of fact in a child custody case, including findings regarding each of the best-interest factors, are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009). This Court defers to the trial court's credibility determinations. *Id*. at 474. The trial court's interpretation and application of the law are reviewed for clear legal error. *Id*. at 475. The trial court's ultimate custody decision is reviewed for an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994); *McIntosh*, 282 Mich App at 475. "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 v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

In making custody decisions, "the child's best interests are of paramount importance, and the goal is to resolve a custody dispute in a way that promotes the child's best interests and welfare." *In re AP*, 283 Mich App 574, 592; 770 NW2d 403 (2009). "[A] trial court determines the best interests of the children by weighing the twelve statutory factors set out in MCL 722.23." *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004).

Respondent-mother challenges the trial court's findings regarding factors (a), (b), (c), (d), (e), (g), (i), and (j). First, with regard to factor (a) (emotional ties between parties and child), respondent-mother argues that the court placed undue weight on respondent-father's recent involvement in the child's life while failing to consider that she was the child's primary caregiver for the first 10 years of his life and that she and the child were bonded. We disagree. Although it was evident from the testimony that both parents loved the child and desired to parent him, and that a bond existed between the child and both parents, we cannot say that the evidence clearly preponderated against the court's finding that factor (a) favored respondent-father. He had been the child's primary caretaker for over two years immediately preceding the hearing, and testimony indicated that he nurtured, loved, and provided the child with a family environment, that he would do anything to keep the child happy, and that the child loved him. On the other hand, respondent-mother had limited contact with the child over the previous two years because he had been removed from her custody after the initiation of neglect proceedings against her because she had difficulty facilitating parenting time due to her transportation issues. This limited contact likely did not promote the bond between herself and the child. On this record, we find no error in the court's determination that factor (a) favored respondent-father.

Next, the trial court weighed factor (b) (parties' capacity and disposition to give the child love, affection, and guidance, and to continue the child's education and religious upbringing) in respondent-father's favor based on the past domestic violence in respondent-mother's home. Respondent-mother argues that the court improperly weighed factor (b) because there was no current concern about her children's safety in her care given her compliance with her treatment plan and the return of her other children to her custody. We disagree. The past domestic

violence, which occurred in the presence of her children and led to the child's removal from her care, clearly disrupted the child's stability and permanency. We recognize that respondent-mother complied with services intended to address the domestic violence issue during the neglect proceedings and that she was no longer involved in a relationship with or residing with her abuser at the time of the custody hearing. However, the past domestic abuse in her home and concerns noted during the neglect proceedings suggested a capacity for future problems in her home that could detrimentally affect her capacity to give the child love, affection, and guidance. In contrast, there was no history of any domestic violence in respondent-father's home. Furthermore, it was undisputed that the child, who had a learning disability, was doing well in his current school compared to the school he attended while in respondent-mother's custody, and therefore, respondent-father possessed a greater capacity to support the child's educational needs, which would benefit his wellbeing.

The trial court weighed factor (c) (capacity to provide the child with food, clothing, medical care, and other material needs) in respondent-father's favor because he had "consistent employment" and demonstrated an ability to fulfill the child's physical needs "without question." We recognize that the record supported a finding that both respondents could financially support the child. However, considering that respondent-father had consistently provided for the child over the past two plus years, we cannot say that the evidence clearly preponderated against a finding that factor (c) favored respondent-father.

Next, the trial court's finding that factor (d) (continuity of stable environment) favored respondent-father was not against the great weight of the evidence. Respondent-mother argues that the court failed to give any weight to the successful completion of her treatment plan. We disagree. It is undisputed that the child resided with respondent-mother for a significant period of time, during the first 10 years of his life. However, respondent-mother's home environment was clearly not always satisfactory or stable because of domestic violence. On the other hand, the evidence clearly indicated that the child's current environment with respondent-father had been stable and satisfactory over the past two plus years. Although respondent-mother successfully completed her treatment plan, the evidence did not clearly preponderate against having the child continue in his current stable custodial environment with respondent-father where he was doing well at home and at school.

Next, the trial court, finding that respondent-father's home "has been more stable and permanent" for the child, weighed factor (e) (permanence, as a family unit, of a custodial home) in respondent-father's favor. In assessing factor (e) the court must focus on the permanence or stability of the family environments offered by the parties. *Mogle v Scriver*, 241 Mich App 192, 199; 614 NW2d 696 (2000). Clearly, respondent-mother in the past was unable to maintain stability and permanency in her family environment due to the ongoing domestic violence between herself and her live-in partner. Although respondent-mother had successfully completed her treatment plan by the time of the custody hearing and the child's half-siblings had been returned to her custody, the stability and permanency of her family environment was only recently obtained. Respondent-father, on the other hand, demonstrated over the past two plus years an ability to provide the child with a stable and permanent household. Although both parents presented a stable environment at the time of the custody hearing, on this record we cannot say that the evidence clearly preponderated against the court's finding that factor (e) favored respondent-father.

Respondent-mother also argues that the court ignored her family unit, where the child would reside with his half-siblings, in considering factor (e). However, contrary to her argument, the court's findings suggests that the court did consider her family unit, but found respondent-father's family environment to be more stable and permanent for the child. Although '"in most cases it will be in the best interests of each child to keep brothers and sisters together . . . [i]f keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control."' *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001), quoting *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). Considering the stability that respondent-father afforded the child and the continuity in the child's education if he remained in his current custodial environment, the trial court did not err in finding that the child's best interests would be served if he remained in his current custodial environment despite being separated from his half-siblings. Indeed, this Court has found that "unyielding judicial adherence to the notion that a child's best interests requires that siblings remain in the same household, may very well, in some cases, create a judicial straightjacket that brings an individual child's personal growth to a screeching halt." *Foskett*, 247 Mich App at 12.

Respondent-mother also argues that the court failed to consider the permanency of respondent-father's relationship with his fiancée in considering factor (e). Although the court did not make a specific finding regarding respondent-father's relationship with his fiancée, it was evident by the record that she was a part of the family unit wherein the child thrived during the past two plus years and that the child was bonded with her. Accordingly, we believe that the presence of respondent-father's fiancée in the home would not jeopardize the continued stability and permanency of the child's current family environment.

Next, the court weighed factor (g) (parties' mental and physical health) in favor of respondent-father, primarily based on respondent-mother's current dependence on other individuals to meet her needs, such as transportation, which, according to the court, placed her at a risk for mental health issues, such as depression. Although we agree with respondent-mother that the record failed to support the court's findings regarding respondent's susceptibility to mental illness, such as depression, other concerns were identified during the neglect proceedings — specifically her "dependent position in turbulent relationships," impaired judgment, and poor insight into her family's issues — which clearly could impact the child's future wellbeing. Furthermore, respondent-mother had a history of being a victim of domestic violence by her partner in the presence of the children. Considering these concerns in light of the lack of any concern in the record regarding respondent-father, we cannot say that the evidence clearly preponderated against the trial court's finding that factor (g) favored respondent-father.

The trial court found that the child was not old enough to make a determination which home would be in his best interests and chose not to weigh factor (i) (reasonable preference of the child). We agree with respondent-mother that the court clearly erred in failing to consider the child's preference in its consideration of the best-interest factors. *Pierron v Pierron*, 282

Mich App 222, 260; 765 NW2d 345 (2009), aff'd 468 Mich 81; 782 NW2d 480 (2010).[1] The child at issue was 12 years old at the time of the custody hearing. This Court has found that children as young as six are generally old enough to express a preference. See *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). Clearly, the 12-year-old child was of sufficient age to express a custodial preference. However, the trial court's findings regarding the other best-interest factors, none of which favored respondent-mother, suggest that the court strongly believed that it was in the child's best interests to remain in his current custodial environment and that the child's preference would not have changed the trial court's ruling. See *Sinicropi v Mazurek (On Remand)*, 273 Mich App 149, 182-184; 729 NW2d 256 (2006) (a trial court's failure to consider the reasonable preference of the child did not warrant reversal where it was evident that the child's preference would not have changed the trial court's ruling). Therefore, any error in the court's failure to consider the child's preference was harmless. *Id.*[2]

Finally, the trial court found that factor (j) (willingness to facilitate and encourage a close relationship between the child and the other parent) favored respondent-father. Considering respondent-father's testimony indicating a realization of the importance of the child's continued relationship with respondent-mother and a willingness to assist with transporting the child to visits when able to do so, we cannot say that the evidence clearly preponderated against the court's finding.

Although respondent-mother does not challenge the court's finding regarding factor (k) (domestic violence), we agree that factor (k) clearly favored respondent-father considering the history of domestic violence in respondent-mother's home and the lack of any such history in respondent-father's home.

We also note that, although the court indicated in its oral opinion that it reviewed all 12 best-interest factors, the trial court did not make specific findings regarding factor (f) (parties' moral fitness) or (h) (home, school, and community record of the child). We note that the "finder of fact must state his or her factual findings and conclusions under each best interest factor." *AP*, 283 Mich App at 605. Regardless, it is evident from the court's findings on the other factors that the court favored the child's current home environment with respondent-father where the child was able to attend a school where he was doing very well. This Court has noted that the factors have some "natural overlap." *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Accordingly, respondent-mother could not demonstrate that the court's lack of specific findings on factors (f) or (h) was "outcome determinative." *Berger*, 277 Mich App at 712. Moreover, respondent-mother did not present any argument regarding factors

[1] Contrary to respondent-mother's argument on appeal, it was evident that the court met with the child and was aware of the child's preference. Specifically, the Guardian ad Litem reported to the court seven days before the custody hearing that the child's preference regarding where he wanted to live had not changed since the child met with the court in chambers.

[2] Also notable was the recommendation of the Guardian ad Litem, who was aware of the child's custodial preference, that respondent-father be awarded sole physical custody of the child.

(f) or (h), and thus has abandoned any claim challenging those factors. *Id*. ("A party abandons a claim when it fails to make a meaningful argument in support of its position.")

Finally, considering that none of the statutory best interest factors favored respondent-mother and nearly all of the factors favored respondent-father, and giving due deference to the trial court's "superior fact-finding ability," we agree that a preponderance of the evidence established that awarding sole physical custody of the child to respondent-father was in the child's best interests. *Pierron*, 486 Mich at 93; *Berger*, 277 Mich App at 715. On this record, we find no abuse of discretion in the court's ultimate award of sole physical custody to respondent-father. *Fletcher*, 447 Mich at 879-880.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot