

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTINE STEPHEN HENRY,

Plaintiff-Appellant,

v

DOUGLAS EDWARD HENRY,

Defendant-Appellee.

UNPUBLISHED
December 22, 2011

No. 303065
Wayne Circuit Court
Family Division
LC No. 07-733472-DM

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Christine Stephen Henry, appeals as of right the trial court order granting a change of custody and awarding sole physical and legal custody of the parties' six minor children to defendant, Douglas Edward Henry. We affirm.

A trial court's custody order must be affirmed unless it is shown that the trial court made factual findings that were "against the great weight of the evidence," "committed a palpable abuse of discretion," or committed "a clear legal error on a major issue." MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). In order to modify an established custodial environment, clear and convincing evidence must exist to demonstrate that the change in custody is consistent with the best interests of the child. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). A trial court is required to weigh the statutory best interest factors delineated in MCL 722.23 and render factual findings regarding each factor. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). "A [trial] court's ultimate finding regarding a particular factor is a factual finding that can be set aside if it is against the great weight of the evidence." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). A trial court's factual findings "with respect to each factor regarding the best interests of the child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction." *Berger*, 277 Mich App at 705.

Custody disputes are governed by the Child Custody Act (CCA). MCL 722.21 *et seq.*; *Berger*, 277 Mich App at 705. "The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009). The CCA "is intended to

promote the best interests of the children, and it is to be liberally construed.” *Berger*, 277 Mich App at 705, citing MCL 722.26(1).

“A trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances.” *Brausch*, 283 Mich App at 355; see also MCL 722.27(1)(c). A trial court may conduct a hearing to evaluate a previous custody decision only if the party seeking a change of custody has established the existence of either a proper cause or change of circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). “[I]n order to establish a ‘change of circumstances,’ a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child’s well-being, have materially changed.” *Id.* at 513 (emphasis in original). In this instance, plaintiff does not challenge the propriety of the trial court’s determination regarding the existence of a proper cause or change of circumstances, the determination of an established custodial environment with both parents or the necessity of conducting an evidentiary hearing. Rather, she only challenges the trial court’s ultimate ruling awarding custody to defendant, asserting error in the trial court’s evaluation of evidence as applied to the best interest factors.

The statutory best interest factors are delineated in MCL 722.23:

- (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.

A trial court is required to consider and explicitly state its findings and conclusions regarding each factor. *Rittershaus v Rittershaus*, 273 Mich App 462, 472-475; 730 NW2d 262 (2007); *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988).

Plaintiff challenges the trial court's findings of fact with respect to a majority of the statutory best interest factors, contending that the trial court's findings were against the great weight of the evidence. A finding of fact is deemed to be against the great weight of the evidence only when the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009).

Factor (a) addresses “[t]he love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a). Although the circuit court found the parties equal on this factor, plaintiff contends that she has a clear advantage because she has spent more time with the children as their primary caretaker and based on her homeschooling of the children. Contrary to plaintiff’s contention, the relative amount of time spent by each party with the children is not determinative of the degree of “love, affection, and other emotional ties existing” between the parties and their children.

Testimony indicated that the children were happy and excited to spend time with both parents and were affectionately demonstrative with them. Both parties consistently exercised the parenting time permitted during the proceedings, with defendant driving six hours round trip in order to spend one hour with his children. We find unpersuasive plaintiff’s suggestion that the psychological evaluation prepared by the court-appointed psychologist, James Bow, Ph.D., indicating that defendant was emotionally distant or detached, showed that defendant could not be deemed equal to her on factor (a). First, Dr. Bow’s evaluation pertains to personality characteristics indicated through testing and, thus, addresses behavioral tendencies, not necessarily actual behavior. Second, Dr. Bow’s test interpretation suggests that these tendencies are apparent in novel social situations and not necessarily indicative of defendant’s behavior in comfortable, close family relationships. Third, Dr. Bow’s evaluation did not include an interview with the children or an observation of defendant with his children. As a result, Dr. Bow’s clinical impression must be construed in conjunction with the testimony of various individuals who had the opportunity to actually view defendant’s behavior with his children and their reaction to him, which was uniformly described as positive and affectionate. Based on the evidence, the trial court’s determination that the parties were equal on factor (a) was not contrary to the great weight of the evidence.

Factor (b) comprises “[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). While the parties were disparate in their opinions regarding the best means of educating their children, the trial court noted that both plaintiff and defendant sought to procure a good education for the children. Both parents participated with the children in church activities and services.

Plaintiff again suggests she should be favored on this factor as a stay-at-home mother. She contends the trial court disrupted the children’s education and religious training by allowing them to be removed to Ohio and that there existed no basis for the trial court to view the proposed Ohio school district more favorably than the district in which the children had been enrolled. In addition, plaintiff disagrees with the emphasis placed by the trial court on her efforts to gain evidence of sexual abuse and contends that no evidence existed to demonstrate the children’s awareness of her activities.

While having differing views, both parties sought to provide the children with a good education. Plaintiff believed homeschooling to be the correct choice, while defendant preferred educational options outside the home. Only defendant provided evidence regarding a proposed school system. Plaintiff failed to provide any evidence regarding the superiority of the current educational arrangements for the children and implied she would return to homeschooling in the future, regardless of the preference of defendant. There was testimony supporting defendant’s concern that homeschooling was not as effective for the children and his view that educational opportunities outside the home had been beneficial to the children. Both parties involved the children in religious training. Plaintiff’s suggestion that the move to Ohio would be overly disruptive is suspect given the fact that her behavior over the past year had resulted in the children being removed from their home, placed with a relative, and subjected to severely restricted parenting time with both parents and changes in educational venues. While the move to Ohio might require an initial disruption of routine, in recompense it offered long-term stability.

Initially, this court recognizes the impact domestic violence and sexual assault should have on any custody arrangement. However, this case is very troubling for an entirely different reason. Plaintiff’s suggestion that the children were not impacted by her efforts to obtain “evidence” against defendant in contradiction to the repetitive determinations of various professionals and agencies is illogical. Because of plaintiff’s behavior, the children lost their home and routine access to both parents for a significant period of time. As implied by the trial court, such actions suggest impaired judgment on the part of plaintiff.

There was significant evidence from various professionals that plaintiff spoke freely in front of the children regarding her suspicions of sexual abuse and permitted others to discuss the matter with the children. Plaintiff also conveniently ignores the repetitive evaluations and investigations she sought, which professionals, such as Bethany Mohr, M.D. of the University of Michigan, viewed as bordering on medical child abuse. The trial court’s favoring of defendant on factor (b) was not against the great weight of the evidence.

Factor (c) encompasses “[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 trial court favored defendant on this factor because of his consistent level of employment and plaintiff’s failure to make plans or seek options to support herself and the children. Plaintiff contends the trial court erred in favoring defendant based on his historic income without due regard for the fact that there was no evidence that plaintiff had failed to provide for the children in the past.

Contrary to plaintiff’s arguments, disparity of income can be a relevant consideration when making a custody determination. *Pierron v Pierron*, 486 Mich 81, 90; 782 NW2d 480 (2010). The trial court’s focus on this factor was the poor judgment demonstrated by plaintiff in subjecting the younger children to multiple physical exams and interviews for sexual abuse, despite the lack of substantiating evidence. There was evidence that plaintiff was inappropriately sharing or discussing information with the minor children regarding the legal proceedings and leading to plaintiff’s efforts to secure additional therapy or consultations for the parties’ daughter. Based on the evidence presented, the trial court did not err in favoring defendant on this factor.

Factor (d) involves “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” MCL 722.23(d). Similarly, factor (e) pertains to “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.” MCL 722.23(e). The exclusive focus under factor (e) is on whether the family unit will remain intact. *Ireland v Smith*, 451 Mich 457, 462; 547 NW2d 686 (1996). In assessing factor (e), a trial court is to evaluate the permanence or stability of the family environments offered by the parties. *Mogle v Scriver*, 241 Mich App 192, 199; 614 NW2d 696 (2000). Based on the recent events that had disrupted the living arrangements and structure of the family unit through removal of the children, resulting in their residence in the maternal grandfather’s home, the trial court deemed neither party to be favored on these factors. Plaintiff contests this finding, suggesting that she should have been favored but that the trial court ignored how well the children had done under her care. Plaintiff also criticizes the trial court’s focus merely on the physical homes or environment that each party was able to provide for the children.

The trial court correctly considered the disruption experienced by these children over the past year in their living situation. Changes had occurred in their residence, educational environments and the availability of access to their parents. As such, the trial court’s determination that neither parent could be favored on these factors, given the prolonged period of disruption of the children’s residence and familial continuity, is not against the great weight of the evidence. Plaintiff’s suggestion that the trial court improperly relied on a determination regarding the preferability of the home environment proposed by defendant is without support in the record as the trial court’s opinion makes no reference to the children’s future home other than to recognize that “[e]ach party will be living in a different home in the near future when their current homes are sold.” As the parents were on equal footing given the need to re-establish a satisfactory living environment and continuity of day-to-day interaction for the children, the trial court’s finding of equality on these factors is not against the great weight of the evidence.

Factor (f) is “[t]he moral fitness of the parties involved.” MCL 722.23(f). In *Fletcher*, 447 Mich at 886–887, our Supreme Court explained as follows:

Factor 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 trial court determined that defendant was favored on factor (f).

In challenging the trial court's ruling on this factor, plaintiff contends she was punished for believing the allegations made by her children and seeking to protect them. She also asserts the trial court ignored the incidents of domestic violence committed by defendant. Ruling in favor of defendant, the trial court indicated it found much of plaintiff's testimony not to be credible. This Court defers to a trial court's credibility determinations. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). The trial court's determination that it did not find plaintiff to be credible was supported by testimony of various individuals suggesting that her reports to several professionals and agencies were inaccurate, manipulative, and designed to force additional investigations. Consistent with the intent of this factor to discern the effect of a parent's conduct on the relationship with their child, Mohr indicated that plaintiff's behavior "could have a negative effect on the children."

Contrary to plaintiff's contentions, the trial court did not overlook or ignore defendant's acknowledged history regarding the inappropriate expression of his anger. The trial court acknowledged this evidence both in its evaluation of factor (f) and in favoring plaintiff on factor (k), pertaining to domestic violence. Based on the extensive analysis performed by the trial court and its very explicit delineation of its reasoning on each factor, there is no support for plaintiff's assertion that the trial court's decision was against the great weight of the evidence.

Factor (g) pertains to "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court determined that this factor favored defendant. Plaintiff argues this determination was against the great weight of the evidence as her involvement in therapy contradicted the court-appointed evaluator's findings regarding her lack of willingness to participate in therapy and inflexibility. Plaintiff asserts the parties should have been, at least, deemed equivalent on this factor.

Neither party was shown to have physical health problems that would interfere with their ability to care for the children. In evaluating the mental health of the parties, the trial court considered the testimony of Bow as the court-appointed psychologist, and the mother's counselor, Melissa Armbruster, along with the court's own observations regarding the parties' "credibility and conduct" throughout the proceedings. "An appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Serv, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

The trial court balanced concerns it had regarding both parties based on Bow's evaluations. There can be no reasonable dispute that the psychological concerns expressed

regarding plaintiff by the evaluating psychologist were of more significance with regard to both the nature of the behaviors evidenced by plaintiff and their entrenchment in her personality than any issues identified regarding defendant's personality traits of shyness and introversion. Bow indicated concerns regarding plaintiff's thought processes and inflexibility. This was supported by plaintiff's demonstrated insistence on pursuing allegations of sexual abuse despite the lack of evidence to substantiate these concerns. Bow's determinations were based not merely on observation of plaintiff, but also on the data obtained from her performance on recognized psychological tests. While Armbruster did not concur with certain descriptions or characterizations by Bow regarding plaintiff, she acknowledged not having performed extensive psychological testing and that her acceptance of plaintiff's verbal reports was based on their consistency rather than actual verification. Based on all of the evidence presented, there is no support for plaintiff's contention that the trial court's ruling on this factor was against the great weight of the evidence.

Factor (j) evaluates "[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 found neither party favored on this factor. Defendant readily admitted he would have difficulty working with plaintiff given the recent history and his concerns that she would continue to demean him to the children. While plaintiff verbally indicated a willingness to work with defendant, there was no indication of any true commitment to reciprocity or open communication. Plaintiff contends that her relinquishment of homeschooling is evidence of her willingness to cooperate. This contention simply ignores the reality that once the children were removed from the custody of both parents and their interactions with the children were restricted to one hour of supervised parenting time a week, by necessity the children were placed in alternative educational settings. Further the demonstrated acrimony existing between the parties, was supportive of the trial court's decision on this factor. See *Wright v Wright*, 279 Mich App 291, 299–300; 761 NW2d 443 (2008).

Plaintiff also contends that the trial court committed a palpable abuse of discretion in deciding to change the legal and physical custody of the minor children.

This Court is required to affirm a custody order "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." *Berger*, 277 Mich App at 705. An abuse of discretion is found to occur "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."¹ *Id.* (footnote added). A trial court's custody decision is subject to the "utmost level of deference." *Id.* at 705-706.

¹ This definition of abuse of discretion has remained applicable in child custody determinations despite the existence of a revised definition for abuse of discretion, i.e., outside the range of principled outcomes, as delineated in *Maldonado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 (2006). See *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006).

The trial court's decision in this case is upheld as there is no evidence that the trial court abused its discretion. The trial court was extremely detailed in the manner it conducted the hearings and in its findings on each of the best interest factors. There is no evidence that the trial court committed error requiring reversal with regard to its factual findings, which are consistent with the evidence in the record. The trial court was free to make credibility determinations regarding the various witnesses and to place more weight on the testimony of certain individuals. On the existing record, it is highly unlikely that a different outcome would be probable even with an alternative factfinder. As such, the trial court did not abuse its discretion in awarding sole physical and legal custody of the minor children to defendant.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause