

STATE OF MICHIGAN
COURT OF APPEALS

RUBY SMITH-PAGE,

Plaintiff-Appellant,

v

URBANE BINGHAM,

Defendant-Appellee.

UNPUBLISHED
December 27, 2011

No. 303115
Wayne Circuit Court
Family Division
LC No. 01-150157-DS

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Plaintiff, Ruby Smith-Page, appeals as of right the trial court's order awarding custody of the minor child, Promise Bingham, to her biological father, defendant, Urbane Bingham. We affirm.

This case involves the change of custody of the minor child from plaintiff, as the custodial parent, to defendant following the child's removal from plaintiff's home by the Department of Human Services (DHS) based on allegations of incidents of domestic violence occurring between plaintiff and her spouse, David Page. Following defendant's motion seeking custody of the minor child, the trial court determined that there had been a change in circumstances, that a custodial environment existed with defendant, and that the best interests of the child required that defendant be awarded custody. The trial court found six of the best interest factors favored defendant; specifically, factors (a), (d), (e), (i), (k) and (l). Both or neither party were favored on the following six factors: (b), (c), (f), (g), (h) and (j). Plaintiff was not favored on any factor.

In matters of custody:

Three standards of review are relevant to our review of a trial court's decision on a motion for change of custody. The trial court's factual findings are reviewed under the great weight of the evidence standard. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). The court's factual findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We review for an abuse of discretion the trial court's discretionary

decisions, such as the award of custody. *Id.* Questions of law in custody matters are reviewed for clear legal error. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). Clear legal error exists when the trial court incorrectly chooses, interprets, or applies the law. *Foskett v Foskett*, 247 Mich App 1, 4–5; 634 NW2d 363 (2001). Further, whether the circuit court has jurisdiction over both child protection actions and domestic relations matters is a question of law we review de novo. See *Berger*, 277 Mich App at 702, 747 NW2d 336. [*In re AP*, 283 Mich App 574, 589-590; 770 NW2d 403 (2009).]

On appeal, plaintiff contends the trial court erred in its determination of factors (b), (c), (d), (e), and (l).¹ Factor (c) addresses “[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). While recognizing that defendant provided consistently for the minor child over the previous year, the trial court found the parties equivalent on this factor based on their both having “the ability to provide for the child.” Plaintiff implies that her superior earning ability and access to better medical benefits through her employment, compared to defendant, should have resulted in her being favored on this factor. “[A] parent with more modest economic resources is . . . entitled to equal consideration in the child custody context.” *Corporan v Henton*, 282 Mich App 599, 607; 766 NW2d 903 (2009) (citation omitted). The record supports the trial court’s determination of equality on this issue as both parties have established homes and are regularly employed with access to medical care and benefits. There is no dispute that both parties can provide for the child’s daily and material needs. Nor was there any evidence or suggestion that the child had any unusual or ongoing medical concerns or needs that were not being met. As such, plaintiff has failed to demonstrate that the trial court’s conclusion regarding factor (c) was in error.

Factor (d) concerns “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” MCL 722.23(d). In finding this factor favored defendant, the trial court observed that the child had been in a stable environment in defendant’s home for approximately one year and opined that her previous residence with her mother was “not stable,” impliedly premised on the history of domestic violence. Plaintiff contends that, had it not been for the initiation of the neglect petition, the child would have continued residing undisturbed in her home for more than ten years and that this longevity should not be outweighed by the short period of disruption caused by the child protective proceedings. Plaintiff asserts that it is unreasonable for the trial court to favor defendant on this factor based on only one year of residence in defendant’s home.

The evidence demonstrated that both parties maintained physically adequate homes for the child. The trial court determined, however, that defendant’s home offered greater stability based on the absence of ongoing domestic violence issues at that location. In contrast, plaintiff’s

¹ Plaintiff does not argue that the trial court erred by placing the burden on her to show by clear and convincing evidence that defendant should not receive custody.

home was less stable because of historic difficulties in the relationship between plaintiff and her current husband resulting in verbal abuse or physical violence. In addition, testimony indicated that Page's alcohol consumption was an issue and a disruption in the child's life when present in plaintiff's home. As the child's older sibling refused to have any ongoing interaction with plaintiff, the court also concluded that the ability to retain a bond and contact between the siblings was more likely within defendant's home. "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). Based on the level of disruption experienced by the child associated with the events leading to her removal from plaintiff's home, the trial court's determination that the current living arrangement with defendant was more preferable and stable was adequately supported by the record.

Factor (e) is "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court determined that factor (e) favored defendant because he had "provided a permanent family unit and custodial home for the child more so than mother." Once again, plaintiff asserts she should be favored based on her longevity as the custodial parent. But, contrary to plaintiff's arguments, factor (e) is forward-looking rather than retrospective. "This factor exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other." *Ireland v Smith*, 451 Mich 457, 462; 547 NW2d 686 (1996) (citation omitted). In this instance, defendant and the child had resided together for the past year. Although defendant was separated from his current wife, this event had occurred before the child came to live with defendant. In contrast, plaintiff's family unit was undergoing significant changes. The older sibling had not only left plaintiff's home but refused to return or have any contact with plaintiff. The dynamic between plaintiff and Page was volatile and disruptive as evidenced by the removal of the children from that home and an ongoing history of domestic violence. In addition, there was evidence to suggest that plaintiff would have difficulty promoting the relationship between defendant and the child as evidenced by her criticism and inappropriate verbal denigration of defendant in the presence of the child. Based on the lower court record, the trial court's determination that defendant was favored on this factor is not contrary to the evidence.

Factor (l) comprises a catchall provision designed to include "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l); see also *Ireland*, 451 Mich at 464 n 7. In determining that factor (l) favored defendant, the trial court noted that this matter was before it because of the initiation of a neglect petition involving physical abuse and domestic violence in plaintiff's home that resulted in placement of the child with defendant, where she was "doing well." In disputing the trial court's determination on this factor, plaintiff cites defendant's lack of involvement with the child before initiation of the neglect petition and emphasizes that, originally, the focus had been on reunification with plaintiff.

In evaluating this factor, the trial court emphasized the existence of the neglect petition and the child's current progress in adapting and thriving in defendant's home. Plaintiff improperly discounts the importance of the neglect petition and the events both leading to its initiation and resulting there from. Despite plaintiff's participation in and completion of required

treatment services, the foster care worker consistently asserted that plaintiff had not demonstrated sufficient benefit from such services. Plaintiff routinely minimized the impact and severity of the domestic violence incidents or the child's expressed concerns regarding a return to the status quo in plaintiff's home should she return there to live. As these issues were proper considerations for the trial court to evaluate, there is no demonstrable error regarding its conclusion that this factor favored defendant.

Factor (b) pertains to "[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 recognizing that both parties love and maintain affection for the minor child, the trial court determined that this factor favored defendant based on the stronger emotional ties that currently existed between the child and defendant as demonstrated by the child's preference to continue residing with defendant and "ambivalen[ce]" regarding the time spent with plaintiff. Plaintiff contends the trial court erred on this factor as it effectively ignored that plaintiff had been the custodial parent for the preceding ten years of the child's life and that, until the child protective proceedings, there had been no involvement by defendant and no complaints necessitating intervention in plaintiff's custody or care of the child.

It is possible that the trial court should have found this factor favored neither parent, or even favored plaintiff. However, given the court's correct rulings on the other individual factors, even a finding that this factor favored plaintiff would not cause the trial court's ultimate decision to grant custody to defendant to be erroneous, because five other factors would still favor defendant compared to, at best, one for plaintiff.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher