STATE OF MICHIGAN

COURT OF APPEALS

DAREN MAURICE MCCLELLAND, II, Plaintiff-Appellant,	UNPUBLISHED March 1, 2012
v	No. 304572 Jackson Circuit Court
BRITTANIE CAMILLE MCCLELLAND, Defendant-Appellee.	LC No. 10-001712-DM

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the April 21, 2011 divorce judgment entered by the trial court following a bench trial, allocating parenting time of the parties' minor child by awarding defendant primary physical custody during the school year and plaintiff primary physical custody during the summers. For the reasons set forth below, we affirm the trial court.

Defendant gave birth to the minor child on February 27, 2007, before the parties were married. At that time, plaintiff was unsure whether he was the father. However, a subsequent paternity test established plaintiff's paternity, and thereafter, he began to take more interest in the minor child. For the first several months of the minor's life, she resided almost exclusively with defendant in Ypsilanti. Then, in the summer of 2007, defendant and the child began living with plaintiff in Jackson. The parties and the child lived together until early 2008, when defendant and the child returned to Ypsilanti. The parties again began living together, in Jackson, in March 2009. They were married on September 21, 2009, and they lived together with the minor child until their separation in June of 2010.

The parties initially agreed to a temporary custody arrangement that was adopted by the trial court, however the parties could not reach a final agreement on custody, necessitating a bench trial. Following the close of proofs, the trial court ordered joint physical and legal custody of the minor child. Defendant received primary physical custody during the school year, and plaintiff was given the following parenting time: the first three weekends of each month beginning after school or work on Friday until Sunday at 5:00 p.m.; the fifth weekend in a month, if applicable; one week during winter break; alternating spring breaks; and holidays consistent with the Jackson County Friend of the Court Handbook. During the summers, plaintiff was to have primary physical custody, and defendant was given the following parenting time: the first three weekends of the month from after work on Friday or 6:00 p.m. until Sunday

at 6:00 p.m.; Wednesday evenings on weeks she does not have the child for the weekend; alternate spring breaks; and holidays consistent with the Jackson County Friend of the Court Handbook. When the child begins kindergarten, the child's weekends will alternate between the parents. It is this order that defendant now appeals.

"All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue." *Pierron v Pierron*, 282 Mich App 222, 242; 765 NW2d 345 (2009); MCL 722.28. Hence, three standards of review apply to child custody decisions. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). "First, the trial court's findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction . . . . Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. . . . Third, discretionary rulings are reviewed for an abuse of discretion." *Id*. at 474-475.

Plaintiff first challenges two factual conclusions by the trial court relating to the level of his parental involvement in the child's life. First, we find that the great weight of the evidence supports the trial court's conclusion that plaintiff was not present when the minor child was born and did not want to have contact with her until paternity was established. Plaintiff's testimony showed he came to the hospital while defendant was in labor, but left before the child was born and did not participate in the birthing process. When asked why he did not stay, plaintiff responded, "At – at the time [defendant] and I, you know, we – we had a – she didn't know for] sure if [the child] was mine to be honest with you."

Second, we find that the great weight of the evidence does not suggest that plaintiff was the child's primary caregiver during the times that he and defendant resided together, as well as for much of the time that they were living apart. A review of the evidence supports the trial court's conclusion that defendant was the child's primary caregiver for the first two years of her life, the majority of which time the child lived solely with defendant. While plaintiff disputed his level of involvement during the first two years of the child's life, we defer to the trial court's determination that defendant offered a more credible version of events. *Pierron*, 282 Mich App at 243. Additionally, we note that for the first five months of the child's life, plaintiff struggled with a prescription drug addiction, and while he sought treatment, he relapsed a year later following an injury to his hand. Only in March of 2009, when the child was two years old, did the family truly begin to reside together. Our review of the record leads us to conclude that the trial court was correct when it found that it was from this date forward that plaintiff began to actively participate in the child's daily care. Hence, between March of 2009 and the parties' separation in June of 2010, the evidence clearly shows active involvement by both parents in the child's daily care, and the great weight of the evidence does not establish that plaintiff was the primary caregiver during this time. Accordingly, we assign no error to the trial court's findings on this issue.

Plaintiff next argues that the trial court incorrectly concluded that an established custodial environment existed with both parents and, therefore, improperly applied a preponderance of the evidence standard rather than a clear and convincing standard to deciding whether to alter the

child's custody arrangement. MCL 722.27(1)(c) provides that a custodial environment 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.

An established custodial environment is "one of significant duration," marked by a parent's provision of "care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). The term "established custodial environment" encompasses both a "physical and psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Id.* An established custodial environment may exist in more than one home and with more than one parent. *Id.*; *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). A temporary custody order does not necessarily create an established custodial environment with the custodial parent; rather an established custodial environment may exist with the noncustodial parent. *Berger*, 277 Mich App at 706-707. "Whether an established custodial environment exists is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Id.* at 706.

We conclude the great weight of the evidence does not suggest that the trial court improperly concluded that the child has an established custodial relationship with both parents. At the time of trial, the child was almost four years old. As discussed above, she spent the first two years of her life almost exclusively with defendant. In March 2009, the child and defendant moved in with plaintiff, and the parties and the child lived together as a family for approximately a year and a half. During this time, both parents shared in the child's daily care and development. While plaintiff has been the primary caregiver since the separation, in the span of the child's four short years, plaintiff's primary custody in the months before trial does not rise to the level of a custodial relationship of "significant duration" such that it dwarfs defendant's continual involvement with the child's life from the moment of her birth. Contrary to plaintiff's assertions, the record reveals defendant has provided a source of stability and continuity for the child throughout her life. The upheaval of defendant's recent absence from the home has impacted the child as demonstrated by her increased clinginess and regression in her potty training. The child's unfortunate response to her mother's absence suggests the closeness of their emotional ties. During trial, defendant, more so than plaintiff, demonstrated an understanding of the child's emotional, physical, and development needs, including appropriate parental concern for the child's rotting teeth, her nutrition, her general health and well-being, her safety relating to the need for a car seat, and her emotional response to the divorce. Both parents testimony suggests defendant has often taken on the role of disciplining the child, while plaintiff tends to be more lenient. For a significant duration, defendant has provided the child's care, discipline, love, guidance, and attention appropriate to the child's age. *Berger*, 277 Mich App at 706. Despite the numerous times the child has moved in her young life, defendant has offered a continuing source of stability and permanence. *Id.* In light of the obvious emotional ties between the child and defendant revealed in the record, the great weight of the evidence does not show that an established custodial environment existed exclusively with plaintiff.

Having decided that an established custodial environment existed with both parents, the trial court could only alter the existing custody arrangement if it appeared, by clear and convincing evidence, to be in the child's best interests. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). We review the trial court's choice, interpretation, or application of the law for "clear legal error." *McIntosh*, 282 Mich App at 475. Plaintiff's argument suggests the trial court improperly used a preponderance of the evidence standard, however, this contention is not supported by the trial court's opinion which stated: "There is *clear and convincing* evidence to change the child's current environment from dad to mom for several reasons." Accordingly, plaintiff's argument that the wrong legal standard was applied is without merit.

Plaintiff also challenges the trial court's findings relating to many of the best interest factors and the court's ultimate decision to alter the custody arrangement. We conclude that the great weight of the evidence supports the trial court's findings relating to the factors, and that the trial court did not abuse its discretion in altering the custody arrangement.

In child custody cases, the court must determine the best interests of the child using the "best interest factors" detailed in MCL 722.23. *Foskett*, 247 Mich App at 9. In making its ultimate custody determination, the trial court is not required to give equal weight to all the factors. *Berger*, 277 Mich App at 705. "The overriding concern is the child's best interests." *McIntosh*, 282 Mich App at 475.

MCL 722.23(a) concerns "[t]he love, affection, and other emotional ties existing between the parties involved and the child." While plaintiff argues on appeal that defendant is erratic and frequently absent, defendant testified that she has been a source of stability and support for the child from the moment of her birth. The trial court concurred with defendant, determining that defendant should be favored under this factor. MCR 2.613 (C); *Berger*, 277 Mich App at 708. It is the trial court that possesses the best opportunity to assess credibility, and accordingly, we defer to the trial court's credibility determinations. *Pierron*, 282 Mich App at 243. None of plaintiff's arguments on appeal suggest the trial court's determinations were against the great weight of the evidence.

MCL 722.23(b) involves "[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." The trial court concluded that both parents were equal under this factor and, deferring to the trial court's assessment of credibility in this regard, we find plaintiff's arguments to the contrary unpersuasive. *Pierron*, 282 Mich App at 243. As to education, we note the parties' joint involvement in selecting the child's daycare in Jackson and defendant's involvement in selecting a Headstart program for the child in Ypsilanti. As to religion, the child does not belong to a particular church, and given the limited importance both parents appear to have placed on the child's church attendance thus far, the ability to guide the child in religious matters does not appear to be a consideration that weighs in favor of either parent.

MCL 722.23(c) involves "[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 trial court concluded this factor favored defendant. As to finances, we note both parents are gainfully

employed and capable of continuing this employment. While defendant's means may be more modest, the 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). We find more troubling, as did the trial court, plaintiff's failure to take the child to the dentist in the time since the separation when he, by all accounts, had been the primary caregiver. We also note, as did the trial court, plaintiff's overindulgence of the child with regard to sweets, junk food, and fast food. While the child's current weight may be healthy, the evidence suggests it has risen while in plaintiff's care, and certainly the long-term health effects of poor nutrition provided the trial court reason for concern. Defendant's testimony suggested that she is better equipped to care for the child in this regard, and we once again defer to the trial court's assessment of credibility. *Pierron*, 282 Mich App at 243.

MCL 722.23(d) requires the trial court to consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The trial court found both parents equal under this factor, and we find this conclusion was in keeping with the great weight of the evidence. Contrary to plaintiff's arguments on appeal, the trial court reasonably concluded the child has not lived in Jackson for the majority of her life. She has moved back and forth between Jackson and Ypsilanti, with defendant as a source of stability. As to plaintiff's disparagement of Ypsilanti, his complaints are largely unsubstantiated. The trial court had before it defendant's assurances that the home in which she resides is not a "project" as plaintiff now alleges. The trial court was free to accept these assurances that defendant's housing offers the child a safe environment. *Pierron*, 282 Mich App at 243.

MCL 722.23(e) instructs the trial court to consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." The trial court concluded both parents are equal under this factor because they are both single and both have the support of families in close proximity. We find the great weight of the evidence does not suggest otherwise. Defendant has extensive family in Ypsilanti, and plaintiff has extensive family in Jackson. Both testified to the support their families have provided.

MCL 722.23(g) relates to the "[t]he mental and physical health of the parties involved." Noting that both parents are overweight and that both allege that the other has a substance abuse problem, the trial court determined that the parties were equal under this factor. On appeal, plaintiff reiterates concerns he raised during trial; namely, that defendant has an unacknowledged substance abuse problem, and that she is depressed, anxious, and suffers from chronic pain. Defendant testified that she does not have a prescription drug problem, but instead takes lawfully prescribed medications for pain and anxiety, and she specifically testified she has no health concerns that would interfere with her parenting. In the face of their conflicting testimony, we defer to the trial court's credibility determination, *Pierron*, 282 Mich App at 243, and in light of plaintiff's admitted history of substance abuse problems, we find nothing to suggest the trial court's findings were against the great weight of the evidence.

MCL 722.23(j) instructs 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." The trial court concluded this factor favored defendant for a number of reasons, including that for an extended period of time in June 2010, plaintiff did not permit defendant to see the child; that there was a need for police

involvement when defendant visited the family home; comments made by plaintiff regarding the relationship between the trial court and the conciliator; and plaintiff's failure to notify defendant when the child ingested an entire bottle of cough syrup and had to have her stomach pumped. In light of these many troubling instances, any one of which might have led the trial court to find in favor of defendant, we do not find the trial court's findings relating to this factor are against the great weight of the evidence. We also find, contrary to plaintiff's argument on appeal, that defendant's move to Ypsilanti, where she has gainful employment and extensive family was not undertaken for no logical reason.

MCL 722.23(*l*) allows the court to consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." *McIntosh*, 282 Mich App 482. The trial court considered no other factors. Plaintiff argues the trial court should have considered the number of registered sex offenders in proximity to defendant's Ypsilanti apartment compared to Jackson. We do not find this particularly relevant to the child's best interests, and the trial court was not required to consider such extraneous information. Generalized threats exist in every community, from known and unknown sexual predators. Plaintiff offers nothing on appeal to even suggest defendant has in any way exposed the child to sex offenders who live in Ypsilanti. Nor did plaintiff proffer any evidence that the child is in fact safer in Jackson.

Finally, we conclude the trial court did not abuse its discretion in ultimately finding clear and convincing evidence to alter the custody arrangement. *Berger*, 277 Mich App at 705. An award of custody is a discretionary decision that should be overturned only if it 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.* Here, in finding clear and convincing evidence existed to alter the custody arrangement the court noted: (1) defendant was the child's primary caregiver for the first two years of the child's life with minimal involvement from plaintiff; (2) defendant only agreed to the original conciliation agreement in June because she believed it was a temporary arrangement, and it made sense to let the child spend her summer with plaintiff because he is a teacher; (3) plaintiff failed to keep defendant involved in the child's life during the case; and (4) plaintiff failed to seek advice for the child's teeth and potty training regression during the time he was the primary caregiver. Because the trial court's ultimate conclusion was well-reasoned, logical, and focused upon the child's best interests, it does not constitute an abuse of discretion.

Affirmed. Defendant, being the prevailing party, may tax costs. MCR 7.219(A)

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello