STATE OF MICHIGAN

COURT OF APPEALS

HOLLY VIRGINIA COCHRANE, Plaintiff-Appellee,	UNPUBLISHED February 14, 2013
v	No. 312572 Kent Circuit Court
GARY SAMUEL COCHRANE, Defendant-Appellant.	LC No. 11-003276-DM

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Defendant Gary Samuel Cochrane appeals as of right the trial court's September 10, 2012, judgment of divorce. The judgment, among other things, awarded plaintiff Holly Virginia Cochrane primary physical custody over her and defendant's minor child, M.C. The only issues raised on appeal relate to the trial court's custody decision. For the reasons set forth below, we affirm.

I. BASIC FACTS

Plaintiff and defendant were legally married on November 30, 2002, and had one minor child, M.C. Plaintiff and defendant separated in March of 2009. In September of 2009, plaintiff moved to Massachusetts. Before moving to Massachusetts, plaintiff had primary physical custody of M.C. after the parties separated. After plaintiff moved to Massachusetts, defendant had primary physical custody of M.C., who lived with him year round except during school vacations and summer vacations. The parties' custody arrangements were never formalized by a court order.

Plaintiff filed for divorce on April 11, 2011, and sought primary physical custody of M.C. At the bench trial on the issue of custody, plaintiff presented testimony that M.C. was considered "obese" by doctors. She also presented testimony that M.C. lost weight while he lived with her during summer vacation and that he gained weight while he lived with defendant. For instance, in the summer of 2010, he lost ten pounds. During the subsequent school year, 2010-2011, M.C. gained 32.3 pounds. In the summer of 2011, M.C. lost eight pounds. During the school 2011-2012 school year, M.C. gained 40 pounds. As a result of high glucose levels from diabetes testing, plaintiff testified M.C. was "pre-diabetic." Plaintiff testified that she closely monitored M.C.'s weight and attempted to help him maintain a healthy, active lifestyle because she was concerned about his long-term health. Defendant testified that he also attempted to help M.C.

live a healthy, active lifestyle. When asked if M.C.'s weight gain was a "huge problem," defendant testified, "I don't know if I would describe it as that . . . ." Additionally, when asked if something serious was occurring with M.C.'s weight, defendant responded, "I don't know."

The trial court first concluded that M.C.'s established custodial environment existed with defendant. Next, the trial court found, in relevant part, that MCL 722.23(c), which directs the trial court consider "[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," strongly favored plaintiff because of M.C.'s weight and plaintiff's involvement in ensuring that M.C. maintained a healthy weight. The trial court then concluded that plaintiff should have primary physical custody of M.C., based entirely on its findings pertinent to MCL 722.23(c).

II. STANDARDS OF REVIEW

"There are . . . three different standards of review applicable to child-custody cases." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). First, "[t]he clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law." *Id.* (citations omitted). Next, the trial court's findings of fact "are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this Court will sustain the trial court's factual findings unless the evidence clearly preponderates in the opposite direction." *Id.* (citation and quotation omitted). Finally, "[d]iscretionary rulings, including a trial court's determination on the issue of custody, are reviewed for an abuse of discretion." *Id.* (citation omitted). In the context of child custody proceedings, "[a]n abuse of discretion exists when the trial court's decision is palpably and grossly violative of fact and logic . . . ." *Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011) (citation and quotation omitted). See also MCL 722.28 (a trial court's decision in a child custody dispute "shall be affirmed on appeal unless the trial judge . . . committed a palpable abuse of discretion . . .").

III. ANALYSIS

Defendant challenges the trial court's findings under MCL 722.23 as well as its decision to award primary physical custody to plaintiff. We conclude that the trial court did not err with respect to either.

Child custody disputes are governed by the Child Custody Act, MCL 722.21 *et seq.* In reaching a decision in a child custody dispute, the trial court must first consider whether there is an established custodial environment. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010).[1] "The established custodial environment is the environment in which 'over an

[1] We note that ordinarily, in cases where there is a previous judgment or order regarding custody, the party seeking to amend the order must demonstrate proper cause or a change in circumstances that would justify the new custody order. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003). However, such a showing was not

appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.'" *Id.* at 85-86, quoting MCL 722.27(1)(c). When a child custody determination would change the child's established custodial environment, "the moving party must show by clear and convincing evidence that it is in the child's best interest." *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010). "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." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

In this case, the trial court found that M.C.'s established custodial environment was with defendant because M.C lived with defendant since September of 2009 and because it found that M.C. looked to defendant for guidance, discipline, the necessities of life, and parental comfort. Neither party challenges that finding on appeal. Moreover, the record demonstrates that the trial court's finding was not against the great weight of the evidence. Indeed, M.C. lived in defendant's primary physical custody since September of 2009 and defendant testified that he had a relationship with M.C. where M.C. looked to defendant to provide security and stability. Therefore, plaintiff, who sought to have M.C. moved away from his established custodial environment, had the burden of proving, by clear and convincing evidence, that doing so was in M.C.'s best interest.

To determine the best interests of the child in a custody dispute, this Court looks to the 12 factors delineated in MCL 722.23. See, e.g., *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). In reaching its custody determination, "[a] court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006) (citations omitted).

Defendant first argues that the trial court finding that MCL 722.23(c) favored plaintiff was against the great weight of the evidence. We disagree. The evidence reveals that M.C. was described as "obese" by his doctors, and that he gained a significant amount of weight while he lived with defendant. Further, he consistently lost weight while he lived with plaintiff. Defendant did not present any evidence to the contrary, but insists that plaintiff's assessment of M.C.'s weight was inaccurate. The trial court found that plaintiff's testimony regarding M.C.'s weight was credible, as well as plaintiff's testimony that M.C. could weigh over 300 pounds by the time he reached high school, given the trajectory he was on. We will not disturb that credibility determination. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

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required in the case at bar because there was never an order or previous judgment concerning custody. *Thompson v Thompson*, 261 Mich App 353, 361; 683 NW2d 250 (2004) (a party does not need to establish proper cause or a change in circumstances for "the trial court's initial or 'new' custody order . . . ."). Here, the parties reached a settlement regarding a temporary order for custody on September 9, 2011, but a corresponding order was never entered by the trial court. Thus, the instant proceeding involved "the trial court's initial" custody order and plaintiff, the party seeking the change, accordingly was not required to demonstrate proper cause or a change in circumstances. *Thompson*, 261 Mich App at 361.

In addition to M.C.'s weight gain, defendant was not as concerned with M.C.'s weight as plaintiff was. Defendant testified that M.C.'s weight issue was not a "huge problem" and he did not know if something serious was occurring with M.C.'s weight. Further, defendant appeared to minimize M.C.'s weight issues by opining that he was "historically [ ] slightly overweight." In contrast to defendant's attitude, plaintiff regularly weighed M.C. and took an active role in monitoring his weight. In light of the fact that plaintiff took a more active role in monitoring M.C.'s weight and was more concerned with his weight, the trial court's finding was not against the great weight of the evidence as the evidence did not "clearly preponderate[ ] in the opposite direction." *Shulick*, 273 Mich App at 323. See also *Moser v Moser,* 184 Mich App 111, 115; 457 NW2d 70 (1990) (where one parent has greater concern for the child's health, that parent had a greater capacity to provide the child with medical care).

Defendant argues that the trial court erred in finding that factor (c) favored plaintiff because the trial court ignored testimony that M.C. was overweight for most of his life. However, defendant did not offer any evidence to refute plaintiff's evidence concerning the manner in which M.C.'s weight increased significantly during the time he lived with defendant. Likewise, defendant did not present any evidence concerning M.C.'s weight loss while in plaintiff's care.

Defendant also contends that the trial court should not have weighed factor (c) in favor of plaintiff because he argues that plaintiff's move to Massachusetts caused M.C. to feel stress, which caused him to eat and gain weight. Thus, he argues that plaintiff bore some responsibility for M.C.'s weight gain and that the trial court should not have weighed factor (c) in plaintiff's favor. We disagree. Defendant's argument ignores evidence that M.C. consistently gained weight while living with defendant and that he consistently lost weight while living with plaintiff. Moreover, defendant did not present any evidence in support of his theory. Accordingly, the trial court's findings with regard to factor (c) were not against the great weight of the evidence.

Defendant also argues that the trial court's findings on factor (h), MCL 722.23(h) were against the great weight of the evidence. Factor (h) considers "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court found that this factor did not favor either party, and this finding was not clearly erroneous. On the one hand, there was evidence under this factor that was favorable to defendant because M.C. received satisfactory grades in school and his home had always been in Grand Rapids. M.C. also had family members in the Grand Rapids area. On the other hand, defendant and M.C. moved four times while M.C. was in defendant's care and M.C. had to change schools on one occasion. M.C. also missed time at school while in defendant's care. Additionally, both plaintiff and defendant assisted M.C. with his homework. In light of the forgoing, the trial court's conclusion that factor (h) did not favor either party was not against the great weight of the evidence.

Defendant also argues that the trial court's findings on factor (j) were against the great weight of the evidence. Factor (j) directs 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." MCL 722.23(j). Again, the trial court concluded that this factor did not favor either party, and this finding was not against the great weight of the evidence. Defendant testified that when M.C. stayed with plaintiff, M.C.

often did not answer his cellular telephone and defendant had a difficult time contacting him. He also alleged that plaintiff was difficult to communicate with because she only communicated via text messages. However, plaintiff testified that she preferred to communicate via text messages because when she spoke with defendant on the telephone, the parties argued and defendant often "scream[ed]" at her in front of M.C. Additionally, she testified she would help facilitate visits between defendant and M.C. if she had primary physical of M.C. The trial court's finding that this factor did not favor either party was not against the great weight of the evidence.

Defendant also challenges the trial court's ultimate custody determination. As this Court has previously explained:

> A child custody determination is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge, one in which he must not only listen to what is said to him and observe all that happens before him, but a task requiring him to discern and feel the climate and chemistry of the relationships between children and parents. This is an inquiry in which the court hopes to hear not only the words but the music of the various relationships. [*Foskett*, 247 Mich App at 9 (citation omitted).]

We conclude that the trial court's custody decision was not an abuse of discretion. As an initial matter, we reject defendant's argument that the trial court abused its discretion by focusing solely on MCL 722.23(c) because the trial court need not give equal weight to all of the factors. *Mazurek*, 273 Mich App at 184. Moreover, it is undisputed that M.C. gained a considerable amount of weight while in defendant's care and that he was obese. Additionally, M.C. consistently lost weight while in plaintiff's care. Further, the record reveals that plaintiff was more concerned with M.C.'s weight than defendant was. Thus, it was reasonable for the trial court to infer that M.C. faced significant health problems unless he began losing weight. Consequently, the trial court's decision was not so "palpably and grossly violative of fact and logic . . ." as to constitute an abuse of discretion. *Dailey*, 291 Mich App at 664-665 (citation and quotation omitted).

Next, we note that the trial court concluded that the factors in MCL 722.31(4), which govern a change of domicile, applied to the case at bar, and that an application of the factors favored plaintiff. Defendant agrees that these factors apply, but argues that the trial court's findings under MCL 722.31(4) were against the great weight of the evidence. We conclude that the trial court clearly erred when it determined these factors apply.

MCL 722.31(1) describes the circumstances under which an application of the factors found in MCL 722.31(4) is necessary.

> A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, *a parent of a child whose custody is governed by court order* shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued. [MCL 722.31(1). (Emphasis added.)]

"According to the plain language of the statute, the change-of-domicile factors specifically apply only to petitions for change of domicile in situations where there is already a custody order governing the parties' conduct." *Kessler v Kessler*, 295 Mich App 54, 58; 811 NW2d 39 (2011). Here, there was not a custody order governing plaintiff and defendant's conduct at the time the divorce action was filed. Accordingly, the factors in MCL 722.31(4) were not applicable. *Id.* Moreover, a trial court cannot consider the factors found in MCL 722.31(4) when they do not apply. *Brecht v Hendry*, __ Mich App __; __ NW2d __ (Docket No. 308343, issued July 24, 2012), slip op at 6. Accordingly, the trial court should not have considered those factors in rendering its custody decision. Having concluded that the factors in MCL 722.31(4) were not applicable, we need not consider defendant's argument that a different consideration of those factors would have resulted in a different outcome.

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra