STATE OF MICHIGAN

COURT OF APPEALS

JOY MERSMAN, a/k/a JOY LINGENFELTER, Plaintiff-Appellant,	UNPUBLISHED October 29, 2013
v	No. 314359 Oakland Circuit Court Family Division
EDWARD JOHN LINGENFELTER, Defendant-Appellee.	LC No. 2005-714401-DM

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order regarding custody and parenting time of the parties' minor child, B.L. We affirm.

Plaintiff argues that the trial court erred in granting defendant unsupervised parenting time with B.L. We disagree.

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings 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." *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010), quoting *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). With respect to the trial court's findings of fact, this Court will not substitute its own judgment "unless the facts clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21. A trial court has abused its discretion in a child custody case when its 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." *Id.*, quoting *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court has committed clear legal error when it "errs in its choice, interpretation, or application of the existing law." *Id.*, quoting *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

An order concerning parenting time can be modified "for proper cause shown or because of change of circumstances." MCL 722.27(1)(c); *Shade*, 291 Mich App at 22. If a modification in parenting time changes the child's established custodial environment, then the party seeking modification must show that the change is in the child's best interests by clear and convincing evidence. MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). If the modification would not change the child's established custodial environment, the moving

party need only show that the modification is in the child's best interests by a preponderance of the evidence. *Pierron*, 486 Mich at 93; see also *Rains v Rains*, __ Mich App __; __ NW2d __ (Docket No. 312243, issued June 13, 2013) (slip op at 16). With respect to the child's best interests, both the statutory best interest factors listed in MCL 722.23 and the parenting time factors listed in MCL 722.27a(6) are relevant. *Shade*, 291 Mich App at 31; see also MCL 722.27a(1). When the trial court considers a motion to change parenting time, it need only make findings on the contested best interest and parenting time factors. See *Shade*, 291 Mich App at 31-32.

The trial court committed clear legal error when it placed the burden on defendant to prove that unsupervised parenting time was in B.L.'s best interests. Nonetheless, this error was harmless. It is important to note the procedural history of the parenting time issue. In April 2010, plaintiff moved for sole custody. At the time, defendant had parenting time with B.L. three out of five weekends, depending on the month, one weekday evening each week, and alternating holidays. Plaintiff's motion for sole custody was heard by the Friend of the Court (FOC), which recommended that defendant have supervised parenting time at least once each month. Defendant objected to the FOC recommendations and requested a de novo hearing before the trial court. Judge Lisa Gorcyca heard defendant's objections and entered an order on August 4, 2010, which set a de novo evidentiary hearing for October 5, 2010, on the issues of custody and parenting time, and provided for defendant to have supervised parenting time with B.L. twice each week *in the interim*.

Thus, the supervised parenting time ordered by Judge Gorcyca was intended to be a temporary arrangement, pending the October 5, 2010, evidentiary hearing. It appears that the order was entered pursuant to MCR 3.215(G)(1), which states that a trial court "may, by an administrative order or by an order in the case, provide that the referee's recommended order will take effect on an interim basis pending a judicial hearing." This interim arrangement normally would have ended when Judge Gorcyca's successor, Judge Elizabeth Pezzetti, entered a final order following the evidentiary hearing. However, plaintiff appealed Judge Pezzetti's order and the trial court granted plaintiff's motion for a stay pending appeal.

Thus, plaintiff's April 16, 2010, motion for sole custody is the origin of the issues raised in this appeal. Based on the FOC's recommendation, it appears that plaintiff also requested supervised visitation at some point during the FOC hearing. Because plaintiff sought modification of the order then in effect (the divorce judgment, with respect to custody and parenting time of B.L.), she has always had the burden of proving modification was in B.L.'s best interests. See *Pierron*, 486 Mich at 93.

This Court's previous decision established that there was proper cause or change of circumstances, so the issue of parenting time could be revisited. *Mersman v Lingenfelter*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2012 (Docket No. 305383), slip op at 3-4. In addition, this Court previously held that B.L.'s established custodial environment is with plaintiff; the parties do not dispute this finding. *Id*. Because plaintiff's proposed parenting time schedule would not change B.L.'s established custodial environment, she had the burden of proving by a preponderance of the evidence that the modification was in B.L.'s best interests. See *Pierron*, 486 Mich at 93. The trial court legally erred by stating that it was defendant's burden to show modification of the parenting time schedule was in B.L.'s best

interests. However, this error was harmless because defendant does not contest the trial court's decision.

In addition, the trial court's order granting defendant unsupervised parenting time after three months of supervised parenting time was not an abuse of discretion. First, plaintiff argues that there was no proper cause or change of circumstances for the trial court to modify the parenting time schedule. However, as discussed above, plaintiff had the burden of proving proper cause or changed circumstances existed to revisit the issue of custody and parenting time. Furthermore, this Court specifically held in its previous decision that there was proper cause or changed circumstances for the trial court to reconsider the parenting time schedule. *Mersman*, slip op at 3-4.

Second, plaintiff contends that the trial court's findings on the best interest factors did not support awarding defendant unsupervised parenting time. Specifically, plaintiff argues that factors (a), (b), (c), (e), (j), and (l) favor her. Again, this writer notes that plaintiff actually had the burden of showing that supervised parenting time was in B.L.'s best interests. Furthermore, the court's findings on these factors were not against the great weight of the evidence.

Factor (a), MCL 722.23(a), is "[t]he love, affection, and other emotional ties existing between the parties involved and the child." The trial court determined the parties were equal on this factor, stating that both plaintiff and defendant love their son and B.L. loves both of his parents. Plaintiff contends that defendant has not been a significant part of B.L.'s life because he was in jail for five months when B.L. was born and B.L. has not lived with defendant since 2006. A parent can still have a strong emotional bond with his child even if they do not live together. Otherwise, this factor would always favor the custodial parent. Furthermore, before the interim order went into effect in August 2010, defendant had frequent parenting time with B.L. – three out of every five weekends, one weekday evening each week, alternating holidays, and half of B.L.'s school and summer vacations. Defendant testified at length about his love and affection for B.L. The trial court also had the opportunity to speak with B.L. in camera. The court's finding that this factor favored both parties was supported by the evidence.

Factor (b), MCL 722.23(b), is "[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 found that both parties have the capacity and disposition to give B.L. love, affection, and guidance. Plaintiff asserts that defendant is not in the same position as plaintiff to give B.L. guidance because of his history of offenses and sexual addiction. While plaintiff is involved at B.L.'s school, defendant has only had one hour each week of supervised parenting time with B.L. However, defendant testified that before the interim order for supervised parenting time was entered, he helped his children with their schoolwork, took them to church, and attended their school and sporting activities. During his supervised parenting time with B.L., they play chess and other games. The trial court's conclusion that this factor favors both parties was not against the great weight of the evidence.

Factor (c), MCL 722.23(c), is "[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 court noted that both parties are employed, although defendant's employment is sporadic and

plaintiff's employment is part-time. Plaintiff argues that defendant is delinquent on his child support and has been unemployed in the past. There was evidence to support the trial court's finding that the parties are equal on this factor. Defendant has continually paid for B.L.'s medical insurance. He testified that his current electrician job ends in November, but his employer has several other jobs lined up that defendant can work on. When working, defendant earns $25 an hour and works full-time. Defendant also explained that he is "on a list with the union" and his current job is a good "fill-in."

Factor (e), MCL 722.23(e), is "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." Plaintiff asserts that this factor favors her because B.L. has always lived with her and defendant lives with his 92-year-old mother and is "confined by the conditions of his probation for sex crimes." However, plaintiff no longer lives in the marital home, which was sold after the parties divorced. B.L.'s brother, Bryan, lives with plaintiff, but his other brother, Keith, lives with defendant. The trial court's finding that this factor did not favor one party over the other was not against the great weight of the evidence.

Factor (j), MCL 722.23(j), is "[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 found this factor favored defendant, after weighing the credibility of the witnesses. Plaintiff contends that defendant is equally at fault for the parties' inability to communicate and polarized relationship. "This Court will defer to the trial court's credibility determinations." *Rains*, slip op at 10. In addition, plaintiff admitted that B.L. missed five parenting time sessions with defendant because of her. Judge Gorcyca's order also provided for supervised parenting time two times each week, but plaintiff has rejected every suggested day and time for the second visit. Since the 2010 order, defendant has only been able to exercise one hour each week. The court's finding was supported by the evidence.

Finally, factor (l), MCL 722.23(l), is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." Plaintiff asserts that the trial court should have given more consideration to defendant's sexual addiction and its effect on B.L. She focuses on the term of defendant's probation that prohibits him from having contact with minor children who are not his own. The trial court considered defendant's sex addiction when deciding factors (f) – "[t]he moral fitness of the parties involved," and (g) – "[t]he mental and physical health of the parties involved." It found both favored plaintiff. The court found credible the testimony of Dan O'Neil, a clinical psychologist who saw defendant as part of court-ordered treatment. O'Neil testified that defendant is not a threat to his own children and said that defendant "has a good understanding of his addiction, has discovered methods for controlling his urges, and has a maintenance plan with support." In addition, the court ordered that defendant's unsupervised parenting time would immediately cease if he was convicted of another sexual offense or stopped receiving treatment. Thus, the trial court clearly considered defendant's history of inappropriate sexual conduct. In addition "the trial court has discretion to accord differing weight to the best-interest factors." *Rains*, slip op at 10.

Third, plaintiff contends that the parenting time factors do not support awarding defendant unsupervised parenting time with B.L. She focuses on factor (c) – "[t]he reasonable likelihood of abuse or neglect of the child during parenting time." As discussed above, the trial

court found credible O'Neil's testimony that defendant is not a threat to his own children and that defendant's addiction has improved through treatment. Defendant has not exposed himself since he was arrested in March of 2010, more than three years ago. He completed a court-ordered treatment program and continues to attend weekly group therapy sessions with O'Neil. O'Neil testified that defendant's risk of reoffense is low. In addition, the trial court ordered another three months of supervised parenting time, presumably to ensure defendant continued to progress in his treatment. Thus, the court's finding that this factor did not require supervised parenting time until 2015 was supported by the evidence.

Given that the trial court's findings on the best interest and parenting time factors were not against the great weight of the evidence, the court did not abuse its discretion in awarding defendant unsupervised parenting time. Plaintiff failed to show by a preponderance of the evidence that supervised parenting time was in B.L.'s best interest.

Finally, plaintiff contends that the trial court's decision violated the law of the case doctrine. "The law of the case doctrine generally provides that a question of law decided by the appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Manske v Dep't of Treasury*, 282 Mich App 464, 467; 766 NW2d 300 (2009). Whether the law of the case doctrine applies is a question of law that this Court reviews de novo. *Id.* In this case, the trial court did follow the law of the case. On remand, it followed this Court's holding that proper cause or changed circumstances existed to revisit the issues of custody and parenting time. However, it independently reviewed and made findings of fact with respect to the best interest and parenting time factors. This was proper. "[A] determination regarding a child's best interests is not a question of law, but a question of fact." *Shade*, 291 Mich App at 22. The law of the case doctrine prohibits a trial court from deciding *a question of law* differently on remand. *Manske*, 282 Mich App at 467 (emphasis added). It does not prohibit a trial court from reviewing questions of fact independently. See *id.* In fact, this Court's previous decision made no reference to the trial court's specific findings on the best interest or parenting time factors. See *Mersman*, slip op at 3-4. Thus, the trial court's decision did not violate the law of the case doctrine.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen