STATE OF MICHIGAN

COURT OF APPEALS

KAREN SUE ROGERS,

Plaintiff-Appellant,

v

RICHARD NICHOLAS KRULAC,

Defendant-Appellee.

UNPUBLISHED
November 14, 2013

No. 315461
Allegan Circuit Court
LC No. 12-049962-DM

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right from the custody determination in a judgment of divorce. We affirm.

> There are [ ] three different standards of review applicable to child-custody cases. The clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law. 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. Discretionary rulings, including a trial court's determination on the issue of custody, are reviewed for an abuse of discretion. [*Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006) (internal citations and quotation marks 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) (quotation omitted).

Child custody disputes are governed by the Child Custody Act, MCL 722.21 *et seq.* *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). In this case, "[b]ecause a temporary custody order existed, the trial court was required to make a finding regarding the issue [of] whether an established custodial environment existed." *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). The trial court found, and neither party disputes, that an established custodial environment existed with plaintiff.

The March 18, 2013, judgment of divorce introduced a graduated parenting time schedule whereby defendant was to receive equal parenting time as of September 2013. Defendant's

parenting time was gradually increased from one overnight visit on alternate weekends and one midweek visit to two overnight visits on alternate weekends and one midweek visit. Subsequently, four non-consecutive parenting weeks were to be given in the summer of 2013. Finally, in September of 2013, defendant and plaintiff were to have joint physical custody and the parties were to have equal parenting time pursuant to a week-on, week-off parenting time schedule. Neither party disputes that the trial court's custody determination changed the child's established custodial environment. Cf. *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008) (holding that where a parent with equal parenting time would be reduced to a "weekend parent," the custody decision changed the child's established custodial environment). Thus, the burden was on defendant to show by clear and convincing evidence that the change in the child's established custodial environment was in the child's best interest. MCL 722.27(1)(c).

In determining whether changing the established custodial environment is in the child's best interest, the trial court looks to the best interest factors found in MCL 722.23. See, e.g., *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). In addition to these factors, where, as here, one party seeks joint custody, the trial court is to consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b).

Plaintiff first contends that the trial court's finding that the parties could cooperate was against the great weight of the evidence. This argument is without merit because, although the record reveals that the parties harbored personal animosity towards each other and had difficulty communicating with each other, these issues did not extend to "basic child-rearing issues." *Nielson v Nielson*, 163 Mich App 430, 434; 415 NW2d 6 (1987). Indeed, despite their disagreements, the record reveals that both parties brought the child to counseling and agreed that the counseling should continue. Further, both plaintiff and defendant testified that they would be willing to attend counseling in order to learn how to co-parent after their divorce. Accordingly, despite plaintiff and defendant's differences, the trial court's finding that they could cooperate on matters of child-rearing was not against the great weight of the evidence. See *Shulick*, 273 Mich App at 326-327.

Next, plaintiff argues that the trial court's decision to award joint physical custody and equal parenting time was an abuse of discretion in light of the evidence presented at trial. In regard to the best interest factors, the trial court found that factor (j), which it determined was "the biggest problem" in this case, favored defendant; factors (d), (e), and (k) favored plaintiff; and the rest of the factors did not favor either party. The trial court indicated that it spoke with the child regarding her preference under factor (*i*), but did not reveal her preference. After considering the factors, the trial court concluded that "it pretty much comes out to a draw," and determined that joint physical custody and equal parenting time was in the child's best interest.

In reaching its custody determination, the trial court need not give equal weight to all the factors. *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). As we explained in *Foskett*, 247 Mich App at 9:

> [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. [Quotation omitted.]

Further, "a finding of equality or near equality on the factors set out in MCL 722.23; MSA 25.312(3) will not necessarily prevent a party from satisfying the burden of proof by clear and convincing evidence on a motion to modify custody." *Heid v Aaasulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995). Lastly, when making a custody determination, "[t]he overriding concern is the child's best interests." *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009).

The trial court did not abuse its discretion when it awarded joint physical custody and equal parenting time. The court found, by clear and convincing evidence, that joint physical custody and equal parenting time was in the child's best interest. See, e.g., *Heid (After Remand)*, 209 Mich App at 594 ("It is eminently reasonable and just to hold, on this record, that the child's best interest is significantly advanced by having two parents who are at all times responsible for and actively involved in his care."). See also *McIntosh*, 282 Mich App at 475 ("The overriding concern is the child's best interests."). In reaching its decision, the trial court emphasized its finding that the child had a relationship with defendant. Further, the trial court found that plaintiff attempted to prevent defendant from being involved in the child's life. The trial court did not err by heavily weighing this fact in defendant's favor in order to preserve the relationship between defendant and the child. See *Sinicropi*, 273 Mich App at 184. Moreover, the trial court also found that although plaintiff accused defendant of a variety of inappropriate actions, joint physical custody was nevertheless appropriate. Plaintiff does not challenge any of the trial court's factual findings, and we defer to the trial court's credibility determinations. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Consequently, we find that the trial court's decision was not "palpably and grossly violative of fact and logic . . ." so as to constitute an abuse of discretion. *Dailey*, 291 Mich App at 664-665 (quotation omitted). See also *Shulick*, 273 Mich App at 325 ("the trial court's custody decision is entitled to the utmost level of deference.").

Plaintiff nevertheless argues that the trial court abused its discretion because it ignored testimony from the child's therapist that joint physical custody was not in her best interest at the time of trial. The record does not support plaintiff's contention that the trial court ignored this testimony where the trial court expressly acknowledged the testimony when it announced that it would gradually introduce joint physical custody and equal parenting time. Furthermore, the therapist's testimony was not dispositive on this issue because the trial court is to focus on the child's best interest, and may emphasize certain facts or factors over others. *Sinicropi*, 273 Mich App at 184-185.

Next, plaintiff argues that the trial court's decision was an abuse of discretion because the trial court ignored the best interest factors and determined that joint physical custody was appropriate simply because it could not conclude that either party was a bad parent. This Court presumes that the trial court knows and understands the applicable law. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007). Moreover, the record belies plaintiff's assertion that the trial court ignored the best interest factors.

Next, plaintiff takes issue with the trial court's decision to gradually introduce joint physical custody and equal parenting time given the court's acknowledgement that the child was not ready for such an arrangement at the time of trial. One of the best interest factors, MCL 722.23(*l*), permits the trial court to consider "any other factor considered by the court to be relevant . . . ." See *McIntosh*, 282 Mich app at 482 ("Factor *l* is a 'catch-all' provision."). Here, there was testimony that the child had reservations about overnight visits with defendant. The trial court was permitted to consider those reservations when it made its custody and parenting time decisions. See MCL 722.23(*l*). Given the child's reservations about overnight visits, the trial court's decision to gradually introduce joint physical custody and equal parenting time was not grossly violative of fact and logic. See *Dailey*, 291 Mich App at 664-665.

Lastly, plaintiff argues that the trial court should not have scheduled defendant's parenting time to increase at the beginning of September of 2013 without conducting an evidentiary hearing at the time of the increase. She contends that the trial, which occurred in January of 2013, did not suffice for the trial court to make a decision about a future parenting time increase change in custody to joint physical custody. Although an evidentiary hearing is required when a trial court grants a change of custody or a change in parenting time that alters a child's established custodial environment, see, e.g., *Shade*, 291 Mich App at 27; *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005), plaintiff has failed to cite any authority in support of her assertion that the trial court cannot delay the onset of its custody or parenting time decisions. Moreover, we find that the trial court's custody determination in this case was consistent with *Shade*, 291 Mich App at 27, and *Grew*, 265 Mich App at 336, because the trial court conducted an evidentiary hearing and considered the best interest factors before reaching its decision. Although plaintiff expresses concern that the circumstances may have changed since the entry of the judgment of divorce, plaintiff can raise this issue in the trial court if a change of circumstances exists. Indeed, the trial court can, upon the showing of proper cause or a change in circumstances, modify an existing custody order. See, e.g., *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering