STATE OF MICHIGAN

COURT OF APPEALS

JAMES RONALD BRANTMAN,

Plaintiff-Appellee,

v

MICHELE MARIE BRANTMAN,

Defendant-Appellant.

UNPUBLISHED
May 22, 2003

No. 243800
Kent Circuit Court
LC No. 98-001587-DM

Before: Schuette, P.J., Sawyer, and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion to change physical custody of the parties' son. We affirm.

Following the parties' divorce in 1999, defendant was awarded physical custody of their child. On February 14, 2001, plaintiff moved for change in physical custody. An evidentiary hearing on the motion for change of physical custody was conducted over a four day period. After considering the testimony, the trial court entered an order awarding plaintiff primary physical custody of the child.

I. Standards of Review

Three standards of review apply in custody cases. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). "The great weight of the evidence standard applies to all findings of fact." *Id.* (citing *Phillips v Jordan*, 241 Mich App 17, 24; 614 NW2d 183 (2000)). Under this standard, a trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *LaFleche*, *supra* at 695 (citing *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994)). Further, "[a]n abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *LaFleche*, *supra* at 695 (citing *Phillips*, *supra* at 20; *Fletcher*, *supra* at 24). Finally, "[a] trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *LaFleche*, *supra* at 695 (citing *Phillips*, *supra* at 20).

II. "Best Interests" Factors

Defendant contends that the trial court properly went through the mandated "best interests" factors, but failed to properly evaluate the factors pursuant to the clear and convincing standard.

The trial court found, and the parties do not dispute that an established custodial environment existed. Therefore plaintiff, as the moving party, was requested to show by clear and convincing evidence that it is in the child's best interest to change custody. *Phillips, supra* at 24-25.

A trial court must make specific findings of fact regarding the "best interests" factors. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998) (citing *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988)). In the case at hand, the trial court made factual findings on each of the custody factors. The court found that neither party was favored by factors (a), (e), (f), (g), (i), and (k), and found in favor of plaintiff on factors (b), (c), (d), (h), and (j).

MCL 722.23(a) examines the love, affection, and other emotional ties existing between the parties involved and the child. The trial court found that both parties love the child deeply, and the child is emotionally bonded to both of them. The trial court found that neither party was favored by this factor.

While defendant believes that plaintiff and the child love one another, she contends that the trial court ignored facts concerning the child's passionate refusal to visit his father. We note that a trial court is not required to address every argument when making findings of fact on these factors. *Fletcher, supra* at 883 (citing *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981)). There was testimony that when plaintiff went to pick the child up at Christmas time for parenting time, the child kicked plaintiff and hit him with a pop bottle. Plaintiff testified that he was able to calm the child down. In addition, defendant testified that this was the first time the child became violent with his father. There was also testimony indicating that plaintiff and the child do spend time together and do have a bond.

A trial court's findings regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20. We conclude that the trial court's findings were not against the great weight of the evidence.

MCL 722.23(b) examines the capacity and disposition of the parties to give love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed. The trial court found that both parties demonstrated some capacity and disposition to provide the child with love and affection. However, the trial court stated that the testimony of Merrill Graham, MSW, CSW, raised serious concerns about defendant's ability to provide the child with appropriate guidance. The trial court found that this factor strongly favored plaintiff.

Defendant contends that the trial court ignored the testimony of Sue Van Duinen, a custody-evaluator with the friend of the court. Van Duinen testified that the parties' psychological evaluations did not support a change in custody. On cross-examination, Van Duinen stated that the evaluation revealed some significant psychological difficulties that may get in the way of plaintiff being an effective, full-time parent: such as his tendency to be

impulsive, his hyperactivity, and his careless behavior. According to Van Duinen, the evaluation acknowledged that plaintiff loves his child, but stated that plaintiff seemed to lack the stable, mature organization that a full-time parent needs for a younger age child.

On redirect examination, Van Duinen acknowledged that the psychological evaluations were old --approximately four years old. Van Duinen further acknowledged that if plaintiff pays his bills and is current on child support, that would indicate stability, maturity, and organization. When Van Duinen was asked, if plaintiff was actively assisting the child with homework, would that be important to you in fathering full-time a child, she stated, "Yes."

After reviewing Van Duinen's testimony, we conclude that the trial court's findings with regard to this fact were not against the great weight of the evidence.

MCL 722.23(c) examines the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care. The trial court looked at the fact that plaintiff is employed full-time and has paid child support regularly, as well as providing for the child's medical needs. The trial court further noted that defendant has no formal employment. Rather, defendant's aunt provides all the food and utilities for defendant and the child in return for defendant caring for her aunt. The trial court stated that it appeared that defendant's living situation was completely within the control of a third party and depended entirely on the ongoing good will of defendant's aunt. Therefore, the trial court found that this factor strongly favored plaintiff.

There was testimony indicating that plaintiff has been employed as an auto technician for sixteen years. Defendant acknowledged that plaintiff pays $107 per week and is current in his child support. Defendant testified about her aunt supporting her and the child. She also testified about a million-dollar trust that had been set up for the child. However, when asked if she had copies of those documents, she stated that she did not have them with her. The trial court's findings were not against the great of the evidence.

MCL 722.23(d) looks at the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The trial court acknowledged that the child has lived with defendant throughout the child's life. However, the trial court stated that although the physical environment appears to be satisfactory, the emotional environment appears to be unstable and unsatisfactory. Therefore, the trial court found that this factor favored plaintiff.

While there was testimony that defendant and the child had lived in the same environment for a number of years, we agree that Merrill Graham, the child's counselor, put the child's emotional environment into question. Graham testified that the child had issues with his own self-image, and that she was concerned because defendant was hypercritical of the child. Therefore, the trial court's findings were not against the great weight of the evidence in regard to this factor.

MCL 722.23(e) examines the permanence, as a family unit, of the existing or proposed custodial home. The trial court stated that it appeared that both parties' home situations were stable. Therefore, the trial court found that neither party was favored by this factor. While there was testimony about defendant and the child living with defendant's aunt for a number of years,

there was favorable testimony about plaintiff's home with his new family. Plaintiff's sister testified that the child "fits in" and belongs at plaintiff's home with his new family. The trial court's findings were not against the great of the evidence.

MCL 722.23(g) examines the mental and physical health of the parties involved. The trial court found that there was no evidence presented which would cause this factor to favor either party.

Defendant contends that this factor favors defendant based on Van Duinen's testimony about plaintiff being impulsive and hyperactive. As discussed above, Van Duinen acknowledged that the psychological evaluations were old. In addition, Van Duinen acknowledged that if plaintiff was paying his bills and was current on child support, this would indicate stability, maturity, and organization. The trial court's findings were not against the great weight of the evidence.

MCL 722.23(h) examines the home, school, and community record of the child. The trial court stated that the child's school attendance has been a concern of his teachers, as well as plaintiff. The trial court considered the fact that the child's homework does not come back from defendant's home on a regular basis and that the child's teacher stated that plaintiff communicates with her quite regularly and is very involved with the child's education. The trial court found that this factor favored plaintiff.

Plaintiff testified that the child missed approximately 20 days of school during kindergarten, approximately 30 days in the first grade, and seventeen days in the second grade. Mary Jandernoa, the child's teacher in both the first grade and second grade, testified that in the first grade, the child had missed 35 days out of 180. According to Jandernoa, this was an unusual amount. For the current year, Jandernoa testified that the child had missed 17 days out of 121.

Jandernoa testified that the child's homework has been a problem since the first grade. According to Jandernoa, homework does not come back to school on a consistent basis. Jandernoa explained that she sends "little books" home with the children to help with their reading comprehension. Jandernoa stated that these books come back from defendant's home very infrequently. When asked if the child missed 75 percent of his homework assignments for the first marking period, Jandernoa stated that that would be her assessment.

After reviewing the parties' testimony, as well as the child's teacher's testimony, we find that the trial court's findings were not against the great weight of the evidence.

MCL 722.23(j) examines the 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. The trial court stated that the testimony of both parties provides clear evidence that defendant is unwilling to facilitate a close and continuing parent-child relationship between the child and plaintiff.

Plaintiff testified about an incident where he went to pick up the child and the child did not want to go with plaintiff. While plaintiff was trying to talk with the child, defendant was video-taping the incident. According to plaintiff, defendant was not helping, but rather was

enjoying taping the incident. Plaintiff acknowledged that defendant did help at Christmas time when the child became violent with plaintiff. However, plaintiff stated that defendant does not regularly help plaintiff "be a dad." Defendant was asked what steps she takes to encourage the child to go with plaintiff, and she stated that she goes outside and talks to the child, but she does not physically force him into a vehicle. When asked if she encourages the child to have a close relationship with his father, she stated:

> His father's phone numbers are programmed into the phone. They're on the fridge at the house that he can call his dad at any time, you know. I make him, when his dad comes, I make him go outside and talk to his father.

Plaintiff's sister testified how defendant would not let the child attend his great-grandfather's funeral.

Plaintiff was asked how he would handle getting the child to go with defendant if he was granted custody, and he stated that the child would go because the child "has the right to know who and what his mother is, and she has a right to know who and what [the child] is." The trial court's findings were not against the great weight of the evidence.

MCL 722.23(k) examines domestic violence, regardless of whether the violence was directed against or witnessed by the child. The trial court found that no evidence was produced which favored either party.

There was testimony that defendant yelled at plaintiff and threatened to hit him with a bat. There was also testimony about defendant getting a personal protection order against plaintiff after their divorce. Based on this testimony, we find that the trial court's finding that no evidence was produced which favored either party was not against the great weight of the evidence.

MCL 722.23(l) examines any other factor relevant to the child custody dispute. The trial court found that no other factors were deemed to be relevant.

Defendant contends that the quality of the respective school districts was ignored. In defendant's motion for reconsideration, she cites the Standard and Poor's report for the school districts involved in the case at hand. This evidence was not introduced at the evidentiary hearing on plaintiff's motion for change of custody; therefore, we conclude that the trial court's finding on this factor was not against the great weight of the evidence.

We further note that the trial court did not abuse its discretion in denying defendant's motion for reconsideration. We stated, in *Charbeneau v Wayne Co General Hospital*, 158 Mich App 730, 733, 405 NW2d 151 (1987), that a motion for reconsideration must demonstrate a "palpable error by which the court and the parties have been misled." (Quoting MCR 2.119(F)(3)). We further note that we have found no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pleaded or argued before trial court's order. *Charbeneau, supra* at 733.

We conclude that evidence regarding the school districts could have been argued before the trial court's ruling on the motion for change of custody. Therefore, the trial court did not abuse its discretion in denying defendant's motion for reconsideration.

III. Conclusion

We hold that none of the trial court's findings regarding the best interests factors were against the great weight of the evidence. Further, we conclude that the trial court did not abuse its discretion in granting plaintiff's motion for change of custody. Plaintiff demonstrated by the requisite clear and convincing standard that the child's best interest required changing physical custody to plaintiff.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder