STATE OF MICHIGAN

COURT OF APPEALS

ROBERT BREWER III,

Plaintiff/Counterdefendant-Appellee,

v

RENEE NICOLE MASSEY,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
September 23, 2004

No. 250844
Wayne Circuit Court
LC No. 02-204926-DC

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order granting joint physical custody, setting parenting time, and determining child support. We affirm in part, reverse in part, and remand for re-determination of child support.

Defendant challenges the trial court's grant of joint physical and legal custody. This Court applies multiple standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court should affirm the trial court's finding concerning an established custodial environment unless the evidence clearly preponderates in the other direction. *Id*. A clear legal error standard applies to all questions of law. *Id*. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id*. A trial court's discretionary rulings, such as to whom it grants custody, are reviewed for an abuse of that discretion. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). We review de novo issues of statutory interpretation. *Eldred v Ziny*, 246 Mich App 142, 146 n 4; 631 NW2d 748 (2001).

The trial court must initially determine if an established custodial environment exists.

First, defendant points to MCL 722.1006[1] and argues that this statute creates an automatic presumption of an established custodial environment in her favor because she is the child's mother. This Court must apply the plain, unambiguous language of a statute as it is written, *Eldred, supra* at 147 n 7, and this statute simply does not pertain to a determination of whether an established custodial environment exists. Instead, it provides a presumption of legal custody in the mother in the absence of a court determination or written agreement of the mother and father to the contrary. *Eldred, supra* at 146. An established custodial environment is a distinct legal concept and has distinct requirements. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5-6; 643 NW2d 363 (2001). MCL 722.1006 creates a presumption of legal custody; it does not determine whether an established custodial environment exists. Because this Court must apply the statute as written, defendant's argument is without merit.

The evidence at trial showed that plaintiff was the primary care giver to the child for a significant amount of time while the parties lived together. The child significantly bonded with both parents. Plaintiff testified that he performed all the basic parental responsibilities when he cared for the child. Plaintiff's mother testified that plaintiff was the primary care giver to the child when the parties lived together. The child was born in May 2001, and the parties lived together from July 2001 to the end of January 2002. Consequently, plaintiff cared for the child for a significant portion of his life before defendant removed him and did not allow plaintiff further contact. This evidence supports a conclusion that the child looked to plaintiff for guidance, discipline, the necessities of life, and parental comfort for an appreciable time. This evidence supported the trial court's finding of a joint established custodial environment. This Court affirms the trial court's finding concerning an established custodial environment unless the evidence clearly preponderates in the other direction. *Phillips*, *supra* at 20.

Defendant attempts to equate the concept of established custodial environment to the house where the parties live. She argues that plaintiff did not have an established custodial environment because he moved out of the apartment they shared. Although the physical environment is a consideration in determining an established custodial environment, it is not the only consideration. *Foskett*, *supra* at 5. This Court has specifically stated it is possible that the parties change domicile but still retain joint physical custody and an established custodial environment. *Brown v Loveman*, 260 Mich App 576, 596; 680 NW2d 432 (2004). Therefore, defendant's argument is without merit.

Defendant further argues that the trial court put too much emphasis on the time period the parties lived together and, instead, should have focused on the time period after she took the child and moved out of the apartment. Defendant claims the trial court should place more emphasis on the time during the custody proceedings. But "repeated changes in physical custody and uncertainty created by an upcoming custody trial" may destroy a previously established custodial environment and preclude the establishment of a new one. *Bowers v*

---

[1] MCL 722.1006 provides: "After a mother and father sign an acknowledgment of parentage, the mother is presumed to have custody of the minor child unless otherwise determined by the court or otherwise agreed upon by the parties in writing."

Bowers, 198 Mich App 320, 326; 497 NW2d 602 (1993). Further, defendant does not contend that the child only looks to her for the necessities of life. Instead, she asserts that he spends more time with her. Defendant cites no authority to support her contention that the amount of time spent with the parent should be an overriding consideration in judging an established custodial environment.

The record reflects that the child spent a significant amount of time with plaintiff over the period after defendant moved him away from the apartment. The record also reflects that the main limiting factor in plaintiff's contact was not his lack of desire or attempts to maintain his influence and contact with the child, but defendant's refusal to allow parenting time. We believe that the evidence existing on the record does not clearly preponderate in the other direction regarding the trial court's determination that the parties had established a joint custodial environment. Accordingly, this Court must affirm the trial court's determination. *Phillips*, *supra* at 20.

Next, defendant argues that the trial court abused its discretion in awarding joint physical custody because the record reflected that the parties could not get along. But defendant did not properly preserve this claim because she did not raise it before the trial court. This Court need not address an issue raised for the first time on appeal, as it is not properly preserved for appellate review. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998). Because defendant failed to timely assert this claim, she has forfeited it. *Stein v Braun Engineering*, 245 Mich App 149, 154; 626 NW2d 907 (2001).

Defendant also contends that the trial court did not consider the parties' ability to cooperate. MCL 722.26a(1)(b). But our review of the record indicates otherwise. When weighing the best interest factors, the trial court specifically addressed the parties' immaturity and inability to get along. The court noted the parties' failure to cooperate in exchanging the child. Further, it is clear that the trial court believed that defendant's parents exacerbated the problem. Thus, the record evidences that the trial court considered the parties' ability to cooperate and weighed it against other factors. The trial court found defendant's parents a main factor in the lack of cooperation and determined that joint custody was in the child's best interest.

The evidence supports the trial court's obvious finding that awarding sole legal custody to either party will not eliminate the parties' intolerance for each other. In fact, awarding sole custody to defendant may result in greater difficulty given her parents obvious problems with plaintiff. Because all custody orders 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, MCL 722.28; *Foskett*, *supra* at 4-5, we conclude the trial court's determination of joint custody was proper.

Next, defendant challenges the trial court's determination regarding some of the statutory "best interests of the child" factors. MCL 722.23. In custody cases, this Court applies the great weight of the evidence standard to all findings of facts. *Phillips*, *supra* at 20. The trial court's findings regarding each custodial factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*.

Defendant first challenges the trial court's findings regarding factor a, MCL 722.23(a), which deals with "[t]he love, affection, and other emotional ties existing between the parties involved and the child." Defendant argues that the trial court failed to consider her relationship with the child and failed to consider plaintiff's allowing the child to ingest alcohol. Defendant argues that this evidence contradicts the court's findings regarding this factor.

But the trial court clearly did consider defendant's relationship with the child. The court specifically stated that defendant and the child share an emotional connection and have a "close bonding relationship;" consequently, defendant's argument is without merit.

The record also indicates that the trial court considered conflicting evidence regarding plaintiff giving the child alcohol when it considered best interests factor f, MCL722.23(f).[2] The trial court chided plaintiff for his drinking habits and his related problems with alcohol and determined that this factor strongly favored defendant. Defendant basically argues that the trial court should have assigned more weight to factor f in making its custody decision. But, a trial court need not give each statutory best interest factor the same weight. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). Although this allegation is very serious, when all the evidence is considered, it does not clearly preponderate in the opposite direction of the trial court's decision. *Foskett*, *supra* at 5. The evidence indicates that the child suffered no lasting effects from being exposed to alcohol. Moreover, evidence existed that defendant also exposed the child to alcohol. Given that the evidence does not clearly preponderate in the opposite direction, this Court must affirm the trial court's determination. *Phillips*, *supra* at 20.

Defendant next challenges the trial court's determination of best interests factor b, MCL 722.23(b), which addresses "[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." Regarding factor b, the trial court found serious deficiencies on both sides, and ultimately, determined this factor was equal. The evidence does not clearly preponderate against the trial court's findings. *Foskett*, *supra* at 5.

Defendant argues that the court erred in regard to its finding about the parties' religion. Defendant's sole argument is that she and her family were more active in their church than plaintiff was in his church. But no such evidence exists on the record to support such a contention; therefore, there is no evidence weighing against the trial court's determination.

Defendant also argues that the trial court failed to take into account plaintiff's "exaggeration and hyperbole" in determining factor b. Defendant basically argues that plaintiff is a liar; however, judgments of witnesses' credibility are left to the sound discretion of the trial court. MCR 2.613(C); *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998).

Defendant challenges the trial court's determination regarding factor d, MCL 722.23(d), which concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and

---

[2] This best interests factor requires the trial court to consider "[t]he moral fitness of the parties involved."

the desirability of maintaining continuity." The trial court found this factor favored plaintiff because he owned his home (albeit jointly with his grandmother), while defendant continued to live with her parents, who openly dislike plaintiff. The trial court found that defendant's parents did not help the child achieve a sense of security and undermined his relationship with plaintiff.

Defendant first argues that plaintiff's home is not satisfactory because he lives there with his grandmother who is an octogenarian with health concerns. Defendant cites no negative aspects of the grandmother's personality or any danger she might pose to the child. Simply put, defendant offers no support for her contention that the grandmother's presence renders the home unsuitable. This Court will not search for authority to sustain a party's argument. *Mudge v Macomb County*, 458 Mich 87, 105; 580 NW2d 845 (1998). Defendant's argument is particularly disingenuous because her own father is disabled.

Defendant also argues that the trial court's finding that her parents were partially responsible for their disputes with plaintiff demonstrates the court's failure to properly evaluate the evidence. But a careful review of the evidence supports the trial court's finding that the animosity between plaintiff and defendant's parents is mutual: The court noted that defendant's parents simply failed to act like adults and deal with plaintiff. Under the circumstances, the trial court's determination was more than justified. The evidence does not preponderate in the opposite direction, so this Court must affirm the trial court's findings. *Phillips*, *supra* at 20.

Defendant challenges the trial court's determination regarding best interests factor k, MCL 722.23(k), which addresses "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Although defendant's argument is unclear, it seems she argues that plaintiff's act of punching a wall in the child's bedroom is worse than her slapping plaintiff because plaintiff punched the wall in the child's presence. But MCL 722.23(k) plainly states that it does not matter whether the child is present or not. Because this Court must apply the plain language of the statute, defendant's argument is without merit. *Eldred, supra* at 147 n 7. Here, plaintiff testified that defendant hit him. And defendant does not deny this on appeal. Consequently, the trial court's determination regarding factor k is supported by the great weight of the evidence, and this Court must affirm. *Phillips*, *supra* at 20.

Finally, defendant argues that the trial court erred in its determination of child support. We agree.

"The award of child support rests in the sound discretion of the trial court [and] . . . is presumed to be correct." *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992). The party challenging a child support order must demonstrate the trial court clearly abused its discretion. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). But the proper application of the state friend of the court bureau's child support formula, as required by the Legislature, is a question of law reviewed de novo. *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002), citing *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 837 (2000).

MCL 552.605[3] is applicable to this case and provides:

> (1) If a court orders the payment of child support under this or another act of the state, this section applies to that order
>
> (2) Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
>
> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

These criteria for deviating from the child support formula are mandatory. *Burba*, supra at 644, citing *Ghidotti v Barber,* 459 Mich 189, 200; 586 NW2d 883 (1998).

Here, the trial court deviated from the child support formula without complying with the statutory criteria. The trial court ordered that child support be based on the Shared Economic Responsibility formula, which provides that "child support must be calculated by offsetting the parties' support obligations." See Michigan Child Support Formula Manual, Twelfth Edition (West, 2000), § IV, B, p 26. But the Manual states the Shared Economic Responsibility formula "should only be used if it can be determined from the specific terms of the custody/parenting time order that the child will be with that parent for at least 128 overnight[s] . . . ." *Id*. Although it is undisputed that the trial court initially intended to order more than 128 overnights, the specific terms of the custody order entered does not provide that plaintiff have the child for the requisite 128 overnights. Consequently, applying Shared Economic Responsibility in this case is a deviation from the child support formula. This deviation may not stand unless the lower court followed the criteria laid out by the Legislature in MCL 552.605(2). *Burba*, *supra* at 644. Here, the trial court failed to set the child support amount determined by application of the child support formula without deviation as required by MCL 552.605(2)(a). This means that the trial

---

[3] This section was added to the support and visitation enforcement act, 1982 PA 295, by 2001 PA 2001, effective September 30, 2001. Identical language is found in numerous other statutes addressing child support. See *Burba, supra* at 644-645.

court improperly deviated from the child support formula. *Burba*, *supra* at 644. Therefore, the trial court abused its discretion in its child support order. *Kosch, supra* at 350.

We affirm in part, reverse in part, and remand to the trial court for reevaluation of child support. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey