STATE OF MICHIGAN

COURT OF APPEALS

TABETHA ARGEL, also known as TABETHA PINK, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED December 20, 2018
v	No. 344836 Jackson Circuit Court
GEORGE ELLIOTT ARGEL, Defendant/Counterplaintiff-Appellant.	LC No. 16-001097-DM

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, George Elliott Argel, appeals as of right from the trial court's order denying his motion for a change in custody. We affirm.

Defendant and plaintiff, Tabetha Pink (also known as Tabetha Argel), were married in Texas. They had one child together during the marriage. This is the second time that this case has been on appeal before this Court. The basic facts are stated in *Argel v Argel*, unpublished per curiam opinion of the Court of Appeals, entered June 12, 2018 (Docket No. 340148), pp 1-2:

> The parties met in Texas when plaintiff was 17 and defendant was 24. Defendant was a lifelong resident of Texas whereas plaintiff's family moved approximately every two years to accommodate her father's work. The parties married in Texas in December 2012 and the child was born in January 2014. Eventually, plaintiff's parents relocated to Michigan and the parties followed.
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> Plaintiff left the marital home in March 2016. She testified that the breakdown of the marriage was the result of defendant's alleged obsession with teen pregnancy pornography. In contrast, defendant claimed that the breakdown of the marriage was the result of plaintiff's extramarital affair.
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> In July 2016 plaintiff took the child to the hospital with allegations that defendant had sexually abused the child. The allegations resulted in supervised

> parenting time for defendant until a final report was made. Defendant testified that his in-laws, who were co-owners of the marital home, were unlawfully entering the home. Defendant testified that the restricted visitation with the child, his in-law's harassment, and his own father's terminal illness caused him to relocate to Texas in August 2016.
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> Because of plaintiff's allegations regarding abuse, defendant requested that the trial court order psychological testing. The parties presented themselves to Dr. Tomas Muldary, who prepared a child custody evaluation. The trial court considered this October 2016 evaluation and conducted a two-day trial in June 2017. The trial court concluded that the child's custodial environment was with plaintiff, that the child's best interests were served by awarding sole physical custody to plaintiff, and that the child would be best served if defendant's visits continued to take place in Michigan. The trial court also imputed income onto defendant for purposes of child support and denied defendant's request that plaintiff pay his substantial attorney fees.

A panel of this Court affirmed the trial court's judgment of divorce that granted the parties joint legal custody and plaintiff sole physical custody of the child. *Id*. at 1.

Plaintiff was involved in a shoplifting incident at the East Jackson Meijer in October 2017, in which the child was present. Defendant filed a motion for a change of custody on the basis of this incident. The trial court held an evidentiary hearing. After extensive testimony, the trial court determined that defendant failed to meet his burden showing that changing the child's established custodial environment was in the child's best interests. This appeal followed.

First, defendant argues that the trial court's factual findings regarding best-interest Factors (f) and (k) were against the great weight of the evidence. We disagree.

"This Court must affirm all custody orders unless the trial court's findings of fact 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Further, "[u]nder the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 20; 805 NW2d 1 (2010). "In child custody cases, [a]n abuse of discretion exists when the trial court's 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*. (quotation marks and citation omitted; alteration in original). "Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law." *Id*. (quotation marks and citation omitted). Finally, "[w]hether an established custodial environment exists is a question of fact that [this Court] must affirm unless the trial court's finding is against the great weight of the evidence." *Berger*, 277 Mich App at 706.

"Child-custody determination" is defined as "a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child." "Child-custody determination includes a permanent, temporary, initial, and modification order." MCL

722.1102(c). The trial court may "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c). "A modification of such a judgment or order is only permissible when it is in the minor child's best interests." *Shade*, 291 Mich App at 23. See also MCL 722.27(1)(c). MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
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> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The 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.
>
> (c) The 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.
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> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
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> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
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> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
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> (j) 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 or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

For factor (f), the moral fitness of the parties, the trial court explained that it found morality issues with defendant at the time of the divorce because of his obsession with pornography. The trial court believed that it found that this factor favored plaintiff at the time of the divorce, but it now believed that the factor favored both parties equally. However, defendant's contention is correct in that the trial court was mistaken. It actually found that the parties were equally morally fit at the time of the divorce.

Nonetheless, we do not believe that the trial court's finding was against the great weight of the evidence. See *Berger*, 277 Mich App at 705. There was no testimony concerning pornography at the custody review hearing, but the trial court clearly stated that it found morality issues with defendant at the time of divorce. In regard to plaintiff, the trial court explained that she committed a crime of dishonesty, but she paid her fine and she was involved in therapy. The trial court clearly considered plaintiff's shoplifting incident in its factual findings, but did not hear any testimony regarding defendant's previous morality issues. The trial court simply found that the parties were still equally morally fit. Thus, the trial court's determination that factor (f) favored both parties equally was not against the great weight of the evidence. See *id.*

Further, the trial court's finding that there were no new circumstances concerning factor (k), domestic violence, was not against the great weight of the evidence. See *id.* On appeal, defendant argues that this factor favored him because he presented video evidence showing plaintiff's family's hostility at a parenting-time exchange. However, defendant did not present any evidence or argue at the hearing that plaintiff's family committed any acts of domestic violence against him. Further, the trial court considered the evidence of plaintiff's family's hostility and plaintiff's attempts to impede defendant's relationship with the child in its analysis of factor (j). Thus, the trial court's conclusion that there was no change in circumstances regarding domestic violence was not against the great weight of the evidence. See *id.*

Additionally, defendant argues that the trial court erred in not considering factor (g), the mental and physical health of the parties. Defendant is correct in that the trial court did not make a specific finding as to this factor. However, the trial court may have concluded that this factor had not changed since the entry of the judgment of divorce. At the custody review hearing, the trial court initially stated that it would only address factors that were relevant as of the time of the hearing and defendant agreed; however, the trial court ultimately made findings on every other factor because it could not remember all of its earlier findings. See *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352 (2014) ("A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.") (quotation marks and citation omitted). Moreover, as discussed earlier, the trial court clearly considered the shoplifting incident, and it discussed plaintiff's post-traumatic stress disorder (PTSD) diagnosis in its factual findings. The trial court may have determined that this factor had not changed or it favored both parties equally.

Next, defendant argues that the trial court erred in finding that the established custodial environment continued to exist with plaintiff. We disagree.

In pertinent part, MCL 722.27(1)(c) provides:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

This Court has stated:

> An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

In this case, the trial court found and a panel of this Court agreed that the established custodial environment existed with plaintiff at the time of the divorce. At the time of the custody review hearing, plaintiff remained the primary caregiver of the child while defendant had parenting time five days and four overnights a month. The trial court determined that the existing custodial environment remained with plaintiff. The trial court stated that the child clearly loved and adored defendant and that the circumstances would be different if defendant had not moved to Texas. This finding was not against the great weight of the evidence. See *id*. Although the trial court acknowledged that a strong bond existed between defendant and the child, she clearly spent a vast majority of her time in plaintiff's care while defendant had parenting time five days a month.

Defendant appears to argue that the trial court's acceptance of the consent order regarding parenting time showed that the established custodial environment existed with both parties. However, the trial court had to determine the established custodial environment at the time of the hearing. The fact that the established custodial environment might change in the future as a result of the parties' agreement at the hearing does not establish that the trial court's determination was against the great weight of the evidence. See *id*. At the hearing, the trial court concluded that the established custodial environment existed with plaintiff and that defendant failed to show that it was in the child's best interests to change that established custodial environment by clear and convincing evidence. However, the trial court agreed with defendant in that he was entitled to more parenting time before the child started kindergarten. Therefore, the trial court asked the parties to come to an agreement regarding parenting time. The parties agreed to 50/50 parenting time until the child started kindergarten. Contrary to defendant's position, the parties ultimate parenting-time agreement did not alter the established custodial environment at the time that defendant filed his motion to change custody or at the time of the custody review hearing.

Finally, defendant asserts that the trial court erred in determining that he failed to meet the clear and convincing evidence standard showing that changing the child's existing custodial environment was in the child's best interests. We disagree.

"When a modification would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Shade*, 291 Mich App at 23. On the other hand, "[i]f the proposed change does not change the custodial environment . . . the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Id*.

Awarding defendant sole physical custody of the child in Texas would change the established custodial environment with plaintiff in Michigan. Thus, the appropriate standard of proof is clear and convincing evidence. See *id*.

In this case, the trial court clearly explained the basis for its decision that defendant failed to meet the clear and convincing standard. It stated that it was a difficult standard to meet and that defendant failed to present any credible expert testimony showing that the child was traumatized or affected by the shoplifting incident. Instead, all the evidence amounted to speculation of how the incident impacted the child. Further, Child Protective Services (CPS) did not find the incident significant enough to place services in plaintiff's home. The trial court determined that it would need to see how the incident impacted the child before changing custody. As a result, the trial court determined that defendant failed to show by clear and convincing evidence that it was in the child's best interests to change the established custodial environment.

The trial court's conclusion is not against the great weight of the evidence. See *Berger*, 277 Mich App at 705. The shoplifting incident was the reason for the custody review hearing. Defendant presented substantial testimony and video evidence regarding plaintiff's actions but failed to present any evidence showing how the incident affected the child. In contrast, there was evidence establishing that CPS interviewed the child regarding the incident. The child denied that plaintiff had shoplifted, stated that plaintiff did not get into trouble, and maintained that plaintiff never forgot to pay for items at the store. Defendant did not refute this testimony. Thus, although the trial court found plaintiff's actions objectionable, the evidence presented at the hearing simply did not show that the incident had such a detrimental effect on the child so that changing the established custodial environment was supported by clear and convincing evidence. Accordingly, the trial court's determination that defendant failed to meet his burden was not against the great weight of the evidence. See *id*. Further, the trial court did not abuse its discretion in denying defendant's motion to change custody. See *id*.

Affirmed.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Amy Ronayne Krause