STATE OF MICHIGAN

COURT OF APPEALS

ERIC MOORE,

Plaintiff-Appellee,

v

KRISTEN DUKE,

Defendant-Appellant.

UNPUBLISHED
February 11, 2021

No. 354575
Ingham Circuit Court
Family Division
LC No. 19-001880-DC

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right the order granting parenting time of RM to plaintiff. We affirm.

I. BACKGROUND

In a separate case, defendant's parents filed a petition to terminate plaintiff's parental rights and adopt RM on the ground that plaintiff had been absent from RM's life for over three years. One month before the petition was scheduled for adjudication, plaintiff filed this case seeking legal and physical custody of RM and parenting time. The court in the termination case adjourned further proceedings until this case was resolved. The Friend of the Court (FOC) held an investigatory hearing in which the parties and defendant's parents participated. Defendant and her parents contended that plaintiff should not have any parenting time because reintroducing him after a long absence would upset and confuse RM. The FOC investigator, finding that defendant had not established that parenting time would harm RM, recommended granting plaintiff a multi-step, graduated supervised parenting-time schedule that would begin with supervised visitation for one hour each week and phase in longer visitation over time. Defendant filed an objection to the investigator's recommendation, arguing that there were statutory grounds to terminate plaintiff's parental rights under MCL 712A.19b(3)(a)(*ii*) (parent has deserted child for more than 91 days without seeking custody), and that it was legally inconsistent for the court to conclude that parenting time would not harm RM when, according to the Legislature, plaintiff's desertion of RM was so harmful as to justify terminating his parental rights.

The FOC referee held a hearing on defendant's objection. Defendant's parents testified that, when RM was born, they paid for plaintiff and defendant's apartment because plaintiff did not have a job. He did not get a job until one year later, and he ended his relationship with defendant soon after. Defendant's parents also frequently took care of RM. Defendant became homeless six months after ending her relationship with plaintiff, and RM moved in with defendant's parents full time. Since that time, defendant was involved in RM's life, but defendant's parents were her primary caretakers.

Defendant's mother testified that plaintiff last visited RM in 2016. Defendant's mother and plaintiff agreed that they did not want to go to court over future visitation. However, plaintiff never contacted defendant's mother again. Defendant and her mother opined that, while they did not fear for RM's physical safety with plaintiff, it would be upsetting and confusing to reintroduce him into her life after his extended absence.

Plaintiff admitted that he had not seen RM or provided any financial support for years. He testified that he frequently told defendant that he wanted to see RM, but she always directed him to contact her parents, which plaintiff believed was improper. Defendant admitted that plaintiff had asked her to see RM about once per week for the last year, and that she had directed him to contact her parents. Plaintiff admitted that he never contacted her parents. He claimed that he contacted a legal aid organization about gaining parenting time, but he did not understand the documents he was given, so he took no further action. Plaintiff testified that he was now willing and able to visit and financially support RM, and that he wholly agreed with a supervised parenting-time schedule to prevent his reintroduction from being "a shock" to RM.

The referee expressed concern about plaintiff's extended absence from RM's life but found that defendant failed to establish by clear and convincing evidence that parenting time would harm RM. The referee opined that defendant's argument regarding MCL 712A.19b(3) was inapposite because the petition to terminate plaintiff's parental rights was not before the court in this case. Defendant filed an objection to the referee's recommendations, and the trial court held a de novo hearing. The trial court determined that the fact that MCL 712A.19b(3) might be satisfied was irrelevant to the parenting-time issue before it because the court in the termination case had specifically declined to make any findings before this case was resolved. The trial court noted that under MCL 722.27a(3), RM had a right to parenting time with plaintiff unless clear and convincing evidence established that it would endanger her physical, mental, or emotional health. The trial court found that defendant failed to establish by clear and convincing evidence that plaintiff presented a risk of harm to RM. Defendant now appeals.

II. STANDARD OF REVIEW

"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) (quotation marks and citation omitted). "Under 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." *Id*. at 21. A "palpable abuse of discretion" occurs "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). "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).

III. ANALYSIS

Defendant argues that the trial court made findings against the great weight of the evidence and palpably abused its discretion in granting plaintiff parenting time because 1) the Legislature has specified in MCL 712A.19b(3)(a)(*ii*) that a parent's desertion of a child for just 91 days causes harm sufficient to justify terminating the parent's parental rights, and plaintiff deserted RM for more than four years, and 2) the trial court should have relied on the opinions of defendant and her parents that being reintroduced to plaintiff would mentally and emotionally harm RM. We disagree.

Defendant has not provided to either the trial court or this Court any authority that satisfaction of MCL 712A.19b(3)(a)(*ii*) related to the termination of parental rights necessarily provides clear and convincing evidence in a parenting-time dispute that a child will be harmed by reintroduction to the parent. Therefore, the trial court properly concluded that MCL 712A.19b(3)(a)(*ii*) has no bearing on this custody and parenting-time case, which is governed by the Child Custody Act of 1970, MCL 722.21 *et seq*. The trial court did not make findings against the great weight of the evidence or palpably abuse its discretion when it determined that neither plaintiff's abandonment of RM, in itself, nor defendant's and her parents' unsupported opinions sufficed to establish by clear and convincing evidence that RM having parenting time with plaintiff as required under MCL 722.27a(3), would endanger RM's physical, mental, or emotional health.

"The child's best interests govern a court's decision regarding parenting time." *Luna v Regnier*, 326 Mich App 173, 179; 930 NW2d 410 (2018) (quotation marks and citation omitted). " 'It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents.' " *Id*. at 180, quoting MCL 722.27a(1). "Therefore, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship . . . ." *Id*. (quotation marks and citation omitted). However, parenting time is not in the child's best interests if "it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a(3).

In this case, it is undisputed that, at the time plaintiff filed his complaint for parenting time, he had not seen RM in person since 2016. He only spoke with her over the phone two times after that date and he never provided any financial support or sent her any birthday or Christmas gifts. Nevertheless, the record reflects that plaintiff called defendant repeatedly and sought opportunities to visit or have contact with RM, but defendant declined to permit such and directed plaintiff to communicate with defendant's parents to have any access with RM. The record indicates that plaintiff lacked a positive relationship with defendant's parents. Plaintiff filed this action for parenting time after defendant's parents petitioned to terminate his parental rights and adopt RM. In the termination action, however, on July 15, 2019, the court declined to adjudicate that petition until resolution of this case, and there has been no further action in the termination case since that date.

As the trial court observed, defendant's argument in this case amounts to a claim that the termination court erred in entering an adjournment on July 15, 2019, instead of terminating plaintiff's parental rights that day. Defendant has not appealed any order in the termination case. The termination case was not before the referee or the trial court in the instant matter, and it is not before this Court now. Yet defendant contends that, even though the termination court did not make a dispositive finding that statutory grounds to terminate plaintiff's parental rights existed under MCL 712A.19b(3) on July 15, 2019, such statutory grounds existed, and such controlled in this parenting-time case and should have been treated by the trial court in this case as clear and convincing evidence that parenting time with plaintiff would mentally and emotionally harm RM. Defendant cites no authority supporting her contentions and we are not persuaded by her reasoning.

This case is wholly governed by the Child Custody Act of 1970, MCL 722.21 *et seq*., and more specifically by MCL 722.27 and MCL 722.27a(3), because it is "a child custody dispute [that] has been submitted to the circuit court as an original action . . . ." MCL 722.27(1). MCL 722.27a(3) provides that "A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." The referee, in making her recommendations, and the trial court, in adopting them after de novo review, acknowledged that plaintiff had been an absentee parent and that, even if he was not legally required to do so, he should have contacted defendant's parents to arrange parenting time with RM. However, the referee and the trial court rejected defendant's argument regarding the impact of plaintiff's abandonment of RM because, under MCL 722.27a(3), plaintiff's absence from RM's life for years did not, in itself, establish by clear and convincing evidence that RM would be harmed by reintroduction to plaintiff. The trial court stated that its custody and parenting-time decision had to be predicated upon clear and convincing evidence that parenting time would be harmful to the child; "not statutory language from [MCL 712A.19b(3)(a)(*ii*)], but actual facts, evidence." The trial court reasoned, "Just the mere fact that [RM] . . . hasn't been with [plaintiff] for three years doesn't make the quantum leap to that conclusion [that seeing plaintiff would cause physical, mental, or emotional harm to RM]." The trial court explained that it could not "reach over to [MCL 712A.19b(3)(a)(*ii*)] and put it in the custody and support act when there has been no order and no determination made [in the termination case] that would supersede what's happening over here." The trial court did not commit a clear legal error in determining that MCL 712A.19b(3)(a)(*ii*) lacked legal bearing in this case.

Considering the record under MCL 722.27a(3), neither defendant nor her mother indicated any concern that RM would be in physical danger with plaintiff. Therefore, the evidence produced was limited to their unsupported opinions that plaintiff's reintroduction to RM would upset and confuse her. Defendant's mother testified that she thought RM would be confused but admitted that she did not know how she would react. Defendant opined that it would not be in RM's best interests to see plaintiff because "she'd be extremely confused on who she's going to be staying with, like, on a day to day basis." Defendant added, "It would devastate [RM]. Like she just, I don't know." Neither defendant's mother nor defendant testified to any specific facts to support their opinions that parenting time would upset RM. The record reflects that defendant did not have RM undergo a psychological evaluation nor presented to the trial court such or any other substantive admissible evidence beyond her conjecture to support her contentions that RM would be harmed by reintroduction to plaintiff. Defendant has failed to provide any specific, factually-based reason to believe that a graduated supervised parenting-time schedule would be insufficient to safeguard RM's emotions and understanding of her relationships with her caregivers. The

record reflects that plaintiff testified that he wholly agreed with a graduated, supervised parenting-time schedule to gradually reintroduce RM to him because he "didn't want [RM] to feel out of place or not understand what was going on" and he "didn't want it all to be a shock for her . . . ." We are not convinced that the trial court erred in its findings of fact or application of the applicable law for its decision.

Defendant also argues, as she did in the trial court, that even if her argument regarding MCL 712A.19b(3)(a)(*ii*) was inapposite in this case, she had established that plaintiff had abandoned RM before, and therefore, that RM would undergo mental and emotional trauma when he abandoned her again. The trial court acknowledged that parents who "fade in and fade out" of their children's lives are "a big, big problem," but that the court could not change the applicable statute and it could not point to any clear and convincing evidence "to say [parenting time] shouldn't happen." The trial court explained that speculation that plaintiff would not comply with the parenting-time order did not constitute specific evidence that would allow the court to anticipate any specific harm to the child. The trial court correctly concluded that the potential that plaintiff would abandon RM again did not constitute clear and convincing evidence currently in existence, such that the trial court could conclude that RM will be harmed by parenting time with plaintiff. Therefore, the trial court's findings were not against the great weight of the evidence, and it did not palpably abuse its discretion by granting parenting time to plaintiff.

Affirmed.

/s/ Michael J. Kelly
/s/ Amy Ronayne Krause
/s/ James Robert Redford