STATE OF MICHIGAN

COURT OF APPEALS

ERIC SHOOK,

Plaintiff,

and

KAREN THOMAS,

Intervening Plaintiff-Appellee,

v

ASHLEY MIKULENAS,

Defendant-Appellant.

UNPUBLISHED
March 18, 2021

No. 354455
Genesee Circuit Court
Family Division
LC No. 13-308548-DC

Before: BORRELLO, P.J., and BECKERING and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] the trial court's order awarding intervening plaintiff grandparenting time with defendant's two minor children. Because the trial court misstated the standard that applied to a request for grandparenting time and failed to make a best-interests determination, we vacate the trial court's decision and remand for further proceedings.

I. BACKGROUND

Plaintiff and defendant had two children out of wedlock. After plaintiff and defendant separated, they shared legal and physical custody of the children and had alternating parenting time. Karen Thomas is plaintiff's mother. For a short period in 2013 and 2014, plaintiff and the children resided with Thomas during his parenting time. In 2014, plaintiff's substance abuse, mental health issues, incidents of domestic violence, and other criminalities led to his parenting

[1] *Shook v Mikulenas*, unpublished order of the Court of Appeals, entered September 24, 2020 (Docket No. 354455).

time being reduced and supervised. Over the years, plaintiff continued to have issues, and in July 2018 he stopped exercising parenting time because of his incarceration. Thereafter, defendant and Thomas had a disagreement regarding visitation for the children, and as a result, Thomas moved for grandparenting time in December 2018. In September 2019, the trial court heard testimony from plaintiff, defendant, and defendant's father, and encouraged the parties to reach an agreement. When no agreement was reached, the trial court issued an order that stated the following:

> Pursuant to MCL 722.27b(l)(d) the paternal grandmother, Karen Thomas, has a right to seek grand parenting [sic] time since the children's parents have never been married, they are not residing in the same household, and paternity has been established.
>
> 1. Parental Presumption
>
> The statute further directs that a fit parent's decision to deny grand parenting [sic] time is presumed not to create a substantial risk of harm to the child's mental, physical, or emotional health.
>
> To rebut the presumption, the grandparent seeking visitation must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time does *not* create such a risk, *Varran v Granneman* [*on Remand*], 312 Mich App 591; [880 NW2d 242] (2015).
>
> 3. Grandparent Burden[2]
>
> lst Step: If the grandparent cannot overcome the presumption, the request for visitation must be denied, MCL 722.27b(4)(b). However, if the grandparent successfully rebuts the presumption that the parent's denial of visitation does not create such a substantial risk, the court moves to the second step of the two-step process.
>
> 2nd Step: Best Interests - In the second step, the Court would then consider whether it is in the best interests of the child to enter an order for grandparenting time. If the court finds by a preponderance of the evidence that this is the case, the court must enter an order for reasonable parenting time. MCL 722.27 b(6).
>
> Mother claims that the grandmother cannot meet her burden as required by MCL 722.27b in that she failed to show any risk of harm to the children's mental, physical, or emotional health. [Emphasis added.]

Thereafter, the trial court concluded that plaintiff's actions had contributed to the ongoing issues between defendant and Thomas. The trial court also stated:

[2] The numbering of the paragraphs was incorrect in the trial court's order.

> The court finds that the paternal grandmother, Karen Thomas, has shown by a preponderance of evidence that mother's decision to deny grandparenting time does *not* create a risk of harm to the children's mental, physical, or emotional health.
>
> The court has considered all of the factors pursuant to MCL 722.27b(6) and finds by a preponderance of evidence that it is in the best interests of the minor children to enter a grandparenting time order. [Emphasis added.]

Ultimately, the trial court ordered that Thomas would receive a gradually increasing schedule of grandparenting time. Defendant appeals this order.

II. ANALYSIS

"Orders concerning grandparenting 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." *Zawilanski v Marshall*, 317 Mich App 43, 48; 894 NW2d 141 (2016) (cleaned up). "A court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id.* (cleaned up).

"Parents have a constitutionally protected right to make decisions about the care, custody, and management of their children." *Geering v King*, 320 Mich App 182, 188; 906 NW2d 214 (2017) (cleaned up). The United States Constitution recognizes "a presumption that fit parents act in the best interest of their children and that there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of fit parents to make the best decisions concerning the rearing of their children." *Id.* (cleaned up).

In contrast, the right to grandparenting time arises by statute, MCL 722.27b. As relevant to this case, MCL 722.27b(1)(d) allows a grandparent to seek a grandparenting-time order when "[t]he child's parents have never been married, they are not residing in the same household, and paternity has been established." The Legislature, however, established a presumption regarding a fit parent's decision to deny grandparenting time:

> In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion. [MCL 722.27b(4)(b).]

If the grandparent does not meet the statutory threshold, the case or motion is to be dismissed. *Zawilanski,* 317 Mich App at 49. But if the grandparent does meet this threshold, then the trial court must consider "whether it is in the best interests of the child to enter an order for grandparenting time." MCL 722.27b(6). "If the court finds by a preponderance of the evidence

that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions." *Id.* In determining the best interests of the child for purposes of a grandparenting time order, the trial court must consider the factors set forth in MCL 722.27b(6)(a)-(j).

In the present case, the trial court never questioned defendant's fitness as a parent, and nothing in the record suggests that defendant was anything but a fit parent. Indeed, Thomas herself recognized that defendant was "a good mom" who worked hard to provide for the children. Therefore, it is presumed that defendant's decision not to allow the children to visit Thomas does not create a substantial risk of harm to the children's mental, physical, or emotional health. As a result, Thomas had the burden to rebut by a preponderance of the evidence the fit-parent presumption that defendant's decision to deny or limit her time with the children did not create a substantial risk of harm to the children's mental, physical, or emotional health.

On appeal, defendant argues that the trial court committed a clear legal error regarding the issue of whether Thomas had rebutted the presumption in favor of defendant. The trial court misstated the appropriate standard to apply when a grandparent has to rebut the presumption that a fit parent's decision to deny them grandparenting time. We cannot merely assume that this was an instance of scrivener's error, as the standard was misstated in both the trial court's statement of the law in its paragraph 1 and its application of the law to the facts of this case. In addition, the trial court omitted any discussion on the record of the relevant best-interest factors. Because the trial court committed a clear legal error, we vacate its decision regarding grandparenting time and remand for further proceedings consistent with this opinion. We take no position on the merits of the request for grandparenting time.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Brock A. Swartzle