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STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER PHILLIP MENIFIELD,

Plaintiff/Counterdefendant-Appellee,

v

MARLISA A. WARREN,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
July 22, 2021

No. 355969
Macomb Circuit Court
Family Division
LC No. 2020-000563-DO

Before: TUKEL, P.J., and SAWYER and CAMERON, JJ.

PER CURIAM.

Defendant/counterplaintiff (defendant) appeals as of right the trial court's judgment regarding custody, parenting time, and child support in which the trial court awarded defendant and plaintiff/counterdefendant (plaintiff) joint legal and physical custody of the parties' child. We affirm.

I. FACTUAL BACKGROUND

The parties have one child together, CFM. Plaintiff initiated this action on February 19, 2020, by filing a complaint for custody, in which he requested joint physical custody of CFM. Shortly thereafter, plaintiff filed an emergency motion for parenting time; the court granted this motion on June 29, 2020. Defendant answered plaintiff's complaint and filed a counterclaim for custody, parenting time, and child support, in which she requested that she be awarded sole physical custody of CFM. Defendant filed a motion for attorney fees, which the trial court granted, and a motion for child support.[1]

[1] The Macomb County Prosecutor's Office brought a support action against plaintiff in the same court while this case was pending. The trial court ultimately consolidated the support case with the action underlying this appeal.

The trial court conducted a bench trial regarding plaintiff's complaint for custody. Plaintiff and defendant were the only individuals who testified at the trial. Following the trial, the court entered an opinion and order regarding, in relevant part, physical custody of CFM. At the outset of its legal analysis, the trial court considered whether an established custodial environment existed with either party. The court analyzed the parties' testimony at trial and specifically considered all relevant periods of CFM's life, including periods when the parties were not living together. The trial court concluded that an established custodial environment existed with both parties. In coming to this conclusion, the trial court stated that it was not persuaded by defendant's argument that an established custodial environment existed only with her "based upon the fact that the parties immediately separated after the birth of [CFM] for approximately seven months and the last 11 months which have been substantially influenced by the pandemic."

Having concluded that an established custodial environment existed with both parties, the court considered the best-interest factors set forth in MCL 722.23 to determine whether clear and convincing evidence supported making a change. The court analyzed and weighed each factor and concluded that neither party demonstrated "by clear and convincing evidence that [CFM's] established custodial environment with both parents should be changed." The court thus awarded the parties joint physical custody of CFM and subsequently entered a judgment in conformance therewith.

II. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant argues the trial court erred by failing to determine whether an established environment existed solely with her during the period between November 30, 2019, and February 19, 2020. We disagree.

"Whether an established custodial environment exists is a question of fact." *Pennington v Pennington*, 329 Mich App 562, 577-578; 944 NW2d 131 (2019). "The great weight of the evidence standard applies to all findings of fact." *Merecki v Merecki*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 353609, issued 4/1/2021); slip op at 2 (quotation marks and citation omitted). "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.*; slip op at 3. Thus, this Court "will affirm a trial court's finding regarding the existence of an established custodial environment unless the evidence clearly preponderates in the opposite direction." *Pennington*, 329 Mich App at 578.

"Before making a custody determination, the trial court must determine whether the child has an established custodial environment with one or both parents . . . ." *Bofysil v Bofysil*, 332 Mich App 232, 242; 956 NW2d 544 (2020). "A child's established custodial environment is the environment in which over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." *Pennington*, 329 Mich App at 577 (quotation marks and citation omitted). See also MCL 722.27(1)(c). "An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence." *Sulaica v Rometty*, 308 Mich App 568, 584-585; 866 NW2d 838 (2014). "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." MCL 722.27(1)(c). "An established custodial environment may exist in more than one home and can be established as a result of a

temporary custody order, in violation of a custody order, or in the absence of a custody order." *Marik v Marik*, 325 Mich App 353, 361; 925 NW2d 885 (2018) (quotation marks and citation omitted). "A court may not change the established custodial environment unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id*. (quotation marks and citation omitted).

Here, defendant argues that an established custodial environment was created solely with her during the period between November 30, 2019, and February 19, 2020, during which time CFM resided only with defendant. According to defendant, the trial court failed to address whether this period created an established custodial environment with defendant alone. This argument is without merit. Contrary to defendant's claim, the court did in fact consider the period between November 30, 2019, and February 19, 2020 when considering whether an established custodial environment existed with either or both parties. Specifically, the trial court noted that the parties separated on November 29, 2019. Immediately after noting such, the trial court analyzed the parties' testimony regarding the period "[a]fter the parties separated." The trial court explicitly noted that, after the parties separated, plaintiff cared for CFM several days a week; exercised overnight visits with CFM; demonstrated comfort providing for CFM's needs; and continued, along with his family, to a be "[d]efendant's primary source of [daycare]" for CFM until March 2020. The trial court noted that, after March 2020, plaintiff "scaled back dramatically on his parenting time" as a precaution against exposing CFM to COVID. The court ultimately concluded that an established custodial environment existed with both parties only after considering all relevant periods of CFM's life, including after the parties separated on November 29, 2019. Defendant's claim therefore completely lacks merit.

It is worth noting that, although defendant references some testimony in her argument on appeal in an attempt to demonstrate that an established custodial environment had been created solely with her during the relevant time period, her ultimate argument on appeal is that the trial court entirely failed to address this period of time. Because defendant incorrectly claims the trial court failed to consider this period of time, she necessarily does not challenge any of the court's factual findings underlying its determination that an established custodial environment existed with both parties. It is thus unnecessary to determine whether the court's ultimate findings regarding the established custodial environment were against the great weight of the evidence. Regardless, the testimony provided at trial does not "clearly preponderate in the opposite direction" of the court's determination that an established custodial environment existed with both parties. *Merecki*, ___ Mich App at ___; slip op at 3.

III. BEST-INTEREST ANALYSIS

Defendant argues the trial court's decision to award the parties joint physical custody of CFM was against the great weight of the evidence. Specifically, she argues that the court's factual findings regarding several of the relevant best-interest factors were contrary to the great weight of the evidence. We disagree.

"All custody orders must be affirmed on appeal unless the circuit court's findings are against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue." *Id*. (citation omitted). "A trial court's findings regarding each best interests factor are reviewed under the great weight of the

evidence standard." *Bofysil*, 332 Mich App at 245 (quotation marks and citation omitted). "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Merecki*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted). "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id*. (quotation marks and citation omitted). "An abuse of discretion, for purposes of a child custody determination, exists when the result 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." *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014). "[T]his Court reviews questions of law for clear error." *Bofysil*, 332 Mich App at 242. "A trial court commits clear error when it incorrectly chooses, interprets or applies the law." *Merecki*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted).

"The purposes of the Child Custody Act, MCL 722.21[] *et seq*., are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Id*. (quotation marks and citation omitted). "A trial court must consider the factors outlined in MCL 722.23 in determining a custody arrangement in the best interests of the [child] involved." *Bofysil*, 332 Mich App at 244. "A court may not change the established custodial environment unless there is presented clear and convincing evidence that it is in the best interest of the child." *Marik*, 325 Mich App at 361 (quotation marks and citation omitted).

As an initial matter, it is worth noting that, before specifically addressing the court's findings as to the best-interest factors, defendant broadly challenges several of the court's "subsidiary findings," which she claims were against the great weight of the evidence and led the trial court to "incorrectly make adverse ultimate findings of fact against her." In arguing against these "subsidiary findings," defendant primarily focuses on her own testimony, occasionally to the extent that she ignores contrary testimony provided by plaintiff. Many of the findings defendant challenges appear to come down to credibility determinations between the parties' testimony. "[T]his Court defers to the trial court regarding credibility determinations." *Rains v Rains*, 301 Mich App 313, 338; 836 NW2d 709 (2013). Defendant also claims the trial court attributed testimony to the parties that neither provided or inaccurately characterized some of the parties' testimony. Although some of the challenged findings are not supported by *explicit* testimony,[2] reviewing the record, we cannot conclude that such findings "clearly preponderate[] in the opposite

[2] Specifically, defendant correctly notes that the trial court stated in its opinion and order that defendant testified that she worked six to seven days per week. Although plaintiff testified that defendant worked six to seven days per week, defendant herself did not testify as to such. Defendant testified that she worked no more than five days per week *at the Detroit Athletic Club (DAC)*, where she worked three to five days per week on average. However, defendant testified that she also worked at Ford Field. According to defendant, she typically worked Sundays at Ford Field and occasionally worked there on Saturdays, as well. Thus, although defendant did not explicitly testify that she worked six to seven days per week, the testimony she provided could have supported the court's conclusion that she worked six to seven days per week between her schedules at the DAC and Ford Field.

direction" of the evidence. *Merecki*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted).

Defendant ultimately argues that the trial court's findings as to best-interest factors (c), (d), (e), and (j) were against the great weight of the evidence. This argument is without merit. Factor (c) "considers 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." *Brown v Brown*, 332 Mich App 1, 19; 955 NW2d 515 (2020), quoting MCL 722.23(c) (quotation marks omitted). Regarding this factor, the trial court found that plaintiff served as the primary financial support for the family, both parties participated in CFM's medical care and felt capable meeting her medical needs, and both parties had a history of employment. The trial court found persuasive testimony that plaintiff regularly cared for CFM while defendant worked, and noted that defendant placed CFM in daycare despite being home to care for CFM. The trial court therefore concluded that this factor weighed slightly in favor of plaintiff.

Defendant argues that no evidence supported the trial court's conclusion that plaintiff served as the primary financial support for the family, especially considering the support case against plaintiff and plaintiff's admission that he had child support arrearages. Plaintiff in fact admitted that he had child support arrearages at the time of trial. However, plaintiff also testified that he was able to pay for everything CFM needed, he paid the household bills during the several years that he and defendant lived together with CFM, he gave defendant a substantial amount of money to help her purchase her own vehicles, and he predominantly paid for CFM's daycare. Plaintiff further testified that, after the parties separated in late November 2019, he provided childcare for defendant while she worked. Both parties testified that defendant and CFM lived in Toledo, Ohio for the first approximately seven years of CFM's life. Both parties further testified that, while CFM and defendant lived in Toledo, plaintiff drove to Toledo, picked them up, and drove them back to Michigan. According to plaintiff, he drove them back to Michigan for all of CFM's medical appointments. The testimony also demonstrated that both parties were involved in CFM's medical care. Considering this record, the trial court's findings regarding factor (c) do not clearly preponderate in the opposite direction of the evidence and, therefore, are not against the great weight of the evidence. *Merecki*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted).

Factor (d) considers the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." *Brown*, 332 Mich App at 20, quoting MCL 722.23(d) (quotation marks omitted). Regarding this factor, the trial court found that neither party raised concerns regarding the other's home, and the testimony at trial demonstrated that both parties provided CFM with a stable and appropriate environment from the time of her birth. The trial court therefore concluded that factor (d) weighed in favor of both parties equally.

In claiming the trial court's findings for this factor went against the great weight of the evidence, defendant relies on her earlier argument that an established custodial environment existed solely with her during the period between November 30, 2019, and February 19, 2020. However, the trial court specifically addressed this period, as well as all other relevant periods in CFM's life, and concluded that an established custodial environment existed with both parties. Defendant also claims the trial court "assumed" CFM lived with both parties as of the time of her

birth; however, the court explicitly noted in its factual findings that the parties moved to different areas shortly after CFM's birth. The trial court's findings regarding factor (d) do not clearly preponderate against any evidence in the record; its finding as to factor (d) therefore are not against the great weight of the evidence. *Merecki*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted).

Factor (e) considers the "permanence, as a family unit, of the existing or proposed custodial home or homes." *Brown*, 332 Mich App at 21, quoting MCL 722.23(d) (quotation marks omitted). "This factor exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other." *Rains*, 301 Mich App at 336 (quotation marks and citation omitted). Regarding factor (e), the trial court found that both parties had the "stable and loving support of their families," but noted that plaintiff's family had been more regularly involved in CFM's life than defendant's family as a result of defendant's family living in Toledo. The court found the testimony persuasive that plaintiff offered CFM "more permanence and stability in terms of a family unit and as a proposed custodial home." The court further found that CFM had "flourished" under the care of plaintiff and his extended family, and stated that "maintaining this continuity of care [was] desirable." Finally, the court noted that there was no evidence of permanence regarding defendant's home because "her support system [was] in Toledo." The court therefore concluded that factor (e) weighed slightly in favor of plaintiff.

Defendant claims that the "family unit" for purposes of factor (e) does not include extended family; however, defendant does not cite any support for this claim. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position." *Seifeddine v Jaber*, 327 Mich App 514, 519; 934 NW2d 64 (2019). Defendant also claims that no evidence demonstrated that CFM "flourished" under the care of plaintiff's family. However, plaintiff testified that his family regularly provided childcare for CFM, and nothing in the record indicates that CFM had not "flourished" throughout her life. Although defendant testified that she had close relationships with her family members, she also testified that they all live in Toledo. The trial court's findings regarding factor (e) do not clearly preponderate against any evidence in the record; its finding as to factor (e) therefore are not against the great weight of the evidence. *Merecki*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted).

Finally, factor (j) considers 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." *Brown*, 332 Mich App at 24, quoting MCL 722.23(j) (quotation marks omitted). Regarding factor (j), the trial court noted that plaintiff admitted to being angry with defendant and having difficulty coparenting with her. The trial court further noted that plaintiff admitted to some communication between him and defendant, and that defendant made CFM available to plaintiff through the telephone during the period when plaintiff had to quarantine. The court found that defendant "testified forcefully that she [was] unable to co[]parent with [p]laintiff despite trying to do so." The court emphasized defendant's demeanor during trial, concluding that her demeanor "clearly indicate[d] that she believe[d] that because she is the child's mother, only she should be responsible for any important decisions regarding [CFM] and when [p]laintiff can exercise parenting time." The court stated that defendant's testimony left it "with the definite impression that she was focused on what she wanted and not what was in the

minor's best interest." The court noted that plaintiff had to file a motion to regain parenting time with CFM after he "voluntarily refrained from exercising parenting time" as a result of the pandemic. The court concluded that factor (j) weighed slightly in plaintiff's favor.

Defendant claims nothing in the record supports a finding that defendant "was unwilling to encourage a close relationship with" plaintiff. However, plaintiff testified that, after the parties separated, defendant set the rules regarding his parenting time with CFM. Plaintiff further testified that he did not have any parenting time with CFM between March 15, 2020, and June 29, 2020, when the court entered an interim parenting time order. Plaintiff acknowledged that defendant provided him with phone calls and video chats during this time and allowed plaintiff to see CFM from defendant's balcony. Plaintiff could not see CFM during this period because of concerns regarding the pandemic. Defendant also testified that plaintiff did not have any overnight visits with CFM for half of March 2020 and the entirety of April 2020 and May 2020. Defendant testified that she tried to facilitate a relationship between CFM and plaintiff during this time by "allow[ing]" CFM and plaintiff to call each other and "allow[ing]" plaintiff to schedule times with defendant during which plaintiff could visit CFM from defendant's balcony. The court expressed concern over defendant's use of the "allow" language during the trial.

In analyzing factor (j), the court emphasized defendant's demeanor during her testimony. A trial court is in a better position than this Court to determine a party's demeanor, and, again, "this Court defers to the trial court regarding credibility determinations." *Rains*, 301 Mich App at 338. The trial court's findings regarding factor (j) do not clearly preponderate against the evidence in the record and, therefore, were not against the great weight of the evidence. *Merecki*, ___ Mich App at ___; slip op at 3.

In summary, the trial court's findings regarding factors (c), (d), (e), and (j) were not against the great weight of the evidence. The trial court therefore did not abuse its discretion by granting the parties joint physical custody of CFM. *Id*.

Affirmed.

/s/ Jonathan Tukel
/s/ David H. Sawyer
/s/ Thomas C. Cameron