STATE OF MICHIGAN

COURT OF APPEALS

DANA WEEKS, JR.,

Plaintiff-Appellant,

v

CIERRA MONIQUE MCFARLIN,

Defendant-Appellee.

UNPUBLISHED
November 18, 2021

No. 356527
Oakland Circuit Court
Family Division
LC No. 2016-845920-DC

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order denying modification of parenting time and legal custody, arguing that the trial court erred by adopting the Friend of the Court (FOC) referee's findings that an established custodial environment existed with both parents, as well as several findings regarding statutory best-interest factors. Plaintiff also challenges the trial court's denial of his request for sole legal custody. We affirm.

I. BACKGROUND

Before the instant proceedings, the parties enjoyed joint legal custody and approximately equal parenting time with their son, DW. On October 2, 2019, the parties agreed to a temporary modified parenting time schedule that still afforded equal parenting time and to revisit the issue of parenting time on January 15, 2020. Approximately three weeks later, however, plaintiff moved to modify defendant's parenting time to have it supervised or limited to one weekend overnight pending the results of an alcohol and substance assessment and a psychological evaluation. After a contentious hearing riddled with outbursts and questionable statements from defendant, the trial court ordered defendant to undergo a psychological evaluation before the January review hearing, directed both parties to submit to alcohol testing (ETG testing) at JAMS (a drug and alcohol testing site) three times a week during their parenting time, and scheduled a hearing for contempt of court arising from defendant's apparently false representation that she had never driven DW without a license.

Before the contempt hearing, plaintiff filed another motion asking for an immediate modification of parenting time on a temporary basis on account of defendant's alleged

noncompliance with her probation, the trial court's order for ETG testing at JAMS, lack of impulse control in court, and other inappropriate conduct. In November 2019, defendant admitted that she lied about driving DW while her license was suspended, and the trial court found her in contempt. Then, after hearing testimony regarding defendant's drunk driving conviction and probation, reasons for failing to submit to some of her required ETG tests, failure to schedule the previously ordered psychological evaluation, and inappropriate messages to plaintiff on Our Family Wizard (OFW), the trial court suspended defendant's regular parenting time pending a full evidentiary hearing before a FOC referee. In lieu of her regular parenting time, defendant was allowed parenting time every other Saturday and on holidays, to be supervised by her mother. Defendant was also directed to complete an anger management program, and both parties were ordered to attend the Love and Logic parenting workshop.

The January 2020 review and evidentiary hearing was adjourned and did not occur until July 2020. In March 2020, plaintiff moved to suspend defendant's parenting time until the evidentiary hearing could be held because defendant continued to send inappropriate messages on OFW, did not fully comply with the trial court's order for alcohol testing, had inappropriate conversations with DW on the phone, had yet to complete her psychological evaluation, and repeatedly sent the police to plaintiff's home until he obtained a PPO against her. Plaintiff further alleged that defendant's mother was not an appropriate parenting time supervisor because many of defendant's violations of court orders occurred in her presence. The trial court subsequently entered a stipulated order providing that defendant's parenting time would be supervised by Growth Works or a mutually agreed upon third party.

In April 2020, defendant filed a motion alleging that Growth Works was not an option for parenting time supervision because of the COVID-19 pandemic and that the parties were unable to agree on an alternative supervisor. By the time the trial court heard the motion in May 2020, Growth Works had reopened for virtual parenting time. Moreover, the parties were still unable to agree on an alternative supervisor, so the trial court ordered that they use Growth Works. The trial court also ordered that defendant receive FaceTime contact with DW at least four times per week.

In July 2020, a referee held a two-day evidentiary hearing and heard testimony from both parties, the psychologist who performed defendant's psychological evaluation, and two of defendant's cousins. The referee concluded that DW had an established custodial environment with both parents and that plaintiff failed to establish clear and convincing evidence that modifying DW's custody or parenting time would be in his best interests. The referee therefore recommended denying plaintiff's motion and reverting to the previously existing equal parenting time arrangement. Plaintiff filed objections, but the trial court agreed with the referee's findings and adopted her recommendation to deny plaintiff's motion and restore defendant's parenting time.

II. STANDARDS OF REVIEW

In matters involving child custody, " 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Pennington v Pennington*, 329 Mich App 562, 569-570; 944 NW2d 131 (2019), quoting MCL 722.28. This Court reviews discretionary rulings concerning parenting time and custody for an abuse of discretion. *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012). "An abuse of

discretion with regard to a custody issue 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). Factual findings, including the existence of an established custodial environment, are reviewed under the great weight of the evidence standard. *Pennington*, 329 Mich App at 570. "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id*.

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff first argues that the trial court erred by finding DW had an established custodial environment with both parents after defendant's behavior and lack of diligence left her unable to exercise meaningful parenting time for over a year. We disagree.

"When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). "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, quoting MCL 722.27(1)(c). "An established custodial environment may exist in more than one home" and is not necessarily dependent on the nature or existence of a custody order. *Marik v Marik*, 325 Mich App 353, 361; 925 NW2d 885 (2018) (quotation marks and citation omitted). Similarly, adjustments to parenting time schedules do not necessarily affect a child's established custodial environment. *Pierron*, 486 Mich at 86.

It is beyond dispute that defendant's parenting time was drastically reduced between November 2019 and the trial court's ruling on December 23, 2020. Before the instant proceedings, the parties enjoyed approximately equal parenting time. The trial court temporarily suspended defendant's regular parenting time in November 2019 and granted her eight hours of parenting time every other Saturday, as well as parenting time on Thanksgiving and Christmas. In March 2020, the parties agreed that defendant's parenting time would be supervised by Growth Works or a mutually agreed upon third party, rather than defendant's mother. The parties were unable to come to an agreement about a supervisor, so the trial court ordered supervision by Growth Works in May 2020, which had recently reopened for virtual parenting time sessions. Defendant was also permitted FaceTime contact with DW at least four times per week. Defendant's use of Growth Works was limited by her financial resources and the parties' schedules.

The reduction in defendant's parenting time, however, is not dispositive of whether DW continued to have an established custodial environment with her. *Id*. Rather, the question is always to whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort. *Id*. The evidence presented on this point was somewhat limited, but was sufficient to support the trial court's finding. Defendant described herself as an emotionally nurturing parent and noted that she was better able to set boundaries and discipline for DW after completing Love and Logic. Defendant indicated that DW struggled with their separation, and she regularly comforted him by expressing her love and hope that they would see each other soon. Despite the physical restrictions on defendant's parenting time during the COVID-19 pandemic, defendant continued to be verbally affectionate with DW and reinforce her pride in how he was

handling the difficult circumstances. Defendant used her limited time with DW to read books and talk about his daily activities and interests. Two of defendant's cousins testified about her positive parenting and bond with DW, and both had seen defendant and DW interact shortly before the parenting time was restricted to a virtual setting. One of the cousins observed that defendant was prepared to feed DW, play with him, and give him her undivided attention. The other cousin testified that DW began misbehaving during parenting time, and defendant responded by calmly talking to him about his behavior and the reasons for it. Even plaintiff acknowledged that Growth Works reported defendant's parenting time as going well and involving healthy communication.

The trial court recognized that the temporary change in parenting time could have altered DW's established custodial environment, but it did not believe that occurred in this case. The trial court's finding was well reasoned, given that the foregoing testimony describes the exact type of relationship that is characteristic of an established custodial environment, as DW apparently continued to rely on defendant for things like guidance, discipline, and comfort. Plaintiff spends much of his argument focusing on defendant's fault in causing the delay that resulted in the long-term suspension of her regular parenting time, but the circumstances surrounding the creation, maintenance, or elimination of an established custodial environment are not controlling. The only question of import is to "whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort." *Id*. The trial court's finding of a joint established custodial environment was not contrary to the great weight of the evidence.

IV. BEST INTEREST DETERMINATION

Next, plaintiff argues that the trial court erred by allegedly rubberstamping several of the referee's unsupported findings regarding best-interest factors. We disagree.

The trial court determined that although DW's established custodial environment had not been altered by the temporary suspension of defendant's regular parenting time, it would likely change if plaintiff's request to permanently modify custody and parenting time was granted. In light of this finding, plaintiff was obligated to establish by clear and convincing evidence that his proposal to change the custody and parenting time arrangement would be in DW's best interests. *Griffin v Griffin*, 323 Mich App 110, 119; 916 NW2d 292 (2018). The trial court's best-interest determination is guided by the statutory best-interest factors outlined in MCL 722.23. *Id*.

To begin, plaintiff takes issue with the trial court's finding about defendant's improvements during these proceedings. The trial court found that defendant "took responsibility for her actions and acknowledged facts unfavorable to her different [sic], and more appropriately, than she has with the Court in prior hearings," and also "admitted to driving with the child, using inappropriate language in OFW, and overall recognized behavior she should not have engaged in." Plaintiff argues that the trial court's finding was against the great weight of evidence because defendant continued to send threatening messages to plaintiff. We disagree.

The trial court's finding on this point was supported by defendant's testimony about her past behavior and its assessment of her credibility and demeanor while testifying. Such findings are entitled to "special deference" on appeal. *Brown v Brown*, 332 Mich App 1, 9; 955 NW2d 515 (2020). More importantly, plaintiff places too much weight on defendant's inappropriate OFW messages. The trial court did not declare that defendant was a model coparent or litigant—only

that she had shown improvement in her behavior. The trial court clearly recognized that defendant's interactions with plaintiff were still a problem, describing them as "less than civilized," but also opined that her improvements were worthy of recognition. Plaintiff has not established that this finding was against the great weight of the evidence.

Plaintiff also argues that the trial court erred by adopting the referee's finding that Factor (b), "[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," favored defendant. MCL 722.23(b). Plaintiff's argument focuses on defendant's alleged interference with DW's education. However, the evidence indicated that both parents were actively involved in DW's schooling. Defendant was formerly a classroom mom and attended field trips, while plaintiff financed DW's private school tuition and attended parent teacher conferences and other school events. Plaintiff points to defendant's opposition of DW's enrollment at Detroit Country Day, but defendant testified her objection was premised on her belief that she was excluded from the decision and her concerns about the timing of DW's transfer while his behavioral problems remained unresolved. Even so, defendant recognized that DW would receive a great education at Detroit Country Day and wanted him to remain there to foster his sense of stability. In fact, defendant testified that the school contacted her about information that it was missing and that she provided the necessary documents to ensure that DW's enrollment for the following school year could be finalized.

Plaintiff also contends that the referee's conclusion that Factor (b) slightly favored defendant rested on her testimony that she attended church. Plaintiff argues that religious matters should not have been taken into account because the parties did not have a prior agreement as to DW's religious upbringing, but he cites no authority for this novel proposition. Even if we accepted that such an agreement about a child's religious education was necessary, the record suggests that plaintiff was, at minimum, passively accepting of defendant's Catholic faith, despite having been raised in a Jehovah's Witness household. Plaintiff testified that he did not consider himself to be a Jehovah's Witness, even if he followed some of the religion's beliefs, such as abstaining from celebrating holidays. Plaintiff also sent DW to Sacred Heart for schooling in the past, even though it was a Catholic school that included prayer in its curriculum. As it appears that plaintiff was not opposed to DW's involvement in defendant's religion and there was no evidence that he desired to educate DW in the beliefs of a Jehovah's Witness, the finding that Factor (b) favored defendant slightly was not against the great weight of the evidence.

Plaintiff next argues that the trial court erred by adopting the referee's finding that Factor (f), "[t]he moral fitness of the parties involved," favored both parties equally. MCL 722.23(f). Plaintiff reasons that this factor should have strongly favored him because he had been sober since October 2017, while defendant's drunk driving and driving DW with a suspended license prompted these proceedings. Plaintiff also contends that defendant stubbornly refused to acknowledge that she had a problem. Plaintiff's argument lacks merit because it rests on an unproven assumption that defendant is, in fact, an alcoholic and that her alcohol consumption affects her parenting. See *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (explaining that issues of moral fitness must relate to how the parties will function as parents).

Although defendant was arrested for drunk driving in 2019, there is little evidence outside of plaintiff's personal opinion from which a court could reasonably infer that this incident equates

with defendant being an alcoholic. Defendant testified that her arrest occurred after she drank too much at a family gathering in honor of her deceased cousin. Importantly, defendant candidly acknowledged that she exercised terrible judgment in deciding to drive after the event and was quite aware of the disastrous consequences that she was lucky enough to avoid. Additionally, DW was not with her when this incident occurred. Defendant successfully completed her probation sentence without incident, and there is no indication that any of her ETG tests were positive. Beyond the singular incident of defendant's drunk driving, which she readily acknowledged responsibility and remorse for, the only evidence that defendant had a problem was plaintiff's opinion that defendant was reluctant to submit to ETG tests because she was essentially an alcoholic. Plaintiff's opinion, however, was entirely speculative and fails to appreciate that there are multiple reasons why a person might by unwilling to attend random alcohol screenings, some of which may be valid. The trial court explicitly found that defendant was not alcohol dependent. Neither this finding, nor the overall finding that Factor (f) favored both parties equally, was against the great weight of the evidence.

Next, plaintiff contends that the trial court erred by adopting the referee's finding that Factor (g), "[t]he mental and physical health of the parties involved," favored plaintiff only slightly. MCL 722.23(g). The trial court ordered defendant to undergo psychological testing because she was seemingly unable to control her outbursts in court, lied about having driven on a suspended license with DW in the car, and made what seemed to be wild accusations about plaintiff's connections at JAMS. Dr. Richard Wooten conducted the psychological evaluation. In addition to interviews with defendant, he administered a series of tests to assess defendant's psychological condition, including three different personality assessments; two parenting assessments; assessments for anger, trauma, and a multisymptom checklist; a neurobehavioral functioning inventory; and risk assessments. Dr. Wooten observed defendant to be completely candid about her anger toward plaintiff and opined that she would benefit from professional counseling, but he did not believe she posed a threat to DW. Additionally, all of defendant's test results were within normal limits. Although Dr. Wooten was hesitant to directly address the implications of defendant's inappropriate OFW messages without evaluating plaintiff as well, he did not seem overly concerned with the negative tone of the messages, reasoning that defendant was seemingly reacting to her feelings of hopelessness and that the messages were more aggressive than violent. Dr. Wooten also opined that defendant acknowledged and took responsibility for her misbehavior in the past, even if she did not feel any particular remorse toward plaintiff.

Plaintiff argues that too much weight was afforded to Dr. Wooten's opinion because his testimony focused on the improbability of domestic violence or abuse and did not actually address the reasons the psychological evaluation was ordered. While we acknowledge that Dr. Wooten did not specifically opine about the implications of defendant's in-court outbursts and dishonesty about having driven DW while her license was suspended, Dr. Wooten's testimony was favorable to defendant and could reasonably lead to the conclusion that defendant did not suffer any psychological impairments that would affect her parenting. Moreover, as the party seeking the custody and parenting time modification, plaintiff bore the burden of proving that modification would be in DW's best interests. *Mitchell*, 296 Mich App at 520. Dr. Wooten's testimony was not only unsupportive of plaintiff's evidentiary burden, it also severely undermined the negative inferences the trial court originally reached about defendant's mental state. That Dr. Wooten spoke so highly of defendant's unabashed truthfulness suggested that defendant had learned from the consequences of her dishonesty earlier in the case. The trial court also reviewed the video

recordings of the referee hearing and was able to see for itself that defendant was much more controlled in her testimony and that her demeanor had significantly improved. The trial court did not err by opining that defendant had overcome its earlier concerns.

Of course, the record also demonstrates that defendant suffered from depression and anxiety in the wake of her parenting time suspension. She admitted that she discontinued her prescribed antidepressant after it exacerbated her symptoms, instead opting to pursue natural remedies. As it relates to her anger management, defendant completed a several-month program and opined that she benefited. Thus, finding that Factor (g) slightly favored plaintiff was not against the great weight of the evidence.

Lastly, plaintiff argues that the trial court erred by adopting the referee's finding that Factor (j) should be credited to both parties equally. Factor (j) addresses "[t]he 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." MCL 722.23(j). With respect to this factor, the referee explained:

> Both parties' testimony indicated that they generally do not communicate well with one another. Our Family Wizard messages were submitted which show that neither party is able to communicate effectively, and that Mother was sending very inappropriate messages to Father. However, these parties have somehow found a way in the past to make joint decisions about [DW's] medical and school needs. Mother has attended anger management classes and testified that she is implementing strategies to improve her communication skills with Father.

Plaintiff contends that this reasoning was belied by evidence that he had to fight to uphold agreements about DW's schooling, the vast number of highly inappropriate and degrading messages that defendant sent to him during the case, and defendant's belief that DW's custody is hers to control.

The referee's reasoning misconstrued the focus of Factor (j), as does plaintiff's argument on appeal. The question under MCL 722.23(j) is not necessarily whether the parents can effectively communicate with each other or make decisions about the child's welfare together. Although parental communication may often play a role under this factor, the crux of Factor (j) "favors parents who facilitate the relationship of their children with the other parent." *Martin v Martin*, 331 Mich App 224, 239; 952 NW2d 530 (2020). With that focus in mind, we believe that the ultimate treatment of this factor as equally credited to both parties was not erroneous because, sadly, the bulk of the evidence suggested that neither party demonstrated significant willingness or ability to foster the other parent's relationship with DW.

The evidence regarding defendant is a mixed bag. On one hand, plaintiff testified that defendant discussed inappropriate topics with DW, "saying things like, there's a lot of wicked people in this world, you know, your dad is buddies with the Judge and, you know, he uprooted you from the house, he's trying to destroy our relationship . . . ." Clearly, such denigration did nothing to encourage DW's relationship with plaintiff. On the other hand, defendant explained that she purchased DW a tablet with a separate phone line to make it possible for DW to communicate with plaintiff without her involvement. She also testified that she willingly "gave"

plaintiff joint custody after giving birth to DW as an unmarried woman, and tried to make it easy for plaintiff to be in DW's life. While plaintiff characterizes defendant's testimony as evidence that she incorrectly views DW's custody as solely within her control, it also demonstrates that she has at least made some attempts to facilitate DW's relationship with plaintiff, regardless of her misunderstanding of the law. At any rate, even if defendant was *willing* to facilitate that relationship, the record raises serious doubts as to whether she had the capacity to set aside her anger with plaintiff in order to do so.

The evidence concerning plaintiff's facilitation of defendant's relationship with DW was extremely limited. In May 2020, the trial court ordered that defendant's parenting time be supervised through Growth Works and supplemented with FaceTime contact no fewer than four times per week. Defendant testified at the evidentiary hearing that she was only able to speak with DW every now and then, clarifying that it was certainly fewer than four times a week and not always using a video format. Defendant further indicated that her participation in virtual parenting time with Growth Works had been limited because she was forced to get a second job to cover her legal expenses, and plaintiff was only willing to make DW available on Wednesdays. Thus, while there was no evidence that plaintiff tried to discourage DW's relationship with defendant, there was also no reason to believe that plaintiff made any effort to foster that relationship either. The sheer number of motions that plaintiff filed in such a short period suggests otherwise. On the whole, the finding that Factor (j) was equal as to both parties was not against the great weight of the evidence.

V. LEGAL CUSTODY

Plaintiff's final argument is that the trial court erred by denying his request for sole legal custody when it was apparent that the parties were unable to agree on important decisions. We disagree.

Joint legal custody refers to the arrangement in which "parents . . . share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b); *Dailey v Kloenhamer*, 291 Mich App 660, 670; 811 NW2d 501 (2011). In deciding whether joint legal custody is appropriate, the court must consider the parties' ability to cooperate and generally agree on such decisions. *Boyfsil v Boyfsil*, 332 Mich App 232, 249; 956 NW2d 544 (2020). As recently reiterated by this Court:

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making and discipline—and they must be willing to cooperate with each other in joint decision-making. If two equally capable parents whose . . . relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. [*Id*., quoting *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982).]

In responding to plaintiff's contention that the referee did not adequately address his request for sole legal custody, the trial court stated:

> The FOC Referee did not provide a direct analysis on a change in legal custody. To the extent the Court need [sic] to formally address this issue, the evidence at the hearing did not rise to the level in the Court's mind, nor was the evidence and testimony focused on, legal custody. Though Plaintiff titled his closing which included an indication that he was still arguing for a change in legal custody, the Court nevertheless finds the focus and substance of the hearing was truly on parenting time. Plaintiff's contention that the parties cannot meaningfully communicate, and that Defendant was less than truthful with the Court on the driving issue, do not rise to the level in the Court's mind that the parties cannot be joint legal custodians. The Court will also note, this file was relatively quiet from inception until the 2019 flurry of litigation, which evidences to the Court that they are, or were at least, capable of being joint legal custodians. Thus, the parties having not meaningfully litigated the issue, the Court finds legal custody a matter not appropriate to question in these proceedings at this time.

It is noteworthy that despite filing at least five motions between September 2019 and the July 2020 evidentiary hearing regarding this matter, each motion sought relief in the form of modified or supervised parenting time, alcohol testing, psychological testing, restrictions on defendant's driving, enforcement of the trial court's prohibition against misusing OFW, and attorney fees. As the trial court observed, it was not until closing arguments that plaintiff first stated his request for sole legal custody. Because this was the first mention of a request for change in legal custody, defendant was never put on notice of the need to respond to that issue, and the proofs regarding that issue were only presented in a tangential manner. Under these circumstances, we are not persuaded that the trial court's decision to disregard plaintiff's eleventh-hour request for sole legal custody was an abuse of discretion.

VI. CONCLUSION

The trial court did not render findings of fact against the great weight of evidence or commit a palpable abuse of discretion or a clear legal error on a major issue. Therefore, we affirm.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Michael J. Riordan