STATE OF MICHIGAN

COURT OF APPEALS

RITA HOLLIS, Plaintiff-Appellee,	UNPUBLISHED November 8, 2012
v	No. 306090 Clinton Circuit Court
JASON MILLER, Defendant-Appellant.	LC No. 10-022075-DZ

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting grandparenting time with defendant's minor child to plaintiff under MCL 722.27b(4). We vacate the order and remand for proceedings consistent with this opinion because plaintiff failed to introduce any evidence supporting that the lack of grandparent visitation raised a substantial risk of harm to the minor child.

Defendant and Lindsay Rue, plaintiff's daughter, had a child together and the couple never married. They separated when the child was between one and a half and two years old. Defendant has had sole legal and physical custody of the child since the child was about two-years old and a no-contact order prevents Rue from seeing the child. However, Rue's family, including plaintiff, have been active in the child's life to varying degrees until, in late 2009 or early 2010, defendant began denying plaintiff visitation with the child. Plaintiff subsequently filed a complaint with the trial court seeking grandparenting time. Over four days, the trial court conducted an evidentiary hearing on the matter.

Plaintiff's witnesses testified she has maintained a close and continuous relationship with the child since the child's birth. Additional testimony supported that plaintiff and her family prevented Rue from having any contact with the child during the child's visitation with plaintiff. However, plaintiff was the only witness who testified concerning whether a future lack of contact with plaintiff and her family might impact the child. All the other witnesses merely testified to the apparently close bond between plaintiff and the child. Even plaintiff's husband failed to testify about any effect on defendant's child; instead he testified about the effects that the lack of contact had on the other children. Plaintiff herself expressed only that she believed the child was suffering emotional harm; she admitted she had no personal knowledge of whether that was true.

In response, defendant presented testimony that the child would act out after visits and that since the visits had ceased, the acting out had lessened. There was also testimony that the child seemed calmer and better adjusted since the visits stopped. Defendant also presented the testimony of Kay Pratt, the child's therapist, and Dr. Stephen Guertin. Both testified that having no contact with plaintiff was unlikely to cause any harm to the child. After hearing all the evidence, the trial court issued an order granting grandparenting time to plaintiff and this appeal followed.

Defendant first argues that the trial court erred in determining that plaintiff met her burden of establishing no contact was a substantial risk of harm to the child. We agree.

"'Orders concerning [grand]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.'" *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007), quoting *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). Under the great weight of the evidence standard, this Court gives deference to the trial court's findings "unless the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994)(internal quotation omitted).

A trial court must give deference to a fit parent's decision regarding grandparenting time. *DeRose v DeRose*, 469 Mich 320, 333-334; 666 NW2d 636 (2003). *DeRose* found the prior version of MCL 722.27b to be unconstitutional because the statute, as previously written, did not provide for deference to a parent's decision. *Id.* at 333. MCL 722.27b governs grandparenting time and was amended after *DeRose* to include subsection 4(b), which states:

> 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.

The statute now raises a presumption that a fit parent's decision to deny grandparenting time does not, in and of itself, create a substantial risk of harm. *Keenan v Dawson*, 275 Mich App 671, 682; 739 NW2d 681 (2007). However, the grandparent may meet his or her burden of rebutting that presumption by showing by a preponderance of the evidence that there is a substantial risk of harm in denying grandparenting time. *Id.*

Defendant does not challenge the trial court's best interest findings and only asserts that, contrary to the trial court's ruling, plaintiff failed to meet her burden of establishing that the denial of grandparenting time created a substantial risk of harm to the child. We agree. While making its ruling the trial court found there was a close and continuous bond between the child

and plaintiff and plaintiff's family. The trial court then addressed the substantial risk of harm and stated:

> The Court will also note that it was—in terms of substantial risk of emotional well-being to the child, that the apparent deliberate act of the father, not only to sever any communications and—and time with the maternal family and the child, in and of itself in the Court's opinion, was not based in—on any reasonable determination. Again, I haven't heard all the facts. I recognize there are witnesses yet to come. But the Court is not convinced that there was any basis as we sit here, and based on the evidence I've heard thus far, for the father to take the action that he did. The Court is further troubled by the fact that in addition to severing contact, that in recognition of the Court's ability to take judicial notice of it—of its files, a tactic utilized by the father, that the Court ultimately determined to be inappropriate was the—the misuse of the personal protection order that after the Court heard testimony, the Court felt it was entirely inappropriate and baseless for the father to take that course of action in an effort to deny the petitioner and her family contact with the minor child.
>
> Furthermore, the Court finds that the father's—there's been testimony, again I haven't' heard from the father yet on this point, but as the—the evidence stands here today, the testimony of the petitioner that when she questioned the father as to why he could not have—why she could not have continuing contact with [the child], the father, instead of answering himself, having communication adult to adult, utilized the child by telling the child to tell grandma why [the child] couldn't have contact. And that, in the Court's opinion, is a serious risk of harm and demonstrates—as the facts stand here today, that the—the father's decision runs afoul of the concerns that were very prominent in the legislature when it enacted 722.27b.

Although the trial court's finding that the child had had a close and continuous relationship with plaintiff was not against the great weight of the evidence, the trial court did abuse its discretion in determining that plaintiff had met her burden. Plaintiff was required to produce sufficient evidence that the denial of contact would result in a substantial risk of harm to the child to overcome the presumption that defendant's denial of grandparenting time would not result in a substantial risk of harm. MCL 722.27b(4)(b). The trial court did not give the required deference to defendant's decision, *DeRose*, 469 Mich at 333-334, but rather shifted the burden to him to justify it.[1]

[1] The dissent suggests that the findings in the trial court's written opinion are sufficient to satisfy the standard. While somewhat more detailed, the trial court's written opinion did not make findings beyond those made from the bench and the added detail does not provide a basis to conclude that a denial of grandparenting time creates a substantial risk of harm to the child. Moreover, the written opinion's legal analysis is limited to a discussion of the appropriate amount of grandparenting time under the best interest factors. The opinion specifically states

Plaintiff's evidence in support of a finding that there was a substantial risk of harm to the child consisted of testimony from friends and relatives.[2] However, while a number of witnesses testified about the close relationship plaintiff and her family had had with the child, none could provide personal observations of how the later lack of contact had affected the child. Thus, these witnesses could not testify that the lack of contact with plaintiff posed a substantial risk or harm to the child. In her own testimony, plaintiff stated that she believed the child was suffering emotional harm because he did not know why contact had ceased. However, plaintiff also admitted that she had no personal knowledge of the child's reaction to the absence of contact. Her husband testified about the negative effect the lack of contact was having on the other grandchildren. However, he also could not state how the lack of contact affected defendant's child.

Plaintiff's trial counsel argued that the abrupt termination of contact created a substantial risk of emotional harm. But no evidence supported that termination of contact actually did cause emotional harm, or created a substantial risk of harm. Additionally, plaintiff's trial counsel argued that plaintiff and plaintiff's family were the only connection the child had with his mother. Again however, no evidence was presented to establish how this equated to a substantial risk of harm for the child. This is particularly notable because the child's therapist testified that the lack of grandparental visitation was not likely to cause any harm. Plaintiff thus failed to produce evidence establishing a substantial risk of harm.

Plaintiff's entire argument was that a child needs a loving grandparent and some access to the maternal side of the family. However, if that were sufficient to overcome the presumption in favor of the defendant's decision, it is hard to imagine a case when the presumption would not be overcome. This would not be consistent with the Legislature's decision to set up a presumption that denial of grandparenting time by a fit parent does *not* create a substantial risk of harm. A trial court may not merely conclude that "grandparenting is good, therefore it should occur." *Keenan*, 275 Mich App at 682.[3]

Although the trial court is in the best position to determine credibility, the trial court's findings in this case are against the great weight of the evidence. *Fletcher*, 447 Mich at 879. Plaintiff presented no testimony or evidence on how the child was being or would be harmed by no contact. Defendant, on the other hand, presented testimony from two witnesses that the child was not being harmed by having no contact with plaintiff and her family. Given the lack of evidence presented by plaintiff, the trial court's finding that there was a substantial risk of harm was against the great weight of the evidence.

---

that the threshold decision concerning substantial harm was made at the September 14, 2010 hearing.

[2] We are concerned that plaintiff also introduced evidence critical of defendant's parenting, despite the fact that plaintiff conceded defendant was a fit parent. Such evidence could be relevant if tied to the standard, but plaintiff made no such argument here.

[3] The *Keenan* Court upheld a trial court's finding that the presumption had been overcome, but in that case the grandparents produced expert testimony that denial of visitation posed a substantial risk of harm to the child. 275 Mich App at 682-683.

Because the trial court erred in determining that plaintiff met her burden, we need not address defendant's remaining issue.

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

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher

STATE OF MICHIGAN

COURT OF APPEALS

RITA HOLLIS, Plaintiff-Appellee,	UNPUBLISHED November 8, 2012
v	No. 306090 Clinton Circuit Court
JASON MILLER, Defendant-Appellant.	LC No. 10-022075-DZ

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

GLEICHER, J., (*concurring*).

I concur with the majority's determination that plaintiff failed to overcome the presumption that defendant's denial of grandparenting time served the child's best interests. I write separately to respectfully express my belief that a grandparent must establish by clear and convincing evidence, rather than by a preponderance of the evidence, that denial of visitation substantially risks harm to the child. I believe that application of the clear and convincing standard is necessary to protect against erroneously depriving parents of their constitutional rights to control the care and custody of their children.

Citing *Keenan v Dawson*, 275 Mich App 671, 682; 739 NW2d 681 (2007), the majority holds that Michigan's grandparenting-time statute, MCL 722.27b, creates a presumption that a fit parent's decision to deny grandparenting time "does not, in and of itself, create a substantial risk of harm." *Ante* at 3. Again citing *Keenan*, the majority continues: "However, the grandparent may meet his or her burden of rebutting that presumption by showing by a preponderance of the evidence that there is a substantial risk of harm in denying grandparenting time." *Id.* I respectfully suggest that *Keenan*'s adoption of the preponderance standard contravenes fundamental principles governing parental rights.[1]

[1] MCL 722.27b(4)(b) states that to rebut the presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm, a grandparent must prove the contrary by a preponderance of the evidence. MCL 722.27b(4)(c) provides:

> If a court of appellate jurisdiction determines . . . that the burden of proof described in subdivision (b) is unconstitutional, a grandparent filing a complaint

A natural parent possesses a fundamental interest in the companionship, custody, care and management of his or her child, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, 483 Mich 73, 91-92; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). The United States Supreme Court reaffirmed the constitutional rights of parents in *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000), invalidating a Washington statute permitting a court to order grandparent visitation despite parental opposition. The Supreme Court explained that the Washington statute "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69. The preeminence of a parent's precious right to raise his or her child is so firmly rooted in our jurisprudence that it needs no further explication.

Thus, defendant enjoys a fundamental constitutional right "to make decisions concerning the care, custody, and control" of his son. *Id.* at 66. Those decisions necessarily include denying grandparent visitation. I would hold that because defendant's constitutional right qualifies as fundamental, to override his decision plaintiff was obligated to clearly and convincingly establish "a substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.72b(4)(b). In my view, an evidentiary preponderance does not suffice to trump constitutionally-protected rights.[2]

My analysis flows from bedrock legal principles mandating deference to a fit parent's decisions concerning child-raising, and that the clear and convincing standard of proof apply when the state or a third party seeks to override a fit parent's choice. In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the Supreme Court emphasized the constitutionally protected rights of natural parents while foreshadowing the application of a heightened standard of proof: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (Citation omitted). A decade later, in *Santosky v Kramer*, 455 US 745, 755; 102 S Ct 1388; 71 L Ed 2d 599 (1982), the Supreme Court observed that "in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." The Court continued: "Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.'" *Id.* (citation omitted). When the individual interest at stake in a

---

> or motion under this section must prove by clear and convincing 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 to rebut the presumption created in subdivision (b).

[2] Here, plaintiff failed to introduce any relevant evidence supporting her claim that denial of visitation created a substantial risk of harm to the child's well-being. Thus, the applicable burden of proof does not impact the outcome.

proceeding is both "particularly important" and "more substantial than mere loss of money," the Supreme Court mandates "an intermediate standard of proof – 'clear and convincing evidence[.]'" *Id.* at 756. The Supreme Court held in *Santosky* that a state must establish by at least clear and convincing evidence constitutionally sufficient grounds for termination before it may terminate parental rights. *Id*. at 768-770.

The termination of parental rights extinguishes the parent-child relationship, while unwanted grandparent visitation merely frustrates parental prerogatives. But in both situations, state action interferes with a core parental right to control a child's associations. The state possesses "a *parens patriae* interest in preserving and promoting the welfare of the child[,]" *id.* at 766, permitting it to terminate parental rights upon clear and convincing proof of unfitness. A grandparent's interest is more attenuated. Grandparenting statutes serve "to ensure the welfare of the children . . . by protecting the relationships those children form with . . . third parties." *Troxel*, 530 US at 64. But a grandparent's desire to visit generally must yield to a fit parent's liberty interest in controlling a child's associations. And I discern no logical basis to hold a grandparent's interest in visitation more compelling that a state's *parens patriae* interest in protecting children. Accordingly, I believe that before a court may constitutionally contravene a parent's fundamental right to oppose grandparent visitation, it must require clear and convincing evidence that protection of the child's best interests supersedes parental choice.

The Supreme Court's decision in *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009), reinforces my analysis. In *Hunter*, the Supreme Court held that when a court hears a custody dispute between a child's natural parents and a third party with whom the child has an established custodial environment, it must determine the child's best interests by applying the clear and convincing evidence standard. *Id.* at 265. The third parties who sought custody in *Hunter* enjoyed a long-term, settled relationship with the involved children. Undoubtedly, the custodians and the children shared a strong emotional bond. Nevertheless, to rebut the presumption that the children's best interests would be served by parental custody, the Supreme Court required the custodians to present clear and convincing evidence. I would hold that because of the identical importance of the constitutionally protected rights at issue in a grandparent visitation action, the same standard of proof should apply.[3]

/s/ Elizabeth L. Gleicher

[3] Unlike in termination proceedings, parents facing grandparent visitation lawsuits have no right to court-appointed counsel. Here, defendant lacked sufficient funds to pay this Court's filing fee, which this Court waived. *Hollis v Miller*, unpublished order of the Court of Appeals, entered September 16, 2011 (Docket No. 306090). In my view, a stricter standard of proof also serves to protect parents such as defendant from lawsuits filed by more financially secure grandparents.

STATE OF MICHIGAN

COURT OF APPEALS

RITA HOLLIS, Plaintiff-Appellee,	UNPUBLISHED November 8, 2012
v	No. 306090 Clinton Circuit Court
JASON MILLER, Defendant-Appellant.	LC No. 10-022075-DZ

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. (*dissenting).*

I respectfully dissent. While I appreciate and understand the other two opinions concerns regarding the grandparenting statute and its burden of proof, I believe the trial court must be affirmed.

Initially, it must be noted that "[o]rders concerning [grand]parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). "A trial court's findings of fact are not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

I am not able to draw a conclusion that the trial court erred, as cited above in *Pickering* and *Fletcher*, based on the trial court's written opinion and order. Initially, the quote from the trial court in Judge Shapiro's opinion is not from the written order. Instead, it is a statement of the trial court on the record, from approximately the middle of the hearing, before it received all the evidence. The law is clear: Courts speak through their written orders. *Johnson v Johnson*, 276 Mich App 1, 12 n2; 739 NW2d 877 (2007). The trial court made sufficient findings of fact to conclude its findings were not against the great weight of the evidence, nor a palpable abuse of discretion, nor was there a clear legal error in its written order. *Pickering* at 5. This Court is directed to focus on these standards. In the findings that the trial court made through its written order, it did include the ruling made by the court on the record on September 14, 2010 as cited in

Judge Shapiro's opinion.[1] This ruling on September 14, 2010, was in response to a motion for directed verdict, not a final opinion. Significantly, prior to the section of the court's ruling as quoted in the Judge Shapiro's opinion, the court began by ruling on the motion and stated:

> Well, the court has heard the testimony of a variety of witnesses, and is of the opinion that the motion for a directed verdict should be denied. There has been significant testimony developed through a variety of witnesses, most notably the petitioner, her husband, two of her daughters, that there was close and—a bond between [the child] and the maternal family since the time of [the child's] birth. The Court . . . has reviewed Plaintiff's exhibit . . . One, which further demonstrates to the Court that not only is it the opinion of the witnesses who have testified, but it's borne out in the photos. And the photos depict a variety of family events, again from the time [the child] was and infant until the time that [the child] last saw his—maternal grandmother, that there is a close bond. There furthermore is a close bond between [the child] and his cousins, and the relationship between [the child] and the petitioner and her family, based on the evidence that the Court has heard thus far, is a solid one, and the Court finds that if it were to rule at this point, looking at the evidence in the light most favorable to the non-movant, that it is appropriate to deny the motion.

Then the remainder of the court's ruling on the motion for directed verdict takes place, as quoted in Judge Shapiro's opinion.

The lower court's written opinion stated, in part, the following facts and findings: Defendant had the 5 year old child explain to plaintiff why the child could not have contact with her instead of relaying this information adult-to-adult himself, the child had a close relationship with plaintiff, plaintiff was involved in the child's life from the date of his birth until January 2010 (for over 5 years), the child spent the night with plaintiff on many occasions during that time and the child enjoyed his time with plaintiff.

Further, the lower court opined that defendant acknowledged in letters that were received into evidence that the child loved plaintiff and defendant thanked plaintiff for being a "wonderful grandma, and for just being there to [sic]". In these letters, defendant stated that he would never take the child from plaintiff. In addition, the court cited the PPO that defendant served on plaintiff, which the lower court set aside. The trial court has a history with the parties and is in the best place to judge credibility. *Berger v Berger*, 277 Mich App 700, 708; 747 NW2d 336 (2008). The lower court's credibility determinations should not be set aside absent an abuse of discretion. *People v Brownridge*, 459 Mich 456; 591 NW2d 26 (1999).

[1] The trial court did reference its previous ruling as follows: "As noted above, this Court previously concluded at the hearing held on September 14, 2010 that Mrs. Hollis proved by a preponderance of the evidence that Mr. Miller's decision to deny grandparenting time created a substantial risk of harm to [the child's] emotional health." However, the trial court's written opinion includes the facts on which it relied more explicitly.

The trial court specifically stated that there were dated photos which contradicted defendant's testimony that the child did not have a relationship with plaintiff the first few years of the child's life. The lower court found that, based on the evidence presented, defendant did not want to allow contact with plaintiff because defendant was angry about the break-up with the plaintiff's daughter who is the child's mother. Based on all the evidence, the trial court ruled that plaintiff did overcome the presumption that defendant's denial of grandparenting time served the child's best interest, and then it engaged in the required evaluation of the best interest factors.

All of this evidence, contained in the written findings of the trial court, and a review of the entire record and written opinion, leads me to the conclusion that the opinion and order must be affirmed as the court's findings were not against the great weight of the evidence, the court did not commit a palpable abuse of discretion, nor did the court make a clear legal error on a major issue. *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007), quoting *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). The trial court is in the best place to judge credibility, and I will not disturb those findings absent an abuse of discretion.

/s/ Amy Ronayne Krause