STATE OF MICHIGAN

COURT OF APPEALS

KARRA KAY EVANS a/k/a KARRA KAY HAGEN, Plaintiff-Appellant,	UNPUBLISHED December 27, 2012
v	No. 311119 Montcalm Circuit Court
DARWIN KEITH DICKSON, JR, Defendant-Appellee.	LC No. 1995-000895-DP

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the June 18, 2012, order of the trial court changing custody of the parties' minor child[1], and awarding the parties joint legal and physical custody with parenting time to be agreed upon by the parties, and, in the event that the parties are unable to agree, placing physical custody of the child with defendant/father during the school year. We affirm.

Plaintiff and defendant lived together on and off for several years, including some time when the child was a newborn, but never married. Defendant acknowledged paternity and, in and stipulation and order dated April 3, 1996,[2] the parties agreed that plaintiff would have sole physical and legal custody of the child and defendant would have "reasonable visitation rights." Subsequently, defendant moved to Tennessee and the child lived with plaintiff for nearly all of his life, occasionally visiting defendant during summers and on holidays. However, in August of 2010 the parties agreed to have the child move to the defendant's house for one year, because that is what the child wanted and because the child was having behavioral issues that were affecting his schooling.

[1] The parties have two children, but this appeal concerns the custody of only one of the children. The other child has reached the age of majority.

[2] Both the parties and the trial court mistakenly refer to the original order awarding custody of the child to plaintiff as being dated December 27, 1995. However, that order addressed only the parties' other child, who is not at issue in this appeal.

On October 21, 2011, defendant filed a petition to change custody, seeking to have the child at issue move to Tennessee with him permanently, and to have joint custody of both of his children. After a custody hearing before a referee, the referee found that the parties should share joint legal custody of the minor child, but denied defendant's petition to change physical custody of the child. Defendant moved for a de novo hearing, which was held before the trial court on April 27, 2012 and May 22, 2012.

In a May 23, 2012, opinion, the trial court found that an established custodial environment existed with the plaintiff. The trial court further found that the defendant had established by clear and convincing evidence that modification of the custodial arrangement was in the child's best interests. After consideration of the statutory best interest factors (MCL 722.23), the trial court ultimately granted the parties joint legal and physical custody of the minor child. The trial court also ordered, however, that the minor child was to remain in the defendant's care and custody throughout the school year in Tennessee and that the plaintiff was to have parenting time with the child for the majority of the summer and that holiday parenting time would be in accordance with the 8th Judicial Circuit Court Parenting Time Policy, with certain specified exceptions. Plaintiff now appeals that ruling, challenging the trial court's finding that modification was in the child's best interest.

Section 8 of the Child Custody Act, MCL 722.28, describes three types of findings and three corresponding standards of review. *Fletcher v Fletcher*, 447 Mich 871, 876-77; 526 NW2d 889 (1994). "Findings of fact are to be reviewed under the 'great weight' standard, discretionary rulings are to be reviewed for 'abuse of discretion,' and questions of law for 'clear legal error.'" *Id.* Findings on each statutory best interest factor (see MCL 722.23) are findings of fact and will be affirmed unless the evidence "clearly preponderates in the opposite direction." *Id.* at 879. The final determination as to whom custody is granted is a discretionary ruling that we review for an "abuse of discretion." *Id.* at 880. We review the lower court's choice, interpretation, or application of the law for clear legal error. *Id.* at 881.

A trial court may not modify or amend its previous custody judgment or orders so as to change the established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). To determine the child's best interests, the lower court must consider the eleven factors set forth in MCL 722.23. *Bowers v Bowers*, 190 Mich App 51, 54-55; 475 NW2d 394 (1991). It must expressly evaluate each factor and state its reasons for granting or denying the custody request on the record. *Dailey v Kloenhamer*, 291 Mich App 660, 667; 811 NW2d 501 (2011).

In the instant matter, the trial court found the parties equal on factors (a), (b), (e), (f), (j), and (k). It found factor (c) to favor plaintiff, and it found factors (d), (g), (h), (i), and (*l*) to favor defendant. Plaintiff challenges the trial court's findings as to factors (a), (d), (e), (g), (h), (i) and (l), each of which we shall address in turn.

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

Plaintiff claims that defendant "does not have the same type of loving relationship or an emotional attachment to the parties' other son." Plaintiff is presumably suggesting that the lower

court should not have found the parties equal on factor (a) because of the differing relationship between defendant and his two children. However, defendant's relationship with the child's brother is not at issue in this dispute. A Friend of the Court investigator found no issues regarding the love, affection, or emotional ties to the child with either parent and the referee also found the parties equal with respect to this factor. Therefore, finding the parties equal on factor (a) was not against the great weight of the evidence.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

The lower court found factor (d) favored defendant because of concerns with plaintiff's "work schedule, requiring travel, overnights and late nights in conjunction with the demonstrated past behavioral and past and present school related issues of the minor child." The trial court also noted that in the year that the child resided with defendant, he did not experience the problems with behavior and schooling that he did when residing with the plaintiff. While considering factor (l) the trial court also noted that while plaintiff testified that she makes sure the child does his homework every night, recent e-mails from the child's teachers indicate that the child rushes through his work and makes a lot of mistakes (resulting in a 1.866 GPA) and is still exhibiting excessive absences. Plaintiff argues that the trial court's finding is against the great weight of the evidence because she and two other witnesses testified that she only travels two to three times per year, and because plaintiff's mother helps supervise the child when she is away on business. Defendant offered conflicting testimony, stating that plaintiff "travels a lot," and does not get home until 6:00 or 7:00 p.m. While plaintiff disagrees with defendant's testimony, this Court must "defer to the trial court's credibility determinations." See *Berger*, 277 Mich App at 700. The lower court's finding was supported by testimony from the record. It was not against the great weight of the evidence.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

Plaintiff argues that she should have been favored on this factor rather than the parties being found equal because "her home is more permanent than [defendant's]," and "the children have essentially lived there for their entire lives." While the trial court found a "sufficient degree of permanency" in plaintiff's home, it also found that defendant "has been married for ten plus years and the minor child has an established bond with his step mother and step siblings." Both parties appear to be in stable, long-term relationships. Similarly, the child appears to have established stable relationships with the families of both parties. The referee found the parties to be equal on this factor and the trial court's finding to the same was not against the great weight of the evidence.

(g) The mental and physical health of the parties involved.

The trial court found this factor "slightly" favored defendant. The trial court noted that plaintiff struggled with depression in 2009 relating in part to the child's desire to live with defendant. The trial court expressed concern about the relationship between plaintiff's mental health issues and the child, particularly given that the child's school related problems appeared to

be recurring. The lower court reasoned that depression and anxiety can be caused by a child's daily needs. Because the child has a history of behavior and school related problems, the lower court said it would remain concerned with plaintiff's mental health until it receives a "clearing evaluation or medical opinion."

Plaintiff acknowledged that she checked herself into an outpatient mental health facility to treat depression and anxiety in 2009 and that her depression was caused by the death of her brother-in-law, her divorce, and because the child "wanted to leave and go with" defendant. Plaintiff, however, contends that the trial court's favoring defendant on this factor was against the great weight of the evidence, considering her testimony that her treatment for depression was by "her own free will," and that she has not taken medication in the last 2½ years.

Plaintiff's own testimony establishes that she has struggled with mental health issues in the past, and that her mental health issues were related in part to the child's desire to live with defendant. While plaintiff is now in fine mental health, the lower court's concern with the possibility of a reoccurrence of plaintiff's depression and its ultimately slight favoring of this factor toward defendant is not against the great weight of the evidence.

(h) The home, school, and community record of the child.

The lower court found this factor favored defendant. It stated that "the minor child had behavior and attendance issues as well as poor grades when living with" plaintiff, adding that "the child was flourishing" when living with defendant. The lower court further stated that "the child is again having problems in school with poor grades, absentees and effort" upon returning to plaintiff's care. Defendant argues that the child improved his performance in school because he repeated the eighth grade, and because the school he attended in Tennessee had low academic standards. While both of these factors could have affected the child's academic performance, it is not clear that either *caused* improvement in the child's grades. Moreover, the child's academic problems went beyond merely grades prior to moving in with defendant and extended to behavioral and attendance issues, both of which also saw improvement after the move, and both of which regressed after he moved back with plaintiff. There is no evidence that "clearly preponderates in the opposite direction" from the trial court's finding that the child's academic and behavioral improvement was the result of the "structure offered with [defendant]." As such, the lower court's finding was not against the great weight of the evidence.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

The lower court found this factor in favor of defendant. The court found the child of sufficient age to express a preference, and found no reason to question the child's competence. Plaintiff argues that the child "lacks maturity and does not necessarily know what is in his best interest." The lower court did not interview the child. It instead relied on the testimony and opinion of the Friend of the Court investigator who testified that the child expressed a preference to live with defendant, and that the child is a "normal functioning ninth grade student." The lower court was entitled to rely on this opinion. As such, its finding was not against the great weight of the evidence.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The lower court found this factor in favor of defendant because of the child's difficulties in school while living with plaintiff. Defendant argues that the lower court should have found this factor in her favor because the child resided with plaintiff for nearly his entire life and that his improvements in school while residing with defendant could be attributed to the fact that he was repeating the 8th grade. As previously discussed, the lower court properly considered the child's difficulties in school and the length of time the child has resided with plaintiff throughout its opinion. The lower court's finding was not against the great weight of the evidence.

IV. CUSTODY DETERMINATION

"[T]he trial court's custody decision is entitled to the utmost level of deference. *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533(2006). As such, we review the lower court's custody determination for an abuse of discretion, which exists when the "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." *Berger*, 277 Mich App at 705. Here, the lower court granted defendant joint physical and legal custody. It found "the minor child needs the stability and/or guidance offered by [defendant]." The lower court reasoned that "the existing school related concerns exhibited when the child was with [plaintiff] are sufficiently detrimental to the child's ultimate success" to warrant a change in physical custody.

The Friend of the Court investigator, the referee and the lower court all agreed that neither party in this case is a bad parent. In fact, the lower court found the parties equal on half of the best interest factors. Still, the lower court heavily considered the child's improved academic performance when living with defendant. "[T]he trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705. Accordingly, the lower court's decision to grant joint physical and legal custody to defendant is not an abuse of discretion.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray