STATE OF MICHIGAN

COURT OF APPEALS

RUDOLPH MARK BRANDOLINO, Plaintiff-Appellant,	UNPUBLISHED March 14, 2013
v	No. 311366 Wayne Circuit Court Family Division
CARLA RENEE BRANDOLINO, Defendant-Appellee.	LC No. 09-102939-DM

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying his motion for change of custody and parenting time, and awarding custody of the parties' minor child to defendant during the school week. Because the trial court's findings on the statutory best-interest factors were not against the great weight of the evidence, we affirm.

This appeal arises from the parties' disagreement regarding where their son will attend kindergarten. After the parties divorced, they were awarded joint legal and joint physical custody of their son and shared week-on-week-off parenting time. Plaintiff lives in Dearborn, and defendant resides in Battle Creek. Each party enrolled the child in a preschool in his or her community. In March 2012, plaintiff filed a motion for change of custody and parenting time in order to facilitate the child's enrollment in the kindergarten program of plaintiff's choice. On appeal, plaintiff argues that the trial court erred by modifying custody in favor of defendant on the basis of its findings on the statutory best-interest factors.

Custody orders "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." MCL 722.28; see also *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). "Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the 'great weight of the evidence' standard." *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011). "Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction." *Pierron*, 486 Mich at 85 (quotation marks, citations, and brackets omitted). A court's ultimate determination regarding to whom to award custody is reviewed for an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889

(1994). In the context of child custody proceedings, "[a]n abuse of discretion exists when the trial court's decision is 'palpably and grossly violative of fact and logic . . . .'" *Dailey*, 291 Mich App at 664-665. "Finally, 'clear legal error' occurs when a court incorrectly chooses, interprets, or applies the law." *Id.* at 665.

A custody dispute must be resolved in accordance with the child's best interests. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). "[A] trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Id.* When a custody modification would change the child's established custodial environment, there must exist clear and convincing evidence that the change is in the child's best interests. MCL 722.27(1)(c); *Hunter v Hunter*, 484 Mich 247, 259; 771 NW2d 694 (2009). Because an establish custodial environment existed with both parties in this case, the trial court correctly applied the clear and convincing evidence standard.

On appeal, plaintiff challenges the trial court's findings on the best-interest factors. The court concluded that factor (a), "[t]he love, affection, and other emotional ties existing between the parties involved and the child," MCL 722.23(a), favored defendant because the evidence "established that [defendant] is the more nurturing parent," and "[defendant's] emotional ties with her son are stronger." The court noted that plaintiff "did not testify regarding his son's emotional needs or his [sic] nurturing ability," that the child "was reprimanded . . . for hugging another child," and that plaintiff disputed that his son "was 'bullied' at his pre-school and did not address the issue until [defendant] requested that he raise it with the school." The trial court also relied on defendant's testimony that she "knows her son," that "he cries in her arms," and that he "snuggles" with her. The trial court's findings were not against the great weight of the evidence.

The court determined that factor (b) favored neither party. Factor (b) pertains to "[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." MCL 722.23(b). The court reasoned that both parties voiced a desire to provide the child with the best possible education and both wanted the child to attend a Catholic school. Plaintiff argues that defendant offered no testimony regarding whether or how she disciplines the child, which is important for his growth and maturation. The trial court's emphasis on the child's education was reasonable given that the purpose of the trial was to determine the location of the kindergarten in which he would enroll. Moreover, the trial court's findings were not against the great weight of the evidence because the evidence did not clearly preponderate in the opposite direction.

Factor (c) concerns "[t]he 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." MCL 722.23(c). The trial court determined that this factor favored defendant. The court expressed concern regarding whether plaintiff "has adequate supervision in place for [the child] when he is at work." The court found it "troubling" that plaintiff's elderly mother cares for the child and that, while in her care, the child "takes care of himself, feeds himself and puts his own pajamas on at bedtime."

Plaintiff argues that factor (c) favors him because he is financially better able to care for the child and that while the trial court scrutinized the care that he provided for the child while he

was at work, the court did not do the same with respect to defendant. Plaintiff contends that defendant leaves the child with a friend, Emeril Diamante, three days a week while she is at work, but Diamante did not testify at the trial. Diamante is defendant's neighbor and a stay-at-home dad, and the record does not contain any evidence that the child does not receive proper care when he is with Diamante. On the other hand, the record does contain evidence that while the four-year-old child is in the care of plaintiff's elderly mother, the child dresses himself, takes care of himself, and prepares his own meals. Accordingly, the trial court's determination that factor (c) favors defendant was not against the great weight of the evidence.

Factor (d) addresses "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court determined that this factor favored defendant. The court noted that plaintiff moved in with his mother after he lost his home because of foreclosure. The court reiterated its concern that plaintiff's mother is not an appropriate caregiver for the child because she is 72 years old, suffers from Parkinson's disease, and uses a cane and a walker to move about. The court further noted that she needed to be assisted into the witness chair and opined that, despite the grandmother's love for the child, she is not physically able to manage a four-year-old child. The court acknowledged plaintiff's allegation that defendant's apartment was unsanitary, but noted that plaintiff did not present a witness to support that assertion and that defendant presented a letter from her landlord indicating that her apartment is well maintained.

Plaintiff appears to argue that his home is preferable to defendant's home in part because he lives in a house and defendant lives in an apartment. Plaintiff fails to explain, however, why the difference in the type of dwelling is relevant. There is nothing unique to four walls and a roof that makes a house a more stable and satisfactory environment than an apartment. Further, when questioned how she would respond if a fire occurred at plaintiff's home in the middle of the night while plaintiff was at work, plaintiff's mother testified that she would awaken the child and could drag him off his bed if necessary. Thus, the record supports the court's concern regarding plaintiff's mother's physical ability to care for the child. The court's findings regarding factor (d) did not clearly preponderate in the opposite direction.

With respect to factor (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e), the trial court determined that this factor favored neither party. The court expressed concern that if plaintiff and his girlfriend of 16 months decide to marry, "that will be disruptive to [the child] and will affect the family unit." The court also expressed concern that defendant's boyfriend, Josh Chaffee, did not "feel his relationship with [defendant] has progressed to the point where he should be a factor in the trial." The court noted that Chaffee "expressed a lack of commitment to [defendant] which could affect [the child]." It is unclear why plaintiff's commitment and Chaffee's lack of commitment equally concerned the court. In any event, our Supreme Court has held that a trial court's conclusion that favor (e) favored neither parent was not against the great weight of the evidence where each parent's long-term plans were uncertain. See *Ireland v Smith*, 451 Mich 457, 465-466; 547 NW2d 686 (1996). Accordingly, the trial court's findings regarding factor (e) were not against the great weight of the evidence.

We next address factor (h),[1] which concerns "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court determined that this factor favored defendant. The court focused on an incident that occurred at Sacred Heart preschool, which the child attended during plaintiff's parenting time. The incident involved the child and two other students at the school. The court noted plaintiff's testimony that the incident "involved hugging and did not constitute bullying" but that plaintiff could not "remember the details" and "made no formal inquiry of the school." The court further noted that plaintiff did not speak with the child's teachers when the incident occurred and did so only after defendant urged him to contact the school for more details about the incident. The court acknowledged that defendant enrolled the child in a few different preschools, "but eventually he ended up at St. Joe's" based on defendant's determination that the child "cannot handle kids that are not nice to him" and "[h]e is behind in his fine motor skills." The court recited defendant's testimony that "St. Joe's is more in tune with [the child's] needs than Sacred Heart," that a teacher advised defendant that the child is behind and is not ready for kindergarten, and that the teacher suggested a junior kindergarten program, which is available at St. Joe's.

Plaintiff argues that the court unduly focused on the alleged "bullying" incident, and failed to appreciate the manner in which plaintiff addressed the matter with the child. The trial court's findings make it clear that the court believed that defendant viewed the matter more seriously than did plaintiff. The court also indicated that plaintiff never communicated with defendant the results of his inquiry with the school regarding the incident. Defendant was not shown a letter from the school regarding the incident until the time of trial.

Plaintiff also argues that he and defendant disagree regarding whether the child is ready for kindergarten. Plaintiff contends that defendant does not believe that the child is ready for kindergarten because he is behind in his fine motor skills. Plaintiff, on the other hand, believes that the child should attend kindergarten and continue to work on and improve his fine motor skills. Plaintiff argues that the trial court "merely believed one party over the other without any evidence in support of the same." Plaintiff fails to acknowledge that defendant presented evidence in support of her opinion. She presented evidence that one of the child's teachers informed her that the child is behind and is not ready for kindergarten. The teacher recommended a junior kindergarten program. Thus, plaintiff's argument that the trial court's determination was not based on the evidence lacks merit.

Plaintiff also argues that while he carefully selected Sacred Hearth after extensive research, there was no evidence that defendant researched available schools and St. Joe's was the third preschool at which she enrolled the child. Plaintiff contends that defendant's and the trial court's opinions about Sacred Heart were based on one isolated incident between the child and two other students. Nevertheless, plaintiff has failed to demonstrate that the trial court's findings regarding factor (h) contravened the great weight of the evidence.

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[1] Plaintiff does not contest the trial court's determination that factor (f), "[t]he moral fitness of the parties involved," MCL 722.23(f), and factor (g), "[t]he mental and physical health of the parties involved," MCL 722.23(g), favored neither party.

Factor (j)[2] 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). The trial court determined that this factor favored neither parent. Plaintiff argues that this factor favored him because he presented evidence of his attempts to communicate with defendant. Although the trial court acknowledged that evidence, the court also noted defendant's testimony that she believed that plaintiff's examples of his attempts to communicate were motivated by the custody trial and not a genuine desire to communicate. Thus, the trial court's conclusion that this factor favored neither parent was not against the great weight of the evidence.

Factor (l),[3] the "catch-all" provision, concerns, "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(*l*); *McIntosh v McIntosh*, 282 Mich App 471, 482; 768 NW2d 325 (2009). Although the trial court did not explicitly state that it weighed this factor in defendant's favor, it appears from the court's reasoning that it did so. The court indicated that it questioned plaintiff's credibility and candor for a variety of reasons. The court expressed concern that defendant did not learn about the letter from Sacred Heart regarding the alleged "bullying" incident or the seriousness of plaintiff's relationship with his girlfriend until the trial. The court stated that it credited defendant's assertion that plaintiff never evidenced a willingness to communicate with her before the issue of where the child would attend kindergarten arose. The court noted that defendant, even though she was unrepresented at the trial, was able to establish that plaintiff's more accommodating weekend work schedule had come about less than two weeks before the trial. Further, the court questioned plaintiff's credibility based on his attempt to "paint a picture" of his mother as a "spry 72-year old woman who works out regularly and can easily handle the challenges of a 4 year old child." The court stated that it did not find such a representation to be accurate. Thus, in analyzing factor (*l*), the court discussed its concerns regarding plaintiff's credibility and forthrightness. "This Court will defer to the trial court's credibility determinations . . . ." *Berger*

[2] Plaintiff does not present any argument regarding factor (i), "[t]he reasonable preference of the child . . . ." MCL 722.23(i). The trial court stated in its opinion that the child was only four years old, and it did not interview the child.

[3] Plaintiff does not offer any argument regarding factor (k), "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). Plaintiff acknowledges that neither party has made an allegation involving domestic violence, and the trial court determined that this factor favored neither party.

v Berger, 277 Mich App 700, 705; 747 NW2d 336 (2008). Further, the trial court's factual determinations with respect to factor (*l*) were not against the great weight of the evidence.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto