

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA REGAN YOUNG,
Plaintiff-Appellee,

UNPUBLISHED
March 11, 2014

v

No. 318036
Ingham Circuit Court
Family Division
LC No. 12-002517-DS

CHRISTOPHER JOHN RIGGS,
Defendant-Appellant.

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

In this child-custody case, defendant appeals as of right from the order of the trial court denying his motion for primary physical custody of the parties' minor son. We affirm.

The parties started dating in 2010. Although they lived together for a time, the parties never married. They had one child born during the relationship, and, initially, the parties were able to exercise custody and parenting time without the involvement of the courts. That changed when plaintiff sought court-ordered child support. Defendant counter-claimed, requesting primary physical custody of the child. The hearing referee recommended denying defendant's motion. After a de novo evidentiary hearing at which the parties testified, the court adopted the referee's recommendation. Defendant now appeals, arguing that the court erred in weighing the statutory best-interests factors contained in MCL 722.23.

“In custody cases, all orders and judgments by the trial court shall be affirmed 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.’” *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009), quoting MCL 722.28. “The court’s factual findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction.” *In re AP*, 283 Mich App 574, 590; 770 NW2d 403 (2009).

Defendant first argues that because there was no custodial environment established with plaintiff, he should only have had to prove by a preponderance of the evidence that the proposed change in custody was in the child's best interests. However, this issue was waived below when defendant acknowledged the existence of an established custodial environment that differed from the environment he sought and also acknowledged the heightened standard of review, i.e., clear and convincing evidence. See *The Cadle Co v City of Kentwood*, 285 Mich App 240, 254-255;

776 NW2d 145 (2009). “A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error.” *Id.*

The best interests of the child control custody disputes between parents. MCL 722.25(1). A court cannot modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment unless presented with clear and convincing evidence that the proposed changes are in the child’s best interests. MCL 722.27(1)(c). “To determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in MCL 722.23(a)-(l) applying the proper burden of proof.”¹ *Foskett v*

¹ The factors are:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The 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.
- (c) 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.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) 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.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Foskett, 247 Mich App 1, 9; 634 NW2d 363 (2001). “A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances.” *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). “This Court will defer to the trial court’s credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors.” *Rains v Rains*, 301 Mich App 313, 329; 836 NW2d 709 (2013) (internal citation and quotation marks omitted). See also *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

Defendant argues that the great weight of the evidence does not support the trial court’s finding regarding MCL 722.23(c) (capacity and disposition of the parties involved to provide the children with food, clothing, other material needs, and medical or remedial care). The trial court weighed this factor equally, but defendant claims that it should have been weighed in his favor. The trial court acknowledged the difference in the parties’ financial situations, but nevertheless found that plaintiff could support the child through public assistance.

There was testimony that defendant had been working as a mechanic for 16 years and was earning \$21 an hour at the time of the de novo hearing. There was also testimony that in addition to food stamps, public cash assistance and medical assistance, plaintiff received assistance from her mother and from defendant. Defendant has also been ordered to pay child support for the child. Although defendant seems to be in a more financially stable circumstance, we cannot conclude that the court’s finding regarding factor (c) “clearly preponderates in the opposite direction,” given the evidence of resources available to plaintiff. *In re AP*, 283 Mich App at 590.

Defendant argues that the great weight of the evidence does not support the trial court’s finding concerning MCL 722.23(d) (length of time the child has lived in a stable, satisfactory environment and desirability of maintaining continuity). The trial court weighed this factor equally, but defendant claims it should have been weighed in his favor because plaintiff’s mother’s home, where plaintiff was living, was unstable and unsatisfactory. Specifically, he asserts that plaintiff’s mother abuses prescription drugs and that plaintiff’s sister and her boyfriend, who he asserts also live in the home, also abuse drugs. Defendant also asserts that plaintiff’s mother evicted plaintiff and that as a result plaintiff and the children came to live with him.

Although plaintiff was living with her mother at the time of the referee hearing, she had been previously evicted from the home and defendant allowed her and her children to move in with him. Plaintiff explained that her mother told her to leave because she and the children caused “drama” at her house. Despite testifying four months earlier that she planned on staying at her mother’s home for only two months, it appears that plaintiff was still living with her mother at the time of the de novo hearing, and it could be argued that “drama” might occur again.

(1) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

However, contrary to defendant's concerns, plaintiff denied his claim that her mother abuses prescription drugs. Further, she testified that plaintiff's sister and the sister's boyfriend no longer lived with plaintiff's mother. She also testified that the father of plaintiff's then-unborn child would not be allowed to be alone with her children, demonstrating a willingness to provide a stable environment.² Deferring to the credibility determinations made below, the court's finding does not "clearly preponderate in the opposite direction." *In re AP*, 283 Mich App at 590.

Defendant argues that the great weight of the evidence does not support the trial court's finding concerning MCL 722.23(g) (mental and physical health of the parties involved). The trial court weighed this factor equally between the parties. Defendant argues that plaintiff has severe mental and physical issues, including depression, scoliosis, uterine fibroids, and cysts on her ovaries, causing frequent severe pain that impede her ability to lift or carry the child. He believes this factor should weigh heavily in his favor.

There was testimony that plaintiff sometimes could not lift the child and other times she could not get out of bed. Noting that plaintiff was "ambulatory" and believing that her inability to pick up the child was due to her pregnancy, the court reasoned that her physical conditions were not the "sort that would cause a parent to forfeit custody of their child." The trial court also concluded that plaintiff "does seem a little depressed, but the testimony is again he said, she said. There's no proof one way or the other." Plaintiff testified that she has not "been depressed in a while." She also stated that she had "been talking to a counselor," presumably about the issue. At the referee hearing, she stated that she had talked to her doctor "a couple of years ago" about her depression and that her doctor put her on medication that did not seem to help. She also told defendant at one point that she thought she had some sort of bipolar disorder.

We understand the court's finding that "[t]here's no proof one way or the other" to support a conclusion regarding whether plaintiff is currently experiencing depressive episodes. The court's finding is necessarily based on a credibility determination, which we will not second-guess. Indeed, plaintiff testified that she had not been depressed for some time. Further, plaintiff's reference to seeing a counselor indicates that she has sought treatment for her condition, which has apparently been successful in helping her control her symptoms. The trial court's finding was not against the great weight of the evidence.

Defendant argues that the great weight of the evidence does not support the trial court's finding concerning MCL 722.23(j) (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 party). Defendant argues that the trial court weighed this factor in favor of plaintiff. This argument fails because it is not consistent with the court's findings. The court stated that it was weighing the factor equally, finding that "[b]oth parties seem to have an appreciation of the necessity of the other parent in this child's life."

² There had been violence issues with the father of this child.

Defendant argues that the great weight of the evidence does not support the trial court's finding concerning MCL 722.23(k) (domestic violence). The trial court weighed this factor slightly in defendant's favor. Defendant argues that it should have been weighed more heavily in his favor because plaintiff admitted that her current boyfriend put her in the hospital. Plaintiff acknowledged the abuse, but denied that she was still with the boyfriend. The court found that even though there had been domestic violence, plaintiff did not "invite" it into her life, did not live with the abuser, and had severed her relationship with him. Plaintiff testified that she would not leave her children alone with him. Accordingly, the trial court's finding was not against the great weight of the evidence.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter