

STATE OF MICHIGAN
COURT OF APPEALS

JENNA LEE DUNCAN,

Plaintiff-Appellee,

v

JOHN TERRY BOOTH,

Defendant-Appellant.

UNPUBLISHED

June 15, 2017

No. 336364

Mackinac Circuit Court

Family Division

LC No. 16-007925-DP

Before: GADOLA, P.J., TALBOT, C.J., and GLEICHER, J.

PER CURIAM.

Defendant, John Terry Booth, appeals as of right an order to pay child support. On appeal, however, he challenges an earlier order granting plaintiff, Jenna Lee Duncan, primary physical custody of the parties' minor child.¹ For the reasons set forth in this opinion, we affirm.

I. BACKGROUND FACTS

The parties dated for approximately two years, but ended their relationship after plaintiff became pregnant with the parties' child. When the child was approximately four months old, defendant moved for primary physical custody. At a hearing before a referee, testimony established that defendant was not present at the child's birth because plaintiff denied him access to the delivery room. He was then physically escorted out of the hospital. Testimony also

¹ The child support order was the first order appealable as of right in this case because it resolved the last pending claim of the parties. See MCR 7.202(6)(a)(i). Defendant attempted to file an appeal as of right from the trial court's custody order, but this Court denied his appeal because the custody order left the issue of child support unresolved and was not a "postjudgment order affecting the custody of a minor" for purposes of MCR 7.202(6)(a)(iii) because it reflected the trial court's initial resolution of the custody issue. See *Duncan v Booth*, unpublished order of the Court of Appeals, entered December 21, 2016 (Docket No. 336118). Defendant may, however, permissibly challenge the custody order as part of this appeal because " 'a party claiming an appeal [as] of right from a final order is free to raise issues on appeal related to prior orders.' " *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009) (citation omitted).

established that plaintiff was living with her grandmother, she had cared for the child without any material support from defendant since the child's birth, and she worked 32 to 40 hours each week as a cashier at a grocery store. Defendant testified that he asked plaintiff to see the child, but plaintiff either refused or ignored his requests. Plaintiff claimed that defendant stalked her by following her car after she left work and driving by her home. She further testified that defendant came into the grocery store where she worked to buy lunch every day. According to defendant, the grocery store was the only convenient place to purchase lunch.

The parties agreed that they were involved in an altercation one night after both of them had been drinking. Plaintiff testified that defendant pulled her out of her car, assaulted her, verbally accosted her, and broke her finger. According to defendant, he approached plaintiff and her friend to inquire about the child, at which point plaintiff's friend "jumped" him and plaintiff began repeatedly hitting him. Defendant asserted that, on a separate occasion, plaintiff bit him, tried to hit him, and damaged his property.

At the hearing, it was revealed that defendant also had an 11-year-old daughter from a previous relationship. The girl's mother testified that defendant and his daughter did not share a strong bond. She explained that her daughter spent one or two weekends with defendant each month, but defendant did not exercise any summer parenting time with his daughter.

Following the hearing, the referee recommended that the parties share joint legal and physical custody of the child. Plaintiff objected to the referee's recommendation and the trial court held a de novo hearing in November 2016. At the hearing, plaintiff provided evidence that defendant previously violated a personal protection order she obtained against him. She testified that, since the last hearing, defendant continued to come into her workplace. One of plaintiff's coworkers testified that the night before the hearing, defendant came into the grocery store then left and drove across the street to a Family Dollar while she and plaintiff closed the store. She testified that similar drive-by occurrences had happened "a good dozen . . . if not more" times.

Plaintiff testified that she had been the child's primary caregiver, and that since the last hearing, she had given defendant an "open window" to see the child. Plaintiff said defendant exercised seven visits, but he brought the child back after only an hour during four of the visits, once because the child was being fussy. Defendant testified that he was expecting a child with another woman. He explained that the woman had two other children, and that she and her children were in the process of moving in with him. When asked where the children would sleep if he was also caring for the parties' child, defendant stated that he would either have to get another house or build an addition to accommodate all of the children. Following the hearing, the trial court issued an opinion and order granting plaintiff primary physical custody of the parties' child.

II. STANDARDS OF REVIEW

On appeal, defendant argues that the trial court erred by concluding that it was in the child's best interests to grant plaintiff primary physical custody. We review a trial court's factual findings as they relate to the best-interest factors in MCL 722.23 under the great weight of the evidence standard. *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014); MCL 722.28. Under the great weight of the evidence standard, we defer to the trial court's factual findings

unless the findings clearly preponderate in the opposite direction. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). We review a trial court's discretionary rulings, including an ultimate award of custody, for an abuse of discretion. *Diez*, 307 Mich App at 389. "An abuse of discretion occurs when a court's decision results in an outcome that falls outside the range of reasonable and principled outcomes." *Id.* (quotation marks and citation omitted). Finally, we review questions of law in custody cases for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). A trial court necessarily commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.*

III. DISCUSSION

Under the Child Custody Act, MCL 722.21 *et seq.*, "a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The twelve factors are as follows:

(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. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

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

On appeal, defendant challenges the trial court's findings with respect to factors (a), (b), (c), (d), and (k). The trial court found that these five factors favored plaintiff, that factor (j) favored defendant, and that the remaining factors were neutral. The referee concluded that the child did not yet have an established custodial environment, and the trial court accepted this determination, explaining that plaintiff did not object to the referee's recommendation on this issue. "If no established custodial environment exists, custody is determined upon a showing by a preponderance of the evidence that a particular placement is in the child's best interests." *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993).

The trial court found that factor (a), the "love, affection, and other emotional ties," MCL 722.23(a), favored plaintiff. The court explained that the child had resided with plaintiff since birth and that defendant had been given limited parenting time, which prevented him from establishing an emotional bond with the child. Plaintiff testified that she had a strong bond with the child, and defendant's mother testified that she also observed a bond between plaintiff and the child. Plaintiff also testified that she cared for the child without help from defendant. According to defendant, he had spent little time with the child because plaintiff restricted his access. However, following the initial hearing, plaintiff testified that she gave defendant an "open window" to see the child, but during four of the seven occasions defendant exercised visitation, he spent only an hour with the child. Given the limited amount of time defendant spent with the child, the trial court's findings regarding factor (a) were not against the great weight of the evidence.

The trial court found that factor (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," MCL 722.23(b), favored plaintiff. The trial court found that plaintiff provided love and guidance and was raising the child in the Presbyterian Church, and that defendant's treatment of his older daughter weighed in plaintiff's favor. Plaintiff stated that she wanted to raise the child in the Presbyterian Church and attended church every week, and defendant supported the child being raised in the Presbyterian Church. Regarding love and guidance, defendant asserts that he asked to see the child and wanted to split parenting time equally. However, "[e]vidence of how a parent treats one child is evidence of how he or she may treat the other children." *In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011). The evidence established that defendant spent one or two weekends each month with his older daughter, did not exercise summer parenting time, and did not have a strong bond with his daughter as a result. Given plaintiff's bond with the child, the lack of time defendant spent with his other daughter, particularly his failure to exercise summer parenting time, and the fact that plaintiff demonstrated that she would continue to raise the child in the Presbyterian Church, the trial court's findings regarding factor (b) were not against the great weight of the evidence.

The trial court found that factor (c), the "capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care," MCL 722.23(c),

avored plaintiff because she had been providing for the child without financial assistance from defendant and in light of new evidence, which was not available to the referee, that defendant was expecting another child for whom he would need to provide care. Plaintiff testified that she worked 32 to 40 hours per week and had been providing for the child without assistance from defendant. Defendant testified that he worked more than 40 hours each week, but also explained that he was expecting another child and that his girlfriend and her two children would be moving in with him. Given plaintiff's demonstrated ability to provide for the child, and the fact that defendant would need to provide for another child in the near future, the trial court's findings regarding factor (c) were not against the great weight of the evidence.

The trial court found that factor (d), the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), favored plaintiff because the child had resided with plaintiff since birth and defendant's living situation was uncertain, given that he testified he might have to move in order to accommodate his new girlfriend and her two children, along with an expected child. Regarding defendant's relationship with his girlfriend, the trial court also noted that it was "unknown how long this relationship has been going on or the stability of the same." Given that the child has lived her entire life, although short, with plaintiff and the uncertainty of defendant's living situation, the trial court's findings regarding factor (d) were not against the great weight of the evidence.

The trial court found that factor (k), domestic violence, MCL 722.23(k), favored plaintiff because defendant violated a personal protection order and continued to enter plaintiff's workplace "on a daily basis." Both parties testified that they were involved in an altercation one night at a marina after both had been drinking. Although the accounts of the fight differ, it is clear that plaintiff struck defendant at some point. According to plaintiff, defendant broke her finger by pulling her from her car. Defendant also testified that plaintiff bit him on one occasion and assaulted him on several other occasions. Both parties obtained personal protection orders against each other, and defendant was convicted of violating plaintiff's order. Defendant's mother testified that he has a temper. Further, defendant did not dispute that he entered plaintiff's workplace on a daily basis to purchase lunch and groceries. Plaintiff testified that defendant often drove by her home and workplace. A coworker confirmed her testimony. The trial court apparently discounted some of the domestic violence evidence. However, it was undisputed that defendant violated a personal protection order plaintiff obtained against him, he continued to enter plaintiff's workplace, and he followed her and drove by her home and workplace on several occasions. Under the circumstances, the trial court's findings regarding factor (k) were not against the great weight of the evidence.

In sum, the trial court did not err by finding that five of the statutory best-interest factors favored plaintiff. The only remaining factor favoring either party was factor (j), the willingness to foster a parent-child relationship between the child and other parent, MCL 722.23(j), which the trial court found favored defendant. Despite plaintiff's initial denial of parenting time to defendant, following the first hearing, she gave defendant an open opportunity to see the child. The evidence established that plaintiff created a stable environment for the child by providing love, affection, and for the child's material needs since birth. At the time of the de novo hearing, defendant was expecting another child, his future living arrangement was uncertain, and testimony established that he had a weak bond with the parties' child, as well as with his older daughter. Plaintiff also introduced evidence that defendant came into her workplace nearly every

day and “stalked” her. Considering this evidence, the trial court did not abuse its discretion by awarding plaintiff primary physical custody of the parties’ minor child.

Affirmed.

/s/ Michael F. Gadola
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher