# STATE OF MICHIGAN

# COURT OF APPEALS

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| CHERYL LYNN-HARRIS SAMBORSKI,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>June 19, 2018 |
| v | No. 341524<br>Washtenaw Circuit Court |
| STEVEN RICHARD SAMBORSKI,<br><br>Defendant-Appellee. | LC No. 2013-002662-DM |

Before: CAMERON, P.J., and METER and BORRELLO, JJ.

PER CURIAM.

In this parenting-time dispute, plaintiff appeals as of right the trial court's order allocating to defendant additional parenting time with the parties' minor children. We affirm.

The parties married in September 2005 and had two children during the marriage. The trial court entered a consent judgment of divorce in May 2014. The judgment gave the parties joint legal and physical custody of the children and provided that defendant would have them for four overnights every two weeks, along with additional parenting time on certain dates and during certain holidays and vacations.

The parties had problems making joint decisions regarding the children and stipulated to the appointment of a parenting coordinator in February 2015. The parenting coordinator resolved several disputes, but plaintiff disagreed with the recommendations issued by the parenting coordinator in December 2016.

In January 2017, defendant moved to enforce the parenting coordinator's third set of recommendations and to modify parenting time. He alleged, in relevant part, that plaintiff terminated the services of the parenting coordinator after she refused to follow the coordinator's recommendation for family counseling. He indicated that plaintiff had created a "high conflict environment" and that the children were exhibiting signs of stress as a result. He further alleged that plaintiff interfered with his parenting time and was not facilitating a close and healthy relationship between him and the children. He argued that the problems since the entry of the last custody and parenting-time order amounted to a change in circumstances or proper cause that warranted revising the parenting-time schedule.

The trial court apparently determined that defendant had established a change of circumstances that warranted revisiting parenting time and held the first day of its evidentiary hearing concerning parenting time in June 2017. At the close of proofs on the first day, the trial court entered an interim, temporary order giving defendant equal parenting time pending completion of the evidentiary hearing.[1]

The trial court completed the evidentiary hearing in September 2017 and issued its opinion and order in December 2017. The trial court concluded that defendant had proved by a preponderance of the evidence that it was in the children's best interests to modify parenting time. It adopted the interim parenting-time schedule as the permanent order of the court. It also addressed daycare and holidays, ordered family therapy, and addressed other miscellaneous issues.

In child-custody disputes, this Court reviews the trial court's factual findings by examining whether the findings are against the great weight of the evidence. *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). This Court reviews a trial court's discretionary rulings in a custody dispute for a palpable abuse of discretion. *Id*. at 877; MCL 722.28. An abuse of discretion in this context "exists when the trial court's 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 v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). This Court reviews de novo the trial court's application of the law to the facts. See *Kaeb v Kaeb*, 309 Mich App 556, 564; 873 NW2d 319 (2015).

Plaintiff first argues that the trial court erred in various ways by entering the interim order governing parenting time. A trial court's clear legal error in entering a temporary order does not by itself require reversal of the final order if the trial court later conducts a hearing and properly makes the required findings and determinations. See *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991). In such a case, the inquiry is whether the trial court erred when it entered its final order. See, generally, *id.* at 534-538. Although the interim order had the effect of providing defendant with additional parenting time during the period at issue, because the applicable period has since passed, the dispute over the propriety of the order has become moot. See, e.g., *Stern v Stern*, 327 Mich 531, 534; 42 NW2d 737 (1950); see also *Crampton v Crampton*, 178 Mich App 362, 363; 443 NW2d 419 (1989) (finding that a claim that an order was entered in error became moot when the order ceased to be in effect). On this record, we cannot fashion a remedy for the error, and there is no indication that future errors of this nature will evade appellate review. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 659-660; 854 NW2d 489 (2014). Moreover, contrary to plaintiff's contention on appeal, there is no evidence that the trial court's entry of the interim order—even if erroneous—prejudiced the hearing that led to the final order. For these reasons, we decline to consider these claims of error. See *Stern*, 327 Mich at 534.

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[1] Plaintiff attempted to appeal the trial court's temporary order, but this Court denied leave to appeal. See *Samborski v Samborski*, unpublished order of the Court of Appeals, entered September 1, 2017 (Docket No. 339187).

Plaintiff contends that the trial court applied an improper burden of proof in changing parenting time.[2] In making this argument, she first asserts that when the proper definition of "established custodial environment" is applied, she was clearly the only parent with whom the children had an established custodial environment. She does not, however, discuss the evidence tending to support the trial court's explicit findings that the children had an established custodial environment with both parents and that this environment predated even the interim parenting-time order.[3] By failing to adequately address the evidence and the trial court's findings, plaintiff has abandoned her claim of error concerning the trial court's finding of the established custodial environment. See *Berger*, 277 Mich App at 706, 712 ("[a] party abandons a claim when it fails to make a meaningful argument in support of its position"). Moreover, there was no evidence that the change in the number of overnights (effectuated initially in the interim order and later in the order being appealed) would so alter the children's relationship with plaintiff that it would cause them to no longer look to her for discipline, guidance, life necessities, or parental comfort. See *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010). Thus, there was no evidence tending to show that the proposed change in parenting time would actually alter the children's established custodial environment. See *Rains v Rains*, 301 Mich App 313, 323-324; 836 NW2d 709 (2013). As such, the trial court was not required to apply a "clear and convincing evidence" burden of proof. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (stating that an established custodial environment cannot be changed without clear and convincing evidence). No error requiring reversal occurred with respect to the burden of proof.

Plaintiff next argues that the trial court's findings regarding the best-interest factors were contrary to the great weight of the evidence. In reviewing whether it was in the best interests of the children to alter parenting time, the trial court considered each of the factors listed in MCL 722.23. See *Shade v Wright*, 291 Mich App 17, 31-32; 805 NW2d 1 (2010) (stating that a trial court may consider, but is not always required to consider, each of the best-interests factors in MCL 722.23 when considering a change to parenting time). The trial court found that the majority of the factors either did not apply, and for that reason warranted no weight, or favored both parties equally. The trial court found that one factor—factor (j)—favored defendant.

Plaintiff argues that the trial court should have found that factors (a), (b), and (c) favored her. Factor (a) involves the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). Factor (b) addresses 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."[4] MCL 722.23(b).

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[2] Plaintiff acknowledges that she is *not* contesting that defendant established proper cause or a change in circumstances that warranted an evidentiary hearing to consider the change in parenting time.

[3] The court noted that defendant had been active in the children's lives since their birth. The court stated that there was "no doubt" that the children had an established custodial environment with both parents.

[4] We note that plaintiff mentions religion briefly in her discussion of this factor but does not provide any tenable argument related to religion, focusing instead on school and daycare.

Factor (c) applies to 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." MCL 722.23(c).

In challenging the trial court's findings regarding these factors, plaintiff argues that the evidence showed that defendant valued his personal time more than he did his time with the children and that he placed his financial concerns over the needs of his children. She maintains, for example, that he "traded" away his parenting time in the original judgment of divorce for a reduction in child support, and she faults him for relying on his new wife for much of the support that the children receive when in his care.

There was testimony that defendant participated in various social activities. He stated that he liked to hunt and golf and was part of a motorcycle club. He also conceded that he missed one school conference while away hunting, and there was testimony that his golf group met on Mondays, which conflicted with his parenting time on some occasions. However, the testimony did not necessarily establish that defendant's outside activities came at the expense of his children's welfare. To the contrary, defendant testified that he participated in numerous activities with the children and regularly provided them with emotional and physical support: he bathed them, fed them, read books with them, worked with them on math, kissed them, and hugged them. Defendant arranged for his new wife to attend the parent-teacher conference in his place when he was hunting and followed up with the teacher upon his return, and there was testimony that he regularly participated in school activities with the children. In addition, there was testimony that defendant had always wanted equal parenting time but had acquiesced to the original parenting-time schedule because his lawyer had advised him that it was a "good deal[.]"

Although the trial "suggest[ed]" that defendant "execute more activities where his children are a priority," it did not in fact find that defendant's personal activities unduly interfered with his ability to parent. The court stated that it was not "fault[ing]" defendant for playing in a golf league during his parenting time. In addition, the trial court evidently did not find credible plaintiff's claim that defendant placed money before his children's welfare. It was for the trial court to assess the weight and credibility of the conflicting testimony, and it resolved the disputes in defendant's favor. See *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 858 (2008). Notably, defendant and his new wife have a home on 8½ acres and the children have their own bedrooms, as well as toys and ponies. Defendant also testified that he enrolled the children in extracurricular activities. While it is true that there was testimony from which the trial court could have concluded that defendant's wife made it possible for him to provide a significant portion of the support that the children receive while in his care, that did not alter the fact that the children were well-cared-for when residing with him. The law does not require a parent to provide for his or her children solely from his or her own resources. Remarriage may improve a party's financial position and accordingly improve that party's ability to provide support. See, e.g., *Beverly v Beverly*, 112 Mich App 657, 662; 317 NW2d 213 (1981). The trial court also chose not to penalize defendant for electing to be a stay-at-home parent after he took disability retirement from the police force and for relying on his new spouse's income to do so. Again, this Court will defer to the trial court's assessment of the weight and credibility to be afforded the relevant testimony. *Wright*, 279 Mich App at 299.

There was, quite simply, ample evidence that defendant loved and cared for his children, MCL 722.23(a), that he had the capacity and disposition to give them love and guidance, MCL 722.23(b), and that he actually provided the children with the necessities of life, MCL 722.23(c). Consequently, the trial court's findings regarding these factors were not against the great weight of the evidence. See *Fletcher*, 447 Mich at 877-878.

Plaintiff next argues that the trial court erred when it found that factor (d), which involves the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), favored both parties equally. Specifically, she maintains that the trial court should not have considered the time that the children have spent with defendant because the children primarily lived with her. As such, in her view, the desirability of maintaining continuity in her home was the relevant inquiry.

Plaintiff cites no authority for the proposition that the trial court had to consider the stability and desirability of her home to the exclusion of the desirability and stability of the home environment provided by defendant, and the statute contains no such limitation. See MCL 722.23(d). The evidence showed that the children had alternately resided with both parents for a significant time and that their lives were stable and satisfactory in both homes. Further, the homes were relatively close together such that the proposed changes in parenting time would not interfere with the children's interactions with neighbors or school. Cf. *Berger*, 277 Mich App at 709. The trial court's finding with regard to factor (d) was not against the great weight of the evidence. See *Fletcher*, 447 Mich at 877-878.

Plaintiff next argues that the trial court erred when it found that the parties were equal with regard to moral fitness under factor (f). See MCL 722.23(f). She argues that the trial court should have weighed this factor against defendant because she did not engage in any wrongdoing during the marriage, whereas the evidence showed that defendant had an affair, that he was reprimanded at work, and that he filed for bankruptcy. The trial court specifically rejected each of these arguments and elected to give them "zero weight . . . ."

Defendant did not contest that he had an extramarital affair, had a reprimand at work, and filed for bankruptcy. He also admitted that his parents helped him during his bankruptcy and that his wife had made purchases in her own name that benefited him. Nevertheless, these events did not require the trial court to find that this factor favored plaintiff. As this Court has explained, factor (f) does not involve a determination of "who is the morally superior adult"; rather, the inquiry concerns the relative fitness of the parties to provide for their children, given the parties' moral disposition. *Berger*, 277 Mich App at 713. There was evidence that plaintiff was deeply hurt by defendant's infidelity and that she believed his handling of money implicated a lack of moral character. But there was no evidence that defendant's infidelity, money-handling, and bankruptcy or the course of his professional career implicated his fitness to parent the children. Cf. *id.* at 714 (stating that the particular facts of the affair at issue in that case demonstrated "poor judgment and lack of insight about the effect [the father's] conduct" had on everyone in the household). There was strong evidence that defendant was an active and supportive parent to the children. On this record, we cannot say that the trial court's decision to weigh this factor equally was contrary to the great weight of the evidence. See *Fletcher*, 447 Mich at 877-878.

Plaintiff maintains that the trial court should not have found that defendant was equal to her with regard to his physical health because it was undisputed that he suffered a hearing loss while in the Marines and had a permanent ankle injury from his service as a police officer. See MCL 722.23(g). However, as with factor (f), there was no evidence that defendant's hearing loss or ankle injury impaired his ability to parent. The trial court's finding was not contrary to the great weight of the evidence. See *Fletcher*, 447 Mich at 877-878.

Plaintiff next maintains that the trial court should have found that factor (h), which addresses the children's "home, school, and community record," MCL 722.23(h), favored her because the children have a good record, which automatically weighs against changing the current arrangement. Plaintiff cites no authority for the proposition that a trial court must weigh this factor against changing the status quo when children have a good record at school. Also, there was no evidence tending to suggest that the proposed change in parenting time would benefit or harm the children's prospects for continuing to develop at school. On this record, it cannot be said that the trial court's finding regarding factor (h) was contrary to the great weight of the evidence. See *Fletcher*, 447 Mich at 877-878.

Finally, plaintiff challenges the trial court's finding with regard to factor (j), which involves 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." MCL 722.23(j). Specifically, she maintains that the trial court in effect improperly punished her for using daycare even though she had valid reasons for insisting on the continued use of daycare. She further argues that the trial court ignored the evidence that defendant was the parent who refused to cooperate and who interfered with her relationship with the children.

The trial court noted that the parties had litigated their parenting decisions since the entry of the consent judgment and concluded that there was "acrimony" that "fuel[ed] the dysfunction" and "stymie[d] co-parenting." The court further stated that it was "mystified" about why the parties were unable to come to an amicable agreement about changes to parenting time given the family changes since the last order and the close proximity of the parties' homes and lives. The court found that plaintiff would rather "have her children in [daycare] than have them spend time with their father." The court stated that this spoke "volumes" about the value plaintiff placed on defendant as a father. The court also noted the disparity between the parties' assessment of the best-interests factors; it explained that plaintiff argued that every factor favored her except two, and defendant argued that every factor was equal except two. The court found that the evidence showed that plaintiff did "not want to promote or facilitate a relationship" between defendant and the children. The court stated that plaintiff appeared to hold "a grudge" against defendant for "indiscretions that occurred during the marriage." It felt that plaintiff had to put aside her "hard feelings" to allow the parties to co-parent the children.

The evidence showed that the parties repeatedly had to have the trial court or their parenting coordinator resolve parenting disputes. There was evidence that plaintiff refused to cooperate with defendant on parenting decisions and insisted on maintaining control over the children to the detriment of their relationship with defendant. The parenting coordinator's recommendations showed that plaintiff refused to consult with defendant on her parenting decisions and repeatedly objected to or interfered with his parenting decisions. The parenting coordinator eventually recommended family therapy because of the high conflict and because

there were concerns about whether the parties were encouraging a strong relationship between the children and the other parent.

There was also testimony that plaintiff refused to allow defendant to interact with the children at an event when the event occurred during her parenting time but was angered and combative when defendant interfered with her efforts to interact with the children at an event during his parenting time. There was also testimony that she insisted that the parties maintain entirely separate property for the children.

There was evidence that tended to suggest that plaintiff did not want to foster a healthy relationship between defendant and the children. Plaintiff admitted that she refused to give the dates and times for the children's swimming lessons to defendant when he asked for them. Plaintiff further admitted that she informed the parenting coordinator that she was going to hire a lawyer the moment that the parenting coordinator suggested that it might be in the children's best interests to have more parenting time with defendant. She also took the position that defendant's new wife should not attend the children's school conferences and that the school should not be able to provide his wife with information about the children's education. She also did not feel that it was appropriate for defendant to include his wife on their telephone calls about the children.

Although plaintiff asserts that the trial court unfairly punished her for refusing to compromise on the issue of daycare, the trial court merely cited her refusal as one example in support of its finding that she was not willing to facilitate and encourage a close and continuing parent-child relationship between the children and defendant. The trial court recognized that plaintiff portrayed herself as "an ultra-competent 'on-task' mother," but found that her testimony "did not ring entirely true" on some matters. Importantly, the court found that she was not acting in her children's best interests. Rather, she "wanted to maintain 100% control of the children's schedules at any cost" and she refused to compromise on parenting time "to punish defendant for his misdeeds." There was ample testimony and evidence to support the trial court's findings in this regard, and this Court will defer to the trial court's superior ability to assess the weight and credibility of the evidence. *Wright*, 279 Mich App at 299. The trial court's finding on factor (j) was not contrary to the great weight of the evidence. *Fletcher*, 447 Mich at 877-878.

Plaintiff has not shown that the trial court's findings were contrary to the great weight of the evidence, and she has not otherwise identified any errors warranting relief.

Affirmed.

/s/ Thomas C. Cameron
/s/ Patrick M. Meter
/s/ Stephen L. Borrello