STATE OF MICHIGAN

COURT OF APPEALS

REBECCA JOY FRANZEL,

Plaintiff-Appellant,

v

JOHN PAUL FRANZEL,

Defendant-Appellee.

UNPUBLISHED
May 16, 2019

No. 344648
Lapeer Circuit Court
LC No. 17-050767-DM

Before: JANSEN, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

In this highly acrimonious and lengthy divorce proceeding, the trial court awarded the parties joint custody with equal parenting time of their three children after a three-day trial. In doing so, the court overlooked its earlier ruling that the children's established custodial environment was primarily with their mother and therefore did not require father to establish proper cause or a change in circumstances warranting an alteration of the custodial arrangement. In considering the best-interest factors affecting child custody, the court also erroneously failed to consider the effect on the children of observing their father's acts of anger and violence toward women and the possibility their father might direct his aggression against his children in the future. Accordingly, we vacate the custody award and remand for further proceedings.

I. BACKGROUND

Rebecca and John Franzel separated after Rebecca summoned the police to the marital home on April 12, 2017. Rebecca asserted that John had meted out verbal and physical abuse against her for over a decade. These incidents were often witnessed or heard by the children. Shortly before their separation, the Franzels' oldest child, E1, intervened on his mother's behalf and John grabbed him by the neck and threw him on the couch. During the argument on April 12, John purportedly threw a laundry basket at Rebecca and slapped her on the arm, leaving a red mark.

After filing for divorce, Rebecca secured a personal protection order (PPO) against John and temporary sole physical custody of their children. John objected and the court conducted a three-day evidentiary hearing to consider the propriety of the PPO and to determine an

appropriate custody arrangement. At the conclusion of that hearing, the court replaced the PPO with a mutual restraining order. In relation to its custody order, the court found that Rebecca was "the primary custodian" and that the children "naturally look[ed] primarily to [her] for guidance, discipline, necessity of life and for parenting comfort." The court therefore awarded primary physical custody to Rebecca with alternating weekends and one midweek evening parenting time to John. The court ultimately reiterated, "Overall, the established custodial parent, the mother is what the Court is going to continue at this time."

In relation to the best interest factors of MCL 722.23, the court mostly found the parties equal. In relation to domestic violence, factor (k), the court noted, "There's domestic violence, constant arguing, traumatizing the children that is not in their best interests. That's why we're separating the parties." The court found mutuality in the situation, however. Despite that Rebecca provided evidence corroborating that John employed physical violence against her and John relied on his word alone to claim that Rebecca was the aggressor, the court found that the "constant yelling, fighting, pushing, shoving . . . appears, at a minimum, to be mutual." The court also found the claim that John abused E1 to be exaggerated as the couple's younger son, E2, told the counselor about it while E1 did not. Even so, the court warned John never to treat the children that way. And the court found that the parties "traumatized" the children with "the constant yelling, pushing, shoving, bickering that is mutual between the parties."

Trial did not occur for nearly a year. In the meantime, John filed several motions and tried to secure additional parenting time. At a September 11, 2017 hearing, the court impliedly acknowledged its earlier ruling on the children's custodial environment, inquiring what "the change of circumstance" was to alter the custody order. John disputed that any established custodial environment existed, but the court considered the issue no further. During this time, John accused the children's nanny of employing corporal punishment, causing her to quit. Rebecca was then forced to leave her job as a grocery store manager and take different employment for less money but with more traditional hours.

Two weeks before trial, Rebecca contacted Child Protective Services (CPS), asserting that E1 had bruises and scratches on his arms and face and accused John of causing them. A doctor determined that one of E1's bruises could have been caused by the mechanism described. However, E2 and the parties' young daughter, E3, denied that their father had harmed E1 and the matter was eventually dropped.

At the close of trial on April 20, 2018, the trial court suddenly changed position regarding the children's established custodial environment, stating, "I can't look at what's been going on in the interim to establish the established custodial environment, 'cause I guaranteed the parties I wasn't going to do that." The court then determined that the children had an established custodial environment with both parents. The court found the parties mostly equal on the best interest factors. The court found that factor (j) weighed in John's favor because Rebecca had not facilitated a close relationship between John and the children. Instead, Rebecca admittedly shut John out of decisions. The court found factor (k), domestic violence, the "most difficult." The court reiterated its belief that Rebecca had exaggerated her claims that John abused her and E1.

> But overall, the totality the Court finds the father more responsible on domestic violence, particularly in the presence of the children. There was a temper . . . . The parties were at odds and fighting a lot. Certainly if there's a lot of argument, it's a two-way fight. But there is testimony, corroborated through the children, which is sad, that there was physical violence. That's never acceptable.

The court posited that the separation of the parties would mean the domestic violence is over. And the court had not "heard that there is any continuing domestic violence regarding any new significant others."

The court ultimately awarded the parties equal parenting time with the children. Rebecca appeals that decision.

II. STANDARD OF REVIEW

Three different standards govern appellate review of a trial court's decision in a child-custody dispute. "We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014). A factual finding is against the great weight of the evidence if the evidence "clearly preponderate[s] in the opposite direction" such that the judgment is a miscarriage of justice. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (cleaned up).[1] A clear legal error occurs when the circuit court "incorrectly chooses, interprets, or applies the law . . . ." *Id.* at 881. "An abuse of discretion 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).

III. ESTABLISHED CUSTODIAL ENVIRONMENT

MCL 722.27(1)(a) provides that in a custody action, the court, "for the best interests of the child," may "[a]ward the custody of the child to 1 or more of the parties involved." Here, the court was required to make that decision very early on as Rebecca had secured a PPO and prevented John any contact with the children until the court made a ruling. At the close of the three-day evidentiary hearing regarding child custody and to set aside the PPO, the court determined that the children had an established custodial environment with their mother as the primary caregiver.[2] The court therefore awarded Rebecca primary custody with parenting time to John on alternating weekends and one weekday evening.

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[1] This opinion uses the new parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

[2] Pursuant to MCL 722.27(1)(c):

When a party seeks to modify a custody award in a way that will alter the child's established custodial environment, that party must "present clear and convincing evidence that it is in the best interest of the child" and must show either "proper cause" or a "change of circumstances." MCL 722.27(1)(c). This determination must be made at the outset; the absence of proper cause or a change in circumstances means that no hearing to reconsider custody will be held. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). The court committed clear legal error by bypassing this requirement and proceeding to reconsider custody at the divorce trial.

John contends that his request to modify custody and parenting time at trial did not impact the children's established custodial environment because the court promised that it would not treat its post-evidentiary hearing order as establishing the children's custodial environment. However, John does not direct us to a location in the extensive record where the court made such a guarantee. When the court made this statement at trial, it also did not indicate when any such promise had been made. To the contrary, the court made several earlier statements indicating that Rebecca provided the children's established custodial environment.

The "temporary" nature of the court's initial custody order does not change the situation in this case. "A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Berger*, 277 Mich App at 707. "[T]he focus is on the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). In any event, the court's initial custody order was not truly "temporary"; it was entered after a three-day hearing based on the testimony of several witnesses, including a counselor who had seen E1 and E2 twice and a CPS worker.

Altering the arrangement under which John had parenting time for only alternating weekends and one weekday evening to evenly shared time certainly changed the children's custodial environment. Accordingly, the trial court was required to first determine whether John asserted proper cause or showed a change in circumstances warranting review. The trial court did not consider that issue. We must therefore vacate that portion of the June 26, 2018 judgment of divorce affecting child custody and remand for further proceedings, beginning with a new determination of the children's established custodial environment and whether proper cause or a change in circumstances warrants altering that environment at that time. See *Vodvarka*, 259 Mich App at 514 (noting that there must be a change in circumstances since the last custody order to warrant revisiting the issue).

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

IV. DOMESTIC VIOLENCE

On remand, the trial court will be required essentially to start over the trial on child custody. The court will be required to "consider up-to-date information" in making its custody determination. *Fletcher*, 447 Mich at 889. For example, while this appeal was pending, John completed a psychological evaluation ordered by the court and the children's counseling was again interrupted, this time because John failed to pay his share of the cost.

Of greatest concern on remand is the court's earlier minimization of the effect of the domestic violence in the home upon the parties' children. The court incorrectly stated that the potential for domestic violence was over because the parties were separated and therefore factor (k) would no longer be a concern. The record is replete with examples of John's use of violence against others and his anger management issues. These issues predated the marriage, have continued since the divorce, and could occur again in the future. Before Rebecca and John were married, he was arrested for acts of violence against her and against his own father. Rebecca recanted her allegations, as victims in the cycle of domestic abuse often do.[3] Nothing legally came of the incident against John's father. While this case was pending, the children's daycare provider called the police because John refused to adhere to their policy of only releasing children to noncustodial parents at the time specified in a court order on file and caused a scene with his aunt. Shortly after the divorce judgment entered, John's girlfriend called 911 to report that John was having a "psychotic" episode and was beating on her doors and windows. Again, like many victims of domestic abuse, this woman did not pursue charges.

In any event, the correct focus is the effect on the children of witnessing any abuse. It is well documented that children that witness abuse in the home suffer long-lasting effects. Children who witness abuse may "react[] with antisocial behavior and psychiatric problems" or be more vulnerable to "develop[ing] either conduct or personality problems." Fields, *The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State*, 3 Cornell J L & Pub Pol'y 221, 226 (1994). Even if the children do not witness the abuse, "[a] chaotic environment in which the mother is injured and anxious, and the father is volatile and enraged disrupts the routine and nurture children need." *Id*. at 228. Moreover, "[m]en who abuse their wives frequently abuse their children, especially as the children grow older" and start to express independence. *Id*. at 222. There was evidence in this case that at least E1 was affected. He exhibited heightened aggression toward his siblings and his mother. This issue must be more fully addressed on remand.

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[3] See Bonomi, et al, *"Meet Me at the Hill Where We Used to Park": Interpersonal Processes Associated With Victim Recantation*, 73 Soc Sci & Med 1054 (2011) (stating that "a high proportion of victims recant and/or refuse prosecution efforts" in domestic violence cases, "as many as 80 percent").

We vacate that part of the judgment of divorce pertaining to child custody and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher