STATE OF MICHIGAN

COURT OF APPEALS

KATHIE ANN ADAMS,

Plaintiff-Appellee,

v

EVERETT CASEY YOUKER,

Defendant-Appellant.

UNPUBLISHED
April 30, 2020

No. 350999
Mecosta Circuit Court
LC No. 2014-22604-DP

Before: MARKEY, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

In this custody dispute, defendant appeals as of right the trial court's September 18, 2019, Order After Objection Hearing denying defendant's objections to the July 16, 2019 Referee Recommendation and Order changing custody, parenting time, and child support. We vacate and remand for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Though never married, the parties in this case share a son. On November 10, 2014, plaintiff filed a paternity complaint, claiming defendant as the child's father, and alleging that defendant was "of sufficient ability to provide support[.]" On November 14, 2014, the trial court ordered genetic testing, which determined defendant to be the minor child's biological father. A consent judgment of filiation was entered on January 8, 2015. The consent judgment of filiation provided that plaintiff would have sole physical custody of Mitchell, but the parties would share joint legal custody. Parenting time would be "as the parties agree." Initially, defendant exercised custody of the minor child on the weekends. However, when the minor child was approximately two years old, the parties agreed to a one week on, one week off schedule. Although never memorialized in a court order, the parties operated under this agreement for about three years.

On February 1, 2019, defendant filed a motion to transfer this case from Mecosta County to Grand Traverse County. Defendant asserted that neither plaintiff, defendant, nor the minor child had resided in Mecosta County for more than six months, and that defendant had resided in Grand Traverse County for more than six months. Plaintiff filed a response and countermotion, and argued that transferring the case to Grand Traverse County was only convenient for defendant, and

that it was not in the best interest of the minor child. Plaintiff went on to argue that she was the primary custodian of the minor child, and that she presently lives in Gratiot County. Indeed, plaintiff argued, "Gratiot County is the most convenient forum and a forum that will best serve the interests of the minor child."

Plaintiff also moved to modify parenting time and to determine a school district. As of September 2019, the minor child was slated to begin kindergarten, and the parties' residences were "too far apart to continue the alternating week schedule." Plaintiff sought to enroll the minor child in Ithaca Public Schools, and asked the trial court order that the minor child will attend Ithaca Public Schools, to modify the parenting time agreement to "afford the parties every other week until the start of the 2019 school year[,]" and to "afford [d]efendant parenting time three weekends every month, alternating holidays, alternating breaks, and half of ever summer" once the school year began.

The parties appeared in front of the Friend of the Court Referee for a two-day hearing on both motions. The referee heard testimony from both parties, then determined that the minor child had an established custodial environment with each parent, and therefore the burden of proof to change custody and parenting time was clear and convincing evidence. The referee found that proper cause existed to change custody and parenting time because Mitchell was starting school. The referee then addressed the best interest factors enumerated under MCL 722.23, and found that both parties were equal under all factors, and went on to conclude:

> This is a close case, and I do believe that because of the history of this case, I'm going to go with the following order: The parties are to share joint legal and joint physical custody. I don't think that's really an issue. I think that's what they've been doing for the last two years. I think they can continue to at least have that designated, but, again, the parenting time has to change.
>
> I'm going to order that the parenting time does change, that father would have – I'm going to go with – grant mother's request, and father have each weekend except for the second full weekend of the month, and that the child attend school in Ithaca Schools starting in Kindergarten next year.
>
> There will be a holiday schedule, and there will be a summer schedule also. The parties are going to be alternating weeks during the summer; they'll continue that – that schedule.
>
> Christmas break and spring break will be designated in the – in the schedule.

The referee denied both transfer motions, and entered an order memorializing the new custody arrangement and parenting time schedule.

Defendant timely filed objections to the referee's recommendations and proposed order in the trial court. Defendant challenged the referee's findings that the parties were equal under MCL 722.23, and argued that the "evidence and testimony at trial did not demonstrate by clear and convincing evidence that it is in [the minor child's] best interests to reside primarily with Plaintiff Mother and attend school within the Ithaca school district." The trial court held a de novo review

hearing, but agreed with the referee and adopted the referee's findings, recommendation, and proposed order as its own. This appeal followed.

STANDARD OF REVIEW

In a child custody dispute, " 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Yachcik v Yachcik*, 319 Mich App 24, 31; 900 NW2d 113 (2017), quoting MCL 722.28. A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). Moreover, "[a] trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citation omitted). This Court reviewed the trial court's determination regarding a child's best interests for clear error. *In re Schadler*, 315 Mich App 406, 408; 890 NW2d 676 (2016). This Court also gives deference to the trial court's factual judgments and ability to make credibility assessments. *Moote v Moote*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 346527); slip op at 2-3.

A trial court's discretionary rulings, like child custody determinations, are reviewed for an abuse of discretion. *Corporan*, 282 Mich App at 605. In a child custody determination, an abuse of discretion occurs when "the result 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." *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014). This Court reviews questions of law for clear legal error. *McIntosh*, 282 Mich App at 474. A clear legal error occurs when the trial court incorrectly chooses, interprets, or applies the law. *Id.*

ANALYSIS

BEST INTEREST FACTORS

First, defendant argues that the trial court's findings that the parties were equal with respect to the best interest factors, MCL 722.23, was against the great weight of the evidence. Specifically, defendant challenges the trial court's findings with respect to Factor (b), Factor (d), Factor (e), and Factor (k). We disagree.

The trial court found, and the parties agree, that the minor child had an established custodial environment with each parent. Therefore, changing the custodial environment required a showing that by clear and convincing evidence, the modification would be in the minor child's best interests. *Foskett v Foskett*, 247 Mich App 1, 5-6; 634 NW2d 363 (2001). Indeed, custody disputes must be resolved in the child's best interests, as measured by the factors enumerated in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The best interest factors enumerated in MCL 722.23 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 a preference.

(j) The willingness and ability 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.

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

The trial court must consider these factors and explicitly state its findings and conclusions regarding each factor on the record; failure to do so constitutes reversible error. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). "Clear and convincing evidence" requires the evidence to be more persuasive than a mere preponderance. *In re Martin*, 450 Mich 204, 225-228; 538 NW2d 399 (1995).

Because defendant only challenges the trial court's findings with respect to Factor (b), Factor (d), Factor (e), and Factor (k), we only address those specific findings. In this case, the referee held a hearing on defendant's motion to transfer the case to Grand Traverse County and plaintiff's motion to transfer the case to Gratiot County, change parenting time, and determine whether the minor child would go to school. The referee made detailed findings on all of the best interest factors at the end of the hearing, and memorialized its findings in a recommendation and proposed order. Defendant filed timely objections, and the trial court held a de novo review hearing, where it generally agreed with the trial court's findings and adopted them as its own, supplementing the findings on the record.

Factor (b) considers the "capacity and disposition of the parties involved to give the children 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 trial court found the parties to be equal, specifically noting that

> the [r]eferee found that factor equal and I agree as well. I don't see that there's anything that shows that these parties both don't have the capacity and disposition to give love – affection, guidance – continuation of education for this young child.
>
> I also concur with the [r]eferee that this isn't – this alternating week schedule cannot work if the child is in school when the parties live so far apart. It wouldn't be practical. It wouldn't work.
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> * * *
>
> Both parties have employment. Both parties have the ability to provide for the child even if at the bare minimum nominally, that factor is found equal[.]

Both parties testified that they were employed and have adequate living arrangements, and neither party was religious. Defendant testified that he had enrolled the minor child in a daycare center that is akin to a preschool, and that the minor child had made friends and showed signs of readiness for kindergarten. Plaintiff testified that she had taken the minor child to kindergarten round-up in her school district, where two of her children already attended school. Both parties had intended on enrolling the minor child in their respective public school districts that upcoming fall. Both parties clearly intended to continue the minor child's education, and therefore the trial court's determination that the parties were equal with respect to Factor (b) was not against the great weight of the evidence.

Factor (d) considers the "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 found that both parties had provided the minor child with a stable environment, and thus the parties were equal. Defendant testified that he has lived on the same property since 2009, and currently he resides with his wife and stepson. The minor child has been staying with defendant on weekends since the minor child was an infant, and every other week for the last three years. Defendant testified that his family lived close by. Similarly, plaintiff testified that she presently lived in Ithaca near her family. Previously, plaintiff lived in Barryton for six years. The trial court acknowledged that plaintiff's move to Ithaca had been preempted by a failed relationship and a brief stay with plaintiff's ex-boyfriend in Evart, but categorized the move as a change in residence and not a symptom of an unstable environment. Moreover, plaintiff had lived in Ithaca for close to a year when these proceedings originated. The trial court's finding that the parties were equal regarding Factor (d) was not against the great weight of the evidence.

Factor (e) considers the "permanence, as a family unit, of existing or proposed custodial home or homes." MCL 722.23(e). Again, the trial court found the parties were equal. Defendant testified that he lives with his wife and stepson, who is two months younger than the minor child. Defendant's stepson and the minor child have a close relationship. Likewise, plaintiff has two other minor children of whom she has full legal and physical custody, and with whom the minor

child is close. The minor child also has a close relationship with and access to both his maternal and paternal grandparents. Thus, it was not against the great weight of the evidence for the trial court to find that the minor child had "permanence in either of the locations[.]"

Defendant urges this Court to follow *Mogle v Scriver*, 241 Mich App 192, 199-200; 614 NW2d 696 (2000), where this Court found Factor (e) favored mother because she was married and the minor child would grow up in a nuclear family. Defendant argues that his "marriage will continue to provide long term stability for the minor child, where plaintiff's single status has "moved on a number of occasions over the last several years, in large part due to her involvement in relationship[s] with partners and residing full or part-time in that home."

However, in *Mogle*, the minor child only had an established custodial relationship with mother. *Mogle*, 241 Mich App at 198. The minor child, who was born with special needs, had almost exclusively lived with mother for the first two years of her life. *Id.* Although father had recently stepped up and had begun providing for the minor child's case, the minor child "continued to spend the majority of her days and nights with" mother. *Id.* That is not the case here: the minor child in this case has an established custodial environment with both parents, and both environments, as discussed, are stable. Thus, defendant's reliance on *Mogle* is misplaced.

Finally, Factor (k) considers "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). Although there was testimony regarding two instances of domestic violence between plaintiff and her ex-boyfriend, the trial court found the parties to be equal, specifically finding "I'm certainly not going to penalize mom who acted appropriately and got out of a domestic violence situation by holding that factor against her. I need something on the record attributing fault to mom to do that and I don't have it. So that factor is also scored equally."

Plaintiff testified that in February 2018, her ex-boyfriend had pushed his way into her home, threw a watch that landed close to her daughter, and refused to leave. Plaintiff ended the relationship, but got back together with the ex-boyfriend after he sought counseling for anger management. In June 2018, a second incident occurred where plaintiff's ex-boyfriend pushed her against a wall and she fell to the ground. After that incident, plaintiff and her two other children left the home and plaintiff left the relationship. Plaintiff moved to Ithaca, and petitioned the trial court for a PPO against her ex-boyfriend. A year later, there was no evidence that plaintiff had continued the relationship, or that any other domestic violence incidents had occurred. With respect to defendant, there was no evidence of any domestic violence. Based on the foregoing, we conclude that it was not against the great weight of the evidence to find the parties to be equal regarding Factor (k). As explained by the trial court, plaintiff did the right thing by leaving a relationship that was harmful to herself and her minor children.

In sum, we conclude that the trial court's finding, that the parties were equal under the best interest factors, was not against the great weight of the evidence. Indeed, both the referee and the trial court engaged in a thoughtful and detailed analysis of the evidence presented.

PARENTING TIME

Next, defendant argues that by drastically altering the parenting time schedule in this case, the trial court changed the minor child's established custodial environment, despite a lack of clear and convincing evidence that such a change was in the minor child's best interest. Indeed, we conclude that it was an abuse of discretion for the trial court to change the parenting time schedule, which significantly reduced defendant's parenting time, without addressing whether the change altered the minor child's established custodial environment. Therefore, remand is required.

After finding that the parties were equal under MCL 722.23, the trial court changed custody in defendant's favor. Previously, defendant only had joint legal custody, but was allowed parenting time as agreed upon by the parties. Following the instant proceedings, defendant obtained joint legal *and* physical custody of the minor child. We conclude that clear and convincing evidence established that it was in the minor child's best interests to award the parties joint legal and joint physical custody.

Next, the trial court determined that the minor child would attend Ithaca Public Schools, and changed the parenting time schedule. Under the new schedule, the minor child would reside with plaintiff during the week, and spend three weekends per month with defendant. Plaintiff and defendant would essentially split school breaks, holidays, and summer vacation 50/50.

Parenting time is governed by MCL 722.27a, which provides, in relevant part:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. [MCL 722.27a(1).]

If a modification to the parenting time schedule would alter the established custodial environment, clear and convincing evidence must establish that the change is in the child's best interests. *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010); MCL 722.27(1)(c).

In this case, the trial court failed to address whether reducing defendant's parenting time would change the minor child's established custodial environment, and if so, whether that change was in the minor child's best interests. If an "amended parenting time schedule would result in a change in the established custodial environment," the trial court is required to addressed why such a change is in the minor child's best interests. *Yachcik v Yachcik*, 319 Mich App 24, 48-51; 900 NW2d 113 (2017). It is clear that moving from a one week on, one week off schedule to three weekends per month during the school year and a 50/50 split of holidays, school breaks, and summer vacation, amounts to a change in the custodial environment. *Id*. at 47-48. Additionally, the trial court failed to articulate why, given that the parties were equal under MCL 722.23, it was in the minor child's best interests to attend one school district over the other.

Given that child custody decisions are discretionary rulings, and a trial court must provide "a reasoned basis" for a discretionary decision, *Michigan Dep't of Transp v Randolph*, 461 Mich 757, 767-768; 610 NW2d 893 (2000), we must vacate the trial court's Order After Objection

Hearing and direct the trial court to address these matters on remand. On remand, before addressing whether the new parenting time schedule alters the established custodial environment, the trial court should explain why it is in the minor child's best interests to attend one school district over the other.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Mark T. Boonstra

Court of Appeals, State of Michigan

ORDER

KATHIE ANN ADAMS v EVERETT CASEY YOUKER

Docket No. 350999

LC No. 2014-22604-DP

Jane E. Markey
Presiding Judge

Kathleen Jansen

Mark T. Boonstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED to the trial court to articulate why it is in the minor child's best interests to attend Ithaca Public Schools, and to address whether the new parenting time schedule alters the established custodial environment. *Yachcik v Yachcik*, 319 Mich App 24; 900 NW2d 113 (2017). The proceedings on remand are limited to this issue.

We do not retain jurisdiction.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 30, 2020
Date

Chief Clerk