

STATE OF MICHIGAN
COURT OF APPEALS

BRITTANY LEE SIMON,

Plaintiff-Appellant,

v

STEVEN MICHAEL SIMON,

Defendant-Appellee.

UNPUBLISHED

July 24, 2012

No. 308528

Clinton Circuit Court

LC No. 09-021720-DM

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting her sole legal custody of the parties' minor children but expanding defendant's parenting time. On appeal, plaintiff challenges the trial court's decision to expand defendant's parenting time.¹ For the reasons set forth in this opinion, we affirm.

Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Borowsky v Borowsky*, 273 Mich App 666, 688; 733 NW2d 71 (2007). [*Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336, lv den 482 Mich 896 (2008)], the Court stated:

¹ Although there is an appeal of right from "a postjudgment order affecting the custody of a minor," MCR 7.202(6)(iii), MCR 7.203(A)(1) provides that "[a]n appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right." Given that the order in this case involved very young children and the parenting time arrangement had been 10 nights every two weeks with plaintiff and four nights every two weeks with defendant, and was changed to 8 nights every two weeks with plaintiff and 6 nights every two weeks with defendant, we conclude that the parenting time order affected the custody of a minor such that this Court has jurisdiction. See *Thurston v Escamilla*, 469 Mich 1009; 677 NW2d 28 (2004).

A factual finding is against the great weight of evidence when the evidence “clearly preponderates in the opposite direction.” *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (citation omitted). A discretionary ruling constitutes an abuse of discretion “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*, 277 Mich App at 705. Clear legal error “occurs when a trial court incorrectly chooses, interprets, or applies the law.” *Id.* at 706.

Before modifying parenting time, the trial court must first determine whether the moving party has shown “proper cause” or a “change of circumstances”. *Shade v Wright*, 291 Mich App 17, 25-26; 805 NW2d 1 (2010). “[I]f a requested modification in parenting time amounts to a change in the established custodial environment, it should not be granted unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child.” *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004). If a parenting time modification does not change the child’s established custodial environment, the parenting time modification must be supported by a preponderance of the evidence. *Pierron v Pierron*, 486 Mich 81, 93; 782 NW2d 480 (2010).

“[T]he focus of parenting time is to foster a strong relationship between the child and the child’s parents.” *Shade*, 291 Mich App at 29. The best interest factors of MCL 722.23 govern modification of parenting time orders. *Berger*, 277 Mich App at 716. MCL 722.23 reads:

As used in this act, “best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

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

In deciding whether to modify parenting time, a trial court is required to make findings with respect to the best interests factors. *Shade*, 291 Mich App at 31-32. A trial court is not required to explicitly address the parenting time factors in MCL 722.27a(6), *id.* at 32, which provides:

The court *may* consider the following factors when determining the frequency, duration, and type of parenting time to be granted:

(a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors. [(emphasis added).]

“Parenting time is granted if it is in the best interest of the child and in a frequency, duration, and type reasonably calculated to promote strong parent-child relationships.” *Brown*, 260 Mich App 576 at 595, citing MCL 722.27a(1).

Plaintiff first argues that the trial court erroneously denied her motion to increase her parenting time. Plaintiff argues that she should have been granted additional parenting time because defendant insulted her and failed to exercise scheduled parenting time. Plaintiff and defendant presented conflicting versions of defendant’s alleged insults. Plaintiff testified that defendant repeatedly failed to exercise his scheduled parenting time. Defendant admitted to missing his scheduled parenting time on a few occasions, but he claimed that his absences were generally excusable. The trial court appears to have accorded some weight to defendant’s testimony that these claims were exaggerated or misleading. The trial court’s credibility determination was not against the great weight of the evidence. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 459; 705 NW2d 144 (2005).

Next, plaintiff argues that the trial court erred by granting defendant’s request for expanded parenting time.² It should be noted, though not appealed, the trial court did so after awarding plaintiff sole legal custody. The rationale for the trial court’s decision to grant plaintiff sole legal custody is central to our finding on the issue of defendant’s expanded parenting time. The trial court found, and we agree, that the major issue between plaintiff and defendant was a failure to communicate. The trial court observed that any interaction between the parties almost always resulted in conflict, sometimes in the presence of the children. As the trial court correctly found, based on the inability of the parties to agree on almost any subject involving the children, in order to advance the best interests of the children, it was necessary for one party to have sole decision making authority. Hence, after a thorough finding of all the best interests factors, the trial court awarded plaintiff sole legal custody.

However, plaintiff argues that by expanding defendant’s parenting time, the trial court implicitly determined that the expansion would be in the children’s best interests. *Shade*, 291 Mich App at 31. Plaintiff argues that because defendant was not favored on a single best interests factor, the trial court’s decision is inherently inconsistent, and courts are not permitted to reach inconsistent results. See *People v Ellis*, 468 Mich 25, 27-28; 658 NW2d 142 (2003).

When reaching a decision on parenting time, the trial court stated, in relevant part:

With regard to parenting time, however, I know there have been some problems, but I’m guided by MCL 722.27a that says: Parenting time shall be granted in accordance with the best interests of the child. And it’s presumed to be in the best interest for the child to have a relationship with – with her parents, in this case, the – the – both girls I think the Defendants (sic) need to talk to one another

² We note that the fact that defendant failed to file a written motion to modify parenting time is irrelevant. However, defendant’s oral request to modify parenting time was sufficient to place the issue before the trial court. *Pickering v Pickering*, 268 Mich App 1, 6-7; 706 NW2d 835 (2005); MCL 722.27a(7).

more respectfully around their children. And that's something I would like, a non-disparaging – disparagement clause in whatever order we have

What I'm going to do – I am going to modify parenting time. I'm not going to simply eliminate Thursdays, but both parties said the Tuesdays work really well because they have minimal contact with one another. So, I am going to let the Defendant have Tuesdays. He's to pick up the children from day-care, if they're attending day-care on that day. If they're sick, he'll have to pick them up from wherever they are, or if day-care's closed for some reason – until Thursday morning, when he drops them off at day-care. So, he can have consecutive overnights, and he'll be responsible for getting them to day-care, then.

Plaintiff argues that the trial court's decision to expand parenting time for defendant was inherently inconsistent because she was favored on most of the best interest factors. However, our Court has previously stated that: "We disapprove the rigid application of a mathematical formulation that equality or near equality on the statutory factors prevents a party from satisfying a clear and convincing evidence standard of proof. We are duty-bound to examine all the criteria in the ultimate light of the child's best interests." *Heid v AAASulewski*, 209 Mich App 587, 596; 532 NW2d 205 (1995). Such is the case here. After examination of all the criteria in light of the children's best interests, we conclude that the trial court's decision to expand defendant's parenting time was supported by the record evidence and case law.

Plaintiff was awarded sole legal custody in this matter because the record clearly revealed that the parties could not agree on any matter involving the care and treatment of the children, and at times the parties refused to communicate with one another. Careful consideration of all the best interests factors led the trial court to this conclusion. Those very same considerations made by the trial court relative to its finding on legal custody also led the trial court to grant defendant parenting time on Tuesday through Thursday, (adding the additional Wednesday). Thus, defendant could pick the children up from day-care and drop them off at day-care thereby limiting interaction between the parties. The trial court correctly noted that reducing the interaction between the parties would greatly reduce the chance for conflict and would foster a better relationship between the parties and between the children and the parties. Thus, contrary to the assertions of plaintiff, the trial court's ruling on increased parenting time for defendant is in the best interests of the children. MCL 722.23. Certainly fostering or at least attempting to create a harmonious relationship between the parents is of paramount concern. See, MCL 722.23(j). The very same factors that led the trial court to correctly conclude that one parent needed to have sole decision-making authority for the children, also led the trial court to fashion a parenting time schedule that would all but eliminate the parties coming into contact with one another.

Based on our examination of all the criteria used by the trial court, we conclude that the trial court properly used the best interests factors of MCL 722.23 to govern its modification of the parenting time order. See, *Berger*, 277 Mich App at 716. Further, the trial court correctly found that "[T]he focus of parenting time is to foster a strong relationship between the child and the child's parents," *Shade*, 291 Mich App at 29 when granting defendant an additional day. The legal basis of the trial court's decision to increase defendant's parenting time and its factual underpinnings are all supported by case law and record evidence. Accordingly, we affirm.

Affirmed. No costs are awarded to either party. MCR 7.219.

/s/ Stephen L. Borrello

/s/ Peter D. O'Connell