

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER A. HOWARD,

Plaintiff/Counter Defendant-
Appellant,

v

EMILY DOHRING a/k/a EMILY ANNABEL,

Defendant/Counter Plaintiff-
Appellee.

UNPUBLISHED
November 29, 2012

No. 311483
Crawford Circuit Court
LC No. 2009-007883-DP

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the July 10, 2012 order granting primary full physical custody to defendant. For the reasons set forth in this opinion, we affirm.

This appeal arises from a dispute between plaintiff and defendant who have a minor child together but were never married. The parties entered into a consent order for custody, parenting time, and child support where the parties had joint physical and legal custody in a week on/week off arrangement. In May 2011, as the result of an apparent agreement between the parties, an order was filed to change custody so that defendant had sole physical and legal custody and plaintiff had parenting time on alternating weekends. However, plaintiff later moved to reverse the order, asserting that he was coerced into signing the agreement. Plaintiff's motion was denied by the referee on September 20, 2011, and plaintiff objected to the referee's determination. The trial court reversed the referee, vacated the May 2011 custody order, and remanded to the referee for evaluation of an established custodial environment and the best-interest factors. The referee determined that there was an established custodial environment with only defendant. The referee also made findings for each of the best-interest factors and determined that it was in the child's best interests to be with defendant and recommended granting full physical custody to defendant. Plaintiff objected to the referee's findings and recommended order and the trial court conducted a de novo review. After the de novo review the trial court determined that there was an established custodial environment with defendant and not plaintiff. The trial court also determined that sole physical custody with defendant was in the best interests of the minor child. This appeal ensued.

On appeal, plaintiff argues that the trial court erred by not making the proper cause or change in circumstances determination as required by MCL 722.27(1)(c) before moving on with the custody determination. This argument contradicts plaintiff's statements on the record. In the trial court proceedings, plaintiff stated: "I think the Court has already found that there's been a significant change of circumstances back in October of 2011." Additionally, plaintiff also acknowledged during the referee hearing that the trial court had made the proper cause or change in circumstances determination by stating: ". . . my understanding though is that we've already crossed that threshold. Judge Burmeister in his order sending this back basically recognized that there's been a significant change of circumstances". Plaintiff cannot now assert that the trial court failed to find proper cause or a change in circumstances because plaintiff agreed the necessary determination had been made. We hold this issue was waived and therefore is not subject to review. Waiver is the knowing or voluntary abandonment of a known right. *Sherry v East Suburban Football League*, 292 Mich App 23, 33; 807 NW2d 859 (2011). Once an issue has been waived it cannot then be raised as an error on appeal. *City of Plymouth v McIntosh*, 291 Mich App 152, 164; 804 NW2d 859 (2010). Moreover, contrary to plaintiff's assertion on appeal, the trial court did find a change of circumstances in order to justify reviewing custody, based upon the child's attaining school age and plaintiff's lack of ability or willingness to help the child attend school. Plaintiff does not challenge the adequacy of the trial court's proper cause or change in circumstances determination and therefore we will not review it.

Next, plaintiff argues that the trial court erred in determining that there was an established custodial environment with only defendant. Determining the existence of an established custodial environment is a question of fact. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). Therefore, a trial court's determination of whether an established custodial environment exists will be affirmed on appeal unless the finding was against the great weight of the evidence. *Id.* "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.* A trial court is required to make a determination of whether an established custodial environment exists with one or both parents before making any custody decisions. *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011).

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. . . . MCL 722.27(1)(c).

A trial court can determine that an established custodial environment exists in multiple homes. *Berger*, 277 Mich App at 706-707. A trial court's findings in regard to an established custodial environment are given deference because of the trial court's position to determine credibility. *Id.* at 707.

The trial court offered a very detailed explanation of its determination that there was no established custodial environment with plaintiff at the time it made its decision. The trial court explained that although plaintiff may have had an established custodial environment at one time, plaintiff's actions eroded that environment. See *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993)("where there are repeated changes in physical custody and

uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed. . . .”) The trial court also determined that “[r]egardless of how much [plaintiff] was present, . . . when he was present, others were providing the overwhelming amount of care for the minor child.” There was evidence presented that plaintiff was not the individual providing care for the child and that plaintiff would miss parenting time. The trial court was in a better position to determine the credibility of the witnesses, and the evidence presented supported its decision that plaintiff was not the parent that over “an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.” *Berger*, 277 Mich App at 706-707; MCL 722.27(1)(c). Based on our review of the record, the trial court determination of established custodial environment was accurate and its findings thoroughly supported by the evidence presented.

Finally, plaintiff argues that the trial court’s findings for three of the best-interest factors were against the great weight of the evidence. All custody orders must be affirmed on appeal unless the trial court committed an abuse of discretion, made findings against the great weight of the evidence, or made a clear legal error. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). This Court reviews the trial court’s findings of fact under the great weight of the evidence standard. *Pierron*, 486 Mich at 85. Under the great weight of the evidence standard, the trial court’s determination will be affirmed unless the evidence clearly prevails in the other direction. *Id.*

The Child Custody Act, MCL 722.21 *et seq.*, promotes the best interests of the child and is used to govern custody disputes. *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). Based on the act, the trial court is obligated to consider the best-interest factors laid out in MCL 722.23 when resolving custody disputes:

- (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.

When evaluating the best-interest factors, the trial court has discretion in determining what weight to give each factor. *Kessler*, 295 Mich App at 64. On appeal, we will defer to the trial court's credibility determinations because of the trial court's position to judge witness credibility. *Id.*; *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Additionally, the trial court does not need to consider every piece of evidence presented or every argument made when making its determination on each factor. *Kessler*, 295 Mich App at 65. Furthermore, a trial court's failure to discuss every piece of evidence does not suggest that any evidence was overlooked. *Id.* And, a trial court may consider the same piece of evidence or circumstance in respect to more than one factor, as the factors have some overlap. *Fletcher*, 229 Mich App at 25.

Plaintiff argues that the trial court's findings for factor (b) were in error because plaintiff has been involved in the child's life while defendant exposes the child to dangerous individuals. While there was testimony that defendant's friends and relatives have criminal records, her testimony was that the child had not been exposed to some of these people, and as to the others, would never be left alone in their company. The trial court believed defendant and the trial court is responsible for credibility determinations. *Kessler*, 295 Mich App at 64. Furthermore, the trial court has discretion in determining what weight to give each factor and does not need to consider every piece of evidence presented its determination on each factor. *Id.* at 64-65. The trial court determined that religion was not at issue and neither was the capacity and disposition of the parties to love their child. The trial court then went on to discuss the guidance and education component of this factor. The trial court found this favored defendant because defendant was concerned with the minor child getting social interaction, and plaintiff disregarded the school schedule in favor of visitation. The trial court found that portions of plaintiff's testimony were not credible and that plaintiff "decided to take actions that interfered with the educational pursuits for the child." The trial court's findings and determination were not against the great weight of the evidence because there was evidence presented that plaintiff intentionally withheld the child from pre-school, claiming that it interfered with his parenting time and he was unable to drive the minor to school because he does not possess a driver's license.

Plaintiff maintains that the trial court erred by not considering adults with criminal records with whom the minor could potentially come into contact. However, the trial court does

not need to consider every piece of evidence presented and failure to discuss every piece of evidence does not mean the evidence was overlooked. *Kessler*, 295 Mich App at 65. As previously stated, the trial court heard that there were several people in defendant's life that had criminal records. But defendant also testified that she would not leave the minor child alone with many of these people and that the minor child had no contact with some of them. It was up to the trial court to make credibility determinations and to decide what evidence to consider. *Id.* at 64-65. The trial court did not err by not discussing the individuals with criminal records and did not err in determining that this factor favored defendant.

Plaintiff also argues that the trial court erred in determining factor (c) because plaintiff is able to provide for his son through work, his family, or his college fund, while defendant made only minimum wage. However, the trial court heard testimony that plaintiff was unemployed and did not appear to be seeking employment. Instead, plaintiff relied on his mother, his girlfriend, and his college fund for financial support. The trial court did not err in determining that defendant's employment made her better suited to provide for the minor child's needs. Plaintiff's reliance on others to provide for the minor child "is not exactly a sustainable long term plan to provide for a minor child." The trial court's determination was not against the great weight of the evidence.

Lastly, plaintiff argues that the trial court erred in its determination of factor (d) because the minor child has had a stable environment with plaintiff in plaintiff's mother's home. The trial court determined that "Both parties have moved a fair amount over the last three years. So, neither has provided a truly stable environment." There was evidence that defendant had moved four times in the past three years. But there was also evidence that plaintiff had lived in several other places and was living with his mother between homes. The trial court addressed plaintiff's residence in factor (e) and said, "Looking at the record as a whole, the home of the Grandmother is a good place for the minor child but does not necessarily appear at various times in this case to be the residence of the Plaintiff." The trial court appeared to acknowledge that although plaintiff's mother's house was a good environment for the minor child, it was not plaintiff's residence at all times. Additionally, the trial court was making determinations on plaintiff and defendant, not plaintiff's mother, plaintiff, and defendant. The trial court did not err in determining that neither party was favored by this factor.

Affirmed. Defendant having prevailed may access costs. MCR 7.219.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens