

STATE OF MICHIGAN
COURT OF APPEALS

JASON CRAIG WEST,

Plaintiff-Appellee,

v

KENDRA SHAREE WEST,

Defendant,

and

MELINDA KAY AMABILE and CLEMENT
AMABILE,

Appellants.

UNPUBLISHED
October 15, 2013

No. 314461
Lapeer Circuit Court
Family Division
LC No. 07-039162-DM

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In this custody dispute, Melinda and Clement Amabile, who are the custodians of the children at issue, appeal of right the trial court's order granting plaintiff Jason West's motion to modify custody and parenting time.¹ Because we conclude that there were no errors warranting relief, we affirm.

On appeal, Melinda and Clement Amabile argue that the trial court abused its discretion when it elected to modify the existing custody and parenting time arrangements. Specifically, they contend that they presented clear and convincing evidence that the modifications were not in the children's best interests. In child custody cases, this court must affirm the trial court's order unless its findings were against the great weight of the evidence, or it committed a palpable abuse of discretion, or it made a clear legal error on a major issue. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The abuse of discretion standard applicable to

¹ The children's mother, defendant Kendra West, is not a party to this appeal. Therefore, we shall use West to refer to plaintiff Jason West.

child custody disputes is highly deferential: this Court will only find that the trial court abused its discretion when its “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, 705-706; 747 NW2d 336 (2008).

Natural parents have a fundamental liberty interest in the care, custody, and management of their children. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). And, in order to protect a parent’s fundamental liberty interest, Michigan law recognizes a presumption that it is in the best interests of the child to award custody to the child’s natural parents. *Id.* at 262-266, citing MCL 722.25(1). As such, in a custody dispute between a natural parent and a third person, the third person must rebut the parental presumption and prove by clear and convincing evidence that custody with the natural parent is not in the children’s best interests using the factors specified in MCL 722.23. *Hunter*, 484 Mich at 265-266.

Here, Jason West is the children’s natural father, but they live under Melinda and Clement Amabile’s care and custody. Because Jason West is the children’s natural father, he was entitled to the benefit of this presumption and, for that reason, Melinda and Clement Amabile bore the burden of demonstrating by clear and convincing evidence that it was not in the children’s best interests to modify the current custody arrangements after West moved for custody of the children. To be clear and convincing, the evidence must produce in the trier of fact a firm belief as to the truth of the precise facts. *Id.* at 265.

The trial court in this case adopted the findings made by a referee with regard to the various factors stated under MCL 722.23 in making its decision. Factor (a) involves “[t]he love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a). The referee found that the parties each loved the children, but noted that West’s emotional tie was not as strong as it could have been because he was absent for several years before reentering the children’s lives.

Melinda and Clement Amabile contend that this factor favored them because the evidence showed that “the thought of spending more time” with West “caused the children so much distress that they ha[d] panic attacks, night terrors, d[id] worse in school and express[ed] distress”; they also stated that they “would prefer to be adopted by the Amabiles.” However, they did not present expert testimony that connected the children’s behavioral changes to West’s request for custody and extended parenting time. In addition, West testified that the children were upset when they left him and sometimes asked Melinda and Clement Amabile if they could stay with West for additional parenting time. Accordingly, the evidence did not clearly preponderate against this finding. *Berger*, 277 Mich App at 705.

As for 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,” MCL 722.23(b), the referee found that West did “almost everything the court asked him to do.” However, the referee emphasized that he must be more involved with the children’s schooling and instructed him that the schools could not limit his involvement.

Melinda and Clement Amabile's argument regarding this factor focuses on their involvement with the children's schools and their promotion of education in their home. They contend that this factor disfavored West because the evidence showed that he never attended functions at the children's schools. Nonetheless, West testified that he was involved in the children's education by helping them with their homework. In addition, West helped the children with showers, fixed their hair, and cooked. He also had birthday parties for the children and took them to his sister's house for an Easter egg hunt. Therefore, the evidence did not clearly preponderate in the opposite direction. *Berger*, 277 Mich App at 705.

Factor (c) is "[t]he 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). The referee found that West, although unemployed and dependent on his girlfriend for a home and financial security, was able to provide the children with food, clothing, medical care, and a good home.

Melinda and Clement Amabile contend that this factor favored them because they, unlike West, who abandoned the children for several years, provided the children with food, clothing, medical care, and a stable environment. Although there was evidence that West is still dependent on his girlfriend, he nevertheless provided the children with clothing, dolls, and other toys at the home. In addition, the evidence showed that West's living arrangements have been stable—he has lived with his girlfriend for five years—and that he has made an effort to assist with and participate in the children's care. Accordingly, the evidence did not clearly preponderate in the opposite direction. *Berger*, 277 Mich App at 705.

The referee stated that factor (d), which addresses "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), did not have much influence on the decision because West's home was in a good neighborhood and the children had a safe place to sleep. Melinda and Clement Amabile argue that this factor clearly favored them because West abandoned the children for several years. Despite the evidence that West did not play a significant role in his children's lives for some period of time, there is evidence that he has since been able to provide appropriate parenting; moreover, there was no evidence that West was not willing and able to maintain continuity after receiving additional parenting time. The evidence did not clearly preponderate in against this finding. *Berger*, 277 Mich App at 705.

Factor (e) addresses "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The referee found that factor (e) favored neither party because Melinda and Clement Amabile had been married for 22 years and West had lived with his girlfriend for five years. Melinda and Clement Amabile contend that this favor favored them because they provided a stable, family environment for several years. While one might intuitively conclude that this factor would favor the people who provided the children with all their needs in a stable, family environment at a time when their parents were unable or unwilling to do so, given that West has already exercised parenting time and that there is no evidence that additional parenting time will disrupt the custodial environment, we cannot conclude that the evidence preponderated against this finding. *Berger*, 277 Mich App at 705.

Factor (f) is “[t]he moral fitness of the parties involved.” MCL 722.23(f). The referee found that this factor favored neither party because the parties were morally fit. Melinda and Clement Amabile contend that this factor favored them because they “have proven to be fit people to care for the children.” However, the referee’s finding that West was morally fit was not against the great weight of the evidence. *Berger*, 277 Mich App at 705.

Factor (g) is “[t]he mental and physical health of the parties involved.” MCL 722.23(g). The trial court found that this factored favored neither party because they were all in good health. Because there was no evidence that West was not in good mental and physical health, we cannot conclude that this finding preponderated in the opposite direction. *Berger*, 277 Mich App at 705.

Factor (h) is “[t]he home, school, and community record of the child.” MCL 722.23(h). The referee found that West was not adequately involved in the children’s schooling, mainly because he relied on Melinda and Clement Amabile to inform him of the children’s activities. The referee recognized that the choice of the children’s school was at issue and found that the children were intelligent and motivated.

Melinda and Clement Amabile argue that this factor favored them because the home, school, and community records of the children were consistent and stable. On the other hand, West was a “sometime parent, who [wa]s only involved when it suit[ed] him.” However, the evidence showed that West helped the children with their schoolwork and that the children’s grades were “wonderful.” Melinda and Clement Amabile testified that one child’s performance dropped since West moved to change custody and expand parenting time. In addition, they stated that the other children’s anxiety increased. However, there was no evidence that connected these issues directly West’s actions. On this record, the finding was no clearly erroneous. *Berger*, 277 Mich App at 705.

Factor (k) is “[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child.” MCL 722.23(k). Melinda and Clement Amabile presented testimony that West had been involved in a domestic incident with his wife, but the referee rejected this evidence after West denied it:

there was some testimony as I indicated before that Mrs. West had bruises and said Mr. West was responsible for it. We need something more than that. It’s inadmissible hearsay and she wasn’t there to say it herself. Had she been, I might have handled it differently but she wasn’t.

Given that Melinda and Clement Amabile failed to present evidence to rebut West’s denial, we cannot conclude that this finding was erroneous. *Berger*, 277 Mich App at 705.

The findings concerning the best interest factors were not clearly erroneous. Moreover, given the presumption in favor of providing natural parents with custody and the evidence that West has demonstrated an ability to positively participate in the children’s lives, we cannot conclude that the trial court abused its discretion by providing West with joint legal custody and by expanding his parenting time.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood