

STATE OF MICHIGAN
COURT OF APPEALS

JOHN J. FRAZIER, SR.,

Plaintiff-Appellee,

v

DENNA KIRKLAND,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

No. 319225
Wayne Circuit Court
Family Division
LC No. 11-114445-DC

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Denna Kirkland appeals by right the trial court's order granting sole legal and physical custody of the minor child to plaintiff, John J. Frazier, Sr., who is the child's natural father. Because we conclude there were no errors warranting relief, we affirm.

In 2004, the minor child was born to Frazier and Darchelle Bellman. Frazier never married Bellman, but they cohabitated for periods. Frazier and Bellman had another son, who was an adult by the time of trial. The minor child lived with Bellman from his birth.

Bellman died of breast cancer in September 2011. After Bellman's death, Bellman's aunt, Kirkland, petitioned the trial court for guardianship of the minor child. The trial court granted the petition. Frazier then sued for custody of his son. Kirkland contended that Frazier would not be a fit parent, in part, because he had a prior conviction for attempted third-degree criminal sexual conduct involving the teen daughter of a former girlfriend.

The trial court held a trial to take evidence concerning the best interests of the child. At the conclusion of the proofs, the trial court made several findings. It found that Kirkland was not cooperative with allowing the minor child to have contacts with Frazier and his side of the family. It also found that Frazier had "a good work history" and "[had not] been sitting on his hands" since being released from prison. He earned some money through employment and his grandmother also supported him financially. As for Frazier's prior criminal conduct, the trial court found that he had made substantial reform:

The Court is not unmindful of the fact that the father, had this CSC with a 15-year old, he was an adult at the time.

But, it's what you do with your life after and the father has gone to prison, he's paid his debt to society and he's also realized that some of the ideas that he had about himself, or his manhood or whatever you want to call it, were basically in the wrong direction.

And the Court believe[s] that he had turned his life around and he's done everything he could, in the Court's mind, to try to get his child back, based on, you know, the legal way.

The trial court also stated findings regarding the factors set forth in MCL 722.23. It then concluded that Kirkland had not met her burden to demonstrate by clear and convincing evidence that it was not in the child's best interest to be placed in his father's custody. Consequently, the trial court entered an order granting sole legal and physical custody of the minor child to Frazier.

On appeal, Kirkland first argues that the trial court erred when it gave improper weight to the parental presumption set forth in MCL 722.25 by analyzing each of the best interest factors stated under MCL 722.23 by determining whether Kirkland showed by clear and convincing evidence that the individual factor weighed in her favor.

A custody order "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Under the great weight standard, the trial court's determination should be affirmed unless the evidence clearly preponderates in the other direction. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). In reviewing the findings, this Court should defer to the trial court's determination of credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). The palpable abuse of discretion standard applies to the trial court's discretionary rulings such as to whom custody is granted. *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994). An abuse of discretion exists 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. *Id.* at 879-880 (quotation marks and citation omitted). Questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Id.* at 881.

A natural parent has a fundamental liberty interest in the care and custody of his child. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). When the statutory presumptions concerning custody conflict, due process requires that the parental presumption under MCL 722.25(1) controls over the presumption in favor of an established custodial environment stated under MCL 722.27(1)(c). *Hunter*, 484 Mich at 263. The best interests of the child are presumed to be served by granting custody to the parent, and that presumption must be weighed heavily in favor of the parent. *Heltzel v Heltzel*, 248 Mich App 1, 24-25; 638 NW2d 123 (2001). To rebut the presumption, a third party must show by clear and convincing evidence that custody by the parent is not in the child's best interest, as determined by consideration of the statutory best interests factors. *Hunter*, 484 Mich at 265.

MCL 722.23 sets forth the factors, whose “sum total” should be considered when determining the best interests of a child:

- (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.

“A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances.” *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

Our Supreme Court has examined the deference that must be afforded to natural parents in custody disputes involving third parties and emphasized the demanding nature of the burden to demonstrate by clear and convincing evidence that the child should not be placed with the parent:

A remaining constitutional question involves the amount of deference due under *Troxel [v Granville]*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000),] to fit parents. We conclude that the statute [MCL 722.25(1)] provides sufficient deference to a fit natural parent's fundamental rights to the "care, custody, and management of their child" We so hold because the statute requires, in order to rebut the parental presumption, clear and convincing evidence that custody by the natural parent is not in a child's best interests.

The clear and convincing evidence standard is "the most demanding standard applied in civil cases" This showing must " 'produce [] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' "

We agree with the Court of Appeals in *Heltzel* [, 248 Mich App at 28,] that, given the unique constitutional considerations in custody disputes involving natural parents, "it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him." A third party seeking custody must meet a higher threshold. He or she must establish by clear and convincing evidence that it is not in the child's best interests under the factors specified in MCL 722.23 for the parent to have custody. This is entirely consistent with *Troxel's* holding. Although a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a "presumption of validity" or "some weight." That is precisely what MCL 722.25(1) does when it requires clear and convincing evidence to rebut the presumption. [*Hunter*, 484 Mich at 264-265 (footnotes omitted).]

In its remand instructions in *Hunter*, the Supreme Court stated how a trial court is to apply the clear and convincing standard in the context of a parent versus third-party custody determination:

At that hearing, the court shall apply MCL 722.25(1) in [the parent's] favor. The court shall not grant custody to [the third parties] unless [the third parties] demonstrate by clear and convincing evidence that custody with [the parent] does not serve the children's best interests. In order to make this showing, [the third parties] must prove that "all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person." [*Hunter*, 484 Mich at 279, quoting *Heltzel*, 248 Mich App at 27 (footnotes omitted).]

The fact that the trial court in the present case examined each best interest factor with the parental presumption in mind does not constitute clear legal error warranting reversal of the trial court's custody determination. See *Fletcher*, 447 Mich at 881. As the Supreme Court stated in *Hunter*, the clear and convincing evidence standard is the most demanding standard applied in civil cases. It is a showing of "evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Hunter*, 484 Mich at 265 (quotation marks and citation omitted).

Here, the trial court found that certain best interests factors weighed in Frazier's favor because it determined that Kirkland had not shown clear and convincing evidence otherwise. But it is evident from a fair reading of the record that the trial court would have reached the same conclusion had it waited, as Kirkland argues should have been done, to apply the clear and convincing standard after making findings on each factor. Under the decision in *Hunter*, Kirkland had to demonstrate—clearly and convincingly—that custody with Frazier was not in the minor child's best interests. Whether the trial court applied that standard at the individual-factor stage, as opposed to after making a decision on the factors in the aggregate, made no difference. The same evidence would be considered against the same standard, just at different points in the analytical process. Contrary to Kirkland's argument, it does not appear that the trial court doubled the applicable burden of proof. The trial court did not commit a "clear legal error on a major issue." MCL 722.28.

Kirkland's additional arguments that the trial court erred in failing to make findings regarding two factors and regarding whether it recognized the established custodial environment are similarly unavailing. Generally, a trial court must consider and explicitly state its findings and conclusions regarding each best interest factor. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008). Overall, "the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007) (quotation marks and citation omitted).

The trial court made a sufficient record regarding MCL 722.23(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 other party). After discussing the case law and standards that would govern its ruling, the trial court found that Kirkland was not willing to facilitate the minor child's interaction with his paternal family:

In this case, the Court, when I look I see the paternal side of the family, has been pretty much excluded from the child's life, subsequent to the mother's demise.

[Kirkland] has not cooperated with the paternal side, regarding visitation of the child, although the Guardian asserts that she tried. The Court is not in agreement, with those efforts. The father, the Department of Corrections allowed the father to have contact with the child in September of 2012.

The visitation was allowed after this Court ruled that the father should and could have visitation with the child and that was in April of 2013. Up until that time, [Kirkland] refused the father visitation.

The trial court later stated that it was “discouraged because the Guardian did not involve the child with the parental side of the family and did not inform the father of the school, counseling, tutor or other activities for [the minor child.]” Thus, the trial court essentially found that best interest factor (j) did not favor Kirkland. And there was testimony supporting the conclusion that Kirkland resisted Frazier and his family’s efforts to stay in contact with the child. At the same time, Frazier testified that he would allow Kirkland visitation with the child in the event that he was granted custody.

Although the trial court did not state findings specific to MCL 722.23(k)(regarding domestic violence), it stated its belief that Frazier turned from his criminal past, which included a domestic incident, and improved himself as a person, noting that he “has turned his life around and he’s done everything he could, in the Court’s mind, to try to get his child back, based on, you know, the legal way.” The trial court created a sufficient record regarding its conclusions about Frazier’s prior criminal conduct. And the trial court’s finding that his criminal past did not negate his ability to parent was not against the great weight of the evidence given the positive testimony from his parole agent, therapist, and his own testimony.

The record also demonstrates that the trial court considered whether there was an established custodial environment with Kirkland and weighed that in making its custody decision. The trial court recognized that Kirkland had provided the minor child with a secure and stable environment during her guardianship:

[Kirkland has] had the child. And the Court, the cases I cited earlier, you can’t just use that as a method to decide the case. You have to look at all the factors.

* * *

Again, the case of Hunter, that I’ve shown, that when you have two different sections of the statute, that when it comes to a case like this, that because the Guardian has had the advantage of having the child with her, that I can’t just look at that

Those statements make evident that the trial court considered there to have been an established custodial environment with Kirkland. At the same time, the trial court recognized that the parental presumption trumps the custodial environment presumption, which was consistent with the decision in *Hunter*.

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly