

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA ANN LOGA, also known as
BARBARA ANN MILLER, also known as
BARBARA ANN DESPINS,

Plaintiff-Appellant,

v

DEVAN RANDALL LOGA,

Defendant-Appellee.

UNPUBLISHED
March 15, 2018

No. 339975
Calhoun Circuit Court
LC No. 2012-000069-DM

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

In this child custody dispute, plaintiff Barbara Loga appeals as of right the trial court order granting defendant Devan Loga's motion to modify custody and parenting time relating to the parties' minor child. Because the trial court did not abuse its discretion by awarding defendant primary physical custody and sole legal custody, we affirm.

Plaintiff and defendant married in 2006 and they divorced in 2012. They have one child together, who was born in 2009. Pursuant to the parties' judgment of divorce, the parties shared joint legal custody while plaintiff received primary physical custody and defendant received parenting time. Under a modified parenting schedule agreed to by the parties in July of 2014, defendant received parenting time every other weekend, Wednesday evenings, alternating holidays, and every other week during the summer.

On November 28, 2016, defendant filed a motion to modify custody, parenting time and child support. Defendant asserted that the child had been physically abused by plaintiff's new husband (Curtis Miller), that there was domestic violence between plaintiff and Miller, that the child had missed school while in plaintiff's care, and that plaintiff allowed the child to wear inappropriate and dirty clothing. The parties stipulated to the existence of proper cause and a change in circumstances, and agreed that an evidentiary hearing should be held with regard to the child's best interests. The trial court held an evidentiary hearing that lasted four days and that included testimony from the parties, their respective spouses, defendant's mother, plaintiff's mother, a Child Protective Services (CPS) investigator, and friends and neighbors of plaintiff.

Following the hearing, the trial court evaluated the best interests factors and granted defendant's motion to change custody. Notably, the trial court determined that the child had

been physically abused by Miller, that plaintiff failed to protect the child and to appreciate the wrongfulness of Miller's conduct, and that there was domestic violence between plaintiff and Miller. Based on its evaluation of the child's best interests, the trial court awarded primary physical custody to defendant, while plaintiff received parenting time every other weekend, Wednesday evenings, alternating holidays, and two weeks during the summer. The trial court's order also specified that the child was not to be left in Miller's unsupervised care and that the child was not to be subjected to corporal punishment. In addition to modifying physical custody, the trial court also granted defendant sole legal custody. Plaintiff moved for reconsideration, which the trial court denied. Plaintiff now appeals as of right.

On appeal, plaintiff argues that the trial court's findings regarding many of the best interest factors were against the great weight of the evidence. Plaintiff maintains that defendant failed to prove by clear and convincing evidence that a change in custody was in the child's best interests. Accordingly, plaintiff asserts that the trial court abused its discretion by changing physical custody. Plaintiff also argues that the trial court abused its discretion by granting defendant sole legal custody. We disagree.

"All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue." *Lieberman v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017), citing MCL 722.28. Under the great weight standard, this Court defers to the trial court's credibility determinations, and "the trial court's factual determinations will be affirmed unless the evidence clearly preponderates in the other direction." *Butler v Simmons-Butler*, 308 Mich App 195, 200; 863 NW2d 677 (2014). "An abuse of discretion, for purposes of a child custody determination, 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 201. Clear legal error "occurs when the trial court chooses, interprets, or applies the law incorrectly." *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014).

"The purposes of the Child Custody Act, MCL 722.21 *et seq.*, are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Lieberman*, 319 Mich App at 78 (quotation marks and citation omitted). When, as in this case, an established custodial environment exists with both parents, the trial court may only modify the established custodial environment if the parent seeking to change custody presents "clear and convincing evidence that the change is in the child's best interests." *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011).¹ Under the Child

¹ If there is an existing custody order, before reaching the best interests determination, there must be a showing of proper cause or a change in circumstances, and the trial court must determine whether an established custodial environment exists. *Pierron v Pierron*, 282 Mich App 222, 243-244; 765 NW2d 345 (2009). Here, the parties agree that there was a proper cause and a change in circumstances that warranted revisiting custody. The trial court determined that the child had an established custodial environment with both parents, and the parties do not

Custody Act, a child's best interests are determined using the twelve best interest factors in MCL 722.23.

In this case, the trial court found that factors (a), (e), (f), (g) were equal, that factors (b), (d), (j), (k), (l) favored defendant, and that factors (c), (h), (i) slightly favored defendant. The child expressed a preference, which the trial court considered under factor (i); but the trial court did not indicate who factor (i) favored. On appeal, plaintiff challenges all of the trial court's best interests determinations except for factors (f),² (g), and (i). Deferring to the trial court's credibility determinations, we conclude that the trial court's factual findings regarding the best interests factors were not against the great weight of the evidence and, in view of the trial court's factual findings, the trial court did not abuse its discretion by modifying the established custodial environment.

First, the trial court found that factor (a) was equal because the child loves both parents and has emotional ties with both parents. See MCL 722.23(a). Plaintiff argues that this factor should favor her because she has been the child's primary caregiver since his birth. While it is true that plaintiff has had the primary care of the child, there was also evidence that the child is bonded with both parents and that he loves both parents. The trial court's findings regarding factor (a) were not against the great weight of the evidence.

Second, the trial court found that factor (b) favored defendant. In reaching this conclusion, the trial court determined that plaintiff lacked the capacity to provide proper guidance for the child because she could not distinguish abuse from physical discipline. See MCL 722.23(b). In this regard, the trial court specified that what occurred in this case was physical abuse and not simply spanking a child as a form of corporal punishment. Nevertheless, on appeal, plaintiff ignores the trial court's finding of abuse and instead argues that Miller employed physical discipline, which is not illegal. See generally MCL 750.136b(9). This argument was presented in the trial court and it was rejected based on evidence that Miller used a belt and struck the child hard enough to leave bruises. Indeed, the evidence showed that CPS substantiated Miller for abuse and substantiated plaintiff for failure to protect. Yet, plaintiff failed to recognize the wrongfulness of Miller's actions and, on appeal, she persists in the assertion that what occurred was mere discipline. Deferring to the trial court's credibility assessments, the evidence supported the trial court's finding that the child was abused, that plaintiff failed to recognize the abuse, and that, given her inability to recognize abuse, plaintiff lacked the ability to provide proper guidance. The trial court's findings regarding factor (b) are not against the great weight of the evidence.

challenge this finding on appeal. Consequently, defendant had to present clear and convincing evidence that a change in custody was in the child's best interests. *Kessler*, 295 Mich App at 61.

² The trial court weighed factor (f) equally. On appeal, defendant argues that he should have been favored under factor (f). Defendant's appellate brief is devoid of citations to the lower court record in support of his position and we therefore consider his argument abandoned. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); *Yee v Shiawassee Co Bd of Com'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Third, the trial court weighed factor (c) slightly in defendant's favor. On appeal, plaintiff details her provision of care for the child, and she asserts that this factor should have weighed in her favor. However, in making her argument, plaintiff largely ignores that main issues relating to the trial court's assessment of factor (c), which included the appropriateness of the child's clothing and his personal hygiene. Defendant complained that plaintiff allowed the child to dress himself, which led to inappropriate clothing choices, and that plaintiff was not addressing the child's difficulty wiping himself properly after using the bathroom, which led to soiled and smelly undergarments. In contrast, plaintiff asserted that the child should be more independent and that defendant was holding the child back. The trial court aptly summed up the testimony on this point by stating "Mom thinks Dad babies [the child] too much and Dad thinks Mom doesn't do enough." Bearing in mind that the child is seven years old, it does seem more than a little odd that defendant finds it necessary to examine the child's bottom after he uses the bathroom and that he does not give the child more freedom in dressing himself and choosing his own clothes. Indeed, the trial court recognized that in some cases "too much was made" of the child's difficulties. Nevertheless, there was evidence that the child was, on occasion, improperly dressed for the weather while in plaintiff's care and that he struggled with bathroom hygiene. If defendant is doing too much, it appears that plaintiff was not doing enough to address these concerns. In weighing factor (c) slightly in defendant's favor, the trial court found that it was better to do too much than to try to push the child toward "independence before he was ready for it." Given the evidence presented, the trial court's findings regarding factor (c) were not against the great weight of the evidence. See MCL 722.23(c).

Fourth, the trial court weighed factor (d) in defendant's favor based on the determination that plaintiff's home was not satisfactory because there was physical abuse and domestic violence in the home. See MCL 722.23(d). On appeal, plaintiff asserts that this factor should have weighed in her favor because the child has been in her primary care his entire life and he is thriving. However, this argument simply ignores the abuse Miller inflicted on the child, which included striking him with a belt and using "lukewarm" showers as a punishment. Additionally, as found by the trial court, there were two instances of domestic violence between plaintiff and Miller. Given these circumstances, the trial court's determination that plaintiff's home was not satisfactory was not against the great weight of the evidence.

Fifth, although the trial court originally weighed factor (e) equally, at the hearing on plaintiff's motion for reconsideration, the trial court weighed factor (e) slightly in defendant's favor because of the domestic violence in plaintiff's home. Factor (e) is concerned with permanence and stability of the family unit and not the "acceptability" of the home. *Ireland v Smith*, 451 Mich 457, 464; 547 NW2d 686 (1996). See also MCL 722.23(e). In this case, the trial court viewed the domestic violence in plaintiff's home as a risk to the stability of plaintiff's family unit. This finding was not against the great weight of the evidence given that domestic violence had occurred and that both plaintiff and Miller had been arrested, and taken out of the home, for domestic violence in the past. While plaintiff argues that the incidents were minor, the trial court's conclusion that these events undermined the stability of plaintiff's family unit was not against the great weight of the evidence.

Sixth, the trial court weighed factor (h) slightly in defendant's favor. On appeal, plaintiff argues that this factor should have favored her because she has a suitable home for the child and is a good parent, who has provided for her son and who is actively involved in his school and

activities. In evaluating factor (h), the trial court did not ignore plaintiff's merits, and credited her with being an involved mother who was concerned about her son, his schooling, and his activities. Nevertheless, the trial court found that factor (h) should slightly favor defendant because there was evidence that defendant took a more active role in the child's homework and, when the child was in plaintiff's home, there were a couple of times when he missed school because Miller overslept. While these issues are relatively minor, they are supported by the evidence and the trial court's conclusion that factor (h) should weigh *slightly* in defendant's favor was not against the great weight of the evidence. See MCL 722.23(h).

Seventh, the trial court weighed factor (j) slightly in favor of defendant because, among other reasons, plaintiff took the retaliatory action of discontinuing babysitting by defendant's mother after defendant filed his motion to change custody. On appeal, plaintiff argues that it was improper to consider plaintiff's activities relating to the child's grandmother because factor (j) focuses on plaintiff's willingness to foster the child's relationship with defendant. However, in our judgment, there is nothing improper in considering retaliatory action taken by plaintiff in response to defendant's motion to change custody. Her negative response is indicative of her general unwillingness to work with defendant, which supports the conclusion that she is either unwilling or unable to facilitate the child's relationship with defendant. See MCL 722.23(j). Moreover, in weighing factor (j) in defendant's favor, the trial court considered additional matters such as evidence that plaintiff had confronted defendant in front of the child, moving the child almost to tears, and evidence that defendant had tried to have conversations with plaintiff about the child but she quickly turned antagonistic and was unwilling to cooperate. Deferring to the trial court's assessment of defendant's credibility regarding these exchanges with plaintiff, the trial court's conclusion that defendant was more willing to foster plaintiff's relationship with the child was not against the great weight of the evidence.

Eighth, the trial court weighed factor (k) in favor of defendant given the instances of domestic violence between plaintiff and Miller. See MCL 722.23(k). The domestic violence included an incident in 2016 when plaintiff slapped Miller on election night because she did not approve of Miller's choice for president. The police were called and plaintiff was arrested, though she was not ultimately charged or convicted. In 2013, Miller injured plaintiff when he dragged her up and down the stairs by her ankles. Miller was arrested and given probation. In weighing factor (k) in defendant's favor, the trial court also expressed concern about Miller's treatment of the child. On appeal, plaintiff disputes the trial court's findings, asserting that the instances of domestic violence between plaintiff and Miller were rare and "de minimis." However, the trial court was aware of the extent and frequency of the violence in plaintiff's home, and the trial court was in fact concerned by plaintiff's attempts to "downplay" the violence in her home.³ In comparison to plaintiff's home, there was no evidence of violence in

³ In evaluating factor (k), the trial court also addressed plaintiff's assertion that she had addressed the domestic violence and abuse concerns in her home because she and Miller were committed to not using corporal punishment in the future, they had participated in CPS services, they had been removed from the CPS central abuse registry, and Miller had voluntarily participated in counseling. While it is true they participated in services and that Miller attended counseling, the trial court reasoned that plaintiff and Miller had not benefited from the services so as to alleviate

defendant's home. In these circumstances, the trial court's decision to weigh factor (k) in defendant's favor was not against the great weight of the evidence.

Ninth, the trial court weighed factor (l), which is the "catch-all" factor, *Ireland*, 451 Mich at 464 n 7, in favor of defendant. In discussing factor (l), the trial court reiterated some of its concerns about the violence in plaintiff's home and concluded that plaintiff had demonstrated a "lack of judgment." More specifically, the trial court was concerned that plaintiff was willing to leave the child in Miller's care even after the domestic violence incident in 2013 and even after learning that Miller hit the child with a belt. The trial court's findings in this regard were supported by the evidence and they were not against the great weight of the evidence.

On the whole, plaintiff has not shown that the trial court's assessment of the best interests factors was against the great weight of the evidence. See *Butler*, 308 Mich App at 200. As found by the trial court, the evidence clearly and convincingly demonstrated that the child's best interests were served by limiting his time in a home where he had been physically abused by his stepfather and where plaintiff failed to recognize the wrong that had been done. Given the trial court's assessment of the best interest factors, the trial court's decision to change custody was not an abuse of discretion. *Id.* at 201. To further protect the child, the trial court also reasonably prohibited any corporal punishment and restricted plaintiff's parenting time by providing that Miller could not spend any unsupervised time with the child. These restrictions were not an abuse of discretion. Because the trial court did not abuse its discretion by awarding primary physical custody to defendant with parenting time (subject to restrictions) for plaintiff, the trial court's physical custody decision is affirmed. See MCL 722.28.

Finally, on appeal, plaintiff also briefly challenges the trial court's award of sole legal custody to defendant. With regard to legal custody, the trial court is required to consider the best interests of the child under the best interest factors, MCL 722.26a(1)(a), and "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child," MCL 722.26a(1)(b). See also *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994). The trial court discussed the child's best interests under the factors as set forth above. As required by MCL 722.26a(1)(b), the trial court also considered whether the parents are able to cooperate and generally agree concerning important decisions affecting the child. The trial court concluded that the parties could not do so. Specifically, the trial court found that the parties did not work well together and that they could not agree on matters such as discipline, general care of the child, and education. The trial court also found that plaintiff in particular was defensive and unwilling to discuss issues with defendant. These findings are not against the great weight of the evidence. Given the trial court's assessment of the child's best

the defects in plaintiff's home. For example, the trial court emphasized that Miller testified that he engaged in therapy to "prove a point." And, based on the evidence, the trial court determined that plaintiff was more focused on the legality of physical discipline than she was in recognizing when an action crossed the line from discipline to abuse. Notwithstanding plaintiff's efforts to address the problems in her home, the trial court's findings regarding domestic violence and abuse were not against the great weight of the evidence.

interests and the fact that the parties cannot cooperate and agree on important matters concerning the child, the trial court did not abuse its discretion by awarding sole legal custody to defendant.

Affirmed. Having prevailed in full, defendant may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell

/s/ Joel P. Hoekstra

/s/ Brock A. Swartzle