

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY B. BURL,

Plaintiff-Appellee,

v

SUZANNE B. BURL,

Defendant-Appellant.

UNPUBLISHED

May 18, 2006

No. 265729

Houghton Circuit Court

LC No. 04-012585-DM

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce granting custody of the parties' minor children to plaintiff. We affirm.

Plaintiff filed for divorce on April 5, 2004, and in June 2004 defendant left the marital home and moved to Indianapolis. At the time, the parties had agreed that defendant would have primary physical custody of the children, and they set out a visitation schedule for plaintiff. However, this agreement eventually broke down, and by the time of the trial, the main issue to be decided was custody of the children. The trial court determined that an established custodial environment existed with defendant but awarded custody to plaintiff.

On appeal, defendant first asserts that the trial court applied an incorrect standard of proof in evaluating the best interests of the children. We disagree. Custody orders must be affirmed on appeal unless the trial court's findings 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; *Harvey v Harvey*, 257 Mich App 278, 282-283; 668 NW2d 187 (2003).

If an established custodial environment exists, then the party bearing the burden of proof must establish by clear and convincing evidence that the custody change is in the best interests of the child. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). Here, the trial court specifically stated:

In determining custody, the court must be guided by what is in the best interest of the minor child or children. If an established custodial environment exists between the child and one or both of his or her parents, then the custodial

environment may not be changed absent presentation of clear and convincing evidence that such a change is in the child's best interest.

This statement accurately sets forth the law on this subject, and it indicates that the trial court understood that changing an established custodial environment is only permissible when clear and convincing evidence is presented that doing so is in the child's overall best interests.

After setting forth its findings regarding each of the factors that must be considered in evaluating the children's best interests, the court stated:

The findings of the Court on the child custody factors above set forth are based upon clear and convincing evidence. The Court has applied such standard to each of the factors above set forth. Based upon the Court's evaluation of the factors, Plaintiff-father is to be awarded actual physical custody of both minor children. The Court finds that father has been consistent in providing parenting to the children and has remained focused in that regard.

It is true that this statement by the trial court evidences some confusion on its part concerning the proper manner in which to evaluate the best interests factors. Specifically, the clear and convincing standard need not be applied to each of the trial court's factual findings regarding the factors but only in determining whether all of the relevant factors taken together indicate that changing the established custodial environment will serve the child's best interests. MCL 722.27(1)(c).

Nevertheless, the fact that the trial court applied a higher burden of proof than required in analyzing each best interests factor does not indicate that the trial court applied a lesser burden of proof in analyzing the children's overall best interests. Rather, the trial court consistently referenced the clear and convincing standard, took into account all of the best interests factors, and determined that it was in the children's best interests to change primary physical custody of them to plaintiff. There is no evidence in the trial court's opinion that the court made its final custody determination based on a burden of proof less than "clear and convincing" or that it awarded custody to plaintiff simply because more best interest factors favored him. Instead, it appears that the trial court concluded that the evidence was clear and convincing that plaintiff had been and would remain a more consistent parent, and, therefore, it was in the children's best interests to change their custodial environment. Accordingly, a remand is not required on this basis.

Defendant next asserts that the trial court erred in analyzing best interests factors (b), (c), and (j). MCL 722.23.¹ Factor (b) addresses the "capacity and disposition of the parties involved

¹ The court found that the parties were equal with regard to all the other factors or that the factors were not relevant, with the exception of factor (i). With regard to that factor, the court found that the children expressed a preference, but he did not disclose the preference. Defendant does not challenge the court's findings on factors other than (b), (c), and (j).

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 court reasoned that plaintiff was better disposed to give the children love, affection, and guidance based on evidence that defendant had in the past suffered from depression, during which plaintiff became the more active parent, and because of defendant’s association with another woman, Kim Smith. The court found that this association affected defendant’s judgment and took her focus off her children.

We conclude that the great weight of the evidence does not preponderate against the trial court’s findings regarding factor (b), because the evidence established that defendant can become distracted from active participation in her children’s lives and may be inclined to put her present interests and associations ahead of her children. Specifically, the evidence adduced at trial suggested that defendant withdrew from many of her usual activities with the children during the summer following the death of her brother. The fact that the depression might have been temporary does not defeat the fact that it reflects, at least in some manner, on defendant’s disposition to provide her children with love, affection, and guidance. There was also substantial evidence introduced suggesting that after defendant’s association with Smith began, defendant’s life began to revolve around Smith. Importantly, one of defendant’s former friends testified that defendant started to pay less attention to her children after defendant met Smith. In contrast, plaintiff was repeatedly described as a loving, stable, and devoted father who enjoyed spending time with his children.

Nor do the trial court’s findings that the evidence indicated that defendant’s association with Smith “seemed” to divert her attention from family and friends and that questions “seemed” to arise regarding defendant’s judgment indicate that the evidence actually preponderated in the other direction. The court’s use of the term “seemed” perhaps indicates that it could not positively identify Smith as the cause of the changes in defendant’s behavior, but it does not undermine the evidence that was presented establishing that changes occurred. Indeed, there was testimony that defendant’s association with Smith negatively impacted defendant’s judgment and her relationship with her children. We conclude that the great weight of the evidence does not preponderate against the trial court’s finding that factor (b) favored plaintiff.

Factor (c) addresses 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.” MCL 722.23(c). Here, the trial court found that plaintiff had a greater capacity and disposition to provide for the children’s material needs. The evidence in this case clearly establishes that plaintiff is well educated and earns a substantial income of more than \$75,000 a year. Contrarily, defendant has a high school diploma and recently obtained employment at which she earns \$10.83 an hour working 31.25 hours per week during the school year. Defendant argues that she has taken classes to become a real estate appraiser and that she will be able to rapidly put in the requisite 2,000 hours she must work as an apprentice appraiser because she is not otherwise employed during the summer. However, presuming that defendant were to work 40 hours a week for three months each summer, it would take her more than four years to put in the requisite number of hours. Further, defendant admitted that she never inquired into the average wages of real estate appraisers and accordingly could offer no evidence of what her future earnings in that profession might be.

Defendant also asserts, relying on *LaFleche v Ybarra*, 242 Mich App 692, 701; 619 NW2d 738 (2000), that the income disparity between plaintiff and her is not as great as it might seem at first because of the child support payments she has received and would continue to receive if awarded physical custody. However, defendant admitted that she relied on her family for significant financial assistance after leaving plaintiff and that she had accumulated approximately \$12,000 in credit card debt during that time, despite the child support payments she had received.

Further, defendant made a highly suspect financial decision, under the circumstances, to loan \$5,000 to Smith to help pay for legal expenses incurred as the result of a criminal prosecution of Smith. The evidence of poor judgment in financial matters also supports the trial court's finding that factor (c) favored plaintiff. See *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 27-28; 581 NW2d 11 (1998) (concluding that the trial court's finding that factor [c] favored the plaintiff because the defendant had demonstrated poor financial judgment was not against the great weight of the evidence). In contrast, the trial court properly noted that plaintiff began paying child support to defendant without court order even before defendant and the children moved out of the marital home. This fact reflects favorably on his disposition to provide for the children. Considering the foregoing evidence, we conclude that the trial court's determination that factor (c) favored plaintiff was not against the great weight of the evidence.

Factor (j) addresses 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." MCL 722.23(j). The trial court concluded that factor (j) also favored plaintiff. At trial, plaintiff testified that defendant would often try to modify their agreements regarding custody and visitation, and he noted that on one occasion when he visited the children in Indianapolis, defendant required him to spend some of his visitation time with the children in the company of Smith, a fact that undoubtedly impacted on the quality of the visitation time. Plaintiff further testified that defendant had refused to provide him with contact information for one of the girl's athletic coaches. Evidence was also presented that defendant had purchased a new home in Indianapolis where the children had started spending some nights but that defendant failed to inform plaintiff of this change of residence.

In evaluating this evidence, the court asserted that defendant should have taken affirmative action to inform plaintiff of the change of residence, even if plaintiff could have reached the children through defendant's cell number. The court further stated that defendant's decision to move the children a significant distance from their father's residence was relevant to its determination that factor (j) favored plaintiff, despite plaintiff's purported agreement to the move. The court noted that defendant admittedly removed the children from the marital home on the morning in question to pressure plaintiff into signing the agreement. In fact, plaintiff testified that, despite his signing of the agreement, it was not possible that defendant believed he did not object to her taking the children to Indianapolis.

Defendant argues that the trial court failed to take into account that she had transportation difficulties that limited her ability to facilitate visitations, but she has not cited any factual support for this claim. This Court is not obligated to search the record for factual support for defendant's argument. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). In any event, we have found no record support for this allegation. Defendant also argues that because plaintiff has an airplane, it is easier for him to visit the children in

Indianapolis. However, plaintiff testified that his ability to use the plane to facilitate visits was weather dependant. Considering the foregoing, we conclude that the evidence does not preponderate against the trial court's finding that factor (j) favored plaintiff.

Finally, defendant argues that the trial court abused its discretion by awarding custody of the children to plaintiff. Our Legislature intended that under the Child Custody Act, MCL 722.21 *et seq.*, children only be removed from an established custodial environment “*in the most compelling cases.*” *Foskett, supra* at 6, quoting *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981) (emphasis added by *Foskett*). Thus, an established custodial environment may only be altered “if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child.” *Foskett, supra* at 6.

In this case, the trial court determined that there was clear and convincing evidence that the best interests of the children would be served by switching primary physical custody of them to plaintiff, because plaintiff had “been consistent in providing parenting to the children” and “focused in that regard.” Of obvious import to the court was the evidence that in the past defendant’s attention to and participation in the lives of her children had been diverted by an episode of depression and by her association with Smith. As already discussed in detail, the evidence adduced at trial leads to the conclusion that plaintiff is better disposed to providing the children with consistent love, affection, and guidance. In addition, the evidence established that defendant would have difficulty meeting the material needs of the children even with the help of child support payments and that defendant was willing to place the financial interests of a friend ahead of those of her children. The evidence also preponderated in favor of a finding that defendant was willing to place her children in the middle of her dispute with plaintiff, notably by removing them from the marital home shortly before they were planning to leave for a vacation with plaintiff, in order to pressure plaintiff into agreeing with her move to Indianapolis, and by otherwise demonstrating a hesitancy to foster the children’s relationship with their father.

A trial court’s custody decision is a discretionary ruling. *Fletcher (After Remand), supra* at 24. As our Supreme Court explained in *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994), the standard of review to be applied in this situation is “not significantly unlike” that set forth in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Thus, to constitute an abuse of discretion, the trial court’s custody ruling “must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather passion or bias.” *Fletcher, supra* at 879-880, quoting *Spalding, supra* at 384-385.

We conclude that the trial court did not abuse its discretion in finding that plaintiff met his burden of proving by clear and convincing evidence that the change in physical custody was in the children’s best interests. Defendant notes that the children were doing well in Indiana and argues that her depression and her association with Smith are past episodes that have little bearing on her current ability to parent the children. The trial court disagreed, finding that these past episodes reflected poorly on defendant’s disposition to provide the children with consistent love, affection, and guidance. We conclude that the evidence presented that defendant lacked good judgment in making both personal and financial decisions, that plaintiff would be better able to provide for the material needs of the children, and that plaintiff would be more willing to facilitate the children’s relationship with the other parent than defendant established clearly and convincingly that the children’s best interests were served by the change in physical custody.

Accordingly, we conclude that the trial court's decision to switch primary physical custody from defendant to plaintiff was not an abuse of discretion.

Affirmed.

/s/ Patrick M. Meter

/s/ Joel P. Hoekstra

/s/ Jane E. Markey