

STATE OF MICHIGAN
COURT OF APPEALS

MELISSA CAMACCI,

Plaintiff-Appellant,

v

DENNIS JOHNSON,

Defendant-Appellee.

UNPUBLISHED

May 22, 2007

No. 273834

Otsego Circuit Court

LC No. 04-010599-DS

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals by right an order directing that the parties' minor son live with defendant during the school year, but alternate holidays, every other weekend during the school year, and all but two weeks of summer vacation with plaintiff. We agree with plaintiff that the trial court incorrectly characterized its decision as merely a change in parenting time rather than in child custody. Although the trial court improperly characterized the matter, we conclude on de novo review that except for harmless errors, the trial court's findings on the best interests factors were supported by the great weight of the evidence, and its ultimate decision, which effectively gave defendant a majority of the parenting time while the child was enrolled in school where defendant resides, was not an abuse of discretion. Consequently, we affirm.

In reviewing a child custody dispute, all orders and judgments of the circuit court 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; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). We review a trial court's findings regarding a petition to change the domicile of a child under the great weight of the evidence standard, and the court's decision on the petition for an abuse of discretion. *Brown v Loveman*, 260 Mich App 576, 591, 600; 680 NW2d 432 (2004). 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. *Fletcher, supra* at 879-880; *Shulick v Richards*, 273 Mich App 320, 323-325; ___ NW2d ___ (2006).

"[A] change in domicile will almost always alter the parties' parenting time schedule to some extent and . . . thus, . . . the parenting time schedule need not be equal to the prior parenting time schedule in all respects." *Brown, supra* at 595. "Parenting time is granted if it is in the best interest of the child and in a frequency, duration, and type reasonably calculated to promote strong parent-child relationships." *Id.* "But . . . if a requested modification in parenting time

amounts to a change in the established custodial environment, it should not be granted unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child.” *Id.*

“Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child’s best interests.” *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A “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.” MCL 722.27(1)(c). “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.” *Id.*

Plaintiff argues that the instant case should have been analyzed as a custody case, and not a parenting time case. Indeed, plaintiff filed a motion for change of custody, not modification of parenting time. The trial court, however, made it clear it considered this issue a parenting time dispute, not a custody modification case. Neither party disputed the trial court’s characterization—in fact, plaintiff’s attorney even stated at trial that he and plaintiff “always treated the petition as a parenting time issue, not as a custody issue,” and expressed that they were “not asking for a modification of custody.”

Regardless of the parties’ and trial court’s statements, several facts exist that clearly indicate both plaintiff’s request for relief and the trial court’s order make the issue one of custody, not parenting time. First, the effect of the trial court’s order is that the child will now spend the vast majority of his time with defendant. This is a significant departure from the parties’ equal joint and physical custody. The order states:

1. Father [defendant] is awarded the minor child during the school year.
2. Mother [plaintiff] is awarded the following:
 - A) Every other weekend during the school year.
 - B) Thanksgiving day will be alternated between the parties with the remainder of that weekend every year awarded to the mother.
 - C) Every year’s spring break. This includes only the week days so that each parent is entitled to one of the alternating weekends.
 - D) During Christmas break, the holiday time will be alternated between parties so that Christmas will be December 24 at 6:00 p.m. to December 26 at 5:00 p.m. and New year’s will be December 30 at 6:00 p.m. to January 1 at 6:00 p.m. All remaining days every year of Christmas break are awarded to the mother.
 - E) Summer break is awarded to mother from the second day after school is out until four days before school starts in the fall except as noted in paragraph 3 of this order.

3. Father is awarded two weeks each summer as uninterrupted parenting time. Father shall notify mother, in writing, no later than April 1st of each year as to the weeks requested. Further, father shall receive two weekends during the summer for parenting time. Written notice of those weekends shall again be no later than April 1st of each year.

4. This matter shall be referred to Friend of the court for a child support recommendation based on this order.

5. The parties shall work out when the minor child is returned to the father after Labor day 2006. The court allows some flexibility, however the child must be returned to father no later than Friday, September 8, 2006 by 6:00 p.m.

Previously, the parties shared joint legal and physical custody of the child pursuant to a two-week on, two-week off arrangement—effectively splitting their time with the child fifty-fifty. Now, however, assuming school is in session from at least September 1 to May 31, defendant has about two-thirds of the total parenting time, while plaintiff only has one-third. The new division of time under the order amounts to a change in the custodial environment. When it becomes clear that a proposed change in parenting time would result in a change in an established custodial environment of the minor child, the trial court must conduct a full evidentiary hearing to determine if the moving party can prove by clear and convincing evidence that the change would be in the best interests of the child and state its findings of fact on the record. *Brown, supra* at 600.

Before commencing a best interests analysis, however, the trial court was required to determine as a question of fact whether an established custodial environment existed. *Mogle, supra* at 197. In analyzing whether an established custodial environment existed, the court must consider whether “over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.” MCL 722.27(1)(c). Here, the trial court made no finding whatsoever regarding whether an established custodial environment existed. Where a trial court fails to make a finding regarding the existence of a custodial environment, we will remand for a finding unless the record is sufficient for us to decide this issue by de novo review. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). In this case, the record is sufficiently complete for us to make this determination on our own. In light of the parties’ previous agreement to equally split custodial time, and the strong evidence that both parties were actively involved with their child, it is manifest that an established custodial environment existed with both plaintiff and defendant.

Plaintiff argues that even if the trial court’s mischaracterization of the case as a parenting time matter does not warrant reversal because the trial court analyzed the case under the proper best interests standard, we must reverse the trial court’s order because the court made several findings against the great weight of the evidence and declined to make other required factual determinations. We disagree. On de novo review, we find that defendant established by clear and convincing evidence that the change in the custodial environment was in the best interests of the child. *Brown, supra* at 585. We also conclude that the trial court’s findings regarding the best interests factors were supported by the great weight of the evidence and its order that gave defendant a majority of the parenting time while the child was enrolled in school where defendant resides, was not an abuse of discretion. *Shulick, supra* at 323-325.

The trial court must evaluate each of the factors enumerated in MCL 722.23 to determine the best interests of the child before deciding a custody dispute, and a conclusion on each factor must be stated. *Wolfe v Howatt*, 119 Mich App 109, 110-111; 326 NW2d 442 (1982). “To reach a conclusion requires weighing the factor for one party or the other or weighing it equally. It does not mean merely mentioning it.” *Id.* at 111. The court must state its factual findings and conclusions under each best interests factor, but the findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The record, however, must be sufficient for an appellate court to determine whether the evidence clearly preponderates against the trial court’s findings. *Id.* at 5. Here, while the trial court noted the findings in its order were “a short summary,” the order and the trial court’s statement of its findings on the record are sufficient for this Court to determine whether the evidence clearly preponderates against them. *Id.*

Regarding the best interests factors, the trial court determined that factors A, D, F, G, H, I, and K were equal or inapplicable. With respect to factor A, the love, affection, and other emotional ties existing between the parties and the child, it was not against the great weight of the evidence for the trial court to find the parties equal in that regard, noting that the parties’ testimony showed it was “strong going both ways between both parties and the child.” Plaintiff testified that she loved the child, and that she, unlike defendant, wanted to enroll him in preschool so he could benefit from being around other children and gain learning skills. Plaintiff also admitted that defendant loved the child, and defendant testified that he showed the child he loved him by “wrestl[ing], hug[ging], kiss[ing], tell[ing] each other we love each other,” and by engaging in “the common guy stuff, hang[ing] out together, play[ing] baseball, stuff like that.”

The trial court also found that factor D, the length of time the child was living in a stable satisfactory environment and desirability of maintaining continuity, was “equal” on both sides, “as both are stable satisfactory environments.” The evidence does not indicate that one party’s environment was more stable than the other’s.

With respect to factor G, the mental and physical health of the parties, defendant testified to several of plaintiff’s self-harm episodes and that he believed she was bipolar because of her mood swings. Although plaintiff denied she ever harmed herself, she admitted she was on medication for depression and anxiety following her divorce from Jason Olds. She also admitted that she was required to attend anger management counseling after being charged with domestic violence. Further, defendant testified that the relationship between plaintiff and his wife, Vanessa, was strained, while the relationship between Vanessa and the mother of his other children, was “great.” Plaintiff presented no evidence that defendant exhibited any similar emotional instability. In light of the overwhelming evidence demonstrating plaintiff’s emotional difficulties, it was against the great weight of the evidence for the trial court to find that this factor was equal. Clearly this error was harmless because having factor G weighed against her would not have benefited plaintiff’s position in this case.

The trial court’s determination that factor H, the home, school, and community record of the child, was equally in favor of both parties was not against the great weight of the evidence. The evidence shows that the child was involved in preschool and tee-ball while staying with plaintiff. When living with defendant, the child had a close relationship with the children who lived in his home and participated in church activities. It was not against the great weight of the evidence for the trial court to determine that the child’s ties to both living situations were equal.

The trial court found that factor F, the moral fitness of the parties, was not a factor one way or another. The mother had some legal difficulties, including writing bad checks and one incident of domestic violence. But criminal charges were dropped in both instances. It was therefore not against the great weight of the evidence for the trial court to find this factor was not applicable. Likewise, it was not against the great weight of the evidence for the trial court to determine factor I, the reasonable preference of the child, to be inapplicable because of the child's young age, an assessment that is permitted by the best interests analysis. Finally, it was not against the great weight of the evidence for the trial court to find that factor K, domestic violence, was not an issue in light of the conflicting testimonies of plaintiff and defendant regarding a single instance of dismissed charges of domestic violence.

Although the trial court did not mention factor C in its order, it stated on the record that factor C, the capacity and disposition of the parties to provide the child with food, clothing, medical care or other remedial care and other material needs, weighed in favor of plaintiff. This was not against the great weight of the evidence. As the trial court mentioned, defendant failed to stay current with his child support obligations.

The trial court determined that best interests factors B, E, J, and L favored defendant. With respect to factor B, the capacity and disposition of the parties involved to give the child love, affection, and guidance, and a continued education and raising the child in his or her religion if any, it was not against the great weight of the evidence for the trial court to find that this factor weighed in favor of defendant, considering the father's heavy involvement with his church and his including his son in church-related activities.

The trial court's finding regarding factor E, the permanence, as a family unit, of the existing or proposed custodial homes, was not against the great weight of the evidence. The trial court noted that defendant was married, and although the mother was in a long-term relationship, she did not own or rent the house she lived in. The trial court also noted that it did not give this factor great weight because plaintiff's relationship with her fiancé appeared to be strong, and plaintiff's boyfriend has a strong incentive to remain at the same residence.

The trial court determined under factor L, which is any other factor considered by the court to be relevant to a particular child custody dispute, that because plaintiff testified she was working two jobs and going to school, she probably would have more time in the summer to spend with her son. Plaintiff testified that she worked a full day at a factory and assisted with the care of her fiancé's elderly grandmother. Although plaintiff indicated the latter responsibility was temporary and that she could bring the child with her, she also testified that she still had two years remaining of class instruction. Thus, the trial court's finding is not against the great weight of the evidence.

The trial court's reasoning for finding factor J favored defendant is unclear. Factor J is 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. The trial court stated:

I do find this factor slightly favors the father as the mother has indicated at least through testimony that that wasn't clearly rebutted that she would not be given [sic] any more breaks to the father on parenting time.

We find this statement insufficient to explain the trial court's reasoning for factor J. Nevertheless, the trial court indicated factor J only "slightly" favored the defendant and very thoroughly analyzed the other best interests factors. Moreover, its conclusions that factors B, E, J, and L favored defendant while only C favored plaintiff were supported by the great weight of the evidence. Thus, any error as to factor J was harmless. Furthermore, as discussed already, the trial erred by finding that factor G favored plaintiff. Considering the foregoing, we conclude that the trial court's order effectively giving defendant a majority of the parenting time while the child was enrolled in school where defendant resides was not an abuse of discretion.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra