

STATE OF MICHIGAN  
COURT OF APPEALS

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DEREK FECHIK,

Plaintiff-Appellee,

v

LORI FECHIK,

Defendant-Appellant.

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UNPUBLISHED

July 30, 2009

No. 286233

Oakland Circuit Court

Family Division

LC No. 2001-659289-DM

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff sole physical custody of the parties' three children. We affirm.

Defendant first argues that the trial court erred with respect to its findings on various best interests factors and in ultimately granting plaintiff sole physical custody. We disagree.

The great weight of the evidence standard applies to all findings of fact. A trial court's findings . . . regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. . . . An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).]<sup>1</sup>

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<sup>1</sup> The trial court found that an established custodial environment existed with both parents. To issue an order changing the established custodial environment, it must be proven by clear and convincing evidence that the change is in the best interests of the child. MCL 722.27(1)(c). However, the parties stipulated below to using a preponderance of the evidence standard. On appeal, defendant briefly argues that the trial court should have disregarded the stipulation and applied the clear and convincing evidence standard. We need not address this argument because it was not raised in the statement of questions presented for appeal. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). At any rate, we reject defendant's blanket statement that "[u]nder an appropriate standard, clear and convincing, the trial court's decision [cannot] be  
(continued...)

Plaintiff and defendant were married in July 2000 and divorced in March 2003. The divorce judgment provided for joint physical and legal custody of the children. In an attempt at reconciliation, the parties moved in together shortly after the divorce. They lived as a family until May 2007 when the relationship deteriorated and defendant moved out. Both parties filed motions for a change of custody seeking sole physical custody of the children. Following an evidentiary hearing, the trial court granted plaintiff sole physical custody of the children.

On appeal, defendant argues that the court erred with respect to its findings on best interest factors (b), (c), (d), (e), (h), and (j).<sup>2</sup> We disagree.

Factor (b) concerns “[t]he 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.” The trial court found that this factor favored plaintiff. It found that, although the parties were equal with regard to the ample love and affection they provide to the children, defendant’s history of drug and alcohol abuse casts some doubt on her ability to provide the children with adequate guidance. Defendant admitted to abusing alcohol in the past. Defendant’s stepmother acknowledged that defendant has issues with alcohol and is a heavy smoker, smoking around one and one half packages of cigarettes daily. Defendant also admitted to cocaine use and taking her mother’s prescription Vicodin for various aches and pains because she could not afford her own. During the divorce proceedings in 2002, defendant tested positive for alcohol and cocaine. During custody proceedings in June 2007, she tested positive for alcohol, hydrocodone, and cocaine. Since her June 2007 drug test, defendant has attended therapy, joined a support group, and submitted to multiple random drug and alcohol screens, all of which were negative for drugs and alcohol. Defendant testified that she recognized that she had been using alcohol as an improper coping mechanism for life’s problems, but had gained insight into her behaviors and has learned alternate ways of dealing with stress. As of the April 2008 evidentiary hearing, defendant maintained that she was living a sober lifestyle. As for plaintiff’s part, he acknowledged drinking too much in the past and occasionally using cocaine, the last time he used cocaine being in late 2006. Plaintiff maintained that his history with drugs and alcohol was never as serious as defendant’s, and he currently does not have a drug or alcohol problem. He has submitted to multiple random drug tests over the years and has never tested positive.

Based on the foregoing, the trial court’s decision to credit plaintiff with factor (b) was well supported. Defendant has had a longstanding struggle with alcohol and drugs. Although defendant, to her credit, has received treatment, passed all of her drug tests after June 2007, and made overall improvement, the trial court did not err in finding that her past struggles have undermined her ability to provide her children with guidance. Although plaintiff, too, had a history of drug and alcohol abuse, his was not as long or serious as defendant’s, and there was no evidence that drugs or alcohol were an issue for plaintiff as of the time of the custody proceedings.

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(...continued)

supported.”

<sup>2</sup> The best interest factors are set forth in MCL 722.23.

Defendant's argument that plaintiff's work schedule is so demanding that it effectively renders him unavailable to tend to his children's basic needs is not persuasive. Plaintiff, employed as a manager at Discount Tire, works about 44 hours per week and is generally home between 3:00 p.m. and 6:30 p.m. on weekdays. Plaintiff gets the children up for school each morning, makes them breakfast, packs their lunches, cooks them dinner, and does homework with them every evening. Plaintiff testified that, after the children arrive home from school in the afternoon, he arrives home from work within about one and one half to two hours. Plaintiff's live-in father takes care of the children while plaintiff is at work, and his father typically drives the children to and from school. We are persuaded that plaintiff is available to tend to the children's basic needs and spends a good deal of time with the children. Plaintiff's father is not excessively involved in the children's upbringing, but rather serves as a valuable member of the extended family.

Next, factor (c) concerns the "capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . and other material needs." The court found that this factor favored plaintiff. Plaintiff has worked at Discount Tire for 17 years and earns a yearly salary of between \$60,000 and \$100,000 as a manager; he also has health insurance through his employer. As the trial court noted, he has been meeting the children's material needs and has the resources to continue to do so. As for defendant, the trial court noted that she had previously earned an annual salary of \$60,000 but was currently employed as a waitress earning \$2.65 an hour plus tips, and without benefits through her employer. Although defendant's salary is less than plaintiff's, she too has been adequately providing for the children's material needs. Nonetheless, plaintiff's job stability warranted finding in favor of plaintiff. Thus, the court did not err with respect to its finding on factor (c).

Factor (d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The court found that this factor favored plaintiff. Since 2006, the children have lived in the Ortonville home in which plaintiff resides. It is a bi-level, 2,000 square foot home with three bedrooms, and it sits on one and one half acres of land. Plaintiff's father lives with him and helps take care of the children when plaintiff is at work. The children have forged neighborhood friendships and are thriving in the Ortonville area. Also, plaintiff's home is located within the Brandon School District, the district in which the children have been enrolled all of their lives, except for the one-month period when defendant moved to Midland with the children in May 2007. Defendant's current home life in Freeland is somewhat less stable in that she lives in a home purchased by her aunt, who has warned defendant that she will be kicked out of the home if she relapses into drug or alcohol abuse. Also, at the time of the evidentiary hearing, defendant's life was poised to undergo significant changes in that she was engaged and expecting a child. Considering all of the evidence, the court did not err in finding that factor (d) favored plaintiff.

Next, factor (e) concerns "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." The court found that this factor favored plaintiff. For reasons stated above with respect to factor (d), plaintiff is able to provide a more stable and permanent living environment for the children. The court did not err in finding that factor (e) favored plaintiff.

Factor (h) concerns "[t]he home, school, and community record of the child." The court found that this factor favored plaintiff. As noted above, the children have lived in plaintiff's home since 2006. They have attended school in the Brandon School District for all of their lives,

save for one month. As the trial court noted, “they have done well in school, have a lot of friends and are involved in activities.” In addition, plaintiff has established a healthy routine for the children with regard to their meal time, homework time, and relaxing time, thus providing for much-needed structure in their lives. Defendant, while herself very involved with the children’s lives, presented less evidence in support of being able to provide the children with structure and stability. In addition, if the children were to be in the primary physical custody of defendant, they would have to change school districts and live in a home and community in which they are far less accustomed and have fewer ties. The trial court noted that Derek, Jr., has autism but has been performing very well in his school district, an additional reason to keep the children in the Brandon School District. The trial court did not err in finding that factor (h) favored plaintiff.

Factor (j) concerns “[t]he 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 court found that the parties were equal with respect to this factor. Defendant argues that she has gone out of her way to encourage a close and continuing parent-child relationship between the children and plaintiff, citing as an example her decision to allow plaintiff to move in with her after the separation in order that they could work on their relationship for the sake of the children. The evidence suggests that defendant has indeed attempted to foster a close relationship between her children and plaintiff. However, defendant fails to allege, nor is there any evidence to support a finding, that plaintiff has failed to likewise facilitate a close relationship between the children and defendant. Fortunately for the children, this case is not one where there is a significant amount of acrimony and bickering between the parties. To their credit, the parties have been able to handle the rigors of joint custody with relative success, and the evidence suggests that the children are well-adjusted and happy. The court’s finding with respect to this factor is well supported.

In summary, because none of the challenged factors clearly preponderated in the opposite direction, the trial court’s findings regarding said factors are affirmed. Further, the court’s ultimate decision to award plaintiff sole physical custody is affirmed because it was not an abuse of discretion. The majority of the best interest factors favored plaintiff, while none favored defendant.

Finally, defendant argues that the trial court erred in failing to make a record of its in-camera interview of the parties’ children and failing to elaborate upon its findings with regard to the children’s preferences. We disagree.

Because defendant raised this issue for the first time on appeal, review is limited to the plain-error doctrine. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Factor (i) of the best interests factors considers “[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.” MCL 722.23(i). A court may conduct an in-camera interview of the child in order to assess the child’s preference. *Surman v Surman*, 277 Mich App 287, 297-298; 745 NW2d 802 (2007). An in-camera interview of a child is limited to the reasonable preference of the child. *Id.* The court must declare on the record whether the child was capable of expressing a reasonable preference and whether the

preference was afforded any weight by the court. *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988). However, in the interest of protecting confidences, the court need not disclose the child's preference. *Id.*; see also *Impullitti v Impullitti*, 163 Mich App 507, 510; 415 NW2d 261 (1987) (stating that a child would experience trauma and distress in having to testify in open court concerning his or her custody preference). Finally, an in-camera interview to determine a child's preference need not be recorded. *Molloy v Molloy*, 466 Mich 852, 852; 643 NW2d 574 (2002).

Here, the court noted in its opinion, “[a]t the request of the parties, I did interview the children and have considered their preferences.” The court's statement suggests that the children expressed a preference, and the court considered their preferences in making the custody determination. The court did not err in failing to record the interview, as the Supreme Court in *Molloy* made clear that such interviews need not be recorded. *Molloy, supra* at 852. In addition, in light of the sensitive and confidential nature of the information, the court was not obligated to disclose the children's preferences. *Wilson, supra* at 97. There is no evidence that the trial court exceeded the permissible scope of the interview or otherwise acted contrary to law. Accordingly, defendant's claim fails.

Affirmed.

/s/ Kathleen Jansen  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood