

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA BRIGGS,

Plaintiff-Appellant,

v

ASHANTI BURNETTE,

Defendant-Appellee.

UNPUBLISHED

April 22, 2014

No. 317408

Menominee Circuit Court

Family Division

LC No. 12-014122-DC

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals by right from the circuit court's order changing primary physical custody of the parties' child to defendant, as well as changing the child's domicile to Florida. For the reasons outlined below, we affirm.

I. FACTS

Plaintiff and defendant were never married. They have one child together. On July 31, 2007, a judgment of paternity was entered in the State of Wisconsin establishing defendant as the child's father and granting joint legal custody to the parties, primary physical custody to plaintiff, and right of reasonable parenting time to defendant. Defendant filed a motion to change physical placement alleging that plaintiff had denied him all contact with the child and requesting that the placement schedule be adjusted to shared placement. On August 8, 2012, jurisdiction of the case was transferred from Wisconsin to Michigan under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*

On October 3, 2011, defendant filed a petition for the establishment of custody and parenting time, alleging that plaintiff had continued denying him parenting time in defiance of court orders, had concealed the location of the parties' child from him, and had wrongfully initiated a termination of parental rights petition against him. On April 3, 2013, defendant filed a motion for an ex parte order modifying custody and parenting time. In the motion, defendant sought temporary legal and physical custody of the child, and alleged that plaintiff's husband had physically abused the child, that she had removed the child from school for extended periods of time, and that she had continually obstructed defendant's attempts to develop a relationship with the child.

A combination threshold determination, custody, and parenting-time hearing was held. At the hearing, defendant testified that plaintiff had ceased communication with him one week after their child was born and had failed to return his calls, e-mails, and text messages. He further testified that plaintiff had concealed her location from him, had enrolled their child in school under a different last name, and had listed her husband as the child's legal father. Defendant introduced evidence that plaintiff had removed the child from school for six weeks for a family vacation, and that the child was now likely to be forced to repeat kindergarten. Defendant also presented evidence that plaintiff's husband had spanked the child with a belt, and that the child frequently reported fearing getting "whooped" by plaintiff's husband. Defendant also testified that plaintiff had been held in contempt of court twice for failing to comply with court orders regarding the provision of parenting time to defendant.

Plaintiff testified that she had neither concealed her location from defendant nor failed to communicate with him, and that she was willing to grant reasonable parenting time to defendant. Plaintiff also testified that she had been the sole provider of the child's care and custody since birth, and that defendant had only exercised eight overnight parenting times. She also testified that her husband would cease the use of corporal punishment on the child, and presented evidence of defendant's prior criminal record, which involved battery, and testimony alleging that defendant had slapped a prior girlfriend.

At the conclusion of the hearing, the court changed primary physical custody of the child from plaintiff to defendant, and the child's domicile from Michigan to Florida, where defendant lived. In support of its ruling, the court found that an established custodial environment existed with plaintiff, but that defendant had shown proper cause for changing that environment by clear and convincing evidence. Specifically, the trial court weighed the change of custody factors and found that, while the majority of the factors were equal or weighed slightly in favor of one parent over the other, the factors concerning a stable, satisfactory living environment and willingness to facilitate a continuing parent/child relationship favored defendant. The trial court found that defendant owned a home, was employed and had a spouse who was employed, and had worked to foster the relationship between the child and plaintiff, while plaintiff and her husband were unemployed, moved from place to place, and had worked persistently to frustrate attempts by defendant and the judicial system to facilitate parenting time for defendant.

The court further found that the change of custody was in the child's best interests, and that a change of domicile was justified, as it had the capacity to improve the child's life, the change was not requested by defendant in order to frustrate plaintiff's parenting time or gain financial advantage, and both parents would still be permitted to enjoy adequate parenting time. Following the entry of the court's order, both parties filed motions for reconsideration, which were denied.

II. STANDARD OF REVIEW

Three different standards of review are used in a child custody dispute: the trial court's findings of fact are reviewed to determine if they are against the great weight of the evidence, the trial court's discretionary decisions are reviewed for an abuse of discretion, and questions of law are reviewed for clear error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

III. ANALYSIS

First, plaintiff argues that the trial court erred by determining that defendant had shown proper cause for changing the established custodial environment in this case. In a child custody case, the lower court must first determine whether an established custodial environment exists. MCL 722.27(1)(c). If an established custodial environment exists, the custody arrangement cannot be modified in the absence of a showing of changed circumstances or proper cause. MCL 722.27(1)(c).

Here, it is undisputed that an established custodial environment existed with plaintiff. Plaintiff argues that the only change of circumstances is the fact that defendant now wishes to have contact with his child. The evidence, however, shows that defendant had persistently sought to make contact with plaintiff and to enforce his rights as a legal parent, but that plaintiff repeatedly thwarted those efforts by moving, refusing to return phone calls and text messages, enrolling the child in school under a different last name, and refusing to comply with mediation requests and court orders. Given this evidence, plaintiff's argument that there has been no change in circumstances appears disingenuous, as plaintiff actively worked to frustrate all attempts by defendant to alter the circumstances that plaintiff had established by ceasing communication with defendant after the birth of their child.

Further, a parent seeking to overturn an established custodial environment need not make a showing of changed circumstances if a showing of proper cause can be made instead. In the instant case, by finally establishing contact and litigating the issue of custody and parenting time, defendant was able to introduce evidence of his attempts to enforce his parental rights in the past, as well as evidence of how plaintiff had sought to thwart those attempts. Given these showings, it was not erroneous for the lower court to determine that plaintiff's attempts to frustrate the relationship between defendant and his son was a proper cause to change the established custodial environment that had allowed plaintiff to exercise such obstructive behavior.

Next, plaintiff argues that the lower court erred by ordering a change of custody. Under MCL 722.27(1)(c), even if a parent is able to establish the changed circumstances or proper cause to change an established custodial environment, a lower court cannot amend a custody arrangement in an absence of a showing by clear and convincing evidence that such a change is in the best interests of the child. MCL 722.27(1)(c). When determining the best interests of a child, the court looks at the following statutory factors:

(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. [MCL 722.23.]

Here, the lower court found the majority of the factors did not favor one parent over the other, but that factors (d) and (j) favored defendant. On appeal, plaintiff asserts that those factors do not favor defendant, and that factor (f), the moral fitness of the parties, favors plaintiff.

MCL 722.23(d) considers “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” Here, the evidence showed that the child in question had moved one or more times nearly every year of his life. It appears that those homes were generally satisfactory, within the same school district, and as part of the same family unit. The evidence also showed, however, that plaintiff was currently living with her mother, was planning a move to California despite the fact that neither plaintiff nor her husband were employed, and had shown a willingness to pull the child in and out of school for extended periods. The evidence further showed that defendant was part of a stable family unit, employed, and owned his own home. Given this evidence, it was not against the clear weight of the evidence for the lower court to determine that plaintiff had not lived in a stable environment, and that plaintiff was likely to continue living in an unstable environment in the future, while defendant would be able to provide a stable home.

MCL 722.23(j) considers “[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.” Here, the overwhelming weight of the evidence supported a finding that plaintiff was unwilling to facilitate and encourage a relationship between the child in question and defendant, while defendant had submitted parenting-time proposals and made arrangements for plaintiff to have phone calls and Skype sessions with her son during non-

custodial periods. Given this evidence, the lower court did not err by finding that this factor favored defendant.

MCL 722.23(f) considers “the moral fitness of the parties involved.” At the custody hearing, the lower court concluded that this factor was equal. On appeal, plaintiff asserts that the factor favored her because she presented evidence that defendant had been charged with various crimes and had testified that defendant had originally engaged in a romantic relationship with plaintiff when she was 16 years old. While this evidence may have weighed on the moral fitness of defendant generally, nearly all of the charged and alleged conduct occurred prior to 2006, and some instances were nearly 20 years old. Given the lack of reasonably recent evidence of defendant’s moral character, it was not against the great weight of the evidence for the lower court to conclude that this factor did not favor either party.

Plaintiff also argues that the trial court erred by ordering a change of domicile. In order to change a child’s domicile from an established custodial environment, a court must determine whether or not such a change is in the best interests of the child after weighing the best-interest factors found in MCL 722.23. Here, as noted above, those findings were made by the lower court. The lower court must also, however, determine whether or not the moving party has established, by a preponderance of the evidence, the factors enumerated in MCL 722.31(4). Those factors are as follows:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent’s plan to change the child’s legal residence is inspired by that parent’s desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child’s schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Here, the trial court found that defendant had established each of these factors by a preponderance of the evidence. Specifically, the court found that the change had the capacity to improve the child’s life due to defendant’s stable home environment, and that defendant had not requested the change of domicile to frustrate plaintiff’s parenting time or to gain financial advantage. These conclusions are supported by the record. Further, an examination of the record

shows that the change in domicile was necessary to establish an arrangement where the child could have parenting time with both legal parents, and that the moving parent had taken steps to ensure that the non-moving parent would have adequate parenting time during both custodial and non-custodial periods.

Finally, plaintiff argues that the lower court unfairly denied plaintiff the right to present witnesses on her behalf at the custody hearing. Near the conclusion of the custody hearing, plaintiff sought to call three unavailable witnesses: plaintiff's husband; an officer of the court who had conducted a home-study of plaintiff's home; and the child's kindergarten teacher. The lower court informed plaintiff that it would accept a copy of the home study in lieu of testimony and would permit plaintiff to call the other two witnesses at a later date. The court informed plaintiff, however, that that later date would not be until a month into the future, and that the court intended to allow defendant to exercise "make-up" parenting time during that time period. Plaintiff declined to call the witnesses.

On appeal, plaintiff asserts that the trial court's actions unfairly denied plaintiff the right to present witnesses in support of her case. This argument, however, fails to acknowledge that plaintiff was free to call those witnesses at a later date, provided that defendant exercised parenting time in the interim. Under MRE 611(a), a trial court has the power to exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence. Here, given the fact that the hearing had already gone on for over a month, that defendant was required to travel from Florida to Michigan for each hearing date, and that plaintiff had a history of obstructing defendant's legal right to parenting time, it was not an abuse of discretion for the trial court to require plaintiff to ensure defendant parenting time if she chose to extend the hearing by another month.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher