

STATE OF MICHIGAN
COURT OF APPEALS

ALLEN REPHOLZ and CHARLOTTE
REPHOLZ,

UNPUBLISHED
January 27, 2015

Plaintiffs-Appellees,

v

No. 322524
Lenawee Circuit Court
LC No. 12-038682-DZ

KRISTIN L. FOSTER, formerly known as
KRISTIN L. REPHOLZ,

Defendant-Appellant.

Before: MURRAY, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiffs, Allen Repholz and Charlotte Repholz, grandparenting time with defendant's son (hereinafter "minor child"). For the reasons stated below, we reverse the trial court's order and remand for entry of an order denying plaintiffs' motion for grandparenting time.

"In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect . . ." *Troxel v Grandville*, 530 US 57, 70; 120 S Ct 2054; 147 L Ed2d 49 (2000) (Opinion by O'CONNOR, J). In this case defendant was married to plaintiffs' son, who passed away at an early age from cancer in March 2012, when the minor child was only two. By December 2012 a significant enough dispute had arisen such that plaintiffs filed a complaint for grandparenting time. An initial hearing was held in March 2013, resulting in an interim order for grandparenting time. The trial court subsequently held an evidentiary hearing in May 2014, and entered an order awarding plaintiffs' grandparenting time. This appeal followed.

I. SUBSTANTIAL RISK OF HARM

Defendant contends that the trial court erred in finding that there was a substantial risk of harm to the minor child's mental, physical, or emotional well-being in the event that plaintiffs' request for grandparenting time was denied, and therefore, plaintiffs should not have been granted grandparenting time. We hold that the trial court's conclusion—that plaintiffs proved by a preponderance of the evidence that there was a substantial risk of harm to the minor child's well-being in the absence of grandparenting time—was an abuse of discretion.

A. STANDARD OF REVIEW

“Orders concerning parenting time 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.” *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). “A trial court’s findings of fact are not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction.” *Keenan v Dawson*, 275 Mich App 671, 679-680; 739 NW2d 681 (2007).

B. ANALYSIS

In order to protect a fit parent’s constitutionally guaranteed liberty interest in raising her own child, a trial court must give deference to a fit parent’s decision regarding grandparenting time. *DeRose v DeRose*, 469 Mich 320, 333-334; 666 NW2d 636 (2003). MCL 722.27b governs grandparenting time and was amended after the *DeRose* decision to include subsection (4)(b), which requires both deference to a fit parent’s decision and a presumption to protect that decision:

In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent’s decision to deny grandparenting time does not create a substantial risk of harm to the child’s mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent’s decision to deny grandparenting time creates a substantial risk of harm to the child’s mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion.

The statute creates a presumption that a fit parent’s decision to deny grandparenting time does not, in and of itself, create a substantial risk of harm. *Keenan*, 275 Mich App at 682. However, a grandparent may meet his or her burden of rebutting that presumption by showing by a preponderance of the evidence that there is a substantial risk of harm in denying grandparenting time. *Id.*¹

At the evidentiary hearing, only Charlotte Repholz testified for plaintiffs. She testified that the minor child is always happy to see plaintiffs when they are visiting, and he appears to be developing emotionally, as well as exhibiting improvement in his vocabulary, speech, and behavior. Charlotte also emphasized that a relationship between the minor child and plaintiffs was necessary to help him further understand his father’s life, while also noting that the minor

¹ The Legislature also provided that in the event a final decision of an appellate court of this state holds that the preponderance of the evidence standard is not sufficient to safeguard the fit parent’s liberty interest in raising her child, then the standard should be clear and convincing evidence. MCL 722.27b(4)(c).

child never asked to go home early during his visits, and he would hug plaintiffs and climb up in their laps to read during the time he spent with plaintiffs.

On the other hand, defendant—the only witness testifying for her side of the case—testified that she saw no substantial risk of harm to the minor child’s mental, physical, or emotional health arising out of her decision to deny grandparenting time. According to defendant, when the minor child returned home after visits, he regularly indicated to defendant that he had been ready to return home much earlier. Additionally, defendant testified that during the periods of time that the minor child does not see his grandparents there was never any indication that he missed them or was mentally, physically, or emotionally affected in any way. And, on more than one occasion he returned from an overnight visit with plaintiffs “obsessed” with when defendant would die, and with death in general. Defendant did not like that the minor child would return from plaintiffs’ home “upset” and “obsessed with death.” Defendant stated, unequivocally, that she did not want plaintiffs to have court ordered visitation. At the conclusion of the hearing, the trial court held that there was “no . . . reason whatsoever to resist or refrain from granting these grandparents parenting [sic] time.”

On the basis of the testimony elicited at trial, the trial court erred in concluding that plaintiffs met their burden of producing sufficient evidence to overcome the presumption that defendant’s denial of grandparenting time would not result in a substantial risk of harm to the minor child’s well-being. MCL 722.27b(4)(b). The trial court did not give the required deference to defendant’s decision, *DeRose*, 469 Mich at 333-334, but rather presumed that grandparenting time was necessary and appropriate, despite defendant’s decision as a fit parent, not to allow it.² Indeed, at a preliminary hearing held more than a year prior to the evidentiary hearing, the trial court unequivocally stated that it was going to award grandparenting time. This was, it bears emphasizing, prior to hearing any evidence. Additionally, at no point in Charlotte Repholz’s testimony did she identify any harm to the minor child that would result from defendant’s decision to deny grandparenting time. And, to the contrary, defendant specifically noted that the minor child appeared “upset” and “obsessed with death” after his visits with plaintiffs. Thus, there was *no* evidence in the record even touching upon any harm to the minor child’s well-being if plaintiffs were denied parenting time, while there was evidence that he experienced harm *because of* the grandparenting time the trial court had previously ordered. Unlike *Keenan*, no lay or expert witness testified regarding how a lack of contact between plaintiffs and the minor child would negatively affect his well-being.

In conclusion, on this record there was no evidence proffered to overcome the statutory presumption that the denial of grandparenting time by defendant, a fit parent, does *not* create a substantial risk of harm. The trial court may not merely conclude, as it did here (and prematurely so, we might add), that “grandparenting is good, therefore it should occur.” *Keenan*, 275 Mich App at 682.

² During the evidentiary hearing, the trial court denied defendant’s motion for directed verdict because it found from plaintiffs’ evidence that plaintiffs and the minor child were benefitting from the interim grandparenting time. That, of course, is not the statutory standard.

II. BEST INTERESTS OF THE CHILD

Defendant next contends that the trial court failed to properly consider, and make a record of its findings, on all of the best interest factors, as required by statute. However, because we find that the trial court erred in finding a substantial risk of harm to the minor child's mental, physical, or emotional health arising out of defendant's decision to deny grandparenting time, we need not address this issue.

III. CONSTITUTIONALITY OF MCL 722.27b(4)(b)

Defendant also contends that the trial court erred in applying the statutory "preponderance of the evidence" standard because that standard is insufficient to protect a parent's constitutional rights to direct the care and custody of his or her child. Though this is an important issue subject to considerable debate, as defense counsel recognized at oral argument before this Court, because this case is resolved on statutory grounds we need not decide the constitutional issue. See *Mantei v Mich Pub Sch Employees Retirement Sys*, 256 Mich App 64, 87; 663 NW2d 486 (2003).

Reversed and remanded for entry of an order denying plaintiffs' motion for grand parenting time. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Henry William Saad

/s/ Kirsten Frank Kelly