

STATE OF MICHIGAN
COURT OF APPEALS

DAWN MARIE WHITE,

Plaintiff-Appellant,

v

ADAM MARANO,

Defendant-Appellee.

UNPUBLISHED

November 16, 2004

No. 253830

Wayne Circuit Court

LC No. 02-211930-DC

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a custody order awarding plaintiff and defendant joint legal and joint physical custody of the minor child. We affirm.

Plaintiff first asserts that the trial court erred in finding defendant had demonstrated by clear and convincing evidence that an award of joint custody was in the best interests of the minor child, given that the court determined an established custodial environment existed with plaintiff, and found the parties generally equal on the best interests factors. We disagree.

In custody cases, this Court reviews factual findings under the great weight of the evidence standard. MCL 722.28; *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Discretionary rulings in custody cases are reviewed for an abuse of discretion. *Id.* In custody determinations, questions of law are reviewed for “clear legal error.” *Id.* If an established custodial environment is determined to exist, a court may order a change of custody only if clear and convincing evidence is provided, demonstrating that the custody change is in the child’s best interest. The individual seeking the change of custody bears the burden of proof. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 24-25; 614 NW2d 183 (2000). The best interests factors are delineated in MCL 722.23:

[The] ‘best interests of the child’ means the sum total of the following factors to be considered, evaluated, and determined by the court:

- (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.]

The trial court in the instant case evaluated each of the best interest factors, *LaFleche*, *supra*, 242 Mich App 700-701, and determined the parties to be equal or not favored on all but two of the twelve factors. The court found factor (c) favored plaintiff, and factor (d) favored defendant.

Plaintiff challenges as against the great weight of the evidence the court's findings on factors (a), (b), (d), (e), (f).¹ Concerning factor (a), the trial court determined the parties to be equal, indicating that the "evidence showed that both parents are emotionally bonded to their daughter" and that efforts by both parents to disprove that the child had bonded with the other "failed." Although plaintiff asserts she exclusively provided care for the child following the

¹ Plaintiff does not challenge as against the great weight of the evidence the court's findings on factors (c), (g), (h), (i), (j) or (k).

parties' separation, these arguments fail to address or disprove the existence of an emotional bond between defendant and Alexandra. Plaintiff's contention that her family has been more involved in the child's care is misplaced, as this factor does not concern the bonds which may exist between the child and third parties. Plaintiff's challenge to the court's finding of equality as against the great weight of the evidence fails.

The court found the parties equal on factor (b). While the parties disagreed on the necessity or benefit to Alexandra of participating in a preschool program, given the child was only three years old at the time of the proceedings, there was no indication of a lack of desire by either party to assure her proper education. Given neither party's overwhelming preference or involvement with a particular parish or church attendance, the court found this issue to be insignificant. Taking into consideration the testimony and evidence that plaintiff made decisions without consulting defendant and scheduled appointments when defendant would not be available due to work to participate in therapy with Alexandra, plaintiff's contention that defendant lacks the "disposition" to provide for the minor child's needs under this factor is somewhat disingenuous, particularly given her concession that defendant has the "capacity" to provide for the child's needs. The court's finding the parties equal under this factor was not against the great weight of the evidence.

Plaintiff does not challenge the court's finding that she was favored under factor (c). The court recognized plaintiff's greater recent involvement in the provision of therapy for the child, but noted the parties' prior cooperation in securing medical treatment² for Alexandra. The court recognized defendant's failure to involve himself and assure medical insurance coverage for the minor child when he changed employment, but also recognized plaintiff's failure to involve or provide defendant with an opportunity to participate in decision-making with regard to the child. Plaintiff's only contention of error with regard to factor (c) is that the court failed to sufficiently weight this factor in plaintiff's favor. However, plaintiff fails to acknowledge the impact of her own behavior on defendant's level of participation in matters pertaining to and impacting Alexandra.

The trial court found defendant was favored under factor (d). The court acknowledged that plaintiff had lived in the same home before and after the parties' separation, but noted that plaintiff and the child spent four nights a week with the maternal grandmother. The court did not deem the grandmother's home unsatisfactory, but found it was not a stable environment for the child. In contrast, defendant was now married and living in a suitable residence that did not require the minor child to accommodate her living arrangement to her caretaker's schedule. Plaintiff contends the significant and ongoing involvement of her family members with Alexandra is contrary to the court's determination that the child's residence at the maternal grandmother's home fails to provide stability. The court's focus on this factor was not an indictment of the relationship between Alexandra and plaintiff's family, but rather, recognized that plaintiff's current schedule required the child to reside in multiple homes rather than having

² Alexandra suffers from brachial plexus palsy as a result of injury during birth, resulting in her lower right arm being shorter and paralysis of that arm.

a stable living arrangement. The finding that defendant was favored under this factor was not against the great weight of the evidence.

The court determined that factor (e) favored neither party. The court recognized the relationships Alexandra had formed with members of plaintiff's immediate family. The court also acknowledged that defendant, while estranged from his natural parents, had a close relationship with his step-mother and recently established a family with his wife and their new baby. Plaintiff speculates that defendant's marriage will fail, but no evidence substantiated this supposition, or contradicted the court's conclusion on this factor. The court's finding was not against the great weight of the evidence.

The court found neither party was favored on factor (f). The court acknowledged defendant's involvement with another woman and his termination of marriage plans with plaintiff within one month of their impending wedding, but noted that there was no evidence to suggest that the minor child was aware of this or improperly involved in this relationship. Plaintiff asserts defendant's bankruptcy and violation of interim parenting time orders demonstrates his moral deficiency. Plaintiff's arguments are misplaced, given that this factor relates solely to a person's fitness as a parent and is not concerned with which party is a "morally superior adult." *Fletcher, supra*, 447 Mich 887. Plaintiff also asserts defendant is preoccupied with pornographic websites, but fails to substantiate this claim in any manner. The court's finding on factor (f) was not against the great weight of the evidence.

Although plaintiff does not challenge the court's findings with regard to factor (j)³, we highlight and quote them at length, as the trial court heavily weighted this factor, found both parties deficient thereunder, and expressed concern "with respect to both of these parents' desire to encourage and foster a close relationship between Alexandra and the other parent":

With respect to Ms. White, the evidence established that she was clearly angry about the termination of her relationship. There is testimony that she made a reference to making appointments to see her daughter. There was also testimony that indicated that she had asked Adam to leave Alexandra's life because it was too hard for Alexandra to see him leave them.

* * *

There was evidence that she stated that Mr. Marano could not see Alexandra without going to court.

She did testify that she was concerned about the ability of Adam and Becky to care for Alexandra. However, there was no factual basis for her conclusion.

³ Plaintiff asserts in her appeal brief that she "does not disagree the parties do not get along and have difficulty relating to each other with regard to Alexandra."

She made false allegations about Neil Marano's stability as a person and obtained a court order for supervised visitation without a factual basis for doing so.

The trial clearly established that I can find no basis whatsoever why there should have been any order in this case for supervised parenting time.

She made allegations of sexual abuse which turned out to be unsubstantiated.

She hired an investigator to follow Mr. Marano and she also filmed him. She followed him herself, and . . . she denied that her daughter wanted parenting time with her father. She called the police on more than one occasion to enforce parenting time.

With respect to Mr. Marano, he claims that the child is not bonded with the mother and prefers him. He degrades Dawn as a mother and wasn't sure that she understood what needed to be done with respect to the child's medical conditions, an allegation that's clearly unsupported by the evidence.

Mr. Marano's step-mother does not like Ms. White, clearly stated she didn't like Ms. White, and will not encourage any relationship bond in this Court's opinion.

Mr. Marano also video taped an interaction at parenting time pick up, which the Court likewise thinks is inappropriate.

While the trial court did not specifically favor either party on factor (1), the court did allude to evidence and testimony that it considered as implicating "maturity issues" pertaining to defendant and plaintiff's use of "the child to get back at Mr. Marano for ending their relationship." Plaintiff asserts that the court failed to consider the plans of the respective parties to provide care and therapy for the minor child. Plaintiff also refers to evidence pertaining to defendant's failure to maintain medical insurance and his violation of prior court orders regarding parenting time, but fails to acknowledge that these incidents were specifically referenced by the court in conjunction with its evaluation of other best interest factors or that the court indicated that the court-ordered restrictions imposed upon visitation were without any basis and should never have been implemented. Again, plaintiff may take issue with defendant's ideas or options for child care, but since they were never implemented, there is no factual basis for plaintiff's contention that they were harmful other than her natural preference to delegate any child care to her immediate family members.

Plaintiff's challenges to the court's determination on the referenced best interest factors as being against the great weight of the evidence fail, and we affirm the court's findings. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

Plaintiff's only remaining assertion of error to be addressed is the weight to be given to the factors in ascertaining whether defendant met the clear and convincing evidence standard necessary to support a change of custody. Plaintiff asserts the equality of the parties on the best interest factors contradicts the court's determination that defendant met the requisite standard to substantiate the award of joint custody. This Court addressed this issue in *Heid v AAASulewski*

(*After Remand*), 209 Mich App 587; 532 NW2d 205 (1995), and affirmed the trial court's change of custody from sole physical custody with the father to joint physical custody:

we are unwilling to conclude that mathematical equality on the statutory factors *necessarily* amounts to an evidentiary standoff that precludes a party from satisfying the clear and convincing standard of proof. [*Heid, supra*, 209 Mich App 594 (emphasis in original).]

The *Heid* Court disapproved of “the rigid application of a mathematical formulation that equality or near equality on the statutory factors prevents a party from satisfying a clear and convincing evidence standard of proof.” *Heid, supra*, 209 Mich App 596.

In the instant case, the trial court found the parties substantially equal on the best interest factors, and its findings were not against the great weight of the evidence. The trial court determined that joint custody was in the child's best interests, stating:

A custodial arrangement other than joint custody would empower one of these parents to the point where the Court feels that the child's ability to maintain a bond with the other parent would be impacted.

The trial court properly made the welfare of the child its “overriding concern and the overwhelmingly predominant factor” in its determination of custody. *Heid, supra*, 209 Mich App 595. Given the trial court's determination of equality of the parties on the best interest factors, plaintiff's failure to demonstrate that the court's findings were against the great weight of the evidence, and the substantiated and valid reasons elucidated by the court for its determination to award joint custody, it cannot be said that the award was either an abuse of discretion or constituted a clear legal error. The court concluded that the young and disabled child needed a close and custodial bond with both parents and that joint custody was necessary to preserve those bonds.

Plaintiff next asserts that the parties' demonstrated inability to cooperate precluded an award of joint custody. We disagree.

This Court reviews a trial court's ruling regarding custody for an abuse of discretion. MCL 722.28; *Fletcher, supra*, 447 Mich 879-880. When contemplating whether to award joint custody, “[t]he trial court must determine whether joint custody is in the best interest of the child by considering the factors enumerated in MCL 722.23, and by considering whether ‘the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.’” *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994), quoting MCL 722.26a(1)(b).

Whether parties are able to cooperate is not the sole factor guiding a trial court's determination regarding the propriety of awarding joint custody. *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987). Importantly, with reference to joint custody, the act of cooperation focuses on the ability of the parties to “agree on basic child-rearing issues.” *Id.*

Despite the evident personal animosity between the parties, their inability to cooperate and their tendency to exacerbate disputes centering on parenting time, trial testimony supported

that plaintiff and defendant had demonstrated an ability to cooperate on major issues pertaining to the health and welfare of the child. During the two years the parties resided together, they cooperated in developing work schedules that permitted one of them to be available to the minor child on an almost twenty-four hour a day basis. There was no dispute in seeking medical intervention and in the completion of three separate surgeries out of state. The child received physical therapy, preschool intervention and other services to facilitate her development without either party interfering in delivery of the services or the child's participation in the specified programs. Even during the highly contentious custody proceedings, the parties evidenced an ability to agree on a temporary change in the parenting schedule to accommodate defendant's revised work schedule. As the parties both demonstrated concern for addressing their child's special needs and an ability to cooperate on major issues impacting the child's overall well-being and development, we conclude that the trial court did not err in the award of joint custody.

Plaintiff's final issue on appeal is that the parenting time schedule fashioned by the trial court is fundamentally unfair to plaintiff and disruptive to the minor child. A trial court's discretionary ruling, including a determination on the issue of custody, is reviewed for an abuse of discretion. *LaFleche, supra*, 241 Mich App 20. The parenting time schedule fashioned by the trial court is not substantially different from the schedule previously followed by the parties and resolves plaintiff's concerns that overnight visitation during the week was disruptive to the child. The trial court fashioned a parenting time schedule that maximized the time each parent could be physically available to the minor child, given their respective work commitments and schedules. The trial court noted that the child's medical needs require that her placement with third parties for day care be minimized. We conclude that the best interests of the child was the controlling factor in the trial court's determination of an appropriate parenting time schedule, *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993), and that the court devised a parenting time schedule that affords the child an opportunity to sustain a strong relationship with both parents in accordance with MCL 722.27a(1). We agree, however, that the failure to set a definite time for the child's pick-up and return Friday and Monday places an unreasonable burden on plaintiff under the circumstances, and remand for the determination of a specific time.⁴

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White

⁴ Plaintiff also raises the question whether it is truly in the child's best interest to be returned to defendant's care on Sunday evening at 6 p.m. after plaintiff's one weekend per month parenting time, only to be returned to plaintiff's care the following morning. Plaintiff should address this argument to the court on remand, and the court shall reconsider the matter in light of present circumstances.