

STATE OF MICHIGAN
COURT OF APPEALS

JASON COPELAND,

Plaintiff-Appellee,

v

MICHELLE MITCHELL,

Defendant-Appellant.

UNPUBLISHED

August 5, 2010

No. 290381

Wayne Circuit Court

LC No. 02-241827-DC

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In this custody dispute, defendant appeals as of right the trial court's order granting plaintiff full physical custody of the parties' minor children. We affirm.

Defendant argues that the trial court's factual findings with regard to the best interest factors are against the great weight of the evidence and fail to establish that a change of custody is in the best interests of the parties' twin daughters. We disagree.

We must affirm custody orders 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. MCL 722.28; *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007). The great weight of the evidence standard applies to all factual findings, and we will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

When considering a motion for change of custody, the trial court must examine the best interests of the children, MCL 722.23, and where modification of a custody order would change the established custodial environment, there must be a showing that the change is in the best interests of the children by clear and convincing evidence. MCL 722.27(1)(c); *Sinicropi v Mazurek*, 273 Mich App 149, 178; 729 NW2d 256 (2006). While the trial court must state its factual findings and conclusions on each best interest factor, the court need not include consideration of every piece of evidence entered and argument raised at trial. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005). The trial court need not engage in an elaborate discussion, but rather, brief, definite and pertinent findings of fact and conclusions of law are sufficient. *Foskett v Foskett*, 247 Mich App 1, 12-13; 634 NW2d 363 (2001); see also MCR 2.517(A)(2); MCR 3.210(D)(1). In the present case, the trial court

considered the best interest factors and concluded that six of the factors favored plaintiff, none of the factors favored defendant, and the remaining six factors were either equal or did not favor either party.

The trial court found that factor (a), MCL 722.23(a), “[t]he love, affection, and other emotional ties existing between the parties involved and the child,” was equal with regard to both parties. Defendant argues that this factor should weigh in her favor because plaintiff did not take an interest in the girls until it was in his financial interest to do so and plaintiff was not involved with the girls in the early part of their lives. However, the record does not establish that plaintiff’s interest in the girls is newly found. Rather, he has been involved for the vast majority of their lives and testified that he spends more time with the girls than defendant. Regardless, both parties testified regarding the love and affection they had for their daughters. Therefore, the trial court did not err in finding that factor (a) was equal because the evidence did not clearly preponderate in the opposite direction.

Regarding factor (b), MCL 722.23(b), “[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:

Mr. Copeland testified that he is better suited at providing guidance for the minor children. He has a routine in his home and the girls are comfortable with it. Mr. Copeland testified that when the girls are in school, they have a morning and after school schedule that helps guide their life.

Mr. Copeland testified that Ms. Mitchell has had 20 caregivers since 2005. In the past year, Mr. Copeland testified that Ms. Mitchell has had eight caregivers for the girls including Holly, Jamie, Kylie, Nicole, Stevie, Jessica, Tracy, and Ms. Mitchell’s 13 year old son. While Mr. Copeland’s mother does provide care for the girls, he does not have other caregivers for the girls.

Ms. Tracy Husted and Ms. Jamie Fisher, two of Ms. Mitchell’s former caregivers, testified [that] Ms. Mitchell let the children care for themselves on many occasions. For example, Ms. Husted testified that one time she arrived at the home to find one of the girls in the driveway carrying her two month old sister, Zoe. On another occasion, Ms. Mitchell allowed Ms. Husted to leave the children by themselves at 11:30 p.m. Further, Ms. Husted testified that she was entrusted with the four minor children on 6-8 different weekends while Ms. Mitchell traveled with friends. Likewise, Ms. Fisher testified that she took Zoe home with her on 6 different weekends when Ms. Mitchell was not available.

Mr. Copeland testified that he will emphasize the importance of education for the girls. He did obtain a degree in 2003 from Wayne State University in business logistics.

While Ms. Mitchell testified about the importance of education for her children, Ms. Fisher implied that Ms. Mitchell did not take the girls’ education seriously. There were times when Ms. Mitchell did not take the girls to school

because she did not feel like it, alleging that the girls were sick. In actuality, the girls were fine.

Mr. Copeland also objects to the girls watching inappropriate movies at Ms. Mitchell's home. It is his belief that the girls watched the Exorcist at Ms. Mitchell's home and were very upset by the movie that is rated R. Ms. Mitchell did not deny this allegation.

Ms. Mitchell introduced two witnesses, one a neighbor and the other a man she met in one of her work places, who testified that she appeared to be a good mother. They testified that she appeared to have adequate food in the home and engaged in age appropriate activities with her daughters. The Court also heard testimony from Holly Rodgers, one of Ms. Mitchell's current caregivers, who testified she had worked for Ms. Mitchell for one year. Ms. Rodgers testified that Ms. Mitchell is a loving mother who provides for her children and spends time with the minor children.

In terms of religion, Mr. Copeland testified that he is not religious and only attends church two times a year. Ms. Mitchell is Catholic and did enroll the girls in the religious education classes at Church of the Holy Family in the 2007 school year. The girls are not attending in the 2008 school year because she could not get help with transportation and the plaintiff did not agree with religious education for the girls. Mr. Copeland denied that Ms. Mitchell ever contacted him about religious education for the 2008 school year. The girls have not been baptized. This factor favors Mr. Copeland. [Emphasis in bold deleted.]

We conclude that there was a sufficient basis for the trial court to award factor (b) to plaintiff. The trial court's extensive findings on this factor are fully supported by the record. Defendant argues that the trial court should have found the factor in her favor because the evidence shows that plaintiff did not have a commitment to continue raising the girls as Catholic. However, the record established that as of November 2007, the girls had not been baptized. Further, defendant had withdrawn them from Catechism classes for 2008. As a result, there is no religious education for plaintiff to continue. Defendant also argues that the trial court wrongly relied on the testimony from her prior nannies, Tracy Husted and Jamie Fisher, who had personal issues with defendant. Defendant's arguments do not overcome the deference due the trial court in making credibility determinations. MCR 2.613(C); *Sinicropi*, 273 Mich App at 155. Also, contrary to defendant's argument, the evidence does not preponderate against the trial court's inference that defendant did not take the girls' education seriously. Although the girls are doing well in school, defendant cannot explain away the testimony that there were instances when she would pretend that the girls were sick and not take them to school because she did not feel like it. Defendant also argues that the trial court wrongly considered the childcare plan offered by the parties as evidence relevant to this factor. However, the trial court's opinion reflects that it considered the large number of caregivers that defendant had used for the girls, which suggests defendant's poor judgment in creating a stable home. Therefore, the trial court did not err in crediting factor (b) to plaintiff because the evidence did not clearly preponderate in the opposite direction.

Regarding factor (c), MCL 722.23(c), “[t]he 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,” the trial court found:

Mr. Copeland testified regarding the type of food he provides for the girls. Ms. Mitchell likewise testified that she provides food for the girls. Mr. Copeland, however, did testify that Ms. Mitchell told him that not everyone needs breakfast in the morning before school. He does not agree with this statement. Ms. Mitchell countered that sometimes the girls will eat at school.

At the change in circumstances hearing on April 8, 2008, Ms. Husted and Ms. Fisher, testified that there was little food in Ms. Mitchell’s home and they often bought food with their own money for the minor children. Ms. Fisher testified there were no supplies available for meals.

Mr. Copeland is currently employed at Playhouse, an adult entertainment club. He will earn approximately \$40,000 in 2008. Mr. Copeland works Wednesday through Friday from noon to 2 a.m. Mr. Copeland testified that he has monthly expenses of approximately \$3,500.00 each month.

Mr. Copeland does have health insurance for the girls and has taken the girls for medical appointments with the pediatrician. He claims he informs Ms. Mitchell of the appointment times but she chooses not to attend. Furthermore, Mr. Copeland does not think that Ms. Mitchell has properly administered antibiotics for the girls because one prescription that was supposed to last for 10 days ran out in 7. Mr. Copeland testified that Ms. Mitchell takes the girls to the dentist, but does not inform him of appointments, although he would like to attend.

Ms. Mitchell testified that Mr. Copeland is somewhat reckless with the girls’ medical care in that he asked a mutual friend, who is a dentist, to prescribe amoxicillin without an examination of the girls. Mr. Copeland testified that this was done with Ms. Mitchell’s consent as the friend met them at Ms. Mitchell’s home. Mr. Copeland’s testimony on this issue was credible to the Court.

While Ms. Mitchell has procured medical care for the girls when they are in her care she has also allowed other caregivers to take the girls to medical appointments. Furthermore, Mr. Copeland testified that medical information regarding the girls has not been provided to him.

Ms. Mitchell has had a number of different jobs. She has been an exotic dancer at four clubs. In 2003 she earned as much as \$1,000 each week. Ms. Mitchell also worked at Gameworks for a brief period of time. She was also employed at Bayside Grill earning about \$300.00 each week. Her MySpace page says she earns \$45,000 a year. Ms. Mitchell agreed that her income information was not accurate. Ms. Mitchell has worked as a dancer at the Penthouse four times in 2008.

Ms. Mitchell is currently employed at the Coliseum where she sells shots. She works Monday through Wednesday from 1:00 p.m. to 7:00 p.m. Ms. Mitchell testified she is usually home by 7:30 p.m. In 2007, Ms. Mitchell testified she earned approximately \$11,831.00. The Court is not clear about her income as she later testified she earned \$400.00 per week. Ms. Mitchell also testified that she receives about \$2,000 each month in child support. Her expenses are approximately \$3,000.00 per month. This factor slightly favors Mr. Copeland. [Emphasis in bold deleted.]

We conclude that there was a sufficient basis for the trial court to find that factor (c) slightly favors plaintiff. The record fully supports the trial court's findings. Defendant again argues that the trial court improperly credited the testimony of Husted and Fisher. In reviewing the findings, we defer to the trial court's determination of credibility. *Sinicropi*, 273 Mich App at 155. Defendant also argues that the trial court wrongly relied on her frequent change of employment. However, the record reflects that plaintiff had maintained steady employment, while defendant's testimony on the issue of employment and income was confusing. Defendant contends that plaintiff was not forthright with his income. However, the record reflects that plaintiff makes enough to provide for the girls. "Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity* and *disposition* to provide for the children's material and medical needs." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) (emphasis in original). The trial court properly evaluated the parties' history of employment and education and, although a close case, found that this factor slightly favored plaintiff. Because the evidence did not clearly preponderate in the opposite direction, the trial court did not err.

Regarding factor (d), MCL 722.23(d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," the trial court found:

Mr. Copeland has lived in the same home for the past five years. He intends to continue to reside in this home with the girls. The home has 4 bedrooms with the girls sharing a room with twin beds.

Ms. Mitchell has changed her residence on a number of occasions. From October of 2004 to August 2005, Ms. Mitchell lived at 3202 Camron Circle in Commerce, Michigan. The home was provided by her boyfriend, Buzz Silverman, whom she met at a club. He also purchased a 2007 Tahoe vehicle for her and gave her \$20,000. Mr. Silverman provided assistance with her minor children by providing transportation to and from school. If Mr. Silverman was not available, his housekeeper provided childcare for the minor children. When Ms. Mitchell ended the relationship with Mr. Silverman he allowed her to keep the house, vehicle and \$20,000.

Ms. Mitchell then moved to 6520 Lake Meadows. While Mr. Copeland asserts that she lived with Brian [Shefferly] in violation of the 2003 Consent Judgment, Ms. Mitchell testified that he only helped her obtain the rental by signing the lease. Ms. Mitchell testified that her boyfriend at the time was Jason Woolen. He helped with the childcare responsibilities of the minor children.

From July 2006 to September 2007 she lived at 6898 Long Lake in West Bloomfield, Michigan. She was renting the home until it went into foreclosure. This required another move.

Ms. Mitchell is currently living at 6528 Lake Meadow in Waterford, Michigan. She lives in a 3 bedroom rental home with her four minor children. This factor favors Mr. Copeland. [Emphasis in bold deleted.]

We conclude that there was a sufficient basis for the trial court to award factor (d) to plaintiff. The record fully supports the trial court's findings. Defendant argues that the trial court's focus on her multiple moves was inappropriate. Defendant relies solely on *Adams v Adams*, 100 Mich App 1, 14; 298 NW2d 871 (1980), where defendant contends that this Court determined that frequent changes of residence are not a basis for a change in custody. However, the *Adams* Court held that there is no presumption of an advantage or disadvantage in raising a child in Michigan versus any other state. *Id.* The trial court properly considered defendant's frequent moves versus plaintiff's stability in his residence. Therefore, the trial court did not err in crediting factor (d) to plaintiff because the evidence did not clearly preponderate in the opposite direction.

Regarding factor (e), MCL 722.23(e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," the trial court found:

Mr. Copeland lives by himself and with the girls when he has parenting time. He has had the same girlfriend for the past five years.

Ms. Mitchell has had a number of relationships with different men since the entry of the Consent Judgment. From the testimony it appears that she has had about five boyfriends and lived with two of them. Ms. Mitchell testified that she was engaged to one of these men that she lived with in 2006. Mr. Kyle [Burrell] is the father of her daughter Zoe, DOB 4-6-07. Mr. Copeland objects to the number of men Ms. Mitchell has lived with contrary to the terms of the 2003 consent judgment of custody that provides for no cohabitation with a member of the opposite sex unless married. Mr. Copeland objects primarily because Ms. Mitchell has traveled with these male friends and left the children for extended periods of time without proper supervision.

Ms. Mitchell's current male friend is Mr. John McKay. Ms. Mitchell testified that he was just a friend. She also testified that he paid for the various trips they took to Arizona, Frankenmuth, Cedar Point and two water park trips. Ms. Mitchell testified that they had separate rooms as the minor children were present. The Court did not find this testimony to be credible. Further, during the interview of the minor children, at least one of the girls told the Court they were left in Mr. McKay's care overnight in a hotel room while their mother went to a party.

Ms. Mitchell currently resides with her four children, Hannah and Hayleigh [sic], Zoe, and her son Troy, who is 13 years old. Ms. Husted also testified that Troy was aggressive with the minor girls and she was not allowed to

discipline him. Ms. Fisher likewise testified that Troy was a little rough with the girls, although he could get along with them. This factor favors Mr. Copeland. [Emphasis in bold deleted.]

We conclude that there was a sufficient basis for the trial court to award factor (e) to plaintiff. The record fully supports the trial court's findings. Defendant again argues that the credibility of Husted and Fisher is suspect and that plaintiff did not take an interest in his children until it was in his financial interest to do so. However, as addressed above, these arguments are without merit. Defendant argues that the trial court ignored the testimony of defendant's 13 year old son, Troy's, treating psychologist, Dr. Yezman, who testified that Troy has a normal and healthy relationship with the girls. However, Yezman only spoke with Troy and was not privy to the rough behavior of Troy toward the girls that was described by Husted and Fisher. Based on the record evidence and the trial court's determination of the credibility of the witnesses, we cannot conclude that the trial court clearly erred with regard to this factor.¹

Defendant does not challenge the trial court's findings that factor (f), MCL 722.23(f), and factor (g), MCL 722.23(g), did not favor either party. Regarding factor (h), MCL 722.23(h), "[t]he home, school, and community record of the child," the trial court found:

The girls' have attended school in Mr. Copeland's Van Buren school district since 2006.

There have been occasions when Ms. Mitchell has failed to pick them up or [has] been late. By way of example, Mr. Copeland testified that the week of November 3, 2008, Ms. Mitchell was late picking the girls up from school on two occasions. He was contacted by the school's transportation department and the principal. Mr. Copeland picked the girls up from school and met Ms. Mitchell for the exchange two hours later. This same problem occurred on October 22, 2008, when Mr. Copeland was contacted by the school principal because the children were not picked up from school. On at least one other occasion, Mr. Copeland was contacted by the bus driver to give permission for someone other than the parties to pick the girls up from the bus stop. Mr. Copeland granted the permission to someone named "George."

Ms. Mitchell testified that she was not aware of the half days for the girls, which caused her to be late. She testified that Mr. George Clipp[ard] is her back

¹ Defendant asserts that the trial court improperly questioned her children during the in camera interview regarding John McKay. The in camera interview in child custody disputes is limited to determining the children's parental preferences. *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2009). However, an interview appropriately limited in scope to parental preferences may result in information that affects other child custody factors. *Id.* at 452. The crux of the trial court's determination regarding change in custody and the factual findings was contingent upon the best interests of the children factors as applied to the parties' circumstances, and the isolated reference to the in camera interview does not lead us to conclude that the trial court exceeded its authority. *Id.*

up in the event that she is running late for the girls. Ms. Mitchell testified that she was never in Mr. Clipp[ard]'s home and the Court was under the impression that Ms. Mitchell did not know Mr. Clipp[ard] very well. Mr. Clipp[ard] was called in rebuttal by Mr. Copeland. He testified that Ms. Mitchell never had a conversation with him about picking up and caring for the girls if Ms. Mitchell was late or unavailable. Mr. Clipp[ard] testified that he has seen different people at the bus stop dropping off and picking up the minor children. Further, he testified that he does not allow his daughter to go to Ms. Mitchell's home.

Mr. Copeland testified that he has a schedule for the girls at his home that provides them with the routine they need to function well at school. He testified that he has a before and after school routine that includes doing homework with the girls. Mr. Copeland believes that Ms. Mitchell has neglected certain parts of the girls' education, although he was not immediately aware of any problems either. Nonetheless, he worked to assist the girls in school.

In terms of extracurricular activities, both parents have registered the girls for extra activities like swimming, etc. Ms. Mitchell has also enrolled the girls in a twins['] competition for the last few years. Overall, the girls are performing well [in] school. This factor slightly favors Mr. Copeland. [Emphasis in bold deleted.]

We conclude that there was a sufficient basis for the trial court to conclude that factor (h) slightly favors plaintiff. Both parties have engaged the girls in extracurricular activities and the girls are doing well in school. Defendant argues that she should not be penalized for the few instances where the girls were picked up late from school. However, the record reflects a pattern in which defendant or the caretakers that defendant uses have been late in picking up the girls from school. On these occasions, plaintiff has had to step in and make arrangements for the girls or pick them up himself. Although defendant travels a greater distance to get the girls to the bus stop, the record does not reflect that this is an isolated incident merely because of heavy traffic or a flat tire. Therefore, the trial court did not err in crediting factor (h) to plaintiff because the evidence does not clearly preponderate in the opposite direction.

Regarding factor (i), MCL 722.23(i), "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference," the trial court stated, "The Court interviewed the minor children and has considered their reasonable preference." A trial court may conduct an in camera interview of a child to determine the child's preference, however, the interview is not intended to be a reliable form of fact-finding and the information received during the interview shall be applied only to the reasonable preference factor. MCR 3.210(C)(5); *Surman*, 277 Mich App at 301-302. The in camera interview is not recorded, *In re HRC*, 286 Mich App at 452, but the trial court must state on the record whether the child was able to express a reasonable preference and, if so, whether that preference was considered by the court in arriving at its custody determination, *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988). Defendant argues that the trial court did not state on the record whether the girls were able to express a preference. However, the trial court stated in its opinion, which is part of the record, that the girls were able to express a reasonable preference and that it considered their preference in its decision. Thus, the trial court satisfied the requirements of the in camera interview.

Regarding factor (j), MCL 722.23(j), “[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 trial court found:

The Court did not hear testimony regarding this factor. The FAME report indicates that the parties accuse each other of making disparaging remarks to the children and a poor ability to communicate regarding the minor children. This came as a surprise as the testimony revealed parties who do communicate for the best interests of the children. Nonetheless, the report indicates that the parties are seeing Dr. Ceresnie in the hope of improving their ability to communicate. This factor does not favor either party. [Emphasis in bold deleted.]

We conclude that there was a sufficient basis for the trial court to conclude that factor (j) does not favor either party. Contrary to defendant’s argument, the testimony revealed allegations that both parties have failed to communicate regarding dental and medical appointments for the girls. Therefore, the trial court did not err in concluding that this factor did not favor either party because the evidence did not clearly preponderate in the direction of either party.

Regarding factor (k), MCL 722.23(k), “[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child,” the trial court found this factor is not relevant to the parties, and defendant does not challenge this finding on appeal. Regarding factor (l), MCL 722.23(l), “[a]ny other factor considered by the court to be relevant to a particular child custody dispute” the trial court found:

Mr. Copeland is concerned about the photos of the minor children on Ms. Mitchell’s MySpace. Both of the girls are shown without blouses. The Court agrees that this is not appropriate and their photos shall be immediately removed from the MySpace page. This favors Mr. Copeland

Mr. Copeland is also concerned because Ms. Mitchell allows just about anyone to provide childcare for the children. For example, when she was living with Mr. Silverman, his housekeeper provided childcare, even when Ms. Mitchell was out of the state of Michigan. On another occasion, Mr. Woolen, Ms. Mitchell’s boyfriend, took Hannah to the emergency room because she was constipated. Also, Ms. Mitchell had a babysitter who was only 12 years old caring for all of Ms. Mitchell’s children when she was in Iowa. This favors Mr. Copeland.

Mr. Copeland is also concerned about Troy’s contact and influence on . . . Hannah and Hayleigh [sic]. In 2008, it came to the parties’ attention that Troy exposed the girls to pornography on the computer. Child Protective Services was involved as a result. This was a part of Mr. Copeland’s basis for his change in custody motion. The Court heard testimony from Mr. Rody Yezman, a psychologist, who testified that Troy was not a threat to the girls and could probably babysit for them for short periods of time. Troy did admit that the girls were looking over his shoulder when he was on the computer looking at pornography. This factor favors Mr. Copeland. [Emphasis in bold deleted.]

We conclude that there was a sufficient basis for the trial court to award factor (1) to plaintiff. Defendant contends that plaintiff was “nit-picking” by criticizing her MySpace page. However, the trial court properly credited plaintiff because of defendant’s irresponsible posting of a shirtless picture of the girls at seven years of age. Defendant also argues that the trial court improperly accepted plaintiff’s claim that defendant’s childcare providers were inappropriate. The record shows an instability with regard to the caretakers used for the girls. Thus, there is sufficient support for the trial court’s findings on this issue. In addition, defendant contends that the pornography incident involving Troy and the girls should not be considered because there is no evidence that the girls were negatively impacted and a psychologist, Dr. Yezman, testified that Troy’s actions were the result of normal curiosity. However, the record reflects that Dr. Yezman also testified that this behavior was inappropriate. This incident is significant and the dangers of this type exposure for the girls are clear. Therefore, the trial court did not err by considering it. Defendant also argues that the trial court ignored the detrimental effect that removing Hannah and Haleigh from defendant’s other children would have on the girls. However, the record is sparse on evidence that such a detrimental effect would occur. Therefore, the trial court did not err in awarding factor (1) to plaintiff because the evidence did not clearly preponderate in the opposite direction. Based on the above analysis, we conclude that the trial court did not abuse its discretion by awarding plaintiff sole physical custody of the parties’ minor children. *LaFleche*, 242 Mich App at 695.

Affirmed.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood