

STATE OF MICHIGAN
COURT OF APPEALS

BROOKE L. HILL,

Plaintiff-Appellee,

v

DANIEL K. HILL,

Defendant-Appellant.

UNPUBLISHED

April 9, 2013

No. 312164

St. Clair Circuit Court

Family Division

LC No. 11-002045-DM

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce entered by the trial court awarding joint physical custody and school-year parenting time to plaintiff. We affirm.

I. BASIC FACTS

Defendant and plaintiff were married in April 2001 and resided in the Lansing, Michigan area until July 2011. They have four minor children.

In November 2010, the parties began experiencing difficulties in their marriage and plaintiff told defendant that she intended to move with the children to Port Huron, Michigan. In response, defendant filed for separate maintenance and obtained an ex parte order preventing plaintiff from moving the children from the marital home. Plaintiff remained in the marital home and the parties continued to work on their marriage, which included attending counseling sessions provided by their church. The parties eventually signed a stipulation and order voluntarily dismissing the separate maintenance action. The parties continued to live together with their children in Lansing until July 2011, when plaintiff left the marital home and moved in with her parents, Mary Chandler and Hollis Chandler, who lived in Port Huron, Michigan. When plaintiff left, she took the four children with her. One week later, defendant drove to Port Huron and took the kids back to the marital home in Lansing.

Plaintiff filed for divorce on August 25, 2011. On January 10, 2012, the trial court entered an order granting temporary physical custody of the children to defendant while the divorce proceedings were pending. On June 20, 2012, a trial was held on plaintiff's complaint for divorce. The only issue that remained to be decided was custody of the children, with the

attendant issues of parenting time and child support. The trial court heard testimony from both parties, several witnesses for each side, and also interviewed the two oldest children.

In its final judgment, the trial court concluded that there was no established custodial environment. Using a preponderance of the evidence standard, the trial court concluded that it was in the best interest of the minor children for the parties to share joint legal and joint physical custody of the children, with the children residing with plaintiff in Port Huron during the school year. Defendant now appeals as of right.

II. STANDARDS OF REVIEW

“This Court must affirm all custody orders unless the trial court’s findings of fact 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; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). “We employ three different standards when reviewing a trial court’s decision in a child-custody dispute.” *Frowner v Smith*, 296 Mich App 374, 380–381; 820 NW2d 235 (2012). “We review the trial court’s findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error.” *Id.*

“Whether an established custodial environment exists is a question of fact that this Court must affirm unless the trial court’s finding is against the great weight of the evidence.” *Berger*, 277 Mich App at 706.

A trial court’s custody determination is entitled to the utmost level of deference, and an abuse of discretion exists with respect to such a determination only where the decision “is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.” *Id.* at 705-706.

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant first argues that the trial court erred in concluding that there was no established custodial environment. We disagree.

The thrust of defendant’s argument on this issue is that the trial court committed clear legal error in relying on this Court’s decision in *Curless v Curless*, 137 Mich App 673; 357 NW2d 921 (1984). We find that the trial court’s reliance on *Curless* was appropriate in this case. In *Curless*, the plaintiff-mother filed for divorce and was awarded temporary custody of the parties’ two minor children during the proceedings. *Curless*, 137 Mich App at 674. Following a trial, the defendant-father was awarded permanent custody. *Id.* In arriving at this decision, the trial court found that the plaintiff was uncooperative with the defendant regarding visitation during the separation. *Id.* at 677. Despite the plaintiff’s lack of cooperation, the defendant spent significant amounts of time with the children during the separation. *Id.* The trial court also found that the children’s environment during the separation was unstable. *Id.* In light of evidence that the children had spent significant amounts of time with the defendant since

separation, the plaintiff was uncooperative in allowing the defendant to visit the children, and the children were aware of the nature of the separation, this Court held that the trial court did not abuse its discretion in finding that no established custodial environment existed. *Id.*¹

Here, the trial court noted that, although the children remained in the marital home with defendant as their primary caregiver, the situation was not stable:

The parents have been living apart in two different communities that are about 120 miles distant from each other. These children have been traveling that distance between parents. They have to realize that they cannot live with both parents at the same time because they haven't been, and that time with either parent is temporary. Based upon these facts the court finds that whatever established custodial environment may have existed when the parties were together with their children, no longer exists as the children are no longer in an environment with either parent that is marked by security, stability and permanence.

As in *Curless*, defendant was awarded temporary custody, but was uncooperative with facilitating parenting time with plaintiff. Despite the uncooperativeness, plaintiff exercised her parenting time as much as possible during the separation. Based on the frequency with which the children visited plaintiff and the fact that both parties wanted permanent custody of the children, the trial court's conclusion on this point merely reflected the reality of the situation.

Moreover, the crux of the established custodial environment inquiry is whether the children's relationships with either parent were "marked by qualities of security, stability, and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Here, the evidence does not clearly preponderate against the court's finding that the children's relationships with defendant were not marked by these qualities. Significantly, there was evidence of defendant's controlling nature, including his restrictions on where plaintiff could pick up the children and when and how the children could communicate with plaintiff. The evidence also revealed that the children typically came to plaintiff to talk about their problems because, according to plaintiff, they were intimidated by defendant. Defendant's intimidating nature was a common theme throughout the testimony of plaintiff's witnesses. Importantly, the trial court was unable to conclude that the children felt comfortable coming to defendant with their problems because they had no choice once defendant was the only parent at home. Repeated visits to plaintiff's every other weekend, with the attendant two-hour drive between homes, in conjunction with the fact that the children were enrolled in two different schools, also militates against a finding of permanency. Accordingly, the trial court's finding that no established custodial environment existed with either party was not against the great weight of

¹ This Court has repeatedly held, "Where there are repeated changes in physical custody and there is uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995); see also *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993).

the evidence.

IV. BEST INTEREST FACTORS UNDER MCL 722.23

Defendant also argues that the trial court made numerous factual findings in relation to the best interest factors, MCL 722.23, that were against the great weight of the evidence and, based on those errors, its decision to award plaintiff joint physical custody and school-year parenting time was an abuse of discretion. Although we agree that the trial court made several findings of fact that were against the great weight of the evidence, we hold that the court's ultimate decision to award plaintiff joint physical custody and school-year parenting time was not a palpable abuse of discretion.

A. FACTOR A

“The love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a).

Defendant argues that the trial court erred in finding that “defendant was unable to refute” plaintiff’s testimony that defendant’s controlling nature led to the breakdown of the marriage. We agree that this finding was against the great weight of the evidence because, other than plaintiff’s characterization of the marital home as “unstable,” there is no evidence in the record to support this finding.² Despite this erroneous factual finding, the trial court’s finding that defendant’s controlling nature affected the emotional ties between the children and their parents was not against the great weight of the evidence. Defendant argues that this factor should have favored him because plaintiff did not testify regarding her relationship with the children since she moved away. To the contrary, plaintiff testified that she saw the children often, even seeing them when it was not her parenting time. This evidence, in conjunction with the evidence indicating that defendant controlled when and how plaintiff could see the children, leads us to conclude that the trial court’s finding on this factor was not against the great weight of the evidence.

B. FACTOR 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.” MCL 722.23(b).

Defendant argues that this factor should have favored him because plaintiff did not testify regarding her relationship with the children since the separation, she unilaterally chose a new school without determining that it would be a good fit for the children, and could not confirm that someone would be home to see the children off to the school every day. To the contrary,

² During closing arguments, plaintiff’s attorney indicated that defendant’s controlling behavior was what led to the breakdown of the marriage, but there is no record evidence in support of such a statement.

plaintiff did testify that someone, either herself or her parents, will be home to get the children ready for school and that she expects to be able to leave work an hour early to ensure this occurs while she is working. And, as the trial court indicated, plaintiff has demonstrated her love and affection since the separation by visiting the children often, including when it is not her parenting time. The record also indicates that she made an effort to call the children when they were with defendant. Regarding her decision-making process about the children's new school, plaintiff inquired about special programs geared toward the children's special needs, which included "innovative programs that would help out and benefit" one of the children. In light of this evidence, the trial court's finding under this factor was not against the great weight of the evidence.

C. FACTOR 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." MCL 722.23(c).

Defendant argues that the trial court erred in finding that defendant unilaterally chose not to return to work after recovering from his employment injury. Our review of the record indicates that both parties testified that the decision for defendant to stay home after becoming injured was a mutual decision. Therefore, we hold the trial court's finding that the decision was unilateral was against the great weight of the evidence. Despite this error, the court's ultimate finding under this factor was not against the great weight of the evidence because the record reveals that both parties were able and willing to provide the children with clothes, food and medical care.

D. FACTOR D

"The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d).

Defendant argues that the trial court erred in finding that "a nanny comes to the home to get the children up, fed and off to school . . ." Insofar as the court found that a nanny gets the kids up in the morning and feeds them, this finding is contradicted by defendant's testimony. Because defendant's testimony is the only evidence relating to this issue, the court's finding on this point is against the great weight of the evidence. Despite this erroneous evidentiary finding, the remaining evidence supports, and defendant does not challenge, the court's finding that the tumult of the separation erased whatever stability the children had living in the marital home. In light of this evidence, the court's finding on this factor was not against the great weight of the evidence.

E. FACTOR E

"The permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e).

Defendant argues that this factor should have favored him because plaintiff failed to provide proof that she will, in fact, obtain the potential rental unit and did not testify how long the rental would be available to her. Defendant, on the other hand, owns the marital home in which the children have lived the last four years of their lives.

“While a child can benefit from reasonable mobility and a degree of parental flexibility regarding residence, the Legislature has determined that ‘permanence, as a family unit, of the existing or proposed custodial home or homes’ is a value to be given weight in the custodial determination.” *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). Thus, it is true that defendant’s custodial home may be more permanent because there is a measure of continuity. However, the inquiry is focused on the children’s interests as it relates to the family unit. The trial court apparently determined that family unit offered by plaintiff—single parent household across the street from grandparents committed to playing a strong role in caring for their grandchildren—was more likely to offer a more permanent custodial home. This is supported by the fact that defendant required the assistance of a non-family member for the children before and after school every day. With regard to defendant’s contention that plaintiff did not provide proof that she will be able to rent the home, or for how long, the court had the opportunity to assess the credibility of plaintiff’s testimony on this point and apparently found her credible. We will not disturb the court’s credibility assessment on appeal. *Berger*, 277 Mich App at 705.

F. FACTOR F

“The moral fitness of the parties involved.” MCL 722.23(f).

Defendant argues this factor should have favored him because plaintiff moved two hours away from the children and lived apart from the children during the separation. In *Fletcher*, the Supreme Court held that in making a finding under MCL 722.23(f), “questionable conduct is relevant . . . only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*.” *Fletcher*, 447 Mich at 887 (emphasis in original). The Court then noted that, although it was not establishing a definitive standard for moral conduct under this factor, the type of morally questionable conduct relevant to a person’s moral fitness as a parent included “verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors.” *Id.* at 901 n 6. Plaintiff’s decision to move out of the marital home and into her parent’s home during the separation does not qualify as the type of immoral conduct relevant under this factor. To the extent that her decision is relevant to her ability to function as a parent, the record demonstrates that plaintiff stayed involved with her children during the separation, visiting and communicating with them often. The trial court’s finding under this factor was not against the great weight of the evidence.

G. FACTOR G

“The mental and physical health of the parties involved.” MCL 722.23(g).

Defendant argues that the trial court’s finding that he was diagnosed with depression was against the great weight of the evidence. We agree that there was no evidence presented at trial that defendant was diagnosed with depression.

It appears the trial court learned that defendant was diagnosed with depression from the Friend of the Court's report. "If a report has been submitted by the friend of the court, the court must give the parties an opportunity to review the report and to file objections before a decision is entered." MCR 3.210(C)(6). However, *Shelters v Shelters*, 115 Mich App 63, 67; 320 NW2d 292 (1982) provides:

The findings of a trial judge relative to custody must be based upon competent evidence adduced in the custody hearing. Where child custody becomes a disputed matter, the Friend of the Court's recommendation is not admissible in evidence except by stipulation of the parties. While the trial judge may consider the Friend of the Court's report, his decision on the custody issue must be based upon properly received evidence. [Citations omitted.]

Because there is no record evidence to support the court's finding that defendant was diagnosed with depression, it was against the great weight of the evidence. Defendant also argues that there is no evidence that plaintiff believed that defendant's aggressive and controlling behavior was caused by defendant not treating his depression and anxiety. Our review of the record indicates that plaintiff never testified regarding defendant's anxiety diagnosis. The court's finding in this regard was pure conjecture and against the great weight of the evidence. In light of these evidentiary errors, the court's finding that this factor favored plaintiff was against the great weight of the evidence. As the trial court found, there was no specific evidence that defendant was affected by his anxiety, and there was no evidence that plaintiff had a medical or mental condition that would affect her ability to parent. Absent the erroneous factual findings noted above, it is apparent that this factor favored both parties equally.

H. FACTOR H

"The home, school, and community record of the child." MCL 722.23(h).

The trial court recognized the children's connection to their current school, as well as the fact that both parents were happy with the school. The benefits of continuing at their current school were tempered, however, by the fact that defendant could not give credible answers regarding the children's school schedule. Moreover, the trial court found that defendant simply followed the recommendation of one of the children's teachers without independently examining whether repeating kindergarten was in the child's best interest. Thus, whatever record the children developed at their current school during the marriage was less relevant because defendant, as the parent who would have custody of them during the school year at this school, did not demonstrate reliability regarding the children's education since the separation. To the extent that the trial court found that this factor favored plaintiff in light of these factual findings, the court's finding was not against the great weight of the evidence.

I. FACTOR 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." MCL 722.23(j).

Finally, defendant argues the trial court made two erroneous findings of fact under this factor, which he argues should have favored both parties equally. Although we agree that the trial court made two findings of fact under this factor that were against the great weight of the evidence, the court's ultimate finding that this factor favored plaintiff was not against the great weight of the evidence.

Defendant first contends that the trial court incorrectly found that defendant acknowledged preventing the children from talking to plaintiff about future plans. To the contrary, defendant testified that he would tell the children to talk to their mother about their day, but in an effort to get them to talk when they were not saying anything on the phone. The trial court's finding that defendant "acknowledged" preventing the children from talking about certain topics is unsupported by defendant's testimony, in which defendant stated that he did "the opposite of that" when referring to plaintiff's characterization of his behavior. Because the evidence of defendant's "acknowledgment" of his behavior preponderates in the opposite direction, this factual finding is against the great weight of the evidence.

Second, defendant argues the trial court incorrectly found that defendant limited plaintiff to only taking two children at a time when she picked up the children. This finding by the court has no basis in the record. Plaintiff never alleged that defendant did this. During cross-examination of defendant, plaintiff's attorney questioned defendant about ever limiting plaintiff's parenting time to two children; defendant denied ever doing it. Outside of opposing counsel's question during cross-examination, there is no indication that defendant limited plaintiff's parenting time to just two children. Because there is no basis for this factual finding in the record, it is against the great weight of the evidence.

These two erroneous factual findings notwithstanding, the court's finding that this factor favored plaintiff was not against the great weight of the evidence. Defendant argues that the trial court erred because "both parties testified that [plaintiff] exercised her parenting time without incident." The record indicates just the opposite. Plaintiff testified that defendant monitored her phone calls with the children, restricted when plaintiff could call the children, and prevented plaintiff from picking the children up at the house. In plaintiff's words, "I was not welcome [at the marital home,]" and "I felt that I was not allowed to [see the children during non parenting time]." Given the ample evidence presented at trial of defendant's controlling nature with plaintiff's access to the children during the separation, the trial court's finding on this factor was not against the great weight of the evidence.

J. CONCLUSION

In light of the foregoing, the trial court's ultimate decision to award joint custody and school-year parenting time to plaintiff was not a palpable abuse of discretion. As noted above, the evidentiary errors altered the outcome of only one factor, MCL 722.23(g) ("The mental and physical health of the parties."). And even this factor, properly analyzed, favored neither party since neither suffered from conditions that would affect their ability to parent. What remains intact is plaintiff's track record of caring for the children and assuming the bulk of the parental responsibilities during the marriage. Even after the separation, plaintiff continued to be involved with the children, despite being two hours away. Going forward, plaintiff testified that she would be able to be home to care for the children more often than defendant. Even when she is

at work, plaintiff can rely on close family to care for the children. Defendant, on the other hand, does not have a similar familial support system and must rely on a nanny, more so than plaintiff expects to rely on her parents. Finally, to the extent that the parent with predominate parenting time has an attendant responsibility to facilitate the relationship between the children and the non-custodial parent, the trial court found that defendant demonstrated a desire to control the circumstances under which plaintiff parented the children. On this record, it cannot be said that the court's decision to award joint custody and school-year parenting time to plaintiff was so "grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher