

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH K. LASLEY,

Plaintiff-Appellant,

V

MICHAEL JAMES MILLER,

Defendant-Appellee.

UNPUBLISHED

July 18, 2013

No. 313005

Saginaw Circuit Court

LC No. 08-000912-DP

Before: SAWYER, P.J., and METER and DONOFRIO, JJ

PER CURIAM.

Plaintiff appeals as of right the trial court's order, entered after remand from this Court,¹ granting sole legal and physical custody of the parties' minor daughter, "IL," to defendant. Because the trial court did not err by denying plaintiff's motion to set aside the 2011 custody order, the court properly applied the clear and convincing evidence standard, and the court's findings on the statutory best-interest factors were not against the great weight of the evidence, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2009, the trial court granted plaintiff sole legal and physical custody of IL. In February 2011, following a custody hearing, the trial court granted defendant sole legal and physical custody of the child. On appeal, this Court reversed the trial court's determination that four of the statutory best-interest factors, MCL 722.23, favored defendant. This Court stated:

We reverse the trial court's findings as to factors B, H, J, and L and remand for the trial court to redetermine custody and for other proceedings consistent with this opinion. On remand, the trial court should consider up-to-date information, including the child's preference if applicable and the child's living arrangements during this appeal. The trial court may conduct a new

¹ *Lasley v Miller*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 2011 (Docket No. 303060) (*Lasley I*). A detailed account of the basic facts and procedural history that occurred before remand are recited in *Lasley I*.

evidentiary hearing if it believes this is necessary. [*Lasley v Miller*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 2011 (Docket No. 303060) (*Lasley I*), slip op at 11.]

Approximately 11 months after this Court issued its opinion and following plaintiff's unsuccessful attempt to disqualify the trial court judge, the trial court held an evidentiary hearing. The only witnesses who testified were the parties themselves. The court indicated that it would consider up-to-date information to "see if any [of the best-interest factors] ha[d] changed since" the first hearing. Following the hearing, the court again determined that factors (b), (h), (j), and (l) favored defendant and also found that factor (f), regarding which the parties were originally rated equal, favored defendant. The court determined that the parties were equal with respect to factors (a), (c), (d), (e), (g), (i), and (k), and did not find that any factor favored plaintiff. The court stated that it had considered joint custody, but that it did not believe that joint custody was possible given the parties' contentious history. The court thus awarded defendant sole legal and physical custody, with previous parenting time and other orders remaining unchanged.

II. LAW OF THE CASE DOCTRINE

Plaintiff first argues that this Court's opinion in *Lasley I* required the trial court to set aside its 2011 order awarding custody to defendant and that the court refused to follow the law-of-the-case doctrine when it denied plaintiff's motion to set aside the 2011 order. "Whether and to what extent the [law-of-the-case] doctrine applies is a question of law that this Court reviews de novo." *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

"When this Court disposes of an appeal by opinion or order, the opinion or order is the judgment of the Court[,]" and "a lower court 'may not take action on remand that is inconsistent with the judgment of the appellate court.'" *Id.*, citing *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law-of-the-case doctrine applies only to issues actually decided, either implicitly or explicitly, on appeal. *Id.*

Plaintiff argues that the trial court erred by refusing to set aside the 2011 order, which this Court reversed, and reinstate the 2009 custody order, which was the last valid custody order. Nothing in *Lasley I*, however, required the trial court to do so. In *Lasley I*, this Court reversed the trial court's findings with respect to best-interest factors (b), (h), (j), and (l) and remanded this case "for the trial court to redetermine custody" and for other proceedings consistent with the opinion, including conducting another evidentiary hearing if the trial court believed that one was necessary. *Lasley I*, slip op at 11. *Lasley I* did not require that the trial court reinstate the 2009 custody order in the interim, before it held a second evidentiary hearing and redetermined custody. Such an order would have had the effect of removing IL from her home with defendant and requiring her to reestablish her home with plaintiff, perhaps only to have her move out of plaintiff's home and back into defendant's home depending on the outcome after the second evidentiary hearing. Had this Court intended that custody of IL revert to pre-2011 custody order status, it would have specifically stated as such.

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff next argues that the trial court erred by determining that IL's established custodial environment was with both parties rather than solely with plaintiff. Regardless whether the child's established custodial environment existed with plaintiff alone or with both parties, however, the trial court was required to apply the clear and convincing evidence standard in order to award sole legal and physical custody to defendant. "[A] court may not change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."² *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010) (quotation marks and citations omitted). In rendering its decision on the record, the trial court specifically stated that it arrived at its decision based on clear and convincing evidence. Thus, because the trial court properly applied the clear and convincing evidence standard, whether IL's established custodial environment existed with both parties or solely with plaintiff, as she contends, is irrelevant. Accordingly, plaintiff is entitled to no relief.

IV. BEST-INTEREST FACTORS

Plaintiff next argues that the trial court erred by awarding defendant sole legal and physical custody of IL because clear and convincing evidence did not establish that doing so was in the child's best interests. "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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "In deciding a child custody matter, the trial court must evaluate each of the statutory factors pertaining to the best interest of the child and must explicitly state its findings and conclusions regarding each factor." *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008) (footnote omitted). We review a trial court's findings on the statutory best-interest factors under the "great weight of the evidence" standard. *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011) (citation omitted). "Thus, a trial court's findings on each factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (quotation marks and citation omitted). "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705. We review for an abuse of discretion a trial court's "[d]iscretionary rulings, such as to whom custody is awarded[.]" *Dailey*, 291 Mich App at 664. In the context of child custody cases, an abuse of discretion occurs when the trial court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Fletcher*, 447 Mich at 879-880, quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

² Conversely, "[w]here no established custodial environment exists, the trial court may change custody if it finds, by a preponderance of the evidence, that the change would be in the child's best interests." *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000).

Plaintiff argues that the trial court's findings on best-interest factors (b), (d), (f), (h), (j), and (l) were against the great weight of the evidence.³ We will address each factor in turn. Factor (b) examines "[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." MCL 722.23(b). In *Lasley I*, slip op at 8, this Court determined that factor (b) favored neither party, and that the trial court's determination that factor (b) favored defendant was against the great weight of the evidence. Following the evidentiary hearing on remand, the trial court stated the following regarding factor (b):

The Court looks at this and sees that dad has taken involvement for the extra curricular activities and has provided access to this child through social ability and raising of the child in a religion or creed which is to his advantage. The Court is also quite concerned that mother feels that one of the local schools, Peace Lutheran, because it's, quote, "Lutheran", unquote, doesn't have diversity versus I believe it would be Sherwood School it's called now days, which is more diverse because they might have blacks, Hispanics, etcetera which the Court highly disagrees that there isn't diversity in that school or the area around it as well as Sherwood. For the record, [IL] does not look like she is of mixed anything, whether that's relevant or not. [IL]'s a pretty blond young lady who it doesn't matter if she attends school with black, Mexican, whatever. She is going to get along with everyone, from the Court's interview with her, but the Court does find that that attitude should not exist in our society. Given that and the other facts that the Court has expressed here today finds that favor [sic] or that factor B favors dad.

The trial court's determination was not against the great weight of the evidence. Defendant testified that he enrolled IL in a karate program and that she was on her "fourth belt." Defendant maintained that the karate instructors encourage students to do well in school, that they teach respect and discipline, and that IL "loves" the class. Defendant also enrolled IL in "Daisies," the Girl Scout program for IL's age group, and testified that IL had earned several badges. Defendant also enrolled IL in a vacation bible school program. Although plaintiff apparently involved the child in training leader dogs, there was no evidence that this activity involved other people or provided an opportunity for socialization.

With respect to IL's school, defendant enrolled the child at Peace Lutheran. He maintained that he researched Sherwood School, where plaintiff wanted to enroll the child, and Peace Lutheran. He chose Peace Lutheran because some of IL's friends went there and it had a smaller class size than Sherwood. In order to qualify for a discounted tuition rate, he, his wife, and IL had to become members of the church and attend more than 50 percent of the services. Defendant acknowledged that in 2009 he was an atheist, but that his wife was Lutheran and

³ The trial court determined that the parties were equal with respect to factors (a), (c), (e), (g), (i), and (k), and plaintiff does not challenge the trial court's findings regarding those factors on appeal. Accordingly, we will not discuss those factors further.

taught him the value of attending church. Defendant completed an eight-hour class and was an active member of the church. He believed that attending church was good for his marriage and he opined that it was good for them to attend church as a family. Moreover, IL had received all A's and her teachers noted that her confidence had improved since she began attending the school.

Plaintiff testified that she believed that it would be better for IL to attend Sherwood School rather than Peace Lutheran because IL would be exposed to a diverse population at Sherwood and would not be exposed to any diversity at Peace Lutheran. Plaintiff claimed that diversity was important to her because IL's sister is both African-American and Caucasian and plaintiff has an American Indian lineage in her family. Plaintiff also testified that she perceived a bias against single parents at Peace Lutheran. Although plaintiff maintained that she did not believe that diversity would be probable or possible at Peace Lutheran, she did not offer any reason why she held that belief. Further, when asked how she felt "shunned" as a single mother at Peace Lutheran, plaintiff testified,

you are the mother of this child who—you're not married and he is, and Lutheran is very strong about how they choose to—what they say. If you're not married and you're not equal to somebody who is. You live less of a life than that.

When asked if anyone from the school told plaintiff that she was not welcome or accepted at the school, plaintiff responded "no." Thus, it appears that the alleged bias against plaintiff was a matter of her own subjective perception. Because the evidence did not clearly preponderate in the opposite direction, the trial court's determination that factor (b) favored defendant is not against the great weight of the evidence.

Plaintiff next challenges the trial court's determination that the parties were equal with respect to factor (d). Factor (d) addresses "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). Following the previous custody hearing, the trial court determined that plaintiff had a "slight advantage." At that time, the court noted that defendant had been married since 2009 "and is becoming more stable as time goes on." Following the evidentiary hearing on remand, the trial court stated that it found the parties "to be equal as dad and mom both have been in stable relationships for some time now and not moving." There was no evidence that either home was unstable or undesirable. Given the child's age and the relative length of time that she had spent in both homes, the trial court's determination that the parties were equal regarding factor (d) is not against the great weight of the evidence.

Plaintiff next challenges the trial court's determination that factor (f), pertaining to the "moral fitness of the parties involved," see MCL 722.23(f), favors defendant. The trial court determined after the previous custody hearing that the parties were equal regarding factor (f). On remand, the court found differently. The court, citing *Wright v Wright*, 279 Mich App 291; 761 NW2d 443 (2008), stated that "disruptive or harassing conduct directed at a spouse may be relevant to a party's moral fitness." The court opined that "[b]oth parties have been guilty of this, however the extent that mother has done this more so by virtue of a web site which can slander, could sacrifice the child's stability and well being for tactical advantage and criticism, the Court finds that only just slightly favored dad."

The evidence shows that plaintiff's mother developed a website that publicized information about the parties' custody dispute and was critical of the custody proceedings and its participants. The name of the website contained the child's first name. Plaintiff testified that she had no input into what appeared on the website and that the website belonged to her mother. She also testified that she had never viewed the website and never asked her mother to take it down. Plaintiff contends that she is not responsible for the website because it belonged to her mother, who "wrote and maintained the website in an attempt to lay out the abuses of the Trial Court and [defendant] based on her experience as a grandmother."

The trial court's finding that factor (f) slightly favored defendant was not against the great weight of the evidence. Our Supreme Court has stated that "[t]o evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship." *Fletcher*, 447 Mich at 887. The Court further stated that "questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*." *Id.* (emphasis in original). Here, assuming plaintiff's testimony to be true, it is very telling regarding how plaintiff will function as a parent. Plaintiff testified that she was aware that her mother maintained a website that contained information about the case, including "what is in the court papers down in the civil court record[.]" Plaintiff also maintained that she never viewed the website or personally observed what it contained. The record shows that the trial court itself viewed the website when it learned of the website's existence. The court stated:

The only thing I was concerned about, I flipped through it real quick, and one of the reasons for calling both attorneys is to make sure whoever put it up took down the information about the child because it had information about the child that was personal such as name, date of birth, where she went to school, all that kind of thing which is—which is a predator's dream, and I felt I had a duty to inform both counsel that that was on there and I wanted them to act on that issue. The rest of it about me I don't care about. People can do that about me all the time and they do so.

Thus, the record reflects that plaintiff chose to "bury her head in the sand" and maintain ignorance of the contents of the website notwithstanding that it contained personal information about her daughter that a prudent parent would not want published on the Internet. If indeed plaintiff's testimony that she never viewed the contents of the website is true, it would seem that any reasonable parent would want to be aware of the information that a website published about his or her child. Although plaintiff maintains that the website belonged to her mother and she had no control over it, plaintiff also affirmatively stated that she never asked her mother to take it down. Thus, the evidence regarding the website and plaintiff's reaction to it was very telling regarding how plaintiff "will function *as a parent*." *Id.* (emphasis added). In short, because the website was critical of the trial court's decision, with which plaintiff disagreed, plaintiff was

more than willing to allow the website to air the reasons for the perceived injustice for IL⁴ instead of examining the content of the website to determine whether it posed any threat to IL.

Plaintiff argues that there was no evidence that the website influenced IL's relationship with plaintiff or defendant and that defendant testified that the website had no bearing on his ability to co-parent. Plaintiff's argument mischaracterizes defendant's testimony. The evidence showed that the parties were supposed to communicate with each other regarding the child's school, medical appointments, etc., using a notebook or a "Computer Wizard" program. Plaintiff's attorney questioned defendant as follows:

Q. If, in fact, all communication is supposed to transpire either through the written note book or the Computer Wizard Program, how does that web site impact your actual ability to co-parent with this woman.

A. How does it impact it? It doesn't impact it.

The record shows that defendant's response was limited to how the website impacted his ability to communicate with plaintiff using the computer program or the notebook. Defendant did not testify that the website did not affect his ability to co-parent with plaintiff generally. In fact, regarding the website specifically, defendant testified that it made co-parenting with plaintiff much tougher and that "[i]t doesn't help co-parenting[.]" When asked how has it not helped co-parenting, defendant testified:

If you got somebody you're trying to work with and trying to communicate with, and you try to take the high road and then you've got somebody turning around saying this person [i.e., defendant] pushed me on the ground or punched me in the boob, and this person [i.e., plaintiff] says I'm a bad mother [referring to defendant's wife], how am I supposed to communicate with a person who allows their mother to put these things on the internet. I don't want to sit there and associate with that. Yeah, it makes it difficult.

Defendant further testified that the allegations on the website were not true and were slanderous. Accordingly, the record demonstrates, contrary to plaintiff's assertion, that the website negatively impacted defendant's ability to co-parent with plaintiff. Thus, the trial court's determination that factor (f) favored defendant did not contravene the great weight of the evidence.

Plaintiff next challenges the trial court's determination that factor (h) favored defendant. She argues that that factor favored neither party. Factor (h) addresses "[t]he home, school, and community record of the child." MCL 722.23(h). Following the evidentiary hearing on remand, the trial court stated:

⁴ The name of the website was <[http://www.\[child's first name\]justice.com](http://www.[child's first name]justice.com)>.

[D]ad has provided leadership and extra curricular activity participation, has been involved in school conferences, transportation, attendance at school events and provide[d] leadership to attend the schools, and assures the child's access to friends and peers for the child's development. And dad can plan and supervise the child's undertaking and home responsibilities appropriate to her age at this point in time.

As previously discussed with respect to factor (b), the evidence supported the trial court's finding that defendant involved the child in extracurricular activities, including karate, Daisies, and vacation bible school. Also as previously discussed, the child was thriving while attending Peace Lutheran school and church, and defendant, his wife, and the child attended the church together as a family. The child was gaining confidence and had earned all A's. Therefore, the trial court's determination that factor (h) favored defendant was not against the great weight of the evidence.

Factor (j) pertains to "[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." MCL 722.23(j). Regarding this factor, this Court held in *Lasley I* that the trial court's analysis was one-sided and ignored defendant's equally divisive conduct. *Lasley I*, slip op at 10. After the evidentiary hearing on remand, the trial court weighed factor (j) in favor of defendant. The trial court reasoned:

This factor was—would favor dad at this time. In light of the fact that the psychologist that was asked to review this with the Court had indicated that she was even resigning once this matter went to the Court of Appeals and after the Court had made it's decision, that she was resigning the co-parenting counseling to the parties indicating, quote, "[plaintiff] has been resistive to efforts to work or cooperate with [defendant] even though she was encouraged to do so by this therapist. The recent development of a web site that attempts to present her case to the world in manner that's hurtful and possibly slanderous to [defendant and his wife] has made it more difficult for a peaceful resolution and impossible to continue in joint counseling." Period. The parties would be notified of her decision to withdraw as a counselor. The Court should also note that [the] web site is enclosed for the Court of Appeals to review without me going through it in detail because I don't prefer to look at it other than to make sure that it's not harming the child and had personal information about the child [] removed after I told the attorneys to take care of that. The rest of the matter that pertains to me or my pleadings is up to them to leave in if they want. But 20—I believe it was about 2400 pages which goes beyond realism and does back up what Miss Clynick [the psychologist] said, therefore factor J favors dad.

The record supports the trial court's findings. The record contains two letters that psychologist Ann Clynick wrote, one to plaintiff and one to the Friend of the Court. The first reads:

I have been in communication with the court and have informed them [sic] that I am withdrawing as the co-parenting counselor in the above case. This

decision followed the court advising me of a website recently created by you that I believe will undermine the process of successful co-parenting.

The text of the second letter reads:

This letter is to inform the court that I am resigning my position of co-parenting counselor to the above parties. [Plaintiff] has been resistant to efforts to work cooperatively with [defendant], even though she was encouraged to do such by this therapist. Her recent development of a web site that attempts to present her case to the world in a manner that is hurtful and possibly slanderous to [defendant and his wife] has made it more difficult for any peaceful resolutions and impossible to continue with joint counseling. The parties will be notified of my decision to withdraw as their counselor.

Thus, the record clearly shows that plaintiff was unwilling to work together with defendant. As previously discussed, defendant's testimony at the evidentiary hearing revealed how difficult it was for him to co-parent with plaintiff considering the information that appeared on the website. The trial court's determination that factor (j) favored defendant was not against the great weight of the evidence.

Finally, plaintiff challenges the trial court's finding that factor (l) weighed in defendant's favor. Factor (l) addresses "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). On remand, the trial court determined that factor (l) weighed in defendant's favor because of the inappropriateness of the website. Plaintiff again argues that she cannot be blamed for her mother's website, but, as previously discussed, plaintiff's attitude toward the website is indicative of her inability and unwillingness to co-parent with defendant. More importantly, the fact that plaintiff purportedly did not view the website to ensure that it contained none of IL's personal information reflects plaintiff's priorities as a parent. The trial court's finding that factor (l) favored defendant did not contravene the great weight of the evidence.

Accordingly, the trial court's findings on the statutory best-interest factors were not against the great weight of the evidence, and the court did not abuse its discretion by awarding defendant sole legal and physical custody of IL. We further reject plaintiff's contention that this case should be assigned to a different trial court judge. Generally, in order to establish judicial bias, a party must prove that "a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial." *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). The record contains no suggestion of actual bias or prejudice. Rather, it indicates that the trial court determined the custody dispute based on the evidence presented.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio