STATE OF MICHIGAN

COURT OF APPEALS

CASSANDRA LAMBERT, Plaintiff-Appellant,	UNPUBLISHED June 7, 2011
v	No. 301646 Crawford Circuit Court
LARRY FARLEY, Defendant-Appellee.	LC No. 09-007815-DP

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying her motion to change custody of the parties' two children from defendant to plaintiff. We affirm.

In child-custody cases, the trial court's findings of fact, including findings regarding each of the best-interest factors, are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009). The reviewing court defers to the trial court's credibility determinations. *Id.* at 474. The trial court's interpretation and application of the law are reviewed for clear legal error. *McIntosh*, 282 Mich App at 475. The trial court's discretionary rulings, including its ultimate custody decision, are reviewed for an abuse of discretion. *Id.* "An abuse of discretion exists [in a child custody case] when the trial court's 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

To revisit a custody order, a party must prove, by a preponderance of the evidence, proper cause or a change of circumstances warranting consideration of a custody change. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Here, the trial court determined that plaintiff met this threshold, but also determined that the children had an established custodial environment with defendant. If an established custodial environment exists with one parent, a trial court may not change that environment unless there is clear and convincing evidence that a change in the custodial environment is in the child's best interests. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 601; 770 NW2d 403 (2009). The child's best interests are determined by considering and weighing the best-interest factors in MCL 722.23(a) – (l). *Brausch v Brausch*, 283 Mich App 339, 355 n 6; 770 NW2d 77 (2009).

Plaintiff first argues that the trial court erred by failing to interview the oldest child, who was six years old, to determine her preference in accordance with best-interest factor (i) (the reasonable preference of the child). See MCL 722.23(i). We agree that the child was old enough to have her preference given some weight. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). Although the trial court declined to interview the child, it stated:

> The Court did not hear evidence on this, as it was of the opinion of the Court [sic] that there were significant legal hurdles for the Plaintiff to overcome before it would be relevant to hear evidence on this factor. In light of the Court's findings on the other factors, and giving the benefit of this factor to Plaintiff if the Court had heard evidence, it would not change the opinion of the Court.

The trial court's statement that it was giving plaintiff the benefit of factor (i) indicates that it did consider the preference of the children in plaintiff's favor. See, e.g., *Treutle v Treutle*, 197 Mich App 690, 695-696; 495 NW2d 836 (1992). Further, given the trial court's determination that this factor would not affect its evaluation of the children's best interests in light of plaintiff's burden, the trial court's failure to interview the child does not require reversal. *Id.*

Plaintiff next argues that several of the trial court's findings with respect to the statutory best-interest factors are erroneous. Specifically, plaintiff challenges the trial court's findings with respect to best-interest factors (b), (c), (d), (e), (h), and (j). We must affirm the trial court's findings unless the evidence clearly preponderates in the opposite direction. *McIntosh*, 282 Mich App at 474.

The trial court found that factor (b) (parties' capacity and disposition to give the child love, affection, and guidance, and to continue child's religious upbringing) favored defendant. Plaintiff argues that defendant is less suited to provide guidance because he neglected the older child's educational needs and he coached Kenneth Wood, a registered sex offender acquainted with defendant, to give false testimony. Although there was evidence that the child had several school absences and neglected to complete some homework assignments, and that defendant failed to attend a school conference, the evidence also showed that the school absences were largely excused and that the child was doing "fantastic" in school. There was also evidence that defendant was satisfactorily attending to the child's medical condition, which was one of the causes for her school absences. The court gave credence to plaintiff's allegation that defendant may have "coached" Kenneth Wood's testimony, but the evidence did not establish that Wood's testimony was false, and the trial court found that the questionable testimony, viewed in conjunction with the investigation of Wood by the Department of Human Services, did not affect the ultimate custody determination. The evidence does not clearly preponderate in the opposite direction of the court's findings. *Id.*

Plaintiff also argues that the trial court erred in finding that religion "does not appear to be an issue under this factor for these parties." Although plaintiff testified that she strives to teach her children to pray and to instill them with religious beliefs, there was no evidence that religious upbringing was historically important to the family. Accordingly, the trial court's finding is not contrary to the great weight of the evidence.

The trial court's finding of equality with respect to factor (c) (capacity to provide the children with food, clothing, medical or other remedial care, and other material needs) also is not contrary to the great weight of the evidence. Plaintiff contends that the children lost weight between June 2009 and June 2010, but there was no evidence presented that the children's pediatrician viewed any alleged weight loss as significant, and plaintiff admitted that she had not raised concerns about the children's weight with defendant or with a medical provider. Further, there was no evidence that defendant failed to provide proper food and nutrition for the children or that any weight loss was attributable to inadequate care. The trial court acknowledged that plaintiff's home was more spacious and more expensive than defendant's trailer home, but plaintiff admitted that she had no legal claim to the house and that she would have no right to stay if she broke up with her boyfriend.

The trial court's finding in favor of defendant regarding factor (d) (continuity of stable environment) likewise is not contrary to the great weight of the evidence. Although there was evidence that three different women (defendant's sister and two different girlfriends) had lived with the family at different times since defendant obtained primary custody, the trial court reasonably gave greater weight to the fact that the core family unit of defendant and the two children had been intact since 2007. Similarly, the trial court's finding of equality regarding factor (e) (permanence, as a family unit, of a custodial home) is not contrary to the great weight of the evidence. Again, it appears that the trial court gave greater weight to the 2-1/2-year period that the children had lived with defendant than to defendant's relationships with other women.

Plaintiff argues that the trial court erred in finding that factor (f) (moral fitness) favored defendant. However, the trial court found that this factor "slightly favors Plaintiff."

Regarding factor (h) (home, school, and community record of the children), plaintiff reiterates her arguments concerning the older child's school absences and incomplete homework, and defendant's failure to attend a school conference. However, it was not improper for the trial court to give greater emphasis to evidence that the child's actual school performance was not adversely affected, and to evidence that defendant was adequately addressing the health problems that caused the child's absenteeism. Because the evidence does not clearly preponderate in the opposite direction, we uphold the trial court's finding in favor of defendant concerning this factor.

Plaintiff contends that defendant admitted that he denied her parenting time, including on Mother's Day, and that this evidence precluded the trial court from finding that the parties were equal with respect to factor (j) (willingness to facilitate a close relationship with the other parent). However, defendant did not admit intentionally denying plaintiff parenting time. Rather, he explained that he preferred to schedule plaintiff's visitations for the weekends he was paid, so that he could afford to pay for transportation, and that plaintiff was agreeable to this arrangement. He denied knowingly using this plan to prevent plaintiff from having a Mother's Day visit and explained that when he realized his mistake, he offered plaintiff an additional weekend visit to make up for it. The trial court evidently gave credence to defendant's explanation—it explicitly stated that "[t]he [c]ourt does not credit the claims by Plaintiff that Defendant is disruptive of her relationship"—and we defer to that determination. *Id.*

Plaintiff contends that the trial court gave insufficient weight to factor (k) (domestic violence), which the court weighed in her favor. "[T]he trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705. The trial court found that the domestic-violence incident at issue involved an occurrence "of a limited duration and degree," which the children did not witness. The court found that weighing this factor in plaintiff's favor did not outweigh the other factors in defendant's favor. These findings do not preponderate against the great weight of the evidence.

Plaintiff argues that the trial court made an improper finding that Child Protective Services (CPS) investigated Kenneth Wood when the court considered factor (l) (any other relevant circumstances). However, CPS investigator Darcy Bowers testified that she investigated a complaint concerning Kenneth Wood in 2009. The matter was closed after Bowers determined that Wood was not living with the family and that he had not had any unsupervised contact with the children. Thus, the trial court's finding is supported by the evidence.

Lastly, given the trial court's factual findings, its ultimate decision to deny plaintiff's motion for a change of custody was not an abuse of discretion. *McIntosh*, 282 Mich App at 475; *Berger*, 277 Mich App at 705. Plaintiff was obligated to prove by clear and convincing evidence that changing the children's established custodial environment was in their best interests. MCL 722.27(1)(c); *In re AP*, 283 Mich App at 601-602. Plaintiff's request focused on (1) the older child's absenteeism from school, (2) domestic violence in 2009, (3) contact with a sex offender, and (4) the children's diaper rash and the older child's chronic urinary tract infections. Given the evidence that the school absences were largely excused and that the older child was doing "fantastic" in school, that the domestic-violence incident involved an isolated occurrence that was not observed by the children, that the children's contact with Kenneth Wood was limited and did not involve any unsupervised contact in which the children were placed at risk, and that defendant was appropriately attending to the children's medical needs, the trial court's decision not to disrupt the children's established custodial environment is not "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." *Berger*, 277 Mich App at 705.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter