

STATE OF MICHIGAN
COURT OF APPEALS

CHELSEA SHYANNE MEASEL,

Plaintiff-Appellant,

v

JAGGER JAMES BEAUDIN,

Defendant-Appellee.

UNPUBLISHED

November 18, 2021

No. 356992

Sanilac Circuit Court

Family Division

LC No. 20-038851-DP

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order awarding the parties joint legal and physical custody of their minor child. Plaintiff contends that the trial court erred by determining that joint physical custody was in the best interests of the child because the trial court's finding that one of the factors for determining the child's best interests, MCL 722.23(j), weighed in favor of defendant is contrary to the great weight of the evidence. We vacate the trial court's order and remand for further proceedings.

I. FACTS

The parties have never been married to each other. According to the parties, after a brief relationship plaintiff learned she was expecting a child. Sometime thereafter, she informed defendant that she was pregnant but did not believe he was the father of the child. At some point the parties ended their relationship, and plaintiff thereafter did not include defendant in the arrangements regarding the child's birth. Plaintiff testified that after the child was born, she determined that the time of the child's birth suggested that defendant was the father. She informed defendant that she believed him to be the child's father and filed a paternity complaint seeking to establish the paternity of the child. After genetic testing established defendant as the biological father of the child, a consent judgment of filiation was entered and defendant was ordered to pay child support. The trial court referred the issues of custody and parenting time to the Friend of the Court.

Approximately six weeks later, defendant filed a petition seeking sole physical custody and joint legal custody of the child, with limited supervised parenting time for plaintiff. Defendant alleged that plaintiff had denied him parenting time with the child and also alleged facts suggesting that plaintiff was unfit to parent the child. Upon the consent of the parties, the trial court entered an interim order granting the parties joint legal and physical custody of the child. Plaintiff petitioned the trial court to set aside the interim order, however, asserting that she had withdrawn her approval of the interim order before entry of the order. Meanwhile, defendant petitioned the trial court, alleging that plaintiff refused to permit him parenting time with the child as ordered by the interim order. After a hearing, the trial court found that plaintiff had, in fact, withdrawn her consent to the interim order for custody and parenting time, and accordingly the trial court rescinded the interim order, and in its place entered a temporary order for custody and parenting time, awarding the parties joint legal and physical custody of the child.

An evidentiary hearing was held before the trial court's referee regarding custody, parenting time, and support. Plaintiff testified that after the child was born defendant continually asked to see the child, but she did not permit defendant to visit the child because she did not trust him. Plaintiff further testified that after the order of filiation was entered, the parties agreed informally that defendant would have parenting time with the child for an overnight visit, but defendant then refused to return the child to her for six days after the parenting time. Plaintiff testified that defendant told her that he would not return the child to her unless she agreed to the interim order awarding him joint physical custody.

At the conclusion of the evidentiary hearing, the trial court's referee determined that an established custodial environment existed for the child with plaintiff and that it was in the child's best interests to be placed in the physical custody of plaintiff. The referee evaluated the evidence in light of the 12 statutory factors for determining the best interests of the child under Michigan's Child Custody Act, MCL 722.23, and determined that factors (b), (d), (e), (f), (g), (h), (j), and (k) equally weighed in favor of plaintiff and defendant, that factors (i) and (l) were not applicable, and that factors (a) and (c) weighed slightly in favor of plaintiff. As to factor (j), the referee found:

The parties were not married and [defendant] had no legal ties to the child until entry of the Order of Filiation on November 17, 2020. Thereafter both parties engaged in behaviors that [were] not in the child's best interest. [Plaintiff] only allowed minimal contact until late December 2020 when she agreed to alternate weekend parenting time. Shortly after beginning his parenting time, [defendant] failed to return the minor child and kept her for six days. The child was not returned to [plaintiff] until a temporary order for custody and parenting time was entered. [Defendant] denied keeping the child as leverage to obtain an order but he provided no other explanation so it is reasonable to infer that he kept the child in order to secure more time.

Accordingly, the referee recommended that the parties be granted joint legal custody of the child, with sole physical custody of the child awarded to plaintiff.

Defendant objected to the referee's recommendation. Thereafter, the trial court conducted a de novo review of the record regarding custody and parenting time. At the conclusion of the hearing, the trial court found that an established custodial environment existed for the child with

plaintiff. However, the trial court determined “that then places a preponderance of evidence burden on the plaintiff.” The trial court then evaluated the evidence in light of the statutory best interests factors and found that the parties were equal on factors (b), (d), (e), (f), (g), (h), and (k), that factors (i) and (l) were irrelevant to the case, that factors (a) and (c) slightly favored plaintiff, and that factor (j) greatly favored defendant. With respect to factor (j), the trial court stated:

This factor to me is extremely important in this particular case, and I want everyone to be aware that that factor does not require an order to facilitate or have a willingness to provide a relationship with the other parent. It was very clear in this case that [plaintiff], despite knowing that [defendant] was the father for a period of several months still denied him time, without any valid justification. In fact, her testimony was that she just didn’t trust him around children despite the fact that he had been around her other child for a period of time. . . . There was testimony that [defendant] denied time to [plaintiff], which was four or five days depending on which party you believe. The testimony was that he was supposed to have the child overnight according to [plaintiff] for one night, [but] according to [defendant] I believe for two nights. There is no question between the two parties that he had the child for six nights so obviously he denied her time back according to their oral agreement for a period of four to five days and perhaps tried to coerce her for lack of a better term into signing an order to get the child back. However, he did return the child. Now, I find that that pales in comparison to the denials of the Plaintiff. The Plaintiff testified that she first told [defendant] that he was not the father. . . . So, [she] denied him for several months apparently not knowing herself if he was the father, then after the birth confirming he was the father, continued to deny him despite repeated requests by him to see the child, to spend time with the child, to go to doctor’s appointments, then an order of filiation entered in approximately November. She continued to deny parenting time with the child and I will say that that is one of the actions that this Court will frankly not put up with. . . . So, I actually find that [factor (j)] weighs heavily in favor of [defendant].

The trial court found that plaintiff “failed to meet the preponderance of the evidence burden,” and ordered that the parties share joint physical and legal custody of the child. Plaintiff now appeals.

II. DISCUSSION

Plaintiff contends that the trial court erred by awarding the parties joint physical custody of the child because the trial court’s finding regarding factor (j) is contrary to the great weight of the evidence. We conclude that the trial court erroneously imposed the burden of persuasion upon plaintiff.

A. STANDARD OF REVIEW

Section 8 of the Child Custody Act of 1970, MCL 722.28, provides that “all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” “A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction.” *Pennington v Pennington*, 329 Mich

App 562, 570; 944 NW2d 131 (2019). The trial court’s award of custody is a discretionary ruling, *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994), that we review for an abuse of discretion. *Pennington*, 329 Mich App at 570. In a child custody case, an abuse of discretion occurs when the result of 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. *Maier v Maier*, 311 Mich App 218, 221; 874 NW2d 725 (2015). If a trial court incorrectly chooses, interprets, or applies the law, it clearly errs on a legal issue. *Pennington*, 329 Mich App at 570.

B. BURDEN OF PERSUASION

The purpose of the Child Custody Act is to promote the best interests of the child and provide a stable environment for the child free from unwarranted custody changes. *Id.* at 570-571. The act authorizes the trial court to determine custody and parenting time in the context of a child custody dispute, imposing a gatekeeping function on the trial court to ensure the stability of the child. *Lieberman v Orr*, 319 Mich App 68, 78; 900 NW2d 130 (2017).

Section 7 of the Child Custody Act, MCL 722.27, provides that when a child custody dispute has been submitted to the court, the court may, among other actions, award custody of the child to one or more of the parties. MCL 722.27(1)(a). The trial court may also “modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances. . . .” MCL 722.27(1)(c); *Bowling v McCarrick*, 318 Mich App 568, 569; 899 NW2d 808 (2017). However, the trial court “shall not modify or amend its previous judgments or orders or issue a new order so as to 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.” MCL 722.27(1)(c).

As a threshold matter, then, the trial court is required to determine whether an established custodial environment exists for the child. *In re AP*, 283 Mich App 574, 601; 770 NW2d 403 (2009). A custodial environment is established for a child “if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.” *Id.*, quoting MCL 722.27(1)(c). “[A] trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination.” *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). If the trial court is making an initial custody determination,¹ it nonetheless is required to determine whether an established custodial environment exists for the child. *Id.* If the trial court finds that an established custodial environment exists for the child, the trial court may not issue a custody order that changes the established custodial environment without clear and convincing evidence that the change is in the child’s best interest. MCL 722.27(1)(c); *Griffin v Griffin*, 323 Mich App 110, 119; 916 NW2d 292 (2018).

¹ If the determination is an initial custody determination, however, neither party is required to show proper cause or change in circumstances, which would be necessary to warrant reconsideration of a previous custody decision. *Kessler*, 295 Mich App at 61.

If an established custodial environment exists with one parent but not the other, the noncustodial parent bears the burden of persuasion and must demonstrate by clear and convincing evidence that a change in the child's custodial environment is in the best interests of the child. *In re AP*, 283 Mich App at 601-602. It is thus the party who seeks to change an established custodial environment of a child who bears the burden of persuasion, by clear and convincing evidence, that the change is in the child's best interest. *Kessler*, 295 Mich App at 61.

In this case, the trial court properly began its consideration with the threshold inquiry of whether an established custodial environment existed for the child. After conducting a de novo review of the record, the trial court found that an established custodial environment existed for the child with plaintiff. The trial court observed that although the child was only approximately eight months old at that time, the "vast majority" of the child's life had been lived with plaintiff. Neither party has challenged that finding, and we agree that the record supports the trial court's finding of an established custodial environment for the child with plaintiff.

Because the child had an established custodial environment with plaintiff, the burden of persuasion rested upon defendant, as the noncustodial parent seeking to change the child's established custodial environment, to show by clear and convincing evidence that a change in the child's custodial environment was in the child's best interests. See *Kessler*, 295 Mich App at 61. However, in this case, after finding that an established custodial environment existed for the child with plaintiff, the trial court determined "that then places a preponderance of evidence burden on the plaintiff." The trial court then evaluated the evidence in light of the statutory best interests factors and found that the parties were equal on most of the factors, that two factors were irrelevant to the case, that two factors slightly favored plaintiff, and that one factor greatly favored defendant. Based upon that evaluation, the trial court found that plaintiff "failed to meet the preponderance of the evidence burden," and ordered that the parties share joint physical and legal custody of the child, thereby changing the child's established custodial environment.

As noted, a trial court errs when it incorrectly chooses, interprets, or applies the law. *Pennington*, 329 Mich App at 570. We conclude that in this case the trial court clearly erred when it imposed the burden of persuasion upon plaintiff with respect to the custody of the child. Because an established custodial environment existed for the child with plaintiff, the burden was upon defendant, the noncustodial parent seeking to change that established custodial environment, to demonstrate by clear and convincing evidence that the proposed change was in the best interests of the child. Because the failure to properly allocate the burden of persuasion is not harmless, we vacate the trial court's order and remand to the trial court for further proceedings. See *Fletcher*, 447 Mich at 882. On remand, the trial court must determine whether defendant carried the burden of demonstrating by clear and convincing evidence that the proposed change to the child's established custodial environment was in the best interests of the child.

C. BEST INTERESTS

Plaintiff contends that the trial court erred by finding that the best interests factors favored defendant because the trial court weighed factor (j) heavily in favor of defendant, contrary to the great weight of the evidence. In determining the best interests of the child, the factors stated in MCL 722.23 must be considered, being:

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

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

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

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

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

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

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

When determining a child's best interests in the context of a custody dispute, the trial court must consider each best-interests factor and explicitly state its findings and conclusions regarding the factors. *McRoberts v Ferguson*, 322 Mich 125, 134; 910 NW2d 721 (2017). The trial court is not required to give equal weight to the factors. *Id.* However, a trial court's discretion in weighing the evidence regarding each factor is not unlimited and must be supported by the weight of the evidence. See *Bofysil v Bofysil*, 332 Mich App 232, 246; 956 NW2d 544 (2020).

In this case, the trial court evaluated the evidence in light of the statutory best interest factors and found that the parties were equal on most of the factors, that two factors were irrelevant

to the case, that two factors slightly favored plaintiff, and that factor (j) greatly favored defendant. The trial court emphasized that factor (j) was very important in this case because plaintiff had been very unwilling to facilitate a relationship between defendant and the child. The record indicates that plaintiff initially told defendant that he was not the father of the child and thereafter denied him access to the child. The order of filiation was entered when the child was approximately five months old. Although the parties dispute the details of their interactions following that order, the record indicates that plaintiff permitted defendant to have overnight parenting time with the child and defendant then refused to return the child to plaintiff for several days. When evaluating factor (j), the trial court reasoned that although defendant's actions were inappropriate, his actions "paled in comparison" with plaintiff's unwillingness to permit defendant parenting time with the child and thus found factor (j) to weigh heavily in favor of defendant and also to outweigh the factors favoring plaintiff. Although we need not resolve this issue in light of our remand, we share the trial court's concern regarding plaintiff's unwillingness to facilitate parenting time between the child and defendant, which facilitated the establishing of the custodial environment with plaintiff alone.

We vacate the order of the trial court and remand to the trial court for determination of whether defendant met his burden of demonstrating by clear and convincing evidence that changing the child's established custodial environment is in the child's best interests. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola