STATE OF MICHIGAN

COURT OF APPEALS

WENDY ROMPH,

Plaintiff-Appellant,

v

CHRISTIAN WARD ROMPH,

Defendant-Appellee.

UNPUBLISHED
May 22, 1998

No. 208037
Barry Circuit Court
LC No. 92-000484 DM

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Plaintiff Wendy Romph appeals as of right the circuit court order modifying the parties' judgment of divorce to change primary physical custody of the parties' two teenage boys to defendant. We affirm.[1]

The parties were married in 1976 and their sons were born respectively in 1979 and 1983. The parties divorced in 1995 and were granted joint legal custody of the boys, with plaintiff being awarded primary physical custody. After the divorce, plaintiff and the boys remained in the marital home and defendant established a new household seven miles away. Evidence in the record suggests that defendant exercised liberal parenting time with the boys.

In late January 1997, plaintiff asked defendant to extend a normal six-day visiting period by four days so that plaintiff could go on vacation. At that time, the boys strongly indicated that they wished to reside permanently with defendant. In response, defendant asked plaintiff to allow the boys to remain with him at least until the boys were finished with wrestling season. Plaintiff reluctantly assented, but asked for the return of the boys after several weeks. Defendant resisted, but returned the boys after plaintiff obtained a court order on March 19, 1997. Defendant then formally petitioned for custody, leading to the present cause of action.

At a hearing on defendant's motion, the circuit court took testimony from the Barry County Friend of the Court caseworker, defendant's neighbor, and the parties, and interviewed the boys in camera. The court acknowledged that because the boys had an established custodial environment with plaintiff, defendant had the burden of proving with clear and convincing evidence that a change in

custody was in the boys' best interests. The court rated the parties equal on most of the statutory best-interest factors, MCL 722.23; MSA 25.312(3), but gave plaintiff a slight advantage concerning the time that the boys had spent in a stable environment and the desirability of maintaining continuity, and, most significantly, gave defendant the advantage concerning the reasonable preferences of the boys. From this, the court concluded that granting defendant's motion was in the boys' best interests.

Plaintiff argues on appeal that there was not sufficient cause or changed circumstances to permit the court to engage in best-interests analysis, that the court merely adopted the opinion of the friend of the court caseworker and failed to come to an independent decision, that the court erred in declining to preserve a record of its in camera interviews with the boys, that some of the court's factual findings were against the great weight of the evidence, and that in any event the record did not support the court's conclusion that a change of custody was in the boys' best interests.

In custody cases, factual findings are reviewed for conformity with the great weight of the evidence, discretionary rulings are reviewed for an abuse of discretion, and questions of law are reviewed for clear error. *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994).

MCL 722.27(1)(c); MSA 25.312(7)(1)(c) authorizes a court to modify an existing custody order on a showing of "proper cause or a change in circumstances." Thus, "where a party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors." *Rossow v Arandra*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Here, the court did not state the basis on which it found a threshold showing of change or cause, but it is obvious that the court acted in response to evidence that the boys had overwhelmingly come to prefer residency with defendant. Although a superficial or ill-founded preference of a child alone would not justify undertaking best-interest analysis, where, as here, there is evidence of an overwhelming preference, along with evidence of neglect and lack of discipline in the custodial household, a court is justified in considering the best-interest statutory factors.

We find no merit in plaintiff's claim that the circuit court failed to render an independent decision but instead simply deferred to the friend of the court caseworker. In *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989), this Court summarized the role of the friend of the court in custody proceedings as follows:

> The FOC's report and recommendation is not admissible as evidence unless both parties agree to admit it in evidence. However, the report may be considered by the trial court as an aid to understanding the issues to be resolved. The trial court's ultimate findings relative to custody must be based upon competent evidence adduced at the hearing. Thus, while the FOC's report and recommendation may not form the basis for the trial court's findings, it may be used to establish a background and context for the proceedings. [Footnotes omitted.]

The FOC caseworker rated the parties equal with respect to all statutory factors but for his finding that plaintiff had a great advantage as concerned the preference of the boys. On the strength of those findings, the caseworker recommended that custody be changed to defendant. The circuit court departed slightly from the caseworker's findings and gave plaintiff a slight advantage on one of the factors under which the caseworker rated the parties equal. That demonstration of the court's contemplation independent of the caseworker, considered along with the court's receiving exhibits plus testimony from three other witnesses as well as the court's recitation of detailed findings that nowhere referenced the caseworker, satisfies this Court that the circuit court did not defer excessively to the caseworker but instead fulfilled its duty to reach its own conclusions based on evidence before it.

We need not reach plaintiff's claim that the court erred in failing to record its in camera interviews with the boys. Plaintiff's counsel withdrew objections to counsel being present for the interviews and expressly waived having any record made of the interviews. Because this issue was waived at trial, it is not preserved for appeal. See *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Further, the courts of this state recognize the extremely sensitive nature of interviews with the subjects of custody battles and accordingly allow trial courts wide discretion regarding the conducting of interviews and the decision whether to record or reveal the results. *Lesauskis v Lesauskis*, 111 Mich App 811, 815; 314 NW2d 767 (1981) (the best interest of the child outweighs any diminution of the parental right to appeal that may result from failure to record the conversation); *Gulyas v Gulyas*, 75 Mich App 138, 145; 254 NW2d 818 (1977).

In custody cases, the best interest of the child must be determined through a weighing and balancing of the factors enumerated in MCL 722.23; MSA 25.312(3). Plaintiff argues that the circuit court should have given her the advantage on five factors under which the court rated the parties equal:

> (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.
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> * * *
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> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
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> (f) The moral fitness of the parties involved.
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> * * *
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> (h) The home, school, and community record of the child.
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> * * *
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> (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.

Regarding (b), the circuit court credited both parties as loving parents, but noted that plaintiff was more involved with the boys' academic pursuits while defendant tended more toward their athletic interests. Plaintiff argues that her greater participation in the boys' schooling, coupled with evidence that defendant did not impose proper discipline on the boys at his household, militated in favor of her obtaining the advantage. However, we agree with the circuit court that defendant's record of encouraging the boys in their athletic activities balances plaintiff's strengths concerning academia, and evidence that defendant in fact affords the boys more attention and imposes greater discipline at his household than does plaintiff in hers balances plaintiff's assertion that she provides the more structured home. The circuit court had a sound evidentiary basis for declining to give plaintiff the advantage under this factor.

Regarding (e), plaintiff argues that she is poised to provide a more stable family setting than is defendant. Plaintiff emphasizes that defendant shares his home with a woman to whom he is not married, in contrast with the stable environment plaintiff has always provided for the boys in the marital home. However, speculation over defendant's future with his fiancée is a poor basis for discrediting defendant's family unit with the boys. Presumably if the relationship between defendant and his fiancée should end, defendant will adjust as necessary to maintain the family unit. Plaintiff points to no evidence that the familial relationship between defendant and the boys is itself unstable or unreliable. For these reasons, the circuit court's rating of the parties as equal for factor (e) was not contrary to the great weight of the evidence.

Regarding (f), plaintiff attacks the moral fitness of defendant's fiancée, which strategy must fail in the first instance because factor (f) concerns the parties, not their romantic partners, and additionally because plaintiff relies for evidence of the fiancée's moral turpitude on assertions and documents in her brief that are not part of the record below. Plaintiff's direct attack on defendant's moral fitness likewise consists of assertions not supported by evidence of record. For these reasons, plaintiff fails to contravene the circuit court's finding that the parties are of equal moral fitness.

Regarding (h), plaintiff argues that she should have the advantage because she was the "guiding parent" responsible for the boys' successes in academic and extracurricular projects. However, plaintiff develops no argument beyond the assertion of her incumbency as primary physical custodian. Because plaintiff cites no authority for the proposition that the custodial parent has a presumptive advantage on this factor where the children have a good school and community record, and because the circuit court recognized evidence in the record that the boys had freely and liberally spent time with defendant and at his household while earning their various home and community accolades, plaintiff's argument that she should have the advantage on this factor because of her status as the primary custodial parent must fail.

Regarding (j), the circuit court credited each party with facilitating the boys' relationship with the other, observing particularly that they had managed to rise above personal animosities for the sake of allowing the boys to move freely from one household to the other. Plaintiff points out that defendant was lax in abiding by visitation schedules, but this laxity had to do with spontaneity in spending time with the boys; plaintiff does not suggest that defendant ever failed to return the boys to her other than after the extended residency that gave rise to the instant case. Plaintiff further protests that defendant informed the boys of the particulars of the financial arrangements between the parties after the divorce.

However, plaintiff shows no linkage between revealing this information to the boys and engendering their disrespect for plaintiff. Regarding defendant's decision to keep the boys after plaintiff returned from her vacation, there is no evidence that defendant interfered with or encouraged a delay in any return of the boys to plaintiff's household before defendant concluded, in this one instance, that he should continue custody in light of the boys' adamantly stated preference. Even then, however, defendant cooperated when plaintiff obtained a court order for the boys' return. For these reasons, the circuit court's rating of the parties as equal under this factor was not against the great weight of the evidence.

Finally, plaintiff argues that the evidence in the record could not, as a matter of law, support the court's finding that clear and convincing evidence favored a change of custody. Because we find no error in the circuit court's factual findings, at issue is whether the circuit court committed clear legal error in concluding from its rating of the parties as equal under all the statutory factors, except for plaintiff's slight advantage concerning the boys' time in a stable home environment and defendant's overwhelming advantage concerning the boys' preference, that clear and convincing evidence militated in favor of changing custody to defendant.

Clear and convincing evidence is that which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

Plaintiff argues that because the circuit court admitted that the instant controversy posed a very close question, the clear-and-convincing evidentiary standard could not be satisfied. However, the circuit court was not implying that it was difficult to determine which party had some slight overall evidentiary advantage. The court repeatedly acknowledged on the record that a change in custody required clear and convincing evidence that the change was in the boys' best interests. Thus, we presume the court to have found that the issue was a close question at the clear-and-convincing evidentiary threshold.

Plaintiff argues that the boys' preference should not have been considered at all because it was an unreasonable preference wrought by defendant's lack of discipline and provision of a "teenager's haven" for them at his home. However, because there is evidence in the record that plaintiff has neglected the boys at times, and failed to follow through with discipline, and that defendant in contrast runs a "tighter ship," the record supports the court's implicit finding that the boys' preference was a reasonable one.

Plaintiff cites *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995), for the proposition that where an evidentiary standoff exists, a party cannot meet the burden of proof by clear and convincing evidence. However, in *Heid*, this Court upheld a change of custody where the court below had rated the parties equal on all statutory factors. *Heid* is distinguishable from the instant case, however, because in *Heid* the court below ruled from the equal rating of the parties under all statutory factors that custody should be changed from physical custody with one parent to joint physical custody. *Id.* There is an obvious symmetry between equal ratings and

joint custody. Still, this Court stated more generally, "we are unwilling to conclude that mathematical equality on the statutory factors *necessarily* amounts to an evidentiary standoff that precludes a party from satisfying the clear and convincing standard of proof." *Id.* (emphasis in original). This Court continued, "The process of reviewing these wrenching decisions is not, at bottom, a problem of quantitative analysis; our duty is finally to analyze the quality of the evidence adduced to determine whether a party's burden of proof is met." *Id.*

Plaintiff also cites *Duperon, supra*, where this Court held that the children's preference did not by itself necessarily constitute clear and convincing evidence that custody should be changed. *Id.* at 82. However, this Court in *Duperon* was upholding the lower court's decision not to change custody based on an advantage under that one statutory factor, not announcing the absolute legal insufficiency of the child's preference alone to tip the balance in one party's favor by clear and convincing evidence. *Id. Duperon* establishes that the child's preference alone is not a basis for disturbing a lower court's finding that custody should not be changed; it does not establish that the child's preference alone will necessarily fail to support a change.

Thus, neither *Heid* nor *Duperon* forecloses a court from finding that an overwhelming advantage to one party on one factor, weighed against a slight advantage to the other party on another factor, constitutes clear and convincing evidence that custody should be changed. We hold that because the evaluation of the evidence in custody cases is very sensitive to quality, as opposed to quantity, *Heid, supra,* 594, the circuit court did not err, as a matter of law, in concluding that where the other factors favored neither party, the "overwhelming preference" of the boys sufficiently outweighed plaintiff's slight advantage on one factor as to constitute clear and convincing evidence that a change was in the boys' best interests.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] The parties' older son, Spencer Ward Romph, has reached the age of majority since the commencement of this action. For this reason, the parties agree that this appeal concerns the younger son only, William Christian Romph, who at the time of decision was fifteen years old.