STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY PARISH HUYCK,

Plaintiff-Appellant,

v

LIVIA SIMPSON KELLY,

Defendant-Appellee.

UNPUBLISHED
October 27, 1998

No. 207246
Chippewa Circuit Court
LC No. 93-000563 DP

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

The trial court entered an order changing primary physical custody of the parties' minor child, Courtney Huyck, from plaintiff to defendant. Plaintiff appeals as of right, and we affirm.

This Court must affirm rulings of the trial court in child custody matters unless the court's findings of fact were "against the great weight of the evidence," its discretionary rulings amounted to a "palpable abuse of discretion," or it committed "clear legal error" on a major issue. MCL 722.28; MSA 25.312(8); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

I.

Plaintiff first argues that the trial court abused its discretion by finding that there was a change in circumstances sufficient to warrant review of the court's prior custody order. "[A] trial court may amend or modify its previous custody judgment or order only `for proper cause shown or because of a change of circumstances'." *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996); MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

> The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. It

> therefore follows as a corollary that where the 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. [*Id.* (citations omitted).]

After the first day of the custody hearing, the trial court indicated that it was making "a preliminary ruling . . . [regarding] the change of circumstances at issue." It indicated that defendant's relocation to Michigan and her decision to be a homemaker probably did not amount to a change of circumstances, warranting a review of the best interest factors. It concluded, however, that bruises found on the minor child were "a completely different question", amounting to "sufficient evidence to proceed further on the merits of th[e] Motion" for change in custody. The court's preliminary finding of a change of circumstances was based on the bruises.

Plaintiff contends that the fact that the child received bruises while living in his home was insufficient to establish a change of circumstances, especially since the court itself, after hearing the testimony and evidence found that neither parent could be blamed for the bruises. We disagree and note that defendant cites no authority for this proposition. Moreover, a close reading of the court's ultimate opinion indicates that the judge was not focused only on the *existence* of the serious bruising or on a potential perpetrator of the injury. The court was also concerned about *the parties' reaction to* the bruises.[1] The court found that defendant was more attentive to and concerned about the child's bruising. When defendant noticed bruises on the child's arm, she called a friend for advice and then took the child to a hospital. The friend testified that the bruises were "big" and "deep", and she indicated that she would have taken her own child to the hospital if he had sustained similar bruises. Additionally, an investigator for Child Protective Services testified that the bruises were "fairly significant" and that the child's explanation, that they were caused by falling and scraping her arm on the headboard of a bed, was not plausible. Despite the fact that the bruises were significant and were not consistent with the child's explanation regarding their cause, plaintiff felt that defendant was wrong to have sought medical attention for them; he felt she should have "[b]elieve[d] her daughter" as to the cause of the bruises. We note that even if the child's explanation was truthful, it appears that medical attention may have been warranted. Plaintiff's testimony indicates that he was unwilling to seek such attention. The issue of the serious bruises sustained by the child while in plaintiff's care, along with the parties' respective concern for the welfare of the child, was sufficient to warrant reconsideration of the best interest factors.

We also conclude that a review of the prior custody order was warranted because there was "proper cause shown" to revisit the custody issue. In October 1995, defendant was given primary physical custody of the child. In September 1996, the court improperly switched primary physical custody to plaintiff, and giving defendant liberal visitation in the summer, even though neither party had requested a modification of the prior stipulation[2]. It did so when denying defendant's petition to change the child's domicile to Oklahoma. Based on the court's ruling, defendant ultimately abandoned her hope of living in Oklahoma and made a commitment to live in Michigan. This decision extinguished the trial

court's reason for sua sponte switching primary custody from defendant to plaintiff. Under the circumstances, we find that this amounted to "proper cause", allowing for a review of the custody arrangement.[3]

II.

Next, plaintiff argues that the court's findings on best interest factors (a), (b), (c), (f), (g), (h), (i), and (k) were so limited that they did not comport with legal obligations. We disagree. "In deciding a custody matter, the trial court must consider and state its findings on each of the statutory best interest factors", which are set forth in MCL 722.23; MSA 25.312(3). *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). In *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993), a panel of this Court stated:

> Defendant argues that the trial court erred in not stating the factual basis for its findings and conclusions with more particularity. We disagree. Although the trial court's findings are terse, a trial court is not required to "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued." Its findings were sufficient.

In this case, the court made adequate findings on the statutory factors. The court found that factor (k) was inapplicable, and it found the parties equal on factor (i) because the minor child had not expressed a preference for one parent over the other. In assessing factors (a), (b), (c), (f), (g), and (h), the court simply indicated that they did not weigh in favor of one party over the other.[4] While we would prefer a trial court to be more explicit in its analysis of the factors, we believe that a finding that the parties are equal on a factor is sufficient to satisfy the trial court's obligation. Such a finding evidences that the trial court has considered the factor and drawn a conclusion based on the evidence. Moreover, a finding of equality is sufficient to permit meaningful appellate review because this Court can review the record to determine if the finding of equality was against the great weight of the evidence.

Plaintiff next argues that the trial court erred by finding that the parties were equal on factor (c) when it should have weighed that factor in his favor. We disagree. Factor (c) relates to the parties' capacity and disposition to provide the child with food, medical care, and other material needs. Although defendant did not work and her husband's income was limited, there was no indication that she and her husband could not or would not adequately provide for the child's material needs. There was evidence that defendant's husband's employment was secure, that they had a tidy, neat, and cozy home, and that the child was well-cared-for and adequately clothed when with defendant. Similarly, there was evidence that plaintiff could and did provide for the child's material needs. Both he and his wife worked and their home was comfortable, neat, and well-stocked with food. Even though plaintiff's income was clearly greater, both parties could appropriately care for the child and therefore, we cannot hold that the trial court's finding on factor (c) was against the great weight of the evidence.

Next, plaintiff argues that the court should have weighed factor (h) in his favor instead of finding that the parties were equal with regard to it. Factor (h) looks at the home, school, and community

records of the child. There was no testimony that the child had experienced problems in defendant's home or community or in plaintiff's home or community. The evidence showed that the child attended Head Start while in defendant's care. There was no indication that she had behavioral or academic problems at that time. The child attended kindergarten while in plaintiff's care, and she similarly succeeded in that environment. Therefore, it was not against the great weight of the evidence for the court to have found the parties equal on factor (h).

Finally, plaintiff argues that the trial court improperly considered additional factors pursuant to factor (l). Under factor (l), the court weighed defendant's attentiveness and concern over the child's bruises in favor of defendant. As noted above, the evidence supported the court's finding that defendant was more attentive than plaintiff with regard to the bruises. It was not improper for the court to consider this when making its determination. Under factor (l), the court also considered, as a factor favorable to defendant, that defendant was planning to be a full-time homemaker, whereas plaintiff and his wife worked outside of their home. The court was allowed, under *Ireland v Smith*, 451 Mich 457, 466-468; 547 NW2d 686 (1996), to consider the parties' proposed child care arrangements under factor (l) in making its custody determination. We also note that the trial court did not rely solely on the fact that defendant was going to remain at home with the child. It merely considered that fact along with the others. It was not improper for the court to consider the child care arrangement, and its finding was not against the great weight of the evidence based on the facts of this case.

III.

Finally, plaintiff argues that the trial court's custody order was not supported by clear and convincing evidence. Before making a custody determination, a trial court must first establish the correct burden of persuasion by deciding whether the child at issue has an "established custodial environment." *Bowers, supra* at 324. Where there is an established custodial environment, a change in custody may not be ordered unless there is clear and convincing evidence that a change is in the best interest of the child. *Id*.; MCL 722.27(1)(c); MSA 25.312(7)(1)(c). If there is no established custodial environment, "custody is determined upon a showing by a preponderance of the evidence that a particular placement is in the child's best interests." *Id*.

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability and permanence, and in which the child is provided with parental care, love, discipline, guidance and attention. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987). MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides in part:

> The custodial environment of a child is established 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. The age of the child, the physical environment, and the inclination of the custodian and the child as the permanency of the relationship shall also be considered.

In this case, the trial court found that an established custodial environment existed between the child and plaintiff. This finding constituted an abuse of discretion. In October 1995, defendant received primary physical custody of the child pursuant to the parties' stipulation. On September 25, 1996, the court switched primary custody to plaintiff. Within one month of this switch, defendant moved for a new trial on the matter, which motion was apparently denied in the spring of 1997. While the child was with defendant for summer visitation, in July 1997, defendant petitioned to modify the custody order. It is clear that an ongoing custody battle commenced soon after the court awarded primary physical custody to plaintiff.

> 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).]

In light of the changes in physical custody and the ongoing legal battle between the parties, the court abused its discretion in concluding that the child had an established custodial environment with plaintiff, especially since the evidence indicated that the child clearly looked to both parties for guidance, discipline, the necessities of life, and parental comfort.

Since the child had no established custodial environment, defendant only had to show by a preponderance of the evidence that, based on the twelve statutory best interest factors, placement of the child with her was in the child's best interest. See *Bowers*, *supra*, 198 Mich App 324. The trial court favored plaintiff on factors (d) and (j). However, it favored defendant on factor (e) and on two additional factors under factor (l), specifically defendant's attentiveness to the child's bruising and defendant's homemaker status. It found the other factors either inapplicable or equally weighed between the parties. In light of the trial court's findings, which were not against the great weight of the evidence, it was not a palpable abuse its discretion to conclude that defendant should receive primary physical custody. A preponderance of the evidence supported this conclusion.

Affirmed.

/s/ Henry William Saad
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] It was not evident at the time the court issued its preliminary ruling, finding a change of circumstances, that the court was concerned about the parties' reactions to the bruises.. Rather, the trial court made these observations at the end of the hearing when it was modifying the existing custody order because of a change of circumstances. However, we believe that the trial court's concern about the bruises included a concern about how they were taken care of and by whom, and thus, its preliminary ruling was appropriate and encompassed those concerns.

[2] The trial court erred by awarding primary custody to plaintiff even though he did not request it. *Mann v Mann*, 190 Mich App 526, 538; 476 NW2d 439 (1991). As stated in *Mann*, "[t]he court in effect deprived defendant of the opportunity to be heard. Had defendant had notice that the court was considering awarding sole legal custody to plaintiff, she might have presented further proofs or made different tactical decisions." *Id.*

[3] While we are mindful that an interstate move by a party is not grounds to revisit custody issues, *Dehring, supra* at 165, this is not simply a case where an interstate move took place. Defendant lost primary physical custody because she wanted to change the child's domicile. When the court denied her motion, she made plans to return to Michigan and try to regain primary custody.

[4] The court did not explicitly state that the parties were equal on factors (f), (g), and (h). However, reviewing the opinion closely, it is evident that the court found the parties to be equal on these factors.