STATE OF MICHIGAN

COURT OF APPEALS

CHARLES WALDROUP, III,

Plaintiff-Appellee,

v

DORIS LEMCOOL,

Defendant-Appellant.

UNPUBLISHED
June 12, 2001

No. 230397
Otsego Circuit Court
LC No. 97-007401-DS

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from an order awarding physical custody of the parties' minor child to plaintiff. We affirm.

Defendant first argues that the trial court's failure to hold an evidentiary hearing and rule on the question whether proper cause or a change in circumstances warranting modification of the custody award was shown, before allowing evidence regarding a best interests analysis, was error requiring reversal. Questions of law in custody cases are reviewed for clear legal error. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.* We review a trial court's findings of fact in a child custody proceeding to determine if they are contrary to the great weight of the evidence. *Id.*

MCL 722.27(1)(c) provides that a trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances." This Court has interpreted the requirement for a showing of proper cause or change of circumstances as follows:

> 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. [*Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).]

Defendant maintains that the pretrial hearing in this case was not an evidentiary hearing and that the order entered following that hearing, which stated that petitioner had established a proper cause of change of circumstances, was entered on the recommendation of a referee whose findings were based on allegations only. In actions tried without a jury, the trial court must find the facts and state separately its conclusions of law regarding contested matters. MCR 2.517(A)(1); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). Findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *Id.*, citing MCR 2.517(A)(1) and *People v Porter*, 169 Mich App 190, 194; 425 NW2d 514 (1988).

Here, the order entered after the pretrial hearing plainly states that "[p]etitioner established a proper cause or change in circumstances which warrants an evidentiary hearing on a change in custody." Further, the court referenced defendant's frequent moves, her failure to provide a stable environment, and her failure to facilitate a relationship between the minor child and his father as the basis for its conclusion. Any challenge to the pretrial order and opinion should have been made within the statutory period allowed under MCR 3.215(E). Moreover, at the custody hearing, the trial court allowed proofs on both questions – proper cause or change in circumstances, and change in custody – and then referenced the court's adoption of the referee's recommendation in its opinion and order changing custody. A trial court may incorporate findings and conclusions made in prior opinions and orders. *Lud v Howard*, 161 Mich App 603, 614; 411 NW2d 792 (1987). The brevity of the findings on proper cause or change in circumstances was not error because the order was definite and pertinent, and it appears that the trial court was aware of the issues in the case and correctly applied the law. *Triple E Produce Corp, supra.* Appellate review would not be facilitated by requiring further explanation. *Id.*

Defendant further contends that the court erred because intrastate moves and disputes regarding visitation do not constitute proper cause or change in circumstances such that the court could consider a change in custody. However, plaintiff's allegations centered not on defendant's intrastate moves, but instead on whether their frequency denied the child a stable environment, thus distinguishing this case from *Dehring v Dehring*, 220 Mich App 163, 166-167; 559 NW2d 59 (1996). Further, the parties' disputes over visitation went beyond those discussed in *Adams v Adams*, 100 Mich App 1; 298 NW2d 871 (1980). Plaintiff also established that defendant actively undermined the relationship between the minor child and plaintiff and that defendant's continued denial of plaintiff's paternity adversely affected the minor child. The trial court's conclusion that there existed proper cause or change of circumstances sufficient to consider a change in custody was not against the great weight of the evidence.

Defendant next argues that the trial court made findings against the great weight of the evidence and clear error in its application of law to the best interests factors, and that the order changing custody was an abuse of discretion. A custody decision is a discretionary ruling that is reviewed under an abuse of discretion standard. *Fletcher v Fletcher*, 447 Mich 871, 881 (Brickley J.), 900 (Griffin J.); 526 NW2d 889 (1994). An abuse of discretion exists where the result was so grossly violative of fact and logic that it evidences a perversity of will, a defiance of

judgment, or the exercise of passion and bias. *Id.* at 879-880 (Brickley J.), 900 (Griffin J.). In custody cases, the court's discretion is constrained by the statutory best interests factors, MCL 722.23, but should be affirmed unless the evidence clearly preponderates in the other direction. *Id.* at 878 (Brickley J.), 900 (Griffin J.).

Here, the court found in favor of plaintiff on factors b, e, g, h, j, and l, and found in favor of neither party on factors a, c, d, and f. The court did not consider factor i, and factor k was not at issue. MCL 722.23.

Considering first the factors that the trial court determined favored neither party, we find no error. With respect to factor a, "[t]he love, affection, and other emotional ties existing between the parties involved and the child," MCL 722.23(a), while the lower court's findings were brief, the court considered testimony provided by both parties and such was sufficient to satisfy the articulation requirements; the court was not required to comment on every matter in evidence. *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). With regard to factor c, the parties' capacity and disposition to provide food, clothing, medical or other remedial care, MCL 722.23(c), the court's finding that "there was no credible testimony regarding either party's inability or disinclination to provide [the child] with food, clothing or medical care," was sufficient. It is the trial court's duty to decide what weight to give each witness' testimony, *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1998), and we give considerable deference to the court's vantage point concerning issues of credibility. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991).

The friend of the court evaluator testified that factor d, "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), favored plaintiff because of the defendant's frequent moves and her failure to acknowledge that the moves could negatively affect the child. In concluding that this factor favored neither party, the court considered both the stability and continuity of the minor child's environment. We find no error. Finally, defendant does not challenge the trial court's finding regarding factor f.

With respect to those factors that the court found weighed in plaintiff's favor, we again find no error. First, the court's findings regarding factor b, the parties' capacity and disposition to give the child love, affection, and guidance, MCL 722.23(b), were supported by the evidence. The court found that defendant's continuing disrespect for authority provides a poor model for the minor child, and that because the child was having difficulty in school both academically and socially, plaintiff's "more cooperative parenting style" would allow him to provide better guidance and make informed and appropriate decisions regarding the minor child. We also find no error in the court's conclusion regarding factor e, "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e). The trial court found that plaintiff could provide a superior environment because of the stability of his job, his permanent residence, and the presence of extended family to provide assistance and support. See *Mogle v Scriver*, 241 Mich App 192, 200; 614 NW2d 696 (2000).

In making its determination that factor g, "the mental and physical health of the parties involved," MCL 722.23(g), favored plaintiff, the court focused on the mental health of the parties. While the psychologist's report indicated that both parties would benefit from individual

psychotherapy, the report supports the court's conclusion that plaintiff's problems "paled in comparison" to defendant's "extreme and profound acrimony" toward plaintiff. The court's decision with respect to factor h, the child's home, school, and community record, MCL 722.23(h), likewise was not against the great of the evidence. At the time of the review, the child was not at an appropriate reading level, he had been caught stealing, and was suspended for three days from school. Contributing to the problem was defendant's attitude toward the child's teachers, which testimony indicated was confrontational, threatening, and disproportionate to the problem. Although the school principal testified that there had been some improvement in the relationship between defendant and the school, the trial court's finding was not against the great weight of the evidence.

Regarding factor j, the parties' willingness and ability "to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent," MCL 722.23(j), we find no error in the court's conclusion that defendant's extreme hostility toward plaintiff significantly limited plaintiff's ability to maintain a close relationship with his child. The record clearly establishes that defendant has continuously frustrated efforts to facilitate closer contacts with plaintiff, resulting in her being found in contempt of court on four separate occasions.

We reject defendant's argument that the court erred by not considering factor i, "[t]he reasonable preference of the child," MCL 722.23(i), and by not making a record of its interview with the child to facilitate appellate review. As a general rule, a trial court must state on the record whether a child was able to express a reasonable preference and whether that child's preferences were considered by the court, but need not violate the child's confidence by disclosing those choices. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871 (1994); see also *Hilliard*, *supra* at 320-321. Further, this Court has stated that the potential for misuse of the recorded statement which was given in confidence by a distraught child far outweighs any possible benefit to a parent's right to appeal. *Lesauskis v Lesauskis*, 111 Mich App 811, 816-817; 314 NW2d 767 (1981).

With regard to factor l, "[a]ny other factor considered by the court to be relevant," MCL MCL 722.23(j), defendant contends that the court failed to consider the deep relationship the minor child has with his half-sister. When determining child custody cases, the importance of keeping siblings together is recognized and in most cases, maintaining this bond is in their best interests. *Weichmann v Weichmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). However, the sibling bond is not determinative of the best interests of a particular child. *Id.* at 440. Finally, defendant does not challenge the trial court's finding that factor k, "[d]omestic violence," MCL 722.23(k), was not at issue.

The evidence in this case did not clearly preponderate against the circuit court's decision to award physical custody of the minor child to plaintiff. Accordingly, we find no abuse of discretion.

Defendant's final argument is that the trial court abused its discretion in scheduling visitation. This Court reviews child visitation orders de novo, but will not reverse unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed clear legal error. *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). The controlling factor is the best interest of the child and visitation will be granted if

it is in the best interest of the child and in a frequency, duration, and type reasonably calculated to promote a strong relationship between the parent and the child. *Deal, supra* at 741-742.

In establishing the visitation schedule, the court followed the recommendation of the psychologist that the parenting schedule be reversed and that defendant's visitation be in the frequency, duration, and type previously awarded to plaintiff. The major difference between the schedule set by the court in this case and the 46th Judicial Circuit recommendation is that it does not incorporate every other weekend overnight visitation. In light of the record in this case, we do not find the ordered visitation schedule to be an abuse of discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jeffrey G. Collins