STATE OF MICHIGAN

COURT OF APPEALS

DALE K. TROWBRIDGE,

Plaintiff-Appellant,

v

TERRY K. FLOWERS,

Defendant-Appellee.

UNPUBLISHED
January 15, 2002

No. 231035
Eaton Circuit Court
LC No. 90-001208-DS

Before: Fitzgerald, P.J., and Bandstra and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff mother appeals as by leave granted the opinion and order changing physical custody of the parties' minor child, Leslie Ann Trowbridge, to defendant father. We affirm.

A custody award may be modified on a showing of proper cause or a change of circumstances that establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). The threshold determination in a court's decision to modify an existing custody order is whether an established custodial environment exists. *Id.* at 695-696. Here, the existence of an established custodial environment was with plaintiff. Accordingly, the trial court could only modify the custody order upon clear and convincing evidence that the modification was in Leslie's best interests. MCL 722.27(1)(c).

The best interests of the child are determined by applying the statutory factors cited in MCL 722.23. In this case, the trial court found that the parties were equal on four factors, that four factors favored defendant, that one factor favored plaintiff, and that two factors were not at issue. Plaintiff contends that reversal is required because there was not clear and convincing evidence to support the trial court's findings with regard to several of the factors. The court's findings are reviewed under the great weight of the evidence standard. *LaFleche, supra* at 695. Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000).

The trial court's findings were not against the great weight of the evidence. In considering factor a, the "love, affection, and emotional ties existing between the parties and the child," MCL 722.23(a), the trial court found that, while both parties expressed their love for Leslie, "both parents placed their own agendas of degrading the other ahead of any love they

have for the child," and weighed the factor equally. These findings were not against the great weight of the evidence. Both parties stated that they loved the child very much and wanted her to have counseling to ease her stress over this case. Nevertheless, there was other evidence suggesting that Leslie had distanced herself from both parents, largely because of their combative behavior. The evidence did not clearly preponderate against the trial court's findings.

Next, the trial court found that factor 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," MCL 722.23(b), slightly favored defendant. Again, this finding was not against the great weight of the evidence. The evidence showed that plaintiff had been Leslie's main source of support and guidance in the past, while defendant's visitation was sporadic and his support record was abysmal. Nevertheless, there was evidence that even if plaintiff had overcome her alcohol abuse problem, she had more recently become extremely agitated, unable to focus on her children's needs, and unable to control her son's alcohol and drug abuse in her home. The evidence also showed that defendant had become more involved in the child's education and her extracurricular activities, he was aware of her interests, and he had successfully completed a parenting class. It was reasonable for the trial court to conclude that defendant was more disposed to care for the child and to give factor b some weight in his favor.

The trial court found that the parties were equal with regard to factor c, the "capacity and disposition . . . to provide the child with food, clothing, and medical care . . . and other material needs," MCL 722.23(c). It is undisputed that, historically, plaintiff clearly has shown the stronger disposition to provide support. Plaintiff urges that this factor be evaluated only on the parties' pre-petition conduct and not take into account defendant's support of the child since he has had custody. This argument is disingenuous, however, in light of cases such as *LaFleche*, *supra* at 701, where the financial status of the parties was considered as of the time of the custody hearing. Because the evidence showed that defendant's disposition to support Leslie was, at the time of the hearing, similar to plaintiff's, and because the evidence suggests that defendant has a slightly greater ability to provide support, we cannot conclude that the court's findings were against the great weight of the evidence.

The trial court found that factor d, the "length of time the child has lived in a stable and satisfactory environment, and the desirability to maintain continuity," MCL 722.23(d) weighed slightly in favor of defendant because there were "significant concerns about the alcohol problem as well as the use of marijuana by the half-brother." Plaintiff argues that the record does not support this conclusion because it fails to take into account her attempts to get her son into substance abuse counseling, her own recovery attempts, and her involvement in Leslie's school activities. However, plaintiff's son resisted treatment and her own recovery was tenuous. She had resorted to telling Leslie and others that defendant was a liar and sociopath, and she acknowledged that she was and had been emotionally devastated over the proceedings. Under these circumstances, the trial court's findings on factor d were not against the great weight of the evidence.

The trial court concluded that factor e, the "permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e), was not at issue. Plaintiff argues that the court should have favored her because until defendant's petition, the family unit was herself and the child. The focus of factor (e), however, is the child's prospects for a stable family

environment and whether the family unit will remain intact. *Ireland v Smith*, 451 Mich 457, 462, 465; 547 NW2d 686 (1996). We therefore reject plaintiff's argument.

Plaintiff also argues that the trial court erred in finding that factor g, the "mental and physical health of the parties," MCL 722.23(g), slightly favored defendant. In reaching that conclusion, the trial court found that plaintiff has experienced mental health problems, and that she sometimes exacerbated these problems by self-medicating with alcohol. According to plaintiff, these findings were erroneous because there was no evidence that she had a continuing alcohol problem after undergoing outpatient treatment, she has cooperated in dealing with her alcoholism, and many of her past actions were aggravated by her now controlled anxiety-panic disorder. However, there was also evidence that plaintiff needed additional, intensive outpatient alcohol abuse therapy. The court's findings were, again, not against the great weight of the evidence.

The trial court concluded that the most significant factor in this case was j, the "willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent," MCL 722.23(j), and found that it slightly favored defendant. In arguing that this was incorrect, plaintiff points to evidence that defendant had attempted to influence the child, portrayed himself in a falsely positive light, and impeded her parenting time. There is record support for each of these claimed instances of misconduct. Nevertheless, there was also evidence that plaintiff also attempted to influence the child, and, most importantly, there was overwhelming evidence that she was intent on convincing Leslie that defendant was a bad person. Plaintiff also told the court that she did not think that it was up to her to foster a good relationship between defendant and the child. On this record, the trial court's findings on factor j were not against the great weight of the evidence. Consequently, after a thorough review of the record, we are satisfied that the court's findings of fact were not against the great weight of the evidence, and the court did not abuse its discretion in ordering a change in custody.

Plaintiff also contends that the trial court clearly erred when it entered the ex parte order of December 8, 1999, without holding an evidentiary hearing. MCR 3.207(B) essentially permits a trial court in a domestic relations matter to issue an ex parte order regarding child custody if the court is satisfied that there is a threat of imminent harm. If the other party objects to the order, a hearing must be held within twenty-one days, but the order remains in effect until changed by a later court order. *Id.* That procedure was followed here. The court entered the ex parte order for change of custody on December 8, 1999. At a December 10, 1999, emergency hearing regarding the ex parte order, counsel for the parties agreed that the terms of the ex parte order would remain in effect, with parenting time issues to be resolved in the future. Under these circumstances, the court properly handled the ex parte order and plaintiff has waived any claim to the contrary. See, e.g., *Chapdelaine v Sochocki*, 247 Mich App 167, 177; ___ NW2d ___ (2001).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly