STATE OF MICHIGAN

COURT OF APPEALS

STEPHANIE J. PATTERSON a/k/a STEPHANIE J. WIATER, Plaintiff-Appellant, v STEVEN W. PATTERSON, Defendant-Appellee.	UNPUBLISHED April 19, 2002 No. 236491 Kalamazoo Circuit Court LC No. 98-000123-TM

Before: Hoekstra, P.J., and Whitbeck, C.J., and Talbot, J.

PER CURIAM.

Plaintiff appeals as of right the Kalamazoo Circuit Court's order changing physical custody of the divorced couples' two minor children from her to their father, defendant. We affirm.

In October 1996, the Delta Circuit Court issued a judgment of divorce that granted joint legal custody of the children, but actual physical custody to plaintiff. The next summer, plaintiff moved for change of domicile to Indiana, which the Delta Circuit Court granted. Thereafter, the case was transferred to the Kalamazoo Circuit Court because neither party continued to reside in the county of original jurisdiction, and defendant had moved to Kalamazoo County. Pursuant to defendant's request, and after a hearing taking place over a number of months, the Kalamazoo Circuit Court (hereinafter "trial court") entered an order modifying the judgment of divorce and changing the custody of the parties' two minor children from plaintiff to defendant.

On appeal, plaintiff first argues that the trial court committed legal error in failing to review and give recognition to the Delta Circuit Court's findings of fact and conclusions that were the basis for three prior decisions denying defendant's requests for custody. In support of this argument, plaintiff relies on the law of the case doctrine. Because the law of the case doctrine in Michigan deals with the appellate court decisions, see *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001),[1] not trial court decisions, it is inapplicable in the present

[1] "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. . . . Whether law of the case applies is a question of law subject to review de novo." *Ashker, supra*; see also *Baks v Moroun*, 227 Mich App 472, 498; 576 NW2d 413 (1998) (law of the case doctrine inapplicable (continued…)

circumstances where only trial court decisions are involved. Thus, plaintiff's argument is without merit.

Plaintiff next argues that the trial court committed legal error in denying plaintiff's motion to dismiss at the close of defendant's proofs and in failing to make findings of fact on the record. We review de novo the trial court's decision on a motion for a directed verdict. *Derbabian v Mariner's Pointe Associates*, ___ Mich App ___; ___ NW2d ___ (2002). When deciding whether to grant a motion for a directed verdict, the trial court must view the testimony and all legitimate inferences from the testimony in the light most favorable to the nonmoving party to determine whether a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994).

At the close of defendant's proofs, plaintiff moved for dismissal, arguing that defendant had not met his burden of establishing by clear and convincing evidence "that something had changed to show a substantial change in circumstance, or some compelling reason." A custody award may be modified on a showing of proper cause or change of circumstances which establishes that the modification is in the child's best interest. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). An evidentiary hearing is required before custody can be changed. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). The party seeking change must establish proper cause or a change in circumstances before the best interest factors may be considered. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Here, viewing the domestic violence claim in a light most favorable to defendant, the evidence at least showed that the parties' children were living in a house where their stepfather kept ammunition and multiple guns, some loaded, had arguably held a two-year-old child, the half-sister of the parties' children, hostage in a room in the house, police intervention was necessary, and a felony criminal charge stemmed from the incident. Under these circumstances, defendant demonstrated a sufficient change of circumstances and thus the trial court did not err in denying plaintiff's motion for directed verdict.

Further, with regard to plaintiff's argument that the trial court violated MCR 3.210(D)(1) because it denied the motion without making any finding of fact regarding the change in circumstance, plaintiff's argument is without merit. Contrary to plaintiff's assertion, MCR 3.210(D) is inapplicable with regard to plaintiff's motion for directed verdict because plaintiff's motion was not a postjudgment motion to modify a final judgment or order, but rather was a motion during the proceedings on a postjudment motion to modify the final judgment of divorce. Findings of fact and conclusions of law were unnecessary with regard to the trial court's ruling on plaintiff's motion, MCR 2.517(A)(4), and even if the trial court were required to make findings of fact and conclusions of law, we have reviewed the trial court's ruling and find it sufficient, see MCR 2.517(A)(2).

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where no prior appellate opinion decided any issues in the case), abrogated on other grounds *Estes v Idea Engineering & Fabricating, Inc*, __ Mich App __; __ NW2d __ (2002).

Plaintiff also raises multiple challenges to the trial court's findings on most of the best interest factors, MCL 722.23. To begin, we note that "[a]ll custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999), citing MCL 722.28.

We have reviewed each of plaintiff's challenges and find that none merit relief. The trial court's conclusions on the factors that plaintiff challenges were supported by the record and were not against the great weight of the evidence. Although the record contained evidence in favor of both plaintiff and defendant on most of the challenged factors, we cannot say that the evidence clearly preponderates in the opposite direction of the trial court's conclusions. *Foskett, supra* at 5; *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Nor did the trial court clearly err in determining that certain factors favored or slightly favored defendant. *Wellman v Wellman*, 203 Mich App 277, 282-283; 512 NW2d 68 (1994). Even if the trial court's decision mentioned evidence that arguably was not pertinent in analyzing certain factors, sufficient pertinent evidence supported its conclusions. In other words, the allegedly non-pertinent facts either did not change how the trial court weighed the factor or they were not necessarily irrelevant. We note that a single circumstance can be relevant to and considered in determining more than one of the child custody factors. *Fletcher v Fletcher*, 229 Mich App 19, 25-26; 581 NW2d 11 (1998).

Further, to the extent that plaintiff argues that the trial court committed legal error in making findings of fact with regard to factor (i) (the children's preference), we find her argument without merit. We have reviewed the record and, contrary to plaintiff's claim, the trial court did not make findings directly in conflict with its own statements on the record. Rather, plaintiff misconstrues the trial court's words and message when dealing with the children's preference. The trial court's comments and rulings, read in context, reveal that the trial court was simply trying to relay a positive message to the parents, that they were raising delightful children, and to encourage them to focus on the best interests of the children and to treat each other appropriately. Obviously, the preference of the children is a factor that many parents respond to with heightened emotions, and from the record here it is apparent that the trial court attempted to handle this emotionally charged factor in a manner to minimize the effect on the parents and to protect the children. We find no legal error.

Plaintiff also emphasized the trial court's findings on factor (f), regarding the moral fitness of the parents, claiming that the trial court erred in discussing that plaintiff, with the children, lived with plaintiff's current husband before their marriage. Even assuming that reliance on this topic was error, factor (f) was but one factor of many that the trial court found in favor of defendant, and thus in the whole scheme of things, it was harmless. See *Fletcher v Fletcher*, 447 Mich 871, 882 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994) ("upon a finding of error, appellate courts should remand to the trial court unless the error was harmless").

Plaintiff further argues that the final decision to change custody from plaintiff to defendant was an abuse of discretion. The abuse of discretion standard applies to the trial court's discretionary rulings; to whom custody is granted is such a discretionary disposition ruling. *Fletcher, supra* at 447 Mich 880 (Brickley, J.), 900 (Griffin, J.); *Foskett, supra* at 5. An abuse of discretion occurs when 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 or bias. *Fletcher, supra* at

447 Mich 879-880 (Brickley, J.), 900 (Griffin, J.); *Winn v Winn*, 234 Mich App 255, 262; 593 NW2d 662 (1999). Under the circumstances of this case, where a serious situation posed potential danger to the children, and on the basis of our conclusions discussed above, we cannot say that the trial court abused its discretion in changing physical custody of the children.

Plaintiff also argues that the trial court erred in using information from an *in camera* interview of the children on issues other than their parental preference. More specifically, plaintiff claims that the trial court "used a statement claimed to have been made by one of the children on a factor other than preference." The trial court indicated in its decision that "when this [c]ourt interviewed the minor children, one of them stated spontaneously that [the stepfather] 'yells at us all the time.'" There is no indication in the record that this comment was anything but spontaneous, as the trial court indicated. Other than her bald assertions, plaintiff does not demonstrate that the trial court engaged in a fact-finding expedition during the *in camera* interview. From the record before this Court, it does not appear that the scope of the *in camera* interview exceeded a reasonable inquiry into the preference of the children. *Molloy v Molloy*, 247 Mich App 348, 363-364; 637 NW2d 803 (2001). Moreover, even if there were error, it was harmless where the record was clear that plaintiff's current husband has an anger management problem.

Plaintiff next argues that the trial court committed legal error and abused its discretion in agreeing with the parties that no evidence greater than two years old would be used, and then using such evidence in the findings of fact. Plaintiff claims, in essence, that the trial court ignored its own ruling.

We find no legal error here and no abuse of discretion with regard to the trial court's admission of and reliance on the complained-of evidence.[2] Plaintiff either failed to object to the evidence presented that she now challenges on appeal, or she in fact solicited that information herself, or the information was merely background information. Despite plaintiff's contention, there is no indication in the record that the trial court would only base its change of custody ruling on any new evidence from the past two years, rather than the evidence presented without objection and considering the totality of the circumstances. Reversal is not necessitated here. *Mixon, supra*.

Finally, plaintiff argues that the trial court committed legal error because it used in its findings a discharge summary regarding plaintiff's current husband that it read, but that was never marked as an exhibit, offered by either party, or admitted into evidence. Clearly, the trial court considered this exhibit admitted pursuant to plaintiff's current husband's and the parties' agreement. Moreover, plaintiff made no objection when the trial court recited the exhibits, including the alleged exhibit in question, that were entered on a previous hearing date. In any event, the record contained much evidence of the same information contained in the discharge summary, although not as detailed. Under these circumstances, even if the trial court did err in

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[2] We review a trial court's decision whether to admit evidence for an abuse of discretion. *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997).

using the discharged summary in its decision, any error was harmless. We find no error requiring reversal. See *Mixon, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot