STATE OF MICHIGAN

COURT OF APPEALS

MARY JO SWAINSTON, Plaintiff-Appellant,	UNPUBLISHED March 18, 2004
v	No. 246505 Ottawa Circuit Court
THOMAS EDWARD ROYCE, Defendant-Appellee.	LC No. 98-030516-DP

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Plaintiff Mary Jo Swainston appeals by right from the trial court's order granting defendant Thomas Edward Royce's motion for a change in the sole physical custody of five-year-old Emma Rose Royce from plaintiff to defendant, granting joint legal custody of Emma to both plaintiff and defendant, awarding plaintiff parenting time every other weekend, and ordering continued counseling for both plaintiff and Emma. We affirm.

Plaintiff begins by arguing that while the trial court correctly found that plaintiff had an established custodial environment for Emma, it erred in addressing the statutory best interest factors, and in ultimately awarding defendant Emma's sole physical custody when defendant failed to show proper cause or a change of circumstances. We disagree.

We review the trial court's findings of fact in a custody matter under the great weight of the evidence standard, the trial court's discretionary rulings for a palpable abuse of discretion, and the rulings regarding issues of law for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A custody award may be modified on a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The party seeking change must establish proper cause or a change in circumstances before the existence of an established custodial environment and the best interest factors may be considered. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

In the present case, the trial court did not initially specifically find a change of circumstances or proper cause. At the conclusion of the custody trial, the trial court found that there was an established custodial environment with plaintiff, and then discussed the statutory best interests factors. We conclude that the trial court implicitly found that there was a change of

circumstances or proper cause shown. In fact, proper cause was shown at trial. In *Vodvarka v Grasmeyer* 259 Mich App 499; __ NW2d __ (2003), this Court stated that in order to establish the "proper cause" necessary to reevaluate a custody order:

> a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant impact on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Id.*, slip op at 512.]

Plaintiff and her social worker, Mary Beth Reimer, testified that Emma's difficulties have improved over the years. But plaintiff also testified that Emma still periodically demonstrated "a negative or depressive mood" and that only one week before her custody trial, "Emma screamed and cried" in the office of court-ordered psychologist Dr. William Russner, and asked on the way to his office "is my daddy going to be there? Why me? Why me?" Defendant also testified that "constantly [there are incidents where] Emma is clearly under distress" and "these type of instances, they happen a lot."

In April 2001, court-ordered psychologist, Dr. David Winstrom, reported that plaintiff would "continue to block any attempt to assist [Emma] that [did] not agree with Ms. Reimer's position to limit the time Emma [was] with [defendant]." Dr. Winstrom found that plaintiff did not comply with his requests and that she was being "quite uncooperative" with him. In December 2001, Dr. Russner diagnosed Emma with separation anxiety disorder. In June 2002, a limited licensed psychologist, Randy Flood, MA, also court-ordered, found that Emma was very dependent on plaintiff, that she picked up on plaintiff's anxiety and as a result experienced anxiety and distress herself. He concluded that the current arrangement was "very detrimental to Emma's welfare." Dr. Russner also testified that he did not feel that plaintiff followed through on his recommendations regarding Emma in 2001. At trial, friend of the court investigator, Stephen Cotton, testified that if custody were not changed, Emma would suffer "irreparable harm" because she was at "significant risk" with plaintiff. According to Cotton, "the problem is the underlying stress and alienation that Emma's experiencing" which Cotton asserted "has not been fixed."

The evidence presented at trial demonstrated that while the parenting time transitions may have been improving, and plaintiff may have been adhering to the court-ordered parenting time more often, the nature of plaintiff's attachment to Emma was still causing Emma considerable stress and anxiety, and interfering with Emma's relationship with defendant. Plaintiff was not following the experts' recommendations and, in fact, denied defendant parenting time in the "recent past." Therefore, as stated in *Vodvarka, supra*, slip op at 512, a "preponderance of the [above] evidence" demonstrated the existence of appropriate grounds "relevant to at least one of the twelve statutory best interest factors," and were of "such magnitude," to have a "significant impact on [Emma's] well-being." Specifically, under MCL 722.23, the cited evidence is relevant to the statutory best interest factors (g), the mental and physical health of plaintiff and Emma, and (j), the willingness and ability of plaintiff to facilitate and encourage a close and continuing parent-child relationship between Emma and defendant.

Thus, defendant demonstrated proper cause at trial. This showing of proper cause enabled the trial court to engage in an evaluation of the statutory best interest factors.

Defendant argues that because Cotton and Flood found that Emma's environment with plaintiff was not "stable and satisfactory" and that it suffered "clear deficiencies," the trial court erred in finding an established custodial environment with plaintiff.

Whether an established custodial environment exists is a question of fact which the trial court must address before it determines the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A custodial environment 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 to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and the child is marked by security, stability and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

Here, the trial court correctly found that while Emma may look to defendant for psychological stability and comfort that she is not getting from plaintiff, Emma primarily looks to plaintiff for guidance, discipline, parental control, and the necessities of life; therefore, plaintiff had an established custodial environment with Emma.

Next, plaintiff argues that the trial court's findings of fact on the statutory best interests factors were against the great weight of the evidence, and that the trial court abused its discretion in finding clear and convincing evidence that it was in Emma's best interests to change Emma's established custodial environment, basing its decision on Flood's report, which plaintiff claims was unreliable and biased in numerous ways. We disagree.

Custody disputes are to be resolved in the child's best interests, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Where an established custodial environment exists, the trial court may change custody only when after a review of the statutory best interests factors, the trial court finds by clear and convincing evidence that a change in custody is in the best interests of the minor child. MCL 722.27(1)(c); *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996). The trial court need not give equal weight to each of the statutory best interest factors, but it may consider the relative weight of the factors as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 581 NW2d 485 (1998). 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).

Here, the trial court favored defendant on the statutory best interest factors (a), (b), (d), (g), and (j), and found all other factors either inapplicable or equally in favor of both plaintiff and defendant. The trial court found the two most relevant statutory best interests factors were

(g) and (j). In regard to factor (g), the mental and physical health of the parties involved, the trial court acknowledged that this factor was "the big one." It found that it was "clear that [plaintiff] has significant mental health issues" and "a personality disorder" that "significantly impact[ed] her ability to be a good parent to her daughter." It found that plaintiff's "personality disorder" manifests itself "in ways that many other people don't see," but during transition times when Emma has to go with defendant, "it surfaces." In regard to factor (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, the trial court found that plaintiff "has not done what she needs to do to facilitate a close and continuing relationship between Emma and [defendant]. She's done the opposite," and it concluded that this factor "clearly favors [defendant]."

Plaintiff argues that these findings are against the great weight of the evidence. Flood, however, found that plaintiff displayed "evidence of some anxiety, [and] obsessive-compulsive tendencies" and the "validity configuration on the psychological testing suggested that [plaintiff] responded to the testing in a somewhat guarded and defensive fashion," which Flood found typical of people being evaluated in a custody dispute. Flood found that plaintiff did not suffer from any "acute psychiatric disorders such as depression or psychosis," but "the testing indicat[ed] some characterlogical issues, her personality variables that might be contributing to problems in her life."

Flood determined that Emma's "attachment with [plaintiff] is interfering with her ability to establish an effectual bond with [defendant]," that she "struggles with facilitating a close relationship between [defendant] and Emma," and that Emma's distress was coming from this "pathogenic ambivalence" that she was experiencing. He also determined that plaintiff was "endorsing and validating Emma's digression and regression." He also noted that at the time of his evaluation, in June 2002, plaintiff had informed him that Emma, who was then 4½ years old, was still sleeping with her ninety percent of the time, and that she had recently breastfed Emma. He found that plaintiff's behavior was likely "meeting [plaintiff's] needs for reassurance and closeness." He stated that it was "difficult for [plaintiff] to be emotionally available to Emma when she is actively struggling with her own anxiety. [Plaintiff's] inability to tolerate and manage separation interferes with her ability to understand and encourage Emma to separate and individuate." Flood concluded that the current arrangement with plaintiff was not stable and satisfactory, was "very detrimental to Emma's welfare" and the source of Emma's distress was her "attachment style with [plaintiff] that is fueled by [plaintiff's] psychological status." Therefore, the trial court's findings on these factors were not against the great weight of the evidence.

Next, plaintiff argues that the trial court abused its discretion in finding that there was clear and convincing evidence that it was in Emma's best interests to change custody from plaintiff to defendant based on its blanket adoption of Flood's report, which, plaintiff contends, was biased and unreliable.

Plaintiff's attorney requested Flood's expertise as a custody evaluator, and his report and recommendation were admitted without objection at Emma's custody trial. In the preparation of his report and recommendation, Flood consulted Dr. Winstrom, who expressed his concerns that plaintiff was "being intrusive and fostering Emma's dependence by sleeping with her, nursing

and holding her when she had meltdowns," and that "his recommendations weren't followed through [with by plaintiff] consistently." He also consulted Dr. Russner, who discussed plaintiff being "an over protective mother" and that her attachment to Emma "was interfering with [Emma's] appropriate parenting time with [defendant]." Flood asserted that Dr. Russner and Dr. Winstrom stated that plaintiff did not follow through with their recommendations "at the level that they were hopeful of." Flood did not meet or talk to any of Emma's school-teachers or care-givers, but he did receive from both parties letters, report cards, various police records, court records, etc.

Flood conducted his psychological evaluations on the parties and completed his custody recommendation and evaluation report under the supervision of his supervisor, Glen Peterson, PhD, a licensed psychologist. Dr. Peterson concurred in Flood's assessment and recommendation and only reached his ultimate recommendation to change custody from plaintiff to defendant after exploring "all the possibilities" with Dr. Peterson. Dr. Russner testified that Flood "did a thorough job," that the "process he used was appropriate," and the "tests he administered were well respected tests." Plaintiff's therapist, Dr. DeJonge, testified that she knew Flood professionally and had referred patients to him in the past. She agreed with Flood that it was possible that plaintiff had the "capacity to use higher powers," "meaning psychologists," to "help her get what she wants" because she "has that history." She also agreed with Flood's assessment that plaintiff required "long term psychotherapy," that long-term therapy is "anywhere from 18 months to three years," or "it could be ten years." Cotton testified that he has a "history of professional working relationship with Randy Flood and [has] respect for his experience and his perspective."

The trial court adopted Flood's report for its findings of fact regarding the statutory best interests factors, finding that it was "a very good report and recommendation and [Flood] defended it well in his testimony." "Due deference 'shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.' MCR 2.613(C)." *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). The trial court heard all of the above testimony from Flood, Dr. Russner, Dr. DeJonge, and Cotton, and decided that Flood was credible enough to adopt his report. We accord due deference to the trial court's determination.

In any event, the trial court did not merely base its decision to change Emma's custody on a blanket adoption of Flood's report, which recommended a change of custody. The trial court considered all of the experts' reports and evaluations admitted at trial and considered two days' of trial testimony. Among the evidence it considered was Cotton's report, which also recommended a change of custody. In preparing his report, Cotton consulted with Reimer, Dr. Winstrom, Dr. Russner, and Flood, and found that "all of those professionals who have been involved, there's not a lot of conflict there," and, in fact, all the information is "consistent" in terms of the difficulties that Emma is having, and the fact that it stems from plaintiff's "pathology and not from any impact [defendant] has other than the fact [that] he exists." None of the testimony from these experts directly conflicted with Flood and Cotton's recommendations to change custody (although Dr. DeJonge maintained that she would not be comfortable making a custody recommendation). State social worker Reimer is the only expert witness that did not support a change in Emma's custody.

Finally, the trial court made its own findings of fact: it did not adopt Cotton's and Flood's finding that there was no established custodial environment. Instead, it independently found that Emma had an established custodial environment with plaintiff. It then proceeded to analyze and make findings of fact on each of the statutory best interests factors. Furthermore, even though Cotton and Flood recommended that defendant receive sole legal custody of Emma, the trial court awarded joint legal custody. It also disagreed with Cotton and Flood's recommendation to implement supervised parenting time until plaintiff completed her required therapy, and Dr. Russner or the friend of the court approved standard parenting time. Instead, the trial court "gave the benefit of the doubt" to plaintiff and allowed her unsupervised parenting time because of Dr. DeJonge's "reasonably positive report" of plaintiff. Thus, it is evident that the trial court did not simply adopt without scrutiny and independent analysis Flood's recommendation to change custody as plaintiff suggests. The trial court did not abuse its discretion when it changed physical custody to defendant.

We affirm.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage