

STATE OF MICHIGAN  
COURT OF APPEALS

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KERRY HOPKINS,

Plaintiff-Appellant,

v

MARK WHITEMORE,

Defendant-Appellee.

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UNPUBLISHED

March 18, 2004

No. 250176

Kent Circuit Court

LC No. 98-008668-DM

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

PER CURIAM.

In this child custody action, plaintiff appeals by right from an order awarding physical custody of the parties' minor child, Kyle, to defendant. We affirm.

Following the parties' divorce, plaintiff was granted sole physical custody of Kyle. Defendant moved for a change in custody, alleging changed circumstances. The trial court determined that a custody evaluation was appropriate. Following a custody hearing, the trial court determined that a change in custody was in Kyle's best interests, and awarded physical custody to defendant.

All custody orders must be affirmed on appeal unless the trial court made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

Plaintiff first argues that defendant failed to demonstrate the requisite change in circumstances required before the trial court could consider a change in custody, pursuant to MCL 722.27(1)(c), which provides that the court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances." In *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994), this Court held:

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.* [Emphasis added.]

Therefore, if the moving party does not establish either proper cause or a change in circumstances, the trial court may not hold a new child custody hearing. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; \_\_\_ NW2d \_\_\_ (2003). “The movant, of course, has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors.” *Id.*, at 509 (emphasis in original).

Following defendant’s motion for a change in custody, the trial court entered an order stating that a custody evaluation was appropriate, “because of possible parental alienation.” Although, the trial court did not articulate the existence of the requisite changes in circumstances, we may infer that the facts defendant alleged in his petition for change of custody were sufficient to warrant revisiting the prior custody order and engaging in a reconsideration of the best interest factors. This Court has held that “in order to establish a ‘change of circumstances,’ a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* impact on the child’s well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child’s environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good or bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an impact on the child.” *Id.*, at 513-514 (emphasis in original).

Defendant’s petition for change of custody demonstrated that since the custody order was entered the conditions surrounding custody of Kyle, “which have or could have a *significant* impact on [Kyle’s] well-being,” materially changed. In support of his petition; defendant offered plaintiff’s repeated refusal to allow Kyle to see defendant in violation of court-ordered parenting time; plaintiff’s indication that she intended to violate upcoming court-ordered parenting time; plaintiff’s refusal to inform defendant of Kyle’s extra-curricular activities; plaintiff’s deliberate act of refusing to let Kyle attend a “Dessert with Dad” school function with defendant, but allowing Kyle to attend the function with her husband; plaintiff’s instruction that Kyle must refer to defendant as “idiot fag,” instruction that Kyle must refer to her husband as “dad,” and punishment if Kyle refers to defendant as “dad”; and plaintiff’s husband’s repeated harassment of defendant, resulting in a personal protection order being issued against plaintiff’s husband.

Plaintiff’s continuing discouragement of Kyle’s relationship with defendant, deliberate refusal to allow defendant to have parenting time with Kyle, and verbal disparagement of defendant “have or could have a *significant* impact on the child’s well-being.” MCL 722.23(j) considers 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.” It is clear that plaintiff’s behavior impeded and discouraged a close and continuing parent-child relationship between Kyle and defendant. The evidence presented in defendant’s petition constituted the requisite change in circumstances necessary to “trigger the trial court’s obligation to determine

custody through a review of the statutory best interest factors.” *Vodvarka, supra* at 516. Therefore, the trial court did not err in reconsidering the custody order and conducting a review of the best interest factors.

Plaintiff next argues that the trial court’s findings of fact on the best interest factors were against the great weight of the evidence, and that the trial court abused its discretion by determining that a change in custody was in Kyle’s best interests. We disagree. We apply the great weight of the evidence standard to all findings of fact and affirm a trial court’s findings regarding each custody factor unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 877; *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

The trial court determined that an established custodial environment existed with plaintiff; therefore, defendant had the burden of proving by clear and convincing evidence that a change in custody was in Kyle’s best interests. MCL 722.27(1)(c); *Vodvarka, supra*, slip op p 6. The trial court set forth findings of fact on the best interest factors and found the parties equal on factors (a), (e), (f), (g), (i), and (l), and found in favor of defendant on factors (b), (c), (d), (h), (j), and (k). The trial court then determined that defendant met his burden of proving by clear and convincing evidence that a change in custody was in Kyle’s best interest. Plaintiff takes issue with the trial court’s findings of fact concerning best interest factors (b), (c), (d), (e), and (h).

MCL 722.23(b) concerns “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.” The trial court determined that both parties had the capacity to love Kyle and give him affection and guidance, but that defendant was favored because he provided a higher level of guidance to Kyle. The trial court was concerned that plaintiff encouraged Kyle to refer to defendant as “Mark dad,” and that plaintiff’s husband referred to defendant as “idiot faggot.” The trial court determined that defendant provided better guidance in the areas of schooling, counseling, medical care, and appropriate communication. The trial court’s findings of fact in respect to factor (b) were supported in the record and were not against the great weight of the evidence.

MCL 722.23(c) concerns “the capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . and other material needs.” The trial court determined that defendant worked at the same company for twenty-one years and was financially stable. Conversely, the trial court found that plaintiff and her husband were living on child support, government assistance, credit cards, and unemployment benefits. The trial court was concerned that plaintiff would not be able to pay for the new home she was building, and that she may lose her current home. Additionally, the evidence demonstrated that plaintiff did not protect Kyle with bug spray, despite concerns regarding the West Nile virus, and did not adequately treat a wound to Kyle’s finger. The trial court determined that defendant was more attuned to Kyle’s food, clothing, medical care, and other material needs. The trial court’s findings of fact with regard to factor (c) were supported by the record and were not against the great weight of the evidence.

MCL 722.23(d) concerns “the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” The trial court determined that Kyle’s living environment with plaintiff and her husband was not satisfactory or stable because of plaintiff’s husband’s alcoholism and instances of domestic violence. The trial court indicated

that plaintiff's husband's "severe alcohol problem" makes him "vindictive, angry, subject to emotional outbursts, and emotionally abusive." The trial court also focused on both an incident of domestic violence against plaintiff, which led to charges against plaintiff's husband, and plaintiff's husband's attempted suicide by overdosing on medication. The trial court determined that plaintiff's husband's "volatile, aggressive, and hostile emotions create an environment that is neither stable or satisfactory" for Kyle. In contrast, the trial court noted that defendant owned a home, was economically and emotionally stable, and provided Kyle with a safe living environment. The trial court's findings of fact with regard to factor (d) were supported by the record and were not against the great weight of the evidence.

MCL 722.23(e) concerns "the permanence, as a family unit, of the existing or proposed custodial home or homes." The trial court determined that both parties were equal on this factor, because regardless of where Kyle resided, he would be involved with his siblings. The trial court indicated that in plaintiff's home, Kyle would live with plaintiff, her husband, and four siblings, and that in defendant's home, Kyle would live with defendant, defendant's fiancée, and two siblings. The trial court's findings of fact with regard to factor (e) were supported by the record and were not against the great weight of the evidence.

MCL 722.23(h) concerns "the home, school, and community record of the child." The trial court determined that defendant was more invested in Kyle's educational needs. He enrolled Kyle in a first-grade preparatory program, volunteered at school, and helped Kyle with his homework. The trial court noted that when Kyle struggled in first grade, defendant responded to Kyle's problems, whereas plaintiff was not aware, attuned, or responsive to the concerns of Kyle's first-grade teacher. The trial court also determined that Kyle was not involved in extracurricular activities when in plaintiff's custody, but that defendant would encourage Kyle to participate in such activities. The trial court's findings of fact with regard to factor (h) were supported by the record and were not against the great weight of the evidence.

Because the trial court's findings on the best interest factors were not against the great weight of the evidence, the trial court did not abuse its discretion in awarding custody of Kyle to defendant.

We affirm.

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