

STATE OF MICHIGAN
COURT OF APPEALS

AMY BIZEK,

Plaintiff/Counterdefendant-
Appellant,

v

JOHN BIZEK,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

July 22, 2004

No. 254039

Wayne Circuit Court

LC No. 02-200653-DM

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiff Amy Bizek appeals as of right an order granting defendant John Bizek sole physical custody of the parties' minor child, Haley Bizek. Plaintiff contends that the trial court erred in ordering a temporary change of custody without conducting an evidentiary hearing, improperly weighed the best interest factors, and improperly denied her motion to disqualify Judge Maria Oxholm. We affirm.

I. Facts and Procedural History

The parties entered a Consent Judgment of Divorce in September of 2002. Against the reservations of the trial judge, the parties agreed to split custody of their two young children, Kyle and Haley Bizek, with plaintiff retaining physical custody of Haley and defendant of Kyle. Six months later, defendant filed a motion seeking a change of custody and enforcement of the visitation schedule. Specifically, defendant complained that plaintiff refused to allow his visitation with Haley and withheld information that she was living with her boyfriend, Steven Hayse at the time the judgment was entered.¹ Plaintiff filed a countermotion seeking custody of Kyle alleging that defendant failed to adequately provide for Kyle's medical and educational needs. Defendant withdrew his motion to modify the custody order and the trial court denied both motions. However, the trial court expressed its concern over allowing a parent to live with

¹ Defendant admitted at a later date that he knew of plaintiff's living arrangement at the time of the divorce.

an unrelated person of the opposite sex within one year of entering into a divorce. The trial court specifically asked plaintiff if Mr. Hayse had “any criminal record,” and plaintiff responded that she was unaware of any.²

In June of 2003, defendant filed an emergency motion to modify parenting time upon his recent discovery that Mr. Hayse was a registered sex offender. Seven years prior, Mr. Hayse pleaded nolo contendere to a fourth degree criminal sexual conduct (CSC) charge in relation to an incident involving an ex-girlfriend. Mr. Hayse had also pleaded guilty in 2001, to disturbing the peace following a domestic dispute with another girlfriend. Plaintiff contended that defendant failed to allege that the children were in actual danger from Mr. Hayse and asserted that defendant’s alcoholism was far more detrimental to the children. Plaintiff also admitted her knowledge of Mr. Hayse’s convictions at the prior hearing. The trial court vacated the custody order in the Judgment of Divorce pursuant to MCR 2.612(C)(1)(f), based on plaintiff’s fraud upon the court and the change of circumstances. The trial court ordered an evidentiary hearing on the custody matter, and granted defendant temporary custody of both Kyle and Haley.

Plaintiff appealed the order to this Court, and the trial court was ordered to hold an evidentiary hearing regarding custody within twenty-one days.³ At the commencement of the hearing, the trial court noted its intent to issue a show cause order against plaintiff for her false statements before the court. The trial court took testimony from both parents, Mr. Hayse, and other relatives and friends. Evidence was presented that defendant had not consumed alcohol since 2001, and had steady employment. Plaintiff testified that she worked from home for Mr. Hayse in his furniture business, but did not receive a salary. Plaintiff was wholly dependent on Mr. Hayse for living expenses and incidental costs. Plaintiff testified that she was not concerned for her children’s safety because Mr. Hayse’s criminal record had been expunged and the prior incidents involved adults. Plaintiff also presented the testimony of a psychologist that Mr. Hayse did not have a predatory nature towards children.

At the end of the hearing, the trial court granted sole physical custody of both children to defendant and prohibited plaintiff from exercising her right to parenting time in the presence of Mr. Hayse. The trial court acknowledged that Haley had an established custodial environment with plaintiff, but found that defendant had shown by clear and convincing evidence that it was in Haley’s best interest to change that environment. After weighing the statutory best interest factors pursuant to MCL 722.23, the trial court found that factors (b), (c), (d), (e), (j), and (l) favored defendant, while only factor (a) favored plaintiff.⁴

² Motion Transcript, April 25, 2003, p 19.

³ *Bizek v Bizek*, unpublished order of the Court of Appeals, entered July 10, 2003 (Docket No. 249393).

⁴ The trial court’s specific findings will be discussed further *infra*.

II. Failure to Conduct an Evidentiary Hearing

Plaintiff contends that the trial court erred in granting a temporary change of custody to defendant without conducting an evidentiary hearing. An evidentiary hearing is the correct forum for a trial court to consider whether proper cause or a change in circumstances exists to warrant modification of a prior custody order.⁵ Before a trial court can fully investigate and perform a best interests analysis pursuant to MCL 722.23, it must first make factual determinations regarding the existence of an established custodial environment.⁶ Once a factual determination has been made by the court regarding the existence of an established custodial environment, it must weigh the statutory best interest factors and make a factual finding regarding each of the factors.⁷

There are times when a trial court must act with immediacy with regard to custody for the protection of the child. However, there is no evidence that Haley was in immediate danger requiring a temporary change in custody without an evidentiary hearing. The trial court erred by entering an immediate order changing custody,⁸ but subsequently held an evidentiary hearing and made the required factual findings on the record, along with the determination of an existing custodial environment. This error was, therefore, harmless.

III. Best Interest Factors

Plaintiff also asserts that the trial court improperly weighed the best interest factors and erroneously emphasized her credibility and Mr. Hayse's CSC conviction in determining to grant defendant sole physical custody of Haley. Plaintiff also contends that defendant failed to meet the requisite burden of proof to justify modification of custody given the existence of an established custodial environment with plaintiff.

We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are

⁵ MCL 722.27(1)(c); *Terry v Affum (On Remand)*, 237 Mich App 522, 535; 603 NW2d 788 (1999).

⁶ *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000); see also *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994).

⁷ *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999).

⁸ See *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991) (finding that a hearing is necessary even for a temporary change of custody).

reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.^[9]

Pursuant to MCL 722.27, a trial court may, in the best interests of the child, “[m]odify or amend its previous judgments or orders for proper cause” upon a showing of a change of circumstances.¹⁰ To establish a change of circumstances sufficient to interrupt the child’s custodial environment, “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* effect on the child’s well-being, have materially changed.”¹¹ Proper cause exists if there are “one or more appropriate grounds that have or could have a significant effect on the child’s life to the extent that reevaluation of the child’s custodial situation should be undertaken.”¹²

The trial court properly found that Haley’s established custodial environment was with plaintiff. However, the trial court also found that defendant established a change of circumstances by clear and convincing evidence. Plaintiff withheld information from defendant and the court that she resided with her boyfriend who had a history of criminal convictions related to prior relationships.¹³ This is clear and convincing evidence that Haley’s custodial environment was not stable.

We also do not agree with plaintiff that the evidence clearly preponderates against the trial court’s findings with regard to the best interest factors. Contrary to plaintiff’s allegations on appeal, the trial court only referenced plaintiff’s credibility as a witness in discussing factors (b)¹⁴ and (l).¹⁵ In determining that factor (b) favored defendant, the trial court considered plaintiff’s truthfulness regarding Mr. Hayse’s convictions. However, the trial court also determined that plaintiff’s concern with defendant’s alcohol consumption was inconsistent with

⁹ *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (internal citations omitted), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), citing MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994), *Fletcher v Fletcher (After Remand)*, 229 Mich App 19; 58 NW2d 11 (1998).

¹⁰ MCL 722.27(1)(c); *Vodvarka, supra* at 508.

¹¹ *Id.* at 513 (emphasis in original).

¹² *Vodvarka, supra* at 511.

¹³ Before modifying the custody order, the trial court stated:

Unfortunately, although Mr. Hayse might have been honest with Ms. Bizek, she was not honest with her husband at the time the Judgment of Divorce was entered. I don’t think that he would have agreed to this arrangement if he had known that his daughter would be living with someone that had been convicted of a criminal sexual conduct charge. [Motion Transcript, June 13, 2003, p 8.]

¹⁴ MCL 722.23(1)(b) (capacity to give love and affection and to raise and educate).

¹⁵ MCL 722.23(1)(l) (any other factor considered relevant by the trial court).

her previous willingness to leave the children with defendant and was no longer a concern as defendant was now sober. Defendant also demonstrated greater involvement with Kyle's special educational needs. In analyzing factor (l), the trial court noted inconsistencies in plaintiff's testimony evincing a lack of knowledge regarding information pertaining to the children. The trial court also considered defendant's consistent interest in the children and willingness to facilitate their relationship with plaintiff, compared to plaintiff's loss of interest in Kyle following the divorce. The trial court's findings with regard to factors (b) and (l) were consistent with the evidence and properly considered plaintiff's credibility.

The trial court only referred to Mr. Hayse's CSC conviction in the discussion of factor (e).¹⁶ The trial court found that plaintiff's home with Mr. Hayse was not a permanent family unit based on Mr. Hayse's history with relationships. The trial court compared plaintiff's residence with defendant's home, where Haley and Kyle would be raised together, and determined that defendant's family unit was more stable.¹⁷ This finding was also consistent with the evidence.

Furthermore, we find that plaintiff's relationship with Mr. Hayse was a legitimate concern for the trial court, and that the trial court's evaluation of this relationship in conjunction with the best interest factors did not focus solely upon Mr. Hayse's CSC conviction. The court also questioned the stability of the home environment provided by plaintiff, given her total financial dependence and the relationship's uncertain future. The factors, and the conditions or circumstances evaluated within them, may have some "natural overlap," and therefore, do not evince either improper weighting or focus by the trial court.¹⁸

We also find that the trial court's finding that factors (c), (d), and (j) favored defendant was consistent with the evidence. Factor (c) concerns a party's financial ability to provide for the children.¹⁹ The trial court properly favored defendant, who had stable employment and adequate child care, to plaintiff, who was financially dependent on her boyfriend—a relationship with an uncertain future. The trial court also properly favored defendant on factor (d), concerning the length of time the child has lived in a stable home and the desirability of continuing that residence, for the same reasons.²⁰ Defendant also still remained in the marital home near an established network of family and friends. Factor (j) concerns the willingness of one parent to facilitate the child's relationship with the other parent.²¹ The trial court acknowledged that both parties had difficulties with this factor in the past, but favored defendant as plaintiff's failure to provide Haley for parenting time led to the current proceedings. The trial

¹⁶ MCL 722.23(e) (permanence as a family unit of the custodial home).

¹⁷ See *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1998) (finding that sibling relationships are appropriately considered in a best interest analysis).

¹⁸ *Carson v Carson*, 156 Mich App 291, 299; 401 NW2d 632 (1986).

¹⁹ MCL 722.23(c).

²⁰ MCL 722.23(d).

²¹ MCL 722.23(j).

court also noted plaintiff's lack of interest in Kyle's education. As the trial court's findings were consistent with the evidence, we should, and will, affirm.

When viewing the "sum total" of the factors required under MCL 722.23, the court did not abuse its discretion in granting defendant sole physical custody of Haley.²² Six of the best interest factors were determined in favor of defendant, while only one was determined in favor of plaintiff. It was appropriate under these circumstances to change custody.

IV. Judicial Disqualification

Following the first day of the evidentiary hearing, plaintiff moved for the disqualification of Judge Oxholm from the remainder of the proceedings, based upon her personal bias toward plaintiff due to her living arrangement. Plaintiff's motion was denied by Judge Oxholm, and again on reconsideration before Chief Judge Mary Beth Kelly. Plaintiff now argues that her motion was improperly denied, as Judge Oxholm's bias was clear due to her many statements disapproving of plaintiff's living arrangement. We review a lower court's decision on a motion for disqualification for an abuse of discretion.²³ As a general rule, a judge will not be disqualified absent a showing of actual bias or prejudice.²⁴

"Opinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep seated favoritism or antagonism that would make fair judgment impossible."²⁵ Plaintiff has failed to demonstrate that Judge Oxholm had an actual prejudice or bias toward plaintiff, as opposed to a concern with Haley's well-being and a desire to secure a custody decision reflecting the best interests of the child based upon complete and accurate information. A review of the transcripts and rulings in this matter shows that Judge Oxholm was even-handed in her treatment of both parties and their respective counsel. The court's rulings do not demonstrate overemphasis or reliance upon limited considerations in its determination of custody. As such, the trial court properly denied plaintiff's motion for judicial disqualification.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper

²² See *Hilliard*, *supra* at 326 (the trial court did not abuse its discretion in changing custody based on the weight of the factors in favor of one party).

²³ *People v Bennett*, 241 Mich App 511, 513; 616 NW2d 703 (2000).

²⁴ MCR 2.003(B)(1); see also *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

²⁵ *Cain*, *supra* at 496.