

STATE OF MICHIGAN  
COURT OF APPEALS

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BRIAN A. DOUGLAS GERARD,

Plaintiff-Appellee,

v

KATHLEEN GARDNER, a/k/a KATHLEEN  
ANN GERARD,

Defendant-Appellant.

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UNPUBLISHED

July 29, 2004

No. 252077

Monroe Circuit Court

LC No. 96-022910-DM

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right the order denying her motion for change of physical custody with respect to the parties' minor son. We affirm.

Defendant first contends that the trial court erred in not finding clear and convincing evidence supporting a change in custody. In custody appeals, the great weight of the evidence standard applies to all findings of fact. MCL 722.28; *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). The trial court's findings regarding the existence of an established custodial environment and concerning each custody factor are to be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* An abuse of discretion standard applies to discretionary trial court rulings such as custody decisions, and questions of law are reviewed for clear legal error. MCL 722.28; *Vodvarka, supra* at 507-508.

In order to change custody, defendant had the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances existed before the trial court was required to consider or visit issues concerning the established custodial environment and the statutory best interest factors, MCL 722.23. MCL 722.27(1)(c); *Vodvarka, supra* at 509. Once a change of circumstances or proper cause is sufficiently proven, the trial court must determine whether an established custodial environment exists in order to define the applicable burden of proof. MCL 722.27(1)(c); *Vodvarka, supra*. "The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). The best interest of the child is determined by analyzing the statutory best interest factors enunciated in MCL 722.23. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The trial court must consider and state its findings and conclusions

regarding each of these factors. *Id.* Brief, definite, and pertinent findings and conclusions are sufficient. *Id.* at 12.

Here, defendant claims the existence of clear and convincing evidence warranting a change of custody. Giving the trial court the required deference, we find no error. The trial court carefully went through and considered the statutory best interest factors. It placed its conclusions and thoughts regarding each factor on the record. In the end, after considering all the factors, the court decided that the case came down to two factors: the child's preference to live with his sister of whom defendant had physical custody; and, plaintiff's failure to provide medical treatment. The trial court concluded that defendant created the separation between the children by deciding to move to Tennessee to be with her ill father. The court stated that this move was not motivated by the children's best interests but defendant's interest in caring for her father. The trial court concluded that defendant could easily move back from Tennessee because she was only making \$7.50 per hour and her husband worked at a temporary job. Regarding the medical treatment, the court stated that plaintiff's failure to send the hearing aide and glasses with the child when he visited defendant in Tennessee for a month was strong evidence of plaintiff's lack of capacity to provide medical care. The trial court also concluded that both parties were making unsubstantiated medical claims in regard to the warts on the child's hands; defendant had expressed a major concern over these warts and plaintiff's failure to have them removed. The court found that plaintiff's failures to provide medical care did not rise to the level of clear and convincing evidence that a change in custody was in the child's best interest.

Defendant argues that the trial court should have given more weight to the factors that favored her, such as the child's preference and her ability to provide a family unit.<sup>1</sup> The weight the court gives each of the statutory factors is discretionary. See *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). The statutory best interest factors need not be given equal weight. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). On the basis of the existing record, we find that the trial court did not abuse its discretion in regard to the weight given to the custody factors, nor did it abuse its discretion with respect to the ultimate decision to deny a change of custody. We are mindful that the Legislature's intent in enacting the Child Custody Act was to prevent the removal of children from established custodial environments except in the most compelling cases. *Vodvarka, supra* at 509. The medical issues were not compelling, and brother-sister separation appears to have been the motivation for the son indicating a preference to live with defendant. The case presented by defendant was not compelling.

Next, defendant contends that the trial court must be reversed because it failed to state its conclusions and findings on each of the statutory best interest factors listed in MCL 722.23. We disagree. A careful review of the record reveals that the trial court did in fact state its findings

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<sup>1</sup> The trial court found that the factor concerning the stability and satisfaction of any existing home environment favored plaintiff. The trial court further found that either defendant failed to present evidence on the remaining factors or the parties were equal.

and conclusions regarding the best interest factors on the record. The court gave a sufficiently detailed account of its findings on the factors. Therefore, defendant's claim is without merit.

Defendant also asserts that the trial court's statement that it had heard no evidence on some of the statutory factors means that this case must be reversed and remanded. Essentially, defendant is arguing that the trial court had to make a determination that a factor favored one party or the other, or specifically find that the parties were equal, even when defendant failed to illicit testimony or offer any evidence regarding that factor. MCL 722.23 merely requires that the court consider, evaluate, and determine the factors. Nothing in the language mandates the trial court to make a specific determination that a particular factor favors one party, or that the parties are equal, where there has been no evidentiary input. The court is clearly free to state and determine that it could not find in favor of one party or the other concerning a best interest factor because of a lack of relevant evidence on the factor. The important point is that the trial court sufficiently acknowledged and addressed all the factors. It would be nonsensical to order reversal on the basis of a lack of evidence on all factors, where the parties did not submit evidence on a factor. Such a rule would allow a party to intentionally withhold some evidence so that he or she could appeal if the court ruled contrary to their wishes. A party may not harbor error as an appellate parachute. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). Further, the trial court's statements regarding the pertinent factors are equivalent to a finding that the parties were equal on those factors, which is an acceptable determination. See, e.g., *McCain, supra*. Accordingly, defendant's argument lacks merit.

Affirmed.

/s/ William B. Murphy  
/s/ Richard Allen Griffin