

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN A. DOUGLAS GERARD,

Plaintiff-Appellee,

v

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

Defendant-Appellant.

UNPUBLISHED

July 29, 2004

No. 252077

Monroe Circuit Court

LC No. 96-022910-DM

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

WHITE, J. (*dissenting*).

I respectfully dissent.

There was unrefuted testimony that the child, who was almost thirteen years old at the time of the custody hearing, had multiple warts all over his hands, and on his knee and elbow, and that plaintiff had neither consulted a doctor or taken the child to the doctor to have the warts treated or removed. Plaintiff acknowledged that defendant had discussed with him the need to have the warts removed various times, but testified that his opinion was that removal of the warts would be too painful, even though he had not consulted a doctor.

Defendant testified that the child suffered embarrassment because of the warts and was ridiculed by his school mates, but plaintiff denied that the warts caused the child any emotional or physical discomfort, and denied that the child had told him that other children make fun of him.

The child is also almost deaf in the left ear, for which he is supposed to wear a hearing aide, but at times refuses to. The child requires eyeglasses for reading as well. Defendant's position at the hearing was that a twelve year old such as the child requires direction from his custodial parent on wearing his hearing aide, and that plaintiff did not provide such direction. Plaintiff's testimony bore this out; he testified that he "can ask him to put it in and if he puts it in, he puts it in," and if he does not, he does not. "I have no control over that." Plaintiff also acknowledged that the child has had trouble reading his whole life, and that he had glasses for reading. Plaintiff acknowledged that when the child went to stay one month with defendant in Tennessee, plaintiff sent neither his hearing aide nor his glasses. Plaintiff's justification regarding not sending the eyeglasses was that the child did not need them while he visited his

mother because he does not wear them when he is outside playing. He also testified that the child does not wear his hearing aide when he plays outside because he sweats a lot.

Defendant testified that during the one month visit, the child could do no reading because he did not have his glasses. And that without his hearing aide, his speech is affected, in that he speaks very loudly, and sounds like he is yelling.

It is undisputed that the minor child was failing math and science while in plaintiff's care. Plaintiff testified at the hearing regarding how he handled the failing grades, that he asked the child why he was not doing his science work, and the child responded that he just does not feel like doing it. When asked "what method have you done or employed to stress that he should be doing better in school," plaintiff responded that he took away the child's allowance, video games and skateboard and that doing so had worked "in the past."

Defendant testified that the minor child loves his sister very much and that his warts are a big concern, partly because the child has a habit of putting his fingers in his mouth, and also because the child tries to hide his hands. Defendant testified that if the child lived with her she would get him medical treatment. She testified that when she learned that the minor child was doing poorly in school, she asked plaintiff to send her the child's school records, that plaintiff had not done so, and that if the child lived with her, she would get him a tutor if she was unable to help sufficiently with his school work. Defendant testified that she and her (new) husband had bought a home, and that the child's grandparents and great-grandparents live nearby.

Defendant testified she has various family members in the area, including her parents and her grandfather. Defendant also testified that the child would be better off with her because he would have constant supervision, and not be home alone.

The child, who was almost thirteen years old, expressed to the court a clear preference to live with his mother and sister.

My reading of the record leads me to conclude that defendant mother established proper cause or change in circumstances and that the best interests factors about which evidence was presented clearly and convincingly favored defendant. Rather than focusing on *the child's* best interests, the circuit court placed undue emphasis on the fact that defendant had moved to Tennessee, and its conclusion that defendant could easily, and should, move back to this area. I would reverse.

/s/ Helene N. White