

STATE OF MICHIGAN  
COURT OF APPEALS

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JENNIFER LYNN HIGGINS,

Plaintiff-Appellee,

v

KENNETH ROLAND LOVELAND, JR.,

Defendant-Appellant.

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UNPUBLISHED

August 5, 2004

No. 252116

Presque Isle Circuit Court

LC No. 99-001872-DP

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals of right from an order denying his motion to change custody of the parties’ minor child. We affirm.

This Court has held that three standards of review apply to 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 reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted).]

Defendant first argues that the trial court applied the wrong law when it analyzed the propriety of changing the child’s custody. A party seeking a change in the custody status of a minor child must first establish either “proper cause” or “a change of circumstances.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). Otherwise, the court simply will not consider the issue. *Id.* at 508-509.

Defendant argues that the trial court looked only at the alleged changes in circumstances and ignored the conditions, such as plaintiff’s substance abuse, that existed before the initial custody order. We disagree. Regarding the substance abuse, the trial court acknowledged the concern this evidence generated, but specifically found that plaintiff had stopped abusing drugs.

It also ordered plaintiff to continue random drug testing as a precautionary measure. Regarding the other allegations, the court found that most of them lacked credible evidential support. The remaining incidents, such as the child's somewhat limited exposure to cigarette smoke, were relatively minor and would not meet the high standard of constituting "proper cause" because the parties were presumably aware of them when they stipulated to the initial order. *Id.* at 515. Moreover, defendant's counsel, probably aware of the unlikelihood of establishing "proper cause," agreed on the record to limit the scope of the trial court's review to the "change in circumstances" standard. We will not now reevaluate the trial court's decision based on an error defendant fostered. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Defendant next argues that the trial court erred when it disregarded defendant's evidence that plaintiff smokes around the child, physically and verbally abuses the child, and uses illegal drugs. We disagree. The record shows that the trial court placed a great deal of emphasis on plaintiff's history of drug use to the extent that it dedicated more than half its opinion to the issue and ordered plaintiff to undergo continued random drug screening. Far from disregarding defendant's evidence, the trial court simply gave credence to the contrary evidence which showed that plaintiff's substance abuse had stopped. Although plaintiff's history of drug abuse was uncontested, two unannounced drug tests corroborated her avowal that she had quit using drugs, and a great deal of testimony demonstrated that she was a good mother when she was not using drugs. Therefore, the evidence did not clearly preponderate against the trial court's finding that plaintiff's substance abuse had ceased.

While defendant presented a great deal of testimony indicating that plaintiff verbally and physically abused her child, plaintiff countered this testimony with witnesses who extensively observed plaintiff with her child and saw no signs of abuse. Moreover, there was testimony that at least some of the witnesses who testified about plaintiff's abusive behavior had reputations for dishonesty and ulterior motives for injuring plaintiff. The trial court found that the proofs presented by both parties had credibility problems, and the conflicting testimony in the record supports that conclusion. While "a court may not immunize its findings from review by purporting to base them on pure credibility determinations in the face of other evidence," we duly defer to the trial court's first-hand opportunity to discern the credibility of witnesses. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). In this case, the testimony was so equivocal and contradictory that it falls well short of clearly preponderating in either direction. Therefore, we will not disturb the trial court's finding that defendant failed to substantiate his allegations of abuse.

Regarding the smoking allegations, the evidence was undisputed that the child was under doctors' orders to avoid cigarette smoke and that plaintiff continues to smoke. However, the trial court apparently did not consider the smoking issue particularly relevant because both parties were aware of the condition before the initial stipulated order. The trial court heard evidence that plaintiff took precautions to minimize her child's exposure to the smoke, and it further found that the issue as presented did not rise to the level of a changed circumstance. The evidence does not preponderate in favor of a contrary conclusion.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell