

STATE OF MICHIGAN
COURT OF APPEALS

COLLETTE L. ROBERTSON, a/k/a COLLETTE
L. ALFORD,

UNPUBLISHED
October 21, 2004

Plaintiff/Counterdefendant-
Appellant,

v

RICKY L. ROBERTSON,

No. 254319
Wayne Circuit Court
LC No. 01-113651-DM

Defendant/Counterplaintiff-
Appellee.

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying plaintiff's emergency motion for modification of custody of the parties' two minor children. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff argues that in finding no change of circumstances the trial court failed to consider and make specific findings on each of the best interest factors and ignored the evidence supporting a modification of custody based on defendant's impending incarceration and the recommendations of the court-ordered psychological evaluators. Three different standards of review are applicable in child custody proceedings. When the trial court errs in its choice, interpretation, or application of the existing law, a clear legal error standard applies. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001), citing *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Findings of fact are reviewed under the great weight of the evidence standard and this Court will uphold the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id.* A trial court's determination on the issue of custody and discretionary rulings are reviewed for an abuse of discretion. *Id.*

An award of child custody can be modified for "proper cause shown" or "[a] change of circumstances" establishing the modification to be in the child's best interest. MCL 722.27(1)(c); *Foskett, supra* at 5. The individual seeking the change in custody must first establish proper cause or a change in circumstances before either the existence of an established custodial environment and the best interest factors may be considered. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509-509; 675 NW2d 847 (2003). To constitute a change of circumstances or proper cause substantiating a consideration of custody change, there must have been a change in

conditions relevant to custody since the entry of the last custody order which has had or could have a significant impact on the child's well-being. *Vodvarka, supra* at 513. The determination of a change of circumstances or proper cause is based on the statutory best interest factors on a case-by-case basis. *Id.* at 514.

Plaintiff alleged that defendant's anticipated incarceration constituted a significant change in circumstances. She also alleged that defendant had consistently denied her parenting time. While not specifically addressed by plaintiff on appeal, an additional change in circumstances is evidenced by the findings of the various court-ordered psychological and psychiatric evaluators that determined plaintiff to be mentally stable, in contradiction of the trial court's findings. The trial court ruled, without benefit of a hearing, that there had been no change in circumstances. The conclusory nature of the trial court's determination and the absence of any explanation of the court's factual findings render this case difficult for appellate review and necessitate reversal and remand to establish a sufficient record.

The failure of the trial court to properly address plaintiff's motion for change of custody is of additional concern given the trial court's determination during the divorce proceedings that plaintiff was "unfit" and awarding custody of the minor children to defendant without a review of the best interest factors. A trial court must consider all of the factors contained in MCL 722.23, applying the correct burden of proof, in order to determine the best interests of the children in a child custody dispute. "A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors." *Foskett, supra* at 9. The trial court failed to follow this very clear mandate.

While the court consistently refers to plaintiff's "mental instability" and "state of mental illness," all psychiatric and psychological evaluations made accessible for this review, and initiated at the court's directive, are contrary to the trial court's factual findings on this issue. The court's determination of custody and "fitness" is directly in opposition to the recommendation of the guardian ad litem assigned by the court to represent the best interests of the children. It is unclear, in large part due to the deficiency of the lower court record, whether the court was more concerned with issues existing between the parties and the court rather than properly focusing of what would best serve the well-being and interests of the minor children involved and thus, may have influenced the court's ruling on plaintiff's motion for change of custody. *Usendek v Usendek*, 8 Mich App 385, 390; 154 NW2d 627 (1967), citing *Remus v Remus*, 325 Mich 641, 643; 39 NW2d 211 (1949).

While assuming the court's authority pursuant to MCL 722.27(1)(e) to "take any other action considered to be necessary in a particular child custody dispute," even if the court determined an emergency situation was existing necessitating an award of temporary custody to defendant, "[s]uch a determination . . . can only be made after the court has considered facts established by admissible evidence – whether by affidavits, live testimony, documents, or otherwise." *Mann, supra* at 533. There is no indication that, upon the availability of plaintiff and the children, that the court conducted a full hearing on the issue of custody. The lower court record is deficient in delineating the findings of the court, and contradictory with reference to the trial court's rulings pertaining to plaintiff's mental health as the primary factor influencing the court's award of custody to defendant when juxtaposed against the findings of numerous professionals evaluating plaintiff's psychological health and stability at the court's behest. The court appears to have adopted the recommendation of one court-appointed evaluator and ignored

or rejected the recommendation of the guardian ad litem, the friend of the court and other assigned mental health professionals. While it is appropriate for the court to consider these reports, its ultimate findings must be based on competent evidence adduced at hearing. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). Just as the court should not make a blanket acceptance of the guardian ad litem's recommendation, the court's adoption of the initial evaluator's report without an independent determination by the court of the best interest factors was in error. As such, to assure the best interests of the children, this matter should be remanded for a full evidentiary hearing on the issues of custody and parenting time.

Although this Court does not typically address issues not raised below or on appeal, *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 533; 672 NW2d 181 (2003), we are compelled to assess whether this case should be remanded to a different judge. The frustration of the trial court with these parties, and particularly with plaintiff, is obvious. In addition, the court appears to have an unwavering conviction regarding plaintiff's psychological instability despite the contrary findings of several mental health professionals. As such, "it would be unreasonable to expect the trial judge to be able to put previously expressed views out of [his] mind without substantial difficulty." *Ireland v Smith*, 214 Mich App 235, 251; 542 NW2d 344 (1995), *aff'd* and modified 451 Mich 457 (1996). Therefore, in order to preserve the appearance of justice and fairness, proceedings on remand shall be conducted by a different judge.

Reversed and remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter