

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA L. CHAMBERS,

Plaintiff-Appellee,

UNPUBLISHED
February 12, 2008

v

No. 281270
Wayne Circuit Court
Family Division
LC No. 99-922370-DC

STANLEY K. BUTTS,

Defendant-Appellant.

Before: Whitbeck, P.J., Owens and Schuette, JJ.

PER CURIAM.

Defendant Stanley K. Butts appeals as of right the October 3, 2007, order of the trial court granting plaintiff Patricia L. Chambers sole legal and physical custody of the parties' minor daughter. We affirm.

This custody battle presents a long and complicated procedural history. The parties' daughter was born on September 24, 1997, and it is unclear which party had custody of the child for the first several months of her life. On July 19, 1999, plaintiff filed her initial complaint seeking sole legal and physical custody of the child. On September 14, 2000, by stipulation of the parties, the trial court entered an order granting plaintiff and defendant joint legal and physical custody of their daughter. However, after Child Protective Services began an investigation into allegations that defendant had physically abused and neglected the child, the child was placed with plaintiff under the supervision of the Family Independence Agency, and on January 23, 2004, the trial court entered an order granting plaintiff temporary legal and physical custody of the child and denying defendant visitation until further order of the court. The trial court also requested a Family Evaluation, Mediation, and Counseling Unit (FEMC) recommendation regarding custody and parenting time.

The FEMC submitted a report dated July 28, 2004, recommending that the court grant the parties joint legal custody and grant plaintiff sole physical custody of the child. In its August 5, 2004, order, the trial court submitted the case to mediation and adopted the July 28 report in its entirety "until such time as the mediation is successfully concluded, or until further order of the

Court.”¹ However, an order dated October 18, 2004, indicates that the court vacated the temporary custody order and reinstated the consent order of September 14, 2000.

Following a hearing on June 9, 2006, the trial court entered an order granting plaintiff temporary sole legal and physical custody and ordering both parties to attend an appointment at the FEMC to receive psychological evaluations and to undergo substance abuse screening. Defendant appealed, and this Court found that the trial court erred in ordering a temporary modification of custody without granting defendant an evidentiary hearing. This Court then vacated the order and remanded the case to the trial court for an evidentiary hearing concerning the change in custody. *Chambers v Butts*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2007 (Docket No. 270985).

At the time when this Court was considering defendant’s appeal of the June 9 order, defendant filed additional motions requesting that the trial court vacate its June 9 order, as well as its December 1, 2004, order regarding parenting time. The trial court held an evidentiary hearing regarding this matter and on January 17, 2007, entered an order rescinding the June 9 order and granting plaintiff sole physical and legal custody of the child. Defendant again appealed. On September 13, 2007, this Court entered an order vacating the January 17 order and remanding the case to the trial court to make the required factual findings.² *Chambers v Butts*, unpublished order of the Court of Appeals, entered September 13, 2007 (Docket No. 280090).

At a motion hearing on October 3, 2007, the trial court addressed this Court’s September 13 order. The court found, based on the testimony at the January 17 evidentiary hearing, that the child had an established custodial environment with plaintiff; the child had been living with plaintiff since September 2006 and plaintiff had provided food, clothing, a home, and education. The court also found that, even if an established custodial environment existed with both parents, “the testimony at the trial showed that there was clear and convincing evidence that sole legal and physical custody should be granted” to plaintiff. The trial court addressed the best interest factors set forth in MCL 722.23 and found that all but two weighed in plaintiff’s favor.

¹ There is no indication in the trial court record that mediation was ever held.

² Specifically, this Court ordered the trial court to address the following issues on remand:

In making a decision regarding custody, the trial court must determine the best interests of the child as defined in MCL 722.23 and must make findings on each factor. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). The record must reflect the trial court’s findings so that this Court may determine whether the evidence clearly preponderates against the findings. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). The record in this case does not reflect the requisite factual findings. This case is REMANDED to the circuit court for proceedings consistent with this order and consistent with *Chambers v Butts*, unpublished per curiam opinion of the Court of Appeals, issued February 15, 2007 (Docket No. 270985).

After making these findings, the trial court granted plaintiff sole legal and sole physical custody of the child.

On appeal, defendant argues that the trial court erred in failing to determine whether an established custodial environment existed and in failing to find proper cause or a change in circumstances to justify a change in the child's custodial environment. We disagree.

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 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).]

A party seeking a change in custody has the initial burden of establishing, by a preponderance of the evidence, that either proper cause or a change of circumstances exists to warrant a change in custody. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). After proper cause or a change of circumstances is established by a preponderance of the evidence, the trial court may then determine whether an established custodial environment exists and analyze the best interest factors set forth in MCL 722.23. *Id.* If the court finds that an established custodial environment exists, it may not enter an order changing the established custodial environment unless it finds that there is clear and convincing evidence that a change in custody is in the child's best interest. MCL 722.27(1)(c). See also *Dumm v Brodbeck*, 276 Mich App 460, 462; 740 NW2d 751 (2007).

The trial court held a hearing and issued the October 3 order on remand from this Court's September 13, 2007, order. In the September 13 order, this Court merely instructed the trial court to make factual findings regarding the best interest factors, MCL 722.23. The order presupposes that the trial court made the other necessary findings before issuing the January 17 order that this Court vacated in its September 13 order.³ Accordingly, we conclude that the trial court properly followed this Court's order when it made factual findings regarding the best interest factors at the October 3 hearing.

Further, when considering the January 17 and October 3 hearings together, we note that all the factual findings necessary to support the trial court's October 3 order granting a change in custody have been met. First, defendant argues that the requisite findings of proper cause or a change in circumstances justifying a change in the child's custodial environment were not made. Admittedly, plaintiff did not present evidence at the October 3 hearing to establish by a preponderance that proper cause or a change in circumstances existed to warrant a change in

³ In fact, the trial court indicated at the October 3 hearing that it would consider the record of the January 17 proceedings when making its rulings.

custody. However, plaintiff presented evidence at the January 17 hearing indicating that in the time since the last valid custodial order was entered in 2004, defendant removed the parties' daughter from school and refused to return her to plaintiff's custody. He also admitted that he filed fraudulent orders with the circuit court granting him sole legal and physical custody of the child. This evidence is sufficient to establish by a preponderance that a change in circumstances existed to warrant a change in custody. In *Vodvarka, supra* at 513-514, this Court held,

[I]n order to establish a "change of circumstances," 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. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [Emphasis in original.]

The uncontested evidence presented by plaintiff indicates that since the last valid custodial order was entered, defendant engaged in parental kidnapping and fraud in an attempt to keep his daughter from her mother and, in so doing, disrupted his daughter's schooling and established lifestyle with her mother. His actions were not in his daughter's best interest, as they disrupted her living and educational environments and hindered her ability to continue a parent-child relationship with her mother, leading to instability in her life that could negatively affect her well-being. See MCL 722.23(d), (j). Accordingly, plaintiff presented sufficient evidence to establish that a change in circumstances existed to warrant a change in custody.

Defendant also claims that the trial court failed to determine whether an established custodial environment existed for the child. However, the trial court properly determined the nature of the child's custodial environment at the time of the hearing.

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

Defendant merely argues that the trial court failed to address the nature of the child's custodial environment. However, at the October 3 hearing, the trial court found that the child had an established custodial environment with plaintiff; she lived with plaintiff since September 2006 and plaintiff provided her with food, clothing, a home, and education. Defendant does not challenge the propriety of this finding on appeal. Regardless, after addressing the best interest factors and determining that all but two weighed in favor of plaintiff, the trial court concluded that, even if an established custodial environment existed with both parents, there was clear and convincing evidence under the best interest factors that sole legal and physical custody should be granted to plaintiff. Accordingly, the trial court properly addressed the question whether the

child had an established custodial environment and properly determined that clear and convincing evidence established that regardless of the nature of the child's current custodial environment, it was in the child's best interest that her mother have full legal and physical custody of her.

In making this ruling, we note that the most recent order filed by the trial court that was not vacated by this Court was the custody order dated October 18, 2004, which awarded the parties joint legal and physical custody. However, certain aspects of the document make us question its authenticity. Defendant initialed a handwritten correction to the text of the order, but the judge did not initial this correction. Further, the signature on this order, which is purported to be that of Judge Richard B. Halloran, the trial court judge at this point in the proceedings, is different from Judge Halloran's signature found on the other orders in this case. We also note that the trial court vacated orders dated July 14, 2006, and July 20, 2006, granting sole physical and legal custody to defendant after determining that these orders had been fraudulently entered. After considering the suspicious nature of the October 18 order and the existence of other fraudulently entered orders in this case, we question whether the October 18 order is authentic. We remand this case merely to direct the trial court to investigate the authenticity of this order and determine if it was fraudulently entered.

Affirmed. However, we remand to the trial court for a determination whether the October 18, 2004, order is authentic or fraudulent. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette