STATE OF MICHIGAN

COURT OF APPEALS

STEVEN ROY LOOMIS, Plaintiff-Appellant,	UNPUBLISHED November 17, 2009
v	No. 291446 Shiawassee Circuit Court Family Division
BETTY JOANN BLUMERICH, Defendant-Appellee.	LC No. 94-004504-DM

Before: Talbot, P.J., and Wilder and M.J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying his motion for a change in custody. We reverse.

Plaintiff first argues that the trial court erred in finding that there was an established custodial environment with defendant. We disagree.

We review a trial court's findings regarding the existence of an established custodial environment under the great weight of the evidence standard, and will affirm the trial court's determination unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28.

The Child Custody Act, MCL 722.21 *et seq.*, governs child custody disputes. The act is intended to promote the best interests of children. *Berger, supra* at 705, citing MCL 722.26(1), and provides for modification of a custody order on proper cause shown or a change of circumstances. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). If the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003).[1] If a child custody hearing is warranted, a trial court must

[1] In this case, the trial court determined that plaintiff had succeeded in showing that there were changes in circumstance, and thus cause for concern, so he allowed the custody hearing to proceed.

"determine the appropriate burden of proof to place on the party seeking the change. To discern the proper burden, the trial court's initial inquiry is whether an established custodial environment exists." *Foskett, supra* at 5, quoting MCL 722.27(1)(c). Under MCL 722.27(1)(c):

> 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 permanency of the relationship shall also be considered. [*Id.*, quoting MCL 722.27(1)(c).]

Moreover, "[a]n established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger, supra* at 706. If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child. *Foskett, supra* at 6-7. But if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests. *Id*.

The evidence supported the trial court's finding that an established custodial environment existed between the child, Cody, and defendant.

Defendant had had primary physical custody of Cody since 1995, when he was less than two years old. The evidence demonstrated that Cody loved both his mom and dad and did not have a negative image of either parent. There was no indication that defendant did not care for Cody. She took Cody to doctor and dentist appointments, researched payment plans for braces for him, stayed in contact with Cody's teachers and school counselors, sat with Cody while he did homework, found him a mentor to help with one class, and kept her home clean, warm, and refurbished.

The problems Cody experienced in school were relatively recent, having had good grades until the eighth grade school year (2007-2008), around the time that defendant lost her home to foreclosure and separated from her husband, Timothy Blumerich. Cody finished his eighth grade year with a low grade point average, and was doing poorly in ninth grade academically. Plaintiff testified that Cody asked him to request a change in custody. While these are serious concerns

and new developments that justified consideration of plaintiff's request for a change in custody,[2] Cody's bad grades and defendant's marital problems do not demonstrate that there was not an

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[2] "To establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then (continued…)

established custodial environment. Therefore, the trial court did not err in finding that an established custodial environment existed with defendant.

Plaintiff next argues that the trial court's conclusion that factors (b), (c), (h), and (l) were equal was against the great weight of the evidence, and therefore, the court's ultimate holding denying plaintiff's motion to change custody was an abuse of discretion. We agree.

A trial court's findings regarding each best interests factor are reviewed under the great weight of the evidence standard. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). The trial court's ultimate custody decision is reviewed for an abuse of discretion. *Id*. An abuse of discretion is a ruling falling outside the realm of reasonable outcomes. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

The purposes of the Child Custody Act are to promote the best interests of the child, and to provide a stable environment for him or her, free of unwarranted custody changes. MCL 722.26(1). A court must consider, evaluate, and determine each of the statutory best interests factors. *Sinicropi v Mazurek*, 273 Mich App 149, 182; 729 NW2d 256 (2006). A court need not give equal weight to all the factors, but may instead consider their relative weight. *Id*. at 184. The factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
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> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.

(…continued)

engage in a reevaluation of the statutory best interest factors." *Corporan v Henton*, 282 Mich App 599, 604; 766 NW2d 903 (2009). Here, the sudden drop in Cody's grades implicates MCL 722.23(h), factor addressing the home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

The finder of fact must state his or her factual findings and conclusions under each factor. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005).

Plaintiff agrees with the trial court that the parties are equal with regard to factors (a), (f), (j), (g) and (k). Plaintiff further agrees with the trial court that factors (e) and (i) favor plaintiff. Finally, plaintiff does not dispute that factor (d) favors defendant. But plaintiff argues that the trial court's determination that the remaining factors are equal is against the great weight of the evidence.

With respect to factor (b), regarding the education and raising of the child in his religion, plaintiff contends that this factor should favor him, because his family regularly attends the Seventh Day Adventist Church, and his children attend a Seventh Day Adventist school, while defendant claimed merely to be a regular attendee of "a Baptist Church." This argument lacks merit. Although it was clear from the testimony that plaintiff and his family were devout Seventh Day Adventists, no claim was made, nor does the record indicate, that the parties agreed to raise Cody strictly in that religion. The evidence shows that Cody was being schooled in two Christian faiths: Cody attends the Seventh Day Adventist church when plaintiff has parenting time, and while he in defendant's care, Cody attends a Baptist church. However suspect it might have been for defendant not to remember the actual name of her church, it was the province of the trial court to find this testimony credible. *McIntosh, supra* at 474. Therefore, the parties are equal in regard to the religion aspect of factor (b).

However, the guidance element of factor (b) favors plaintiff. When addressing guidance, this Court tends to examine a party's inclination to implement discipline and rules. See *MacIntyre, supra* at 454; *Fletcher v Fletcher*, 229 Mich App 19; 581 NW2d 11 (1998). In the case at bar, there was little testimony regarding discipline, but both plaintiff and the court addressed Cody's poor grades when discussing this factor.

As discussed above, the evidence presented at trial revealed that Cody did well in school until the eighth grade, when his grade point average dropped precipitously. This downturn in school achievement coincided with defendant's separation from Blumerich and a foreclosure on their home. Defendant did testify regarding the steps she was taking to make sure that Cody completed his homework assignments and improved his grades, which involved staying in constant contact with Cody's teachers, receiving regular progress reports, and sitting with Cody while he did his homework. But at the time of trial, Cody's academic performance was still

quite poor. Cody himself told the psychological evaluator that his bad grades were attributable to the stress caused by the presence of his maternal grandmother in defendant's home. By contrast, Cody found plaintiff's home to be less stressful.

Moreover, although defendant initially testified that she got Cody a tutor to help with his classes, when further questioned by the trial court on this point, she explained that the "tutor" was really a mentor, who was a 12th grade student. Thus defendant's judgment in relying on a student mentor to assist Cody with his failing grades reflects poorly on defendant's capacity to provide guidance for Cody, and the testimony did not show that defendant, the parent with primary physical custody had been able to successfully guide Cody in this area. For these reasons, the trial court's finding that the parties were equal on factor (b) is against the great weight of the evidence.

Plaintiff next disputes the trial court's finding of equality for factor (c). Plaintiff argues that the testimony demonstrated that defendant's home was experiencing serious financial distress, and therefore, the trial court's findings were against the great weight of the evidence. We agree.

There is no evidence that Cody lacked basic material needs. Moreover, aside from the one incident where defendant failed to take Cody to get his stitches removed, defendant, as the parent with primary physical custody, regularly took Cody to his doctor and dentist appointments, while plaintiff would take Cody to the doctor during his parenting time if Cody was sick, or there was an emergency. But there is a stark disparity between the parties' abilities to provide for Cody materially, going forward.

Defendant and Blumerich, both unemployed, had recently lost their home to foreclosure, and were living in a three-bedroom trailer home with four children. Defendant asserted that Cody had his own room, her two other sons shared a room, and her daughter slept either on the couch or with her. When defendant's mother-in-law came to spend the night, she allegedly slept on a chair. Plaintiff, on the other hand, had been employed in law enforcement for 15 years. His wife, Shannon Loomis, had a job at a medical office. The couple was current with the mortgage on their home, where each child had his or her own room.

Factor (c) does not contemplate which party earns more money; it is intended to evaluate the parties' capacity and disposition to provide for the children's material and medical needs. *Berger, supra* at 712. This factor looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income. *Id*.

But here, the only work history defendant had was a three-month temporary position with General Motors, and she had no apparent plans to look for employment. She testified that Blumerich, her estranged husband, paid her bills, although, at the time of trial, he had been laid-off from his job too. Defendant also depends on child support from plaintiff and the father of one of her other children. But that other father was delinquent in his payments.

Child support payments can be considered income. See *LaFleche v Ybarra*, 242 Mich App 692, 701; 619 NW2d 738 (2000). But in a case where the plaintiff mother similarly had no job and depended on others, including government, for support, this Court upheld the trial court's finding that factor (c) favored the defendant father, who "had enjoyed stable employment

for nine years," and so concluded, even though the plaintiff mother was working on an associate's degree as a medical assistant. *Hilliard v Schmidt*, 231 Mich App 316, 323; 586 NW2d 263 (1998), abrogated on other grounds by *Molloy v Molloy*, 247 Mich App 348; 637 NW2d 803 (2001), aff'd in part, vac'd in part 466 Mich 852 (2002). Given the foregoing evidence, the great weight of the evidence shows that plaintiff is better able to provide for Cody's material needs, going forward.

Plaintiff next argues that the trial court erred in finding equality with regard to factor (h). Plaintiff argues that Cody's academic problems coincided with instability in defendant's household, and that defendant, as the custodial parent, was responsible for ensuring Cody's daily attendance at school, and had the duty to verify completed homework. We agree.

There was no testimony indicating that plaintiff had tried doing anything more proactive than defendant with regard to homework. But when plaintiff had parenting time, he would set aside time for Cody to read.

Defendant is the parent with the day-to-day responsibility for Cody, and the disruptions in defendant's home coincided with the sudden, precipitous and prolonged drop in Cody's grades. As noted above, Cody himself told the psychological evaluator that he attributed his bad grades to the stress he felt in defendant's house. In *MacIntyre*, this Court found that the trial court's determination that factor (h) favored the plaintiff father was consistent with record evidence because "the child's grades and behavior at school declined following an incident in which [the] defendant [mother] rearranged his room and damaged his belongings after he and [the] plaintiff worked together to clean the room. As a result, the child began sleeping on the couch . . . ." *MacIntyre*, *supra* at 458. The foreclosure on defendant's former home, resulting in cramped quarters in their current mobile home, and the psychological stress afflicting Cody in that home, are very serious, and for these and all of the other reasons discussed above in regard to factor (b), the trial court's findings for factor (h) are against the great weight of the evidence.

Finally, factor (l), a catch-all, is designed to take into consideration other relevant factors. See generally *Ireland v Smith*, 451 Mich 457, 464 n 7; 547 NW2d 686 (1996). Plaintiff argues that the trip defendant took in 2007, during which she did not contact Cody, is further indication of instability in defendant's home. We agree.

That defendant left town and did not call home for several days is troubling, as was the fact that she did not ask plaintiff to look after Cody during that time. We further find that defendant's (as well as Blumerich's) *testimony* regarding the trip – and many other issues – was incoherent and inconsistent at best. In *MacIntyre*, though addressing a different factor, this Court supported a trial court's decision in favor of the plaintiff father and took into consideration the defendant mother's "evasive testimony." *MacIntyre*, *supra* at 455. For these reasons, the trial court's failure to find that factor (l) favors plaintiff is against the great weight of the evidence.

For the foregoing reasons, we conclude that the trial court's findings for factors (b), (c), (h) and (l) are against the great weight of the evidence. Accordingly, because the evidence clearly showed changed circumstances, and because the child's best interests clearly favored giving plaintiff custody, the trial court abused its discretion in denying plaintiff's motion to change custody.

Reversed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly