STATE OF MICHIGAN

COURT OF APPEALS

JULIE ANN BROWN, Plaintiff-Appellant,	UNPUBLISHED April 27, 2010
v	No. 293956 Montcalm Circuit Court Family Division
DAVID JOHN KAVANAGH, Defendant-Appellee.	LC No. 07-009161-DM

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant sole physical custody of their two children. Because the parties' oldest child turned 18 during the pendency of this appeal, she is no longer subject to the custody order. Accordingly, we consider plaintiff's arguments in terms of the parties' minor son. We affirm.

In a custody matter, this Court reviews the trial court's findings of fact under the great weight of the evidence standard and will affirm factual findings unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Discretionary rulings, including custody decisions, are reviewed for an abuse of discretion, which occurs only "when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* Legal questions are reviewed for clear legal error, which occurs "when a trial court incorrectly chooses, interprets, or applies the law." *Id.* at 706.

We turn first to plaintiff's argument that the trial court erred in denying her post-hearing motion to allow her to present the testimony of her sister. On de novo review of the decision of a domestic relations referee, the trial court must allow the parties to present live evidence, but may impose certain reasonable restrictions on the proceedings. MCR 3.215(F)(2). Plaintiff asserts that the trial court may only restrict a party from presenting new evidence if there is an adequate showing that the evidence was not available at the earlier hearing. Plaintiff has it backward: "[t]he court may, in its discretion . . . prohibit a party from introducing new evidence or calling new witnesses *unless* there is an adequate showing that the evidence was not available at the referee hearing." MCR 3.215(F)(2)(c) (emphasis added).

Plaintiff made no attempt at showing that her sister was legally unavailable. It appears that her sister was at the time of the hearing, employed by the Department of Corrections (DOC), and felt at risk of reprisal if she had testified. At the time of the de novo review, plaintiff's sister was no longer with the DOC and was apparently ready to testify. But plaintiff made no showing that her sister was unavailable to testify, in a legal sense, at the referee hearing. In fact, the record indicates that plaintiff made no attempts to present any evidence at the referee hearing. The trial court was within the discretion afforded by MCR 3.215(F) in refusing to allow the testimony. See *Dumm v Brodbeck*, 276 Mich App 460, 463; 740 NW2d 751 (2007).

We next address plaintiff's claims that the trial court erred in finding a change in circumstances and proper cause to allow modification of the custody order. The referee's finding of a change in circumstances was based on the decline in the minor boy's grades and plaintiff's desire to marry a DOC inmate. Plaintiff had met the inmate while employed by the DOC and began a relationship that ultimately resulted in her resigning from her position when faced with the prospect of dismissal.

A party seeking to modify a custody order must first demonstrate either proper cause or a change in circumstances. MCL 722.27(1)(c); *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). If the moving party fails to make such a showing, the court may not hold a custody hearing. *Corporan*, 282 Mich App at 603-604. A change in circumstances may be demonstrated by proving 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." *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003) (emphasis in original). Proper cause may be shown by demonstrating "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial environment should be undertaken." *Id.* at 511.

Taken together, the evidence supports the referee's finding that the child's failing grades were a sign of a material change of circumstances. The child apparently suffers from attention deficit/hyperactivity disorder (ADHD), which is being treated, in part, with medication. The record shows that at the time of the Friend of the Court (FOC) investigation, the boy was failing every course in which he was enrolled. The principal of his school characterized the number of missing assignments the boy had in all of his courses as the largest he had seen in his approximately 20 years of professional experience. The testimony of the FOC investigator supports the conclusion that the situation as presented evidenced a declining school performance (i.e., a change).

As for the issue of the inmate, the record does not clearly preponderate in opposition to the finding of changed circumstances. Defendant testified that he did not know of plaintiff's relationship with the inmate before January 2009. Although plaintiff argued in her opening statement that she had considerable evidence of defendant's prior knowledge of the relationship, and directly accused defendant of lying when she cross-examined him, she did not testify that defendant had prior knowledge, nor did she offer any of the evidence she asserted existed. There is nothing in the lower court file referencing the relationship prior to the entry of the judgment of divorce, and the first reference in the post-judgment record is found in defendant's February 6, 2009, response to plaintiff's motion to change child support.

In any event, as the court noted and focused upon, even if defendant had been aware of the existence of a relationship, "the extent to which the evidence indicates that [plaintiff] had involved the children in her relationship with this felon, is . . . truly a concern that would not have been available to him at the initial proceedings." We will not discuss the ways in which plaintiff has involved her son with the inmate, but we assert our agreement with the court's findings.

For these same reasons, we conclude that the record evidence does not preponderate against the court's finding of proper cause to revisit the circumstances of custody.

Next, we turn to plaintiff's claim that the trial court erred in finding that there was no established custodial environment with plaintiff. "An 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." *Berger*, 277 Mich App at 706. If an established custodial environment exists, then it cannot be modified unless there is clear and convincing evidence that a change is in the best interests of the child or children. MCL 722.27(1)(c). If no established custodial environment exists, then custody may be modified if a preponderance of the evidence shows that modification is in the child's best interests. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993).

The trial court erred in finding that the custody order had been entered too recently to support the "significant duration" requirement. An established custodial environment does not depend on a custody order, but a custodial relationship. *Id.* at 325. Although the custody order was only entered in 2008, the children have lived with their mother for their entire lives and lived in what was the marital home for a number of years. The duration of the custodial relationship was significant enough to support a finding of an established custodial environment.

However, given evidence concerning plaintiff's ability to control and influence her son, the court did not clearly err in finding that there was no established custodial environment with plaintiff. Further, if there had been error, it would have been harmless. The trial court found that clear and convincing evidence supported a modification of the custody order. In fact, the trial court said that the evidence to support the change of custody was "overwhelming." An error does not require reversal "unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613. Such is not the case here.

Finally, we turn to plaintiff's claim that the trial court erred in its evaluation of the statutory best interest factors. MCL 722.23. Specifically, plaintiff challenges the court's findings with respect to factors (d), (e), (f), (i), and (*l*). Regarding factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), the court rated the factor equal because of the pending proposed changes in both parents' residences. Both homes the parties were living in at the time of the proceedings below appear to be satisfactory, but given their admitted plans to move from both, the matter of continuity is in flux. Thus, the evidence did not preponderate against the court's conclusion.

Regarding factor (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e), the trial court found that defendant's relationship with his girlfriend had more of the "hallmarks of permanence" than did plaintiff's relationship

with the inmate, even though plaintiff plans to marry him. The court's finding was in keeping with the record evidence. The uncertain nature of plaintiff's proposed marriage does call into question the potential permanence of her proposed family unit. Further, as the FOC investigator noted, the inmate has no experience with caring for children. Indeed, he was a child (aged 15) when he was imprisoned.

Considering factor (f), "[t]he moral fitness of the parties involved," MCL 722.23(f), the court noted that defendant had two alcohol-related criminal convictions, and a further alcohol-related automobile accident that did not result in a collision. The court found, however, that this factor "overwhelmingly" favored defendant, because of "the choice that [plaintiff] has made—and . . . more importantly . . . the misrepresentation that she was willing to engage in to pursue the relationship" with the inmate. Given evidence of plaintiff's pursuit of a relationship with an inmate at a time when she was working for the DOC, her persistence in maintaining that relationship even though it was apparently in violation of her employment, and her willingness to use her son's name to conceal her correspondence with the man, it cannot be said that the evidence preponderates in the opposite direction of the court's finding.

Factor (i) looks to "[t]he reasonable preference of the child." MCL 722.23(i). The court indicated a desire to meet with the children, but nonetheless concluded that the record supported the conclusion that the factor weighed evenly between the parties. The record does not preponderate against the court's conclusion.

As for factor (*l*), "[a]ny other factor considered by the court to be relevant to a particular child custody dispute," MCL 722.23(*l*), the court considered the fact that plaintiff had sent photographs of the two children to the inmate. The court found that this was evidence of poor judgment on the part of plaintiff, and that it opened the family up to danger, due to, for example, the possibility that the inmate or other inmates would use the pictures for blackmail,[1] or "for singling these children out and harming them." Defendant testified that he found out about the photographs "[t]hrough the rumor mill at work," which supports the conclusion that knowledge of the photographs had spread beyond just the inmate. The court's concern seems reasonable, and its finding is supported. Contrary to plaintiff's claims, the trial court did not mention the photographs when considering best interest factors (b) and (f).

In sum, all the trial court's findings with respect to the statutory factors were supported by the evidence. The decision by the trial court appears to have been motivated by genuine concern for the well being of the children, appropriately guided by the 12 statutory factors. The result did not demonstrate perversity of will, defiance of judgment, passion, or bias.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell

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[1] Defendant continues to work for the DOC.