

STATE OF MICHIGAN
COURT OF APPEALS

AMENA OMAR,

Plaintiff-Appellee,

v

KHALIF MAZIN SLIETY,

Defendant-Appellant.

UNPUBLISHED

June 24, 2010

No. 295743

Washtenaw Circuit Court

LC No. 07-002645-DM

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right a trial court order denying his motion to change custody of the minor child. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

The parties were married in December 2002 and divorced in May 2008. The minor child, a daughter, was born April 19, 2005. The consent judgment of divorce awarded plaintiff and defendant joint legal custody of the minor child and awarded plaintiff sole physical custody of the minor child. Defendant was awarded parenting time every weekend except for the third weekend of every month, from 4:00 p.m. on Friday until 7:00 p.m. on Sunday. During the school year, defendant had parenting time from Thursday at 4:00 p.m. until Friday morning on the week that he did not have weekend parenting time. During the summer, defendant had parenting time from Wednesday at 4:00 p.m. until Thursday evening at 7:00 p.m. on the week that he did not have weekend parenting time.

In April 2009, defendant filed a motion to change custody and parenting time. Among other allegations, defendant alleged that plaintiff and the minor child lived with plaintiff's extended family, including her 19-year-old brother, Abdul Omar, and 16-year-old brother, Osama Omar. Defendant's motion alleged that he was concerned about the physical safety and mental health of the minor child because she revealed instances of potential physical abuse and neglect by plaintiff's brothers. In May 2009, the trial court entered an order increasing defendant's parenting time. Under the new order, defendant had parenting time from 8:00 a.m. on Friday until 7:00 p.m. on Sunday for the first, third and fifth week of the month, and from 8:00 a.m. on Friday until 7:00 p.m. on Tuesday for the second and fourth week of each month.

The trial court held a three-day evidentiary hearing on defendant's motion. In a confusing opinion on the record, which will be explained more fully below, the trial court denied defendant's motion to change custody. In its November 2009 order regarding custody and parenting time, the trial court also reduced defendant's parenting time with the minor child. Under the new order, defendant was awarded parenting time from 2:30 p.m. on Friday to 8:30 a.m. on Monday on the first, second, fourth and fifth weekend of each month. The trial court also stated in its order "[t]hat when the parties show a pattern of notifying and working together regarding doctor appointments the court will consider additional parenting time for Defendant."

Thereafter, defendant moved for reconsideration. The trial court denied defendant's motion for reconsideration, and this appeal ensued.

II. STANDARDS OF REVIEW

MCL 722.28 governs child custody disputes on appeal and provides:

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

This Court applies three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the "great weight" standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). A trial court's findings regarding the best interest factors are reviewed under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). This Court defers to the trial court's determinations of credibility. *Id.*; *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Second, this Court reviews questions of law for clear legal error that occurs when a trial court incorrectly chooses, interprets, or applies the law. *Berger*, 277 Mich App at 706. Third, discretionary rulings, such as custody decisions, are reviewed for an abuse of discretion. *Fletcher*, 447 Mich at 879; *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006). The overriding concern is the child's best interests. *Fletcher*, 229 Mich App at 29.

In addition, "[o]rders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005).

We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). The abuse of discretion standard recognizes "that there will be circumstances in which there will be no single correct outcome; rather there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. ANALYSIS

Defendant argues that the trial court failed to sufficiently articulate its factual findings with respect to the existence of an established custodial environment and that the trial court erred in failing to find that there was an established custodial environment with respect to both parents. Defendant also argues that the trial court erred in failing to conduct an analysis of the minor child's best interests in denying his motion for change of custody.

A trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The goal of the Child Custody Act, MCL 722.21 *e seq.*, is to minimize unwarranted and disruptive changes of custody orders, except in the most compelling circumstances. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). Thus, a party seeking a change in child custody is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change in circumstances. *Vodvarka*, 259 Mich App at 508. If a party fails to do so, the trial court may not hold a child custody hearing. *Id.* at 508-509.

In *Vodvarka*, this Court explained the terms "proper cause" and "change of circumstances":

[T]o 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 engage in a reevaluation of the statutory best interest factors.

* * *

[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. [*Id.* at 512-514 (emphasis in original).]

After defendant moved for a change of custody based in part on allegations that plaintiff's brother Abdul¹ was physically abusing the minor child, the trial court interviewed the minor child. According to the trial court, the minor child told the court "that her uncle kept hitting her" and then asked to leave. Because the court was unsure if the minor child was being truthful, and apparently also because the parties disputed whether Abdul was physically hurting the minor child, the trial court determined that it would hold an evidentiary hearing.² Following the evidentiary hearing, which occurred on three separate days, the trial court issued its opinion on the record denying defendant's motion for a change in custody.

The trial court's ruling is confusing in that the trial court characterized the evidentiary hearing as a custody hearing³ and made a finding that plaintiff had an established custodial environment without first making a ruling regarding whether defendant established proper cause or a change of circumstances sufficient to warrant a change in custody. Whether there is proper cause or a change of circumstances is a threshold matter that must be determined before a custody hearing can be held. *Id.* at 508. If the moving party fails to demonstrate proper cause or a change of circumstances, the trial court may not hold a custody hearing. *Id.* Although the trial court considered the evidentiary hearing to be a child custody hearing, we find that the evidentiary hearing is properly characterized as an evidentiary hearing to determine if defendant had established proper cause or change of custody.⁴ The trial court's opinion on the record focused on whether plaintiff's brother physically abused the minor child. Irrespective of the trial court's failure to specifically articulate whether defendant established proper cause or a change of circumstances, the trial court's reasoning and analysis indicate that the trial court essentially found that the evidence did not show that plaintiff's brother abused the minor child and that there was not proper cause or a change of circumstances sufficient to warrant a change of custody:

¹ Although defendant's motion for change of custody alleged that plaintiff's other brother also abused the minor child, the testimony at the evidentiary hearing primarily focused on Abdul's conduct toward the minor child.

² Whether there is proper cause or a change of circumstances sufficient to change custody is a factual determination that must be made on a case-by-case basis. *Vodvarka*, 259 Mich App at 512, 514. However, an evidentiary hearing is not necessary to resolve the initial question whether there is proper cause or a change of circumstances sufficient to change custody. *Id.* at 512.

³ In its May 20, 2009, order, the trial court stated "that there appears to be a preponderance of the evidence warranting a change of custody" and ordered "THAT the parties are scheduled for a *custody hearing* on Tuesday, June 23, 2009 at 2:00 p.m. to continue on June 30, 2009 at 2:00 p.m. if necessary" (Emphasis added.)

⁴ We also note that statements made by defense counsel on the record indicate that defendant considered the purpose of the evidentiary hearing to be to determine whether there was proper cause or a change of circumstances sufficient to warrant a change of custody. In objecting to testimony offered by plaintiff's aunt at the June 30, 2009, hearing, defense counsel stated: "As the Court pointed out, the relevant timeframe is from after entry of judgment of divorce to the filing of the motion. We're showing change of circumstances or proper cause shown, that's a timeframe."

In this case . . . it appeared to the Court that there was an allegation that the mother's environment was a dangerous one because her brother, who is quite young, 19, I believe, lived with her; and that he was physically battering the child; and that the mother knew of this and did not disallow it.

The Court—both party—the mother denied it, the father asserted that it was true.

The Court interviewed the child. The child told the Court during the course of chit-chat that her uncle kept hitting her. And then she said, "May I leave now?" And that was the only conversation that she had with the Court about that incident. The Court was not sure whether she was telling the truth or not.

But based on what she said and the arguments in the court, I determined that I would go ahead with the—with the hearing.

And we had quite a lengthy hearing on this matter. And many of the mother's family, who lived in the same home, testified; and her brother, Abdul, testified. And they all (clear throat)—excuse me. They all testified that Abdul did not hit the child, that he was a very loving . . . uncle and companion in the home, that he was very entranced with the child, and was a good—a good companion to her.

The father, of course, presented the uncle in a different light but was not able to prove to the Court's satisfaction that the uncle had been interfering with the child improperly.

The first—almost the first fact testified to by the mother was that she was moving out of her parents' home and moving into her own home with only her child and perhaps her grandmother. So she was moving away from the uncle; although she testified that he could certainly come around and visit.

* * *

And I find that the only issue in which there was a serious difference was whether the mother maintained the child in an unsafe environment by remaining with the uncle. I did not find even by a preponderance of the evidence that the uncle was injuring the child.

Second, I found that she was either out or immediately moving out of her parents' home . . . where the uncle lived.

And that otherwise the mother was a suitable custodian and continued to show that she was a stu—a suitable custodian.

So I am denying the father's motion for a change in custody

As stated above, we conclude that the trial court's ruling is tantamount to a conclusion that defendant failed to establish the threshold necessary to further consider whether a change in custody was warranted. Because proper cause or a change of circumstances was not established, the trial court was without authority to make a determination regarding the existence of an established custodial environment or to reconsider the statutory best interest factors. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Defendant's failure to establish proper cause or a change of circumstances precluded the trial court from further consideration of his motion to change custody. Therefore, we reject defendant's arguments that the trial court was required to make a determination regarding the existence of an established custodial environment and make findings regarding the statutory best interest factors.

In sum, we observe that the trial court made some procedural errors in this case that ultimately caused errors in its legal analysis. First, it erred in failing to determine whether defendant established proper cause or a change of circumstances sufficient to warrant a change of custody. Second, it erred in characterizing the evidentiary hearing as a custody hearing when it was not authorized to conduct a custody hearing absent a determination that there was either proper cause or a change of circumstances. Third, it erred in ruling that there was an established custodial environment with respect to plaintiff because further consideration of the propriety of a change of custody, including a determination of the existence of an established custodial environment with either parent, was improper absent proper cause or a change of circumstances. Despite the trial court's errors in this case, however, we need not reverse because, for the reasons explained above, we find that the trial court reached the right result, albeit for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

In a related argument, defendant argues that the trial court's decision not to prevent plaintiff's brother Abdul from having any contact with the minor child was against the great weight of the evidence. According to defendant, the trial should have entered an order prohibiting Abdul from being in the presence of the minor child. Defendant argues at length in his brief on appeal regarding Abdul's criminal history. As noted above, there was conflicting evidence regarding whether Abdul physically harmed the minor child. While defendant testified that Abdul physically harmed the minor child, plaintiff, Abdul himself and other family members testified that Abdul loved the minor child and never harmed her. Plaintiff also testified that she no longer lived in the same household as Abdul and that she would never allow Abdul to transport the minor child in his car. Whether Abdul physically harmed the minor child was a factual inquiry, and we defer to the trial court's determinations regarding the weight of the evidence and the credibility of witnesses. MCR 2.613(C); *Berger*, 277 Mich App at 715. We will not interfere with the trial court's determination that the testimony of plaintiff and witnesses for plaintiff was more credible than the testimony of defendant regarding this issue. Regarding whether Abdul physically harmed the minor child, it cannot be said that the evidence clearly preponderates in the opposite direction. *Fletcher*, 447 Mich at 877-878.

Defendant next argues that the trial court erred in denying his motion for reconsideration. According to defendant, reconsideration was proper because the trial court failed to analyze the statutory best interest factors. As explained above, because there was not proper cause or a change of circumstances sufficient to warrant a change of custody, the trial court was not authorized to make a determination regarding the existence of an established custodial environment or the minor child's best interests. *Rossow*, 206 Mich App at 458. Defendant also

argues that the trial court should have granted his motion for reconsideration because after the evidentiary hearing, plaintiff continued to fail to adequately address medical conditions of the minor child, including a skin infection, and plaintiff's brother continued to engage in criminal activities. Defendant testified at the evidentiary hearing regarding plaintiff's alleged failure to adequately address the minor child's medical conditions. The court made a finding that the parties failed to cooperate regarding the child's medical care and made modifications to the parenting time to address that lack of cooperation.⁵ In addition, there was testimony at the evidentiary hearing regarding plaintiff's brother's problems with the law. Thus, we find that the issues presented by defendant in support of his motion for reconsideration present the same issues already ruled on by the court. "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). The trial court did not abuse its discretion in denying defendant's motion for reconsideration.

Defendant next argues that the trial court erred in failing to award parenting time that was sufficient to promote a strong relationship between the minor child and defendant. According to defendant, the trial court reduced his parenting time from the previous parenting time order and as a result, he has one less weekend per month of parenting time, has no weekday parenting time, and there is an 11-day period every month in which he has no parenting time with the minor child.

Parenting time is governed by statute:

(1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

* * *

(3) A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.

* * *

(6) The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:

(a) The existence of any special circumstances or needs of the child.

⁵ Opinion of the trial court on the record, October 27, 2009, p 29.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

(7) Parenting time shall be granted in specific terms if requested by either party at any time. [MCL 722.27a.]

The trial court's November 2009 order awarded defendant parenting time on the first, second, fourth and fifth weekend of each month from 2:30 p.m. on Friday to 8:30 a.m. on Monday. This was a reduction in parenting time from the trial court's May 2009 order regarding parenting time, which had granted defendant parenting time from 8:00 a.m. on Friday until 7:00 p.m. on Sunday for the first, third and fifth week of the month, and from 8:00 a.m. on Friday until 7:00 p.m. on Tuesday for the second and fourth week of each month.⁶

We find that the trial court did not violate MCL 722.27a in awarding parenting time to defendant. Moreover, contrary to defendant's suggestion, the trial court was not mandated to consider the factors in MCL 722.27a(6). MCL 722.27a provides that "[t]he court *may* consider" the listed factors in making a determination regarding parenting time. (Emphasis added.) The use of the term "may" is permissive, not mandatory. *Manuel v Gill*, 481 Mich 637, 647; 753

⁶ We observe that the trial court's award of increased parenting time to defendant in May 2009 occurred after defendant alleged that plaintiff's brother was physically harming the minor child, an allegation which the trial court ultimately rejected following the evidentiary hearing.

NW2d 48 (2008). The statute does not specify a formula for determining the proper amount of parenting time. Rather, it requires parenting time “in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent[.]” Under the circumstances, we find that the trial court’s award of parenting time was frequent enough and long enough to promote a strong relationship between the minor child and defendant. Moreover, we observe that the trial court stated that it would consider granting defendant additional parenting time “when the parties show a pattern of notifying and working together regarding doctor appointments”

Defendant finally argues that the case should be remanded to a different trial judge because the trial court has demonstrated that it is unable to objectively weigh and consider the evidence in this case. Generally, a trial court is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003); see also MCR 2.003(C)(1). Defendant does not advance any meaningful argument regarding how the trial court demonstrated actual bias or prejudice or its supposed lack of objectivity. “A party abandons a claim when it fails to make a meaningful argument in support of its position.” *Berger*, 277 Mich App at 712. In any event, because of our disposition of this case, we need not consider this argument.

Affirmed. Plaintiff, being the prevailing party, may tax costs under MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens