STATE OF MICHIGAN

COURT OF APPEALS

BUFFY LYNN WHITSON, Plaintiff-Appellant,	UNPUBLISHED September 7, 2010
v	No. 295657 Genesee Circuit Court Family Division
JAMES MICHAEL GRADY, Defendant-Appellee.	LC No. 01-234212-DM

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

In this custody matter, plaintiff appeals as of right from the trial court's custody order granting defendant primary physical custody of the parties' three minor children. We affirm.

Plaintiff first argues that the trial court abused its discretion by ordering an evidentiary hearing to determine whether to modify the custody order because defendant failed to show, by a preponderance of the evidence, that proper cause or a change in circumstances existed. We disagree because defendant made an initial showing that proper cause existed.

In a custody matter, we review 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.

To demonstrate that a change in a custody order is warranted, the moving party must make an initial showing, by a preponderance of the evidence, either that proper cause exists for a change, or that circumstances have changed since the entry of the most recent custody order. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003); MCL 722.27(1)(c). The trial court need not hold an evidentiary hearing on this threshold determination. *Corporan v Henton*, 282 Mich App 599, 609; 766 NW2d 903 (2009).

In the context of the Child Custody Act, "proper cause" to revisit a custody order means "an appropriate ground for legal action to be taken." *Vodvarka*, 259 Mich App at 510. The party seeking the change in custody must demonstrate circumstances that "have or could have a significant effect on the child's life." *Id*. at 511. The inquiry into proper cause is fact sensitive, and the trial court may use for guidance the 12 best interest factors designated in the Child Custody Act. *Id*. at 511-512. A change of circumstances is established 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." *Id*. at 513 (emphasis in original). Something more than normal life changes that occurs during a child's life must be shown. *Id*. If proper cause or a change of circumstances is not established, the court is precluded from holding a child custody hearing to determine the child's best interests. *Id*. at 508.

In its order for an evidentiary hearing, the trial court stated in its order setting an evidentiary hearing that "[i]ssues are raised by both parties causing the Court sufficient concern that an evidentiary hearing will be scheduled in this matter." In ruling on plaintiff's motion for a new trial, the trial court clarified that its order for an evidentiary hearing implied that the *Vodvarka* standard was met based on its review of the detailed pleadings and the Child Protective Services (CPS) reports. Although the trial court did not make detailed findings on why it ordered an evidentiary hearing to consider modifying the custody order, we conclude that ordering the evidentiary hearing was not an abuse of discretion. When considering the facts that are not in dispute, defendant established, by a preponderance of the evidence, that there was proper cause to revisit the custody order.

The pleadings and CPS reports showed that there had been dramatic confrontations between the parties' eldest daughter and plaintiff, including an instance where plaintiff had essentially kicked her 12-year-old daughter out of the house for a night, as a way to teach her a lesson. Further, contents of one of the CPS reports at trial established that there was a lot of yelling and arguing in plaintiff's home and that the children wanted to live with defendant. Moreover, there is no dispute that the parties' eldest daughter was regularly babysitting for her siblings and plaintiff was having some mental health issues. Thus, the trial court was within its discretion to reconsider the custody order because defendant showed, by a preponderance of the evidence, that there were questions of fact as to whether there were material changes in the ability of plaintiff to provide guidance and discipline, the stability of plaintiff's home, the possibility of a mental health condition affecting plaintiff's ability to parent, and the children's custody preferences, such that the conditions existing could have had a significant effect on the children's well being.

Next, plaintiff argues that defendant did not show, by clear and convincing evidence, that a change in custody was in the best interest of the children. We disagree.

If the court finds that an established custodial environment exists, it may not change that environment unless it finds clear and convincing evidence that a change in custody is in the child's best interests. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526; 752 NW2d 47 (2008). In this case, the parties do not dispute the trial court's finding that there was an established custodial environment with plaintiff only. Therefore, defendant was obligated to show, by clear and convincing evidence, that a change in custody was in the children's best interests. The best interests are to be evaluated in light of the statutory best interest factors set forth in MCL 722.23(a)-(l).

The trial court must weigh the statutory best interest factors found in MCL 722.23 and make a factual finding regarding each of the factors. *Grew v Knox*, 265 Mich App 333, 337; 694 NW2d 772 (2005); *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); MCL 722.23; MCL 722.27. While the trial court must state its factual findings and conclusions on each best interest factor, the court need not include consideration of every piece of evidence entered and argument raised at trial. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005). Also, MCR 3.210(D), which governs factual findings in child custody hearings and trials, incorporates by reference MCR 2.517, which provides, in part, that "[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." See *Foskett v Foskett*, 247 Mich App 1, 12-13; 634 NW2d 363 (2001).

When considering the statutory best interest factors, the trial court considered the aforementioned factors and concluded that five of the factors favored defendant, none of the factors favored plaintiff, and the remaining seven factors were either equal or not relevant to the inquiry. Plaintiff argues that the trial court erred in its evaluation of the statutory best interest factors. MCL 722.23. Specifically, plaintiff challenges the trial court's findings with respect to factors (b), (d), (g), (i), and (k), which are the factors that favored defendant.

Regarding factor (b), MCL 722.23(b), "[t]he 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," the trial court found that there had been dramatic confrontations between the parties' eldest daughter and plaintiff, which established a troubling and potentially dangerous dynamic between the two of them. The trial court also found that the incidents involving plaintiff breaking the parties' eldest daughter's cell phone during an argument, interacting in a hostile fashion when denying to a teacher, that a paper, which plaintiff helped her eldest daughter write, was partially plagiarized, not allowing the parties' son to play football because of plaintiff's personal dispute with the coach, and confronting Carolyn Thomas regarding counseling of the parties' eldest daughter, all showed plaintiff's propensity to fight personal battles using her children as pawns under the guise that she is acting in their best interests. The trial court concluded from this evidence that plaintiff has a problem providing guidance and discipline to the children. The trial court also found that, although defendant is untested in day-to-day guidance, the children act appropriately when with him, and that the structure of his house and expectations regarding academics showed that he would be more effective in providing guidance and discipline.

The trial court's findings are fully supported by the record. Plaintiff argues that the trial court's findings essentially empower the parties' eldest daughter to continue her teenage rebellion. However, as the trial court found, plaintiff's behavior went beyond addressing typical teenage rebellion, and plaintiff's actions fostered an environment where she was not able to provide adequate guidance and discipline. There were repeated instances of inappropriate confrontations between plaintiff and her eldest daughter, which included plaintiff kicking her daughter out of her house for a night and smashing her daughter's cell phone during an argument. Further, as the trial court found, plaintiff showed a pattern of angry and hostile behavior toward people in her children's lives under the guise of working for her children's best interests. Thus, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in favoring defendant on this factor.

Regarding factor (d), MCL 722.23(d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," the trial court found that both parties have stable environments for the children, but that this factor favored defendant because there are concerns regarding plaintiff's home that have manifested in stress for the children, and, when comparing the parties, defendant's home is more stable and satisfactory.

Plaintiff argues that the trial court erred because there will always be stress in a home and mere stress does not support the conclusion that a home is not stable and satisfactory. However, the testimony showed that the stress in plaintiff's home goes beyond routine stress as the aforementioned confrontations and testimony regarding excessive yelling showed. Further, these elements are not a part of defendant's household. Thus, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in favoring defendant on this factor.

Regarding factor (g), MCL 722.23(g), "[t]he mental and physical health of the parties involved," the trial court noted that neither party has any physical issues that would interfere with their parenting and defendant does not have any mental health concerns. However, the trial court noted a concern about plaintiff's testimony that she suffers from mild bi-polar disorder, anxiety, and panic attacks, and these conditions, which she treats with medication, nevertheless, caused her to be unable to maintain employment. The trial court was further concerned by evidence that plaintiff engaged in several inappropriate confrontations and is unable to separate her wants from what is best for her children.

Plaintiff argues that there was no testimony regarding how her mental health affects the parties' children and there is nothing to suggest that her mental health is not under control. However, as the trial court found, plaintiff's general behavior is concerning because she is unable to separate her needs from what is best for her children. Moreover, her inability to maintain employment due to her mental health conditions raises a valid concern in how her conditions affect the children. Therefore, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in favoring defendant on this factor.

Regarding factor (i), MCL 722.23(i), "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference," the trial court interviewed the children with regard to their preference. The parties eldest daughter indicated a strong preference to live with defendant, while the other two children indicated they wanted to split time equally with both parents.

Plaintiff argues that favoring defendant on this factor empowers the eldest daughter to get what she wants even though she is motivated by teenage rebellion. Plaintiff's attack on the eldest daughter's motivation does nothing to dispute that the trial court interviewed the children and each expressed their reasonable preference. In each case, the children expressed a desire to spend more time than they had been spending with defendant. Therefore, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in favoring defendant on this factor.

Regarding factor (k), MCL 722.23(k), "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child," the trial court found that this factor favors defendant because, at a minimum, there are dramatic conflicts with inappropriate yelling

between plaintiff, plaintiff's husband, Brian Whitson, and the parties' eldest daughter, and that on at least one occasion, there was inappropriate physical contact resulting in marks on the eldest daughter's neck. The trial court also found that Brian acknowledged putting his hands on the parties' eldest daughter's neck when she attempted to walk away from him.

The trial court's findings are fully supported by the record. Plaintiff argues that the trial court abused its discretion in finding that this factor favored defendant because the two CPS reports did not substantiate instances of physical abuse against the eldest daughter. However, the trial court based its findings on the testimony of Thomas and Brian, and we defer to the trial court's determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Moreover, the trial court discredited any allegations of physical abuse by defendant against the parties' son because a smack to his head occurred in the context of playing football when the parties' son had a helmet on. Thus, because the evidence does not clearly preponderate in the opposite direction, the trial court did not err in favoring defendant on this factor.

Therefore, based on all of the above, the trial court did not abuse its discretion in awarding defendant primary physical custody because there was clear and convincing evidence that a change in custody was in the children's best interests.

Lastly, plaintiff argues that remand is necessary in order for the trial court to provide a more detailed parenting time schedule. Plaintiff contends that the current schedule leaves open for interpretation days in which there is not school and parenting time options when one parent relies on a third party to watch the children when the other parent is available during that time.

Regarding parenting time, the trial court ordered as follows:

> The parenting schedule is reasonable as agreed between the parties. If the parties cannot agree, then the following will apply:
>
> - First week: Plaintiff shall have Thursday after school until Monday school drop off
> - Second week: Plaintiff shall have Friday after school until Saturday at 10 am
> - Third week: Plaintiff shall have Thursday after school until Monday school drop off
> - Fourth week: Plaintiff shall have Wednesday after school until 7:30
> - In summer, the parties shall alternate weeks
> - Holidays are pursuant to the Genesee County Friend of the Court guidelines.

Pursuant to the parenting time schedule, parenting time on holidays is set up according to the friend of the court guidelines. In an instance during the school year where there is no school on a day that the guidelines do not delineate as a holiday, the current schedule does not explicitly

state what should occur. Nevertheless, the parenting time schedule, in effect, states that the parenting time switch occurs when the school day would begin or end, regardless of whether school is actually held. Further, because the parenting time schedule does not provide a right to first refusal regarding watching the children, there are no parenting time options when one parent relies on a third party to watch the children even though the other parent is available during that time. Therefore, remand for clarification of the parenting time schedule is not necessary.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad