STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL PATRICK HUTCHINS, Plaintiff-Appellee,	UNPUBLISHED May 31, 2012
v	Nos. 302747; 305791 Kalamazoo Circuit Court
JULIE BETH HUTCHINS, Defendant-Appellant.	LC No. 2007-005514-DM

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

These consolidated appeals involve the custody of the parties' minor child. In Docket No. 302747, defendant appeals by right the trial court's October 22, 2010 order changing custody of the minor child from defendant to plaintiff; in Docket No. 305791 defendant appeals by right the trial court's July 22, 2011 order denying her motion for change of custody. We affirm.

"This Court must affirm all custody orders unless the trial court's findings of fact are against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); MCL 722.28. Under the great weight of the evidence standard, we defer to the trial court's findings of fact unless the evidence clearly preponderates in the opposite direction. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

Initially, we consider and reject plaintiff's two arguments regarding why we should not hear defendant's appeal in Docket No. 302747. First, plaintiff claims that defendant's appeal is not permitted because defendant, by pursuing a motion for change of custody from the October 22, 2010 order, acknowledged and acquiesced to the finality of that order. However, MCR 7.203(A) grants an appeal of right to a final order of the trial court. A final order, in pertinent part, is defined as, "in a domestic relations action, a postjudgment order affecting the custody of a minor." MCR 7.202(6)(a)(iii). Defendant's subsequent motion to change custody does not affect the definition of a final order and whether it may be appealed under the court rules. Accordingly, plaintiff's argument lacks merit.

Second, plaintiff argues that defendant's appeal is moot because the appropriate remedy for a trial court's error in a custody matter is a hearing regarding current facts. According to plaintiff, this relief was already granted to defendant when the trial court held an evidentiary

hearing in July 2011 on defendant's motion for change of custody from the October 22, 2010 order. Plaintiff relies on *Fletcher v Fletcher*, 447 Mich 871, 889-890; 526 NW2d 889 (1994), where our Supreme Court held that the appropriate remedy for the trial court's legal error in its consideration of certain statutory best interest factors was a remand to the trial court for reevaluation of the custody award, and the trial court was to consider current information. Accordingly, if the trial court committed error in its custodial disposition, the proper remedy is to remand to the trial court for reevaluation of the custody award and the reevaluation is to include up-to-date information. This is not a remedy that defendant has already received. The July 2011 evidentiary hearing was based solely on information about events and circumstances that occurred after February 5, 2010, the last date that evidence was presented to the referee. In deciding defendant's motion to change custody, the trial court did not reconsider any of the information used to enter its order to change custody from defendant to plaintiff. Accordingly, because defendant has not received the relief specified in *Fletcher*, we reject plaintiff's argument that defendant's appeal in Docket No. 302747 is moot.

In Docket No. 302747, defendant argues that the trial court failed to make necessary findings of fact regarding proper cause or change of circumstances to review the statutory best interest factors for a change in custody. She also argues that the "conclusory factors" the trial court cited were insufficient to establish proper cause or change of circumstances.[1]

A trial court must make findings of fact as provided in MCR 2.517 when deciding a contested postjudgment motion in a domestic relations action. MCR 3.210(D)(1). Brief, definite, and pertinent findings on the contested matters are sufficient without over elaboration of detail or particularization of facts. MCR 2.517(A)(2). In child custody cases, a trial court is not required to comment on every matter in evidence or to declare acceptance or rejection of every position argued. *Fletcher*, 447 Mich at 883.

While the trial court used several broad phrases that it did not explain, the trial court did cite certain, specific facts that led to its conclusion that there was proper cause or change of circumstances. These included the minor child's post-2007 academic record, the minor child's removal from Kalamazoo Country Day School (Kalamazoo Day), his tardiness and absences, and defendant's reliance on the minor child to take his medications. In addition, the trial court mentioned that the minor child was "a very sad young man." Although the trial court did not expound on this statement, it can reasonably be inferred that the trial court was referring to the fact that, as a result of a sexual touching incident, the minor child lost a close friend.

[1] We reject defendant's claim that the trial court was prohibited from finding that proper cause existed because plaintiff only alleged change of circumstances in his motion for change of custody. Defendant has abandoned the issue by failing to cite supporting legal authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Moreover, defendant does not claim unfair surprise or prejudice by plaintiff's subsequent argument that proper cause existed.

"A court may modify or amend a child custody order 'for proper cause shown or because of a change of circumstances.'" *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009), quoting MCL 722.27(1)(c).

> [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. . . .
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> [T]o 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. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 512-514; 675 NW2d 847 (2003).]

Here, the minor child was tardy 26 days in one trimester at Kalamazoo Day before he was dismissed from the school; however, the evidence did not establish that the minor child's dismissal from Kalamazoo Day has had or will have a significant effect on his well-being. The minor child did not suffer any academic setbacks from being dismissed from Kalamazoo Day. The minor child was enrolled in the Gull Lake Public Schools for the remainder of his third grade year, and at the end of the year, he was promoted to the fourth grade. The change in schools did not result in the loss of services. Also, the minor child was not tardy while attending Gull Lake Public Schools. We conclude that the child's being tardy and being dismissed from Kalamazoo Day are neither proper cause nor a change of circumstances.

Similarly, we conclude that defendant's reliance on the minor child to take his morning medications does not constitute either proper cause or change of circumstances because the evidence did not show that this occurred on a regular and consistent basis or that it continued to be a problem after the minor child began attending Gull Lake Public Schools. Accordingly, the evidence did not establish that the minor child's failure to take his morning medications in and of itself has had or will have a significant effect on the minor child's well-being.

Regarding the minor child's post-2007 academic record, the evidence established that the minor child refused to do class work. In addition, the minor child's teachers from Gull Lake Public Schools testified that when uncompleted class work was sent home, the minor child did not always return with the work completed the next day. In one marking period, the minor child

received Fs in one class because he had not completed his work. In addition, teachers testified that the minor child was disruptive in class, and, overall, there was no indication that this behavior was improving. In the fall of 2009, the minor child received numerous write-ups for disruptive behavior in the classroom and on the playground.

The trial court committed no error in relying on the minor child's post-2007 academic record to find proper cause.[2] The minor child had established a pattern of refusing to do his class work and of completing his homework. He was also a disruptive student. The testimony of the child psychologist established an inference that the minor child's academic problems resulted from not having clear and consistent boundaries. According to the psychologist, defendant struggled with setting boundaries for the minor child. If the minor child's behavior of not completing class assignments and homework, as well as his disruptive behavior, continued, behaviors for which he had already received failing marks and an in-school suspension, those behaviors are of such a magnitude that they could have a significant effect on the minor child's well-being. The behaviors are relevant to the minor child's school record. MCL 722.23(h).

In addition, the minor child had been involved in a sexual touching incident with a close friend. The incident led to a criminal investigation, in which the investigating officer recommended that the two boys not have contact with each other. The friend's family lived in the same subdivision as defendant and the minor child, which resulted in the minor child's having unpleasant contact with the friend's mother. The child psychologist testified that the contact the minor child had with the mother, along with the minor child's not being allowed to play on the same basketball team as his friend, prohibited the minor child from moving past the sexual touching incident. The incident and the resulting consequences, which are relevant to the desirability of maintaining defendant's home environment and to the minor child's home and community record, MCL 722.23(d) and (h), are of such a magnitude to have a significant effect on the minor child's well-being. Based on the minor child's post-2007 academic record and the sexual touching incident, the trial court's finding that proper cause existed was not against the great weight of the evidence.

Defendant next argues that the trial court erred when it failed to determine whether an established custodial environment existed. According to defendant, this error by the trial court resulted in the court's vacillating between the proper clear and convincing evidence standard and the improper preponderance of the evidence standard when it analyzed the statutory best interest factors, MCL 722.23.

When a trial court is confronted with a motion to change custody, it must determine the appropriate burden of proof to place on the moving party. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). To determine the proper burden of proof, the trial court's inquiry is whether an established custodial environment exists. *Id.* If an established custodial environment

[2] We note that the minor child's academic record did not establish a change of circumstances. The evidence established that even before 2007, the minor child fought with students, destroyed property, was disruptive in class, and refused to do homework. Accordingly, there was no change in the minor child's academic record from before the entry of the divorce judgment.

exists, then the noncustodial parent must show by clear and convincing evidence that a change in the custodial environment is in the child's best interests. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 601; 770 NW2d 403 (2009). If no established custodial environment exists, then the party moving for custody need only show by a preponderance of the evidence that the change is in the child's best interests. *Foskett*, 247 Mich App at 6-7.

Here, defendant refers to the trial court's oral ruling at the end of the de novo hearing on objections to referee's recommended order. The trial court, when it issued its ruling from the bench, did not determine whether an established custodial environment existed. In addition, when it announced that the best interests of the minor child required plaintiff receive primary physical custody, the trial court did not state which standard, the clear and convincing evidence standard or the preponderance of the evidence standard, it used. However, the October 22, 2010 order stated: "The established custodial environment of the child is with the Defendant and therefore, the Plaintiff's burden was to prove by clear and convincing evidence that a change in custody is in the best interests of the child as required by MCL 722.23." A trial court speaks through its written judgments and orders. *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009). Accordingly, based on the October 22, 2010 order, the trial court found that the minor child had an established custodial environment with defendant.

Because an established custodial environment existed with defendant, the trial court could only change custody of the minor child if plaintiff proved by clear and convincing evidence that a change in custody was in the minor child's best interests. MCL 722.27(1)(c). Defendant claims that the trial court vacillated between the clear and convincing evidence standard and the preponderance of the evidence standard when it analyzed the best interest factors. We find this argument is misplaced because it conflates the moving party's ultimate burden of proof on a motion for a change of custody where an established custodial environment exists with the amount of evidence necessary to support a trial court's finding regarding an individual fact, including a best interest factor. While the moving party must meet the clear and convincing standard to obtain a change of an established custodial relationship, MCL 722.27(1)(c), the trial court's findings as to individual facts, including the individual best interest factors, are reviewed under the preponderance of evidence standard because as to all custody hearings the trial court's factual findings must be affirmed unless they are "against the great weight of the evidence." MCL 722.28. "The great weight of the evidence standard applies to all findings of fact. Thus, a trial court's findings on each factor should be affirmed unless the evidence 'clearly preponderates in the opposite direction.'" *Fletcher*, 477 Mich at 879 (citation omitted); See also *Berger*, 277 Mich App at 710.

Defendant further argues that the trial court failed to consider factors (d) and (f) when it analyzed the statutory best interest factors, MCL 722.23. There is no merit to defendant's argument. Regarding factor (d), the trial court found that the first consideration of the factor, the length of time the child has lived in a stable, satisfactory environment, favored defendant, but found that the second consideration, the desirability of maintaining continuity, did not favor defendant. Consequently, the trial court stated that it was not going to further consider this factor. Regarding factor (f), the moral fitness of the parties involved, although the trial court stated that it was "not weighing" the factor, it clearly, in fact, did consider and weigh it. The trial court stated that it was concerned about some of defendant's behavior, but found that there was not enough evidence of any "moral defects" affecting the child. Thus, the court considered

factors (d) and (f) as it must. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). A court need not give equal weight to each best interest factor. *Berger*, 277 Mich App at 705.

Defendant also argues that the trial court's findings on factors (b), (g), (h), (j), and (1) were against the great weight of the evidence. We disagree.

Factor (b) concerns "[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." MCL 722.23(b). The trial court stated that there had not been much discussion concerning "the religious end of thing[s]," but "on the educational end," it found that plaintiff was the favored parent. For the reasons already discussed, the trial court's finding was not against the great weight of the evidence.

Factor (g) considers "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court found that factor (g) favored plaintiff. There is no question that plaintiff is the healthier parent. Defendant is a survivor of thyroid cancer, and she takes medication for her lack of a thyroid. Defendant is also on numerous medications for arthritis, cholesterol, asthma, depression, anxiety, and insomnia. Like each best interest factor, the question under factor (g) is whether the parents' mental and physical health affects their ability to parent. See *Fletcher*, 447 Mich at 886-887. The trial found that defendant's mental and physical health did affect her parenting ability. We defer to the trial court's superior fact-finding ability, *Berger*, 277 Mich App at 705-707, and cannot say that the court's finding was "against the great weight of evidence," MCL 722.28, or that the evidence "'clearly preponderates in the opposite direction.'" *Fletcher*, 477 Mich at 879 (citation omitted).

Factor (h) concerns "[t]he home, school, and community record of the child." MCL 722.23(h). Describing the minor child's academic record as "horrible," the trial court found that factor (h) did not lend itself to defendant's favor.

The evidence does not clearly preponderate in the opposite direction of the trial court's finding. Admittedly, the minor child had never failed a grade; at the end of each school year, he was always promoted to the next grade. Nonetheless, the evidence supports the trial court's description of the child's academic record as "horrible." The minor child had been dismissed from Kalamazoo Day, in part, because the minor child refused to do his class work. This problem continued while the minor child attended Gull Lake Public Schools. The child's teachers at Gull Lake Public Schools testified that the minor child often refused to do his class work and that, when the uncompleted class work was sent home, it did not always come back completed. The minor child's failure to complete class work earned him some Fs on his fourth grade report card. The testimony of the minor child's teachers also showed that the minor child engaged in disruptive behavior in the classroom. Under these circumstances, the trial court's finding that factor (h) did not favor defendant was not against the great weight of the evidence.

MCL 722.23(j) requires consideration of "[t]he 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." Based on defendant's pattern of sharing information, the trial court found this factor favored plaintiff.

Again, the evidence does not clearly preponderate in the opposite direction of the trial court's finding. Although defendant claimed that she kept plaintiff informed of how the minor child did at Kalamazoo Day, plaintiff testified that defendant never informed him that the minor child was having behavioral issues at the school. Plaintiff testified that he felt "sucker punched" by defendant when he learned from the director of Kalamazoo Day why the minor child had been dismissed from the school. Plaintiff also testified that he learned defendant had stopping bringing the minor child to occupational therapy with a counselor when he stopped receiving explanations of benefits. There was evidence of other instances where defendant failed to share information with plaintiff. Plaintiff testified that defendant did not inform him that she had signed the minor child up to play basketball and that the child had been prevented from playing on the team that practiced on Friday nights. Defendant's former coworker testified that defendant said that she had not told plaintiff that the minor child had placed her hand near his private area. Accordingly, the trial court's findings that defendant had a pattern of not sharing information and that factor (j) favored plaintiff was not against the great weight of the evidence.

Factor (l) concerns "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). We find no merit to defendant's argument that in considering this factor the trial court improperly required perfection of her. In mentioning that the minor child had numerous tardies at Kalamazoo Day, that defendant had taken the minor child out of school for a week to go to Florida, that defendant was consistently late to therapy appointments, and that defendant had forgotten to pick up the minor child from a restaurant, the trial court was not requiring perfection from defendant. The trial court indicated that each incident, in isolation, was not cause for worry. But, the trial court concluded the incidents showed a pattern in defendant's behavior that indicated defendant just did not view things as important until there was a crisis. The evidence supported the trial court's finding.

Defendant also argues that the trial court erred in using a hearsay statement in a police report that defendant sits at the computer all night when analyzing factor (1). Even though the police report contained hearsay, it was defendant who moved to admit it into evidence. "[E]rror requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Moreover, even without this hearsay, the trial court's finding regarding factor (l) was not against the great weight of the evidence.

In sum, in Docket No. 302747, we must affirm the trial court's findings of fact because they are not "against the great weight of the evidence." MCL 722.28. It follows that the trial court did not commit "a palpable abuse of discretion or a clear legal error on a major issue," *id*., by finding that clear and convincing evidence supported changing the child's established custodial relationship from defendant to plaintiff was in the best interest of the child. MCL 722.27(1)(c); *Berger*, 277 Mich App at 710. Consequently, we must affirm the trial court's October 22, 2010 order changing custody of the minor child. MCL 722.28.

In Docket No. 305971, regarding defendant's motion to change the custody of the child back to her, we review the trial court's determination regarding the existence of proper cause or change of circumstances under the great weight of the evidence standard. *Corporan*, 282 Mich App at 605. Under this standard, the Court defers to the trial court's findings of fact unless the findings clearly preponderate in the opposite direction. *Id.* Based on our review of the record,

we conclude that the trial court's finding that defendant failed to establish a change of circumstance or proper cause was not against the great weight of the evidence. MCL 722.27(1)(c); MCL 722.28; *Parent*, 282 Mich App at 154.

We affirm. Defendant as the prevailing party, may tax costs pursuant to MCL7.219.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey