

STATE OF MICHIGAN
COURT OF APPEALS

CHELSEA BAIRD,

Plaintiff-Appellant,

v

JOSHUA RICHMOND,

Defendant-Appellee.

UNPUBLISHED
March 20, 2012

No. 304901
Clinton Circuit Court
Family Division
LC No. 08-020452-DS

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this child custody dispute, plaintiff Chelsea Baird appeals by right the trial court's order granting defendant Joshua Richmond's motion to change custody for their minor child. We conclude that the trial court did not err when it determined that there were changed circumstances sufficient to warrant a review of the child's custody arrangements, but erred when it refused to consider evidence of past conduct in assessing whether a change was in the child's best interests. For these reasons, we affirm in part, reverse in part, and remand for additional proceedings consistent with this opinion.

Baird and Richmond are the natural parents of a minor child born in September 2007. They initially stipulated in March 2009 to joint legal custody with Baird having sole physical custody and Richmond entitled to parenting time. In December 2010, Richmond moved for sole physical custody of the child, alleging that Baird had a tumultuous relationship with her boyfriend, Kyle Morey, against whom she sought and received a personal protection order (PPO) in June 2010. Richmond alleged that he was concerned that the incidents of physical violence between Baird and Morey "could or may have" occurred in the child's presence and that Baird continued to have contact with Morey even after getting the PPO. Richmond also alleged that Baird lived with her parents and that they too engaged in domestic violence; that Baird had received a minor in possession conviction in August 2010 with a blood alcohol level in excess of .20 grams per 100 milliliters; permitted her father to watch the child even though her father was a known marijuana grower and user; and had generally exposed the child to arguing, drinking, swearing, and violence.

The court referred the matter to the Friend of the Court. At the hearing, the referee restricted the evidence to events that had occurred since the entry of the last order, except as otherwise necessary to show a change in circumstances. At the conclusion of the hearing, the referee determined that Richmond had failed to sustain his burden to show proper cause or change in circumstances and, even if he had, there was not clear and convincing evidence that changing custody was in the child's best interests. Richmond filed objections to the referee's determinations, and the trial court held a de novo evidentiary hearing. The trial court permitted the parties to present additional evidence because it believed the referee hearing was improperly limited, but it still limited both presentation of proofs, and later consideration of proofs, to those events occurring after entry of the last custody order.

The trial court concluded that Richmond had shown proper cause or change in circumstances based on Baird's new abusive relationship, drinking behaviors, and failure to comply with a court order requiring no drinking in front of the child. The trial court then considered the 12 statutory best interest factors, see MCL 722.23, and determined that the parties were equal on all but four, which favored Richmond. The court concluded that it was in the child's best interests that Richmond take custody of the child and, accordingly, granted Richmond's motion. Baird filed multiple motions arguing that the trial court improperly limited the scope of the evidence. She also attempted to provide additional "new" evidence that was obtained after the hearing. The trial court denied each of these motions, concluding, among other things, that under *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), it could not consider any events occurring before entry of the last custody order and that the "new" evidence had been available at the time of the hearing.

Baird now appeals.

Baird first contends that the trial court erred in limiting the evidence submitted and considered to those events occurring after entry of the last custody order.

"[A]ll custody orders must be affirmed on appeal unless the trial court's findings were 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." Clear legal error is when a trial court "incorrectly chooses, interprets, or applies the law." [*Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008) (citations omitted).]

Although Richmond asserts that the trial court never explicitly limited itself to considering those events that occurred after the entry of the March 2010 order, the record belies that assertion. First, the referee hearing transcripts, on which the trial court relied, expressly limited the proofs to that time period, except to the extent necessary to show what circumstance were like before the order to determine if there was a change. In addition, the trial court not only made several statements during the hearing restricting proofs to events after entry of the last order, but explicitly stated in its written order that it was not considering such evidence. Therefore, we consider whether the trial court properly limited the evidence.

A trial court generally has the authority to limit the presentation of evidence, see MRE 611; this is especially true where the proposed evidence is not relevant to the determination at issue. See MRE 401; MRE 402; MRE 403. And, in *Vodvarka*, the Court did hold that, when considering whether there was a change in circumstances sufficient to warrant reconsidering custody, a trial court should limit itself to considering the evidence since the last custody order. *Vodvarka*, 259 Mich App at 501. However, the Court also clearly stated that its limitation was applicable only to the question of whether a change in circumstances or proper cause exists. *Id.* at 514-515. Thus, although the trial court could not consider evidence before entry of the order in determining whether Richmond had met his burden to show change in circumstances or proper cause, there existed no such blanket limitation for the best interests determination. Indeed, such a restriction would be contrary to the point of determining a child's best interests. At a minimum, evidence of prior behaviors is necessary to determine whether a party is continuing to make bad decisions or working to improve their life. Certainly, nothing prevents the trial court from weighing the evidence of recent behaviors more heavily. Indeed, it would seem quite reasonable to do so. The court may not, however, draw an arbitrary temporal line and refuse to consider any behaviors that occurred before that time. Rather, the trial court must consider all evidence that might be relevant to the best interests determination.

The record is clear, however, that the trial court erroneously believed either that it had to or was permitted to limit evidence to only those events occurring after entry of the March 2009 custody order. The trial court made a significant error of law in this regard, and we must, accordingly, reverse the custody order. See *Powerly*, 278 Mich App at 527. Further, because the current record does not contain the evidence at issue, the custody determination cannot be made on the record; instead, we conclude that the trial court must hold a new evidentiary hearing on the child's best interests at which the parties should be permitted to present all relevant evidence concerning the child's best interests. In light of this conclusion, we need not consider Baird's arguments related to the trial court's findings on the best interest factors. Because the findings were made on a truncated record, they are necessarily flawed.

Additionally, Baird argues that the trial court erred in finding that there was a change in circumstances or proper cause. "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). We defer to the trial court's findings unless the evidence "clearly preponderate[s] in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

In its bench opinion awarding sole physical custody to Richmond, the trial court found that there was "proper cause or change of circumstances":

Our last order was March 30th, 2009. Under that order the parties had joint legal custody and mother was granted physical custody There were provisions in that order that neither party was to consume alcohol or be under its influence during parenting time and then there were parenting times set forth therein. Since that last order, there have been some changes, significant changes. We have had testimony, undisputed testimony, including from [Baird] and her mother, that she has violated the order of March 30, 2009 on several occasions. She indicated that she would drink including while she had the minor child, which

was contrary to the court order. She was in fact arrested on one occasion as a minor in possession when her blood alcohol was over point 2. She has exposed . . . the child to a series of domestic violence incidents with Mr. Morey, in fact, she had to obtain a PPO against him because she alleged about 20 violations, 20 incidents of domestic violence including physical violence toward her and that after the PPO was issued she continued to see him and continued to allow him to transport and watch the minor child.

MCL 722.27(1)(c) requires a trial court to find either proper cause or change in circumstances before revisiting custody. “Proper Cause” requires proof, by a preponderance of the evidence, that there exists an appropriate ground, relevant to at least one of the statutory best interest factors and “of such magnitude to have a significant effect on the child’s well-being,” for legal action to be taken by the trial court. *Vodvarka*, 259 Mich App at 512. A “change in circumstances” requires proof “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).

Baird does not dispute that the events cited by the trial court were relevant to one of the best interest factors. Rather, Baird objects to the consideration of the incidents of drinking and domestic violence as constituting proper cause or change in circumstances because there was no showing of a direct impact on the child. However, establishing a change in circumstances only requires that the conditions “have *or could have* a significant effect on the child’s well-being.” *Id.* (emphasis added). The Court in *Vodvarka* noted that it chose the phrase “could have” to specifically “signify that a court need not await some negative effect on a child before undertaking an examination of the child’s best interests.” *Id.* at 511 n 10. There is no question that Baird’s excessive drinking and continued exposure to domestic violence could have a significant impact on the child’s well-being. Therefore, the trial court properly determined that there had been a change in circumstances sufficient to revisit custody. *Id.*; MCL 722.27(1)(c).

Baird next argues that the trial court erred in finding an established custodial environment with both parents. We disagree with Baird’s characterization of the record. The trial court only made a finding of an established custodial environment with respect to Baird. It made no determination regarding Richmond, and none was necessary given the conclusion that an established custodial environment existed with Baird. Because it was Richmond seeking to change that environment, as the trial court recognized, he bore the burden to demonstrate by clear and convincing evidence that a change in custody is in this child’s best interest. *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010).

Baird also argues that the trial court erred in failing to consider joint custody. In light of our reversal, we need not consider this issue. We note, however, that MCL 722.26a requires only consideration of “joint custody,” not joint *physical* custody. Here, where the trial court awarded joint legal custody, one might conclude that the trial court did, in fact, “consider an award of joint custody.”

In conclusion, the trial court did not err when it found that there were changed circumstances that warranted a review of the child's custody arrangements. However, in making the best interests determination, the trial court erred by improperly limiting the evidence. The trial court should have allowed the parties to present evidence that might be relevant to determining what is in the child's best interests, even if that evidence concerns events that occurred before March 2009. For these reasons, we affirm the trial court to the extent that it determined that there was a change in circumstances sufficient to warrant reconsideration of the child's custody arrangements, but reverse its best interests determination and remand for a new hearing on the child's best interests. Both parties should be permitted to present whatever evidence they believe is relevant, subject to the general rules of evidence, without regard for whether that evidence was presented previously at the referee hearing or the de novo review hearing.

Affirmed in part, reversed in part, and remanded for an evidentiary hearing solely on the best-interest factors. We do not retain jurisdiction. Neither party having prevailed in full, neither may tax costs. MCR 7.219(A).

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly