

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY J. LIVINGSTON,

Plaintiff-Appellant,

v

JENNIFER LIVINGSTON,

Defendant-Appellee.

UNPUBLISHED

June 12, 2012

No. 307120

Bay Circuit Court

LC No. 04-007440-DM

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff father appeals by right the circuit court's order granting a change in custody of the parties' minor children. We affirm.

The parties divorced in 2007, and the circuit court granted the parties joint legal custody of the children, with primary physical custody to plaintiff. In 2010, defendant sought to change the custody order. The evidence at the hearings on the change in custody focused primarily on defendant's mental health. Defendant's psychiatrist testified that since 2007, defendant had been doing "especially excellent" and had complied with her medication plan, treatment, and counseling. The psychiatrist opined defendant was not a threat to the children. Similarly, a psychologist/social worker who had been working with the family since 2007 testified that defendant's treatment was very consistent, and that defendant had a "very successful conclusion" of psychotherapy intervention and "a successful intervention with medication management."

The circuit court found that since 2007, defendant had made good progress on her mental health. The court further found that defendant's progress was a "success story," and that she had shown that she could deal with her mental health appropriately. The court then determined that the improvement in defendant's mental health was a significant change of circumstances. The court also found that the children had an established custodial environment with plaintiff. Reviewing the statutory best interest factors, MCL 722.23, the court concluded that a change to joint physical custody was in the children's' best interests.

MCL 722.28 provides that in child-custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the circuit 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." In addition, a circuit court may not modify a custody order unless the moving party has demonstrated proper cause or a change of circumstances to warrant reconsideration of

the custody decision. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The movant has the burden of proving by a preponderance of the evidence that proper cause or a change of circumstances exists. *Vodvarka*, 259 Mich App at 509. To establish a change of circumstances, the 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.” *Id.* at 513. We review a circuit court’s determination regarding a change of circumstances under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

Plaintiff first argues that the circuit court erred in finding a change of circumstances sufficient to warrant a modification of the custody order. We disagree. A change of circumstances requires a “change,” so the circuit court must compare the present circumstances with the circumstances that existed at the time of the last custody order. *Vodvarka*, 259 Mich App at 514. In this case, the circuit court recognized that defendant had a “long history of psychiatric difficulties.” The court found, however, that since the last custody order, defendant had not displayed symptoms of psychiatric difficulties that could cause danger to the children.

This finding was not against the great weight of the evidence. Testimony from defendant’s psychiatrist and the parties established that defendant had not threatened the children since 2004. The psychiatrist further testified that defendant had shown no indication of depression, mood swings, or delusions, and that defendant was not a threat to the children. The evidence also indicated that defendant was maintaining a full-time job and was functioning in a positive manner. From this evidence, the circuit court could conclude that the change in defendant’s mental health was a change in circumstances that warranted reconsideration of the custody order.

Plaintiff next argues that the circuit court erred by finding that a change in custody was in the children’s best interest. Specifically, plaintiff maintains that the circuit court failed to recognize the serious nature of defendant’s threats to the children. We disagree; the circuit court commented extensively on defendant’s previous condition, her suicide attempt, and her suicide ideations, including thoughts of killing herself and her children. The circuit court went on to find that defendant now has good insight into her condition and that she is dealing with her condition appropriately. We find no error warranting reversal in the circuit court’s conclusions.

Plaintiff last argues that the circuit court abused its discretion in modifying custody, because statutory factors (b), (d), (e), (g), and (h) favored plaintiff, and the parties were neutral on the other factors. We disagree. We review the court’s ultimate determination of custody for an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 880-881; 526 NW2d 889 (1994). An abuse of discretion exists when the circuit court’s decision is “palpably and grossly violative of fact and logic.” *Id.* at 879 (internal quotation and citation omitted). A court need not give equal weight to all of the factors, but may consider the relative weight of the factors as appropriate under the circumstances. *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

The circuit court was within its discretion when it weighed the children’s preferences, the psychologist/social worker’s recommendation, and the benefits of having both parents involved in the children’s lives. It may be reasonable for a court to conclude that the children’s best interest is “significantly advanced by having two parents who are at all times responsible for and

actively involved” in the children’s care. See *Heid v Aasulewski*, 209 Mich App 587, 594-595; 532 NW2d 205 (1995). The circuit court found that the children “would greatly benefit from their mother being as fully in their lives as the father.” In concluding that there was clear and convincing evidence supporting the change to joint custody, the circuit court stated that it was making its recommendation “due primarily to the children’s point of view” and the significant change in defendant’s mental health problems. Under these circumstances, this Court cannot conclude that the circuit court’s award of joint custody to the parties was grossly violative of fact and logic.

Affirmed.

/s/ Stephen L. Borrello

/s/ Peter D. O’Connell

/s/ Michael J. Talbot