STATE OF MICHIGAN

COURT OF APPEALS

JAY ROBERT JOHNSTON,

Plaintiff/Counter-Defendant-Appellant,

v

AUTUMN NICOLE JOHNSTON,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
August 21, 2012

No. 308247
Lapeer Circuit Court
LC No. 09-041666-DM

Before: O'CONNELL, P.J., AND JANSEN AND RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion to change custody of the parties' minor children. We reverse and remand for further proceedings.

I. BACKGROUND FACTS

Plaintiff and defendant were married for over 10 years and had two children together, a son and daughter. The parties eventually decided to divorce for various reasons, including defendant's five year relationship with a married man. The judgment of divorce was entered on September 10, 2010, and the court ordered joint legal custody but sole physical custody to plaintiff, who was planning to move with the children to Midland, Michigan. Defendant's parenting time was every other weekend and every Wednesday (non-overnight) during the school year. Summer vacations and other holidays were divided equally. The trial court also ordered that plaintiff was allowed to move to Midland with the children and if defendant moved there as well, she could request the physical custody of the minor children to be shared.

After the judgment of divorce was entered, plaintiff moved to Midland with the children and worked at Dow Chemical, earning approximately $72,000 a year. Defendant remained living in Columbiaville, Michigan, seeking better employment, as she only earned $10,000 a year. Two months after the divorce was final and while still in Midland, plaintiff and the children began living with plaintiff's girlfriend and her two children. Plaintiff and his girlfriend eventually married in September 2011. Also in September 2011, defendant began working at Quick Reliable Printing in Midland, earning $15 an hour and working 40 hours a week. Because she wanted to be closer to the children and her new job was in Midland, defendant moved there in October 2011. She procured a three-bedroom apartment a few miles from where plaintiff was

residing with the children. Defendant then filed a motion to change custody, requesting joint physical custody and parenting time on a week on/week off basis.

A hearing was held and defendant claimed that the children were not being bathed and their teeth were not being brushed. She also alleged that the children were experiencing health problems that plaintiff was not addressing properly, such as constipation, cavities, a fever, and a sore on their daughter's lip. Additionally, defendant claimed that the children were emotionally upset by plaintiff's new marriage and living arrangement and were having behavioral problems. Defendant provided examples such as their son smearing his fecal matter on the walls and bed, and their daughter exhibiting disturbing signs of punching herself in the face and pulling her hair out. Their son also had to repeat first grade because as opposed to enrolling him in another year of kindergarten as recommended, plaintiff enrolled him in first grade. Defendant also asserted that plaintiff's step-children were physically assaulting the children, leaving bruises, and that the children did not want to return to plaintiff's house when defendant's parenting time ended.

Plaintiff, on the other hand, testified that the children bathe regularly and live in a clean environment. He also testified that he tells them he loves them, they come to him with problems, feelings, and triumphs, and he provides them with food, clothing, and access to proper medical care. He also helps them with their homework, attends parent teacher conferences, teaches them responsibility through household chores, and disciplines them when needed. While plaintiff admitted that the children did not see a dentist for a year, this was only because they were waiting for a family appointment, which was never available. Plaintiff also explained that after witnessing his daughter hit herself one time, he had a frank discussion with her about how this was unacceptable behavior. Plaintiff never witnessed his son smear fecal matter anywhere, and his son's progress since repeating first grade was excellent. While plaintiff acknowledged that there were some difficulties with the remarriage, he felt that everyone was getting along despite the occasional squabble. Plaintiff also claimed that defendant would constantly request more parenting time and was constantly early to pick up the children and late to drop them off. Furthermore, plaintiff claimed that defendant violated court orders by talking to the children about contentious issues in the divorce. Plaintiff also testified that while their son sometimes became upset when returning to plaintiff's house, defendant exacerbated the situation by dragging out the goodbyes and engaging in "theatrics."

At the close of the hearing, the court stated that when originally deciding custody in the judgment of divorce, joint physical custody would have been ordered if logistically possible. The trial court also referred to the judgment of divorce as a conditional custody order, with the condition being defendant moving to Midland. The court stated that if this was a change of custody action, good cause to revisit custody was defendant's relocation, her change of employment, and "a lot of little issues regarding the children" that "add up to a lot." The court then found that there was an established custodial environment with plaintiff and discussed the best interest factors. The trial court found that the ability to provide for the children's physical needs had favored plaintiff, but now favored each party equally. In regard to moral fitness of the parties, the trial court stated that while this factor had weighed slightly in plaintiff's favor because of defendant's affair, it now weighed equally considering plaintiff's behavior in moving in with his girlfriend so soon after the divorce. As for all of the other factors, the trial court stated that they either favored both parties equally or did not apply. Therefore, the trial court found that "maybe" the children needed more time with defendant and that it was in the best

interests of the children to modify custody. The trial court granted joint physical custody and every other week parenting time. Plaintiff now appeals.

II. STANDARD OF REVIEW

Three different standards of review apply in child custody cases. *Foskett v Foskett*, 247 Mich App 1, 4; 634 NW2d 363 (2001). We review the trial court's "choice, interpretation, or application of existing law" for clear legal error. *Id.* at 4-5. We review the trial court's findings of fact, such as the finding of an established custodial environment, under the great weight of the evidence standard, and "this [C]ourt will sustain the trial court's factual findings unless the evidence clearly preponderates in the opposite direction." *Id.* at 5 (internal quotations and citation omitted); see also *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). Finally, we review the trial court's discretionary rulings "for an abuse of discretion, including a trial court's determination on the issue of custody." *Foskett*, 247 Mich App at 5. "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

III. ANALYSIS

A. Change of Custody Action

Defendant challenges that this was not really a change of custody, but merely the implementation of the conditional custody order in the judgment of divorce. However, while the judgment of divorce included a statement that defendant could relocate to Midland and petition to change custody, there is no language guaranteeing that defendant's request would be granted. This Court also has held that court orders are "irrelevant" for issues like determining the existence of an established custodial environment or the burden of proof in change custody actions. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Furthermore, defendant fails to cite any caselaw to support a finding that conditional language in custody orders implies that this Court may dispense with the change of custody analysis. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (internal quotations and citation omitted) (stating that "[i]t is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). Thus, we construe this action as a change of custody case.

B. Proper Cause or Change of Circumstance

As the moving party in a change of custody action, defendant "has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists" to justify a modification of custody. *Vodvarka*, 259 Mich App at 509. The finding of proper cause or change of circumstance must be determined "*before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors." *Id.* (emphasis in original). Hence, in order to reach plaintiff's claims about the established custodial environment or the best interest factors, we first

must determine that the trial court correctly found that a preponderance of the evidence established proper cause or change of circumstance.

"[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka*, 259 Mich App at 511. The grounds relied upon "must be of a magnitude to have a significant effect on the child's well-being to the extent that revisiting the custody order would be proper." *Id.* at 512. In order to establish a change of circumstance, "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." *Id.* at 513 (emphasis in original). However, the evidence of a change of circumstance "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." *Id.* at 513-514. For both proper cause and change of circumstance, a court may consider the best interest factors of MCL 722.23. *Id.* at 512, 514.

In this case, the court found that there was good cause to revisit the custody situation because of defendant's relocation, her change of employment, and the "little issues" regarding the children. In regard to defendant's relocation and change of employment, these are merely normal life changes that occur frequently in the course of a parent's life. See *Vodvarka*, 259 Mich App at 513. Moreover, defendant failed to demonstrate how these changes significantly affect the custodial circumstances surrounding the children. Defendant has been, and continues to be, a constant presence in the children's lives. Both parties agree that defendant exercises all of her parenting time and has enjoyed additional time with the children. Further, defendant testified that she and her daughter have become even closer since the divorce and have a better relationship. Thus, defendant has failed to demonstrate that her relocation or new job has or will have "a *significant* effect on the child's well-being," *Vodvarka*, 259 Mich App at 513 (emphasis in original), as she already has a significant presence in and involvement with the children's lives. In reaching this conclusion, we are "[e]ver mindful that our Legislature's intent underlying the Child Custody Act was to 'minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an established custodial environment, *except in the most compelling cases*[.]'" *Foskett*, 247 Mich App at 6 (emphasis in original), quoting *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981).

In addition, the trial court's reference to the "little issues" regarding the children is an insufficient factual finding. "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." *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). The hearing was replete with allegations concerning the children's well-being, some of which were quite serious, and many of which were contested. Yet, the trial court only referenced "little issues" regarding the children, without providing any further explanation or detail. Without knowing what the trial court was referring to or whether the court found defendant's allegations to be credible, we are unable to determine if the court erred in finding proper cause or change of circumstance. Moreover, it is also unclear from the record whether the trial court would have still found proper cause or change of

circumstance without considering the normal life changes of defendant's relocation or new employment.

C. Conclusion

Since the trial court failed to articulate factors that were not normal life changes in support of its finding of a change of circumstance or proper cause, we are unable to determine whether the threshold showing has been met. Without this threshold showing, plaintiff's claims relating to the best interest analysis or the preferences of the children are premature. We reverse and remand for further factual findings. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Riordan