STATE OF MICHIGAN

COURT OF APPEALS

BRENDA S. LEMONS,

Plaintiff-Appellant,

v

STEVEN W. LEMONS,

Defendant-Appellee.

UNPUBLISHED
February 8, 2000

No. 216481
Monroe Circuit Court
LC No. 96-022980 DM

Before: Jansen, P.J., and Collins and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order changing physical custody of the parties' minor children from plaintiff to defendant. We affirm.

Plaintiff and defendant were married in 1992, but had lived together for several years prior to their marriage. They separated in September 1996, and during the pendency of their divorce action shared joint legal and physical custody of their children, Patrick (DOB 8/19/89) and Kailey (DOB 3/2/94). The parties were able to reach a settlement on all issues except child support, child custody, and parenting time, which were then the subjects of a trial. On April 9, 1998, the court made a record of its findings with regard to the statutory best interests factors of MCL 722.23; MSA 25.312(3).[1] The court found that on a majority of the factors, the parties were equal or the factor did not apply. The court found that factor f, moral fitness, favored defendant, but that factors d and e slightly favored plaintiff (based on defendant's heavy work schedule and the convenience of plaintiff's job as a daycare provider). The court granted physical custody to plaintiff, but granted defendant two out of every three weekends for parenting time. These weekends began on Thursday night so that defendant would be able to get the children ready for school on those Fridays.

Before the written order was entered, the parties were back before the trial court for clarification of issues regarding parenting time and the holiday and vacation schedules. Then, on September 4, 1998, defendant filed a motion for reconsideration and/or change of custody, alleging, among other things, that: (1) plaintiff had moved and enrolled the children in another school district

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

without notifying defendant; (2) plaintiff had been trying to sabotage defendant's time with the children; (3) plaintiff was living with her boyfriend; and (4) the children were now in their fourth school district since the separation. At a September 17, 1998, hearing, the court signed the final divorce judgment and granted defendant's request for an evidentiary hearing on his motion for reconsideration and/or change of custody. At the November 17, 1998, evidentiary hearing, the court heard only new evidence, i.e., evidence addressed to events that occurred since the trial. On December 10, 1998, the court issued an order changing physical custody of the children from plaintiff to defendant. In an attached and incorporated memorandum of law, the court provided detailed bases for its new findings with regard to the best interests factors.

Plaintiff first contends that because an intrastate change in domicile is not a proper cause or change of circumstances sufficient to warrant reanalysis of the best interests factors, the trial court was not authorized to engage in such reanalysis. All 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. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J), 900 (Griffin, J); 526 NW2d 889 (1994). Whether the facts as alleged and/or found constitute a sufficient change of circumstances or proper cause to warrant a reanalysis of the best interests factors is a question of law. See *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). Therefore, we review this issue to determine whether the trial court incorrectly interpreted or applied the law. *Fletcher, supra* at 881.

In a child custody dispute, a trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Thus,

> where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in reconsideration of the statutory best interest factors. [*Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).]

See also *Dehring, supra* at 165. The trial court acknowledged that an intrastate change in domicile does not, standing alone, constitute proper cause or change in circumstances sufficient to revisit a custody matter. *Dehring, supra* at 165-166. However, in this case, the court was faced with evidence of a change of circumstances beyond the move.

The court indicated that its original "narrow decision" in favor of plaintiff was based, in large part, on plaintiff's representations of stability and the fact that the parties got along fairly well and were apparently able to accommodate what the court described as an unusual parenting time schedule. On reconsideration, the court indicated that the circumstances were not as he understood them to be when making his original decision. The court noted, among other things, that plaintiff moved and transferred the children to a different school district without informing defendant and without listing him as a parent on the school emergency information cards, while at the same time listing a male friend as a person to whom the children could be released. The court cited further evidence that plaintiff was apparently

unwilling to facilitate and encourage a close and continuing parent-child relationship with defendant, as well as evidence of her lack of truthfulness with regard to the circumstances surrounding the move. Given the erosion of significant underpinnings on which the court based its original custody decision, we conclude that the trial court properly determined that there was proper cause to reconsider the best interests factors.

Plaintiff next contends that even if it was proper to hold a change of custody hearing and reevaluate the best interests factors, the court made its findings based solely on the intrastate move and on plaintiff's relationships with men. According to plaintiff, neither of these bases was a proper subject for the court's consideration and the existence of plaintiff's relationships was not supported by facts in the record. Whether the court based its findings on improper and unsupported considerations mixes a question of law (whether the bases were improper) with a question of fact (whether the bases were unsupported). Again, this Court must review the question of law for "clear legal error." *Fletcher*, *supra* at 881. The great weight of the evidence standard applies to all findings of fact; a trial court's findings as to the existence of an established custodial environment and as to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* at 879.

When reevaluating the statutory best interests factors from MCL 722.23; MSA 25.312(3), the trial court acknowledged that plaintiff had a right to move intrastate and stated that it was considering the reasons for her move only inasmuch as those asserted reasons indicated her lack of credibility, and the circumstances of the move indicated lack of stability and an unwillingness to facilitate a relationship between the children and defendant. Thus, the court was not considering the move, per se, but rather, the court was legitimately considering the statutory best interests factors in light of the circumstances of the move. With regard to the court's determination that plaintiff made "quick commitments to involve herself with men who are strangers to the children," the court's opinion indicates that it considered this conduct only as it related to stability and moral fitness. Further, the opinion does not indicate that the court inappropriately considered plaintiff's relationships to determine "who is the morally superior adult," but rather, correctly analyzed plaintiff's conduct in terms of whether it would "necessarily [have] a significant influence on how [plaintiff] will function as a parent." *Fletcher*, *supra* at 886-887. Finally, contrary to plaintiff's contentions, the trial court's opinion does not indicate that it considered the acceptability or type of plaintiff's home under factor e; rather, the court discussed plaintiff's lack of stability under both factors d and e. Circumstances can be relevant under more than one best interests factor. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 25-26; 581 NW2d 11 (1998).

With regard to plaintiff's assertion that the court's determinations were based on facts that were unsupported by evidence, we first note that the court's determination that an established custodial environment did not exist, was not against the great weight of the evidence. Consequently, as the court correctly determined, the burden at the change of custody hearing was on defendant, by a preponderance of the evidence, rather than by clear and convincing evidence. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Underwood v Underwood*, 163 Mich App 383, 390; 414 NW2d 171 (1987). When the court addressed each of the best interest factors, it summarized, to some extent, the evidence related to that factor. Our review of the record shows that the court summarized the arguments and evidence accurately. Plaintiff has articulated nothing that would demonstrate that the

facts, as the court found them, were against the great weight of the evidence. Therefore, this Court has no basis on which to find that the trial court erred when making its factual determinations. *Fletcher, supra* at 878-879.

Finally, plaintiff contends that the court erred in its reanalysis of the best interests factors by finding that it would be in the best interest of the children to change physical custody to defendant. The abuse of discretion standard applies to the trial court's discretionary rulings and "[t]o whom custody is granted is a discretionary dispositional ruling." *Fletcher, supra* at 879-880. An abuse of discretion is found when the result was so 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.* The court's discretion is also limited factually, in that its determinations must be supported by the weight of the evidence. *Id.* at 881.

A court need not give equal weight to all factors, but may consider the relative weight of the factors as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998). On reevaluation of the best interests factors, the trial court found equivalence between the parties or inapplicability with regard to factors a, b, c, g, and k. The court found that factor i favored plaintiff and that factor f favored defendant. These findings were the same as those made the first time the court considered the custody issue. However, the court found differently on the remaining factors. The court found in favor of defendant on factors d, e, and h, based on plaintiff's instability. The court also found that factor j was strongly in favor of defendant based on evidence that plaintiff was uncooperative with regard to facilitating defendant's relationship with the children.[2]

Because the court's conclusion with regard to each of the factors was supported by the evidence, and because the factors, as found by the court, clearly preponderated in favor of defendant, we conclude that the court's decision to change custody did not demonstrate a perversity of will, defiance of judgment or an exercise of passion or bias.[3] *Fletcher, supra*, 447 Mich 879-880. Moreover, given the fact that the court found for defendant on a majority of the factors that it did not find equal or inapplicable, plaintiff's claim that the court gave overwhelming weight to factor f is without merit. See *McCain, supra* at 130-131. Accordingly, we find that the court did not abuse its discretion by changing the physical custody of the parties' minor children from plaintiff to defendant.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan

[1] The statutory factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The 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.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The 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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23; MSA 25.312(3).]

[2] We note that the trial court expressly indicated that defendant was not to pick Patrick up from school on Thursdays and that plaintiff's resistance to defendant's attempts to do so cannot appropriately be characterized as non-cooperation.

[3] Plaintiff spends much time arguing about the factor addressed to domestic violence. In its original assessment of factor k, the court determined that when the parties feuded, defendant was more apt to express himself physically, and that there was evidence that he may have once thrown a dresser drawer that actually struck plaintiff. The court determined, however, that this did not appear to be an ongoing situation or something that would be handed down to the children or have an adverse effect on them. At the evidentiary hearing, no new evidence was presented with regard to domestic violence and the court again determined that the factor was not applicable. On this record, we are not prepared to

conclude that this finding was against the great weight of the evidence or that the court's use, or non-use, of this factor amounted to an abuse of discretion.