STATE OF MICHIGAN

COURT OF APPEALS

KELLY FENNER,

Plaintiff-Appellee,

v

RONALD FENNER,

Defendant-Appellant.

UNPUBLISHED
March 20, 2001

No. 222976
Genesee Circuit Court
LC No. 91-169732-DM

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

In this child custody case involving defendant's motion for a change of custody, defendant appeals as of right from a family court order holding that he failed to establish proper cause or a change of circumstances warranting analysis of the statutory best interests of the children factors. We affirm.

Defendant first contends that the family court erred by ruling that no change in circumstances was established because the court made such a determination prior to assigning the matter to the referee for a hearing. In the context of a child custody proceeding, we review a family court's findings of fact to determine whether they contravene the great weight of the evidence, a family court's discretionary rulings for a palpable abuse of discretion, and questions of law for clear legal error. MCL 722.28; MSA 25.312(8); *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). A court's findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Mogle*, *supra*. An abuse of discretion exists when an unbiased person, considering the facts on which the court relied, would find no justification or excuse for the decision. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

Defendant argues that the family court determined prior to the hearings conducted by the referee that defendant established a change in circumstances warranting an analysis of the children's best interests. MCL 722.23; MSA 25.312(3). In its orders prepared on August 31, 1998 and September 17, 1998, however, the court made no finding of proper cause or a change in circumstances. The court merely referred the matter to a referee for a recommendation regarding change of custody, child support and parenting time. While defendant contends that throughout the hearing, the parties and the referee were under the impression that a change in circumstances already had been established, the record does not support defendant's contention. Because our

review indicates that the court at no time found that defendant had met his burden of establishing a change in circumstances, MCL 722.27(1)(c); MSA 25.312(7), we reject defendant's allegation of error.

Defendant next asserts that the family court erred in determining that he failed to establish either proper cause or a change in circumstances. The plain and ordinary language of MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent that the statutory best interest of the child factors should be considered only when a party seeking modification of a custody order has demonstrated either proper cause or a change in circumstances. Consequently, if the moving party fails to make such a preliminary showing, the family court "is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors." *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

After reviewing the record, we find that the evidence presented did not clearly preponderate against the family court's finding that defendant failed to establish proper cause or a change in circumstances, thereby precluding any analysis of the statutory best interest factors. *Mogle*, *supra*; *Rossow*, *supra*. Several witnesses testified that the children appeared happy and well adjusted in plaintiff's care, and exhibited no signs of emotional or physical disorder. The referee himself met with the children and characterized them as "absolutely delightful and . . . very engaging." For more than one year prior to entry of the court's opinion and order, plaintiff maintained a stable residence with Douglas Guffey, whom plaintiff planned to marry in June 1999. According to more than one witnesses' testimony, plaintiff had ceased consuming alcoholic beverages. While defendant, his mother, and his sister testified that just after the parties' divorce the children were often dirty and smelled bad when defendant picked them up from plaintiff's residence, these witnesses did not maintain that this situation continued at the time of the hearings. Furthermore, while allegations of domestic violence loomed large throughout the hearings, Guffey testified that he never saw plaintiff lose her temper or hit the children.

Both the referee and the family court found that although plaintiff had numerous relationships with different men, the relationships did not seem to adversely affect the children. The court further found that plaintiff seemed to be maturing and getting her life in order. In light of the existing record supporting the court's determinations, we cannot conclude that the court's findings were against the great weight of the evidence.[1] *Mogle*, *supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

[1] While defendant claims that the mere fact that plaintiff previously moved to Florida itself was sufficient to constitute a change of circumstances, we note that this Court has held that an interstate change of residence does not suffice to warrant revisitation of the statutory best interest factors. *Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996).