

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT C. PERKEY,

Plaintiff-Appellant,

v

HEIDI E. PERKEY, a/k/a HEIDI E.
VANDERMOSS,

Defendant-Appellee.

UNPUBLISHED

June 25, 2002

No. 238702

Wayne Circuit Court

Family Division

LC No. 94-435265-DM

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

In this child custody case, plaintiff appeals as of right from the trial court's opinion and order denying plaintiff's motion for change of custody on the basis that plaintiff failed to establish proper cause or a change of circumstances warranting analysis of the statutory best interest factors, MCL 722.23. We affirm.

Plaintiff argues that the trial court erred in determining that he failed to establish either proper cause or a change in circumstances. We disagree.

Whether a change in circumstances exists to warrant modification of a prior custody order is essentially a factual determination. In the context of a child custody proceeding, this Court reviews a trial court's findings of fact to determine whether they contravene the great weight of the evidence, a trial court's discretionary rulings for a palpable abuse of discretion, and questions of law for clear error. MCL 722.28; *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* at 196. 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).

MCL 722.27(1)(c) provides that a trial court may modify or amend a previous custody judgment only for proper cause shown or because of a change in circumstances. See *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001); *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999); *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). The plain and ordinary language of § 27(1)(c) evinces the Legislature's intent that the statutory best interest factors should be considered only when a party seeking

modification of a custody order has first demonstrated either proper cause or a change in circumstances. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Consequently, if the moving party fails to make such a preliminary showing, the trial 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.” *Id.*

Here, plaintiff failed to establish proper cause or a change in circumstances, thereby precluding the trial court from analyzing the best interest factors. The fact that the children may have expressed a desire to live with plaintiff is not a sufficient basis upon which to revisit custody. *Curlyo v Curlyo*, 104 Mich App 340, 349; 304 NW2d 575 (1981). Nor are we convinced that a change in circumstances existed with regard to the children’s academic difficulties, the differences between the parties’ parenting styles and discipline techniques, defendant’s temper or “short fuse,” defendant’s use of “inappropriate language” in the custodial home, defendant’s alleged failure to “stress daily showers or good grooming awareness,” and defendant’s alleged attempts to “sabotage” the relationship between plaintiff and the children. The record reveals that these are the same circumstances that, according to plaintiff, existed in 1999, and were the same issues raised by plaintiff in his unsuccessful motion for change of custody at that time. Thus, there have been no material changes between 1999 and plaintiff’s request for a change of custody in June 2001.

Further, it was undisputed that plaintiff had frequent contact with the children, liberal visitation rights, and joint legal custody. Therefore, he was just as capable as defendant of assisting the children with their homework and hygiene (and thus these concerns were as much his responsibility as they were the responsibility of defendant). Moreover, with regard to defendant’s alleged attempts to sabotage the relationship between plaintiff and the children, it appears from the record that plaintiff could also be accused of attempting to sabotage the relationship between defendant and the children. Plaintiff has repeatedly attempted to remove the children from defendant’s care without showing that there has been a material change in circumstances warranting a removal. In any event, it was undisputed that the children had a good relationship with plaintiff. Defendant indicated that the children loved plaintiff and that he was very affectionate with them and the evidence indicated that plaintiff spent a lot of time with the children and had frequent contact with them. Plaintiff admitted that he was “real close” with the children. Therefore, it does not appear that defendant had sabotaged plaintiff’s relationship with the children. With regard to the allegations of verbal abuse, plaintiff has shown nothing more than that defendant and her husband occasionally lose their tempers and “yell” at the children. There was no showing that the children were being harmed or abused in defendant’s home. In sum, there simply has been no showing that there was any material change in circumstances in the custodial home warranting an analysis of the best interest factors. *Terry, supra* at 534-535; *Dehring, supra* at 164-165; *Rossow, supra* at 458.

Plaintiff claims that the trial court was required to hold an evidentiary hearing with regard to his request for change of custody even if he did not establish a change of circumstances, because a change of custody was in the best interests of the children. We disagree. As previously indicated, the plain and ordinary language of § 27(1)(c) evinces the Legislature’s intent that the statutory best interest factors be considered only when a party seeking modification of a custody order has demonstrated either proper cause or a change in circumstances. *Rossow, supra* at 458; *Dehring, supra* at 164-165. Having failed to make this

preliminary showing, the trial court was not authorized to revisit the prior custody decision by reconsidering the statutory best interest factors. *Rossow, supra* at 458; see also *Dehring, supra* at 164-165. Because plaintiff failed to show proper cause or a change in circumstances, the trial court was not required to conduct an evidentiary hearing.

Plaintiff also claims that an evidentiary hearing was required under MCR 3.210(C)(7). We disagree. MCR 3.210(C)(7) provides as follows:

In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion. [MCR 3.210(C)(7).]

Although plaintiff claims that there were contested factual issues that needed to be resolved by an evidentiary hearing, no hearing was necessary in this case. Before deciding plaintiff's motion for change of custody, the trial judge resolved all contested factual issues in favor of plaintiff. The trial judge specifically indicated that he was "accepting as true the allegations submitted by plaintiff." Because there were no contested factual issues to be resolved, an evidentiary hearing was not required under MCR 3.210(7).

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot