STATE OF MICHIGAN

COURT OF APPEALS

RONALD J. ETTINGER,

Plaintiff-Appellee,

v

CHERYL I. ETTINGER,

Defendant-Appellant.

UNPUBLISHED
August 16, 2002

No. 238031
Oakland Circuit Court
LC No. 99-626412-DM

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right the order granting plaintiff's motion to change custody and awarding sole physical and legal custody of the parties' minor children, Jordan and Jamie, to plaintiff.[1] We affirm.

Defendant first argues that the trial court improperly entered an order changing custody without first holding an evidentiary hearing as required by MCL 722.27(1)(c).[2] A review of the original judgment of divorce and the January 5, 2001, order at issue reveals that the trial court did not change custody, but rather modified the parenting time schedule and gave plaintiff decision-making authority on educational and medical issues. The trial court also scheduled, and later held, an evidentiary hearing with regard to the issue of custody. Thus, defendant's argument that custody was changed without an evidentiary hearing is misplaced.[3]

[1] In the original judgment of divorce, defendant was given sole physical custody and the parties shared joint legal custody. After the divorce, plaintiff moved for sole physical and legal custody.

[2] MCL 722.27(1)(c) precludes a temporary change of custody without first holding a hearing. *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991).

[3] In support of her argument that the trial court changed custody in its January 5, 2001, order, defendant cites the trial court's statement, made at trial, "What was the most significant to me, last January—was it January that I changed—temporarily changed custody?" However, a court speaks through its judgments, orders, and decrees, not its oral statements or written opinions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). We additionally note that defendant did not file an interlocutory appeal with regard to the January 5, 2001, order.

Next, defendant argues that joint custody was effectively changed to sole custody by the trial court's ruling that plaintiff was to have decision-making authority regarding educational issues. In support of this argument defendant relies on *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993). In *Lombardo*, this Court held that a trial court "should not relinquish its authority to determine the best interest of the child to the primary physical custodian." *Id.* at 160. The present case is distinguishable in that (1) plaintiff did not have sole physical custody and, therefore, the trial court did not hold that plaintiff, by virtue of being the sole physical custodian, had decision-making authority regarding educational issues, and (2) the trial court considered the best interest of the children before ordering that plaintiff have sole decision-making authority.

Defendant also argues that the trial court erred in changing the original custody arrangement to give sole legal and physical custody to plaintiff. 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; *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). Because a custody determination is a discretionary one, the trial court's custody decision must be reviewed under the abuse of discretion standard. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994). Finding an abuse of discretion must be more than a disagreement in judicial opinions between the trial court and this Court. *Id.* at 897. In reviewing the findings of fact, this Court should defer to the trial court's determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

A party who seeks to change custody must make a showing of a proper cause or a change in circumstances, MCL 722.27(1)(c). The trial court found that circumstances had changed since the judgment of divorce was entered. The trial court found that, following the divorce in which the parties agreed to joint legal custody, defendant created conflict by making decisions without plaintiff 's consent, such as the decision to home-school the children despite Jordan's speech and language difficulties, low maturity, and lack of socialization skills. The trial court did not find credible defendant's testimony that she tried to obtain special services for Jordan. In reviewing the findings of fact, this Court should defer to the trial court's determination of credibility. *Mogle, supra*, 241 Mich App 201. The court also found that circumstances had changed because plaintiff no longer agreed with the provision in the agreement with regard to the decision not to immunize the children or provide them with traditional medical care or check-ups. These facts, which were confirmed in an expert's report, support the trial court's holding that a change of circumstances was shown.

Defendant next argues that the trial court erred in finding that there was an established custodial environment with plaintiff. Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the best interests of the children. *Mogle, supra* at 197.

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

Here, the trial court found that a custodial environment existed with both defendant and plaintiff. Plaintiff lived in the marital home until the end of May 2000, after the divorce was finalized. For the next three months, the children stayed overnight at plaintiff's home for a minimum of three nights per week. During the summer of 2000, the children stayed with plaintiff for nine days. Beginning in January 2001, the trial court ordered that the children stay three days and four nights per week with plaintiff. Further, the testimony indicates that the children look to both parents for guidance, discipline, the needs of life, and parental comfort. Dr. Schaer's report also indicates that the children have strong ties with both parents. Under these circumstances, the trial court did not err in finding that an established custodial environment existed with both plaintiff and defendant.[4]

If an established custodial environment exists, a court may order a change of custody only if clear and convincing evidence is presented that the change is in the child's best interest. The party seeking the change bears the burden of proof. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 24-25; 614 NW2d 183 (2000). The child's best interest is measured by the factors set forth in MCL 722.23. In deciding which party should have custody of the minor children, the trial court properly considered the statutory best interest factors.[5]

The trial court weighed factor (b), the capacity and disposition of the parties involved to give the child love, affection, guidance and to continue the education and raising of the child in his or her religion or creed, equally in favor of both parties. Defendant argues that the trial court should have weighed this factor in her favor because defendant concentrates on her children's feelings, is attentive to their needs, and explores the Jewish faith with them. However, the trial court specifically considered defendant's testimony that she continues to maintain a Jewish home and intends to raise the children in the Jewish faith. The trial court also found that defendant is able to give the children love, affection, and guidance. Nonetheless, the trial court found that the parties were both able to give love, affection, and guidance. The evidence supports this finding. Therefore, the trial court's finding on this factor was not against the great weight of the evidence.

The trial court weighed factor (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, in

[4] Defendant argues that the trial court's finding of a custodial environment was based on the improperly entered January 5, 2001, order. As discussed, *supra*, the January 5, 2001, order was not improperly entered. Additionally, the trial court based its finding on facts that arose independent of the January 5, 2001, order. Moreover, a custodial environment can be established as a result of a temporary or permanent custody order, in violation of a custody order, in the absence of a custody order, or pursuant to an order which was later reversed. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). The court's concern is not with the reasons the custodial environment was established, but with whether it exists. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

[5] Defendant does not take issue with the trial court's findings on factors (a), (f), and (g).

plaintiff's favor. The trial court primarily focused on medical care, finding that defendant's "belief system has resulted in the children's lack of appropriate dental care and lack of important immunizations against catastrophic disease . . .. While defendant mother is certainly entitled to her beliefs and opinions, the Court finds it too risky to put off or avoid traditional medical care, especially medical evaluations and check-ups for the children where serious health problems can be detected and treated." Although defendant cites evidence that she occasionally did seek medical care, the facts relied upon by the trial court are supported by the record. Defendant takes issue with the trial court's language, "mother's strongly held beliefs in regard to medical care and the medical profession could have impacted negatively on her children's health." Defendant argues that the trial court improperly speculated on things that may occur in the future or might have occurred. However, as can be seen from the quoted portion of the opinion above, the trial court considered that defendant's beliefs resulted in lack of medical care. This was appropriate regardless of the speculation about what may or could occur as a result of the lack of medical care. Therefore, the trial court's finding on this factor was not against the great weight of the evidence.

The trial court weighed factor (d), the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity, equally in favor of both parties. The trial court found that plaintiff lived in the marital home until the divorce. After the divorce, the children resided comfortably at both plaintiff's home and defendant's home. The record supports these facts. The children look to both parents for guidance, discipline, needs, and comfort. Defendant argues that she has always been the children's primary caretaker and now works only part-time. However, the facts show that since the divorce, plaintiff has also provided a great deal of primary care. Therefore, the trial court's finding on this factor was not against the great weight of the evidence.

The trial court weighed factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes, in favor of plaintiff. The trial court specifically cited to defendant's testimony that Jordan experienced a "meltdown" as a result of the divorce in May 2000, but defendant, nonetheless, introduced a new fiancé in July 2000. In contrast, the trial court noted that plaintiff was more focused on establishing a stable home for him and the children. The record supports these facts. Defendant argues on appeal that she was not engaged in July 2000. However, the trial court accurately found that the children reported to plaintiff in July 2000 that defendant would be getting remarried. Defendant also argues that there was "rank speculation and innuendo" about her relationship. However, the facts cited by the trial court merely show that defendant introduced a new relationship while plaintiff decided to focus more on stability.[6] Therefore, the trial court's finding on this factor was not against the great weight of the evidence.

The trial court weighed factor (h), the home, school, and community record of the child, in favor of plaintiff. The trial court cited defendant's failure to follow up with Birmingham schools despite the court's direction that she do so in the fall of 2000. The trial court also noted

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[6] Defendant also argues that the trial court should not have considered defendant's practice of sleeping in bed with the children, but the trial court did not include this fact in its analysis of factor (e).

defendant's attempts to home-school Jordan and Dr. Schaer's opinion that defendant acted as an obstructionist. The trial court did not find credible defendant's testimony about her efforts to obtain special services for Jordan. The trial court further noted that despite Jordan's apparent success in Birmingham schools, defendant continues to propose that he attend Waldorf School in Detroit, which would require an hour commute. The trial court also noted defendant's tendency to limit the children's social interaction with children who do not share the same beliefs as defendant. Therefore, the trial court's finding on this factor was not against the great weight of the evidence.

The trial court did not consider factor (i), the reasonable preference of the children. Factor (i) provides that a trial judge must consider in a custody dispute the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference. Defendant argues that the trial court erred by failing to interview Jordan. The trial court did not consider the preferences of the children because of their ages (6 and 3) and because of the circumstances. Dr. Schaer opined that the children were too young to express preferences. There was evidence presented that Jordan is functioning below his chronological age. Additionally, the trial court appointed a guardian ad litem for the children who did not indicate that the children voiced a preference. Under these circumstances, the trial court did not err in deciding not to interview Jordan. Assuming, arguendo, that the trial court erred by failing to interview Jordan, failure to interview a child whose preference cannot outweigh the other factors does not require reversal. *Treutle, supra* at 696.

The trial court weighed factor (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, equally in favor of both parties. Defendant argues that the trial court failed to consider that plaintiff "allowed the boys to make hostile telephone calls to their mother." However, plaintiff testified that Jamie made the call spontaneously and that plaintiff told him that it was not appropriate while reinforcing how much defendant loves them. There was additional evidence that plaintiff fosters a relationship between the children and defendant's family and encouraged the children to make gifts for defendant while they were on vacation. Therefore, the trial court's finding on this factor was not against the great weight of the evidence.

The trial court did not consider factor (k), which considers domestic violence. Defendant argues only that plaintiff "revealed controlling behavior in his post-judgment attempts." However, defendant does not cite to any specific evidence showing violence, and therefore, the trial court did not err in finding that there was no reason to address this factor.

The trial court also considered factor (l), any other factor considered by the court to be relevant to a particular child custody dispute. The trial court cited to Dr. Schaer's report, which was substantiated by defendant's testimony, that defendant's philosophy has concretized itself into dogma and put her children at risk educationally, psychologically, and medically. The trial court cited to the fact that Jordan was not, until court order, enrolled in a school system that was able to address his needs. The trial court also cited to the fact that defendant's overprotection causes the children to have separation difficulty manifesting itself in Jordan's unwillingness to adjust to school. The trial court attributed Jordan's successful adjustment to plaintiff's intervention. The evidence supports all these facts. Therefore, the trial court's findings on this factor are not against the great weight of the evidence.

On appeal, defendant either denies that such evidence exists or contends that the trial court should have considered other evidence. However, this Court does not consider credibility anew. *Mogle, supra*, 241 Mich App 201. The fact that the trial court believed some testimony and not others does not render its factual findings erroneous. Defendant also argues that the trial court "cannot rely solely on an expert's report and testimony." However, the trial court relied on Dr. Schaer's testimony and report along with the other evidence presented at trial. Therefore, based on the lower court record, the evidence supports the trial court's findings.

Defendant next argues that the trial court incorrectly applied the preponderance of the evidence standard rather than the clear and convincing standard that is required to change custody if there is a finding of an established custodial environment. The clear and convincing standard also applies when there is an established custodial environment with both parents. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000). Therefore, the trial court committed clear legal error in applying the preponderance of the evidence standard. However, this Court must make a de novo examination of the trial record to determine if the error was harmless. If the error is harmless, remand is not required. *Fletcher, supra* at 882.

The evidence supports a finding that, even by clear and convincing evidence, it is in the best interest of the children for plaintiff to have sole legal and physical custody. The trial court specifically noted that joint custody was not workable or beneficial because of the "vast philosophical differences of both parents." However, the most striking evidence supporting the trial court's decision is that defendant exhibits a complete lack of ability to compromise and has resorted to bizarre measures to prevent plaintiff's involvement in decision making. Therefore, the trial court did not abuse its discretion in awarding sole legal and physical custody to plaintiff.

Defendant finally argues that the trial court erred in denying her request for attorney fees. The trial court's decision whether to award attorney fees is reviewed for an abuse of discretion. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). In family law cases, attorney fees are properly awarded only as necessary to enable a party to prosecute or defend a suit. MCL 552.13(1); *Hanaway, supra* at 278; *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Defendant has failed to cite to the record in support of her argument that she should be awarded attorney fees. A review of the facts cited on appeal, which lack citation to the record,[7] do not support a finding that defendant is unable to bear the cost of litigation. The trial court did not abuse its discretion in denying defendant's request for attorney fees.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

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[7] MCR 7.212(C)(7) provides that facts stated in an argument "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court."