

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT LILLIE,

Plaintiff-Appellant,

v

SHAWN KEETON,

Defendant-Appellee.

UNPUBLISHED
December 3, 2002

No. 241199
Washtenaw Circuit Court
LC No. 97-007420- DC

Before: Whitbeck, C.J. and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order returning possession¹ of the parties' minor child to defendant. We affirm.

I. Basic Facts and Procedural History

The minor child was born in January 1994, when defendant was fifteen years old. The parties, who never married, lived together for approximately ten months after the minor child's birth until defendant moved out. Plaintiff kept the minor child against defendant's wishes and exercised full control over defendant's parenting time. In March 1997, defendant took the minor child for the weekend and, upon discovering various physical problems, sought medical care and informed plaintiff that she would not return the minor child to him.

In March 1997, plaintiff filed a complaint for custody alleging that the minor child had lived with him since April 1994. According to the complaint, defendant exercised sporadic visitation with the minor child. Plaintiff also alleged that in March 1997, defendant took the minor child for visitation and informed plaintiff that he would never see his son again. Based on his alleged fear that defendant would remove the minor child from Michigan, plaintiff requested an ex-parte order "affirming the actual custodial arrangement that has been in effect since the

¹ During the pendency of the lower court proceedings, several orders used the terminology "possession" rather than "custody" or "parenting time." Although we disagree that a parent can "possess" a child, and dislike the use of the term in the context of child custody proceedings, we note the trial court used "possession" to mean "parenting time" or "extended parenting time" in unique situations. Accordingly, we use it in this opinion as this conforms with the terminology used by the trial court.

[minor] child's birth." On March 19, 1997, the trial court entered an ex-parte order giving "temporary possession" to plaintiff.

Defendant responded to plaintiff's complaint and filed a motion for change of possession. Defendant alleged that plaintiff was not a fit and proper custodian and that he did not adequately care for the minor child. Defendant alleged that plaintiff neglected the minor child's physical and medical needs. Defendant also alleged that plaintiff had a history of being abusive, not caring for his home, and not cooperating in giving defendant parenting time.

In September 1997, the trial court entered an order for immediate change of possession to defendant. Following a full evidentiary hearing, the trial court entered an order granting full custody to defendant. In October 1998, in response to plaintiff's objections to the Friend of the Court (FOC) recommendation, the trial court entered another order granting custody to defendant. The essential provisions of this subsequent custody order remained the same, but also summarized the burden of proof and the trial court's findings on the child custody factors. MCL 722.23.²

In May 1999, plaintiff filed a "motion regarding custody" wherein he alleged that plaintiff abused alcohol and failed to address the minor child's needs.³ After this motion was filed, plaintiff lived in Wisconsin, Connecticut, and Georgia. By February 2001, plaintiff was \$3,435.40 in arrears in his child support payments.

In August 2001, plaintiff filed a motion for emergency change of custody alleging that defendant had two warrants for her arrest and abused alcohol.⁴ Another hearing was scheduled. The evening before the hearing, plaintiff contacted the police indicating where defendant could be found and arrested. Defendant appeared at the hearing without counsel and in police custody. As a result, the trial court entered a "temporary order allowing child to reside with the plaintiff," who was living in Connecticut at the time. After resolving the warrants, defendant filed a motion to return the minor child to her. This motion was denied but the trial court did advise that, at the adjourned evidentiary hearing, it would be particularly interested in getting a sense of "where [defendant] is now."

At the evidentiary hearing in April 2002, defendant testified that she recognized that alcohol was causing her trouble and that she had taken steps to avoid alcohol consumption. Defendant had also begun seeing a counselor. Additionally, defendant expressed her conviction that the minor child should have a relationship with plaintiff and her willingness to foster that

² The trial court found the parties to be equal on all factors with the exception of factors (j) and (l). Under factor (j), the trial court found that defendant showed greater willingness and ability to foster a relationship between the minor child and plaintiff. Under factor (l), the trial court found that defendant demonstrated more maturity and stability than plaintiff and showed greater concern for the best interest of the minor child, rather than personal interest.

³ The lower court record does not contain an order in response to this motion.

⁴ The warrants for defendant's arrest arose from defendant's failure to pay fines and costs related to charges involving driving while impaired and with open intoxicants.

relationship. After the hearing, the trial court entered an order returning possession of the minor child to defendant and left intact the order granting custody to defendant.

II. Returning Possession to Defendant

Plaintiff argues that the trial court erred in returning possession of the minor child to defendant. Plaintiff contends that the trial court instead should have determined which parent had the established custodial environment and applied the best interest factors accordingly. We disagree.

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); *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). If the court finds a proper cause or change in circumstances, then the court must determine whether an established custodial environment exists. *Id.* at 695-696. 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 child. *Id.* at 696; *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

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).

In this case, the trial court did not abuse its discretion in denying plaintiff's request to change custody, and returning possession to defendant, because plaintiff failed to show proper cause or a change in circumstances. After the trial court awarded custody to defendant, it entered a temporary order giving temporary possession to plaintiff, which it referred to as a "form of extended parenting time." This order was based on plaintiff's alleged concerns regarding defendant's arrest warrants and alcohol use. At the evidentiary hearing, plaintiff admitted to contacting police so that defendant's arrest would coincide with the earlier custody hearing. Plaintiff also exaggerated the extent of defendant's problems. The trial court found defendant credible and was impressed with her attempts to deal with her admitted problems. In contrast, the trial court doubted the credibility of plaintiff's motivation in initiating the custody action.

In reviewing the findings of fact, this Court should defer to the trial court's determination of credibility. *Mogle, supra* at 201. Based on this evidence, the trial court properly found that plaintiff failed to show good cause or a change in circumstances. Consequently, the trial court was not required to address whether there was an established custodial environment or apply the best interest factors. Therefore, the trial court did not err in returning possession to defendant and reaffirming the custody order.

III. Reliance on the FOC Recommendation

Next, plaintiff argues that the trial court made repeated mention of the FOC recommendation in its ruling and improperly relied upon the recommendation in returning the minor child to defendant. We disagree.

A statutorily authorized report and recommendation of the FOC is not admissible as evidence at a custody hearing unless both parties agree to admit the evidence. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). However, even if not admitted as competent evidence, the report may be used by the trial court as an aid to understanding the issues to be resolved and it may be used to establish a background and context for the proceedings. *Id.*

In August 2001, plaintiff requested that the FOC make a report concerning custody. The report was completed in late January 2002. Plaintiff filed a timely objection to the report. At the evidentiary hearing, plaintiff again objected to the report. In response, the trial court indicated it would read the report, but could not rely on the report because of plaintiff's objection. At the conclusion of the evidentiary hearing, the trial court indicated that it read the report and took judicial notice that the FOC had recommended immediate return of the minor child to defendant. The trial court also mentioned the FOC recommendation at the close of its opinion.

Upon review of the record, we find the trial court did not improperly rely on the report. The trial court based its opinion on the fact that plaintiff was given a temporary possession to allow defendant to resolve problems in her life. The trial court noted that defendant was successfully addressing those problems. Further, the trial court was dismayed by plaintiff's conduct in instigating defendant's arrest the day before a custody hearing. The trial court's mere mention that the FOC recommended that the minor child be returned to defendant's possession was not error.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly