STATE OF MICHIGAN

COURT OF APPEALS

KENDRA ANN CONNIN-HILLIS,

Plaintiff-Appellant,

v

MINIS RALPH HILLIS, III,

Defendant-Appellee.

UNPUBLISHED
May 18, 2006

No. 265787
Washtenaw Circuit Court
LC No. 97-007044-DM

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that changed custody of the parties' oldest child to defendant.[1] We reverse and remand for further proceedings consistent with this opinion.

Plaintiff's asserts that the trial court erred when it found a sufficient change of circumstances to allow defendant's motion for a change in custody to proceed. On the limited record presented, we disagree. Whether a movant is entitled to an evidentiary hearing on a motion for change of custody depends on whether the movant has established by a preponderance of the evidence proper cause or change of circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509, 512, 514; 675 NW2d 847 (2003). Whether the facts asserted by the movant are legally sufficient to meet that standard is a question of law. This Court reviews questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996); *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 506; 556 NW2d 528 (1996)

A custody award may be modified only on a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Before defendant filed the motion to change custody, plaintiff had sole legal and physical custody of the parties' three children. Thus, in order to seek a change in custody for the oldest child, defendant had to establish proper cause or a change in circumstances that would warrant review of that child's custody. Here, defendant alleged a change in circumstances: the child's strong preference to

[1] The parties have three children; defendant did not seek any change in custody for the younger two children and plaintiff continues to have sole legal and physical custody of them.

live with defendant. To constitute a legally sufficient change of circumstances, a movant must show that since entry of the custody order, there has been a material change in conditions relating to custody of the child that has had or could have a significant impact on the child's well-being. *Vodvarka, supra* at 513. In the absence of a showing of a change of circumstances, the trial court is precluded from holding a custody hearing. *Id.* at 508-509. The trial court is not required to hold an evidentiary hearing to determine whether this threshold has been met, but can accept as true the facts alleged to constitute proper cause or a change of circumstances and then decide whether such facts are legally sufficient to satisfy the standard for proceeding. *Id.* at 512. The determination whether there has been a sufficient change in circumstances should be based on a consideration of the statutory best interest factors *Id.* at 511-512. Here, the primary factor at issue is MCL 722.23(i), the child's preference.

Plaintiff does not dispute that the child's expressed custodial preference has changed: during the course of earlier proceedings and as recently as February 2003, the child expressed a preference to reside with plaintiff but, beginning in 2004, the child began to express a preference to live with defendant. It is clear from the record that the child's strong preference to live with defendant, together with anger over disciplinary incidents that occurred between the child, plaintiff and plaintiff's partner, were having a significant impact on the child's school performance, his relationship with his siblings, and his behavior. Thus, the trial court did not err when it concluded that there was a sufficient change in circumstances to warrant a hearing on defendant's motion to change custody.[2]

Plaintiff also contends that the trial court erred when it failed to make findings of fact about the best interest factors. We agree. A trial court is required to consider and explicitly state its findings and conclusion with respect to each of the factors set forth in MCL 722.23 when it determines the best interests of the child. *Foskett, supra* at 9. That is, the trial court

> must state [its] factual findings and conclusions under each best interest factor. These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties. However, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings. [*MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005).]

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[2] Plaintiff further claims that the trial court erred when it found that there was a shared established custodial environment with both parents. The trial court's conclusion that the child had an established custodial environment with both parents was not based on the amount of time the child lived with defendant, but on the court's finding that, at all relevant times, the child looked to both parents for parental care, comfort, discipline, love, guidance, security, and stability. The record supports this conclusion.

Also, plaintiff's argument in this regard is of no moment to this appeal. Regardless whether the trial court concluded that the child had an established custodial environment with plaintiff or with both parents, defendant was required to establish by clear and convincing evidence that a change in custody was in the child's best interests. That is, defendant faced exactly the same evidentiary burden in either case.

Whether the trial court has met this burden is a question of law, which this Court reviews for clear error. *Vodvarka, supra* at 508.

Here, the trial court judge noted that he was troubled by some of the testimony and was concerned that the parents appeared to be embroiled in a "power-play." The judge further noted his concern that plaintiff was very restrictive in allowing defendant access to the children's school records. The trial judge explained that he felt the expressions of the child were important and that the testimony corroborated the findings of the Friend of the Court evaluator. The judge then concluded that he thought it was time that the child lived with defendant. The judge did not address the best interest factors specifically, but merely adopted the Friend of the Court evaluator's assessment without further analysis or articulation. However, the evaluator's report also failed to specifically address the best interest factors, and instead offered only a brief overview of the current situation and then a conclusion as to those factors. Further, plaintiff had objected to the evaluator's report, the report was not admitted into evidence, and the evaluator did not testify during the hearing. Neither the Friend of the Court evaluator nor the trial court considered and specifically articulated findings of fact about the individual best interest factors set forth in MCL 722.23. "Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 'and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing.' " *Foskett, supra* at 12. Therefore, we vacate the trial court's change of custody order and remand for a new hearing and a new determination, supported by specific findings of fact regarding the statutory best interest factors, whether custody should be changed to defendant.

Because we conclude that the trial court must conduct a new hearing, we need not address plaintiff's assertions that most of the best interest factors favored her, while others favored neither party, or that defendant failed to present clear and convincing evidence that a change in custody was in the child's best interests.[3]

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[3] In this regard, we note that plaintiff argues that a child's preference standing alone is always insufficient to constitute clear and convincing evidence warranting a change in custody. Contrary to this assertion, however, Michigan law is clear that a trial court is not required to weigh each of the best interest factors equally, but rather is permitted to give each factor, including a child's preference, that weight appropriate for the circumstances presented. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). Further, a finding of equality or near equality on the best interest factors does not necessarily preclude a party from satisfying the burden of proof that a change in custody is in the child's best interests by clear and convincing evidence. *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). Thus, prevailing on a single factor, all other things being equal, does not preclude a finding of clear and convincing evidence warranting a change. Plaintiff cites this Court's decision in *Duperon, supra* at 79, as establishing that a child's preference, without more, is an insufficient basis to change custody. However, in *Duperon*, this Court upheld the lower court's decision *not* to change custody based on an advantage under that one statutory factor given the circumstances presented in that case; *Duperon* did not announce an

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Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder

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absolute legal insufficiency of the child's preference alone to tip the balance in one party's favor by clear and convincing evidence.