STATE OF MICHIGAN

COURT OF APPEALS

JAMES ROWLAND,

Plaintiff-Appellee,

v

STACY ROWLAND,

Defendant-Appellant.

UNPUBLISHED
August 19, 2008

No. 284266
Lake County Trial Court
LC No. 02-005674-DM

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

PER CURIAM.

In this child custody action, defendant appeals by right from an order of the circuit court holding that the parties share joint legal and physical custody of their two minor children. For the reasons set forth in this opinion, we affirm the trial court's substantive rulings, but are required to remand the matter in accordance with MCL 722.31 for the trial court to state on the record the factors enumerated in MCL 722.31.[1] We note that the trial court already has ample evidence for listing the factors set forth in MCL 722.31(4), so we leave it entirely to the trial court's discretion whether additional testimony or argument is necessary in making its findings.

A divorce judgment was entered for plaintiff and defendant on October 4, 2002, granting the parties joint legal custody of the children as of that date. The children primarily lived with defendant until March 2006 when they were temporarily removed from plaintiff's care as the result of a Child Protective Services (CPS) investigation. The children were first placed with defendant's parents, then in foster care, and finally with plaintiff. In early 2008, plaintiff moved with the children to Chicago without first obtaining a court order to change the children's domicile.

I

[1] "When a parent wishes to move with a minor child to a location more than 100 miles away, and the parent does not have sole legal custody, the trial court *must* consider the [MCL 722.31(4)0] factors, keeping the child as its primary focus." *Rittershaus v Ritterhaus*, 273 Mich App 462, 465; 730 NW2d 262 (2007) (emphasis added).

Defendant's first argument is that there was no proper cause or a change in circumstances to warrant a reconsideration of custody.

There are three standards of review in child custody appeals. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). First, this Court reviews a trial court's findings of fact to determine whether they are against the great weight of the evidence. *Id*. Whether an established custodial environment exists is a question of fact. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). Second, this Court reviews the trial court's discretionary rulings for an abuse of discretion. *Vodvarka*, *supra* at 507-508. In order to find an abuse of discretion, "the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). See also *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006). Third, this Court reviews questions of law for clear legal error. *Vodvarka*, *supra* at 508. "'A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.'" *Id*. (citation omitted).

A trial court may modify a custody award if the moving party establishes that there has been a proper cause or a change in circumstances. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 24; 614 NW2d 183 (2000). To establish "proper cause" the moving party must show by a preponderance of the evidence that there is an appropriate ground for the court to take legal action. *Vodvarka*, *supra* at 512. "The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors." *Id*.

To establish "change in circumstances" the moving party must show that the affected children's living situation has so greatly changed since the entry of the last custody order as to have a significant effect on the children's well-being. *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007). In *Vodvarka*, this Court stated:

> [N]ot just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate that something more than normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Vodvarka*, *supra* at 513-514.]

In this case, defendant argues that the trial court did not initially find that there was a proper cause or a change in circumstances, and therefore should not have proceeded to consider whether a change in custody was warranted. Defendant notes that the children were temporarily placed with plaintiff in June 2006 after a CPS investigation, but that no evidence was presented to show whether the investigation was still pending. Defendant further notes that the temporary placement with plaintiff is insufficient to have a significant impact on the children's well-being as the previous custody order required the children to have parenting time with plaintiff for an extended period over the summer months anyway. However, defendant's arguments are without merit because the trial court correctly recognized that it did not have the freedom to arbitrarily

change a child custody order previously issued and could not make a change to the custodial environment without good reason. The court also noted that after the date that the parties had agreed to joint legal custody, "protective services became involved in Manistee County and the children then were placed with [plaintiff and], that really kind of vitiated the custodial-environment requirement." Thus, the court observed that the children's living situation had so greatly changed since the entry of the last custody order that the children's well-being had been significantly impacted. See *Rittershaus*, *supra* at 473.[2] Therefore, it can be presumed that the trial court recognized a change in circumstances that would require an investigation into the statutory best interest factors. Accordingly, the trial court correctly concluded that there was a change in circumstances and did not commit clear legal error.

II

Defendant's second argument is that the trial court should have applied a clear-and-convincing evidence standard when determining whether to change the custodial arrangement. We agree with defendant that this is indeed the standard when a custodial environment exists. However, we find it extraordinary that defendant argues that a custodial environment existed at a time when the evidence clearly indicated that CPS had removed the children from defendant's care, her parents had refused to act as their caregivers, and the children had been living in Chicago with plaintiff.

Whether there is an established custodial environment is a question of fact. *Mogle*, *supra* at 192. Where an established custodial environment exists, the trial court must find clear and convincing evidence that a change to that custodial environment is necessary. *Baker v Baker*, 411 Mich 567, 573; 309 NW2d 532 (1981); *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). However, if no established custodial environment exists, the trial court can award custody based on the preponderance of the evidence. *Hayes*, *supra* at 387.

The crux of this issue is whether the trial court found an established custodial environment, and therefore which standard it should have applied. Defendant argues that the children had an established custodial environment with her as evidenced by the five years they were in her care prior to removal in 2006, and the temporary placement with plaintiff does not change that fact. MCL 722.27(1)(c) provides as follows:

> 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 the child as to permanency of the relationship shall also be considered.

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[2] Moreover, as of the hearing the children had been moved from Manistee, Michigan to Chicago, Illinois, a distance of well over 250 miles, and there is no indication that plaintiff received prior approval by the court for the move. *Sehlke v VanDerMaas*, 268 Mich App 262, 266; 707 NW2d 603 (2005), rev'd in part on other grounds 474 Mich 1053 (2006).

This Court has concluded that the established custodial environment is not determined simply based on a custody order. *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993).

However, repeated changes in physical custody can destroy an established custodial environment. In *Baker*, *supra* at 580-582. As in *Baker*, the children in the case at hand had repeated changes in custody and uncertainty in their living situation. Although the children had lived with defendant for five years, the period immediately prior to the custody hearing was characterized by instability and uncertainty. The evidence shows that a complaint was filed against defendant with CPS on March 28, 2006. After this time, the children were temporarily placed with defendant's parents. Shortly after the placement, defendant's father contacted local law enforcement and asked that the kids be removed. Next, the children were placed temporarily in foster care with a woman in Scottville. Finally, on June 13, 2006, the children were placed with plaintiff and eventually moved to Chicago. Although the children may have had an established custodial environment with defendant prior to this period, it was not intact at the time of the hearing. As noted in *Baker*, "[c]ertainly those repeated custodial changes and geographical moves, with the necessarily attendant emotional implications, destroyed the previously established custodial environment in which the boy was living and precluded the establishment of a new one, at least until after trial." *Baker*, *supra* at 581. That reasoning holds true here. Thus, the trial court properly concluded that there was no established custodial environment and the evidence was correctly reviewed based on a preponderance of the evidence standard.[3]

III

Defendant's third argument is that the trial court was not permitted to use a friend of the court (FOC) report because it was hearsay evidence for which no exception exists. We conclude that defendant waived this issue for appeal. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *People v Carines*, 460 Mich 750, 762, 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Once a party has waived an issue, it cannot be appealed. *People v Adams*, 245 Mich App 226, 239-240; 627 NW2d 623 (2001).

Here, the guardian ad litem noted to the court, "everyone has been supplied with copies of the friend of the court recommendation prepared by Carol Wallace. And I would move that it be admitted so that Miss Wallace doesn't have to testify." The court noted that Wallace was present and asked if either plaintiff or defendant wished to have her testify. Plaintiff said, "No, I don't" and defendant said, "No." Thus, defendant effectively waived her right to address this issue on appeal as she was given the opportunity to have live testimony provided directly by the author of the FOC report and she turned down this opportunity.

IV

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[3] In any event, the court noted that even if the higher standard were required, the court "would come up with the same result as [it was] going to come up with here today."

Defendant's fourth argument is that the trial court improperly concluded that the best interest factors weighed in favor of plaintiff. Defendant points to eight of the best-interest factors and finds fault with the trial court's decision in each of them. In reviewing the trial court's findings, we must defer to the fact-finder's determination of credibility. *Mogle*, *supra* at 201.

MCL 722.23 provides as follows:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (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.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (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 or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

Factor (b)

The trial court found the parties equal on this factor without citing the supporting evidence underlying that conclusion. However, the trial court is not required to comment on every matter in evidence. *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000).

Defendant's argument is predicated on a false premise and a non sequitur. She asserts that her mother testified that the oldest child missed CCD classes and his first holy communion after being placed in plaintiff's care. However, Janice Barton testified that the boy "missed out on his first communion because of all of this." She did not testify that he missed CCD classes; rather, that was the premise in the question preceding this answer. Moreover, defendant's proffered conclusion that "placing the children [with plaintiff] disrupted their" religious education does not follow from the fact that the oldest child did not participate in his first holy communion at a time when he apparently could have. Barton testified that the boy missed his communion "because of all this." This answer does not place the blame for the missed communion at plaintiff's doorstep. Instead, it implies that the continuing upheaval in the children's lives is responsible, and the record aptly demonstrates that both parties have had a hand in creating this situation. This Court will not disturb the trial court's factual finding in this regard.

Factor (c)

The court found the parties equal on this factor. Defendant argues that this factor should have weighed in her favor. Defendant asserts that the evidence showed that neither plaintiff nor defendant have strong employment histories and both relied on outside agencies for assistance, with plaintiff needing assistance to find beds for the children. Defendant also notes that there was testimony that plaintiff needed help on budgeting.

The trial court observed that both parties do not have positive employment history and have relied on agencies to help them support the children. The trial court noted that plaintiff is in the process of getting a job. The fact that plaintiff needed help in securing bunk beds and continues to need help in budgeting does not mean that defendant, by default, is better able to provide for the physical needs and comforts of the children. Again, both have required state help in meeting the needs of their children. Indeed, there was testimony that plaintiff was more receptive to this help than defendant.

Factor (d)

The trial court ruled that plaintiff had an edge on this factor as the kids had been living with him for several months. Defendant argues that there was evidence to show that the children did not have proper beds and that plaintiff would soon be moving again. Defendant also argues that there was testimony that the children were provided for when they were with her in both their physical and emotional needs.

The trial court noted, as did the FOC report, that each of the parties have moved a number of times. The court concluded that plaintiff had a slight edge regarding the stability

factor because he has had the children for the last several months. Although this is a close question, the trial court's finding is not against the great weight of the evidence.

Factor (e)

The trial court noted that neither party is part of an intact family unit; therefore the parties were equally situated. Defendant points out that plaintiff has children from other relationships and that he does not have a consistent relationship with those children. Defendant argues that it is clear from the testimony that plaintiff has an unstable home-life because he was then living with his parents and had prior failed attempts at creating a home with other romantic partners. Defendant argues that she has a consistent family unit for the boys to live in.

The circumstance of plaintiff's relationship with other children does not speak to the permanence of the family unit in this proposed custodial home. Further, the fact that plaintiff's second marriage ended in 2005 does not mean that the family unit he had established with his children as of 2008 was unstable. Defendant clearly did not think this argument through prior to its inception because this fallacious reasoning could also be used to support the conclusion that defendant created instability in the family unit by divorcing plaintiff. While a pattern of broken homes could raise a concern about what might occur in the future, it does not necessarily mean that there is no "permanence, as a family unit, of the existing or proposed custodial home."

Factor (f)

The trial court found that plaintiff and defendant were equal in moral fitness. Defendant argues that this conclusion does not take into consideration the fact that plaintiff disobeyed a court order to move the children more than 100 miles away. As it relates to plaintiff's parenting, defendant argues, the prohibited move of the children shows that plaintiff cannot be expected to follow the other orders of the court regarding the children, thus putting the children at risk. Defendant argues that this factor should have weighed in favor of her.

The trial court stated that there was no real distinction between the moral fitness of the parties as it relates to the children. It is true that in violation of the judgment of divorce, plaintiff did move the children to Chicago without the court's permission. See MCL 722.31. However, he did so in the apparent attempt to find work. The court allowed the move after-the-fact, observing that "given the economic circumstances of the state of Michigan right now, I can't really expect somebody to . . . stay here." In light of other moral "lapses" evidenced in the record (including the circumstances leading to the removal of the children from defendant's custody in 2006), plaintiff's changing of the children's domicile without prior approval does not mean that the court's finding was against the great weight of the evidence.

Factor (h)

The trial court found that plaintiff had a better home, school, and community record with the children. Defendant argues that the school record with plaintiff was no better than with defendant and the trial court should have ruled this factor equally, if not finding in defendant's favor. Defendant argues that the evidence presented regarding the children missing school while with her was only included in the FOC report, which she argues was inadmissible. Further,

defendant argues, the children were delayed in starting school after plaintiff moved because they did not have the necessary physical for the school system.

As discussed above, no error requiring reversal occurred with respect to the use of the FOC report. The trial court correctly noted that when the children were living with defendant they missed more school than when they lived with plaintiff. The FOC report states that the oldest child had 27½ absences and was tardy 14 times in the 2006/2007 school year, and this poor attendance was negatively affecting the boy's school performance. Additionally, the oldest child missed 5 days of school while living with plaintiff as compared to 21 absences while living with defendant over the same time period. The trial court correctly considered this information and reasonably concluded that plaintiff has a better home, school, and community record.

Factor (j)

Again, the trial court found the parties to have an equal, albeit troubled record on this factor. Defendant argues that this finding is against the great weight of the evidence because the court failed to acknowledge that plaintiff moved the children more than 100 miles away. However, the court did not find that both parties were equal because each is willing and able "to facilitate and encourage a close and continuing parent-child relationship between the child[ren] and the other parent." Rather, the court noted that this has been "a problem for both parties." Moving the children is just symptomatic of this ongoing problem. Even if defendant is accurate that plaintiff did not work out a visitation plan before moving the children more than 100 miles away, there is evidence to indicate that plaintiff contacted authorities to attempt to schedule visitation time with defendant. The trial court finding on this factor is reasonable given the evidence.

Factor (*l*)

The trial court implied that this catch-all factor weighed in plaintiff's favor. Defendant argues that the trial court should have concluded that the parties were equal under this factor, and not favor plaintiff in this regard. Defendant also argues that the trial court erred when it failed to indicate the extent it was going to consider the CPS involvement, when it failed to acknowledge the CPS reports against plaintiff, and when it failed to consider plaintiff's lack of education and how that will affect the children.

Simply because the trial court did not mention pieces of evidence does not mean that that evidence was not considered as evidence. *Fletcher, supra* at 883. For example, the court's failure to reference CPS referrals regarding plaintiff does not mean they were not considered. Indeed, the court referenced "a number of . . . referrals" without delineating between the parties. This can reasonably be understood to incorporate all CPS referrals.

Ultimately, the trial court was obligated to determine the weight and credibility of the evidence presented, and it did just that. *Gorelick v Dep't of State Hwys*, 127 Mich App 324, 333; 339 NW2d 635 (1983). The trial court's conclusion was not against the great weight of the evidence.

V

Defendant's fifth argument is that the trial court erred in granting permission to plaintiff to change the primary residence of the children more than 100 miles. We review a trial court's decision regarding a change in domicile of minor children for an abuse of discretion and the trial court's findings are reviewed under the great weight of the evidence standard. *Grew v Knox*, 265 Mich App 333, 339; 694 NW2d 772 (2005).

"MCL 722.31 specifically applies to all cases in which a parent wishes to change the legal residence of a child 'whose custody is governed by court order . . . .'" *Spires v Bergman*, 276 Mich App 432, 436; 741 NW2d 523 (2007), quoting *Grew*, *supra* at 338. Moreover, according to MCR 3.211(C)(3), "a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act, MCL 722.31." Therefore, "[w]hen a parent wishes to move with a minor child to a location more than 100 miles away, and the parent does not have sole legal custody, the trial court *must* consider the [MCL 722.31(4)] factors, keeping the child as its primary focus." *Rittershaus*, *supra* at 465 (emphasis added). See footnote 1, *infra*. These factors are:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.31(4).]

As is required with the best interest factors, the trial court should consider and explicitly state its findings and conclusions with respect to each of the factors listed in MCL 722.31(4). See *Bowers*, *supra* at 328.

Here, plaintiff asked the court that he be allowed to move to Chicago with the children. The trial court expressly stated on January 11, 2008, that plaintiff "may be allowed to move once the custody—once this thing is done," but that the issue would not be addressed until the custody decision had been made. Despite the trial court direction, plaintiff moved the children some time between January 11, 2008 and February 22, 2008.

When the trial court made its custody recommendation at the February 22, 2008 hearing, it stated:

> So be that as it may, the question is, how do I interpret and how do I come up with a, you know, a practical solution? Well, what I'm going to do is, I'm going to follow the friend of the court's recommendation that—in this particular case. I think we'll have joint custody of the kids, joint physical custody of the kids, which is going to be difficult because Mr. Rowland apparently has moved to Chicago. And given the economic circumstances of the state of Michigan right now, I can't really expect somebody to, you know, ultimately stay here in the—So I'm going to allow that move, but there's a couple of conditions.

The trial court stated that protective services would continue to check on plaintiff and the children, and that a schedule would be created by the friend of the court.

The trial court did not consider on the record the MCL 722.31(4) factors in making the decision about whether plaintiff could move the children more than 100 miles away as required by statute and court rule. The trial court summarily stated that he could not expect someone to stay in Michigan given the economy, but there is no indication that this statement was made with the child as the primary focus in the court's deliberations. Therefore, the trial court improperly applied the law under MCL 722.31(4) and this case must be remanded for a reconsideration of whether a move of more than 100 miles away is in the children's best interest according to MCL 722.31(4). We leave it to the sole discretion of the trial court whether there is any need for additional testimony or argument on this issue.

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello