

STATE OF MICHIGAN
COURT OF APPEALS

JOHN H. SPEARS,

Plaintiff-Appellant,

v

BROOKE MARIE ZIEMBA, a/k/a BROOKE
MARIE SEGUIN,

Defendant-Appellee.

UNPUBLISHED

April 6, 2010

No. 292174

Wayne Circuit Court

Family Division

LC No. 00-024757-CC

Before: WILDER, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for change of custody. We affirm.

The parties met in 1998. They did not marry. Their sole child, Montana Spears, was born in 1999. Plaintiff commenced this action in 2000. A year or two later, the parties moved to Iowa with Montana. Later, plaintiff returned to Michigan. Montana remained with her father in Iowa.

In November 2003, the trial court entered a consent judgment of custody, providing for joint legal custody, and granting sole physical custody of Montana to plaintiff. A detailed parenting time schedule was also set forth in the judgment. In 2007, plaintiff received a job offer with a company located in South Carolina. Plaintiff accepted the job offer and during the time defendant was exercising her summer parenting time with Montana, plaintiff moved to South Carolina. On June 28, 2007, plaintiff filed a motion to change domicile in the trial court. Plaintiff's motion was referred to the circuit court's Family Evaluation, Mediation and Counseling unit (FEMC), for investigation and recommendation on the motion to change domicile. When the FEMC recommendation was still pending in August 2007, the trial court judge ruled that Montana would remain in Michigan and attend school pending a hearing on the motion. In September 2007, a psychologist for FEMC recommended granting the request to change domicile. The trial court, however, did not hold an evidentiary hearing on the motion to change domicile until January 2008, and following the hearing he took the matter under advisement.

Before the January 2008 evidentiary hearing, in December 2007, defendant had filed a motion for change of custody. In February 2008, the trial court denied the motion to change domicile. The trial court also held that an evidentiary hearing was required on the motion to change custody because there had been a change in the established custodial environment due to plaintiff's relocation and the child having remained in Michigan, and thus, there had also been a change in circumstances.

In April 2008, plaintiff filed a delayed application for leave to appeal in this Court from the trial court's August 2007 order denying the motion to change domicile. This Court denied the delayed application for leave, *Spears v Ziemba*, unpublished order of the Court of Appeals, entered June 26, 2008 (Docket No. 284967), stating in part:

In light of plaintiff's failure to appeal the February 11, 2008[,] opinion and order denying his motion to change the child's domicile and his failure to remain in Iowa, the delayed application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review. However, the matter is REMANDED to the trial court to promptly conduct a hearing on defendant's motion to change custody.

In April 2008, the trial court referred the case to the Family Counseling and Mediation Division (FCMD) of the circuit court for a recommendation on custody and parenting time. In May 2008, the FCMD indicated it had been unable to make a recommendation because plaintiff failed to appear for an interview, however, an employee of FCMD met with the parties in October 2008 and authored a report in December 2008, recommending that the court award sole physical custody of Montana to defendant.

In March and April 2009, nine and ten months after this Court's remand order, the trial court held the evidentiary hearing regarding the motion to change custody. The trial court heard testimony that Montana had been living with defendant in Michigan since July or August 2007, was in school and was progressing well, that the home environment was stable, and that plaintiff shared negative information about defendant and information about the instant litigation with Montana.

Defendant testified extensively, indicating that she learned that plaintiff would be moving to South Carolina in June 2007, but plaintiff would not discuss it with her. Defendant testified that while she had Montana, she had to file a motion to get, from plaintiff, Social Security payments that Montana was supposed to be receiving.

In May 2009, the trial court issued its opinion and order granting defendant's motion for change of custody. First, the trial court found that there was an established custodial environment for Montana with defendant. The trial court concluded that Montana had been with defendant since August 2007, and that Montana naturally looks to defendant for guidance, discipline, necessities of life, and parental comfort.

Next, the trial court analyzed the factors relating to the best interests of the child. The trial court found that several of these factors favored defendant. The trial court reasoned that plaintiff had withheld Montana's Social Security benefits, and was unable to put aside his differences with defendant. The trial court also found that plaintiff was unable to see the

negative impact on Montana of the bickering between the parties. The trial court noted that Montana ends up caught in the middle, relaying messages between the parties. The trial court also found that, from the testimony, defendant's home seemed stable and satisfactory. Accordingly, the trial court adopted the FCMD unit's recommendation, and held that it was in Montana's best interests that defendant have sole physical custody.

Plaintiff first argues that the trial court erred in concluding that there was an established custodial environment with defendant. We disagree. In a custody dispute, the great weight of the evidence standard applies to all findings of fact by the trial court. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

The overriding concern in custody battles is the child's best interests, *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009), and the ultimate resolution of any child custody dispute rests with the trial court, *Harvey v Harvey*, 470 Mich 186, 187; 680 NW2d 835 (2004). The trial court considers all the evidence, and arrives at its conclusions, giving each piece of evidence the weight it deems appropriate. *McIntosh*, 282 Mich App at 477. A trial court is in no way obligated to accept the custody recommendation made by Friend of the Court personnel. *Id.* Absent error in the trial court proceedings, this Court may not substitute its judgment for that of the trial court. *Id.* at 478.

In deciding custody, the trial court must determine if there is an established custodial environment. *McIntosh*, 282 Mich App at 477 n 2. "The custodial environment of a child is established if over an appreciable period of time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). "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." MCL 722.27(1)(c). If the trial court determines that an established custodial environment exists with a particular parent, it cannot change that environment unless clear and convincing evidence is presented that a change of custody is in the child's best interests. MCL 722.27(1)(c); *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). In other words, once a court has concluded that an established custodial environment exists, "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interests of the child to do so." MCL 722.27(1)(c).

Here, the trial court concluded that there was an established custodial environment for Montana with defendant because Montana had been living with defendant since the summer of 2007, pursuant to the trial court's order that Montana not be removed from the state of Michigan after plaintiff moved to South Carolina. The trial court noted that under its prior order, Montana had enrolled in school in Michigan, had been with defendant for an appreciable time, and that Montana naturally looks to defendant for guidance, discipline, necessities of life, and parental comfort. The trial court also found that the emotional ties between Montana and defendant are stronger than those between Montana and plaintiff.

While we acknowledge plaintiff's valid complaint about the trial court's failure to act expeditiously on his motion to change domicile and on the motion to change custody by permitting a two year delay before bringing this matter to conclusion, nevertheless, on the record

before us, the trial court's finding, that there exists an established custodial environment with defendant, is not against the great weight of the evidence.

Next, plaintiff argues that, after finding that an established custodian environment existed with defendant alone, the trial court used that finding to reverse the burden of proof on the change of custody motion so that plaintiff, the party opposing the motion, now had the burden of proving, by clear and convincing evidence, that he should have custody. We disagree.

Questions of law are reviewed for clear legal error. MCL 722.28; *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003).

Because there was an established custodial environment with defendant, the trial court could not change custody absent clear and convincing evidence that a change of custody was in the child's best interests. *Jack*, 239 Mich App at 670. Therefore, the burden of proving by clear and convincing evidence that a change of custody was warranted rested with plaintiff, and the trial court did not improperly shift the burden of proof. *Id.*

Plaintiff next argues that the trial court failed to determine whether there was a change of circumstances, and therefore erred in changing the custodial arrangement. We disagree.

The Child Custody Act provides, in relevant part, that the trial court may, for the best interests of the child, "[m]odify or amend its previous judgments or orders for proper cause shown *or because of a change of circumstances . . .*" MCL 722.27(1)(c) (emphasis added). The trial court's February 2008 order found that a change of circumstances had occurred because plaintiff's relocation to South Carolina led to a change in the established custodial environment. Accordingly, the trial court did not fail to find the requisite change in circumstances warranting consideration anew of the custodial arrangement.

Finally, plaintiff argues that the trial court erred in its findings regarding the statutory factors bearing on the best interests of the child, MCL 722.23. But plaintiff fails to present argument or evidence to contradict the trial court's findings on any of the best interest factors. This Court is not obliged to make a party's argument for him. This issue is abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot