

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT ALLEN DELING,

Plaintiff-Appellee,

V

LOTUS ANN LAM, f/k/a LOTUS ANN DELING,

Defendant-Appellant.

UNPUBLISHED

October 7, 2010

No. 295272

Kent Circuit Court

LC No. 03-004339-DM

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order awarding plaintiff physical custody of the parties' three minor children and both parties' joint legal custody. We reverse and remand for further proceedings consistent with this opinion.

In 2004, the parties entered a consent judgment of divorce wherein they were awarded joint legal and joint physical custody of their three minor children. In 2008, defendant moved to change custody and requested full physical custody of the children; plaintiff responded and also requested full physical custody of the children. The trial court appointed a guardian ad litem (GAL) who prepared a report wherein she applied the Child Custody Act's (CCA) best interest factors and recommended that plaintiff be awarded physical custody of the children, with both parties maintaining joint legal custody. The trial court held a custody hearing and adopted the GAL's report and findings with respect to the best interest factors and awarded plaintiff physical custody of the minor children.

On appeal, defendant argues that the trial court erred in entering the custody order when, in lieu of making findings and conclusions with respect to the statutory best interest factors, the trial court instead adopted the GAL's report as its holding. Defendant failed to preserve this issue for review because she did not first raise it in the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). But because this issue involves the custody of a minor child and failure to consider it may result in manifest injustice, a question of law exists, and the facts necessary to its resolution have been presented, we will review the merits of defendant's argument. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). We employ three different standards to review a trial court's decision in a child custody dispute. We review a trial court's findings of fact to determine if they are against the great weight of the evidence, discretionary decisions for an abuse of discretion, and questions of law for clear error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A clear

legal error occurs when the trial court “incorrectly chooses, interprets, or applies the law.” *Id.* at 881.

Child custody disputes are governed by the CCA, MCL 722.21 *et seq.* *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Before a trial court modifies a custody order, it must first find that the moving party has shown that a change of circumstances or proper cause exists that warrants consideration of a change in custody. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). If proper cause or a change of circumstances exists, the trial court must hold an evidentiary hearing and make specific findings and conclusions regarding each of the CCA’s best interest factors to determine whether modification of the custody order is in the child’s best interests. *Grew v Knox*, 265 Mich App 333, 336-337; 694 NW2d 772 (2005). “Whether a court is establishing custody in an original matter, or altering a prior custody order, the requirement is the same: ‘specific findings of fact regarding each of twelve factors that are to be taken into account in determining the best interests of the child’ must be made.” *Id.* at 337, quoting *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). While a trial court may appoint a GAL or other professional “and consider their recommendations for the resolution of the dispute,” MCL 722.27(1)(d), “[t]he trial court’s ultimate findings relative to custody must be based upon competent evidence adduced at the hearing.” *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). Moreover, “the trial court must arrive at its own conclusions in a custody dispute and cannot delegate its authority to the Friend of the Court or other experts.” *Moser v Moser*, 130 Mich App 97, 102-103; 343 NW2d 246 (1983).

The trial court committed two errors in modifying the custody order in this case.¹ First, the trial court failed to articulate whether there were changed circumstances or proper cause shown to modify the initial custody order. MCL 722.27(1)(c); *Vodvarka*, 259 Mich App at 508-509. Second, assuming that a finding of proper cause or change of circumstances was implicit when the court held an evidentiary hearing, the trial court failed to make specific findings of fact and conclusions of law regarding each of the CCA’s 12 best interest factors before it changed custody. *Grew*, 256 Mich App at 336-337. Instead, the trial court essentially adopted the GAL’s report and in doing so it improperly delegated its authority under the CCA. *Duperon*, 175 Mich App at 79; *Moser*, 130 Mich App at 102-103. The trial court’s failure to evaluate and explicitly state findings and conclusions as to each of the CCA’s best interest factors requires us to reverse

¹ We note that this Court has in several previous cases reversed the trial judge in this case, Judge Patricia Gardner, for failure to conduct requisite hearings, to properly apply the law before changing or modifying custody. See for example, *Smith v Nooney*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2008 (Docket No. 281744), *DeHaven v Venstra*, unpublished order of the Court of Appeals, entered September 6, 2007 (Docket No. 280274), *Holmes v Roman-Holmes*, unpublished order of the Court of Appeals, entered October 13, 2005 (Docket No. 265566), and *Hopkins v Whittemore*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2004 (Docket No. 250176).

and remand for a new child-custody hearing. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, defendant may tax costs. MCR 7.219(A).

/s/ Jane E. Markey

/s/ Brian K. Zahra

/s/ Elizabeth L. Gleicher