

STATE OF MICHIGAN
COURT OF APPEALS

MARY COLLEEN REED,

Plaintiff-Appellant,

v

STEVEN JAMES REED,

Defendant-Appellee.

UNPUBLISHED

December 28, 2010

No. 297097

Cass Circuit Court

LC No. 06-000308-DM

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Mary Reed contests the change of physical and legal custody of the parties' two minor children to Steven Reed in this post-judgment divorce action. We affirm.

Mary and Steven Reed were married in 1994 and divorced by consent judgment in 2006. Initially, the parties were awarded joint legal custody, with physical custody of the two minor children to Mary. Within nine months of the entry of the divorce judgment, Steven sought a show cause order alleging Mary's violation of the parenting time schedule and unilateral changes to the children's school enrollment. This was the initiation of numerous motions by both parties and the entry of several court orders finding Mary in contempt for her failure to abide by the terms of the judgment.

On April 4, 2008, Steven filed a petition seeking an ex parte change of legal and physical custody alleging Mary was engaging in multiple and harassing phone calls to his residence, work, family and friends, that she appeared intoxicated and would engage in verbal confrontations in the presence of the minor children, that the children had numerous absences or tardy arrivals at school and their school records indicated behavioral problems in the classroom, lack of organization and being unprepared for class with deteriorating academic performance. An ex parte order granting a change in legal and physical custody was entered on April 4, 2008. Pending a friend of the court review, the issue regarding the children's school enrollment was addressed resulting in their placement in the Edwardsburg public school system. Following six full-day hearings, the friend of the court referee, noting the prolonged and contentious nature of the parties' relationship throughout and after their marriage, found the existence of proper cause to consider a change of custody and the existence of an established custodial environment with both parents. The referee recommended joint legal and physical custody. Steven objected to the referee's recommendation and sought a de novo hearing before the trial court.

Following several delays, the trial court conducted a hearing. In addition to reviewing the testimony and evidence from the friend of the court hearing, the trial court took testimony from the parties and the psychological evaluator and interviewed the minor children in camera. The trial court found the existence of a change of circumstances necessitating a review of the custody arrangement for the children. After determining that a custodial environment did not exist with either parent, the trial court evaluated all of the best interest factors¹ and found Mary favored on factors (a) love, affection and emotional ties and (f) moral fitness. Neither party was favored on factor (e) permanence of the family unit. Steven was favored on factors (b) capacity to give love, affection and guidance, (c) provision of food, clothing and medical care, (d) length of time in stable environment, (g) mental and physical health, (h) home, school and community records, (j) willingness to facilitate parental relationship and (k) domestic violence. The trial court indicated it had interviewed the minor children and that they had expressed a preference in accordance with factor (i). Under factor (l), the trial court found Mary's inability or unwillingness to resolve issues stemming from the divorce interfered with her parenting of the minor children. After weighing all of the best interest factors, the trial court found clear and convincing evidence supporting a change of legal and physical custody to Steven.

At the outset, we are compelled to address deficiencies in Mary's appellate brief that we attribute to her appearing in propria persona. Mary's brief and behavior in the trial court demonstrates a lack of understanding of the procedures and rules governing the lower court hearings or how to present her concerns for appeal.² Mary's written submission to this Court presents a rambling historical overview of issues and concerns that are not of particular relevance to the issue of custody. While asserting Steven committed fraud to procure custody, Mary does not actually deny that any of the alleged incidents occurred, but rather attributes her actions to being the understandable result of the inordinate stress she experienced because of Steven's behavior. Consequently, it is difficult for this Court to address or construe her actual arguments.

Mary contends that each of the allegations regarding the impropriety of her behavior are insufficient, taken individually, to support a change of custody. This is consistent with her presentation, which dwells on very specific incidents rather than on a view of the entire situation. Mary also attacks the evidence presented not by denying its existence or accuracy but by suggesting that those testifying should not be deemed credible. She also invokes and presents considerable discussion of Steven's relationship with and the behavioral problems exhibited by his oldest son, who was not a subject of the lower court proceedings. Mary makes very general and vague assertions regarding the weight attributed by the trial court to certain testimony, yet fails to cite anything in the trial court's ruling to support her allegations and mischaracterizes the trial court's findings on the best interest factors or to address the factors in any logical manner.

¹ MCL 722.23.

² Although litigants engaged in self representation are typically afford a degree of leniency, Mary's "[a]pppearance in pro per does not excuse all application of court rules." *Bachor v Detroit*, 49 Mich App 507, 512; 212 NW2d 302 (1973).

Although Mary provides a listing of case law, she fails to explain the relationship of the cited cases to the facts at hand or even coherently to her assertion of error by the trial court and, thus, her appellate brief is not in conformance with the court rules.³ “It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant's arguments, and then search for authority either to sustain or reject the appellant's position.”⁴ While Mary’s failure to cite and integrate supporting legal authority for her position technically constitutes an abandonment of her issues on appeal⁵, we nevertheless provide the following discussion to explain our determination that her claims lack merit. Mary also incorrectly argues error pertaining to the failure to rescind the ex parte order for temporary custody and to implement the recommendations of the friend of the court referee. Notably she did not seek to appeal the ex parte order and fails to recognize that the referee’s decision is merely a recommendation that, because Steven objected and requested a de novo hearing, would not be implemented. This Court has no alternative but to ignore Mary’s stated issues on appeal and proceed with our review based on the final order following the de novo hearing by the trial court.

The Child Custody Act governs child custody disputes.⁶ “The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances.”⁷ “A trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances.”⁸ If the parent seeking to change custody fails to establish a proper cause or change of circumstances, a trial court is precluded from holding a hearing to revisit a previous custody determination.⁹ “[I]n order to establish a ‘change of circumstances,’ a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed.”¹⁰

Steven petitioned the trial court for a temporary change of custody alleging that Mary’s behavior had become inappropriate in that she was engaging in frequent and disparaging phone calls to him, to people at his place of employment and others regarding post-divorce issues. She was precluding or interfering in his exercise of parenting time and would engage in verbal

³ MCR 7.212(C)(7).

⁴ *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007) (citation omitted).

⁵ *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008).

⁶ MCL 722.21 *et seq.*, *Berger*, 277 Mich App at 705.

⁷ *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009).

⁸ *Id.* at 355; see also MCL 722.27(1)(c).

⁹ *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003).

¹⁰ *Id.* at 513 (emphasis in original).

disputes with him in the presence of the minor children. Mary was also making unilateral decisions regarding the children's education pertaining to their school enrollment contrary to the award of joint legal custody along with concerns about their school attendance records and performance. In substance, Mary did not deny the allegations but merely attributed any identified problems to Steven's behavior and the resultant stress she was experiencing or other factors unrelated to her own performance.

While the parties' relationship post-divorce was less than idyllic, both acknowledge several months of concerted effort to cooperate and communicate regarding their children's needs immediately following entry of the judgment. Unfortunately, their detente significantly deteriorated along with their ability to focus on the welfare of the minor children and any recognition of how their behavior would negatively impact the children. Based on the ongoing and escalating conflicts, the trial court correctly determined that Steven had demonstrated the proper cause and change of circumstances necessary to proceed with a review of the existing custody arrangement.

Having first determined the existence of proper cause and a change of circumstances, the trial court next addressed whether an established custodial environment existed with either or both parents. The existence of an established custodial environment comprises a question of fact that a trial court is required to address before determining whether changing a previous custody order would be in a child's best interest.¹¹ If modifying a custody arrangement alters an established custodial environment, it is incumbent on the party seeking to change custody to demonstrate by clear and convincing evidence that such a change in the custodial environment would serve the best interest of the child.¹² But, if modifying a custody order does not change an established custodial environment, the moving party is required to show only by a preponderance of the evidence that a change would be in the child's best interests.¹³

Specifically, MCL 722.27(1)(c) provides:

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

In other words, an established custodial environment is deemed to exist when a parent provides

¹¹ *Brausch*, 283 Mich App at 356 n 7.

¹² MCL 722.27 (1)(c); *Pierron v Pierron*, 282 Mich App 222, 244-245; 765 NW2d 345 (2009).

¹³ MCL 722.27(1)(c); *Pierron*, 282 Mich App at 245.

the care, discipline, love, guidance, and attention a child requires, thereby creating a permanent and secure environment for the child.¹⁴

“Custody orders, by themselves, do not establish a custodial environment.”¹⁵ Nor are custodial environments unchangeable once established. “[T]he focus is on the circumstances surrounding the care of the children *in the time preceding trial*.”¹⁶ After reviewing the record, the court's findings at the time concerning the existence of an established custodial environment were not against the great weight of the evidence.¹⁷ The record established that until April 2008, the children had looked to Mary as their principal custodian for guidance, discipline, the necessities of life, and parental comfort.¹⁸ In the time period leading up to trial, the relationships between the children and their parents changed. Steven became more involved and had an increased opportunity to interact with the children. But this recent alteration in their relationship was still too new and tenuous for the trial court to deem it to be of sufficient duration to demonstrate the establishment of a custodial environment. In the meanwhile and leading up to the April 2008 order, Mary's relationship with the children was deteriorating. Although Mary maintained and performed the duties of a custodial parent her interactions with the children and ability to provide them guidance and comfort was impaired by her inability to work and communicate in a productive manner with Steven. By denigrating and interfering in Steven's relationship with the children, Mary negatively impacted and diminished the custodial environment she had established. While the record evidence is somewhat mixed and does not show either party in an exceptionally favorable light, it does not “clearly preponderate in the opposite direction” of the trial court's finding that a custodial environment was not established with either parent.¹⁹

The trial court followed the correct procedural sequence in determining that Steven had demonstrated proper cause and a change in circumstances to permit a review of the current custody arrangement. After evaluating whether an established custodial environment existed, the trial court reviewed the requisite factors to ascertain what custody arrangement would promote and further the children's best interests.²⁰ Although a trial court must state its factual findings and conclusions on each of the best interest factors, it is not required to include consideration of every piece of evidence or argument raised by the parties.²¹ In ruling on the factors a trial court

¹⁴ *Berger*, 277 Mich App at 706.

¹⁵ *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993); see also *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

¹⁶ *Id.* at 388 (emphasis added).

¹⁷ MCL 722.28

¹⁸ See MCL 722.27(1)(c).

¹⁹ *Berger*, 277 Mich App at 706.

²⁰ MCL 722.23.

²¹ *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005).

is not required to engage in an extensive discussion as long as it provides a brief and definitive explanation of its pertinent findings of fact and conclusions of law.²² In this instance, the trial court addressed all of the best interest factors and concluded that eight of the factors favored Steven, two of the factors favored Mary, and the remaining factor did not favor either party.²³ As Mary fails to specify which of the trial court's findings she takes issue, this Court will address all of the factors except the two on which she was favored or the parties were determined to be equal as it is presumed she does not contest those determinations.

Factor (b) of the best interest factors requires the trial court to evaluate “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.”²⁴ The trial court did not specifically evaluate the parties' contributions or involvement in their children's religious education. While acknowledging Mary's capacity to provide the children with love, affection and guidance, it expressed concern that, currently, she was inordinately focused on issues from her divorce and relationship with Steven and was not sufficiently disposed to provide the children with the necessary levels of attention and guidance. This was supported in the record by evidence of incidents in which she precluded parenting time for the children with Steven, created dramatic scenes and engaged in verbally inappropriate behavior demeaning their father in the presence of the minor children. The record also showed that the children were absent and frequently tardy to school while in Mary's custody, which negatively reflected on her ability to assure the children's educational needs were being met. The trial court's observations were further supported by the psychological evaluator's findings that Mary's behavior was narcissistic as she was unable to view matters from a broader perspective that would give primary consideration to the interests and needs of the children rather than her bitterness and anger from her divorce. As Mary's focus and behavior shifted from the children to her personal animosity against Steven, her capacity and disposition to provide the children with a nurturing environment declined and the trial court properly found this factor favored Steven.

Factor (c)²⁵ entails the trial court's evaluation of “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.” Steven was favored on this factor based on his employment and income permitting him to provide financially for the children's basic everyday needs. While Mary had been employed as a teacher a number of years ago, she had made no discernable efforts to procure employment or additional education following the divorce and relied on financial assistance from family

²² *Foskett v Foskett*, 247 Mich App 1, 12-13; 634 NW2d 363 (2001); see also MCR 2.517(A)(2); MCR 3.210(D)(1).

²³ The trial court also indicated that it had interviewed the minor children and that they had expressed a preference, which the trial court did not divulge. See MCL 722.23(i).

²⁴ MCL 722.23(b).

²⁵ MCL 722.23(c).

members. The trial court's evaluation of this factor in favor of Steven was consistent with the evidence presented.

Factor (d)²⁶ pertains to “the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” While Mary initially provided the children with a stable environment, any consistency eroded as demonstrated by the necessity to change residence based on the sale of the marital home and unilateral changes in school environment initiated by Mary in switching the children from a Montessori school to other private schools. Her inability to assure the children's arrival and attendance at school in a timely manner supported the trial court's determination that Mary's ability to maintain a structured and disciplined environment for the children had significantly deteriorated. At the point the trial court received testimony and evidence, issues regarding the children's attendance at school while residing with Steven had been significantly alleviated. When combined with the erratic behavior of Mary in denying parenting time and her increasing verbally animosity toward Steven in the presence of the minor children, there is sufficient support for the trial court's determination of this factor in favor of the children's father.

Factor (g)²⁷ addresses the respective mental and physical health of the parties. While there was no suggestion of any physical health concerns for either party, the psychological evaluator did indicate concerns regarding Mary's psychological health based on her inability to overcome the bitterness and anger following the divorce and obsessive concerns with minutia rather than a broader perspective and focus on the needs of the minor children. Mary's psychological problems were negatively impacting the minor children and their relationship with both parents. This Court will defer to the trial court's determinations involving witness credibility.²⁸

Factor (h) encompasses “[t]he home, school, and community record of the child.”²⁹ In evaluating this factor, the trial court again focused on the discrepancies in the children's school performance and attendance while in the custody of Mary versus Steven. The current evidence demonstrated greater consistency regarding school attendance and improved academic performance while in Steven's custody. The trial court also noted that while Mary was more frequently involved and present at the children's schools that this did not necessarily translate into a benefit or strength for her given the children's discomfort with her level of involvement and physical presence in their classrooms. This factor, based on the evidence existent at the time of the hearing, weighed in favor of Steven.

²⁶ MCL 722.23(d).

²⁷ MCL 722.23(g).

²⁸ *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007).

²⁹ MCL 722.23(h).

The ability to facilitate the children's relationship with the other parent is the focus of factor (j).³⁰ The trial court indicated inappropriate behavior by both parties but that Mary's current interference with Steven's parenting time and ongoing denigration of him in the presence of the minor children resulted in this factor being weighed in Steven's favor. There was also evidence that Mary attempted to control how Steven parented the children while in his custody. Evidence of Mary's ongoing and escalating inappropriate behavior adequately demonstrated that her actions failed to foster and, instead, served to disparage and denigrate Steven's relationship with the minor children. While neither parent served as a model of behavior on this factor, Mary's current actions were more clearly detrimental and geared toward diminishing the interactions and involvement of Steven in the lives of their children rather than fostering a relationship.

While factor (k)³¹ again comprised a close call for the trial court, Mary's current level of verbal abuse tipped the balance. Both parents had historically engaged in behaviors comprising domestic violence, but Mary's escalating verbal assaults supported the trial court's finding on this factor.

The trial court's consideration of Mary's failure to "resolve" issues stemming from her marriage and divorce under factor (l)³² was supported by the testimony of the psychological evaluator and Mary's own focus on assertions of wrongdoing by Steven that were not relevant to the current issues pertaining to the best interests of the children. While this factor was not specifically "weighed" by the trial court, the ruling indicated that the concerns indicated under this factor permeated all of Mary's actions and were interfering with her ability to effectively parent the minor children.

Based on the record, there is more than sufficient support for the trial court's award of custody to Steven. As acknowledged by the trial court, neither party is a model parent. Unfortunately, the trial court was required to impose the best available solution given the ongoing and long-standing animosity and immature behavior of both parties. While loathe to suggest continued litigation by these individuals, on appeal Mary attempts to introduce evidence that was not considered by the trial court at the time of the custody decision. This Court is not the proper forum for the introduction or consideration of such documents³³ and any new evidence that has arisen since the trial court's ruling that demonstrates that Steven has failed to adhere to the trial court's ruling or to meet the needs of the minor children should be brought to

³⁰ MCL 722.23(j).

³¹ MCL 722.23(k).

³² MCL 722.23(l).

³³ *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

the attention of the friend of the court to, hopefully, pursue a more efficient and amicable resolution of any such disagreements or concerns.

Affirmed.

/s/ Jane M. Beckering

/s/ Michael J. Talbot

/s/ Donald S. Owens