STATE OF MICHIGAN

COURT OF APPEALS

DERIK DENEWETT,

Plaintiff-Appellee,

v

DANIELLE JOHANNA ROZANSKI a/k/a
DANIELLE JOHANNA THIEL,

Defendant-Appellant.

UNPUBLISHED
October 18, 2011

No. 303673
Crawford Juvenile Division
LC No. 08-007657-DP

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

In this custody case, defendant appeals the order of the circuit court affirming the referee's decision to grant primary physical custody to plaintiff. Because the record contains ample support for the circuit court's decision, we now affirm.

The parties' minor child was born in September 2006. The trial court entered a final parenting time order in January 2009, which granted the parties joint legal custody with defendant receiving primary physical custody.

In September 2010, defendant's mother, Donna Stevens, petitioned to be appointed temporary guardian of the child. At the October 2010 hearing on her petition, Stevens testified that defendant had not lived with her for the previous two months, but that she had not permanently moved away. Defendant had left the parties' son with Stevens in the Grayling area, while she stayed 180 miles away in Harbor Beach, Michigan with her new husband. Stevens testified, however, that defendant was once again living with her.

Plaintiff moved to modify custody in December 2010, alleging that defendant did not reside with her mother, and had left the minor child with Stevens. At the referee hearing, defendant admitted that, after the temporary guardian hearing, she had returned to Harbor Beach with her husband within two weeks.[1] She posted a Facebook entry on September 13, 2010, that

[1] The parties also stipulated that defendant's new husband had been convicted of two counts of assault with intent to commit second degree criminal sexual assault.

she had "finally moved out of Grayling today." She also changed her address on her driver's license to her Harbor Beach address. However, she testified that she had moved back to Stevens' house as soon as she was served with the motion to modify custody. She stated that she had spent about two weeks every month with her son even prior to moving back. Plaintiff testified that he had only seen defendant once aside from court hearings, although he always went inside Stevens' house when he came to pick up their son.

The referee first found proper cause or change of circumstances for considering a custody change based on a factual finding that defendant did leave the parties' child with Stevens for approximately four months. The referee found that defendant did visit the child, but that the visits generally were only a couple days at a time and did not add up to two weeks per month. The referee next concluded that there was no established custodial environment with either parent, because Stevens was the one who had been responsible for the child's day-to-day care. After considering the statutory best interest factors enumerated in MCL 722.23, the referee found by a preponderance of the evidence that it would be in the child's best interest to transfer primary physical custody to plaintiff.

Defendant objected to the referee's conclusion. The circuit court held a de novo hearing at which it took additional testimony from the parties and from Stevens. However, it adopted the referee's findings in all points except one. The referee had found an established custodial environment with Stevens, and the circuit court simply found no established custodial environment.

I. STANDARDS OF REVIEW

In reviewing child custody decisions, this Court reviews a trial court's factual findings under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Under this standard, we defer to the trial court's findings of fact unless the findings "clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (citation and quotation marks omitted). However, this Court reviews a trial court's determinations of law for clear legal error. *Corporan*, 282 Mich App at 605. "Clear legal error occurs when a trial court incorrectly chooses, interprets, or applies the law." *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008) (internal quotations omitted). Finally, this Court reviews for an abuse of discretion the trial court's discretionary decisions. An abuse of discretion occurs "when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

II. ANALYSIS

Defendant first argues that the circuit court did not have authority to revisit the custody arrangement in this case. A court may only modify a custody order "for proper cause shown or because of change of circumstances." MCL 722.27(c).

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. 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.
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> [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. Again, not 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 something more than the 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. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 512-514; 675 NW2d 847 (2003).]

In this case Stevens testified that defendant had not lived with her for two months prior to the guardianship hearing. Defendant agreed, and also admitted that she moved out again after that hearing for another two months. Plaintiff testified that he had not seen defendant or been aware that she was in town during that period other than for court dates. Therefore, there was ample evidentiary support for the circuit court's finding that defendant had essentially abdicated her role as custodian of the minor child. This factual finding was not against the great weight of the evidence.

Moreover, that finding constitutes both proper cause and a change of circumstances. Defendant's choice to move away from her son was a change in the conditions surrounding the custody of the minor child. The fact that the child was not in the day-to-day care of either of his parents was relevant to a number of the best interest factors, including (a) the love, affection, and other emotional ties between child and parent, (b) the capacity of defendant to give the child love, affection, and guidance and contribute to the child's education, and (d), the length of time the child lived in a stable environment. See MCL 722.23. Defendant's extended absence was also likely to have a significant impact on the child's well-being.

In addition, the trial court noted that defendant had married a registered sex offender and that this formed a basis to revisit the earlier order. This was supported by the parties' stipulation. Given that defendant had primary physical custody of the child by virtue of the earlier order, and especially given that testimony was presented that the new husband could not be alone with the parties' minor child, that fact alone would support a finding that the circumstances surrounding custody had changed to such an extent that it did, or could have a significant effect on the child's well-being. *Vodvarka*, 259 Mich App at 512-514. The circuit court's finding was not against the great weight of the evidence. *Corporan*, 282 Mich App at 605. Thus the court was justified in finding both a change of circumstances and proper cause, and was free to consider a change of custody.

Defendant next argues that the circuit court should have found an established custodial environment with her, thereby requiring plaintiff to produce clear and convincing evidence in favor of a change of custody rather than merely a preponderance of evidence. By statute, "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." MCL 722.27(1)(c). Defendant argues that the court is only to consider whether such an environment exists, not the reasons behind the environment. See *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992). However, the referee found that defendant had been largely absent for four months, and that there was a dearth of evidence regarding who the child looked to for guidance and discipline, and based its conclusion on these facts. In that portion of his analysis, the referee did not discuss why defendant was absent, or base his decision on any moral judgment concerning that reason. The circuit court accepted the referee's conclusion on this point.

Defendant's lengthy absence is sufficient to show that the previous custodial environment defendant had established with the child had been destroyed. Existing custodial relationships can be destroyed, for example, by "repeated changes in physical custody and uncertainty created by an upcoming custody trial[.]" *Bowers v Bowers* (*After Remand*), 198 Mich App 320, 326; 497 NW2d 602 (1993). Here, if plaintiff's version of events is credited, defendant essentially deserted her for four months. While we need not establish any absolutes concerning how long a parent having physical custody of a child can temporarily relinquish it before a custodial environment is destroyed, under the circumstances here, the trial court's finding was reasonable.

Defendant also argues that she temporarily relinquished custody of the child to protect his best interests, and therefore custody may not be modified without clear and convincing evidence that the child's best interest would be served by the modification. See *Theroux v Doerr*, 137 Mich App 147, 149-150; 357 NW2d 327 (1984). However, this policy exception generally applies to temporary transfers occasioned by difficulties or situations that the transferring parent needs time to overcome. *Id.*; see also *Straub v Straub*, 209 Mich App 77, 81; 530 NW2d 125 (1995). Here, there was evidence that defendant left the child in a third party's custody so that she could be with her new husband and, on the basis of a credibility assessment and the evidence that defendant's new husband was a registered sex offender, the circuit court could reasonably conclude that defendant did not view this as a temporary arrangement. The finding that defendant had not established a custodial environment was not against the great weight of the evidence.

Defendant finally argues that there was no evidence to support a change of custody, under any standard. Because the circuit court correctly held that there was no established custodial environment, the burden was on plaintiff to establish by a preponderance of the evidence that the minor child's interest would be best served by a modification of custody. *Pierron v Pierron*, 486 Mich 81, 89-90; 782 NW2d 480 (2010).

Defendant argues that best interest factor (a) should have been found in her favor because she has always acted in the child's best interest, including not uprooting him from the only home he had ever lived in. However, there is substantial evidence in the record that defendant left the child behind for an extended period of time to be with her new husband. The referee and circuit court might have been justified finding in defendant's favor if they found her testimony credible, but they were not required to favor defendant by the great weight of the evidence.

With regard to factor (c), defendant argues that there is no evidence to suggest that she does not have the capacity to provide for the minor child's material needs. Defendant testified that she and her husband are both unemployed, while plaintiff and his wife were both employed. However, the referee noted that any economic disparity could be ameliorated by child support payments, and that there had been no past issues with the child receiving inadequate care, and found that the factor only slightly favored plaintiff. In *LaFleche v Ybarra*, 242 Mich App 692, 701; 619 NW2d 738 (2000), this Court held that an economic disparity did not require the trial court to find factor (c) in favor of the higher earning spouse, given the availability of child support payments. However, *LaFleche* did not state that economic disparity could not be considered at all, only that a finding ignoring such disparity was not against the great weight of the evidence. The circuit court's finding on this factor was not against the great weight of the evidence.

Defendant also objects to the referee's decision based on a "feeling" from the testimony that factor (j) favored plaintiff. She argues that there is no evidence to show that she does not support a relationship between the minor child and plaintiff. However, the referee and circuit court were in the best position to evaluate the credibility of the parties' testimony on this point. *Berger*, 277 Mich App at 705. Further, there is some evidence in the record that defendant has denied plaintiff visitation time. This finding was not against the great weight of the evidence.

The referee's choice to grant custody to plaintiff rested primarily on its finding that defendant had left the child with Stevens for a protracted period. The circuit court adopted this position as its own. Given that the other facts in this case do not strongly favor either party, the fact that defendant chose not to live with her son for four months provides ample support for the circuit court's decision. Even apart from considerations concerning defendant's new husband, granting primary physical custody to the parent who seems most interested in spending time with the child on a day-to-day basis does not evidence a perversity of will or defiance of judgment.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck