

STATE OF MICHIGAN
COURT OF APPEALS

JOAN GATES, f/k/a JOAN MICHELLE
KADOGUCHI,

Plaintiff-Appellant,

v

RODNEY JAMES KADOGUCHI,

Defendant-Appellee.

UNPUBLISHED
November 14, 2013

No. 313829
Wayne Circuit Court
Family Division
LC No. 03-341533-DM

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals from the order that (1) awarded defendant sole legal and sole physical custody of the parties' minor children, Ryan Kadoguchi (DOB 4/6/99), Megan Kadoguchi (DOB 2/10/01), and Jack Kadoguchi (DOB 4/15/03), and (2) established parenting time. We affirm.

I. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

A moving party who seeks a change of custody must show proper cause or a change of circumstances. And here, plaintiff contends that the trial court's finding of proper cause or change of circumstances was against the great weight of the evidence, but our review of the record shows otherwise.

This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard. Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings "clearly preponderate in the opposite direction." [*Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (citations omitted).]

"A trial court may only consider a change of custody if the movant establishes proper cause or a change in circumstances." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

To establish proper cause, the moving party must establish by a preponderance of the evidence an appropriate ground that would justify the trial

court's taking action. Appropriate grounds should include at least one of the 12 statutory best-interest factors and must concern matters that have or could have a significant effect on the child's life. Only after a moving party has established proper cause or a change of circumstances may the trial court reevaluate the statutory best-interest factors. [*Mitchell v Mitchell*, 296 Mich App 513, 517-518; 823 NW2d 153 (2012) (citations omitted).]

[T]o 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. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 513-514; 675 NW2d 847 (2003) (emphasis in original).]

"[E]vidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order." *Id.* at 514 (emphasis in original).

The trial court found that the parties' inability to co-parent and the parties' behavior overcame the threshold of proper cause or change of circumstances and that several issues since the judgment of divorce constituted a change of circumstances. Plaintiff argues that there was no change of circumstances because the parties have had difficulty co-parenting and communicating since the beginning of the divorce proceedings. Plaintiff contends that the issues of co-parenting and communicating have been considered by the Family Evaluation, Mediation, and Counseling Unit (FEMC) several times and joint legal and physical custody has been maintained. Plaintiff further argues that defendant's prior motion for custody was similar and was denied on October 22, 2010, and defendant's last motion for custody was denied on August 1, 2011.

The trial court apparently found that the last custody order was the judgment of divorce, despite the fact that there were several denials of motions to change custody since then, and further found that several issues since then met the threshold of proper cause or change of circumstances. Plaintiff does not dispute that the last custody order was the judgment of divorce, but suggests that the same issues existed even before then. Even if the parties have had difficulty co-parenting and communicating since before the judgment of divorce, an escalation or expansion of disagreements can constitute a change of circumstances, see *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011), and the trial court specifically found that several issues that transpired post-judgment constituted a change of circumstances. According to the trial court, the September 13, 2011, incident involving plaintiff calling the police precipitated the current motion for custody.

Plaintiff contends that, even considering such evidence, there was no proper cause of change of circumstances because Child Protective Services (CPS) found all allegations were unsubstantiated, the domestic violence charges against the children have been settled or

dismissed, and the incident involving the police resulted in no further action. In his motion to change custody, defendant alleged that the proper cause or change of circumstances was plaintiff's inability to control the children, based, in part, on the incident in which plaintiff called the police. Plaintiff testified that she called the police after Ryan and Jack yelled obscenities, Ryan pushed her, and Jack punched her in the back.¹ Plaintiff also testified that she has had difficulty controlling the children recently, although they do obey her. She then admitted Jack does not always listen to her. Although the trial court did not specify that the incident involving the police constituted proper cause or change of circumstances, it noted that this incident precipitated the motion. This incident is relevant to several best interest factors, including (b) (the capacity and disposition of the parties involved to give the children love, affection, and guidance and to continue the education and raising of the children in their religion or creed, if any), (d) (the length of time the children have lived in a stable, satisfactory environment, and the desirability of maintaining continuity), (h) (the home, school, and community record of the children), and (k) (domestic violence), and would have a significant effect on the children's well being. MCL 722.23. Thus, even if the charges were settled or dismissed and no further action was taken, it constitutes proper cause. Moreover, plaintiff's inability to control the children, based on the September 13, 2011, incident, is a change in the children's environment that would have a significant effect on their well being. See *Vodvarka*, 259 Mich App at 513. This incident occurred after the judgment of divorce. Thus, it constitutes a change of circumstances. Accordingly, the trial court's finding of proper cause or change of circumstances was not against the great weight of the evidence. See *Corporan*, 282 Mich App at 605.

II. BEST INTEREST FACTORS

Plaintiff contends that the trial court incorrectly found that plaintiff requested that Ryan and Jack be prosecuted, did not properly apply the clear and convincing evidence standard, and clearly erred in its findings regarding factors (a), (b), (d), (e), (h), (j), and (l). We disagree.

The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Corporan*, 282 Mich App at 605 (citation omitted).]

"Once a party has met the initial burden of showing a change in circumstances or proper cause to revisit the custody order, the next step is for the circuit court to determine the applicable burden of proof for the custody hearing." *Dailey*, 291 Mich App at 666-667. If an established custodial environment exists with both parents, the trial court cannot modify custody unless there is clear and convincing evidence that modification is in the child's best interest. *Id.* at 667.

¹ According to the police report attached to defendant's motion, this incident occurred on September 13, 2011.

In determining the best interests of the child, the court must review the best-interest factors listed in MCL 722.23. In addition, the court must consider “the general level of cooperation and agreement between the parties when considering joint custody.” When ruling on a custody motion, the circuit court must expressly evaluate each best-interest factor and state its reasons for granting or denying the custody request on the record. [*Dailey*, 291 Mich App at 667 (citations omitted).]

The trial court found that an established custodial environment existed with both parties and that a change of custody could only be made on clear and convincing evidence that the change was in the best interests of the child. The trial court considered each factor and found that factors (a), (b), (d), (h), and (l) favored or slightly favored defendant, factor (c) favored plaintiff, and factors (e), (f), (g), (j), and (k) favored neither party. The trial court also considered factor (i).

Given its finding that an established custodial environment existed with both parties, the trial court correctly applied the clear and convincing evidence standard. See *Dailey*, 291 Mich App at 667. Plaintiff does not dispute the trial court’s finding of an established custodial environment with both parties or the applicability of the clear and convincing evidence standard.

A. PLAINTIFF’S TESTIMONY

Plaintiff first argues that the trial court incorrectly found that she requested that Ryan and Jack be prosecuted. Plaintiff contends that she requested that the charges be dismissed. Plaintiff argues that, based on the exchange between her attorney and the trial court at the November 21, 2012, hearing, the trial court misinterpreted her testimony.

Plaintiff testified that there was an incident in which Ryan and Jack were yelling obscenities at her, she tried to remove a baseball bag, Ryan grabbed the bag and pushed plaintiff into the wall, and Jack punched her in the back where she had previously had surgery. Plaintiff then called the police. Both children were offered a diversion program. Plaintiff testified that she wanted Ryan to accept the diversion program, but defendant told him to plead not guilty. She later spoke with the prosecutor and had the charges against Ryan dismissed. At the November 21, 2012, hearing, the trial court judge and plaintiff disputed whether plaintiff wanted Ryan to plead not guilty. Ultimately, the trial court found that plaintiff was upset with defendant for telling Ryan to plead not guilty. Plaintiff disputed this. However, this finding was correct based on plaintiff’s testimony.

Regardless, the trial court’s findings in its opinion were not against the great weight of the evidence. The trial court found that there was an incident that resulted in plaintiff calling the police on Ryan and Jack and charges were brought against them. In discussing factor (h), the trial court found that plaintiff requested that Ryan and Jack be brought before the juvenile court for domestic violence. In discussing factor (l), the trial court also stated that plaintiff contacted the police and had the children brought up on charges for domestic violence. These findings were supported by the evidence because plaintiff called the police, despite the fact that she later wanted the children to accept offers for diversion and she had the charges against Ryan

dismissed. Even if plaintiff did not specifically request that the children be prosecuted, the trial court found it significant that she lost control and called the police.

B. BURDEN OF PROOF

Plaintiff next suggests that the trial court did not properly apply the clear and convincing evidence standard. Plaintiff fails to articulate her argument and, instead, quotes her trial counsel's arguments from the November 21, 2012, hearing. At the hearing, the trial court judge stated that she saw defendant "as a much more positive fit, but maybe this much better." Plaintiff's trial counsel argued that the trial court found that defendant was only "this much better," but "the law says that the standard of proof is clear and convincing evidence." According to plaintiff, the trial court judge held her fingers only a half inch apart. Despite this statement, the trial court judge then stated that she found the change of custody was in the children's best interest by clear and convincing evidence. The trial court's opinion also provides that defendant established by clear and convincing evidence that the change of custody was in the children's best interest. Accordingly, there was no clear legal error.

C. BEST INTEREST FACTORS

With regard to the best interest factors, plaintiff disputes the trial court's findings regarding factors (a), (b), (d), (e), (h), (j), and (l).

1. FACTOR (a)

Factor (a) is "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court found that both parties loved the children and showed affection toward them, but was concerned with the emotional ties between plaintiff and the children based on its review of the reports in the case and interviews with the children. The trial court found that this factor slightly favored defendant.

Plaintiff argues that the trial court's findings were against the great weight of the evidence because the FEMC previously found this factor was equal, the trial court never observed plaintiff and the children interacting, and there was no evidence supporting the trial court's finding. The FEMC's prior findings are not relevant to the trial court's finding after the evidentiary hearing.² Furthermore, the trial court was not required to observe plaintiff and the children interacting and properly relied on reports and the testimony at the evidentiary hearing. The trial court failed to specify why it was concerned with the emotional ties between plaintiff and the children. Nonetheless, the trial court's finding that this factor slightly favored defendant was not against the great weight of the evidence given the evidence of the incident in which plaintiff called the police on the children.

2. FACTOR (b)

² Plaintiff makes this argument with regard to each factor.

Factor (b) is “[t]he 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.” MCL 722.23(b). The trial court found that neither party took the children to church and both were incapable of guiding the children in a relationship with the other parent. The trial court also found both parties love the children, but “their means of displaying affection and guidance is skewed.” The trial court found that plaintiff’s testimony was inconsistent with what she reported to FAME when she acknowledged that she slapped and sat on one son. The trial court believed that while plaintiff appeared more relaxed and indicated her relationship with the children was going well, the underlying issues in plaintiff’s home had not been addressed or rectified. The trial court found that this factor favored defendant.

Plaintiff argues that the trial court’s findings were against the great weight of the evidence because the FEMC previously found this factor was equal, plaintiff testified she never slapped her children, and the trial court found that she was more relaxed and her relationship with the children was going well. The trial court’s finding that this factor favored defendant was not against the great weight of the evidence. Although plaintiff testified that she never slapped the children, the trial court found that this testimony was inconsistent with what she reported to “FAME” on May 15, 2012. Although the May 15, 2012, report is not available, according to the April 30, 2012, FEMC report, plaintiff acknowledged grabbing Jack by his neck and jaw and sitting on him. Further, plaintiff testified that she had difficulty controlling and disciplining the children and Jack did not listen to her.

3. FACTOR (d)

Factor (d) is “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” MCL 722.23(d). The trial court found that while this factor appeared to favor both parties, it was concerned with the stability of plaintiff’s home because of her issues of controlling the children and vulgar language in the home. The trial court found that this factor favored defendant.

Plaintiff argues that the trial court’s findings were against the great weight of the evidence because the FEMC previously found this factor was equal, there was no evidence that the custodial arrangement with plaintiff was anything but stable, there was a desire to maintain continuity, plaintiff has a suitable living environment, and defendant was being evicted. The trial court’s finding that this factor favored defendant was not against the great weight of the evidence. Although there was evidence that defendant was being evicted, he denied it. Further, plaintiff testified that she could not control the children, she was separated from her spouse, and she moved several times. This was evidence that her home was not stable and continuity would not be desirable. Plaintiff also testified that she may have used profanity or obscene language in front of the children. However, contrary to the trial court’s finding, there was no testimony regarding Megan being called the specific name found by the trial court. It was noted in the August 17, 2010, FOC report that defendant alleged such language was used by plaintiff and her husband.

4. FACTOR (e)

Factor (e) is “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.” MCL 722.23(e). The trial court found that plaintiff was remarried, but separated from her current spouse and defendant has lived alone in Westland since the judgment of divorce. The trial court found that this factor favored neither party.

Plaintiff argues that the trial court’s findings were against the great weight of the evidence because the FEMC previously found this factor was equal or favored plaintiff and defendant was evicted. The trial court’s finding that this factor favored neither party was not against the great weight of the evidence. Defendant denied he was evicted, although there was some evidence that he was being evicted, such as his bankruptcy filing. Moreover, plaintiff recently separated from her husband and had moved several times.

5. FACTOR (h)

Factor (h) is “[t]he home, school, and community record of the child.” MCL 722.23(h). The trial court found that the children attended school in plaintiff’s district and were doing well, except for one of the boys. The trial court also found that Ryan and Jack were brought to juvenile court at the request of plaintiff. The trial court found that this factor slightly favored defendant.

Plaintiff argues that the trial court’s findings were against the great weight of the evidence because the FEMC previously found this factor was equal, Jack completed the diversion program, plaintiff had the charges against Ryan dismissed, plaintiff never requested that charges be brought, and defendant was not involved in the children’s schooling or community. The trial court’s finding that this factor slightly favored defendant was not against the great weight of the evidence. The parties both testified that Jack had difficulties in school. Although defendant testified he was not involved in the children’s schooling, this factor relates to the children’s record, not the parties’ involvement. Even if plaintiff did not specifically request that charges be brought, she called the police during the incident and reported domestic violence. Thus, it was her conduct that resulted in the boys being charged.

6. FACTOR (j)

Factor (j) is “[t]he 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.” MCL 722.23(j). The trial court found that neither party was willing or able to facilitate or encourage a close and continuous relationship with the other parent. The trial court found that this factor favored neither party.

Plaintiff argues that the trial court’s findings were against the great weight of the evidence because the FEMC previously found this factor was equal on one occasion and favored plaintiff on one occasion, there was no evidence that plaintiff did not facilitate and encourage a close and continuous relationship with defendant, and there was evidence that defendant fails to foster respect for plaintiff. The trial court’s finding that this factor favored neither party was not against the great weight of the evidence. Plaintiff testified that she encourages a relationship between defendant and the children by trying to cooperate with defendant regarding baseball. However, as the trial court found, there was evidence that neither party encouraged a relationship

with the other parent. There was evidence that defendant questioned the children about plaintiff, spoke negatively about plaintiff, called her names in front of the children, and told the children they did not have to listen to her. Defendant, however, testified that he told the children to listen to plaintiff and did not tell the children to call the police when plaintiff yells at them. There was also evidence that plaintiff informed defendant of the children's medical appointments only hours before the appointment, refused to speak with defendant on the phone or hung up on him, and tried not to speak at all about defendant with the children.

7. FACTOR (1)

Factor (1) is “[a]ny other factor considered by the court to be relevant to a particular custody dispute.” MCL 722.23(1). The trial court found that other relevant factors were a parent's inability to maintain control and adequately parent during tough times, a parent's ability to assess a situation and act in the children's best interest, and a parent's ability to recognize that their behavior is contributing to an un-nurturing environment for the children. The trial court found that neither party was able to recognize the extent to which their behavior contributed to an unstable environment. The trial court found that defendant did not give plaintiff breathing room with her parenting, called the police on more than one occasion, and failed to take them to school twice. The trial court found that plaintiff only gives defendant 24 hours' notice of doctors' appointments and dropped the children off at defendant's girlfriend's house. The trial court indicated that the largest impact on it was plaintiff having charges brought against her children and was concerned with plaintiff's inability to act in the children's best interest. The trial court found that the situation escalated because plaintiff cannot maintain control. On one occasion plaintiff expressed a willingness to give the children to defendant and later recognized that the children were out of control. The trial court found that plaintiff lost or was losing the ability to effectively parent. The trial court found that plaintiff was still having issues in her home and admitted that one child still has issues listening to her. The trial court found that this factor favored defendant.

Plaintiff argues that the trial court's findings were against the great weight of the evidence because the facts considered under this factor were discussed under the previous factors, plaintiff pursued therapy for the children, while defendant would not agree, defendant interfered with plaintiff's parenting, defendant failed to take the children to school nine or more times, most medical appointments were made only 24 hours in advance, plaintiff did not lose control during the incident involving police, and defendant continuously involved the police and CPS.

The trial court's finding that this factor favored defendant, despite his interferences with plaintiff's parenting time and inappropriate behavior, was not against the great weight of the evidence. The factors discussed by the trial court, although similar to others addressed, were different. Both parties testified that the other would not agree to therapy. Plaintiff testified that the parties could not agree on where to take Jack for therapy, defendant would not agree on therapy for Ryan, and the guardian ad litem (GAL) was appointed to deal with the therapy issue. Defendant testified that he tried to get therapy for the children and plaintiff would not agree. Although plaintiff listed six dates on which the children were absent, defendant acknowledged that the children missed school only when plaintiff was not home on Sunday evening or he believed they feared for their safety so he did not return them. He did, however, acknowledge

another time that he failed to return the children. With regard to appointments, defendant testified that plaintiff notified him only hours in advance. Contrary to plaintiff's argument, there is no evidence that such appointments were made only 24 hours in advance. Finally, although plaintiff contends that by calling the police she maintained control, the trial court's finding that she lost control was not against the great weight of the evidence.

The trial court did not commit clear legal error and its findings regarding the best interest factors were not against the great weight of the evidence. The trial court did not abuse its discretion in changing custody.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Kathleen Jansen