

STATE OF MICHIGAN
COURT OF APPEALS

DIANE PEARS,

Plaintiff-Appellant,

v

PERCY RAMSEY,

Defendant-Appellee.

UNPUBLISHED

May 8, 2007

No. 271820

Wayne Circuit Court

LC No. 00-067838-DP

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for a change of custody and awarding defendant physical custody of the parties' child, David Pears, primarily because of alleged abuse in plaintiff's home. We reverse.

The parties' child was born out of wedlock in November 1998. Defendant acknowledged paternity in 2001, and parenting time was subsequently established with defendant. In August 2005, defendant filed a petition to change custody from plaintiff to himself, alleging that (1) plaintiff had moved frequently between different residences and the child lacked stability; (2) plaintiff and the child were exposed to continuing violence in plaintiff's home at the hands of plaintiff's husband, Abdullahi Kah; and (3) the child appeared to be exhibiting behaviors indicative of emotional turmoil in his life. Defendant believed that Kah was using corporal punishment against the child and alleged that the child had reported being spanked and whipped on the back and hands. The child also reported being grabbed at the neck by Kah and swung around, which apparently occurred after the court had entered an order prohibiting corporal punishment by third parties. After the court found by a preponderance of the evidence that a change of circumstances existed, it conducted a full evidentiary hearing to consider the child's best interests. Following the hearing, the court found by clear and convincing evidence that custody should be changed to defendant.

Child custody appeals are governed by the following standards of review:

We apply three standards of review in custody cases. 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. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d

11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. *Id.* Questions of law are reviewed for clear legal error. *Fletcher, supra*, 229 Mich App 24, citing MCL 722.28; MSA 25.312(8), and *Fletcher, supra*, 447 Mich 881. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher, supra*, 229 Mich App 24, citing *Fletcher, supra*, 447 Mich 881. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).]

Plaintiff first argues that defendant failed to show proper cause or a change of circumstances to warrant reconsideration of the custody arrangement. A trial court may not modify a previous custody order and change an established custodial environment unless the moving party demonstrates proper cause or a change of circumstances by a preponderance of the evidence. MCL 722.27(1)(c); *Vodvarka, supra* at 508-509.

In *Vodvarka, supra* at 512-514, this Court explained:

[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.

* * *

[W]e hold that in 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.

The evidence showed that plaintiff married Kah in June 2004. Plaintiff later filed a petition for a personal protection order (PPO) against Kah and alleged in her affidavit in support of the PPO that Kah had physically abused her and had also hit the child. Allegations of physical abuse were also reported to, and investigated by, Protective Services. Dr. Daniel Swerdlow-Freed, a court-appointed psychologist, also conducted an evaluation.

According to the reports by Dr. Swerdlow-Freed and the Protective Service investigators, no actual abuse of the child was found, although Dr. Swerdlow-Freed believed that the child was

subject to inappropriate corporal punishment. Although the allegations of abuse were not substantiated, in light of plaintiff's living arrangement with Kah and the child's exposure to potentially inappropriate disciplinary methods, the trial court did not err in finding that there was a sufficient showing of a change of circumstances to justify a full evidentiary hearing to consider the child's best interests.

Plaintiff next argues that the trial court erred by electing not to consider evidence of domestic violence in plaintiff's home at the second-phase hearing to determine the child's best interests, and instead relying on the evidence presented on this subject at the first-phase hearing, which was limited to determining whether a change of circumstances existed. Because plaintiff did not object on the record to this limitation, the issue is not preserved and, accordingly, our review is limited to plain error affecting plaintiff's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Plaintiff argues that she was prejudiced because a preponderance of the evidence standard governed the first phase of the proceeding, whereas a clear and convincing evidence standard governed the second phase. However, the differing standards of proof did not prevent the trial court from considering the evidence in light of the proper standard. Plaintiff also argues that she would have deposed some of the individuals whose reports the court considered at the first hearing had she known in advance that the court would not hear additional testimony on the issue of domestic violence. The record discloses, however, that the parties did depose Dr. Swerdlow-Freed. Moreover, this case is distinguishable from *Grew v Knox*, 265 Mich App 333, 336-338; 694 NW2d 772 (2005). In *Grew*, the trial court did not conduct a separate hearing on the defendant's motion to change custody and, consequently, did not hear evidence on the 12 statutory best interest factors. Here, the trial court conducted the required hearing and considered each of the best interest factors before changing custody. For these reasons, plaintiff has not shown a plain error.

Plaintiff also argues that the trial court erroneously awarded defendant temporary custody of the child pending the outcome of the evidentiary hearing, without conducting a hearing. The trial court did not characterize its order as an order changing custody. Instead, the court stated that it was only expanding defendant's parenting time and prohibiting overnight visits with plaintiff. We agree with plaintiff that the actual effect of the trial court's order was to temporarily change custody to defendant. But the court did so because of the serious allegations of abuse of the child. Plaintiff is correct that a trial court may not ordinarily change custody without first conducting an evidentiary hearing to determine the child's best interests and weighing all the relevant best interest factors, even on a temporary basis. *Grew, supra* at 336. However, this Court has recognized that courts are empowered to temporarily change custody in emergency situations, without first conducting a hearing regarding the child's best interests. In *Brandt v Brandt*, 250 Mich App 68; 645 NW2d 327 (2002), this Court held that the trial court properly entered a PPO that prohibited the respondent from contacting his children, thereby modifying custody and parenting time decisions made in an earlier child custody proceeding. The Court held that such orders need not comply with the requirements of the Child Custody Act, MCL 722.21 *et seq.*:

Respondent is correct that MCL 722.23 enumerates several factors for a court to use to determine the best interests of the children involved in a custody dispute. Nonetheless, we do not believe that these factors were required to be applied in the instant case. The trial court was not making a custody

determination. Instead, the trial court was simply issuing an emergency order, which was essentially an award of temporary custody of the children to petitioner, while granting respondent parenting time until the divorce proceeding was initiated so that the children might be protected from physical violence or emotional violence or both inflicted on them by respondent. [*Brandt, supra* at 70.]

We believe that the temporary change of custody was justified by the allegations of abuse in this case.

Plaintiff's primary argument is that the trial court erred in its consideration and findings regarding the statutory best interest factors in MCL 722.23(a) – (l). We agree.

We review the trial court's findings of fact pursuant to the great weight of the evidence standard. *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). Under that standard, the trial court's findings will be upheld unless "the evidence clearly preponderates in the opposite direction." *Id.* This Court will defer to the trial court's findings on credibility. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

The trial court found that the child had an established custodial environment with plaintiff. Therefore, the trial court could not disturb that custodial environment unless there was clear and convincing evidence that a change was in the child's best interests. MCL 722.27(1)(c). The trial court was required to base its decision on the best interests of the child, by considering, evaluating, and determining "the sum total" of the 12 factors listed in MCL 722.23(a) – (l).

Here, the trial court considered each of the best interest factors and found that five factors favored defendant, while none favored plaintiff, and that the remaining factors were equal between the parties. Plaintiff argues that the court erred in its findings regarding factors b, d, e, h, i, j, k, and l.

Factor b involves 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." Although the trial court found that this factor did not favor either party, this determination was based only on its evaluation of the child's schooling. We find no error with regard to the court's assessment of the child's schooling, but the court erred in finding that there was no evidence offered regarding the child's religious training. On the contrary, there was uncontradicted testimony that plaintiff was involved in the child's religious training by taking him to church services, Bible study, and other church activities. Because there was no evidence that defendant was involved in providing religious guidance to the child, the trial court should have weighed this factor in favor of plaintiff.

Plaintiff also argues that the trial court incorrectly found that the parties were equal with respect to factor d, the length of time the child has lived in a stable, satisfactory environment, where the evidence showed that she has had sole custody of the child since his birth. Plaintiff asserts that the trial court unduly focused on the period of time when she lived with Kah, which was just over a year.

It was undisputed that the child had lived exclusively with plaintiff, except for overnight visits with defendant, for approximately six years. The trial court appeared to conclude that because plaintiff moved in with Kah after they married, but then moved out and then moved back in temporarily, that she moved around frequently. Plaintiff's relationship with Kah lasted a little more than a year before she moved out of his home in July 2005. Plaintiff then moved back into the same home where the child had been raised for most of his life. The record does not show that plaintiff was moving frequently, other than between her home and Kah's home during that one-year period. Considering the length of time the child resided exclusively with plaintiff, we conclude that the trial court erred in finding that the parties were equal on this factor. Rather, the evidence clearly preponderates in favor of plaintiff. Despite the moves plaintiff made in 2004 and 2005, the evidence established that plaintiff has provided the child with a stable home environment for the majority of his life.

Plaintiff also argues that the trial court erred by finding that factor e, the permanence of the existing or proposed custodial homes as a family unit, equally favored both parties. We agree with plaintiff that the trial court misapplied this factor by focusing on the physical attributes of the parties' homes and by not giving sufficient weight to the permanence of the family units in each residence. The court found that the parties' housing situations were equal, but erred by determining that the child's separation from his only sibling was not significant. In considering factor e, the court should have focused on the stability of the family unit, not the suitability of the parties' physical housing situations. See *Ireland v Smith*, 451 Mich 457, 464-465; 547 NW2d 686 (1996). The child has had an established permanent family unit for approximately five years with plaintiff and his younger sister. In addition, the evidence showed that plaintiff and the child had a close relationship with extended family, particularly plaintiff's sister and her sister's children. Other than defendant's mother, there was no evidence that defendant had any other relatives involved in the child's life. The evidence clearly preponderates in favor of finding that this factor favors plaintiff. See *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995).

Plaintiff argues that the trial court ignored much of the testimony regarding her efforts to help the child with his schoolwork when analyzing factor h. We agree. The trial court ignored testimony that plaintiff offered significant help to the child at his school in order to help him adjust and progress in his schoolwork in its evaluation of this factor. Indeed, the court acknowledged this evidence in its discussion of factor l. There, the court found that plaintiff made contributions toward helping the child in his education. However, the court inexplicably failed to consider this evidence when considering the child's school record as required for factor h. Even if the court was justified in finding that this factor slightly favored defendant because he arranged for tutoring and was more of a disciplinarian when it came to schoolwork, the evidence does not support the trial court's conclusion that this factor "strongly" favored defendant.

We find no error with the trial court's refusal to consider the child's preference under factor i. The court determined that the child's preference was not reasonable because it was based on improper influences. We defer to the trial court's superior position to judge the credibility of the child.

We further find that the trial court erred in finding that factor j, the parties' efforts to facilitate the child's relationship with the other parent, favored defendant. There is no support in the record for the trial court's finding that plaintiff was less willing to facilitate defendant's

relationship with the child. The history of this case showed that plaintiff had encouraged a relationship between defendant and the child when defendant initially doubted he was the child's father and did not have anything to do with the child for the first few years of his life. There was no evidence that defendant's efforts to facilitate plaintiff's relationship with the child were superior to plaintiff's efforts, particularly after defendant was awarded temporary custody.

We agree with the trial court that factor k, domestic violence, favored defendant. However, we believe that the trial court unjustifiably gave too much weight to this factor in its overall custody decision. The court failed to take into account that Protective Services and a court-appointed psychologist investigated the alleged incidents of abuse against the child by Kah and all found no evidence of physical abuse. Although plaintiff filed for a PPO against Kah and made statements that he had hit both her and the child, the physical evidence did not support a finding that the child was subject to abuse. The psychologist also found that the child was not seriously affected by the corporal punishment. The trial court did not err in finding that this factor favored defendant, but because plaintiff was divorced from Kah at the time of the hearing and there was no evidence that she had a history of leaving the child in inappropriate situations, undue weight was given to this factor.

As indicated previously, the trial court considered the child's schooling in its evaluation of factor l when it should have taken that evidence into account when analyzing factors b and h. The court also considered matters under factor l that were unrelated to the child's best interests, such as plaintiff's failure to pay a fine and her request to adjourn a hearing without sufficient reason. The trial court did not explain how these actions affected the child's best interests. Thus, the trial court erred in finding that this factor favored defendant.

While a trial court's exercise of discretion to change custody should be given the utmost level of deference, *Shulick, supra* at 323-325, the trial court's decision in this case does not comport with the great weight of the evidence. *Foskett v Foskett*, 247 Mich App 1, 13; 634 NW2d 363 (2001). Overall, the custody factors slightly favored defendant with respect to his ability to provide for the child's educational and medical needs. He was also favored because of prior domestic violence in plaintiff's home. But the concerns with domestic violence and inappropriate corporal punishment had been addressed and eliminated by the time the court was asked to change custody. Further, a preponderance of the evidence clearly favored plaintiff with respect to many of the best interest factors. The evidence did not clearly and convincingly show that the child's best interests would be served by changing his custodial environment from plaintiff to defendant. We therefore reverse the trial court's decision modifying custody and awarding physical custody to defendant.

In light of our decision, it is unnecessary to address plaintiff's final issue on appeal.

Reversed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto