

STATE OF MICHIGAN
COURT OF APPEALS

SHAUNA ORESIK,

Plaintiff/Counter-Defendant-
Appellant,

v

ERIC PUMFORD,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

July 18, 2006

No. 268281

Barry Circuit Court

LC No. 04-000553-DM

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion to change custody of the parties' two minor children. We affirm.

Plaintiff and defendant were married September 27, 1997, and had two children, Kaylianne (Kayli) and Isaac. The parties separated in September 2002, and plaintiff filed for divorce November 2, 2004. A judgment of divorce was entered May 5, 2005. Neither party was represented by counsel during the divorce proceedings. The judgment awarded joint physical and legal custody of the children to the parties. Plaintiff was given physical custody from 5:00 p.m., Sunday to 5:00 p.m., Friday, and defendant was given physical custody each weekend. Defendant petitioned for a change in custody June 14, 2005. The Friend of the Court initially recommended that the established schedule stay in place but later recommended that defendant be awarded physical custody and the parties be given joint legal custody. At the pretrial hearing, plaintiff's counsel noted that defendant did not allege a change in circumstances in his motion for a change in custody. The trial court allowed defendant to amend his motion. At a subsequent hearing, plaintiff moved to dismiss on the ground that defendant could not demonstrate a change in circumstances. The court denied the motion and stated it could not make that determination without a full presentation of the evidence.

Following testimony and arguments, the court ruled defendant did not demonstrate a change in circumstances but established proper cause to evaluate the custody order. It cited Kayli's poor school record and the children's dental health issues. Plaintiff's counsel challenged the court's finding of proper cause because the trial court considered events that occurred before the judgment of divorce was entered. The trial court noted that it was permissible to take these events into account when considering proper cause. Each party addressed the best interest

factors in closing remarks. The court took the matter under advisement. In its written opinion, it found an established custodial environment existed with plaintiff. It determined that defendant demonstrated by clear and convincing evidence on the basis of the best interest factors that a change in custody was in the children's best interests. Because of the parties' unwillingness or inability to communicate with each other, the trial court awarded defendant physical and legal custody of the children and set forth specific parenting time for plaintiff.

Three standards of review apply to child custody cases. Factual findings are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates otherwise. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003), citing *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). In reviewing the findings, we defer to the trial court's determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Discretionary rulings, including an ultimate determination of custody, are reviewed for an abuse of discretion. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Questions of law in custody cases are reviewed for clear legal error. *Fletcher, supra* at 24, citing MCL 722.28.

Plaintiff raises several claims of procedural error. She first argues she did not have notice that proper cause would be an issue because defendant only pleaded a change of circumstances in his amended motion. The Child Custody Act specifies that a child custody order may be modified on a showing of proper cause *or* a change in circumstances. MCL 722.27(1)(c). It does not require that both grounds be pleaded, and our courts have not interpreted the applicable statute, MCL 722.27(1)(c), to require this action. In light of plaintiff's reliance on *Vodvarka* at the trial court level, she was aware that the trial court could find either proper cause or a change of circumstances as a ground for its decision to evaluate the previous custody order. *Vodvarka, supra* at 508-514. Because defendant's amended motion contained allegations relating to plaintiff's purported substance abuse; failure to ensure the children attended school; volatile relationship with her boyfriend; failure to seek medical and dental care for the children; and failure to provide clean, safe, and permanent housing, we are not persuaded by plaintiff's argument that she was unable to fashion a trial strategy to counter a proper cause argument.

Plaintiff next argues the trial court erred when it considered evidence predating the judgment of divorce. Although a court is limited, in determining a change of circumstances, to events occurring since the most recent custody order, the court may, in unusual cases, consider events that occurred before the most recent order when determining whether proper cause exists. *Vodvarka, supra* at 501. We find this case falls under the realm of "unusual" cases that warrant consideration of events occurring before the initial custody order. Neither plaintiff nor defendant were represented by counsel during the divorce proceedings, and the custody order set forth in the judgment of divorce did not demonstrate that the trial court considered the best interest factors before awarding primary physical custody to plaintiff. A trial court must determine the child's best interests before resolving a custody dispute. *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004).

Next, plaintiff argues the trial court should have conducted two separate hearings because the movant must prove by a preponderance of the evidence either proper cause or a change in circumstances *before* the trial court can consider whether an established custodial environment exists. While *Vodvarka* requires the trial court to evaluate the existence of proper cause or a change in circumstances before a custody order is reviewed, it does not require that these

decisions be made at a separate hearing. The trial court is permitted, but not required, to conduct a hearing on these threshold issues if it determines that one is necessary. *Id.* at 511-512. Here, a full evidentiary hearing was conducted in which eight witnesses testified. The witnesses were those who would normally testify at a custody hearing. The trial court also interviewed Kayli. The record does not reveal that the trial court considered the existence of an established custodial environment or reviewed the best interest factors before making the required initial finding of a change in circumstances or proper cause. No authority requires a trial court to conduct a second evidentiary hearing when it obtains the necessary information at one hearing. Cf. *MacIntyre v MacIntyre*, 472 Mich 882; 693 NW2d 822 (2005) (if a court can independently determine whether a custodial arrangement is in the child’s best interest, then an evidentiary hearing is not necessarily required).¹

Plaintiff next argues the trial court committed clear legal error when it found proper cause to reevaluate the custody order. Proper cause is “one or more appropriate grounds that have or could have a significant effect on the child’s life to the extent that a reevaluation of the child’s custodial situation should be undertaken.” *Vodvarka, supra* at 511. The trial court should rely on the criteria outlined in the twelve best interest factors, MCL 722.23(a)-(l), when deciding if a particular fact constitutes an appropriate ground. *Id.* at 512. However, the grounds presented must be “of a magnitude to have a significant effect on the child’s well-being to the extent that revisiting the custody order would be proper.” *Id.* We find the record supported the trial court’s decision that proper cause existed under factor (h), the “home, school, and community record of the child,” and factor (c), the “capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . and other material needs.” Kayli had a dismal record of school attendance, and the health care provided to the children while in plaintiff’s care had negatively affected them. These factors were “of such magnitude to have a significant effect” on the well-being of Kayli and Isaac. *Vodvarka, supra* at 512. Thus, clear legal error did not occur.

¹ In reaching our conclusion, we are not persuaded by plaintiff’s argument that she was prejudiced by the trial court’s failure to rule on the issue of established custodial environment until three days after the hearing. The trial court informed the parties that it could not review the custody order and rule on an established custodial environment and the best interest factors until it determined whether proper cause or a change in circumstances existed. The hearing testimony presented sufficient evidence for the trial court to reach the necessary decision on the existence of an established custodial environment, and ultimately, its custody ruling. We find no abuse of discretion.

We additionally reject plaintiff’s argument that the trial court waived defendant’s burden to prove the existence of proper cause or a change in circumstances. To establish the 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.” *Vodvarka, supra* at 512. Plaintiff claims that the trial court considered evidence presented during her case-in-chief when it ruled that defendant met his burden of proof on proper cause. Thus, she maintains that the trial court did not require defendant to prove the existence of proper cause. However, our review of the record indicates that sufficient testimony on the issues deemed relevant by the trial court was presented during the defendant’s case-in-chief.

Plaintiff next argues the trial court abused its discretion by awarding defendant physical and legal custody of the children. Under MCL 722.23, a custody dispute must be resolved in the best interest of the child on the basis of the enumerated factors. The trial court must explicitly state its conclusions regarding each factor. *Foskett, supra* at 9. However, the court need not comment on every matter in evidence; rather, it may consider the relative weight of each factor as is appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998). Here, the trial court ruled that six factors were weighted equally between the parties. It found, however, that factors (c), (d), (e), and (h) favored defendant, while only one factor, that being the reasonable preference of a child, MCL 722.23(i), favored plaintiff.

Plaintiff claims the trial court's finding on factor (h) was not supported by the evidence. Our review of the record supports the trial court's conclusion. Kayli's poor attendance record indicated plaintiff was unable to ensure that her children regularly attended school. Additionally, Kayli's basic early literary skills never met the target goal for oral reading fluency, and plaintiff was reluctant to allow Kayli to continue receiving special education. While Kayli's most recent test scores indicated an improvement, they fell well short of grade-level skills. While we note that the trial court placed little, if any, weight on Isaac's school record, the record demonstrated that plaintiff did not enroll Isaac in school on time or properly provide his immunizations. Moreover, the evidence indicated defendant was involved in, and concerned about, the children's education even though he did not have custody of them during the week.

The record also supports the trial court's conclusion with respect to factor (c). Defendant's favorable testimony about his own house was uncontradicted. While plaintiff disputed defendant's allegations about the conditions at her house, Kalamazoo Township Police Detective Szekely and Child Protective Services Investigator Root corroborated defendant's testimony. Additionally, the evidence regarding the parties' ability to financially provide for the children did not clearly preponderate against finding that factor (c) favored defendant. Moreover, defendant was the proactive parent in seeking medical and dental treatment for the children. Even though it was difficult for defendant to seek dental care for the children because of his weekend parenting time, he took Kayli to the dentist during the summer and took Isaac to the hospital for antibiotics after discovering the abscess on Isaac's gum.

In contrast, plaintiff admitted that the mobile dentist indicated that Isaac should "see a dentist as soon as possible for decay, cavities, abscess and infection." Yet, as of the hearing date, several months after the mobile dentist's recommendation, Isaac had still not seen a dentist for a follow-up visit. Although plaintiff claimed to have problems with insurance, the children were covered by defendant's insurance, and plaintiff failed to obtain an additional copy of defendant's insurance information after she lost her initial copy. Plaintiff also claims there was no medical evidence to support the trial court's finding that poor hygiene caused the medical conditions suffered by the children. Our review of the record leads to a contrary conclusion.

Plaintiff next argues that factor (d), the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," was erroneously decided. To the extent the trial court may have relied on hearsay testimony that plaintiff and her boyfriend fought and used foul language, its reliance was erroneous. However, the instability in plaintiff's relationship was shown through other testimony. Plaintiff's mother testified that in 2004 or 2005, plaintiff and the children twice stayed with her. Additionally, plaintiff moved herself and the children into a shelter in 2005 on one occasion. Hence, we conclude that the

evidence did not clearly preponderate against the trial court's finding in favor of defendant on this factor.

Plaintiff finally argues that factor (e), the "permanence, as a family unit, of the existing or proposed custodial home or homes," was erroneously decided in defendant's favor. This factor focuses on "the child's prospects for a stable family environment," and the judge must give careful consideration to the entire situation, weighing all facts that bear on whether the parties can best provide the children the benefits of a custodial home marked by permanence, as a family unit. *Ireland v Smith*, 451 Mich 457, 465-466; 547 NW2d 686 (1996). While the trial court incorrectly found that each party had been in a relationship for four years, the evidence indicated a lack of stability in plaintiff's relationship and home environment. In comparison, there was no testimony about instability in defendant's home or relationship with his new wife. Thus, we find that the evidence did not clearly preponderate against the trial court's finding in favor of defendant on this factor.

In awarding physical and legal custody to defendant, the trial court evaluated the credibility of each party, and concluded that while defendant "appeared to make an honest effort to tell the truth," plaintiff's testimony was "obviously less than candid." We defer to the trial court's determination of credibility. *Mogle, supra* at 201. The evidence demonstrated that plaintiff's action, or lack thereof, negatively impacted the children's lives, especially with regard to Kayli's school progress and Isaac's dental care. Hence, the court properly determined defendant established by clear and convincing evidence that it was in the children's best interest to grant defendant physical and legal custody of the children.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray