

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES A. KWILINSKI,

Plaintiff-Appellee,

v

MARY ELLEN KWILINSKI, a/k/a MARY ELLEN
FERRO,

Defendant-Appellant.

UNPUBLISHED

January 7, 2000

No. 218689

Eaton Circuit Court

LC No. 91-000130 DM

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from an order awarding sole physical custody of the parties' minor son, Nicholas S. Kwilinski, to plaintiff after several years of joint physical custody. We affirm.

Defendant first argues that the trial court erred in considering the statutory best interest factors, claiming that, instead, it should have dismissed plaintiff's petition based on plaintiff's failure to meet the threshold requirement necessary when seeking modification of a custody order. We disagree. A trial court may modify a custody award "for proper cause shown or because of change of circumstances." MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). "[W]here the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the best interest factors." *Dehring, supra* at 165, quoting *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Here, plaintiff established proper cause for change of custody by providing sufficient evidence that the current custody arrangement was unsatisfactory and not beneficial to the minor child's educational progress.¹ Thus, we conclude that the trial court did not err when it proceeded to consider the best interest factors.

Defendant next argues that plaintiff failed to show, by clear and convincing evidence, that a change in custody was in the child's best interests. In essence, defendant asserts that the trial court's findings of fact with regard to the statutory best interests factors are not supported by the evidence. We disagree. Unless the trial judge made findings of fact against the great weight of evidence, we must

affirm. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-879; 526 NW2d 889 (1994). The trial court need not give equal weight to each best interest factor. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). In other words, “[n]either a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors.” *Id.* “In child custody cases, the overwhelmingly predominant factor is the welfare of the child.” *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993).

Here, the trial court considered and made findings of fact regarding each of the statutory best interest factors as required, *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993), and thereafter concluded that plaintiff should have custody of the minor child, Nicholas. Even assuming that defendant’s assertion that the trial court erred in determining some of the best interest factors is correct, such a conclusion does not necessarily change the outcome because the trial court need not give equal weight to each factor. *McCain, supra*. The trial court believed that the minor child’s educational needs may best be served if the child lived with plaintiff during the school year. According to the trial court, “[plaintiff’s] concern for his son’s education and willingness to go the extra mile may be conducive to Nicholas’ school progress.” The trial court determined that the best interests of the child, which is the overriding concern, dictate that he live in a stable custodial environment throughout the school year, where his educational needs are a priority. Upon review of the record, we find evidence to support the trial court’s conclusion. On the specific facts of this case, we find no palpable abuse of discretion.

Defendant further argues with regard to the best interest factors that the trial court erred in “rubberstamping” the friend of the court (“FOC”) report instead of basing its decision on evidence in the record. We find this argument without merit. At a custody hearing, the statutorily authorized report and recommendation of the FOC is not admissible as evidence unless both parties agree to its admission. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). Here, the parties made no objection to the admission of such as evidence nor requested limited admissibility,² and thus the court is entitled to unrestricted use of this evidence. See MRE 105. Further, we decline to address defendant’s argument that the trial court’s failure to address a change in parenting time as an appropriate remedy was error. Defendant fails to cite Michigan law requiring a trial court to address other options before changing custody. See *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993) (“We will not search for authority to sustain a party’s position”).

Finally, defendant asserts that the trial court erred in failing to provide for the custody of the other minor child, Charles A. Kwilinski (“Charlie”), and because the order fails to meet the statutory requirements for support orders. We disagree. MCR 3.205(C)(1) provides, “[e]ach provision of a prior order remains in effect until the provision is superseded, changed, or terminated by a subsequent order.” Here, where the 1992 judgment of divorce contained the necessary provisions regarding custody and child support, those provisions remained in effect, modified only by the trial court’s order at issue. Thus, the order is not deficient. To the extent that defendant argues that the trial court failed to consider the effect of the change in Nicholas’ custody on the sibling relationship between Charlie and Nicholas, defendant’s argument is without merit. Although the sibling bond should be considered, ultimately the best interests of the individual child should control a custody decision. *Wiechman v*

Wiechman, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). Because the trial court reviewed the statutorily required best interest factors and found that it was in Nicholas' best interest to live with plaintiff during the school year, we find no error.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter

¹ Although both parties agreed that the current arrangement with Nicholas spending part of the school week with each parent was not in the child's best interests, defendant sought modification of parenting time whereas plaintiff sought modification of custody.

² When asked if there was any objection to the court receiving the FOC report into evidence, defendant's counsel responded, "I don't have any objection." Further, even if defendant misunderstood at that time that the use of the document was for limited purposes, the record later reveals that the court intended to use the report as evidence in lieu of having its author testify to its contents, and no objection was made at that time.