

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN MARIE JUSSILA,
Plaintiff-Appellant,

UNPUBLISHED
April 12, 2002

v

MICHAEL WAYNE JUSSILA,
Defendant-Appellee.

No. 238552
Eaton Circuit Court
LC No. 97-000358-DM

Before: Cavanagh, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s grant of defendant’s motion to change primary custody of the parties’ two minor children from plaintiff to defendant. We reverse and remand.

Plaintiff’s first two issues on appeal concern the statutory prerequisites to a trial court’s authority to revisit and modify an existing custody arrangement. Plaintiff argues that the trial court erred in its implicit finding that defendant had shown proper cause or changed circumstances sufficient to justify the court’s reconsideration of the existing custody arrangement. Plaintiff also argues that, even if proper cause or changed circumstances did exist, the trial court abused its discretion in ordering a change in custody because defendant failed to show by clear and convincing evidence that removal from their established custodial environment with plaintiff was in the children’s best interests. We agree with plaintiff on both issues and address them together.

A trial court is not statutorily authorized to revisit an otherwise valid custody order unless the party seeking the change in custody first shows proper cause or a change of circumstances sufficient to warrant the court’s reconsideration of a child’s best interests. MCL 722.27(1)(c); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). A trial court’s finding with regard to changed circumstances is reviewed for an abuse of discretion. MCL 722.28; *Sharp v Talsma*, 202 Mich App 262, 264; 507 NW2d 840 (1993). The existence of an established custodial environment is a factual inquiry, and a trial court’s findings of fact will be sustained unless they are against the great weight of the evidence. MCL 722.28; *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

In this case, the trial court erred in revisiting the existing custody arrangement in the absence of proper cause or changed circumstances. The record is devoid of evidence to support

the court's implicit finding of proper cause or changed circumstances. Notwithstanding defendant's marriage and the fact that the children were four years older than when the parties divorced, no significant changes had occurred, including in the geographic or custodial arrangements of defendant, plaintiff, and the children. The court's reference to defendant's "legitimate concerns about the children's emotional and social health" is not supported by competent or objective testimony about the negative or harmful influences the children endure at plaintiff's home. In fact, the only truly negative concern apparent from the record arguably arose in *defendant's* environment with his wife's son.

The trial court further erred by granting defendant's motion to change custody in the absence of clear and convincing evidence that a change was in the children's best interests. The disposition of a custody dispute is within the discretion of the trial court. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994); *Mogle, supra* at 196. The weight ascribed by the trial court to its factual findings under the best interests factors is also an exercise of the trial court's discretion, but that discretion is not unlimited. *Fletcher, supra* at 881. If a trial court's factual findings are not supported by the evidence, the court's findings may be reversed by this Court. *Id.* Where an established custodial environment exists, as it does here with plaintiff, a court may not disturb a child's custodial arrangement in the absence of clear and convincing evidence that a change is in the child's best interests. MCL 722.27(1)(c).

Mathematical equality does not necessarily preclude a party from satisfying its clear and convincing burden of proof. *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995). However, the quantitative results of a court's analysis of the best interests factors may well result in an "evidentiary standoff" in which a party cannot meet the clear and convincing standard required to change an existing custody arrangement. *Id.* Where the best interests factors do not favor either party quantitatively, a party can only satisfy a burden of clear and convincing evidence through its production of evidence qualitatively superior to the other evidence. *Id.* at 595. In this case, defendant made no such showing.

Plaintiff also argues on appeal that the trial court's decision to grant defendant's petition to change custody infringed on her constitutional right to raise her children free from judicial interference. However, we need not address this constitutional issue because the trial court did not and because it is not necessary to resolve this case. See *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). In any event, we disagree with plaintiff's contention that *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000) prohibited the trial court from interfering with daily decisions she – as the children's natural mother and custodial parent – made with regard to her children's best interests. *Troxel* does not stand for the proposition that a natural custodial parent's right to make decisions regarding her children's care should enjoy absolute immunity from the scrutiny of the children's other natural – but *noncustodial* – parent.

Finally, plaintiff argues that the trial court erred when it failed to conduct an independent best interest evaluation of each child to determine whether the best interests of one child might be contrary to the best interests of the other child. In consideration of our resolution of plaintiff's other issues on appeal, it is unnecessary to review this issue. We note, however, that a trial court's use of the statutory best interests factors is not discretionary. A trial court must apply the best interests factors to each child individually in order to advance the best interests of each

sibling when one child's best interests may differ from the child's siblings' best interests. *Foskett v Foskett*, 247 Mich App 1, 11-12; 634 NW2d 363 (2001).

Reversed and remanded for entry of an order denying defendant's motion for change of custody and for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell