

STATE OF MICHIGAN  
COURT OF APPEALS

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LESLIE GAPINSKI,

Plaintiff-Appellant,

v

THOMAS WALKER,

Defendant-Appellee.

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UNPUBLISHED

October 21, 2003

No. 247755

Otsego Circuit Court

LC No. 99-008318-DP

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

PER CURIAM.

Plaintiff appeals by right from an order awarding to defendant primary physical custody of the parties’ daughter, Hannah. Defendant filed a motion asking for primary physical custody, which was denied, but the Friend of the Court awarded to defendant increased parenting time. Plaintiff objected, and the circuit court conducted a de novo “best interests of the child” analysis under MCL 722.23. The circuit court ordered joint legal custody, physical custody to defendant, parenting time to plaintiff, mediation, and a support recommendation from the Friend of the Court. Plaintiff appeals, challenging the grant of physical custody to defendant. We affirm.

As an initial matter, plaintiff alleges that the circuit court lacked subject-matter jurisdiction. This challenge may be raised at any time, *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996), and is reviewed de novo. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999). Plaintiff bases her challenge on the fact that defendant did not object to the Friend of the Court Referee’s findings. However, this Court has held that “on motion of *any party dissatisfied* with a recommendation of the friend of the court,” the circuit court is “to conduct a hearing as if no friend of the court hearing had been conducted previously and arrive at an independent conclusion.” *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 101 (1986) (emphasis added). Plaintiff objected to the Friend of the Court’s recommendations, and did so within the required time period, so the circuit court did not lack subject-matter jurisdiction.

In child custody cases, a trial court’s “choice, interpretation, or application of the existing law” is reviewed for clear legal error. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). “When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct.” *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). However, “this Court will sustain the trial court’s factual findings unless ‘the evidence clearly preponderates in the opposite direction.’ ” *Foskett, supra* at 5 quoting *LaFleche*

*v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Finally, “discretionary rulings are reviewed for an abuse of discretion, including a trial court’s determination on the issue of custody.” *Id.* “To whom custody is granted is a discretionary dispositional ruling,” but “the court’s exercise of that discretion is . . . limited by the statutory best interest factors.” *Fletcher, supra* at 880-881.

“Review of custody orders is not de novo.” *Fletcher, supra* at 882. On a finding of non-harmless error, “de novo review of the ultimate custodial disposition is inappropriate.” *Id.* at 889. Instead, “an appellate court should remand the case for reevaluation,” and “on remand, the court should consider up-to-date information.” *Id.* We note that the parties do not dispute that plaintiff had established a custodial environment for Hannah, so altering that environment requires “clear and convincing evidence that it is in the best interest of the child.” *Foskett, supra* at 5.

MCL 722.23 provides:

As used in this act, “best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) 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.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The 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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The circuit court did not consider factors (b), (h), (i), or (k), and found that the parties were equal on factors (a), (f), and (g). The parties do not dispute that factors (g) and (i) favor neither party. Plaintiff challenges all other factors.

We have carefully reviewed the record and the trial court's opinion. We are satisfied that the trial court appropriately considered the necessary factors in reaching its conclusion. Moreover, we are not persuaded that the trial court erred in its findings of fact and conclusions of law, nor in its determination that there was clear and convincing evidence that it was in the child's best interest to grant physical custody to defendant.

Affirmed.

/s/ Pat M. Donofrio  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell