

STATE OF MICHIGAN
COURT OF APPEALS

TERESA N. DORR,

Plaintiff-Appellee,

v

TIMOTHY DORR,

Defendant-Appellant.

UNPUBLISHED

May 17, 2005

No. 259283

Oakland Circuit Court

LC No. 2002-667713-DM

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order changing custody of the parties' two minor children from joint physical and legal custody to sole physical and legal custody with plaintiff. We affirm.

Defendant first argues that the trial court erred in finding that plaintiff showed a sufficient change of circumstances to reevaluate the prior custody order. We disagree. MCL 722.27(1)(c) provides that a court may modify or amend its previous judgments or orders only "for proper cause shown or because of change in circumstances." Therefore, a party seeking a modification or amendment of a trial court's judgment or order for custody must first prove by a preponderance of the evidence the existence of proper cause or a change of circumstances before the trial court can consider whether an established custodial environment exists and conduct a review of the best interest factors. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). 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." *Id.* at 513 (emphasis in original). Stated another way, "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." *Id.* at 513-514.

The trial court's factual finding that circumstances had changed since entry of the previous custody order is reviewed under the great weight of the evidence standard. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). The trial court found that the parties had disdain for each other throughout this action, and that their lack of communication had seriously affected the children since entry of the original custody order. The trial court determined that

defendant's unwillingness to provide for one child's special behavioral needs, defendant's behavior toward plaintiff in front of the children, and defendant's move, which contributed to the tension between the parties regarding the locations of the children's schools, were changes that had significantly affected the children. The parties' inability to reach an agreement regarding fundamental needs of the children, such as education, is a significant change in circumstance allowing reevaluation of the statutory best interest factors. Therefore, the trial court's finding that plaintiff demonstrated by a preponderance of the evidence that a sufficient change of circumstances existed to warrant revisiting the original custody order was not against the great weight of the evidence.

To the extent defendant argues that the trial court erred in failing to conduct a de novo hearing on the issue of child custody after he contested the friend of the court recommendation, we note that defendant did not include this issue in his statement of questions involved, and only raised it for the first time in his reply brief under the guise of supplemental authority; therefore, we could decline to consider this question. MCR 7.212(C)(5); *Health Care Ass'n Workers Compensation Fund v Director of the Bureau of Worker's Compensation, Dep't of Consumer and Industry Services*, 265 Mich App 236, 243; 694 NW2d 761 (2005). However, because we have all the facts and law before us, we will briefly address the merits of the issue. *Id.*

MCL 552.507(5) provides that "[t]he court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court." However, MCR 3.215(F)(2) provides that "[i]f both parties consent, the judicial hearing may be based solely on the record of the referee hearing." Here, defendant expressly agreed that the trial court could base its decision on a de novo review of the referee hearing record. Moreover, MCL 552.507(6)(a) provides that "de novo hearings" include a "new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee." Because the trial court's order modifying custody was based on a "de novo hearing" of the referee hearing record, defendant received the de novo hearing to which he was entitled; therefore, he is not entitled to relief on this issue.

Moreover, to the extent defendant relies on this Court's recent decision in *MacIntyre v MacIntyre*, 264 Mich App 690, 697; 692 NW2d 411 (2005) to support his argument that the trial court erred in failing to conduct a de novo hearing, we note that our Supreme Court summarily reversed the judgment of the Court of Appeals, which erroneously held that "a de novo review of the record . . . is clearly insufficient for a trial court to use to make [a child custody] determination," and that "a trial court is 'duty bound to exercise [its] own judgment' by conducting a de novo hearing to determine what custody arrangements would be in the child's best interests." *MacIntyre v MacIntyre*, 472 Mich 882; 693 NW2d 822 (2005). Our Supreme Court held that while MCL 600.5080(2) requires a "review" of a child custody decision, and that the parties' agreements may not waive the availability of an evidentiary hearing if the circuit court determines that a hearing is necessary to exercise its independent duty under the Child Custody Act, MCL 722.25, as long as the circuit court is able to "determine independently what custodial placement is in the best interests of the children," an evidentiary hearing is not required in all cases. *MacIntyre, supra* at 882, quoting *Harvey v Harvey*, 470 Mich 186, 187; 680 NW2d 835 (2004). As in *MacIntyre*, the trial court here was able to make such an independent determination based on a "de novo hearing" of the referee hearing record; therefore, defendant is not entitled to relief on this issue.

Defendant next argues that the trial court's findings that best interest factors (b), (h), and (k) weighed in favor of plaintiff were against the great weight of the evidence, and that the trial court abused its discretion in determining that it was in the best interests of the children to award sole physical and legal custody of the children to plaintiff. Custody disputes are to be resolved in the children's best interest, as measured by the factors set out in MCL 722.23. *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000). Because the trial court determined that an established custodial environment existed with both parties, plaintiff had to show by clear and convincing evidence that a change in custody was in the best interests of the children. MCL 722.27(1)(c); *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). Additionally, the trial court's findings regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20.

Factor (b) concerns "[t]he capacity and disposition of the parties involved to give the child[ren] love, affection, and guidance and to continue the education and raising of the child[ren] in [their] religion or creed, if any." MCL 722.23(b). The trial court set out several reasons for finding in favor of plaintiff on factor (b), including that defendant refuses to cooperate with plaintiff in making educational decisions for their special needs child and objects to the school choices based on inconvenience. This finding is supported by plaintiff's testimony that the child's teacher, counselor, and social worker all recommended a special program, but that defendant refused to allow the child to attend. Defendant admitted that he did not investigate or propose any alternative special schools. The trial court's finding was not against the great weight of the evidence, and is affirmed because the evidence does not clearly preponderate in the opposite direction.

Factor (h) concerns "[t]he home, school, and community record of the child[ren]." MCL 722.23(h). Defendant argues that the children have behavioral and school problems because they spend eleven hours in day care every day. Plaintiff testified that her son's school recommended that he attend a special program. Defendant made no attempt to get him into a special school. Also, the parties' daughter was absent twice from school and tardy twice when defendant was responsible for taking her to school. The trial court found plaintiff's testimony that her daughter was doing well and that the children had friends in the neighborhood to be credible because plaintiff was more involved with her children's education. The trial court's finding was not against the great weight of the evidence, and is affirmed because the evidence does not clearly preponderate in the opposite direction.

Factor (k) concerns "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child[ren]." MCL 722.23(k). In finding in favor of plaintiff on factor (k), the trial court referred to plaintiff's testimony regarding defendant's violence and continued threats, which were corroborated by plaintiff's sister. Plaintiff testified that defendant slapped her in front of the children, spit in her face, and repeatedly disparaged her during exchanges and on voicemail. Defendant maintained that no violence occurred. However, testimony from plaintiff and her sister supports the conclusion that the trial court's finding was not against the great weight of the evidence, and is affirmed because the evidence does not clearly preponderate in the opposite direction.

In sum, the trial court's findings with respect to the best interest factors were not contrary to the great weight of the evidence. Further, the trial court did not abuse its discretion in

determining that an analysis of the best interest factors supported awarding sole physical and legal custody of the children to plaintiff.

Defendant next argues that the trial court did not properly impute his income for purposes of the child support calculation. However, this Court dismissed this issue for lack of jurisdiction in a prior order. *Dorr v Dorr*, unpublished order of the Court of Appeals, entered December 14, 2004 (Docket No. 259283).

We affirm.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra