

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH JOY ALANOLY,

Plaintiff-Appellee/Cross-Appellant,

v

DARIUS CRESTON MCCRARY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
February 20, 2014

No. 316037
Oakland Circuit Court
Family Division
LC No. 2008-745761-DP

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's March 13, 2013 order, which modified the prior custody order concerning the parties' minor child. We affirm the modification of custody.

Plaintiff cross-appeals the trial court's denial of attorney fees. We vacate the denial of fees and remand for consideration of the parties' respective ability to pay plaintiff's attorney fees under MCR 3.206(C)(2)(a).

I. MODIFICATION OF CUSTODY ORDER

In 2009, the trial court entered a stipulated order granting the parties joint physical and legal custody of their then two-year-old child, who was born out of wedlock. The order specified that the child would reside with plaintiff in Michigan in the summers and with defendant in California during the months of the standard school year. The order also specified the parenting time applicable to various holidays and school vacations.

In 2010, plaintiff filed a motion to change the custody order. After lengthy discovery disputes and motions, the trial court entered its December 2013 order modifying the physical custody of the child. The order granted plaintiff primary physical custody of the child during the months of the standard school year and granted defendant primary physical custody during the summers and major school breaks. The order maintained the parties' joint legal custody of the child.

A. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

As this Court has explained, modification of a custody order requires proof of proper cause or a change in circumstances:

Before modifying or amending a custody order, the circuit court must determine whether the moving party has demonstrated either proper cause or a change of circumstances to warrant reconsideration of the custody decision. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The movant has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists. *Vodvarka*, 259 Mich App at 509. To establish proper cause, the movant must prove “the existence of an appropriate ground for legal action to be taken by the trial court.” *Id.* at 512. Further, “[t]he appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude [as] to have a significant effect on the child's well-being.” *Id.* Similarly, to establish a change of circumstances, the 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. [*Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011).]

In this case, defendant contends that the trial court erred in finding proper cause or change of circumstances. We disagree. We must defer to the trial court’s determination on proper cause or change of circumstances unless the court’s findings are against the great weight of the evidence. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). The record in this case indicates that plaintiff met her burden of establishing by a preponderance of the evidence that continuation of the prior custody arrangement could have a significant detrimental effect on the child’s life. See *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012). In addition, plaintiff established that conditions materially changed, and that those changes could have a significant effect on the child’s well-being. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 513-514; 675 NW2d 847 (2003).

The record supports the trial court’s finding that defendant sporadically attempted to exclude plaintiff from the child’s life. There was evidence that plaintiff did not receive parenting time during the summer of 2010. There was also evidence that defendant caused delays during the parenting time exchanges. Plaintiff testified to several instances in which defendant avoided responding to her parenting time requests. There was also evidence that defendant did not always inform plaintiff of the child’s living arrangements in California and did not give plaintiff information about the child’s various caregivers. Plaintiff also testified that defendant did not inform her that the child had started attending school. This alienation and exclusion of plaintiff could have a significant effect on the child’s well-being within the meaning of MCL 722.23(j) (willingness and ability to facilitate and encourage a relationship between the child and the other parent). Accordingly, the evidence supported the trial court’s determination that there was proper cause for modification of the custody order.

The exclusion and alienation may also constitute a change of circumstances. Given the evidence of numerous events that occurred after entry of the stipulated custody order, the trial court could reasonably conclude that the alienating behavior was escalating. See *Dailey*, 291

Mich App at 666 (finding proper cause or change of circumstances where the parties' disagreements "escalated and expanded to topics that could have a significant effect on the child's well-being").

Although defendant argues that plaintiff's claims of alienation were not corroborated, the trial court was free to make credibility determinations and determine the weight of the witnesses' testimony. *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008). Accordingly, the trial court could rely on plaintiff's testimony despite any contradictory testimony or lack of corroborating testimony. Moreover, the trial court expressly found that defendant was "completely lacking in credibility." We defer to the trial court's assessment of witness credibility. MCR 2.613(C).

B. ESTABLISHED CUSTODIAL ENVIRONMENT

As the trial court in this case recognized, the analysis of the change of custody motion required the court to determine whether the child had an established custodial environment.

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(c)(1).]

"Where no established custodial environment exists, the trial court may change custody if it finds, by a preponderance of the evidence, that the change would be in the child's best interests." *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). If an established custodial environment exists, the trial court may not change custody unless it finds by clear and convincing evidence that the change is in the child's best interests. MCL 722.27(c).

In this case, the trial court determined that no established custodial environment existed with either parent. The record supports the trial court's determination. "A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Corporan*, 282 Mich App at 605 (citation and internal quotation marks omitted).

Defendant argues that the child looked to him for guidance, discipline, the necessities of life, and parental comfort, and that the child thus had an established custodial environment with him. The trial court determined, however, that defendant was not fully credible. Moreover, the record demonstrates that several individuals provided childcare for the child while the child was in California, and that the child lived in multiple households. "Repeated changes in physical custody and the uncertainty resulting from an upcoming custody trial can destroy an established custodial environment." *Rains v Rains*, 301 Mich App 313, 333; 836 NW2d 709 (2013); see also *Bowers v Bowers*, 198 Mich App 320, 325-326; 497 NW2d 602 (1993). Given the evidence that many people provided care for the child for substantial periods of time, the trial court's determination that the child had no established custodial environment is not against the great weight of the evidence.

C. BEST-INTEREST FACTORS

The trial court correctly recognized that the determination of the child's best interest required consideration of the best-interest factors listed in MCL 722.23. See, e.g., *Dailey*, 291 Mich App at 667. The court reviewed each of the statutory factors and determined that factors (e), (j), and (l) favored plaintiff, and that factors (b) and (f) slightly favored plaintiff. Defendant contends that the trial court's findings on these factors were against the great weight of the evidence. In addition, defendant challenges the court's findings that the parties were equal under factors (d) and (i). Again, we disagree with defendant's arguments.

We need not address each factor separately in this opinion, because the trial court's evaluation of the factors ultimately turned on credibility determinations. As noted previously in this opinion, we defer to a trial court's assessment of witness credibility. The trial court stated, "Father purposefully tried not to answer questions and portrayed his circumstances and visions for [the child] in grandiose terms, whereas Mother answered questions honestly even when the answer was against her self-interest." Given that the evidence turned largely on witness credibility, and given the deference we afford to the trial court's credibility assessments, we must conclude that there was sufficient evidence to support the court's evaluation of the best interest factors in this case.

II. ATTORNEY FEES

Plaintiff contends that the trial court abused its discretion in denying her request for attorney fees. We agree, in part.

MCR 3.206(C) controls attorney fee awards, as follows:

- (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
- (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
 - (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
 - (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

We review for abuse of discretion a trial court's decision whether to award attorney fees. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012).

In this case, the trial court denied the request because of both parties' conduct and because both parties' actions contributed to the amount of attorney fees. The record supports the court's determination. Throughout the case, both parties claimed that the other had violated court orders. The parties filed a spate of motions over the course of nearly two years. The trial court found that both parties violated court orders, that defendant was unnecessarily evasive in answering questions and providing discovery, and that plaintiff had not given defendant advance

notice of certain exhibits and documents. On balance, the trial court was within its discretion in denying plaintiff's request for attorney fees under MCR 3.206(C)(2)(b).

However, we find nothing in the record to confirm that the trial court considered the parties' ability to pay plaintiff's fees as required under MCR 3.206(C)(2)(a). The record indicates that plaintiff provided proof of her income as compared to her attorney fees, and that the trial court had made a finding concerning defendant's income. On the basis of this evidence, the trial court was required to specifically address the income evidence. *Loutts*, 298 Mich App at 155-156. We thus remand for consideration of plaintiff's request for attorney fees under MCR 3.206(C)(2)(a) and *Loutts*.

The order modifying custody is affirmed. The denial of plaintiff's request for attorney fees is vacated. Remanded for consideration of attorney fee request under MCR 3.206(C)(2)(a). No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter