STATE OF MICHIGAN

COURT OF APPEALS

ABIR YOUSSEF FAWAZ,

Plaintiff-Appellant,

v

JAMES SCOTT FLYNN,

Defendant-Appellee.

UNPUBLISHED
July 23, 2019

No. 346807
Washtenaw Circuit Court
LC No. 12-001338-DP

Before: M. J. KELLY, P.J., and MARKEY and GLEICHER, JJ.

PER CURIAM.

Plaintiff Abir Youssef Fawaz appeals by right the trial court's order awarding primary physical custody of the parties' minor child, JF, to defendant James Scott Flynn. We affirm.

In 2013, a consent order of filiation was entered by the court. The parties were granted joint legal custody of JF, plaintiff was awarded primary physical custody of the child, and parenting time was left for later determination. Eventually, the parties agreed on a parenting time schedule. In February 2017, JF made allegations that she was being physically abused by plaintiff and that she feared her mother. Plaintiff claimed that she simply spanked JF, while JF described more serious contact, such as being thrown against a wall. A Child Protective Services (CPS) investigation was immediately opened, and JF was placed with defendant. On February 28, 2017, defendant filed a motion for an ex parte order awarding him temporary physical custody of JF. The motion was denied, but the trial court scheduled an emergency hearing that took place on March 1, 2017, and both parties testified. On March 6, 2017, the trial court entered an order awarding defendant temporary physical custody of JF, granting liberal supervised parenting time to plaintiff, and referring the issue of custody to the Friend of the Court (FOC) for an investigation and recommendation.

On March 29, 2017, the parties met with an FOC evaluator, and they reached an agreement that was labeled an "Interim Consent Agreement And Court Order" (ICACO). Under the ICACO, defendant was to "continue to have sole physical custody of the minor child until 18 years of age or until further Order of the Court." Additionally, the parties agreed to joint legal custody, and plaintiff was to continue enjoying supervised parenting time. Plaintiff also agreed

to complete a psychological evaluation. Nearly four months then passed with apparently no additional FOC proceedings or meetings when on July 14, 2017, plaintiff filed a motion for change of physical custody and to allow the child to go on a family vacation. In the motion, plaintiff stated that "[s]ince the entry of the [ICACO], there has been a change of circumstances." On July 31, 2017, defendant filed a motion seeking permission for JF to attend school in a different county, and he filed a response to plaintiff's custody motion. In his response, defendant "denie[d] there has been any change of circumstances." After a hearing on August 2, 2017, the trial court authorized the change in school districts and referred the custody issue to the FOC.

The FOC, picking up where it had left off in late March 2017, issued a recommendation in December 2017 that defendant maintain primary physical custody of JF and that plaintiff be granted supervised parenting time. Plaintiff objected to this recommendation, and in January 2018, the trial court referred the custody dispute to an FOC referee for an evidentiary hearing. Consequently, a three-day evidentiary hearing was conducted by the referee. In July 2018, the FOC referee issued a recommendation that defendant retain primary physical custody of JF and that plaintiff be awarded supervised parenting time. In August 2018, plaintiff filed an objection to the referee's recommendation, and the trial court later held an evidentiary hearing on the issue of custody. In November 2018, the trial court entered an order adopting the FOC referee's recommendation, awarding defendant primary physical custody of JF, and granting plaintiff supervised parenting time. Plaintiff now appeals.

Plaintiff argues that the trial court erred in failing to find proper cause or a change of circumstances prior to referring the matter to the FOC in March 2017 and also erred when the court ultimately found proper cause and a change of circumstances, considering that the record did not support a finding of either threshold prong. Plaintiff also argues that the trial court's finding that there was clear and convincing evidence that it was in the child's best interests to award physical custody to defendant was against the great weight of the evidence.

In *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006), this Court, relying primarily on MCL 722.28, addressed the standards of review applicable in child custody disputes, observing:

> There are three different standards of review applicable to child custody cases. The trial court's factual findings on matters such as the established custodial environment and the best-interests factors are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction.[1] In reviewing the findings, this Court defers to the trial court's determination of credibility. A trial court's discretionary rulings, such as the court's determination on the issue of custody, are reviewed for

[1] Similarly, "[t]his Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

> an abuse of discretion. Further, . . . questions of law in custody cases are reviewed for clear legal error. [Citations and quotation marks omitted.]

MCL 722.27(1)(c) provides that in a custody dispute, a trial court, for the best interests of the child at the center of the dispute, may "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances." The court, however, is not permitted to "modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). "These initial steps to changing custody—finding a change of circumstance or proper cause and not changing an established custodial environment without clear and convincing evidence—are intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (quotation marks omitted).[2]

In *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010), our Supreme Court discussed the next step of the analysis, explaining:

> If the proposed change would modify the established custodial environment of the child, then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests. Under such circumstances, the trial court must consider all the best-

[2] The first step in the analysis is to determine whether the moving party has established proper cause or a change of circumstances, applying a preponderance of the evidence standard. *Vodvarka*, 259 Mich App at 508-509. In *McRoberts v Ferguson*, 322 Mich App 125, 131-132; 910 NW2d 721 (2017), this Court stated:

> Proper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken. In order 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. To constitute a change of circumstances under MCL 722.27(1)(c), 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. [Citations, quotation marks, and alterations omitted.]

With respect to the issue of "proper cause," the criteria outlined in the statutory best-interest factors "should be relied on by a trial court in deciding if a particular fact raised by a party is a 'proper' or 'appropriate' ground to revisit custody orders." *Vodvarka*, 259 Mich App at 512. In regard to "change of circumstances," the relevance of facts presented should also "be[] gauged by the statutory best interest factors." *Id.* at 514.

> interest factors because a case in which the proposed change would modify the custodial environment is essentially a change-of-custody case.

The statutory best-interest factors are set forth in MCL 722.23.

With respect to plaintiff's argument that the trial court erred in failing to find proper cause or a change of circumstances prior to referring the matter to the FOC, we must admit some confusion on the matter in light of the record and the procedural posture of the case. Initially, defendant had moved for physical custody of JF and the matter was referred to the FOC in March 2017; however, the parties then entered into the ICACO, which gave defendant primary physical custody of JF. There was no FOC recommendation at the time, ostensibly because the ICACO had interrupted the FOC evaluation process. About four months passed during which defendant had sole physical custody of JF, and plaintiff then filed a motion for change of custody. The matter was referred once again to the FOC. It was plaintiff's motion to change custody that was pending at that point, so typically she would have had the obligation to prove by a preponderance of the evidence that proper cause or a change of circumstances warranted revisiting the ICACO that gave defendant physical custody of JF.[3] Indeed, in her motion, plaintiff claimed that there had been a change of circumstances. Plaintiff's argument on appeal is assailing the trial court's decision to refer the matter to the FOC back in March 2017 absent the court first determining whether there was proper cause or a change of circumstances. It is arguable that the ICACO rendered that issue moot.[4] Nevertheless, the trial court proceeded on the basis that defendant had to establish proper cause or a change of circumstances, treated the established custodial environment as existing with plaintiff, and required defendant to prove by clear and convincing evidence that it was in the child's best interests to award custody to defendant. Therefore, we shall analyze the case within that framework.[5]

A trial court may refer a case to the FOC "[t]o investigate all relevant facts, and to make a written report and recommendation to the parties and to the court, regarding child custody or parenting time, or both[.]" MCL 552.505(1)(g). But MCL 552.505(1)(g) also provides that "[i]f custody has been established by court order, the court shall order an investigation only if the court first finds that proper cause has been shown or that there has been a change of circumstances." See *Bowling v McCarrick*, 318 Mich App 568, 571; 899 NW2d 808 (2016). The fact that CPS removes a child from a home "is in and of itself sufficient evidence of a change in circumstances to warrant a trial court to consider a change of custody." *Shann v Shann*, 293 Mich App 302, 306; 809 NW2d 435 (2011).

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[3] The established custodial environment could have been viewed as being with defendant at the time, requiring plaintiff to show by clear and convincing evidence that it was in the best interest of JF to award custody to plaintiff.

[4] Although the ICACO was designated as "interim," defendant already had temporary physical custody by court order and the ICACO gave defendant physical custody of JF until age 18 or further order of the court.

[5] Defendant has not filed a brief on appeal.

Here, plaintiff argues that the trial court erred because it referred the case to the FOC in March 2017 before making the threshold determination. At the hearing on March 1, 2017, the trial court did not explicitly find that "proper cause" or a "change of circumstances" existed before granting a temporary change of physical custody and referring the case to the FOC for investigation. But the trial court did observe that JF was in a "traumatic crisis period," that there were allegations of physical abuse, that CPS had removed the child, that the court was relying on CPS's recommendation to have the child stay with defendant, that the court could not fully assess JF's best interests at this juncture, and that the court needed to protect the child. The court then referred the matter to the FOC. Approximately 19 months later in October 2018 at the evidentiary hearing, the trial court stated, "So before ruling on changing custody, and the [c]ourt did find that there was sufficient cause to open up the question of course because of the emergency removal by CPS[.]" It appears that the court may have been referencing a determination that the court had made back on March 1, 2017. Regardless, we conclude that given the nature of the trial court's remarks at the hearing on March 1, 2017, the court plainly, albeit implicitly, found "proper cause" to revisit the issue of custody. Accordingly, there was no violation of MCL 552.505(1)(g). Moreover, the court's conclusion that the removal of JF by CPS constituted proper cause was not against the great weight of the evidence. See *Shann*, 293 Mich App at 306.[6]

We now turn to plaintiff's argument that the trial court's finding that there was clear and convincing evidence that it was in the child's best interests to award physical custody to defendant was against the great weight of the evidence. Plaintiff specifically argues that the trial court erred in its assessment of six of the best-interest factors, MCL 722.23(a), (b), (c), (g), (h), and (j). A trial court must examine all of the best-interest factors, stating its findings and conclusions as to each factor. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The court does not have to make its custody determination on the basis of a mathematical calculation of the factors; rather, it can properly assign differing weights to the factors when making its decision. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). And in *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995), this Court stated that "we are unwilling to conclude that mathematical equality on the statutory factors *necessarily* amounts to an evidentiary standoff that precludes a party from satisfying the clear and convincing standard of proof."

MCL 722.23(a) considers the "love, affection, and other emotional ties existing between the parties involved and the child." Plaintiff contends that this factor should have been weighed in her favor because supervised visitation logs showed that she shared a strong bond with the child. These logs, however, do not appear to be part of the lower court record; plaintiff did not

[6] We note that there was testimony that CPS substantiated that JF had incurred an injury caused by plaintiff; however, it was categorized as a level 3 determination, which was not deemed serious, and CPS closed the case, without plaintiff being placed on the central registry. Nonetheless, the child's removal by CPS based on claims of abuse and visible injury was a significant enough event affecting JF's well-being that it sufficed to establish proper cause under MCL 722.27(1)(c).

introduce them as exhibits.[7] To consider evidence on appeal that was not presented to the trial court would constitute an impermissible expansion of the lower court record. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Therefore, the logs will not be considered by us on appeal, nor would they have altered our ruling even if considered.

Again, this case arose because CPS removed the child from plaintiff's care. The child reported that she did not want to return to plaintiff's home. Plaintiff later testified that JF had been physically and verbally abusive toward her during supervised visits. Plaintiff additionally testified that she had been late to a number of parenting time sessions and missed some visits. Therefore, the record supports the trial court's finding that plaintiff's relationship with the child was, at best, "disorganized." In contrast, defendant became involved with JF and restructured his life to become a full-time father. The trial court's findings that the child's emotional ties were stronger with defendant and that Factor (a) favored defendant were not against the great weight of the evidence.

MCL 722.23(b) considers 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." Importantly, this factor considers the "*capacity* and *disposition* of the parties, not whether each party has in fact had the opportunity to demonstrate that capacity and disposition." *Demski v Petlick*, 309 Mich App 404, 447-448; 873 NW2d 596 (2015). Plaintiff asserts that this factor should have been weighed in her favor because she was more involved in the child's life than defendant before he gained custody. While plaintiff's factual claim is correct, it is not that pertinent because Factor (b) considers the capacity and disposition of the parents, not whether they have had an opportunity to demonstrate that capacity and disposition. Therefore, defendant's lesser involvement in JF's life before gaining custody, as limited by his parenting time rights, did not weigh against him. And the trial court properly considered his behavior after defendant gained custody and his capacity to give JF love and affection moving forward.

Furthermore, the record reveals that when defendant obtained custody, he demonstrated the capacity to help JF succeed. Plaintiff had seldom met with the child's teachers, but defendant was often in contact with her teachers. JF was consistently late to school while she was in plaintiff's care, and although JF was not immediately perfect and on time after defendant became her primary custodian, the frequency of tardiness decreased. Additionally, JF suffered physical discipline at the hands of plaintiff when she struggled at school. The trial court's findings that defendant had a greater capacity and disposition to support the child's education and that Factor (b) favored defendant were not against the great weight of the evidence.

MCL 722.23(c) considers 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." Plaintiff argues that

[7] Some visitation logs are part of the lower court record. But the logs that plaintiff refers to in her brief on appeal are from earlier visits and were never admitted into evidence.

this factor should have been weighed in her favor because she maintained the child's vaccination schedule. Plaintiff contends that no evidence was presented to the referee regarding the child's vaccination history, so the referee's conclusion that plaintiff failed to maintain JF's vaccination schedule was improper. It is true that there was no testimony about the child's vaccination history before the referee. The referee, however, did not place any emphasis on this fact, and it does not appear to have been pivotal or crucial to the referee's recommendation.

Moreover, there was evidence that defendant had a greater capacity to provide for JF. Plaintiff was unemployed and relied on financial assistance from her brother. She was also dependent on her boyfriend for housing. There was conflicting testimony about whether plaintiff maintained JF's dental health. Plaintiff believed that the child had a learning disability, but she never sought assistance for or evaluation of JF. Plaintiff believed that the child needed therapy, but she never communicated that belief to anyone other than her attorney. In contrast, defendant was employed and had cared for JF's medical, dental, and material needs since obtaining custody. Defendant demonstrated his capacity and disposition to care for those needs. The trial court's findings that defendant had the greater capacity and disposition to support JF's needs and that Factor (c) favored defendant were not against the great weight of the evidence.

MCL 722.23(g) considers the "mental and physical health of the parties involved." Plaintiff argues that this factor should have been weighed equally between the parties because her examining physician did not diagnose her with any personality disorder or mental illness. While plaintiff's assertion is true, the doctor did raise concerns about her mental stability. The physician testified that plaintiff had trouble making good decisions and that she struggled to meet the challenges of daily life. Further, he reported that plaintiff could be self-absorbed and had trouble focusing. The trial court noted that it found plaintiff's testimony rambling and incoherent at times, which was consistent with observations made by the physician and the FOC. The trial court's findings that plaintiff had some issues with her mental health and that Factor (g) favored defendant were not against the great weight of the evidence.

MCL 722.23(h) considers the "home, school, and community record of the child." Plaintiff maintains that this factor should have been weighed evenly between the parties. She contends that the trial court was incorrect when it found that the child was working at her grade level while in defendant's care, where she had struggled before. And the court erred, according to plaintiff, when it downplayed mediocre test results by stating that JF had only been in defendant's care for a few months at the time of the testing. Plaintiff's contentions do find support in the record. The child's teacher testified that JF was still not quite at grade level even after entering defendant's care. Further, JF had been in defendant's care for over a year before taking the referenced standardized test. These facts, however, do not undermine or negate the rest of the evidence presented to the trial court, which showed that JF was making more progress at school while in defendant's care than when she was in plaintiff's care. Additionally, the child's emotional development was "coming along quite nicely" when she was in defendant's care. The trial court's findings that JF was more successful at home, at school, and in the community after defendant obtained custody and that Factor (h) favored defendant were not against the great weight of the evidence.

MCL 722.23(j) considers 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." Plaintiff argues that this factor should have been weighed in her favor because her relationship with JF was deteriorating, and she attributed this deterioration to defendant's conduct.

The trial court acknowledged that there was "distrust" between the parties, and it noted that facilitating a relationship with the other parent was an issue for both parties. The record revealed, and the trial court acknowledged, that the child's relationship with plaintiff was deteriorating. But plaintiff did not present relevant evidence connecting this deterioration to any of defendant's actions. Plaintiff points to the testimony that defendant told the staff of a visiting center that he believed plaintiff was a prostitute, but this is irrelevant as JF was not present during that conversation. There was evidence that defendant was actually encouraging the child to contact plaintiff and that he often attempted to facilitate phone calls between the two. There was also evidence that plaintiff disregarded an order to stop recording the child's phone calls and that she continued to attempt to gain "ammunition" against defendant by recording calls. The trial court's findings that defendant was facilitating and encouraging the relationship between plaintiff and JF to a greater extent than plaintiff's efforts and that Factor (j) favored defendant were not against the great weight of the evidence.

We finally note that the FOC, the referee, and the trial court each came to the same conclusion about JF's best interests. It is generally not our place to substitute our judgment on findings of fact, particularly when three neutral evaluators have come to the same conclusion. In sum, the trial court's factual findings were not against the great weight of the evidence and the court did not abuse its discretion in awarding primary physical custody of JF to defendant.

We affirm. Having fully prevailed on appeal, defendant is awarded taxable costs under MCR 7.219.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Elizabeth L. Gleicher