

STATE OF MICHIGAN
COURT OF APPEALS

KEITH MCNETT,

Plaintiff-Appellee,

v

AUBRI M. GIBSON,

Defendant-Appellant.

UNPUBLISHED

August 19, 2003

No. 245710

Barry Circuit Court

LC No. 00-000796-DP

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's September 6, 2002 order that gave sole physical custody of their daughter, Jaden Skylar Gibson-McNett, to plaintiff. We reverse and remand.

Pursuant to a prior court order, defendant had been awarded sole physical custody of Jaden. MCL 722.27(1)(c) permits a court to modify its previous custody orders for "proper cause shown or because of a change in circumstances." Thus, a trial court may not disturb defendant's established custodial environment absent a showing by clear and convincing evidence that such a disruption is in the child's best interest. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). The party seeking the change bears the burden of proof. MCL 722.27(1)(c). Furthermore, this Court reviews for clear error a trial court's choice, interpretation, or application of the existing law. *Foskett, supra* at 4-5. The trial court's decision shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. MCL 722.28.

Defendant was initially awarded sole physical custody of the child on November 30, 2000, pursuant to the court's December 8, 2000 order that was entitled "Friend of the Court Recommendation and Subsequent Order Following a Conciliation Conference." Subsequently, on June 20, 2001, a stipulated order of filiation was entered that incorporated the custody terms of the December 2000 order. On May 8, 2002, plaintiff moved for a change of custody. After a hearing, the court granted plaintiff's motion and awarded him sole physical custody of Jaden.

Defendant first argues that the trial court improperly considered events that had occurred before the court's last custody order, that was entered on June 20, 2001, in determining whether a change of custody was justified. The only case defendant cites in support of her position is

Schafer v Fedewa, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2003 (Docket No. 240402). *Schafer* concerned a child custody dispute arising in the context of a divorce. On November 8, 1999, a custody order awarding the defendant custody of the minor child was entered. *Id.* at 1. Nearly four months later, a consent judgment of divorce was entered by the court which included the custody terms. Six days after the divorce judgment was entered, the plaintiff filed a motion for change of custody. *Id.*

A hearing was held on this motion fourteen months later, at which time the defendant argued that the plaintiff was required to show that a change in circumstances sufficient to warrant a change of custody had occurred in the six-day period between the entering of the divorce judgment and the filing of the plaintiff's motion for change of custody. *Id.* at 2-3. The plaintiff, on the other hand, asserted that the proper time frame in which the change of circumstances could be shown to have occurred was the period between the date the custody order was entered and the date that the plaintiff had filed his motion. *Id.* The trial court agreed with the plaintiff, and ultimately his motion for change of custody. *Id.* at 3-4.

On appeal, this Court held that the issue was not properly before the trial court at the time the court made its determination because the plaintiff had failed to timely object to custody agreements entered between the filing of plaintiff's motion and the hearing on that motion. *Id.* at 4. The Court then added, "Further, the focus of the hearing was not limited to this six-day interval as it should have been, or even to events that occurred after the divorce judgment was entered." *Id.* It is this statement on which defendant relies for her position.

Although unpublished opinions lack binding precedence under the rule of stare decisis, MCR 7.215(C)(1), and the statement was dicta, we agree with the basic premise behind the *Schafer* Court's reasoning. Had the motion been properly before the trial court, the *Schafer* Court noted, the plaintiff should have been limited to presenting evidence of "change of circumstances" that had occurred after the divorce judgment was entered because the plaintiff had consented to the terms of the divorce judgment, which addressed custody of the minor child. *Schafer, supra* at 5. Similarly, in this case, we believe plaintiff should not have been allowed to present evidence of changed circumstances which occurred before the June 20, 2001 order of filiation because this order explicitly stated that both parties consented to the entry of the order. Furthermore, plaintiff did not object to its terms, and thus, at least implicitly, approved of defendant continuing to have sole physical custody of their daughter.¹ Therefore, plaintiff should not now be heard to complain of events which occurred before June 2001. This conclusion is also in keeping with and in furtherance of the purpose of the Child Custody Act, MCL 722.21 *et seq*, which is to "minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an established custodial environment, except in the most compelling cases." *Foskett, supra* at 6; internal quotation and emphasis added omitted. Because we cannot discern the degree to which the court relied on

¹ We note that had the June 20, 2001 order establishing filiation not included the custody terms, or had plaintiff objected at that time, we would have found it proper for the court to consider all events occurring since the December 2000 order.

events that occurred before June 20, 2001, we find the error was not harmless. Accordingly, we find that a remand is necessary.

Defendant also argues that the trial court failed to make specific findings as to each best interest factor listed in MCL 722.23 and that, accordingly, defendant is entitled to reversal and remand. In deciding a custody matter, the trial court must consider each of the best interest factors set forth in MCL 722.23 and must explicitly state its findings and conclusions regarding each. *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). However, this does not mean that a court must comment upon every matter in evidence or declare acceptance or rejection of every proposition argued. *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994). Here, contrary to defendant's assertion, the trial court did place its findings of fact with regards to each factor on the record, stating, at a minimum, in whose favor it weighted the factor. Brief, definite and pertinent findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts. *Id.* Although it is helpful to the appellate court for the trial court to specifically discuss the facts supporting its findings, which the trial court did on two factors, it was not required to do so. However, while we find the court's findings as stated on the record may be minimally sufficient, the court should identify the evidence that supports its findings on each factor. Such expressions facilitate meaningful appellate review.

Because we concluded above that this case must be remanded, we do not consider the merits of defendant's argument regarding whether the court's findings regarding the "best interest of the child" factors were against the great weight of the evidence.² On remand, we instruct the trial court to consider only evidence of changed circumstances since June 20, 2001, including events that transpired after the court's September 6, 2002 custody modification order, in making its findings regarding the "best interest of the child" factors.³ *Fletcher, supra* at 889.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

² For the same reason we do not address defendant's final appeal issue- whether the trial court abused its discretion in denying defendant's motion for new trial.

³ The *Fletcher* Court instructed that "upon a finding of error, an appellate court should remand the case for reevaluation, unless the error was harmless." The Court also instructed that the reevaluation should include up-to-date information. *Fletcher, supra* at 889.