

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARY JO ROODVOETS,<sup>1</sup>

Plaintiff-Appellant,

v

THOMAS E. ROYCE,

Defendant-Appellee.

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UNPUBLISHED

June 26, 2007

No. 275461

Ottawa Circuit Court

LC No. 98-030516-DP

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting sole legal custody of the parties' minor child to defendant, and requiring supervision of plaintiff's parenting time. We affirm.

This matter continues a long-running custody fight between the parties over their daughter, Emma Rose Royce, born November 22, 1997. This matter has twice been before this Court before. The first time, in Docket No. 232845, April 2001, plaintiff sought leave to appeal an order denying plaintiff's motions for modifications of an order setting a parenting time schedule. The application was denied. The second time, in Docket No. 246505, March 2004, plaintiff appealed the circuit court's order granting defendant's motion for a change in the sole physical custody of then five-year-old Emma from plaintiff to defendant, granting joint legal custody of Emma to both plaintiff and defendant, awarding plaintiff parenting time every other weekend, and ordering continued counseling for both plaintiff and Emma. This Court affirmed.

In August 2002, during the hearing on defendant's motion for sole physical custody of Emma, the trial court stated:

This is a really extraordinary case. It would a - - it is very unusual to change custody from one parent to another when, at least, on the surface the parent that has custody is doing a good job with external things and has an established custodial environment with that parent. But this is a case where there are psychological issues that are deeply troubling and they will, over time, create a

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<sup>1</sup> Formerly Mary Jo Swainston.

situation where there is no relationship between the child and the father unless the Court does something about it now.

We find the situation little changed since that time.

Defendant first moved for sole legal custody and supervision of plaintiff's parenting time in September 2003. In response, the court entered an order assigning a court-appointed evaluator to this case. The process was neither smooth nor swift, but the evaluation was ultimately completed by Dr. Peter Everts on July 5, 2005. Plaintiff brought a motion to have the court adopt the recommendations of Dr. Everts, to continue to current status of legal and physical custody, and to appoint a Parenting Coordinator to address issues of parenting time so that the parties would not have to come to court to work out all problems. Defendant filed a renewed motion for sole legal custody and supervised parenting time for plaintiff.

The trial court held a hearing on the motions, and determined that an evidentiary hearing was the necessary next step, stating that it could not "simply sign an order adopting the evaluator's recommendation." Plaintiff argued that defendant had not pled sufficient change in circumstances to warrant an evidentiary hearing. Defendant argued that the basis for the evidentiary hearing was not a change in circumstances, but "that the conduct that was the cause for the change in custody continues to occur." The trial court's written order after the motion hearing stated: "the Court finds [defendant] has alleged facts that if true would constitute a change in circumstances, and further for the reasons stated on the record, the Court orders an evidentiary hearing."

The evidentiary hearing was held September 7, 2006,<sup>2</sup> and November 10, 2006. The trial court issued a written opinion on December 18, 2006. The court first found that there was an established custodial environment with defendant, MCL 722.27(1)(c). The court then reviewed the best interest factors, MCL 722.23, and found that factors a, b, d, e, g, h, and j favored defendant father, and factors c, f, and k were equal to both parents.<sup>3</sup>

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<sup>2</sup> On August 1, 2006, between the motion hearing and the scheduled evidentiary hearing, plaintiff signed a stipulation allowing her counsel to withdraw; she represented herself at the evidentiary hearing.

<sup>3</sup> MCL 722.23:

(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.

(continued...)

As to defendant's request for sole legal custody of Emma, the court said:

The communication between the parties which joint legal custody requires has been burdensome to Mr. Royce, and the sheer volume of communication suggests that it has been unsuccessful. Mrs. Roodvoet's [sic] excessive communication has resulted in increased drama in their relationship rather than understanding and agreement. It has also been one source of Emma's increased stress. The greater source of her anxiety and stress is Mrs. Roodvoets' constant subtle and not-so-subtle reminders to Emma that mother misses her and that she should do what's necessary to return to mother's care. The parties here have established that they cannot cooperate well enough to make the adjustments necessary to enable them to effectively co-parent their child. Mrs. Roodvoets cannot accept disagreements, with Mr. Royce; her communications and other responses are incessant. It's in Emma's best interest that the important decisions affecting her best interests be made by her father, without the burden of excessive communication and resulting anxieties imposed on Emma. Mr. Royce shall have sole legal custody of the minor child.

As to parenting time, the court noted that defendant sought an order of supervised visitation for plaintiff, and plaintiff sought an order appointing a parenting coordinator. The judge noted that parenting time should be granted in a way reasonably calculated to promote a strong relationship between the child and the non-custodial parent, but also noted that time may be limited if there is clear and convincing evidence that it will subject the child to an unreasonable risk of physical, mental, or emotional injury. MCL 722.27a.

The court stated that it was particularly troubled by the fact that plaintiff had obtained a Masters in Social Work, and was studying child development, and still brought her now ten-year-old child to tears in approximately one out of five telephone conversations, as reported by defendant. The court noted that plaintiff "continues to make inappropriate comments to Emma even when she knows she's being recorded." The court found that there are "ongoing problems" that "lend weight to Dr. Kieliszewski's<sup>4</sup> opinion that Plaintiff's prognosis is grim, and requires long-term counseling to control."

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(...continued)

- (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.

<sup>4</sup> An expert witness called by defendant.

The court concluded:

Based on all the evidence, the court finds clear and convincing evidence that unsupervised parenting time will subject Emma to an unreasonable risk of mental or emotional injury, and grants Defendant's motion to require Plaintiff's parenting time to be supervised. Plaintiff is ordered to continue in counseling . . .

Plaintiff appeals the grant of sole legal custody to defendant, and the grant of defendant's motion that plaintiff's parenting time be supervised.

Before a court may conduct a review of the best interest factors, the party seeking a change in custody must prove by a preponderance of the evidence that either proper cause or a change of circumstances exists. Plaintiff argues that the trial court erred because it failed to comply with the threshold requirement of finding proper cause or a change in circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003).

At the close of the motion hearing that prompted the court to order the evidentiary hearing, the trial court stated: "[defendant's] motion does raise and allege facts, which, if true, would, would establish a change or circumstances that would permit the Court to address the issues of legal custody and parenting time."

We review the trial court's factual finding that a change in circumstances was shown under the great weight of the evidence standard, MCL 722.28.<sup>5</sup> Under this standard, "a reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (citation omitted).

To establish a change of circumstances, the party moving for a change in custody 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." *Vodvarka, supra* at 513. And the change must be significant; "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." *Vodvarka, supra* at 513-514.

Here, no change in circumstances was proved, and the trial court therefore erred in stating that the change in circumstances was sufficient basis for revisiting custody. However, we also find that this error was harmless. As defendant argued to the trial court, the basis for the evidentiary hearing was not a change in circumstances, but "that the conduct that was the cause for the change in custody continues to occur." In order to revisit custody, the moving party must

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<sup>5</sup> "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court 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

establish either a “change in circumstance” or “proper cause.” *Vodvarka, supra* at 512. Although a change in circumstance was not proved, we find that defendant did offer sufficient evidence to support a finding of proper cause:

to establish ‘proper cause’ necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Vodvarka, supra* at 512].

The evidence offered during the evidentiary hearing included testimony from plaintiff and defendant and from three different mental health professionals.

Defendant testified that the issues that led to the change in custody are ongoing, and create ongoing stress for Emma. Defendant stated that Emma still cried after twice weekly phone calls with her mother, and he provided the court with an audio tape of a phone conversation between plaintiff and Emma<sup>6</sup> during which Emma cried for eight to nine minutes. Defendant stated that plaintiff was typically 15 minutes to two hours late returning Emma after her parenting weekends.

Defendant testified that Emma had told him that on weekends with her mother, her mother still went to sleep with her and woke up with her. Defense counsel added that plaintiff had been advised, in 2001, that she should not sleep in the same bed with her then four-year-old child.

Defendant testified generally that he has concerns about the time Emma spends alone with plaintiff. He stated that when Emma returns from time with her mother, she is often upset by things that were said. For example, in 2006 Emma wrote in her journal that her mother told her she was a Swainston, and her father told her she was a Royce, and she was confused. In addition, defendant testified that he believed Emma was confused and distressed by the various roles of persons in her life when she was at her mother’s house. Specifically, Emma had been encouraged to call plaintiff’s ex-husband, Paul Swainston, “dad,” and to call defendant “daddy.” Then plaintiff remarried, without first notifying Emma of her intent to do so. Plaintiff’s new husband, Rick Roodvoets, is apparently rarely at home on the weekends when Emma stays at her mother’s house; defendant has never met Roodvoets. Paul Swainston is still significantly involved in parenting time, as he is often present in the home when Emma is there, and often drives Emma home to defendant’s residence in Illinois, approximately a three and a half hour drive, each way. Defendant testified that when plaintiff creates confusion like this, it is stressful for Emma.

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<sup>6</sup> These phone conversations are taped as a result of a court order authorized defendant to record them.

Finally, defendant testified that in the two weeks leading up to this hearing, Emma had been deliberately keeping herself awake until late at night, and had told him that this was “so that she can report back to her mother some, some problems, and make her mother feel good.” Defendant stated that Emma had told him she was concerned about lying to her mother, and that she felt she had to either stay up late in order to create problems, or lie to her mother and tell her she was having problems in the Royce home.

Dr. Peter Everts, the court-appointed evaluator, also testified during the evidentiary hearing. Although he recommended retaining the status quo arrangement of custody and parenting time, he admitted that time and cost constraints prevented him from completing as thorough an evaluation as he would have liked.<sup>7</sup>

During Dr. Everts’ testimony, defense counsel played a recording of a phone conversation between plaintiff and Emma from February 2005. During the call, Emma said repeatedly that she wanted to come home, meaning her mother’s house, and her mother repeatedly encouraged her to tell her father and step-mother that she wanted to come home. Dr. Everts testified that this was an “unwarranted response” to Emma by her mother at this point in the process between the parties. Defense counsel also observed on the record that the 17 minute phone call included eight to nine minutes of crying by Emma. Dr. Everts stated that the phone call was “certainly not a strong piece of evidence, here, supporting the separation, the healthy separation” of Emma from her mother, meaning after physical custody was transferred to Emma’s father.

Dr. Russner, also a witness in the evidentiary hearing, was appointed by the court in 2001 to evaluate Emma, and after the change in custody, defendant took Emma to Dr. Russner for therapy intermittently as needed. Dr. Russner testified that he had met with plaintiff in April 2003, a year and a half after the change in custody, and recommended to her then that she decrease the number of gifts she gave or sent to Emma, decrease the amount of time spent on goodbyes on the phone and in person, and eliminate some of the “rituals” involved in those goodbyes because all of this was distressing to Emma. Dr. Russner stated that it was not the behaviors themselves so much as the “degree,” meaning frequency or intensity. He noted that occasional letters or gifts were positive things for kids to receive to reinforce that their non-custodial parent was thinking of them, but that that plaintiff did “too much of it too often.”

Dr. Russner testified that he listened to tape recordings of phone conversations between plaintiff and Emma. He stated that since the calls recorded during or prior to February 2006, he had not heard the same “level of distress” from Emma, and he concluded that the situation had “gotten significantly better.”

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<sup>7</sup> Dr. Everts stated that in the course of his evaluation he interviewed defendant and plaintiff, Emma’s teacher and school principal, and Dr. DeJonge, and well as reviewing documentation provided by the parties from the school and from other mental health professionals involved in the matter. Due to time and financial constraints imposed on the process, Dr. Everts did not feel he had sufficient time to devote to meeting with Emma, so he did not meet with her at all.

Dr. Jeffrey Kieliszewski, a licensed psychologist retained by defendant, also testified.<sup>8</sup> The witness was accepted as an expert in clinical psychology and forensic psychology.

Dr. Kieliszewski testified about the criteria for diagnosing Borderline Personality Disorder, and stated that his review of the records indicated that plaintiff's behavior lined up with several of the nine criteria for diagnosing Borderline Personality Disorder. Specifically, he noted that records of plaintiff's counseling sessions as far back as the 1980s indicated plaintiff had problems establishing and maintaining proper boundaries in relationships. He noted that Dr. DeJonge's [plaintiff's therapist] counseling records indicated plaintiff had issues managing anger, managing her emotions in her relationship with Emma, and managing relationships with others. He used, as an example, notes from Dr. DeJonge's records indicating that plaintiff had stated she was planning to get married, and then one month later broke up with her fiancé, and then one month later was back in the relationship and planning the wedding again.

Dr. Kieliszewski stated that he felt "quite sound in saying that based on my review of the data, this particular person [plaintiff] is probably medium to high in regards to the potential for Borderline Personality Disorder." He further stated that:

The prognosis for alleviation of that condition is very grim. These folks often need to be involved in several years of psychotherapy. And the psychotherapy typically focuses on managing their behavioral problems, managing their emotional responses, and really focuses more on maintaining a lifestyle of stability with better communication in relationships, and probably more importantly, developing some insight that they have dysfunctional personality characteristics that can impact others.

Dr. Kieliszewski also testified that plaintiff's patterns of behavior affected Emma's overall emotional well-being. In response to a question about Dr. Russner's observation that the crying and distress on Emma's part seemed to have abated in recent months, Dr. Kieliszewski testified that it was typical of BPD to get "more educated about how to interact with the mental health professionals to get, to cast a particular impression."

When asked whether BPD in a parent had an impact on children, Dr. Kieliszewski stated:

What you find is that the children of these particular types of individuals are more prone to depression and anxiety and somatic, which complaints; and somatic means expressing emotional turmoil through physical symptoms or concerns.

Specific to Emma, Dr. Kieliszewski testified:

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<sup>8</sup> Dr. Kieliszewski stated that he did not meet with either party or with Emma, but relied solely on a review of records presented to him about the case, including records provided by other therapists who had counseled plaintiff and Emma, records provided by Emma's school, and correspondence between the parties. He testified that he spent 16 hours reviewing records.

when I reviewed this case, one thing that I notice is that Emma is experiencing this distress, to the point where she needs to obtain treatment. And specifically associates her distress to her interactions with her mother and her mother's behavior.

With respect to custody, Dr. Kieliszewski concluded that he would "have a great deal of concern about her ability to hold legal custody of her child to the extent that she would make decisions that would be in the best interest of the child."

On this record, we find there was sufficient evidence to support a finding of proper cause in the trial court, and the trial court was therefore able to revisit the existing custody arrangement.

Plaintiff next argues that the trial court erred in finding that the best interest factors favored defendant, and that the trial court abused its discretion in ordering the change in legal custody and parenting time. Plaintiff asserts, as part of this argument, that because she represented herself at the hearing, the court should have been more sensitive in its rulings as to the admissibility of witness testimony. Plaintiff argues that she was not aware, before the hearing, that defendant intended to call an expert witness who would disagree with the recommendations of the court-appointed evaluator. Plaintiff also argues that the court should not have denied her the opportunity to call her own therapist, Dr. DeJonge, as a rebuttal witness, after defendant's surprise witness testified.<sup>9</sup>

We apply various standards of review in custody matters:

The great weight of the evidence standard applies to all findings of fact. 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. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted)]

The abuse of discretion standard recognizes that in some situations there will be more than one reasonable and principled outcome. An abuse of discretion occurs only where the trial court's decision falls outside this principled range of outcomes. *Shulick v Richards*, 273 Mich App 320, 324; 729 NW2d 533 (2006) (citing *Maldonado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003)).

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<sup>9</sup> At the close of the first day of the hearing, plaintiff asked the court to allow her to call Dr. DeJonge on the second day of the hearing. Defendant objected, arguing that there was "no justifiable excuse" for plaintiff calling a witness out of order. The court sustained the objection.

To order this change in custody, the trial court had to first find by clear and convincing evidence that a change in custody was in Emma's best interests. Here the trial court found that most of the best interest factors favored defendant, and on this record, we cannot say that the evidence clearly preponderates a contrary conclusion on any of the best interest factors. Rather, defendant's testimony as to the stress on Emma and the actions precipitated by that stress supports the finding that a change in custody was in Emma's best interests. Plaintiff did not rebut this testimony, other than to state that she felt the issues that had led to the change in custody had improved, and that by all accounts (from teachers and others familiar with Emma), Emma was "thriving." Taking the record as a whole, we cannot say that the trial court abused its discretion in ordering the change in custody. And we note that even discounting Dr. Kieliszewski's testimony for the reason that he never met plaintiff, and assuming that the testimony of other mental health professionals would be offsetting if Dr. DeJonge had testified, the judge could reasonably have relied on the parties' testimony and simply found defendant more credible.

The change in custody was within a range of principled outcomes, and the trial court did not abuse its discretion.

Plaintiff argues, finally, that the supervised visitation schedule ordered by the trial court is not of the frequency, duration, or type reasonably calculated to promote a strong relationship between plaintiff and Emma, as required by MCL 722.27a(1).

However, MCL 722.27a(3) limits the child's right to time with a parent if "it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." We review the trial court's factual findings under the great weight of the evidence standard, and its custody determination on this issue for an abuse of discretion.

Viewing the record with appropriate deference to the trial court, we find nothing to indicate that the judge's factual conclusions were against the great weight of the evidence. Likewise, the final custody decision is within the range of principled outcomes.

Affirmed.

/s/ Jessica R. Cooper  
/s/ William B. Murphy  
/s/ Janet T. Neff