

STATE OF MICHIGAN  
COURT OF APPEALS

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KELLY RENEE MATTSON,

Plaintiff-Appellant,

v

BRENT WILLIAM STARK,

Defendant-Appellee.

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UNPUBLISHED

May 10, 2011

No. 300520

Chippewa Circuit Court

LC No. 09-010618-DC

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Plaintiff-mother appeals as of right from the trial court's order awarding primary physical custody of the parties' minor child to defendant-father. We affirm.

Prior to the change of custody at issue in this matter, a custody order was entered on September 29, 2009, which granted shared physical and legal custody of the minor child (DOB: 3/19/06) to both parties, with each parent having visitation two days on, two days off, and alternating weekends. Defendant moved to change custody following an incident where plaintiff came to his home during the early morning hours with the child on March 17, 2010. Defendant videotaped the incident, during which Plaintiff shouted and cursed at him, as well as refused to leave despite defendant's repeated requests that she do so. The child was present for this incident. Plaintiff was aware defendant was videotaping this incident. During the hearing on whether to grant defendant's motion, the trial court also heard testimony concerning additional incidents that had occurred between the parties since the initial custody determination.

Plaintiff first argues the trial court's finding that a change of circumstances sufficient to consider a change in custody existed in the present case was against the great weight of the evidence. We disagree.

Three standards of review apply in custody cases. The trial court's findings of fact are subject to review under the great weight of the evidence standard. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court will affirm the findings of the trial court concerning the existence of an established custodial environment and with respect to each best interest factor unless the evidence preponderates against those findings. *Id.* This Court also reviews a trial court's discretionary rulings, such as a determination of custody, for an abuse of discretion, and questions of law for clear error. *Id.*

A trial court has the power to modify custody. However, unwarranted and disruptive changes in custody should be avoided. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). To that end, a party requesting a change in the established custodial environment must, as a threshold matter, demonstrate either proper cause or a change in circumstances sufficient to warrant a change before a trial court may order such a change. *Id.*, citing, MCL 722.27(1)(c); *Killingbeck v Killingbeck*, 269 Mich App 132, 146; 711 NW2d 759 (2005). The party seeking a change in custody must establish a change in circumstances by a preponderance of the evidence. *Id.* at 509.

This Court explained the meaning of “change of circumstances” in the context of child custody in *Vodvarka v Grasmeyer*, 259 Mich App 499, 513-514; 675 NW2d 847 (2003), stating:

[I]n order to establish a “change in 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. Again not just any change will suffice . . . and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [Emphasis in original.]

In challenging the trial court’s finding, plaintiff-mother specifically argues that the trial court failed to articulate that the incident in question significantly affected the minor child. Plaintiff submits no authority for her apparent assertion that the trial court must do so. “A party “may not merely announce [her] position and leave it to this Court to discover and rationalize the basis for [her] claims.” *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009).

In any event, we find that plaintiff misconstrues the law related to the change of circumstances requirement in custody disputes. Rather than requiring a showing that the minor child has actually been significantly affected, the Court in *Vodvarka* stated that a change that *could* have a significant affect is sufficient to revisit this issue of custody. *Vodvarka*, 259 Mich App at 513-514. Here, the evidence from the custody hearing established a pattern of growing hostility between the parties. While the videotaped encounter between the parties was perhaps the most egregious example, there was additional evidence of this hostility. For example, defendant related an incident where he attempted to pick up the minor child for his scheduled parenting time and plaintiff suddenly decided that he could not take the minor child because he was tardy. When defendant attempted leave with the minor child, plaintiff forcibly removed her from his arms and ordered her into the house. These repeated antagonistic interactions between the parents while in the child’s presence would undoubtedly significantly affect the minor child. Thus, the trial court’s finding of the existence of a change of circumstances was supported by the record and not against the great weight of the evidence.

Plaintiff also argues the trial court improperly evaluated the statutory best interest factors and abused its discretion in awarding primary physical custody to defendant. We disagree.

To determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in MCL 722.23 and apply the proper burden of proof. *Foskett*, 247 Mich App at 9. “If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and

convincing evidence that the change serves the best interests of the child.” *Id.* at 6. MCL 722.23 provides:

(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.

(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.

Here, the trial court analyzed each of the statutory best interest factors in light of the facts of the case and concluded that most of the factors favored the parents equally, but found that factors (d), (j), and (k) favored defendant.

During its discussion of the best interest factors, the trial court referred the March 17, 2010 incident, during which plaintiff traveled to defendant-father’s home and proceeded to shout and curse at him for approximately thirty to forty minutes, all in the presence of the minor child. Plaintiff argues that the statements made by the trial court indicate that it decided to modify

custody solely on this incident and that such decision was improper. Plaintiff appears to misapprehend the trial court's ultimate finding related to custody. It is improper for a trial court to decide to modify custody based on one incident in most cases. A change in custody can only be ordered if a trial court finds, *based on the statutory factors*, that a change in custody is in the minor child's best interest. While it is true that the trial court referred to the incident when articulating its findings as to the statutory factors, this does not mean that the incident standing alone served as the sole basis for the trial court's ultimate decision, but rather informed the trial court's findings related to the individual factors. Indeed, the trial court specifically stated that its decision was the result of weighing all of the factors.

We conclude the trial court's factual findings related to the best interest factors were supported by the record. In deciding that factor (d) favored defendant, the trial court stated that plaintiff had failed to provide a satisfactory environment as demonstrated by her conduct. The trial court specifically referenced plaintiff's behavior on the night of the videotaped verbal assault against defendant at his home and in the presence of the minor child. Other evidence also supported the finding that plaintiff had repeatedly engaged in erratic and irresponsible behavior that was inconsistent with providing a satisfactory environment for a then four-year-old child.

There was also support in the record for the trial court's finding that factor (j) favored defendant. On more than one occasion, plaintiff had directed disparaging comments about defendant toward the minor child, and had verbally assaulted defendant in front of the minor child. Plaintiff had even once directed the minor child to run away from her father and into plaintiff's home. In addition, plaintiff herself acknowledged the hostility between the parties. This conduct, coupled with the growing antagonism between the parties, would not be conducive to facilitating a relationship between the minor child and either or both of the parents. Plaintiff emphasizes that the parties were able to engage in visitation exchanges without the necessity of third parties. However, the fact that the parties were able to avoid engaging in fist cuffs does not constitute a basis for finding that plaintiff has facilitated a relationship between the child and defendant. In contrast, no evidence was presented to show that defendant had disparaged plaintiff in the minor child's presence or had engaged in any conduct that would undermine plaintiff's relationship with the minor child.

As a final matter, we reject plaintiff's apparent assertion that it is never in a child's best interests for one parent to obtain sole custody after a joint custodial environment has been established. If this were the case, the Child Custody Act would not allow for modification of custody after a joint custodial environment has been established. Instead, the Act specifically allows for modification of any established custodial environment, either joint or with a single parent, so long as the movant provides clear and convincing evidence that such a change is in the child's best interest. MCL 722.27(1)(c); *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). In essence, plaintiff is arguing that there is, or should be, a presumption in favor of joint custody. However, this Court has already determined there is no statutory presumption in favor of joint custody. *Wellman v Wellman*, 203 Mich App 277, 285; 512 NW2d 68 (1994).

In conclusion, the trial court's ultimate finding that there was clear and convincing evidence that the minor child's best interest would be served by awarding defendant primary physical custody was not an abuse of discretion.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Elizabeth L. Gleicher