

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

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SUMMER MARIE SLATER,

Plaintiff-Appellant,

v

JOHN JOSEPH MICHELS,

Defendant-Appellee.

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UNPUBLISHED

May 10, 2012

No. 306547

Arenac Circuit Court

LC No. 03-008315-DM

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion to change physical custody of the child. For the following reasons, we affirm.

**I. BACKGROUND**

When the parties divorced on November 23, 2003, the court granted plaintiff sole physical custody and both parties joint legal custody of the child. The child lived with plaintiff from that time until July 24, 2011, when the Department of Human Services removed the child from plaintiff for physically abusing him.<sup>1</sup> The DHS removal complaint was attached to defendant's motion to change custody and alleged the following facts: (1) the child suffered observable marks and a hand print on his arm from plaintiff's physical attack; (2) the child lived in fear of plaintiff and contemplated suicide or flight; (3) plaintiff had a long history of child abuse against her children, including a prior removal of another child for physical abuse on January 25, 2007; and (4) numerous services designed to prevent removal were provided to plaintiff, all of which were unsuccessful. The motion also alleged that, based on the child's observable physical injuries and plaintiff's own admissions, the court placed the child in defendant's care on July 26, 2011. The child remained with defendant since that time and adjusted well to the new placement. Although plaintiff had been receiving reunification services through DHS, defendant filed this motion to change custody.

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<sup>1</sup> The same trial court judge presided over both this case and the DHS proceeding which was assigned docket no. 07-9983-NA in the circuit court.

Following the hearing on defendant's motion to change custody, the trial court found that plaintiff's physical abuse of the child presented clear and convincing evidence of a change in circumstances to justify reconsideration of the child custody factors. Next, the court found that, as a result of being placed in defendant's care, the child had an established custodial environment with defendant. Finally, the court evaluated the best interest factors as follows: (1) love and affection favored neither party because both parties loved the child; (2) capacity for care and nurturing favored neither party, as both parties had been delinquent in their child-rearing duties in the past;<sup>2</sup> (3) capacity for physical needs favored neither party because both parties were able to meet the child's needs; (4) duration and stability of home environment favored defendant because plaintiff's physical abuse created a volatile home environment for the child; (5) permanence of the placement favored defendant because the court felt maintaining the child's continuity in his current school arrangement was important; (6) moral fitness favored defendant because of plaintiff's physical abuse; (7) the parties' respective mental and physical health favored neither party, but that this element had little weight since both parties appeared healthy; (8) the child's home and school environment favored neither party because no evidence was presented to make the matter relevant; (9) the reasonable preference of the child favored neither party because neither party presented evidence on the matter and the child was too young to express a meaningful opinion entitled to serious weight; (10) the willingness and ability to facilitate the parent-child relationship with the other party favored neither party, as no evidence was presented to make the issue relevant; (11) prior domestic violence favored plaintiff, since defendant had a PPO filed against him in 2009 by his current girlfriend; and (12) an additional relevant factor, the child abuse substantiation itself, favored defendant.

After weighing the factors and noting plaintiff's pending criminal child abuse charge, the trial court granted defendant's motion and changed physical custody of the minor child to defendant because "compelling reasons" existed to do so, but the court retained joint legal custody. The trial court's order reflected its findings during the motion hearing, and it is from this order that plaintiff now appeals.

## II. CHANGE OF PHYSICAL CUSTODY

Plaintiff first argues that the trial court erroneously granted defendant's motion to change custody by: (1) failing to consider whether changed circumstances justified revisiting custody; (2) failing to consider whether the court's order changing custody would upset the child's established custodial environment with plaintiff; and (3) failing to properly evaluate the best interest factors established in MCL 722.23.

MCL 722.28 provides that in child-custody disputes "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." Our Supreme Court has explained that MCL 722.28 "distinguishes among three types of findings and assigns standards of review to each." Findings of fact, such as the

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<sup>2</sup> Defendant admitted that he was negligent in checking on the child's educational progress.

trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision is "palpably and grossly violative of fact and logic . . . ." Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. [*Dailey v Kloenhamer*, 291 Mich App 660, 664-665; \_\_\_\_ NW2d \_\_\_\_ (2011) (citations omitted).]

When issuing an order that will modify a prior child custody order, the trial court must follow a three step process. MCL 722.27(1)(c). First, the trial must find that the movant has established, by a preponderance of the evidence, that proper cause or a change in circumstances justifies reconsidering the custody order. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003); MCL 722.27(1)(c). "Proper cause" requires a showing of appropriate grounds that may have a "significant effect on the child's life[.]" *Vodvarka*, 259 Mich App at 511. A changed circumstance exists when custody conditions that could significantly affect the child's well-being have materially changed since the court made its initial custody order. *Id.* at 513.

Second, and only if the trial court has found either a change in circumstance or proper cause, the trial court must determine whether the child has an established custodial environment with either parent; this determination is necessary to establishing the proper burden of proof on the movant. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 527-528; 752 NW2d 47 (2008). An established custodial environment exists when the child "'naturally looks to the custodian in that environment for guidance, discipline, the necessities of life and parental comfort[.]" *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981), quoting MCL 722.27(1)(c), and when "the relationship between the custodian and the child is marked by qualities of security, stability, and permanence[.]" *id.* at 579-580.

The court's final step is to determine whether a change in custody is in the best interests of the child. The trial court should explicitly evaluate each factor under the relevant standard: preponderance of the evidence if no established custodial environment would be affected by the modification, or clear and convincing evidence if it would alter the environment. MCL 722.23; *Powery*, 278 Mich App at 528. Although the trial court is not required to comment on each piece of evidence presented when making the "best interest" determination, it must explicitly address each factor on the record. *Pierron v Pierron*, 486 Mich 81, 91; 782 NW2d 480 (2010); *Sinicropi v Mazurek*, 273 Mich App 149, 179-181; 729 NW2d 256 (2006). However, if the record establishes that the trial court tangentially addressed the factors by discussing the evidence relevant to each factor, this Court may infer the trial court's finding on the factor. *Sinicropi*, 273 Mich App at 182.

#### A. CHANGE OF CIRCUMSTANCES

The trial court's finding that changed circumstances justified a review of the custody order was not against the great weight of the evidence. In addressing this issue the trial court

may have actually applied the clear and convincing evidence standard when it found that plaintiff's admitted physical abuse of the child constituted a sufficient change of circumstances to justify a change in custody.<sup>3</sup> Regardless, the trial court's finding that plaintiff's substantiated and admitted physical abuse of the child was an event that significantly affected the child's well-being, was supported by the evidence. Further, the abuse was a subsequent event since the court made its initial custody order on November 25, 2003, and plaintiff's August 1, 2011 admission of abuse was not considered in any of defendant's prior motions to change custody. Accordingly, the record supported the trial court's conclusion that there was a change of circumstances sufficient to revisit custody. *Vodvarka*, 259 Mich App at 513.

#### B. ESTABLISHED CUSTODIAL ENVIRONMENT

As noted above, in addressing this issue the court must determine whether an established custodial environment existed between the child and one or both of his parents. *Powery*, 278 Mich App at 527-528. A court is statutorily required to determine who the child naturally looks to for guidance, comfort, necessities of life, etc. MCL 722.27(1)(c). Here, the record supports the trial court's conclusion that an established custodial environment existed with defendant. The finding was predicated on the child's current living arrangement as well as on the volatile situation he had while living with plaintiff. Additionally, defendant testified that he and his son had close communication while the son lived with plaintiff, that he exercised the vast majority of his parenting time, and that defendant and the child would camp together and discuss important issues. Thus, the preponderance of the evidence standard was the proper burden of proof for defendant to establish that a change in custody was warranted.

However, even assuming plaintiff is correct in that the child also had an established custodial environment with her (or exclusively with her), the trial court appears to have applied the clear and convincing standard to its best interest determination. Thus, because the trial court appeared to have used the burden of proof argued for by plaintiff in reaching its decision, any error as alleged by plaintiff would have been harmless. And, in any event, the preponderance of the evidence was the appropriate standard.

#### C. BEST INTEREST OF THE CHILD

Although not ideal, we find that the trial court's treatment of the best interest factors was appropriate. First, its factual findings were not against the great weight of the evidence. *Dailey*, 291 Mich App at 664. The court accurately recited each and every best interest factor contained in MCL 722.23, recited evidence contained in the record to support its factual findings, and noted where it found the particular best interest elements to be irrelevant in its analysis. *Sinicropi*, 273 Mich App at 180.

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<sup>3</sup> The transcript can be read to indicate that either the trial court applied the clear and convincing evidence standard, or that it was simply remarking about how strong the evidence was regarding changed circumstances. If the former is what actually occurred, it would be harmless error.

Plaintiff claims that the court wrongly decided the “duration and stability of the home environment” (factor d), “permanence of the placement” (factor e), and “moral fitness” (factor f) elements. However, the court clearly stated that its determination was based on plaintiff’s physical abuse of the child. Severe physical abuse of a child, after years of DHS services to prevent such abuse, constitutes clear and convincing evidence that plaintiff maintained a hazardous and unstable home environment and that plaintiff lacked the moral fitness to adequately function as a parent. Further, the child’s duration and progress in his current home environment supported the finding that defendant’s home environment is a permanent arrangement. Finally, plaintiff’s argument that the court did not consider the child’s reasonable preference is contradicted by the record. The trial court expressly evaluated this factor, noted that neither party presented relevant evidence on the factor, and opined that the factor was not entitled to consideration because of the child’s young age.

Finally, the court’s ultimate ruling was not an abuse of discretion. The trial court’s decision to grant defendant’s motion to change custody was clearly predicated on accurate and relevant evidence in the record and there were no reversible errors of law. Because the best interest factors favored a change of custody, the trial court’s decision was not “palpably and grossly violative of fact and logic.” *Dailey*, 291 Mich App at 664-665 (quotation marks and citation omitted).

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Christopher M. Murray  
/s/ Elizabeth L. Gleicher