

STATE OF MICHIGAN
COURT OF APPEALS

AMIE LEPAGE,

Plaintiff-Appellant,

V

JOEL ALEXANDER MERTZ,

Defendant-Appellee.

UNPUBLISHED

February 8, 2011

No. 299083

St. Clair Circuit Court

LC No. 99-001367-DP

Before: K. F. KELLY, P.J., AND GLEICHER AND STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting the parties joint legal custody of the parties' two minor sons, with defendant being awarded physical custody of both boys. We affirm.

The Child Custody Act (CCA), MCL 722.21 *et seq.*, governs child custody disputes between parents. *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005), overruled on alternative grounds by *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009). The CCA sets forth presumptions and standards by which competing custody claims are judged, and prescribes the procedures and reliefs available. *Ruppel v Lesner*, 421 Mich 559, 565; 364 NW2d 665 (1984). All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

A circuit court may “[m]odify or amend its previous [custody] judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age.” MCL 722.27(1)(c). Plaintiff argues that the trial court erred in not finding a change in circumstances before conducting an evidentiary hearing to determine custody. Rather, plaintiff argues, the trial court impermissibly conducted one evidentiary hearing to determine both the threshold question as well as to consider the statutory best interest factors. Plaintiff failed to raise this argument below, so we review for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The trial court found that there was proper cause and a change of circumstances sufficient to consider a motion for change of custody. Plaintiff does not argue that this finding was in

error. Plaintiff argued below that the transfer of custody was temporary and therefore did not constitute good cause per *Theroux v Doerr*, 137 Mich App 147; 357 NW2d 327 (1984). Having not argued that the hearing or the outcome of the hearing was impacted, plaintiff therefore has not met her burden of demonstrating that any alleged procedural error affected a substantial right. *Kern*, 240 Mich App at 336. For this reason alone her argument fails.

Moreover, plaintiff has not shown that any error occurred. Indeed, the court made the two required findings of fact. At the initial motion hearing held on defendant's motion to change custody, the court heard argument on the question of whether proper cause or a change in circumstances had been shown. The court determined that an evidentiary hearing needed to be held on the threshold issue because the parties had completely different views of what was intended when they agreed to change the children's living arrangements, and on the issue of whether a change would be in the best interests of the children. In his detailed findings of fact and conclusions of law, the trial judge found proper cause to inquire about the custodial environment of the children. The court's finding of proper cause regarding the eldest child was based on evidence relating to that child's behavior and academic problems. Regarding the younger child, the court found that the mother's inability to provide housing for an extended period of time constituted proper cause. MCL 722.27(1)(c) does not direct that the threshold question must be decided in a separate hearing held before an evidentiary hearing on the best interest factors. While an evidentiary hearing be held "before custody can be modified, even on a temporary basis," *Knox v Grew*, 265 Mich App 333, 336; 694 NW2d 772 (2005), the statute does not preclude one evidentiary hearing to determine both the threshold issue as well as the custody determination.¹

Plaintiff next argues that the court violated public policy, which encourages parents to temporarily transfer custody while they address temporary problems by providing that the party who does so will not lose custody because of the action. This Court has stated that it is "good public policy" to encourage "parents to transfer custody of their children to others temporarily when they are in difficulty by returning custody when they have solved their difficulty." *Straub v Straub*, 209 Mich App 77, 81; 530 NW2d 125 (1995); see also *Loyd v Loyd*, 182 Mich App 769, 779-781; 452 NW2d 910 (1990). Accordingly, a court should strive to return custody to a parent who relinquished custody temporarily to protect the child's best interest. *Heltzel v Heltzel*, 248 Mich App 1, 33; 638 NW2d 123 (2001).

Certainly, as is the case with the parties' oldest son, temporarily transferring custody in order to attend to a behavioral problem of a child is within the spirit of the stated public policy. See *Straub*, 209 Mich App at 81. However, unlike *Theroux*, 137 Mich App at 147, a case on which plaintiff relies, it was not demonstrated that the parties here entered an agreement to temporarily transfer custody to defendant. There was no written agreement or agreed amount of

¹ Further, MCR 3.210(C)(8) speaks of a court's discretion to determine whether "an evidentiary hearing is necessary with regard to a postjudgment motion to change custody . . . in order for the court to make an informed decision on the motion." (Emphasis added.)

time that the children would have temporarily resided with defendant. Plaintiff said that she and defendant agreed that their oldest son would reside with defendant in an effort to improve his behavioral problems, but would return if there was no improvement. Defendant testified that he did not understand that the child's living with him was to be temporary. All of the child's clothing was moved to his father's home and his school was changed. Plaintiff's own testimony established that the boy's residence with defendant was of indeterminate duration, unlike the circumstance in *Theroux*. It was not plain error to determine that this arrangement was not temporary. Moreover, both parents did agree that the eldest boy's behavior and grades had changed substantially since the entry of the original custody order and that the mother has been highly challenged in managing him. Those changes alone demonstrate a substantial change of circumstance and good cause to consider a change of custody.

Regarding the parties' youngest son, plaintiff explained that in March 2009 she requested that defendant house the boy temporarily because she had to move to her mother's small apartment after a dispute with her boyfriend. Defendant agrees that the change was intended to be temporary. It was, however, months after she obtained both stable housing and legal income that she sought the return of her youngest son to her home. There is ample basis upon which to find that this was a *Theroux* temporary arrangement, albeit without a writing. However, while *Theroux* articulates a public policy to enforce temporary custody arrangements, it does not negate the holding of *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003), which defines proper cause as "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." The mother's job loss, home loss and relocations occasioned the younger son's change of schools for an entire school year and a drop in his school performance. This Court cannot say that the trial court's determination that the circumstances regarding the younger son created proper cause for inquiry into his custodial arrangements constituted plain error.

Next, plaintiff argues that the trial court applied an incorrect standard of proof while evaluating the evidence. The trial court clearly stated that having determined that an established custodial environment existed with both parties, it would apply a clear and convincing standard to its consideration of the statutory best interest factors. Plaintiff argues, however, that because there was evidence to support that plaintiff had some strengths in the three factors found to favor defendant, the evidence could not have been clear and convincing that custody should have been awarded to defendant. Plaintiff also argues that even if the conclusion that best interest factors (b) and (c) favored defendant is correct, there was still evidence that she also could also satisfy the factors. Plaintiff highlights the evidence that she presented on each of the factors and offers an opposite conclusion from the trial court. She does not, however, effectively refute the existence of competent testimony to support the court's findings. For example, when discussing factor c plaintiff asserts that "[t]he court concluded that Joel seems to be in a stable relationship, but there is no showing that Amy's relationship is capable of long term stability. On that basis alone the Court determined that this factor favors Joel". She does not deny the court's recitation of the history of the relationships including the frequent separations plaintiff and her fiancé have had over 11 years including the one that led to the transfer of custody of the younger son with his father. While we appreciate the passionate disagreement counsel has with the trial court's findings, we have no basis upon which to disturb them.

Next, plaintiff raises the unpreserved argument that the trial court erred in entering its custody order 72 days after the final custody hearing. In a case involving the custody of a minor, “[t]he court must enter a decision within 28 days after the hearing,” unless good cause for extending the time is shown. MCR 3.210(C)(3), (7). The trial court and the parties apparently labored under the misunderstanding that the time period was 56 days. We acknowledge that the court did not meet that standard either. However, no specific remedy for such a delay is offered in the court rules and the trial court did base its ruling on the period of time between the hearing and the ruling. Additionally, there was no evidence that the delay affected the custody determination or affected a substantial right of plaintiff. See *Kern*, 240 Mich App at 336. Therefore, a new custody trial is not warranted.

Lastly, plaintiff argues that the trial court erred in not advising the parties that joint custody was a possibility. See MCL 722.26a(1) (“In custody disputes between parents, the parents shall be advised of joint custody. . . .”). Here, the record supports the conclusion that both parties were aware of the joint custody option. The order of filiation and support entered after defendant admitted paternity of the parties’ youngest son provides “[t]hat per agreement of the parties, the parties shall share joint legal custody with physical custody awarded to the Plaintiff.” Additionally, defendant testified that the parties had agreed in fall 2009 to share physical custody, one week on and one week off, and that he had decided to pursue full custody after plaintiff changed her mind. Although plaintiff’s recollection of whether an agreement had been reached differed, she did confirm that she asked defendant to share physical custody at one of the children’s request. Thus, it is evident from the record that plaintiff was aware of the joint custody option.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens