

STATE OF MICHIGAN
COURT OF APPEALS

KURT KARL ALHOLINNA,

Plaintiff/Counter Defendant-
Appellee,

v

ANN MARGARET ALHOLINNA,

Defendant/Counter Plaintiff-
Appellant.

UNPUBLISHED
May 29, 2012

No. 307012
Lapeer Circuit Court
Family Division
LC No. 08-040044-DM

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right an order of the Family Division of the Lapeer Circuit Court denying defendant's motion to change custody. For the reasons set forth in this opinion, we affirm.

This appeal arises from a consent judgment of divorce entered on April 8, 2008. Relative to this appeal, the trial court awarded joint legal and physical custody of their three minor children, resulting in a parenting time schedule commonly referred to as a "week on/week off." Plaintiff lost his home and moved into a 1970's motor home on Otter Lake Campground in May of 2011. Defendant alleged that the motor home was unsuitable housing for the children, with inadequate heating and a lack of beds. Plaintiff, however, claimed that defendant did not object to summertime use of the motor home, provided it had adequate water and heat access. Further, plaintiff alleged that he was planning to move into a rental home within the Lakeville School District on October 1, 2011. Plaintiff asserted that the children have attended Lakeville Schools, "which are known to be excellent and safe," their entire lives.

Defendant alleged that she lost her job in Lapeer in early 2011 and was forced to search for employment elsewhere, eventually finding full-time employment at Primary Home Care in Saginaw. She further alleged that plaintiff consented to her moving with the children to Saginaw, which plaintiff denied.

Defendant then enrolled the parties' children in the Saginaw Township school system, approximately an hour drive from both parties' residences at the time. Consequently, plaintiff sought an ex parte order to maintain the status quo as to their children's attendance at Lakeville

schools, which was granted on August 25, 2011. In response, defendant filed an objection to the ex parte order, as well as a motion for an ex parte order modifying the temporary full-time residence of the children and allowing them to attend school in the Saginaw Township School District. In that motion, defendant argued that her new employment in Saginaw and desire to live closer to her place of work constituted a significant change in circumstances. Further, she argued that plaintiff failed to maintain suitable housing for the children when he moved to the motor home, and that he was unable to effectively care for the children's various medical problems.¹

On September 19, 2011, the court held a hearing on defendant's motion, finding that defendant's choice to move to Saginaw, plaintiff's housing situation, plaintiff's ability to meet the medical needs of the children, and the children's preference as to residence did not constitute sufficient change of circumstances that would require an evidentiary hearing. This appeal ensued.

Defendant argues that the court erred when it denied her motion to change physical custody of the parties' three minor children. She argues that she has demonstrated proper cause or change of circumstances warranting an evidentiary hearing and reevaluation of custody. "This court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). The trial court's factual findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

Under MCL 722.27(1)(c), a custody order may be modified only if the moving party demonstrates "proper cause" or a "change of circumstances." *Corporan*, 282 Mich App at 603. This Court has previously explained that "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." *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003). Further, "[t]he appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors,^[2] and must be of such magnitude to have a significant effect on the child's well-being." *Id.*

Likewise, "in order to establish a 'change of 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." *Id.* at 513 (emphasis in original). Further, "not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being." *Id.*

¹ It is undisputed that the children have serious medical issues, one being diabetic, one having kidney problems, and one having Asperger's Syndrome.

² MCL 722.23.

In this case, defendant argues that she has demonstrated proper cause with respect to numerous best-interest factors such that the trial court should have reevaluated custody. Specifically, defendant asserts that MCL 722.23(a)-(d), (f)-(j), and (l) weigh in favor of changing custody.

MCL 722.23 provides in entirety as follows:

As used in this act, “best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

Factor (a)

Defendant argues that plaintiff's failure to properly care for the children's medical needs, allowing them to sleep on the floor of his motor home, and having them start the school year in the motor home where they could not take a shower means that this factor weighs in her favor. On this issue, the trial court found that the camper was a temporary issue, and that if plaintiff failed to rectify the housing issue the trial court would revisit the issue. There is evidence provided by both parties to this Court that since the date of the hearing, plaintiff has moved to a different location. Additionally, the trial court found that the living arrangements complained of was temporary, a finding supported by subsequent events raised in the briefs of both parties to this action.

Considering defendant's claims on the issue of housing in the aggregate, regardless of the veracity of these assertions of fact, the conclusion that they bespeak of a lack of emotional ties between plaintiff and the children is entirely speculative and predicated on a predisposition to presume the conclusion. We therefore cannot assign error.

Factor (b)

Defendant argues that the asserted facts set forth regarding factor (a), along with plaintiff's lack of engagement in the children's extracurricular and academic activities, as well as moving them into a motel instead of the promised house "because it was haunted" evidences a significant change in circumstances. As with factor (a), regardless of the veracity of these assertions of fact, the conclusion that they evidence a lack of capacity or disposition to give the children love, affection, and guidance is entirely speculative and predicated on a predisposition to presume the conclusion.

As for the issue of attending to the children's education, plaintiff asserted that he also has "been involved with his kids [sic] educational issues since the divorce."

Factor (c)

This is an issue that was at the heart of much of the discussion in the trial court. On appeal, defendant focuses on the children's medical needs.

The trial court's finding with regard to plaintiff's capacity to address the children's medical needs was not against the great weight of evidence. In her motion, defendant asserted the following:

The parties' middle child . . . is a Type 1 diabetic and requires an insulin pump. Plaintiff is not responsible regarding the children's medical issues. Recently, [he] had a diabetic seizure on the bathroom floor of his father's home. Their youngest child . . . went to wake their dad up for assistance. Plaintiff told his son "let me sleep 10 more minutes". Plaintiff later called Defendant to seek her assistance. When she walked in the house, the oldest was checking [the middle child's] blood sugar despite Plaintiff being present. Further, Plaintiff has refused to "poke" him with the insulin needle when he is in need of insulin.

Plaintiff flatly denied all allegations that he was unable to provide for their care.

At the motion hearing, plaintiff admitted that there may have been a few isolated incidents involving medical care, but denied that he had a problem meeting the children's special medical needs. In response to defendant's motion for reconsideration, the trial court stated that "[t]he allegation of improper dealing with a medical issue can be addressed with a separate order for education and does not justify a change of custody."

Whether the parties can attend to the children's medical needs is an important consideration. As framed by defendant, the incident involving the parties' middle child does seem problematic. However, it also seems to lack context. If plaintiff did say "let me sleep 10 more minutes," it is not clear that this came in response to being told the boy was ill. It is also not clear that plaintiff did not attend to his son when the situation was made clear to him. Further, the fact that he called defendant for assistance evidences an ability to seek help, even given the ongoing tension between the parties.

Finally, that there has been an incident regarding the middle child does not evidence a pattern of failure to attend to his medical needs, nor does it indicate that plaintiff has been unable to attend to the needs of his other children.

Factor (d)

Defendant argues that the plaintiff has not had a stable home for the children in over a year. She asserts that he did not move into his new residence on October 1, 2011 as promised, and his reason for failing to do so was because the house was "haunted."

The trial court's finding at the time of the motion hearing that plaintiff's housing issue had been resolved was not against the great weight of evidence. Plaintiff was admittedly living in a motor home in the Otter Lake Campground during the summer of 2011, but at the time of the hearing, he asserted that the children would only be required to stay there for one more week. Plaintiff further asserted that he planned to move into a rental home within the Lakeville School District on October 1, 2011. Given that plaintiff's housing situation appeared to be temporary, the trial court's finding was not against the great weight of evidence.

In defendant's motion for reconsideration, she asserted that plaintiff had not moved into the home "because it has ghosts." There is no support in the record for this assertion.

Factor (f)

Defendant argues that plaintiff "lacks the proper morality to be trusted." This assertion is predicated on the prior assertion that he had not moved as of October 1, 2011. Again, there is no support in the record for this assertion. Moreover, that he did not move is not evidence that he did not intend to move when the representation was made to the court.

Factor (g)

Defendant argues that plaintiff's mental health must be considered given his stated reason for not moving on October 1, 2011. This assertion is predicated on the prior assertion that he had

not moved as of October 1, 2011 because the house was “haunted.” Again, there is no support in the record for this assertion.

Factor (h)

Defendant reiterates the arguments made with respect to plaintiff’s alleged failure to attend to the children’s medical needs, living in the motor home, and lack of involvement in educational matters. This argument fails for the same reasons cited above.

Factor (i)

Defendant asserts that the children have expressed a desire to live with her. The trial court found that “the children’s preference alone” was not a change in circumstances warranting an evidentiary hearing. This finding was consistent with this Court’s decision in *Curylo v Curylo*, 104 Mich App 340, 349; 304 NW2d 575 (1981) (“A change in the children’s preferences as to the custodial parent will almost never justify the grant of a new trial”). Thus, the trial court’s finding that the preference of the children did not constitute a change in circumstances warranting an evidentiary hearing was not against the great weight of evidence.

Factor (j)

Defendant’s argument is predicated on her dispute with plaintiff regarding whether he agreed to her moving to Saginaw. That plaintiff objected to the move, either initially or subsequently, does not necessarily mean that he cannot and will not encourage a close relationship between the children and defendant. There is nothing in the record showing that plaintiff has intentionally attempted to undermine that relationship.

Factor (l)

Defendant’s argument that the “children just do not seem to be a priority” to plaintiff because of a failure to attend to their medical needs, fails for the reasons set forth above.

Though couched differently on appeal, during defendant’s argument on her motion before the trial court, her counsel argued that the motivating factors behind her move were to be near her new job and to be near her new boyfriend. As the trial court properly noted, defendant chose to move to Saginaw for a new job and to be near her new boyfriend; the decision was discretionary.

Affirmed. We do not assign any costs to either party for the filing of this appeal. MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello