STATE OF MICHIGAN

COURT OF APPEALS

DARREN MOORE,

Plaintiff-Appellant,

v

MICHELLE MOORE,

Defendant-Appellee.

UNPUBLISHED
December 16, 2014

No. 320941
Oakland Circuit Court
Family Division
LC No. 2007-740632-DM

Before: STEPHENS, P.J., and TALBOT and BECKERING, JJ.

PER CURIAM.

Plaintiff, Darren Moore, appeals as of right an order granting the motion filed by defendant, Michelle Moore, for change of custody and parenting time in this child custody matter. We vacate the custody order and remand for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were divorced in 2008, and the judgment of divorce provided that they were to have joint legal and physical custody of their minor child. Since that time, there have been several custody orders in this case. Soon after the divorce, the child began spending five nights per week with plaintiff, and, pursuant to plaintiff's January 13, 2010 motion, the trial court modified the parenting time schedule, reducing defendant's parenting time to two days per week with no overnight visits. In July 2010, defendant moved back into plaintiff's home, and the parenting time order was suspended. In 2011, plaintiff moved out of the house along with the child, and in July 2011, the trial court entered a new custody order, granting defendant parenting time on alternating weekends and one midweek visit. Plaintiff was to exercise the remainder of the parenting time.

In December 2012, plaintiff filed a motion to change parenting time once again, requesting that defendant's parenting time be reduced to one supervised visit per month. In response, defendant filed a motion to change custody, alleging that in December 2012, plaintiff assaulted her and that he prevented her from exercising parenting time. She also alleged that she obtained a personal protection order (PPO) against plaintiff because of the assault. On February 8, 2013, plaintiff and defendant agreed to a consent order pursuant to which defendant received

parenting time on alternate weekends and Monday mornings. Under the terms of the order, the child's primary residence remained with plaintiff.

On September 3, 2013, defendant filed another motion for change of custody and parenting time, which ultimately gave rise to this appeal. In the motion, defendant alleged that on February 26, 2013, after the entry of the consent order, plaintiff was convicted of domestic assault in connection with the December 2012 assault. Further, defendant alleged that during and after plaintiff's domestic assault trial, she learned that plaintiff was on probation for multiple offenses, and he had been convicted of drunk driving in October 2012. Defendant also alleged that plaintiff's parents, with whom plaintiff resided, assumed most of the responsibility for parenting the child during plaintiff's parenting time, and that plaintiff prevented her from exercising her parenting time.

At a hearing held on September 25, 2013, the trial court found that plaintiff's conviction for domestic assault constituted a change of circumstances that warranted revisiting the February 8, 2013 consent order. The trial court recognized that the events that gave rise to the conviction happened before the entry of the consent order, but concluded that the conviction was nevertheless a change of circumstances. Accordingly, the trial court scheduled evidentiary hearings to determine whether a change of custody would be in the child's best interests. Following a four-part evidentiary hearing, the trial court found that the child had an established custodial environment with plaintiff, and that defendant satisfied her burden of establishing, by clear and convincing evidence, that a change in custody was in the child's best interests.

II. CHANGE OF CIRCUMSTANCES

Plaintiff first argues that the trial court erred when it conducted an evidentiary hearing and evaluated the best-interest factors set forth in MCL 722.23 because there was no change of circumstances after the entry of the February 8, 2013 consent order. Specifically, plaintiff argues that even though he was convicted of domestic assault after entry of the last custody order, the events giving rise to that conviction occurred before the entry of the last custody order. Further, plaintiff contends that his domestic assault conviction had no effect on the wellbeing of the child.

"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 the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings 'clearly preponderate in the opposite direction.' " *Id.*, quoting *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

"[A] trial court may modify a custody award only if the moving party first establishes proper cause or a change of circumstances." *Id.* at 603, citing MCL 722.27(1)(c). "Accordingly, a party seeking a change in the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change of circumstances." *Id.* If the moving party fails to demonstrate proper cause or a change of circumstances, the trial court may not hold a child custody hearing. *Id.* The moving party must demonstrate proper cause or a change of circumstances by a preponderance of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). In order to establish a change of circumstances, the

moving party 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 omitted). More specifically, "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." *Id.* at 513-514. "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." *Id.* at 512.

Regarding the evidence that can be considered by the trial court in determining whether there has been a change of circumstances, this Court has stated:

> Because a "change of circumstances" requires a "change," the circumstances must be compared to some other set of circumstances. And since the movant is seeking to modify or amend the prior custody order, it is evidence that the circumstances must have changed since the custody order at issue was entered. Of course, evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order. As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a "change" of circumstances. [*Id.* at 514.]

Plaintiff argues that there was no change of circumstances that had or will have any effect on the child after the entry of the February 8, 2013 consent order. The trial court based its determination that a change of circumstances had occurred on plaintiff's domestic assault conviction, which took place after entry of the prior custody order. The events giving rise to the domestic assault conviction occurred on December 16, 2012, before the entry of the February 8, 2013 order. Plaintiff argues that his conviction, on its own, is not a change of circumstances that affected the child. We disagree. Plaintiff was sentenced to 10 days in jail for the domestic assault conviction. While plaintiff was in jail, his parents cared for the child. Although the physical altercation had occurred at the time the last custody order was entered, neither defendant nor the trial court could have known at that time that plaintiff would be convicted and sentenced to a jail term; rather, there was little more than unproven allegations of domestic assault at the time of the last custody order. The corroboration of the domestic assault allegations, through plaintiff's conviction, can amount to a change of circumstances. Cf. *Mitchell v Mitchell*, 296 Mich App 513, 518-519; 823 NW2d 153 (2012) (finding, in part, that allegations that turned out to be fabricated amounted to a change of circumstances). Also, although the underlying facts for the domestic assault conviction occurred before the entry of the February 8, 2013 order, the effect on the child was escalated after plaintiff's conviction, given that plaintiff's resultant jail term removed him from the child's life for a period of time. See, generally, *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011) (explaining that a change of circumstances can result from a condition that "escalated" or "expanded" after the entry of the last custody order).

Further, we note that the domestic assault conviction implicated several of the statutory best-interest factors, which are used to determine the relevancy of facts in deciding whether there

was a change of circumstances. See *Vodvarka*, 259 Mich App at 514. Plaintiff's ability to provide support for the child was compromised by his conviction and jail sentence, which falls under the best-interest factors of MCL 722.23(b) and MCL 722.23(c). Plaintiff's conviction also affected the stability of the home for the child, which implicates the best interest factor of MCL 722.23(d). Because the child personally witnessed the domestic assault incident, the best interest factor of MCL 722.23(k) was also implicated. Clearly, plaintiff's conviction and resultant jail term were more than normal life changes for the child, and they were likely to have had a significant impact on his well-being. Accordingly, it was not against the great weight of the evidence for the trial court to conclude that defendant established, by a preponderance of the evidence, there was a change of circumstances since the February 8, 2013 custody order.

III. BEST INTERESTS

Plaintiff next argues that the trial court abused its discretion when it determined that a change of custody would be in the best interest of the child. Specifically, plaintiff argues that the trial court's findings on several of the statutory best-interest factors were against the great weight of the evidence. Further, plaintiff contends that because the trial court erred in its factual findings, its ultimate determination that defendant proved by clear and convincing evidence that a change of custody was in the best interest of the child was an abuse of discretion.

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 the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Dailey*, 291 Mich App at 664, quoting MCL 722.28. Accordingly, the trial court's findings of fact are reviewed under the great weight of the evidence standard. *Id.* Discretionary rulings, including the ultimate award of custody, are reviewed for an abuse of discretion. *Fletcher*, 447 Mich at 879. Further, "clear legal error" occurs when the trial court chooses, interprets, or applies the law incorrectly. *Id.* at 881.

"A custody award may be modified on a showing of proper cause or change of circumstances that established that the modification is in the child's best interest." *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). "The threshold determination in a court's decision to modify an existing custody order is whether an established custodial environment exists." *Id.* at 695-696. Where an established custodial environment exists, "a court is not to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id.* at 696. In determining whether a change of custody is in the best interest of a child, the best-interest factors set forth in MCL 722.23 are the appropriate measurement. *Id.* at 700. The trial court is required to consider and explicitly state its findings and conclusions regarding each best interest factor. *Id.* However, the trial court is not required to comment on every matter in evidence or make detailed findings on every proposition argued. *Id.* The best-interest factors set forth in MCL 722.23 are:

> (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 witnesses by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

In its opinion and order, the trial court determined that there was an established custodial environment with plaintiff. Neither party opposes that conclusion on appeal. The trial court then determined that factors (b), (c), (f), (g), (j), (k), and (*l*) favored defendant, and that factors (a), (d), and (e) favored neither party. The trial court determined that factor (h) favored plaintiff, and it determined that factor (i) would not be considered because the parties agreed that the child, whom the trial court described as being "on the border of whether or not he's old enough[,]" would not be interviewed by the court. On appeal, plaintiff challenges the trial court's findings regarding factors (a), (b), (c), (d), (e), (i), (j), and (*l*).

FACTOR (a)

Factor (a) involves the love, affection, and other emotional ties existing between the parties involved and the child. MCL 722.23(a). The trial court concluded that factor (a) was "credited to both parties" because "both parties clearly love [the child] and have strong emotional ties with him." Plaintiff argues that the trial court should have concluded that factor

(a) favored him because he contends that he has been the primary source of emotional support for the child, and that defendant has been absent from the child's life for much of the last several years. Although plaintiff is correct in noting that defendant was absent from the child's life at times, the trial court's finding that this factor did not favor either party was not against the great weight of the evidence. The trial court concluded that "the conflict between [defendant] and [plaintiff] may have been a significant contributing factor to [defendant's] actions" and her absence from the child's life. Also, as the trial court noted, the record reveals that defendant made an effort to become more involved in the child's life as of late. On this record, the trial court's finding that both parties loved the child and had strong emotional ties with him was not against the great weight of the evidence.

FACTOR (b)

Factor (b) requires the trial court to consider the capacity and disposition of the parties involved to give the child love, affection, and guidance, as well as the parties' capacity and disposition to educate and raise the child in his or her religion or creed, if any. MCL 722.23(b). The trial court concluded that both parties had the capacity to provide the child with love and affection; however, it determined that factor (b) "slightly" favored defendant because plaintiff's parents provided much of the love, affection, and guidance to the child while he was in plaintiff's care. This finding was not against the great weight of the evidence. Although defendant was uninvolved in the child's life in the past, record evidence demonstrated she was currently much more involved in the child's life and education. Notably, she testified that she helps the child with his reading and his schoolwork. Further, although plaintiff testified that he helped the child with his homework, the record supports the trial court's finding that plaintiff's parents, rather than plaintiff, provided much of the support for the child while he was at plaintiff's house. For instance, the child's teacher stated in an affidavit that she contacts either defendant or plaintiff's parents, not plaintiff, when she needs to communicate about the child's progress. In addition, plaintiff's father stated that he and plaintiff's mother provided all transportation for the child and prepared meals for the child. In sum, the trial court's conclusion that factor (b) slightly favored defendant was not against the great weight of the evidence.

FACTOR (c)

Factor (c) involves the capacity and disposition of the parties to provide the child with food, clothing, medical care, and other material needs. MCL 722.23(c). The trial court found that factor (c) favored defendant because she demonstrated the ability to provide for her other son "and is able to meet all needs for her children." In reaching this conclusion, the trial court noted that both parties "have made impractical financial decisions" and both had difficulties meeting their financial obligations. Additionally, the trial court found that plaintiff relied on his parents to pay for the majority of the child's material needs. Plaintiff argues that the trial court ignored evidence on the record suggesting that defendant is unable to provide for the material needs of the child; specifically, plaintiff argues that defendant was delinquent on child support payments and that she has had an unstable work history in the past several years. Defendant was delinquent on child support payments at the time of the hearings. However, defendant's other son has lived with her throughout the last several years, and there was no evidence suggesting that she has been unable to provide for him or for the child at issue when he was in her care. On the other hand, while plaintiff is employed and has a higher earning capacity than defendant has,

he continues to live in his parent's home, and the evidence illustrated that plaintiff's parents pay for most or all of the child's expenses. Though defendant has not been in a position to provide for the material needs of the child since the time of her divorce with plaintiff, she has demonstrated an ability to provide for her other son and she obtained gainful employment at the time of the custody hearing. Meanwhile, the record revealed that plaintiff has only demonstrated an ability to rely on his parents for the child's material needs, as well as his own. Accordingly, the trial court's conclusion that factor (c) favored defendant was not against the great weight of the evidence.

FACTOR (d)

Factor (d) involves the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. MCL 722.23(d). As explained by our Supreme Court in *Ireland v Smith*, 451 Mich 457, 465 n 8; 547 NW2d 686 (1996), "[f]actor d calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ("the desirability of maintaining continuity")." The trial court found that factor (d) favored neither party because both parents have provided stable and satisfactory homes for the child. The trial court found that both parties have resided at their current residences since 2011, that the child has two loving grandparents when he is with plaintiff, and an older brother when he is with defendant. Plaintiff argues that factor (d) should have favored him because the child has lived with him, at his parent's home, for the majority of the time since 2011. In some respects, plaintiff is correct to note that continuity for the child might be better served in his custody. Specifically, the child has spent the majority of his time over the last several years with plaintiff, and he has been enrolled in Troy schools and sports teams, which would presumably be disrupted if he is in defendant's custody. Though the child is familiar with spending time in Lake Orion with defendant and his older brother, he would be forced to adjust to a new school, new friends, and a new routine if he is placed in defendant's custody. However, because of his young age, and his familiarity with the stable households of both parents, it is unlikely that awarding custody to either parent would cause a significant disruption in his life. Accordingly, the trial court's finding that factor (d) favored neither party was not against the great weight of the evidence.

FACTOR (e)

Factor (e) involves the permanence, as a family unit, of the existing or proposed custodial home or homes. MCL 722.23(e). "[T]he focus of factor e is the child's prospects for a stable family environment." *Ireland*, 451 Mich at 465. The trial court determined that factor (e) favored neither party because both plaintiff and defendant live in permanent family units. The trial court also noted that plaintiff "relies heavily on his parents for all aspects of support and that it may be appropriate for [plaintiff] to set up his own self-sustaining household." Plaintiff argues that defendant's proposed custodial home lacks permanence; however, there is no evidence on the record to support that assertion. Defendant and her other son have lived in Lake Orion since 2011, and there is nothing in the record to indicate that that will change. Moreover, in making his argument that his proposed home environment is more permanent, plaintiff ignores the fact that he currently lives with his parents and that he may not continue to do so forever. Thus, on this record, the trial court's finding that factor (e) favored neither party was not against the great weight of the evidence.

FACTOR (j)

Factor (j) involves 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. MCL 722.23(j). The trial court found that factor (j) favored defendant because she is required to coordinate with plaintiff's father for all exchanges of the child, and plaintiff's father has not kept her updated with the child's schedule or events that interfere with her parenting time. Plaintiff argues that factor (j) should have favored neither party because he has never interfered with defendant's parenting time. There is currently a PPO preventing plaintiff from having any contact with defendant; accordingly defendant works with plaintiff's father to coordinate parenting time and exchanges of the child. Defendant testified that she finds it difficult to communicate with plaintiff's father. She also testified that plaintiff and plaintiff's father failed to notify her that they were enrolling the child in numerous summer camps that interfered with her parenting time. Plaintiff questions defendant's credibility, but the trial court found defendant's testimony credible, and we defer to that credibility determination. *Gagnon v Glowacki*, 295 Mich App 557, 568; 815 NW2d 141 (2012). Because the evidence suggests that plaintiff failed to keep defendant informed of the child's activities and that this failure has affected defendant's parenting time, the trial court's finding that factor (j) favored defendant was not against the great weight of the evidence.

FACTOR (*l*)

Factor (*l*) involves any other factor considered by the trial court to be relevant to a particular child custody dispute. MCL 722.23(*l*). The trial court found:

> The court finds that although Mother had periods of decreased involvement with [the child], the conflict between Mother and Father may have been a significant contributing factor to Mother's actions. Mother has petitioned this court several times since 2011 to increase her parenting time. She has been continuously more and more involved and has taken a very active role in [the child's] education. Furthermore, the court finds it significant that she has been able to provide, albeit with some state assistance, for her oldest son and has been in the same residence with her children since the parties split. The Father's continuous battle with alcohol and significant and ongoing legal difficulties cannot be minimized. Nor can Father's reliance on his parents for his parenting duties and economic responsibilities.

Plaintiff argues that the trial court should have found that factor (*l*) favored neither party because defendant failed to exercise her allotted parenting time in 2012, and his alcohol and legal problems have not affected the child. However, the evidence presented at the hearings demonstrates that defendant currently is involved in the child's life and, as the trial court recognized, has been increasingly involved in the child's life as of late. Further, the record supports the finding that defendant has demonstrated an ability to provide for her other son. Finally, the record supports the trial court's finding that plaintiff had repeated problems with alcohol, including probation violations for alcohol use during the pendency of the custody hearings. The finding that these problems affected the child was not against the great weight of the evidence, as plaintiff was incarcerated following his probation violations. Accordingly, the

trial court's finding that factor (*l*) favored defendant was not against the great weight of the evidence.

FACTOR (i)

Factor (i) involves the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. MCL 722.23(i). On this factor, the trial court explained that "the parties agreed that the minor child would not be interviewed. As such, this court will not consider any preference." Plaintiff argues that the trial court committed error requiring reversal when it failed to conduct an interview with the child, despite the agreement of the parties that the child should not be interviewed. We agree. On similar facts in *Kubicki v Sharpe*, __ Mich App __; __ NW2d __ (Docket No. 317614, issued August 28, 2014), slip op at 11, this Court ruled that "[t]he circuit court legally and harmfully erred by failing to consider the child's wishes when it made its best-interest determination." In that case, as in the case at bar, the parents of the child agreed that they did not want the child to be interviewed, despite the fact that the child may have been old enough to express a preference. See *id.* This Court explained in *Kubicki*, "[r]egardless whether the parties wished for an interview, the court was affirmatively required to consider the child's preference." *Id.* The trial court's failure to interview the child, without determining whether the child was old enough to express a preference, was error requiring reversal, and therefore, we vacate the trial court's order and remand for a new custody hearing. The trial court may consider all up-to-date information brought to its attention at this new hearing. See *id.* at 12.

IV. APPELLATE ATTORNEY FEES

Finally, defendant requests that this Court grant her appellate attorney fees. She contends that she is unable to pay her appellate attorney fees, but plaintiff is able to pay, so he should be required to pay those fees. Pursuant to MCR 3.206(C):

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

We have explained that under MCR 3.206(C), "[a]ttorney fees are not awarded as a matter of right but only when necessary to enable a party to carry on or defend the litigation." *Spooner v Spooner*, 175 Mich App 169, 174; 437 NW2d 346 (1989). "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). This burden includes the burden to

provide evidence of the attorney fees that were incurred. *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009). ("The party requesting attorney fees must show that the attorney fees were incurred and that they were reasonable."). A party cannot rely on unsubstantiated assertions when requesting attorney fees under MCR 3.206(C). *Smith v Smith*, 278 Mich App 198, 208; 748 NW2d 258 (2008).

In requesting attorney fees, defendant cites trial testimony indicating that her income, at the time of trial, was approximately $10 or $11 per hour. She also notes that plaintiff earns approximately $75,000-$85,000 per year, and because he lives with his parents, has few expenses. However, despite alleging this disparity in income, defendant has not alleged the amount of attorney fees incurred in this appeal that she allegedly cannot afford. As part of her burden under MCR 3.206(C), plaintiff was required to allege that she was unable to bear the expenses of the action, see MCR 3.206(C)(2)(a), which included alleging facts concerning the amount of fees incurred in this case, see *McIntosh*, 282 Mich App at 483. Thus, she failed to allege facts sufficient to demonstrate an inability to bear the expense of this appeal. A party may not rely on unsubstantiated assertions that he or she cannot afford attorney fees. *Smith*, 278 Mich App at 208. As such, we must reject her claim that she is entitled to an award for her appellate attorney fees pursuant to MCR 3.206(C).

Reversed and remanded for a new custody hearing. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Michael J. Talbot
/s/ Jane M. Beckering