STATE OF MICHIGAN

COURT OF APPEALS

DUANE FRANCIS CHIZMADIA,

Plaintiff-Appellant,

v

MICHELLE ANNETTE CHIZMADIA,

Defendant-Appellee.

UNPUBLISHED
March 9, 2010

No. 294395
Lapeer Circuit Court
LC No. 95-021724-DM

Before: FITZGERALD, P.J., and CAVANAGH and DAVIS, JJ.

PER CURIAM.

Plaintiff father appeals as of right the trial court's order changing a prior custody order under which the parties had week on/week off parenting time with their son, Nicholas, to permit Nicholas to attend Cranbrook School as a boarding student. The trial court did not change the parties' joint legal custody. We affirm.

The parties were married in 1991, Nicholas was born in 1993, and the parties were divorced in 1997. The parties have had joint legal custody and equal physical custody, on a week on/week off basis. In Nicholas's eighth grade, he was advised to consider attending Cranbrook School. It is undisputed that Nicholas strongly desires to attend Cranbrook; furthermore, he was admitted and given a 70% discount on tuition. Defendant mother supports Nicholas attending Cranbrook as a boarding student, and plaintiff father opposes Nicholas attending Cranbrook. The parties' relationship, and in particular plaintiff's relationship with Nicholas, deteriorated as a result. After a day of testimony, the friend of the court recommended that Nicholas attend, and the trial court adopted that recommendation.

In custody cases, a trial court's findings of fact, including its findings regarding the best interest factors or the existence of a custodial environment, are reviewed deferentially and will be affirmed unless the evidence clearly preponderates to the contrary. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). The trial court's discretionary rulings, including any final decisions regarding custody, are reviewed for an abuse of discretion. *Id*. This Court's review is less deferential where it appears that the trial court's decisions or findings were based on an erroneous view of the law or erroneous application of the law to the facts. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). Questions of law, including statutory interpretation, are reviewed de novo. *Thompson*, *supra* at 358.

Before the trial court can change a child's custody, an evidentiary hearing must be conducted. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). As a prerequisite to the evidentiary hearing, the trial court must determine that there is "proper cause" or there has been a "change of circumstances." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-514; 675 NW2d 847 (2003). The determination of whether there is proper cause or a change in circumstances sufficient to reconsider a custody award is a question of fact. See *id*. at 512.

Changing a child's established custodial environment requires the trial court to consider the twelve "best interest factors" under MCL 722.23 and find "clear and convincing evidence that [the change] is in the best interest of the child." *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The trial court is obligated to "evaluate each of the factors contained in the Child Custody Act, MCL 722.23 . . . and state a conclusion on each, thereby determining the best interests of the child." *Thompson*, *supra* at 363 (citations omitted); see also *Foskett*, *supra* at 9. The purpose of these requirements is to "to minimize unwarranted and disruptive changes of custody orders," except under the most compelling circumstances. *Heid v AAASulewski* (*After Remand*), 209 Mich App 587, 593-594; 532 NW2d 205 (1995); see also *Foskett*, *supra* at 6.

The bulk of plaintiff's argument is simply that (1) the parties' son's wishes are the only reason for changing the parties' custody;[1] and (2) the law is that a child's wishes, standing alone, cannot constitute proper cause, changed circumstances, or the reason for changing custody. Plaintiff relies entirely on *Curylo v Curylo*, 104 Mich App 340; 304 NW2d 575 (1981).[2] *Curylo* disfavors – in very strong language – changing custody on the basis of a child's wishes, but it falls short of prohibiting it altogether. This Court stated:

> A change in the children's preferences as to the custodial parent will almost never justify the grant of a new trial. The preferences of the children may be too easily influenced by the break-up of the marriage and competition for their love between the parents. If the children's changed preferences required the grant of a motion for a new trial, the courts would be encouraging the parents to use their children as pawns in the marital break-up. This situation would place undue emotional pressure on the children and parents alike. We will do nothing which might encourage immature parents to use their immature offspring in a high stakes game of psychological roulette. [*Curylo*, *supra* at 349.]

This Court further stated that a trial court would not abuse its discretion by declining to place much weight on a child's stated preferences. *Id*. Although the *Curylo* Court's admonition and warning should be given careful consideration, they are not an absolute rule. Furthermore, the

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[1] The trial court found the parties equal on all of the statutory best interest factors, MCL 722.23, other than the reasonable preferences of the child and the "other factor" that Cranbrook was an exceptional school that would give Nicholas advantages and opportunities in life that would otherwise not be available to him.

[2] *Curylo* pre-dates the "first out rule," MCR 7.215(J)(1).

fact that a trial court will not abuse its discretion by declining to take a given act does not logically necessitate that the court *will* abuse its discretion if it *does* take that act.

Significantly, the hazards of which *Curylo* warns are not present here. Quite the contrary: the evidence suggests strongly that if any kind of manipulation is occurring, it is the *child* manipulating his parents. In fact, plaintiff father himself testified that "a lot of this is Nicholas has managed to manipulate both his parents to get what he wants – wanted in going to Cranbrook." The evidence was unequivocal that Nicholas's desires in this matter originated strictly from himself. Clearly, Nicholas has indeed ended up under "undue emotional pressure" as a consequence of his desire to attend Cranbrook, but he is equally-clearly not being "used as a pawn" by either parent. *Curylo* has no application to the facts of this particular case.

Parents who have joint legal custody of a child must agree upon important decisions that affect the child's welfare. *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 295-296; 750 NW2d 597 (2008). One of those important decisions is the child's placement in a particular school. *Id*. at 296. "If [the parents] are unable to agree, the trial court must resolve the dispute according to [the child's] best interest." *Id*. The parties here could not agree which school Nicholas would attend, so the trial court was not merely permitted to resolve that dispute, it was *required* to resolve that dispute. The parties' undisputed inability to agree on Nicholas's high school "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," and thus constitutes "proper cause" to revisit a custody order. See *Vodvarka*, *supra* at 854.

The parties agreed, and the trial court properly found, that they were equal on almost all of the statutory best interest factors other than "the reasonable preference of the child," MCL 722.23(i). The trial court also sua sponte relied on "any other factor considered by the court to be relevant to a particular child custody dispute," MCL 722.23(l). As to the former, plaintiff only asserts that it was impermissible to rely on Nicholas's preferences alone, which is incorrect. In fact, because the trial court properly considered Nicholas old enough, it was required to give Nicholas's preferences at least some weight. *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992). Given the obvious significance of Nicholas's preferences here, and the undisputed strength of his convictions, the trial court did not err in weighing those preferences heavily. *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006); *Lustig v Lustig*, 99 Mich App 716, 731; 299 NW2d 375 (1980). Nicholas's preferences here could have established by clear and convincing evidence that his attendance at Cranbrook was in his best interests.

As to the latter, plaintiff asserts that there was no evidence that Cranbrook was a school for "gifted" children, no evidence that Nicholas was a "gifted" student, and no evidence that Cranbrook was in any other way an "elite" school. This, too, is simply wrong. Plaintiff asserts that there was no evidence that, for example, Cranbrook was an elite school, or the opportunity to attend Cranbrook was an opportunity that would give Nicholas more options and advantages in his future. In fact, the testimony consistently stated that attendance at Cranbrook *would* give Nicholas a better education than he could get anywhere else, a résumé that would more likely grab the attention of "Ivy League" schools if seeking attendance there, and a superior education. Presumably, plaintiff relies on the fact that on cross-examination, most witnesses conceded that there were "no guarantees" and that any advantages conferred by Cranbrook attendance would depend on whether Nicholas applied himself. The "other factor" relied on by the trial court, that

Cranbrook was simply a better school for Nicholas and would expand his future possibilities, may not have been enough by itself to establish by clear and convincing evidence that Cranbrook attendance was in Nicholas's best interests. However, the trial court's factual findings were not against the great weight of the evidence, and it was not error for the trial court to rely on them in addition to Nicholas's preferences.

Plaintiff also argues that the trial court impermissibly changed his custody. We believe that plaintiff confuses a change in custody with a change in the custodial environment. The trial court did not alter the parties' joint legal custody. Furthermore, the parties continue to have essentially equal amounts of parenting time, which the trial court sternly admonished Nicholas to comply with. However, plaintiff is correct in asserting that the amount of parenting time enjoyed by either parent has been changed drastically. The fact that it changed by the same amount for both parents is only relevant to the fact that *custody* has not been changed – the *custodial environment* is now very different. Nevertheless, it would be harmless error if the trial court found no change to the custodial environment – the trial court found the change to be in Nicholas's best interests under both the preponderance of the evidence standard *and* the clear and convincing evidence standard. As discussed, we do not find the trial court's findings of fact against the great weight of the evidence. Therefore, the trial court's order should be affirmed.

Plaintiff finally argues that the trial court should have recused itself because it pre-decided the matter at the initial hearing on defendant's petition to allow Nicholas to attend Cranbrook. We disagree. At the initial hearing, both parties were able to place on the record arguments that were consistent with their ultimate positions. The trial court then placed on the record an extensive statement that included its view that its "general inclination" was for Nicholas to attend Cranbrook. When viewed in context, it is readily apparent that the trial court was – as a different judge observed on de novo review – attempting to advise the parties that, if the evidence conformed to those arguments, the likely outcome would be that Nicholas would attend Cranbrook. We find nothing in the record to support a finding that the trial court had pre-decided the matter or held any bias against either party or either party's arguments. The trial court did not err in refusing to recuse itself.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis