

STATE OF MICHIGAN
COURT OF APPEALS

ROSARIA C. BUCHER a/k/a
ROSARIA PATTERSON,

UNPUBLISHED
February 3, 1998

Plaintiff-Appellant,

v

No. 205749
Macomb Circuit Court
LC No. 93-001129-DM

JOHN BUCHER,

Defendant-Appellee.

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

In this child custody matter, plaintiff appeals as of right from the trial court order granting physical custody of the parties' three minor children to defendant. We reverse and remand for an evidentiary hearing and consideration of all of the best interest factors.

Pursuant to the parties' consent judgment of divorce, entered October 24, 1994, sole physical custody of the parties' three minor daughters was granted to plaintiff, but the parties were to have joint legal custody over their children. Thereafter, plaintiff attempted to remove the children from the State of Michigan to the State of New Jersey where she established residency with her new husband and accepted a new job. Defendant objected to the relocation, and the court denied plaintiff's motion for change of domicile finding that the move was not in the best interests of the children.

After numerous, lengthy disputes over various custody and visitation issues, the parties entered into a stipulation on August 19, 1996, whereby plaintiff was permitted to relocate with the children to New Jersey, and defendant was granted extended visitation and his child support obligations were reduced. Among other things, the stipulation included a provision which stated as follows:

Should a child decide that she wishes to reside with the noncustodial parent, that child may do so after she has completed the current school year, but only if it is determined by both parents that the child's decision to change residence is based on sincere and sound reasoning. Great weight will be given to the child's decision and parties will be

reasonable in giving or withholding their consent to a change of custody. However, should there be a dramatic decrease in the child's academic performance, custody will revert to the prior parent.

At the end of the summer of 1997, during which the children resided primarily with defendant, he filed a motion for custody of the minor children. Over plaintiff's objections, and without conducting an evidentiary hearing on the matter, the court granted the motion and awarded custody to defendant. The court based its decision exclusively on the fact that the children expressed a preference to live in Michigan and, pursuant to the parties' stipulation, the court was obliged to honor their request. Plaintiff now appeals that decision.

This Court will affirm a custody order on appeal unless the trial court's factual 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; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877, 900; 526 NW2d 889 (1994). The great weight of the evidence standard applies to all findings of fact; a trial court's findings as to the existence of an established custodial environment and as to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* at 879,900. The abuse of discretion standard applies to the trial court's discretionary rulings such as to whom custody is ultimately granted. *Id.* Questions of law are reviewed for clear legal error, which occurs when the court incorrectly chooses, interprets or applies the law. *Id.* at 881,900.

On appeal, plaintiff asserts several arguments to support her position that the trial court erred by modifying the custody order to award custody to defendant. First, she argues that appellate courts have consistently reversed modifications of custody orders entered without an evidentiary hearing, and she urges this Court to do so here because the trial court failed to conduct an evidentiary hearing and consider all of the best interest factors. We agree.

Under most circumstances, an evidentiary hearing is required before any change of custody is ordered. *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991). Changing custody without providing a hearing "circumvent[s] and frustrate[s] one of the purposes of the Child Custody Act-- to minimize the prospect of unwarranted and disruptive changes of custody." *Id.* at 532. Without considering testimony, affidavits, documents, and other admissible evidence, a court is not in a position to properly determine what is in the best interests of the child. *Id.*; *Stringer v Vincent*, 161 Mich App 429, 432; 411 NW2d 474 (1987).

This Court has advised that the first step in deciding a child custody dispute is to determine whether an established custodial environment exists. *Stringer, supra* at 434. A court should refrain from changing the custodial environment, unless it is presented with clear and convincing evidence that the change would be in the best interest of the child. On the other hand, if the court finds that an established custodial environment does not exist, then it may modify a custody order if the non-custodial parent can prove by a preponderance of the evidence that a custody change was warranted. *Id.* at 435. Thus, a custody award may be modified on a showing of proper cause or a change of circumstances which establishes that the change would be in the best interests of the children. MCL

722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996). However, absent an evidentiary record upon which the court can resolve this issue, this Court is unable to carry out its function of determining whether the court abused its discretion or committed clear legal error in rendering its decision. *Stringer, supra* at 434.

In the instant case, the trial court determined that defendant established proper cause and a sufficient change in circumstances to modify the custody award. However, it did not initially determine whether there was an established custodial environment. Nor did the court conduct an evidentiary hearing to permit each party to present witnesses, evidence, and support for their opposition to the other party having custody. Furthermore, the trial court erroneously relied solely on the child's preferences in making its ruling, ignoring the other relevant factors expressly contained in the Child Custody Act. Thus, because the court failed to comply with the requisite procedure, we find that the trial court's order was erroneous. Accordingly, we find that the order should be reversed and this matter should be remanded to the trial court for an evidentiary hearing and full consideration of all the factors. See *Pluta v Pluta*, 165 Mich App 55; 418 NW2d 400 (1987).

Plaintiff also argues that although the parties stipulated to accord great weight to the children's preferences, they are not permitted to stipulate or alter the law. We agree.

Although stipulations are favored and generally upheld by the courts, "a parent may not bargain away a child's rights by agreement with a former spouse." *Napora v Napora*, 159 Mich App 241, 243; 406 NW2d 197 (1986). Despite a stipulation between the parents, a custodial environment may not be changed absent clear and convincing evidence that the change is in the "best interests of the child." *Id.* at 246-247. "Parties . . . cannot by agreement usurp the court's authority to determine suitable provisions for the child's best interests." *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993). It is the duty of the trial court to determine the best interests of the child in resolving disputes affecting the welfare of the child. *Id.* Such a determination must be made in accordance with the standards set forth in the law. Where a court does not make specific findings concerning the best interests factors, as required under the statute, and simply concentrates its decision on one factor, the matter should be reversed and remanded for a determination of the child's best interests in light of all the relevant factors. *Id.*

We find that the parties' stipulation essentially precluded the *parties* from objecting to a change of custody where the children manifested a sincere desire to live with the noncustodial parent. However, the stipulation did not obligate the *court* to order a change of custody based solely on the agreement. Indeed, a court is not bound by stipulations or agreements concerning child custody. *Sirovey v Campbell*, 223 Mich App 59, 82; 565 NW2d 857 (1997). Nor can parties conclusively agree to apportion child custody without consideration by the court. *Id.* In fact, a court has the authority to explicitly reject the parties' stipulation and proceed to make an independent determination of the child's best interests based on the appropriate factors. *Id.* We do not suggest that a court is without authority to accept the parties' agreement, or otherwise accord it great weight, and include it in its order, as long as the court independently determines, after assessing all the factors, that the agreement is in the best interests of the child. *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994). Thus, while the parties here may have preferred that the court afford great emphasis and

consideration to the children's preferences, they cannot limit the court's consideration of the other factors. Indeed, the purpose of the best interest factors is to allow the court to assess the overall best interests of the children in light of the competing interests and needs of the parties. To permit the parties, by stipulation, to limit the court's review would nullify the Child Custody Act to the detriment of the child. For these reasons, we remand this case to the trial court for a thorough consideration of all of the statutory factors.

Reversed and remanded for actions consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ Mark J. Cavanagh