

STATE OF MICHIGAN
COURT OF APPEALS

TANYA R. DODGE,

Plaintiff-Appellant,

v

ANDREW MCINTYRE,

Defendant-Appellee.

UNPUBLISHED

May 22, 1998

No. 206669

Kent Circuit

LC No. 94-001139-DC

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

In this custody proceeding, plaintiff appeals by right the order amending the custody judgment to grant the parties joint legal and physical custody of their minor daughter. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff and defendant are the parents of a five-year-old child. The circuit court entered a judgment of custody in 1994, awarding plaintiff legal and physical custody and granting defendant visitation. The court subsequently amended the judgment to include a specific schedule providing for visitation on Tuesdays and Thursdays from 4:00 p.m. to 8:00 p.m. and alternate weekends from 5:00 p.m. on Friday until 5:00 p.m. on Sunday. Plaintiff, however, apparently permitted defendant to visit with the child beyond that required by the court's order. Defendant's weekday visits routinely extended overnight. After over a year of using this visitation arrangement, plaintiff sought to restrict defendant's visitation to that ordered by the court because she believed that the child's behavioral problems resulted from a lack of stability in her home environment. Defendant thereafter moved to amend the custody judgment to formalize what he characterized as a "de facto joint custody arrangement." Defendant further requested the right to claim the child as a dependent for tax purposes in alternate years.

The parties resolved some disputed issues before the hearing on defendant's motion. The court then heard argument regarding the custody issue. Defendant's counsel prefaced his argument with the following:

I'm asking for joint legal custody of the parties' four-year-old daughter. But, in reviewing my motion and my adjourned motion, renote of motion, I did not specifically ask for joint legal custody, so perhaps I can't argue it this morning.

Plaintiff's counsel, however, signaled that she would not object to the court allowing opposing counsel to argue the legal custody issue.

At the conclusion of argument, the court found as follows:

When the parties have an agreement that a child will spend 45 percent with one party and 55 percent with one party, they have in fact agreed to joint custody. I don't think joint custody is somehow defined only as 50/50. Therefore, when they have joint physical custody, it inevitably follows that there needs to be joint legal as well.

* * *

But the arrangement here is a joint one, and we're going to recognize it as such. With regard not only to joint physical, which it is, you can't have joint physical and not, in reality, share joint legal.

The court further granted the parties the right to claim the child as a dependent in alternate years and modified defendant's child support obligation to correspond with the new custody arrangement.

Plaintiff's counsel objected to the court awarding joint physical custody because defendant never requested a change in physical custody. Plaintiff's counsel stated:

Your Honor, one point I bring out, I allowed [defendant's counsel] to argue a joint legal motion believing that was in the best interest of everyone here. I'm surprised by the Court, on its own motion, changing this to joint physical custody.

Plaintiff's counsel also informed the court that the child was undergoing counseling, and further indicated that the parties had agreed that they would wait for the counselor's recommendation before petitioning the court for custody changes. Plaintiff's counsel then requested that the court not consider modifying its custody order until after the counselor made a recommendation.

The court rejected plaintiff's request, stating as follows:

I don't see how you're prejudiced in the least, because the case law is real clear. When it comes to assessing these matters, including changes in custody, the Court looks at the reality, not labels. The reality is 45/55. That's what I'm going to look at.

It doesn't matter what the labels are, so I'm going to leave it as is. I don't think that anyone is prejudiced by doing that at all when it comes to seeking a change.

The court subsequently entered an order granting the parties joint legal and physical custody of the child.

Plaintiff first argues that the court erred in amending its custody order without holding an evidentiary hearing. We agree. In custody cases, we review the trial court's findings of fact under the great weight of the evidence standard, the court's discretionary rulings for an abuse of discretion, and questions of law for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994).

The trial court may amend or modify a custody order for proper cause or because of a change in circumstances if to do so is in the child's best interest. *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). The governing statute, MCL 722.27(1)(c); MSA 25.312(7)(1)(c), provides that the court, acting in the best interests of the child, may:

Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances The court shall not modify or amend its previous judgments or orders or issue a new order so as 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. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

If no established custodial environment exists, the court may modify a custody order upon a showing by a preponderance of the evidence that the change is in the child's best interest. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995).

In this case, contrary to defendant's characterization of the trial court's decision, the court did, in fact, amend its custody order. MCR 3.210(D)(1) requires that the court make findings of fact and conclusions of law on a contested postjudgment motion to modify a custody order, such as the one involved in this case. The trial court must make three factual findings to support its decision. First, the court must find that the moving party has demonstrated either proper cause or a change of circumstances to support a change in custody. *Dehring, supra* at 165. Second, the court must determine whether an established custodial environment exists. *Hayes, supra* at 387-388. The court must then determine whether that moving party has shown by the applicable level of proof that the requested change is in the child's best interest. *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 595; 532 NW2d 205 (1995). When the motion is based on facts not of record, the court may hear the motion on affidavits or direct that it be heard on oral testimony or deposition. MCR 3.213 & 2.119(E)(2). Consequently, the court must ordinarily hold an evidentiary hearing before making its findings of fact and conclusions of law in custody cases. See *Stringer v Vincent*, 161 Mich App 429, 433; 411 NW2d 474 (1987).

We conclude that the trial court erred by modifying its custody judgment without holding an evidentiary hearing. The court's decision to modify a custody order involves more than discerning the

parties' informal agreement. Although the parties' informal custodial arrangement is certainly relevant to the existence of changed circumstances, the moving party must demonstrate a sufficient change in circumstances to justify a modification of the custody order. *Dehring, supra* at 165. The trial court is generally not bound by formal stipulations or agreements concerning child custody, much less an informal arrangement such as alleged in this case. *Sirovey v Campbell*, 223 Mich App 59, 82; 565 NW2d 857 (1997). No formal agreement exists because plaintiff did not stipulate to shared custody merely by not disputing defendant's assertions at the hearing. See *Watson v Watson*, 204 Mich App 318, 321 n 2; 514 NW2d 533 (1994). Therefore, an evidentiary hearing is necessary to facilitate appellate review because no evidence exists in the record to support the court's decision. *Stringer, supra* at 433.

Further, even if we were to conclude that the record supports an implicit finding of changed circumstances, the court still erred in not holding an evidentiary hearing on the best interests issue. We recognize that a best interest determination is normally implicit in the court's acceptance of the parties' agreement regarding custody. *Sirovey, supra* at 83. In this case, however, the circumstances surrounding the motion and the parties' statements at the hearing should have alerted the court to the need for an evidentiary hearing on the best interests issue. *Stringer, supra* at 433. The parties must present evidence on this contested issue to enable the trial court to make findings of fact in support of its decision. MCR 3.213 & 2.119(E)(2). We therefore reverse and remand for an evidentiary hearing and other proceedings consistent with this opinion.

Plaintiff next argues that the trial court erred in granting defendant the right to claim the child as a dependent in alternate tax years. Because the trial court's decision in this regard rested on its custody determination, we also reverse and remand for further consideration of the issue after the court holds an evidentiary hearing.

Reversed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan

/s/ Joel P. Hoekstra

/s/ Robert P. Young, Jr.