STATE OF MICHIGAN

COURT OF APPEALS

TRACY ELIZABETH VOLKERS, f/k/a TRACY ELIZABETH EYDE, Plaintiff-Appellee,	UNPUBLISHED November 9, 1999
v	No. 216849 Shiawassee Circuit Court
DANIEL LOUIS EYDE, Defendant-Appellant.	LC No. 94-003917 DM

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's post-divorce order granting plaintiff's petition to confirm physical custody of their minor children. We affirm.

The parties were married on April 21, 1989. Two children were born during the course of their six-year marriage. Plaintiff filed for divorce in June 1994. The parties subsequently negotiated and reached a settlement agreement, in which they agreed to share joint legal custody of their children, with plaintiff to have primary physical custody. The trial court approved the agreement, and entered the resulting consent judgment of divorce on November 28, 1995. The custody provision from that judgment that is the focus of this appeal provides:

> **IT IS FURTHER ORDERED AND ADJUDGED** that parties expect to continue to reside in Okemos, Michigan School district at least until their youngest child completes the sixth grade. In the event the custodial parent moves from the Okemos School District before that time, physical custody will transfer to the remaining parent unless neither parent will be residing in the Okemos School District or unless by petition to the Court, it is determined by the Court that such a change of custody would not be in the best interest of the minor children as defined in the Child Custody Act. [Emphasis in original.]

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Sometime later, plaintiff became engaged to her current husband, who resided in DeWitt. Plaintiff filed a petition on June 17, 1998, to confirm physical custody of the children when she

moved to DeWitt after the marriage. Citing the relevant provision of the divorce judgment, plaintiff argued that it would not be in the best interests of the children to transfer physical custody to defendant. In response, defendant filed an answer, arguing that a move by plaintiff outside the Okemos School District meant that physical custody of the children would automatically transfer to him.

Following a two-day hearing, the trial court granted plaintiff's petition. The court rejected defendant's argument that the agreement automatically gave him physical custody, finding that the argument ignored the subsequent language of the provision, which provided plaintiff with the chance to petition the court to keep custody with her in the event she moved outside the Okemos district. Further, the court concluded that regardless of who shouldered the burden of proof, and regardless of the nature of that burden, a review of the statutory best interest factors[1] established that it was in the children's best interests for plaintiff to retain custody.

On appeal, defendant first argues that the trial court erred in failing to enforce the automatic transfer of physical custody from plaintiff to defendant. We disagree. As the trial court noted, defendant's reading of the custody provision at issue overlooks the portion that unambiguously provides for court review of such a change in custody upon the filing of a petition.[2] See *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994) (observing that the trial court's interpretation of a property settlement agreement "was proper in light of the clear contractual language"). Because plaintiff filed her petition to confirm physical custody, the automatic change in custody provided for in the provision was never effectuated.

Next, defendant contends that the trial court erred in considering the statutory best interest factors without first requiring plaintiff to demonstrate proper cause or change in circumstances warranting a change in physical custody, as per MCL 722.27(1)(c); MSA 25.312(7)(1)(c). We disagree. Initially, we observe that defendant's argument is predicated upon his assertion, which we have rejected, that physical custody of the children automatically transferred to him when plaintiff moved out of the Okemos School District. If defendant did not have custody of the children, then plaintiff was not required by statute to demonstrate either a proper cause or a change of circumstances.[3]

Additionally, we note that it is the custody provision itself, not the statute, that triggered the review of the best interest factors. The parties agreed that a move out of the Okemos School District by the custodial parent was, by itself, sufficient to warrant a review upon the filing of a petition with the court. Thus, in essence, the parties agreed that neither one bore the initial burden of proof on the matter. Therefore, given the clear language of the provision, we conclude that the trial court did not err in considering the best interest factors.[4]

Finally, defendant asserts that the trial court erred in imposing the burden on him to show by clear and convincing evidence that a transfer of custody to him was in the best interests of the children. We disagree. MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides that "[t]he 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 interests of the child." "The burden of establishing clear and convincing evidence that a change of

custody is in the best interests of the child is on the party moving for a change in custody." *Treutle v Treutle*, 197 Mich App 690, 692; 495 NW2d 836 (1992).

Because physical custody of the children remained with plaintiff, we conclude that regardless of the petition filed, it was in reality defendant who was seeking a change in custody. Accordingly, the burden of proof was on defendant to establish by clear and convincing evidence that a change in custody is in the best interests of the children. In any event, the record makes clear that the trial court concluded that regardless of who bore the burden of proof in the matter, there had been no showing that a change of custody to defendant would be in the best interests of the children. We find no error in this conclusion.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald

[1] MCL 722.23; MSA 25.312(3)

[2] We note that the provision does not limit the triggering of the court's review to the type of petition filed; it only speaks of the filing of "a petition."

[3] Accordingly, defendant's reliance on *Rossow v Aranda*, 206 Mich App 456; 522 NW2d 874 (1994), is misplaced. In *Rossow*, physical custody of the minor child had actually been transferred from the mother to the father before the mother sought to set aside the agreement on which the transfer was based.

[4] Further, given that we conclude that physical custody had not automatically transferred to defendant, then pursuant to MCL 722.27(1)(c); MSA 25.312(7)(1)(c), it would have been defendant who bore the initial burden of proof. In this regard, we note that an intrastate change of domicile does not, by itself, constitute either a proper cause or a change in circumstances sufficient to warrant a change in physical custody. *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996).