

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GERALD L. ALEXANDER,

Plaintiff-Appellant,

v

CONNIE J. ALEXANDER,

Defendant-Appellee.

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UNPUBLISHED

July 28, 2000

No. 223889

Macomb Circuit Court

LC No. 98-001542-DM

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying his motion for change of custody of the parties' minor child. We affirm.

On March 20, 1998, plaintiff filed a verified complaint for divorce. On June 22, 1998, the parties entered into a consent judgment of divorce. The judgment provided that the parties "shall have joint legal and physical custody of the minor child" born on November 14, 1988, until the child reached the age of eighteen. The parties also agreed that during custody or parenting time, each parent would not allow an unrelated person of the opposite sex to stay overnight. The judgment of divorce provided that neither party would pay child support. Rather, the parties agreed to share the reasonable and necessary expenses of the child on a "50/50 basis."

On June 29, 1999, defendant filed a motion for change of physical custody and for review of child support and child care expenses. Defendant alleged that plaintiff only engaged in parenting time and was not exercising joint physical custody since the fall of 1998. Furthermore, plaintiff allegedly had not made any contribution toward the clothing, housing, or other needs of the minor child, contrary to the terms of the judgment of divorce. On August 5, 1999, an order amending the judgment of divorce entered. This order provided that the parties would continue to share joint physical and legal custody of the minor child and set forth a schedule for custody and parenting time. The judgment of divorce was to remain in effect as to all other provisions.

Despite the recent stipulation, on September 28, 1999, plaintiff filed a motion for change of custody. In the sparse motion, plaintiff blanketly alleged that there had been a “change in circumstances” involving the parties and that joint legal and physical custody should be awarded to plaintiff. Plaintiff requested that the matter be referred to the friend of the court for determination of the best interests of the child, that plaintiff be awarded sole legal and physical custody, and that child support, child care, and health care expenses be paid to the plaintiff for the benefit of the minor child. Any specifics regarding the “change in circumstances” was absent from the pleadings. Defendant opposed the motion. Defendant alleged that there had not been any change in circumstances and that plaintiff had been stalking defendant at her home and place of employment.

On October 12, 1999, a hearing was held before the friend of the court referee. At the hearing, plaintiff argued that the minor child needed special care and attention because he was only ten years of age and was diagnosed with Down’s Syndrome. The minor child allegedly was not receiving proper care and attention. Consequently, plaintiff had taken the minor child to see Dr. Andrew Maltz for counseling. Plaintiff alleged that the minor child had been exposed to improper language and gestures. The minor child had engaged in inappropriate touching of himself and others. Therefore, plaintiff requested an evidentiary hearing and the appointment of Dr. Maltz for an independent evaluation regarding custody. Plaintiff further alleged that defendant had violated the judgment of divorce provision precluding overnight visitors.

Defendant denied the allegations levied by plaintiff. Defendant argued that the parties had just stipulated to amend the custody order contained in the judgment of divorce, and the circumstances since the entry of the order had not changed. Defendant argued that the impetus for the motion was the fact that she had just begun to date an individual known by the parties. Defendant denied that overnight visits had occurred. Furthermore, defendant alleged that the minor child was thriving in his school environment. Defendant attributed any inappropriate conduct to his exposure to television viewed at plaintiff’s residence. The referee held that Dr. Maltz’s concern stemming from a two month period did not constitute a change in circumstances. The referee also suggested that the parties confer regarding the necessity for counseling and agree to a doctor for an evaluation. However, because of the recent stipulation and the lack of change of circumstances, the motion was denied. The referee did not hear testimony, and plaintiff did not object to the circumstances of the hearing.

Plaintiff filed objections to the order of the referee. On October 25, 1999, the parties appeared before the trial court. The parties made their respective arguments. The trial court then took testimony from each parent. Plaintiff alleged that the minor child engaged in inappropriate touching, but did not delineate specifics. Plaintiff further alleged that the minor child was making inappropriate comments. Defendant denied that the care of the minor child was lacking and disputed plaintiff’s ability to judge the minor child’s progress due to his limited involvement with the care of the child. Defendant also attested that the minor child engaged in inappropriate language, but was reprimanded for his conduct. At the conclusion of testimony, the trial court adopted the recommendation of the friend of the court as its own order. The trial court also concluded that unilateral activity, such as counseling, would not occur, because the parties were to confer prior to any such determination.

Plaintiff argues that the trial court erred in failing to find proper cause or change of circumstances and order an investigation, recommendation, and evidentiary hearing addressing plaintiff's motion for change of custody. We disagree. Orders and judgments of the circuit court involving child custody disputes shall be affirmed on appeal unless the findings of fact are against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court committed a clear legal error on a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). A trial court may amend its previous custody judgment or order only for proper cause shown or because of a change in circumstances. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). The party petitioning for a change of custody always bears the burden of proof. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991).

In the present case, plaintiff failed to meet his burden of proof in establishing proper cause or a change in circumstances. *Mann, supra*. Plaintiff testified that changes in the minor's behavior had occurred. However, defendant disputed that changes in the minor child's behavior had occurred. Rather, defendant testified that the minor child was thriving in his environment. While he did engage in inappropriate language, he was reprimanded for his conduct, as any child his age would be. Furthermore, defendant testified that plaintiff was not in a position to evaluate the minor child's progress or circumstances because of his limited conduct with the child prior to the amended custody order. The trier of fact ascertained the credibility of the witnesses, and we will not resolve it anew. *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991). Because plaintiff failed to meet his burden to establish proper cause or a change in circumstances to warrant setting aside the stipulation, the trial court was not required to address the statutory best interest factors or custodial environment. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). We cannot conclude that the trial court's findings of fact are against the great weight of the evidence or that a clear legal error occurred.<sup>1</sup>

Affirmed.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh

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<sup>1</sup> In *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999), we held that it is improper for a trial judge to resolve a custody dispute on the pleadings and the report of the friend of the court when no evidentiary hearing was held. While the referee, for reasons not apparent in the record, failed to hold an evidentiary hearing regarding plaintiff's motion, the trial court heard testimony from the parties at the motion hearing regarding objections to the referee's proposed order. Accordingly, *Schlender* is not controlling. Furthermore, we note that plaintiff did not object to taking testimony at the motion hearing and did not seek an adjournment to present additional witnesses.