

STATE OF MICHIGAN
COURT OF APPEALS

ROXANA CHAPMAN WINOKUR,

Plaintiff-Appellee,

UNPUBLISHED
June 22, 2001

v

STEVEN C. WINOKUR,

Defendant-Appellant.

No. 225939
Oakland Circuit Court
LC No. 91-407911-DM

ROXANA WINOKUR, a/k/a ROXANA
CHAPMAN,

Plaintiff-Appellee,

v

STEVEN C. WINOKUR,

Defendant-Appellant.

No. 226008
Oakland Circuit Court
LC No. 91-407911-DM

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order granting plaintiff's motion for modification of parenting time.¹ We reverse.

On appeal, defendant first argues that the trial court erred by failing to treat plaintiff's motion to modify parenting time as a motion for change of custody. A decision of the trial court

¹ Apparently uncertain whether the order would be treated as a change in parenting time or a change in custody, defendant filed both a claim of appeal from the trial court's March 16, 2000, order in Docket No. 226008, and an application for leave to appeal the same order in Docket No. 225939. On April 5, 2000, this Court granted defendant's application for leave to appeal in Docket No. 225939 and consolidated the matter with Docket No. 22608. *Chapman v Winokur*, unpublished order of the Court of Appeals, entered April 5, 2000 (Docket No. 225939).

regarding parenting time will not be reversed unless the trial court made findings of fact against the great weight of the evidence, committed palpable abuse of discretion, or committed clear legal error. MCL 722.28; *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). When a modification of parenting time amounts to a change in the established custodial environment, the trial court should apply the standard used for a change in custody and refuse to grant a modification unless it is persuaded by clear and convincing evidence that the change would be in the best interests of the child. *Stevens v Stevens*, 86 Mich App 258, 270; 273 NW2d 490 (1978). Whether an established custodial environment exists is a question of fact, which the trial court must address before it determines the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

In the instant case, defendant had been awarded sole physical custody of the children on September 25, 1997, almost nine months before plaintiff filed her motion. At the evidentiary hearing, the trial court determined that the established custodial environment was with defendant. Plaintiff's petition to modify parenting time requested that the parties have equal parenting time. The trial court granted plaintiff's petition and awarded equal parenting time to both parties.

Because plaintiff's petition effectively requested a change in the custodial environment, the trial court could not modify the September 25, 1997, custody order unless plaintiff presented clear and convincing evidence that a change of custody would be in the best interests of the children. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). Where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized to revisit an otherwise valid prior custody decision and consider the statutory best interest factors. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). After the initial threshold is met, a determination of whether a change in custody would be in the child's best interest is made by weighing the sum total of the twelve factors set forth in MCL 722.23. *Ireland v Smith*, 214 Mich App 235, 243; 542 NW2d 344 (1995), *aff'd as modified* 451 Mich 457 (1996).

Defendant argues that the trial court erroneously applied the standard for a modification of parenting time rather than a change of custody and that plaintiff did not demonstrate sufficient changed circumstances to support a change in custody. We agree. The trial court in the instant case applied the standard for a modification of parenting time in determining if there was a change in circumstances:

I think the Court should consider [plaintiff's move from Missouri to Michigan] as a change of circumstances with respect to parenting time. It may not be a basis to change custody but I think in terms of parenting time it can be a basis. The age of the children can be a basis. It's a fairly low standard in terms of what the change in circumstance has to be.

The trial court correctly noted that there is a lower standard to demonstrate a justification for a modification of parenting time than for a change in custody. However, because plaintiff's petition for modification of parenting time effectively changed the custodial environment, the trial court should have determined whether the change in circumstances met the change in custody standard rather than the modification of parenting time standard. The trial court stated on the record only that it had found a sufficient change in circumstances for a modification of

parenting time; we cannot conclude that, under the proper standard, it would have found sufficient change to modify custody. Accordingly, the trial court's March 16, 2000, order is reversed and the trial court must reinstate the September 25, 1997, custody order.

Because we rule in favor of defendant on these grounds, we need not address defendant's other arguments.

Reversed.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ Patrick M. Meter