STATE OF MICHIGAN

COURT OF APPEALS

LISA R. BOEHNLEIN,

Plaintiff-Appellee,

v

ALBERT J. BOEHNLEIN,

Defendant-Appellant.

UNPUBLISHED
July 6, 2001

No. 231000
Washtenaw Circuit Court
LC No. 94-001984-DM

Before: Hood, P.J., and Whitbeck and Meter, JJ.

WHITBECK, J. (*dissenting*).

I respectfully dissent because I believe that under the complex facts of this case and the applicable case law and court rules, the trial court erred when it determined that an evidentiary hearing was not necessary.

I. Standard Of Review

Whether the trial court must hold an evidentiary hearing on every motion for change of custody presents a question of law that appellate courts review de novo.[1] However, the trial court's decision not to hold the evidentiary hearing must be reviewed for factual findings that went "against the great weight of evidence," a "palpable abuse" of the trial court's discretion, or a "clear legal error on a major issue."[2]

II. Evidentiary Hearing

The child custody act[3] authorizes a trial court to modify child custody "orders for proper cause shown or because of change of circumstances," and if in the child's best interests.[4] As the

[1] *Schlender v Schlender*, 235 Mich App 230, 232; 596 NW2d 643 (1999).

[2] MCL 722.28.

[3] MCL 722.27(1)(c).

[4] The majority, in ultimately concluding that Albert Boehnlein failed to articulate a change in circumstance, does not comment on the disjunctive nature of this statutory requirement. Under MCL 722.27(1)(c), his burden was to articulate a change in circumstances *or* proper cause for the change of custody.

majority concedes, case law clearly holds that a trial court cannot order a change of custody without first holding a hearing.[5] However, I recognize the possibility that a trial court's decision not to hold a hearing, when denying a motion for change of custody on the basis of voluminous documentary evidence already submitted, should be addressed as a separate question. Consequently, I believe it necessary to examine the case law concerning child custody hearings to determine whether the trial court erred in denying the motion for change of custody on the basis of documentary evidence alone, without first holding a hearing.

The reasoning behind three significant cases in the area of child custody provide insight into why trial courts hold evidentiary hearings in these matters. In the first case, *Mann v Mann*,[6] though the mother and father retained joint legal custody of their two minor sons following their divorce, the mother had physical custody. Approximately seventeen months after the divorce, the father moved for a change of physical custody, alleging that his sons were being exposed to "illegal activities" and other unsavory conduct in their mother's home, and that the children's education was suffering.[7] The friend of the court referee held an evidentiary hearing on the motion and considered numerous psychological reports before recommending that the trial court grant the motion.[8] Though the mother objected to the referee's report and recommendation and requested that the trial court conduct a de novo hearing on the motion,[9] the trial court adopted the referee's recommendation and granted the motion for the temporary change in custody without conducting a hearing. After holding an evidentiary hearing several months later, the trial court entered an order granting the father sole legal custody – even though he had requested that the trial court continue joint legal custody – as well as physical custody, without explaining its reasoning.[10]

On appeal, the mother in *Mann* argued that the trial court could not change custody, even in an interim order, without first holding a hearing.[11] This Court agreed, noting that in drafting MCL 722.27(1)(c), the section of the child custody act also at issue in this case, the Legislature intended for inertia to rule custody matters.[12] In other words, the Legislature intended to

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[5] See, generally, *Dick v Dick*, 210 Mich App 576, 587; 534 NW2d 185 (1995) (MCR 3.210[C] "requires a hearing in a contested case."); *Mann v Mann*, 190 Mich App 526, 532-533; 476 NW2d 439 (1991) (trial court erred in entering interim order changing custody without holding hearing); *Pluta v Pluta*, 165 Mich App 55, 61; 418 NW2d 400 (1987) (trial court erred in failing to hold evidentiary hearing to address best interests factors before entering order changing custody); *Stringer v Vincent*, 161 Mich App 429, 432-433; 411 NW2d 474 (1987) (trial court erred in relying on referee's report and recommendation, which the parties had not stipulated was accurate, and not holding hearing before ordering change in custody).

[6] *Mann*, *supra* at 527-528.

[7] *Id*. at 528.

[8] *Id*.

[9] See MCL 552.507(5).

[10] *Mann*, *supra* at 528, 538.

[11] *Id*. at 529.

[12] *Id*. at 531.

minimize disruptions to a child's living arrangement unless they were necessary.[13] By granting the motion for change of custody without holding a hearing, the trial court had "frustrate[d]" this legislative purpose and made it impossible for the trial court to find the facts necessary to conclude whether to order a change of custody.[14] Further, by changing legal custody without a request by either party to do so, the trial court effectively denied the mother her due process rights to notice and an opportunity to be heard.[15] Consequently, though the failure to hold a hearing before the interim order did not merit reversing the trial court because it did eventually conduct such a hearing, the subsequent denial of a hearing on legal custody required reversal.[16]

The second important case concerned a different aspect of a motion for change of custody. In *Rossow v Aranda*,[17] for reasons unstated in the appellate opinion, the mother stipulated to give the father physical custody of their oldest daughter. Evidently having second thoughts about this arrangement, the mother moved for a change of custody.[18] The trial court, however, denied the motion.[19] On appeal, the mother apparently not only challenged the trial court's determination that the alleged grounds for setting aside the stipulation and granting the motion – duress or coercion – did not constitute proper cause or changed circumstance, but also challenged the trial court's refusal to consider the best interests factors.[20] This Court, however, held that the trial court did not have an obligation to make findings on the best interest factors, reasoning:

> The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. It therefore follows as a corollary that 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 by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.[21]

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[13] *Id*.

[14] *Id*. at 532.

[15] *Id*. at 538.

[16] *Id*. at 533, 538.

[17] *Rossow v Aranda*, 206 Mich App 456, 457; 522 NW2d 874 (1994).

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*. at 458.

As a result, having already concluded that there was no basis in the record to support coercion or duress, this Court affirmed the trial court, essentially determining that the failure to hold a hearing was harmless under the circumstances of the case.[22]

The third important case, which built on *Mann's* foundation and on which Albert Boehnlein now relies, is *Schlender v Schlender*.[23] At issue in *Schlender* was a local court rule called an "administrative policy"[24] that required a parent moving for change of custody to make an offer of proof. From this offer, the judge handling the case would determine whether, if it were to hold a hearing, it was likely that the parent would be able to sustain the burden of proof necessary to support a change of custody.[25] If the judge concluded that the parent would not be able to sustain the burden of proof, the motion would be denied summarily.[26] Because of this local court rule, the trial court in *Schlender* summarily denied the father's motion for change of custody even though he and the mother had submitted significant materials as an offer of proof. On appeal, this Court's primary concern was that the circuit court had attempted to promulgate a local court rule without obtaining the necessary approval or going through proper channels.[27] However, and I believe this to be a critical point, this Court in *Schlender* also commented:

> We find that the petitioner in a custody matter cannot be deprived by local court rule of an evidentiary hearing. This Court has held that it is improper for a trial judge to decide the issue of custody on the pleadings and the report of the friend of the court when no evidentiary hearing was held. *Stringer v Vincent*, 161 Mich App 429, 432; 411 NW2d 474 (1987). The trial court must determine the best interests of the child as defined in MCL 722.23; MSA 25.312(3), and must make findings on each factor. *A hearing is required before custody can be changed on even a temporary basis*. *Mann v Mann*, 190 Mich App 526, 529-530; 476 NW2d 439 (1991). The court rules also recognize the right to a hearing in custody cases. MCR 3.210(C).
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> The policy at issue eliminates the *right of a party seeking a change of custody to have an evidentiary hearing*. Because postjudgment motions in domestic relations actions are governed by court rule, see MCR 3.213, a local court rule regarding domestic relations actions is invalid.[28]

Thus, this Court remanded the case to the trial court for further proceedings, presumably so that the father could have a hearing before the trial court ruled on the motion for change of custody.[29]

[22] *Id*. at 457, 458.

[23] *Schlender*, *supra*.

[24] *Id*. at 232.

[25] *Id*. at 231.

[26] *Id*.

[27] *Id*. at 232-233.

[28] *Id*. at 233 (emphasis added).

[29] *Id*. at 233-234.

Notably, though he concurred in the remand, Judge Kelly wrote separately to question whether a hearing would be required in a case in which the parties had no additional evidence to offer.[30]

What, then, are the lessons that can be drawn from these three opinions? *Mann* holds that there can be no change in custody without a hearing, a scenario not at issue in this case because the trial court denied Albert Boehnlein's motion. Nevertheless, *Mann* is relevant because it emphasizes that when a trial court must make a factual determination in a custody matter, an evidentiary hearing is critical to the trial court's ability to establish a record from which it can draw its conclusions. *Mann* also warns courts to be vigilant about parents' rights to due process and underscores the role hearings play in affording those due process rights.

The brevity of the *Rossow* opinion makes it less than comprehensive on any matter. If read only casually, it would be easy to conclude that *Rossow* stands for the proposition that a hearing is not necessary in every case. The *Rossow* Court concluded that the trial court did not commit error requiring reversal when it failed to hold a hearing on the best interest factors. However, when read carefully, I believe that *Rossow* actually suggests that the Legislature intended to allow trial courts to consider *separately* some of the constituent issues relevant to determining whether to change custody. Though not directly addressing the proper cause or change of circumstances language in MCL 722.27(1)(c), *Rossow* classifies these considerations as threshold issues. Thus, the least strained and most natural reading of *Rossow*, at least in my view, is that a parent requesting the change of custody must pass *each* threshold before the trial court is obligated to take any steps with regard to the next consideration.

The critical issue that *Rossow* does not answer is the depth and breadth of the allegations of proper cause or changed circumstances necessary to pass the first threshold and move to a hearing. *Schlender* helps fill this void, suggesting that the threshold is a very low one. As this Court commented, custody matters simply are not determined on the basis of the pleadings.[31] An evidentiary hearing is the proper place to test factual matters.[32] I agree with Judge Kelly's concurrence in *Rossow*, which suggested that there may be some inefficiency inherent in holding a hearing when the bulk of the evidence is documentary and introduced in conjunction with the motion itself. However, as this Court is so often inclined to note, trial courts have the unique

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[30] *Id*. at 234.

[31] *Id*. at 233; accord *Cochrane v Brown*, 234 Mich App 129, 132; 592 NW2d 123 (1999) (trial court could not limit review of referee's recommendation to transcripts when statute provided for hearing de novo); *Dresser v Dresser*, 130 Mich App 130, 135; 342 NW2d 545 (1983) (emphasizing that there must be a hearing before a trial court may modify a child support order).

[32] I do not suggest that MCR 2.116(C)(10) applies to custody disputes. However, if I were inclined to conclude that a motion for change of custody could be subject to a summary procedure akin to a motion for summary disposition under MCR 2.116(C)(10), the trial court in this case went well beyond the bounds of the analysis that sort of decision requires. Rather than determining whether there was a factual dispute in the record that should be resolved following a hearing, the trial court directly resolved the parties' dispute, making factual findings and conclusions of law, which it could not do when ruling on a motion for summary disposition. *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).

ability to weigh factors that do not reveal themselves in a cold record.[33] To give up an opportunity to judge and weigh issues like credibility, which is often critical in highly emotional custody cases, by denying an evidentiary hearing may be a costly mistake because the ultimate issue at stake – a child's welfare – is so very important.

In the end, holding a hearing on every change of custody motion might be the most efficient use of judicial resources and the parties' time because whether to hold a hearing will no longer be subject to dispute.[34] There is no doubt that, in this case at least, debating whether to hold a hearing occupied a significant amount of time and concern. A legal rule that is easy to apply consistently will eliminate the potential for dispute on this issue. Consistent with *Schlender*, I have confidence that the existing sanctions available to the trial courts are adequate to address motions to change custody that are frivolous or intended to harass.[35] Though the majority fears that holding evidentiary hearings will disrupt children's lives by changing custody too frequently and unnecessarily, there is a distinction between holding a hearing and making the decision whether to order a change of custody. If the trial court, following a hearing, determines that there is a change of circumstance or proper cause to change custody, those different circumstances or proper cause mandate the change of custody, not the fact that the trial court held a hearing. Certainly, within the parameters the Legislature set for changing custody, even the most zealous child welfare advocates would not object to a change of custody following a hearing when there is proof of at least one of these two statutory bases for changing custody.

Further, though the majority reasons that MCR 3.210(C) does not apply in this specific postjudgment context, I disagree. I conclude that MCR 3.210(C) supports my view that a hearing was necessary in this case. MCR 3.210(C) states that a trial court "must" hold a hearing within fifty-six days of when custody of a minor child is in dispute,[36] including when there is a motion for a change of custody.[37] Case law suggests that MCR 3.210(C), which previously appeared as MCR 2.306(F), governs a motion for change of custody after the trial court has already entered a divorce judgment, despite the fact that other provisions[38] within the same court rule clearly apply only to pre-judgment divorce cases. For instance, both *Schlender*, which referred to MCR 3.210,[39] and *Mann*, which relied on MCR 3.206(F),[40] implicitly concluded that this special domestic relations rule concerning child custody hearings applied even though the trial court in

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[33] See *People v Kowalski*, 236 Mich App 470, 475; 601 NW2d 122 (1999); see also MCR 2.613(C).

[34] Recent changes to the court rules, discussed *infra*, would make it unnecessary to hold a hearing in every case after July 1, 2001, even under my analysis.

[35] *Schlender*, *supra* at 233-234.

[36] MCR 3.210(C)(1) and (2).

[37] MCR 3.210(C)(1)(b).

[38] See MCR 3.210(A) (concerning hearings before the judgment of divorce).

[39] *Schlender*, *supra* at 233.

[40] *Mann*, *supra* at 534.

each case had already entered a divorce judgment. Otherwise, this Court in *Schlender* and *Mann* might have relied on MCR 2.119 to suggest that a hearing was not absolutely critical.

Additionally, MCR 3.213 indicates that MCR 2.119, a rule of civil procedure governing motion practice, controls "[p]ostjudgment motions in domestic relations cases . . . ." However, MCR 3.201(A)(2)(a) suggests that a postjudgment motion for a change of custody should be determined according to the rules set out in subchapter 3.200, which includes the hearing requirement in MCR 3.210(C). If MCR 3.210(C) does apply to a post-divorce motion for change of custody under the current structure of the courts rules, and I believe that *Schlender*, *Mann*, and MCR 3.201(A)(2) compel this conclusion, then the trial court's obligation to hold an evidentiary hearing is unambiguous and, therefore, simply not subject to debate.

When I attempt to synthesize the meaning of *Mann*, *Rossow*, and *Schlender* in light of MCR 3.210(C) and the plain language of and purpose behind MCL 722.27(1)(c),[41] I arrive at a very simple legal principle: if the motion for change of custody alleges proper cause or a change of circumstance supporting a change of custody, the trial court must hold an evidentiary hearing to determine whether that proper cause or change of circumstance actually exists. Only if the movant does not allege proper cause or a change of circumstance, the specific statutory grounds for changing custody, would there be reason to decline to hold a hearing. In other words, a trial court, regardless of its substantive decision to grant or deny the motion for change of custody, cannot avoid the hearing requirement as long as the moving party alleges proper cause or a change of circumstance.[42] If the trial court finds on the basis of the evidence adduced at the hearing and introduced into the record that proper cause or a changed circumstance does exist, the trial court must then proceed to the best interests analysis.

III. Application

If this rule of law is applied to the facts of this case, it is clear that the trial court committed clear legal error in denying the evidentiary hearing. The motion for change of custody, though it rambles, rehashes irrelevant procedural history, and is not always clear, alleged that facts existed to support the statutory grounds that must be proven to change custody. For instance the allegation that Albert Boehnlein and his new wife had recently arranged their schedules so that they could provide more direct care for his son and that they would enroll him in a different and, in their opinion, better educational/therapeutic program suggested both proper cause and a changed circumstance.

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[41] See *id*. at 531.

[42] I acknowledge that there is debate concerning whether a hearing is necessary when the parties stipulate to the change of custody. See *Phillips v Jordan*, 241 Mich App 17, 34; 614 NW2d 183 (2000) (Holbrook, Jr., P.J., dissenting); *Terry v Affum (On Remand)*, 237 Mich App 522, 535; 603 NW2d 788 (1999). However, because the contentious facts of this case do not suggest that the parties agree on even simple matters, much less that they stipulated to change custody, this Court is not called on to resolve this issue.

Even if the trial court would have ultimately determined that these allegations were not proven or that the best interests factors did not favor changing custody,[43] this fervent dispute between the parents was the proper subject of a hearing. In *Winn v Winn*,[44] another custody case involving a child with special needs, the father was able to achieve some success in controlling the child's seizures with a specific diet and, therefore, moved for a change of custody so that he could be more involved in the child's daily care.[45] While this Court concluded that the trial court misapplied the best interests factors in granting the motion,[46] there was no debate over whether the trial court erred in holding a hearing, which involved considering the child's special health and education needs, before ruling on the motion.[47] As in *Winn*, the trial court here should have held a hearing.

There is a strong and understandable temptation to give in to frustration in a difficult and contentious custody case such as this, but in my view trial courts must resist this temptation for the sake of the child at the center of the dispute. The ABA program coupled with day-to-day reinforcement of ABA principles in Albert Boehnlein's home may not actually be any more effective in helping the child progress than having the child attend the TEEACH program while living with Lisa Boehnlein. Nevertheless, that there is a dispute concerning whether this change in custody and educational program might benefit the child only underscores the need for a hearing to resolve this issue.

IV. MCR 3.210(C)(7)

The majority comments that the trial court in this case anticipated the Michigan Supreme Court's recent amendment of MCR 3.210(C), following the new procedure set out in new subsection (7) in this case. While that may be so, from my perspective, MCR 3.210(C)(7) does not change the necessity of a hearing in this case.

MCR 3.210(C)(7), when it becomes effective July 1, 2001, will provide:

> In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

My conclusion that a trial court may make a threshold decision concerning whether to hold an evidentiary hearing on the basis of whether the parent has alleged a change of circumstance or proper cause is similar to the way this new court rule focuses on whether there is a question of fact to be resolved at an evidentiary hearing. The similarities are also striking in light of my observation that case law suggests that an evidentiary hearing is unlikely to be necessary when

[43] See *Phillips*, *supra* at 241; MCL 722.25(1).

[44] *Winn v Winn*, 234 Mich App 255, 257-258; 593 NW2d 662 (1999).

[45] *Id*.

[46] *Id*. at 260-262, 271.

[47] *Id*. at 258-268.

the parties agree to a change of custody. Absent the parties' agreement to a change of custody, allegations that there are changed circumstances or proper cause for a change of custody will logically involve a factual dispute in most cases. Nevertheless, I have applied established, binding case law, and not this new court rule, because MCR 3.210(C)(7) did not exist, much less become effective, at the time the trial court declined to hold the evidentiary hearing in this case. Therefore, MCR 3.210(C)7) neither could support nor contradict the trial court's authority to deny the evidentiary hearing in this case.

Even if MCR 3.210(C)(7) did apply to this case, it would not compel a different result. The plain text of MCR 3.210(C)(7) only permits the trial court to determine from an offer of proof or "otherwise" whether there is a factual dispute before granting or denying an evidentiary hearing on a postjudgment motion for a change of custody. The trial court went well-beyond the authority this court rule confers, essentially determining that there was a factual dispute and then resolving it in favor of Lisa Boehnlein.

MCR 3.210(C)(7) qualifies the nature of the factual dispute meriting an evidentiary hearing as those "issues that must be resolved in order for the court to make an informed decision on the motion." This suggests that there are some disputed factual issues that may not need to be addressed at an evidentiary hearing because the trial court is able to make an "informed decision" without the hearing. However, because the circumstances of the dispute in this case are complex, I see little possibility that the trial court was able to make an "informed decision" on the substance of Albert Boehnlein's allegations without an evidentiary hearing. In this regard, I note that the trial court relied in part on a quasi-estoppel theory to avoid a deeper analysis, likely because an evidentiary hearing was necessary before it could determine whether the opportunity for increased home care and a different learning environment would be in the child's best interests, meriting a change of custody.

For the foregoing reasons, I would reverse and remand for an evidentiary hearing.

/s/ William C. Whitbeck