STATE OF MICHIGAN

COURT OF APPEALS

MISTY ROBARGE,

Plaintiff-Appellee,

v

JEFFREY STEVENS,

Defendant-Appellant.

UNPUBLISHED
July 20, 2001

No. 231506
Dickinson Circuit Court
Family Division
LC No. 98-010595-DM

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's November 13, 2000 order denying his petition for a change of custody. We affirm.

The parties were married on December 11, 1995. Their daughter, Cheyenne Lyn Stevens, was born on September 16, 1995. According to the record, the parties separated in the spring of 1998, and plaintiff filed for divorce on December 23, 1998. In May 1999, plaintiff moved to Kansas City, Missouri, while defendant remained in Crystal Falls, Michigan.

On August 9, 1999, the parties, without counsel, appeared before the trial court for a divorce hearing. During the hearing, the parties informed the court of their agreement to share joint legal and physical custody of Cheyenne, who was then three years old. When the court inquired about the parties' understanding with regard to joint custody, plaintiff indicated on the record that Cheyenne would spend "[s]ummers with [defendant] and the school year with [plaintiff]." Defendant did not object to this characterization of the custody agreement. A review of the record indicates that after plaintiff moved to Kansas City in the spring of 1999, Cheyenne resided with each parent for three months on an alternating basis.

The remainder of the divorce hearing was devoted to ascertaining defendant's child support obligations. After defendant expressed his concern that the child support issue not be referred to the friend of the court, the parties agreed on the record that defendant would pay plaintiff $100 a month in child support. The court approved this agreement and ordered defendant to pay plaintiff $100 a month in child support for the months that Cheyenne was in plaintiff's physical custody. The court did not order plaintiff to pay child support when

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

Cheyenne was in defendant's physical custody. As relevant to this appeal, the August 9, 1999 consent judgment of divorce[1] also awarded the parties joint legal and physical custody of Cheyenne.[2] However, the consent judgment of divorce did not articulate the specific arrangements regarding joint physical custody.[3]

In February 2000, defendant filed a petition seeking a change in custody. Defendant's initial petition,[4] filed in pro per on February 1, 2000, requested that plaintiff pay $100 a month in child support for the time Cheyenne was in defendant's physical custody. Defendant further requested that the court order that Cheyenne spend the school year with defendant. Following an evidentiary hearing, the trial court, in a well-reasoned twenty-page written opinion and order, held that a modification of the existing custody order was not warranted because defendant failed to demonstrate "proper cause" or a "change in circumstances." See MCL 722.27(1)(c). As relevant to this appeal, the trial court concluded:

> Nothing in the evidence justifies the conclusion that [d]efendant has proven by any evidentiary standard, much less by clear and convincing evidence, that he should be awarded custody; or that there should be a change in the existing custody order regarding the child. . . . The parties shall continue to share joint legal and joint physical custody of Cheyenne. Defendant shall have Cheyenne in his care during the summer. . . . [Cheyenne] shall return to plaintiff's care at least seven days before school commences in the fall.

We review a trial court's findings of fact in a custody matter to determine whether they are against the great weight of the evidence, and will affirm them unless the record evidence clearly preponderates in a contrary direction. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994) (Brickley, J). A trial court's ultimate custody award is reviewed for an abuse of discretion. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

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[1] A review of the form judgment reveals that it was completed by one of the parties in their own handwriting.

[2] A trial court is permitted to accept the parties' stipulations regarding custody and visitation and incorporate it into a judgment. *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994). "Implicit in the trial court's acceptance of the parties' custody and visitation arrangement is the court's determination that the arrangement struck by the parties is in the child's best interest." *Id.*

[3] Instead, the trial court stated on the record:

> Well, I won't put anything in the judgment about [specific custody arrangements]. Because that's going to have to be flexible. And you're going to have to work those things out as the years go on.

[4] A second petition was filed on June 7, 2000, after defendant retained counsel.

The thrust of defendant's argument on appeal is that the trial court erred in modifying the existing custody order after it determined that a change in circumstances did not exist. We disagree.[5]

Although the August 9, 1999 consent judgment of divorce did not encompass the specifics of the physical custody arrangement between the parties, it did provide that the parties were to share joint legal and physical custody. In contrast, the November 13, 2000 judgment articulated the specific arrangements relating to custody, providing that Cheyenne would spend the school year with plaintiff and summers with defendant. Contrary to defendant's assertion on appeal, our reading of both judgments demonstrates that the trial court did not modify custody in the second judgment.

As defendant correctly notes in his brief on appeal, a trial court may not modify an existing custody order unless "proper cause" or a "change in circumstances" is shown. MCL 722.27(1)(c); *Rossow v Aranda*, 206 Mich App 456, 457; 522 NW2d 874 (1994). However, underlying defendant's argument that the trial court impermissibly modified custody is the mistaken assumption that, by specifying the details of the custody arrangement in the November 13, 2000 order, the trial court modified the existing custody order. Rather, the trial court simply articulated the terms of the joint custody arrangement originally agreed on by the parties on the record during the August 1999 divorce hearing.[6] Such action by the trial court is expressly authorized by MCL 722.26a(3), which provides:

> If the court awards joint custody, the court *may* include in its award a statement regarding when the child shall reside with each parent, or may provide that physical custody be shared by the parents in a manner to assure the child continuing contact with both parents. [Emphasis supplied.]

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[5] Defendant also argues that the August 9, 1999 consent judgment included the parties' agreement that they would alternate having physical custody of Cheyenne every three months. Our review of the record does not support defendant's assertion. For instance, during the divorce hearing, plaintiff indicated on the record that the parties agreed that if she moved to Kansas City defendant would have physical custody of Cheyenne during the summer, and plaintiff would have physical custody during the school year. Defendant did not object to plaintiff's characterization of the custody agreement in spite of having ample opportunity to do so. Further, plaintiff testified during the evidentiary hearing that the parties entered into an agreement in February 1999 that set forth these terms in writing. A copy of this agreement, signed by defendant, was entered into evidence at the evidentiary hearing.

[6] An undated written agreement, signed by both parties and admitted into evidence at the evidentiary hearing, also reflects that the parties agreed that Cheyenne would spend the school year with plaintiff in Kansas City. Specifically, the agreement provided in relevant part:

> In the event of one of the parents moving out of the state/area parenting time will be as follows: The custodial parent *Misty Stevens*, shall have [the] minor child from September through April. The noncustodial parent, *Jeffrey Stevens*, shall have [the] minor child from May through August. [Emphasis in original.]

A plain reading of § 26a of the Child Custody Act, specifically the use of the word "may,"[7] provides that a trial court is not required to enunciate the specific terms of a joint custody arrangement in its order. It thus follows that when a trial court's original judgment is silent on the specific terms of the child's living arrangements, and a subsequent order articulates those terms but maintains the existing custody order, such an articulation does not amount to a modification in custody as contemplated by § 27 of the Child Custody Act.

Defendant also challenges the trial court's factual determinations on the best interest factors, claiming that they are against the great weight of the evidence. See MCL 722.23. Given the trial court's express determination that a change in circumstances[8] did not exist, we need not address this claim.[9] "[W]here 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 custody decision and engage in a reconsideration of the statutory best interest factors." *Rossow, supra* at 458.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert J. Danhof

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[7] "[T]he term 'may' designates a permissive provision." *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993) (citations omitted).

[8] On appeal, defendant does not challenge the trial court's determination that defendant had not proven a change in circumstances warranting modification of the existing custody order.

[9] In its written opinion and order, the trial court indicated that it decided to weigh the statutory best interest factors in spite of its determination that defendant had not proven a change in circumstances "in the event that another court would disagree with [the trial court's] conclusion that there has not been a change in circumstances."