STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE J. SEALY,

Plaintiff-Appellant,

v

JOHN D. KENOYER,

Defendant-Appellee.

UNPUBLISHED
March 18, 2004

No. 250129
Eaton Circuit Court
LC No. 95-000922-DM

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order modifying custody. We reverse and remand.

The parties are the parents of two children, Seth (d/o/b 10/20/88) and Hannah (d/o/b 3/9/90). The parties were married on April 4, 1987, and divorced on March 29, 1996. The judgment of divorce granted joint legal custody and sole physical custody to plaintiff. On October 12, 2000, plaintiff moved to modify parenting time, and defendant answered on February 23, 2001, with his own motion seeking sole physical custody. The trial court thereafter ordered that the parties submit to a friend of the court (FOC) investigation and referee hearing regarding custody and parenting time, and the parties agreed to submit to a psychological examination.

The clinical psychologist recommended that the parties continue to share legal custody, and also that the parties share physical custody, with the children living with defendant during the school year. Considering in part that recommendation, the FOC investigator concluded that defendant should have primary physical custody of the children for a "trial period" of one year – the 2002-2003 school year. Defendant thereafter moved to adopt the FOC recommendation, and the Family Court referee issued a recommended order that defendant receive sole physical custody of the children. Plaintiff objected to entry of the order. At the subsequent de novo hearing conducted by the trial court, the clinical psychologist reiterated that defendant should have sole physical custody of the children. However, a social worker that counseled the children, contradicted the psychologist's testimony by concluding that it was not in the children's best interest for defendant to have primary custody. Following this testimony, as well as the testimony of both parties, the trial court found that both parties had established a custodial environment, and that joint physical custody was appropriate, with the children living with defendant during the school year.

Plaintiff appeals the order modifying custody, arguing that the trial court erred when it (1) failed to determine whether proper cause or change in circumstances justified modifying custody and (2) applied the preponderance of the evidence standard where it first found that both parties had established a custodial environment. We agree with both arguments.

It is well settled that a court can modify a custody order only if the moving party establishes by a preponderance of the evidence that "proper cause" or a "change in circumstances" supports a finding that a change in custody is in the children's best interest. MCL 722.27(1)(c); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994); *Vodvarka v Grasmeyer*, ___ Mich App ___; ___ NW2d ___ (Docket No. 248058, released December 2, 2003), citing *Dehring v Dehring*, 220 Mich App 163; 559 NW2d 59 (1996). If this initial burden is not met, "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." *Rossow*, *supra* at 458.

The trial court also must make the factual determination whether an "established custodial environment" exists before it assesses the child's best interest. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), citing *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). The applicable statute provides in relevant part:

> The 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 interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

The existence of an established custodial environment determines the burden that the party seeking a change in custody must meet. "If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child." *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001); see also *Wilson v Gauck*, 167 Mich App 90, 95; 421 NW2d 582 (1988), citing MCL 722.27(1)(c); *Baker v Baker*, 411 Mich 567; 309 NW2d 532 (1981). "On the contrary, if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests." *Foskett*, *supra* at 6-7; *Wilson*, *supra*; *Baker*, *supra*.

Here, the trial court did not explicitly address the threshold inquiry of whether proper cause or a change in circumstances existed to justify changing custody. Instead, it proceeded with the "best interest" factors after determining that both parties had established a custodial environment.

However, even if the trial court implicitly found that there was a change in circumstances or proper cause to justify consideration of the best interest factors, the court's application of the wrong standard cannot be overlooked. The court found that both parents had established a custodial environment, and it found that "[t]he burden on the defendant, therefore, is a preponderance of the evidence." But, where a custodial environment is established, the proponent of the change must present clear and convincing evidence that the change serves the best interests of the child. *Foskett*, *supra* at 6; *Wilson*, *supra* at 95; *Baker*, *supra*. Accordingly, the trial court's order modifying custody must be reversed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage