STATE OF MICHIGAN

COURT OF APPEALS

CHAD MICHAEL STEPHENSON, Plaintiff-Appellant,	UNPUBLISHED March 20, 2007
v	No. 272937 Jackson Circuit Court, Family Division
MICHELLE LEE STEPHENSON, Defendant-Appellee.	LC No. 00-000371-DM

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order awarding primary physical custody of the parties' minor children to defendant and ordering plaintiff to pay child support pursuant to the Michigan Child Support Formula. We affirm.

Plaintiff Chad Stephenson and defendant Michelle Stephenson married in 1997. They divorced in November 2000. The trial court awarded joint legal custody of the parties' two minor children to plaintiff and defendant and awarded primary physical custody of the children to defendant. The trial court ordered plaintiff to pay child support and childcare expenses. On December 11, 2001, the trial court entered a stipulated order, which provided, in part, that the parties "shall have joint legal and joint physical custody of the minor children." The order further provided that "the parties wish to deviate from the guidelines and agree that the Plaintiff's child support obligation be reserved, $0.00 per week, based on the new joint custody agreement."

On May 12, 2006, defendant moved to modify the custody order, seeking primary physical custody of the children. She alleged that she signed the stipulated order because plaintiff told her he would not visit the children unless she agreed to give him joint physical custody and eliminate his child support obligation. She also alleged that, after the entry of the stipulated order, plaintiff failed to exercise his parenting time and that he placed the children at risk because he consumed alcohol in the children's presence and continued to operate a motor vehicle after his driver's license was revoked.

After a hearing on defendant's motion, the trial court determined that there was proper cause to modify the child custody order. The court reasoned:

> I can't understand why there's not a significant amount of parenting time complaints that have been filed and documented. I can't understand why a father wouldn't have a week of scheduled vacation with the children. And even if the children didn't have – had an activity that was scheduled, why he's not there, why he's not in Court, why he's not reinforcing it. And I think that the reason for that is he simply doesn't want to pay guideline child support. I think he negotiated a joint custody relationship with the mother. She wasn't represented. It'd be one thing if the parties truly had joint physical custody, but the parties don't have joint physical custody. It's not what they've been exercising consistently. And, as I indicated before, that is the good cause for changing the custodial relationship.

The trial court found that an established custodial environment existed with both parents and, after examining the best interests of the child factors set forth in MCL 722.23, the trial court concluded "by way of clear and convincing evidence that they clearly favor the mother." Thus, the court awarded primary physical custody of the children to defendant. The trial court ruled that plaintiff was entitled to reasonable rights of parenting time and ordered him to pay child support according to the statutory child support guidelines.

Plaintiff first contends that the trial court erred in finding that the parties did not have joint custody of the children. We disagree.

"To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). Under the great weight of the evidence standard, "this Court will sustain the trial court's factual findings unless 'the evidence clearly preponderates in the opposite direction.'" *Shulick v Richards*, ____ Mich App ____; ____ NW2d ____ (2006), quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.*

Joint physical custody is an arrangement in which a child "reside[s] alternately for specific periods with each of the parents." MCL 722.26a(7)(a). In this case, the stipulated order provided, in part, that the parties had joint physical custody of the children and that "the plaintiff and the defendant shall have parenting time with the minor children on alternate weeks." An order that provides for alternating weeks of parenting time indicates that the parties have a joint physical custody arrangement. See *Shulick, supra*; *Gehrke v Gehrke*, 266 Mich App 391, 392; 702 NW2d 613 (2005); *Winn v Winn*, 234 Mich App 255, 260; 593 NW2d 662 (1999). Thus, pursuant to the terms of the order, the parties had joint physical custody of the children as a matter of law. An order entered by a court of proper jurisdiction must be obeyed even if it is clearly incorrect. *Schoensee v Bennett*, 228 Mich App 305, 317; 577 NW2d 915 (1998).

Nevertheless, the trial court found that the parties did not exercise their alternating weeks of parenting time consistently and that plaintiff had "significantly" less than 128 overnights with the children. Therefore, the parties did not "truly" have joint physical custody of the children. The evidence in this case supported the trial court's finding that the actual amount of parenting time exercised by the parties was inconsistent with the joint custody arrangement contemplated by the parties when they signed the stipulated order. Defendant testified that, from December

11, 2001, to January 2005, plaintiff had the children for approximately 50 overnights per year. In 2005, he had the children for 99 overnights. From January 1, 2006, to July 26, 2006, he had the children for 14½ overnights. In support of her testimony, she submitted a copy of her journal, in which she documented plaintiff's parenting time. Defendant admitted that she denied parenting time to plaintiff when he arrived to pick up the children and was intoxicated, or when he exhibited "dangerous behavior" in the children's presence. However, she also testified that plaintiff offered her several reasons why he could not exercise his parenting time, including that he could not provide transportation for the children, that it was "not a good night," and that he did not have a babysitter for the children. Plaintiff testified that, contrary to defendant's testimony, he had the children for approximately 150 overnights in 2004 and 2005 and that defendant denied him parenting time "plenty" of times. However, "[t]his Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Dragoo v Dragoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). See also MCR 2.613(C). The trial court's finding, that the parties did not "truly" have joint physical custody of the children, was not against the great weight of the evidence. The evidence did not clearly preponderate in the opposite direction; therefore, we must sustain the trial court's finding. *Shulick, supra*.

Plaintiff also contends that the trial court erred in determining that proper cause existed to modify the custody order. We disagree.

A child custody order may only be modified upon a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The moving party "has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (emphasis in original).

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. [*Id.* at 512.]

"[I]n order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original).

In this case, the trial court was concerned about plaintiff's failure to enforce the stipulated order and his failure to exercise his parenting time with the children. "[P]arenting time is not merely a right of the parent, but also a right of a child and thus an obligation of the parent." *Delamielleure v Belote*, 267 Mich App 337, 340; 704 NW2d 746 (2005). However, the record indicates that the trial court did not modify the custody order to sanction plaintiff for failing to enforce the order. Cf. *Kaiser v Kaiser*, 352 Mich 601; 90 NW2d 861 (1958). The trial court was

also concerned about plaintiff's seeming manipulation of the child support guidelines. The trial court found that plaintiff negotiated a joint custody arrangement with defendant because "he simply doesn't want to pay guideline child support." The court noted that it had "an obligation to make sure there's statutory child support set and paid." Regardless of the agreement of the parties, the trial court was responsible for determining and protecting the children's inherent rights with respect to custody, support, and parenting time. *Harvey v Harvey*, 470 Mich 186, 192-194; 680 NW2d 835 (2004).

In *Macomb Co Dep't of Social Services v Westerman*, 250 Mich App 372, 377; 645 NW2d 710 (2002), this Court opined that:

> Biological parents have an inherent obligation to support their children. *Evink v Evink*, 214 Mich App 172, 175-176; 542 NW2d 328 (1995). A biological parent must support a minor child unless a court of competent jurisdiction modifies or terminates the obligation or the child is emancipated. MCL 722.3. The purpose of child support is to provide for the needs of a child. *Evink*, *supra* at 176. The parents of a child are not permitted to bargain away a child's right to receive adequate support. *Id.*

A trial court has discretion to modify a child support order "as the circumstances of the parents and the benefit of the children require." MCL 552.17(1). However, when modifying a child support award, the trial court has a statutory duty to follow the criteria set forth in the Michigan Child Support Formula Manual ("MCSFM"). *Burba v Burba (After Remand)*, 461 Mich 637, 643-645, 647; 610 NW2d 873 (2000).

The shared economic responsibility formula ("SERF") provision found in the MCSFM provides:

> When children share substantial amounts of time with both parents, child support should consider the costs and savings associated with parenting/custodial time. When a parent cares for a child overnight, that parent will cover many of the child's unduplicated costs. Conversely, the other parent will not be expending food or utility costs for the child. This calculation presumes that as parents spend more time with their children they directly contribute toward a greater share of all expenses. [2004 MCSF 3.05.]

For purposes of the SERF, "substantial amounts of time" is specifically defined in the MCSFM as 128 overnights. 2004 MCSF 3.05A; *Gehrke*, *supra* at 396. However, a noncustodial parent need not exercise his rights of visitation for all of those days before the SERF becomes applicable. *Eddie v Eddie*, 201 Mich App 509, 514; 506 NW2d 591 (1993). "[T]he support must be based upon the number of days that the noncustodial parent is entitled to visitation under the order, not the actual visitation that will be exercised in the future." *Id.* at 514 n 1.

Pursuant to the terms of the stipulated order, plaintiff was entitled to a reduction in his child support obligation under the SERF, regardless of the number of overnights or the amount of parenting time that he actually exercised. *Id.* The trial court found, however, that plaintiff exercised "substantially" less than 128 overnights per year. Consequently, plaintiff was not entitled to calculate his child support obligation using the SERF. However, because the SERF

applied regardless of the amount of parenting time that plaintiff exercised, the trial court could not modify the child support order without modifying the custody order. Thus, based on the facts of this case, plaintiff's seeming manipulation of the child support guidelines constituted "the existence of an appropriate ground for legal action to be taken by the trial court." *Vodvarka, supra* at 512.

Further, plaintiff's nonpayment of child support was "relevant to at least one of the twelve statutory best interest factors . . . ." *Id.* Payment of child support is relevant to the parties' ability to continue the education of the children, MCL 722.23(a), and the capacity and disposition of the parties to provide the child with food, clothing, medical care, and other material needs, MCL 722.23(c). Plaintiff's failure to enforce the parenting time schedule, and his manipulation of the child support guidelines, were also relevant under MCL 722.23(l), which authorizes a trial court to consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute."

Finally, plaintiff's failure to enforce his parenting time, coupled with his nonpayment of child support, was "of such magnitude to have a significant effect on the child[ren]'s well-being." *Vodvarka*, *supra* at 512. A parent's inability to adequately provide a child with food, clothing, medical care, and other material needs certainly has a significant effect on the child's wellbeing. The evidence in this case established that defendant was recently unemployed at the time of the hearing on her motion to modify the custody order. Plaintiff was employed full-time and had the ability to pay child support. Because defendant did not have a source of income, but was primarily responsible for caring for the parties' two minor children, plaintiff's payment of child support would have had a significant impact on the children's wellbeing. Plaintiff testified that the main factor contributing to his failure to exercise his parenting time was not his lack of desire or attempts to exercise his parenting time, but defendant's refusal to allow parenting time. The trial court found, however, that plaintiff negotiated the joint custody arrangement because he did not want to pay the statutory child support and that he failed to enforce the parenting time provisions in the custody order. "On review, considerable deference is given to the superior vantage point of the trial judge respecting issues of credibility . . . under the statutory factors." *Thames v Thames,* 191 Mich App 299, 305; 477 NW2d 496 (1991). Thus, we conclude that the trial court did not err in determining that proper cause existed to modify the custody order.

Because defendant established proper cause to modify the custody order, the trial court was authorized to consider whether an established custodial environment existed and to conduct a review of the best interest factors. *Vodvarka, supra* at 509. A custodial environment "is one of significant duration 'in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.'" *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000) (citation omitted). Where supported by the facts, a trial court may find that an established custodial environment exists in more than one home. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000). Here, the trial court found that an established custodial environment existed with both parents. Plaintiff did not challenge this finding on appeal.

Because an established custodial environment existed with both parties, the trial court could modify the existing custody order under MCL 722.27(1) only upon a showing of clear and convincing evidence that the change was in the children's best interests. *MacIntyre v MacIntyre*, 267 Mich App 449, 451; 705 NW2d 144 (2005). After examining the factors set forth in MCL 722.23, the trial court concluded that a change in custody was in the children's best interests. On

appeal, plaintiff did not challenge the trial court's findings on any of the factors. Further, he did not challenge the trial court's determination that the change of custody was in the children's best interests. The trial court did not abuse its discretion in awarding primary physical custody of the children to defendant, where the court found that there was clear and convincing evidence to do so. *Id.* Thus, we affirm the trial court's order awarding primary physical custody to defendant and ordering plaintiff to pay child support. MCL 722.28.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder