

STATE OF MICHIGAN
COURT OF APPEALS

HEATHER LINA-MARIE SHAFFER a/k/a
HEATHER LYON,

UNPUBLISHED
August 13, 2009

Plaintiff-Appellant,

v

PATRICK ALTON SHAFFER,

No. 290674
Clinton Circuit Court
LC No. 07-019700-DM

Defendant-Appellee.

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying plaintiff's motion for change of domicile of the parties' minor children and granting defendant's motion for change of custody. We reverse in part and remand to the circuit court for entry of an order consistent with this opinion.

The parties divorced in 2007 following a three-year marriage and are the parents of two daughters, born in 2003 and 2005. The judgment of divorce awarded the parties' joint legal custody and plaintiff sole physical custody of the children. Defendant was awarded reasonable parenting time. The record reflects that defendant has consistently exercised his parenting time.

Plaintiff's motion for a change of domicile was precipitated by economic hardship, i.e. lack of local employment, that led to plaintiff's new husband securing employment in Wyoming, and the hope that plaintiff might also find employment. There is nothing in the record to suggest that plaintiff's motion to change domicile was motivated by anything other than her economic circumstances. Although the Friend of the Court recommended approval of plaintiff's petition, defendant objected and moved for a change of custody. The circuit court determined that plaintiff failed to establish by clear and convincing evidence that a move to Wyoming was in the best interests of the minor children and following an evaluation of the factors set forth in MCL 722.31(4), denied plaintiff's request for a change of domicile. The circuit court found an established custodial environment existed with both parents and determined that defendant met his burden of showing the existence of a proper cause or change in circumstances to warrant a review of the custody order. The circuit court stated:

I do find there is proper cause, or a change of circumstances, to revisit the
current Custody Order because Plaintiff had filed a Petition to Change Domicile

of the minor children to a thousand miles away, approximately a thousand miles away from where they currently live. In addition to that, she was asking that the defendant's parenting time be substantially modified and the financial impact of exercising parenting time would be substantially impacted, as well. And, I do think that that has a significant impact on the children and is more than just a - a change, an everyday change in their lives.

After addressing the best interest factors, the circuit court found that plaintiff and defendant actually exercised joint physical custody of the children, and modified the custody order to reflect that arrangement.

Plaintiff's sole issue on appeal challenges the circuit court's factual determination that defendant met his burden of establishing a proper cause or change in circumstances to warrant a revisit of the custody order as being against the great weight of the evidence. Specifically, plaintiff argues that because the circuit court denied plaintiff's motion for change of domicile, there existed no change of circumstances or proper cause to permit review of the custody order.

In order to revisit the custody and parenting time order, defendant was required to prove by a preponderance of the evidence that either a proper cause or change in circumstances existed. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). "[P]roper cause' means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka, supra* at 511. To establish a change in 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. If the moving party fails to meet its burden, the circuit court is precluded from revisiting the custody order. *Vodvarka, supra* at 508.

The circuit court's finding that a proper cause or change in circumstances existed to warrant a reconsideration of the then-existing custody order was against the great weight of the evidence. Contrary to defendant's argument, the record reflects that the circuit court's rationale for finding that a proper cause or change in circumstances was based on the potential impact that a change of domicile and modification of the parenting time agreement would have on the children. Once the circuit court denied plaintiff's motion for a change of domicile, all concerns regarding the effect a move to Wyoming would have on the minor children's lives and relationship with defendant were allayed. It would be illogical and against the intent of the Legislature to permit a trial court to hold that a party's filing of a motion for change of domicile constitutes a proper cause or change in circumstances irrespective of the trial court's decision regarding the motion. Because the circuit court's inquiry into whether it should modify the custody order should have ended when it denied plaintiff's motion for change of domicile, we conclude that the circuit court abused its discretion when it modified the custody order.

The trial court also implied that its modification of the custody order to joint physical custody merely reflected the actual circumstances or practices of the parties with regard to the exercise of parenting time with the minor children. However, the court's indication that the parenting time arrangements had been voluntarily expanded, standing alone, is insufficient to establish a change of circumstances or proper cause for modification of the custody order,

especially without a commensurate demonstration that such a modification was in the best interests of the minor children. *Powery v Wells*, 278 Mich App 526, 530; 752 NW2d 47 (2008). Defendant failed to demonstrate that the conditions pertaining to the custody of the minor children had materially altered. This Court has previously noted that “[n]ot just any change will suffice,” and that “over time there will always be some changes in a child's environment, behavior, and well-being.” *Vodvarka, supra* at 513. The mere voluntary expansion of parenting time by the parties did not “demonstrate something more than the normal life changes . . . that occur during the li[ves] of [the] child[ren].” *Id.* While sufficient change may have occurred to alter defendant’s support obligation, it was not appropriate to modify the custody order.

Reversed in part and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher