STATE OF MICHIGAN

COURT OF APPEALS

SHEILA MARIE GENDICH, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 293139 Clinton Circuit Court
TERENCE ARTHUR R. WHITEMAN, Defendant-Appellant.	LC No. 99-013367-DM

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

PER CURIAM.

In this child custody case, defendant appeals as of right from an order of the circuit court granting plaintiff sole legal and physical custody over the parties' minor daughter and sole legal, but joint physical custody over the parties' minor son. Because defendant was afforded proper due process, the trial court did not err when it did not hold an evidentiary hearing, the trial court properly held that a change in circumstances existed, the trial court's findings of fact were not against the great weight of the evidence, and the trial court did not improperly consider impermissible evidence, we affirm in part. However, because the trial court failed to comply with the requirements of MCL 722.27a regarding defendant's request for a specific parenting time schedule, we reverse in part and remand for further proceedings.

Defendant first argues that he was deprived of due process when plaintiff failed to provide him with a copy of her motion for a change in custody. The Court reviews de novo whether a person has been afforded due process. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). In civil cases, due process generally requires notice of the nature of the proceedings to be held, an opportunity to be heard, and a decision by an impartial decision maker. *Id*. at 159. Having reviewed the record, we conclude that defendant was provided with sufficient due process. Plaintiff filed her motion for a change in custody on May 8, 2008. Attached to her motion was a certificate of mailing, which indicated that she mailed a copy of the motion to defendant on the same day. The certificate of mailing is prima facie evidence that defendant received a copy of the motion, including the attachment that contained her factual allegations. MCR 2.104(A)(1). Moreover, in an email from defendant to plaintiff on May 10,

2008, defendant referenced a document sent by plaintiff the day before, and then denied the accuracy of statements made therein.

We also disagree with defendant's argument that he was deprived of his due process rights because plaintiff did not conform to MCR 2.119(A).[1] Contrary to defendant's argument, plaintiff was not required to file a supporting brief when she filed her motion for a change in custody. MCR 2.119(A)(2) only requires a party to file a supporting brief when he or she presents an issue of law. Although an inherently legal issue, whether a change in circumstances or a proper purpose exists warranting a reevaluation of a then-existing custody order is a question of fact, not law. *Fletcher v Fletcher*, 447 Mich 871, 877-878 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Therefore, plaintiff was not required to file a brief in support of her motion.

Next, defendant argues that the trial court erred in failing to hold an evidentiary hearing and independently rule on the question whether defendant demonstrated that proper cause or a change in circumstances existed to warrant reconsideration of the custody order. In child custody cases, a trial court's findings of fact are reviewed under the great weight of the evidence standard. MCL 722.28; *Fletcher*, 447 Mich at 877-878 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Its discretionary rulings, such as to whom custody should be granted, are reviewed for an abuse of discretion, *Fletcher*, 447 Mich at 880-881 (Brickley, J.), 900 (Griffin, J.), and questions of law are reviewed for clear legal error.

A trial court may modify an established custody order only on a showing of proper cause or a change in circumstances demonstrating that the modification is in the best interest of the child. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). "'[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 v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). To

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[1] MCR 2.119(A) states, in relevant part, as follows:

> (1) An application to the court for an order in a pending action must be made by motion. Unless made during a hearing or trial, a motion must
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> (a) be in writing,
>
> (b) state with particularity the grounds and authority on which it is based,
>
> (c) state the relief or order sought, and
>
> (d) be signed by the party or attorney as provided in MCR 2.114
>
> (2) A motion or response to a motion that presents an issue of law must be accompanied by brief citing the authority upon which it is based.

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. Contrary to defendant's argument, a trial court is not required to hold a separate evidentiary hearing to determine whether the moving party has met his or her burden of proof. *Id.* at 512 ("Although these decisions will be based on the facts particular to each case, we do not suggest that an evidentiary hearing is necessary to resolve this initial question.").

Defendant also argues that the trial court erred when it found that a change in circumstances existed and committed clear legal error when it used the preponderance of the evidence standard to determine whether a change in circumstances existed.

Defendant specifically asserts that because the allegations contained in plaintiff's motion occurred prior to the entry of the last custody order, the trial court should have denied plaintiff's motion for a change in custody. However, the record reflects that while plaintiff's motion for a change in custody contained allegations that had occurred prior to the entry of the last custody order, the motion was not based solely on those allegations. The trial court properly refused to consider those allegations, and we agree with the trial court that the other circumstances plaintiff alleged were sufficient to warrant a custody reevaluation. The credited circumstances include defendant's criminal trial, defendant's initial conviction, failure of communication, and defendant's placement of obstacles to the parties' minor daughter's education. Moreover, it is well settled that the preponderance of the evidence standard is proper burden of proof when determining whether a change in circumstances exist. See, e.g., *Vodvarka*, 259 Mich App at 509.

We also reject defendant's assertion that the trial court's finding that the best interest of the child factors weighed in plaintiff's favor was against the great weight of the evidence. Custody issues are to be resolved in the child's best interest, as measured by the best interest factors found in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The best interest factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

In the present case, the trial court weighed factors (a), (c), (d), (g), and (j) equally in favor of both parties and factors (b), (e), (f), and (h) in plaintiff's favor. In regard to factor (i), the trial court stated that it interviewed the parties' minor children and found that they were old enough to express a preference, which she took into consideration. The trial court held that factor (k) was not applicable and it did not consider there to be any other significant factors to warrant a consideration of factor (*l*). The trial court did, however, state that in determining the legal custody issue, it did consider the parties' ability to communicate and get along as it related to matters involving the children, which it found was nonexistent.

Defendant argues that the trial court erroneously considered criminal charges that had been brought against him, but of which he had not been convicted, when considering factor (f).[2] When considering factor (f), a court may consider any questionable conduct of a party that might affect the party's ability to function as a parent. *Berger v Berger*, 277 Mich App 700, 712-713; 747 NW2d 336 (2008). Such conduct includes illegal or offensive behavior. *Id*. at 713. By defendant's own admission, the circumstances of his criminal trial had a negative effect on his relationship with his daughter and his ability to parent to her. When asked why his daughter felt alienated from him, defendant noted his "long absence" from the children during the criminal proceedings and opined that what was happening with his daughter constitutes "parental alienation syndrome in which children when . . . deprived of contact with somebody for a long period of time become alienated." Further, the court found it "troubling" that defendant did not remember what other charges (several counts of unlawful delivery of drugs) had been filed other than the criminal sexual conduct charges. We conclude it was proper for the trial court to consider the conduct when considering factor (f). *Id*.

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[2] An order of nolle prosequi had been entered after the trial court vacated defendant's convictions and ordered a new trial.

Defendant also argues that the trial court erroneously considered whether there was a lack of communication between him and plaintiff and unjustly faulted him for not attending his children's extracurricular events. Contrary to defendant's argument, the trial court did not penalize him for complying with the communication provisions of the parties' 2006 custody order. Our review of the trial court's statements does not indicate that the trial court found that there was a lack of communication between the parties because defendant would not talk with plaintiff on the phone or in person. To some extent, defendant's argument is predicated on an erroneous characterization of the court's finding. Where the court was speaking of the desire and effectiveness of the parties' sharing of information and decision making, defendant is focusing on the means of the process. Defendant does not dispute that he and plaintiff have a strained relationship and that at times, they have not had the best communication. Thus, the trial court did not err when it held that there was lack of communication between the parties.

Similarly, the trial court did not err when it faulted defendant for failing to attend the children's extracurricular events. As the trial court correctly pointed out, nothing in the 2006 custody order prohibits plaintiff and defendant from being in the same room or jointly attending their children's extracurricular activities. Thus, defendant's argument that in not attending his children's extracurricular activities he was complying with the 2006 custody order is erroneous. Because the relationship between the parties is something that a court can consider when evaluating the best interest of the child factors, the trial court did not err when it faulted defendant regarding this issue. MCL 722.23(a).

Defendant also argues that because plaintiff did not allege in her motion for change of custody that she and defendant did not have good communication, the trial court should not have considered plaintiff's testimony to that effect when considering the best interest factors. However, whenever a court contemplates a joint custody arrangement, it must consider whether the parties' involved have the ability to cooperate with each other. MCL 722.26a(1)(b); *Wellman v Wellman*, 203 Mich App 277, 281-282; 512 NW2d 68 (1994). Although the parties' inability to cooperate with each other does not automatically preclude a joint custody award, it is a factor that may be considered when evaluating the best interest of the child factors. *Wellman*, 203 Mich App at 284-285; see MCL 722.23(*l*). The ability to cooperate is both impacted by and impacts the ability to communicate.

Finally, defendant argues that the trial court erred when it failed to issue a specific parenting time schedule after defendant requested that the court do so. Pursuant to MCL 722.27a(1), unless parenting time is not appropriate under the circumstances of that case, a court must grant parenting time in a "frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." Where a parent granted parenting time makes a request that the court grant parenting time in specific terms, the court must do so. MCL 722.27a(7); *Pickering v Pickering*, 268 Mich App 1, 6-7; 706 NW2d 835 (2005). A party may request that the court grant parenting time in specific terms at any time. *Pickering*, 268 Mich App at 7. Once defendant filed his motion for reconsideration requesting a more specific parenting time schedule, the trial court was required to issue an order granting defendant parenting time in more specific terms. MCL 722.27a(7); *Pickering*, 268 Mich App at 6-7. The matter should not simply be left to the discretion of defendant and the children.

We reverse in part and remand to the trial court for reconsideration of its parenting time order. We express no opinion regarding the specific provisions of any subsequent order. In all other aspects, we affirm. We do not retain jurisdiction. Costs to neither party.

/s/ Alton T. Davis
/s/ Pat M. Donofrio