STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY DAVID SAVAGE,

Plaintiff-Appellee,

v

HEATHER ANNE SAVAGE,

Defendant-Appellant.

UNPUBLISHED
November 18, 2010

No. 295847
Ionia Circuit Court
LC No. 2008-026552-DM

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals by right the circuit court's denial of her motion to change schools, change parenting time, or modify custody. We affirm.

The parties' son, Liam, was born on March 14, 1999. The parties subsequently married on June 12, 1999. The parties lived together in the marital home in Ionia, and their child attended the Ionia Public Schools. Plaintiff filed his complaint for divorce on September 23, 2008, after which time the parties separated and defendant moved out of the marital home. Plaintiff remained in the marital home and the minor child continued attending the Ionia Public Schools.

In February 2009, the circuit court entered an interim order granting the parties joint physical and legal custody of their son. The order required a midweek split in parenting time during the school year, and alternating periods of parenting time during the summer. The record indicates that the parties did not fully adhere to the ordered schedule, but that they did abide by a midweek split in parenting time for some portion of the 2008-2009 school year, during which time the child continued to attend elementary school in Ionia.

On July 28, 2009, the circuit court entered a judgment of divorce, which contained a final order regarding custody of the child. This order provided that the parties would have joint legal and physical custody of the child and that "[p]arenting time . . . will be liberal and reasonable as agreed upon between the parents." The order went on to specify the precise parenting time schedule that the parties were expected to follow, incorporating the bulk of the interim parenting time provisions.

Within a few months, plaintiff learned that defendant intended to move with the child from Ionia to Oakland Township, where the child would be enrolled in the Lake Orion schools.

Plaintiff desired to keep the child enrolled in the Ionia schools. Thus, both parties filed motions for a change in custody, with both seeking primary physical custody of the child. Defendant specified in her motion that she had recently become engaged and that she intended to move to Oakland Township "to live with [her] fiancé and find gainful employment." She desired to take the child to live with her and her fiancé. Defendant asserted that her fiancé had a stable job and a home of his own, and would be able to provide health insurance for her and the child. Defendant sought primary physical custody of the child with reasonable parenting time for plaintiff.

In contrast, plaintiff sought "sole legal and physical custody of his child," with reasonable parenting time for defendant. Defendant asserted in his motion that it was "important for the minor child to maintain his current residence, school, and extracurricular activities, i.e., sports [and] scouting," which were "already established here in Ionia." Plaintiff did not believe it would be in the best interests of the child to remove him from the stability and permanence that the Ionia schools provided.

On September 14, 2009, a circuit court referee held a hearing on the parties' motions. At the hearing, defendant announced that she was not actually looking to "modify custody," but was simply requesting a change in parenting time, seeking to change the child's number of overnights with defendant from 205 to 245 per year, and seeking to change the child's number of overnights with plaintiff from 160 to 120 per year. Specifically, defendant proposed that the child stay with her on all weekdays and one weekend per month during the school year, and with defendant for the remaining weekends each month during the school year. She proposed that the child stay with her for three weeks during the summer and with plaintiff for seven weeks during the summer. With respect to holidays, defendant wished to leave in place the holiday time schedule contained in the circuit court's existing order.

Plaintiff desired that the child remain enrolled in the Ionia public schools and proposed that the child stay with him on all weekdays and one weekend per month during the school year. Plaintiff proposed that the child stay with defendant for the remaining weekends during the school year and that the parties should split their time with the child equally during the summer. Plaintiff pointed out that, even during the school year, the child would be able to have regular contact with defendant throughout the week via telephone or e-mail.

After the hearing, and following an in camera interview with the child, the referee recommended that the parties retain joint legal custody and that primary physical custody be granted to plaintiff, with the child continuing to attend the Ionia schools. The referee mailed the recommended order on October 5, 2009. Twenty-three days later, on October 28, 2009, the clerk of court received defendant's objections to the recommended order. The circuit court ruled that defendant's objections were untimely, but altered the order to allow the parties to retain joint physical custody with additional parenting time for plaintiff to accommodate the child's Ionia school schedule.

Defendant argues on appeal that the circuit court erred by analyzing her motion as a request for a change in custody, as opposed to a mere request for a change of schools or a modification of parenting time. We must affirm the circuit court's ultimate decision on a custody matter unless the court's findings are against the great weight of the evidence, the court made a clear legal error, or its decision constituted a palpable abuse of discretion. MCL 722.28. We find no error or abuse of discretion in this case.

First, we note that the circuit court's order did not change the child's legal or physical custody status. Indeed, as explained previously, the circuit court modified the referee's initial recommendations and ultimately ordered that the parties retain both joint legal custody and joint physical custody of the child.

Second, we conclude that the circuit court properly determined that defendant's proposed move to Oakland Township with the child, and accompanying proposed enrollment of the child in the Lake Orion schools, would constitute a change in circumstances sufficient to warrant consideration of the statutory best interest factors. See *Pierron v Pierron*, 282 Mich App 222, 263-264; 765 NW2d 345 (2009) (*Pierron I*), aff'd 486 Mich 81 (2010); *Sinicropi v Mazurek*, 273 Mich App 149, 177-178; 729 NW2d 256 (2006).

Third, we conclude that the circuit court properly determined that defendant's proposed move to Oakland Township and accompanying enrollment of the child in the Lake Orion schools would have altered the child's established custodial environment and that defendant failed to meet her burden of establishing by clear and convincing evidence that the move was in the child's best interests. This conclusion is consistent with our Supreme Court's recent decision in *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010) (*Pierron II*). In *Pierron II*, 486 Mich at 84-93, our Supreme Court engaged in a fact-sensitive analysis to determine that a mother's proposed move with her children from Grosse Pointe Woods to Howell, with an accompanying change of schools, would not constitute a change in the children's established custodial environment. There, the mother had primary physical custody of the children and the children spent the majority of their time with her even before the proposed move to Howell. *Id*. at 86-89. Indeed, the children typically spent time with their father only on the weekends, and the *Pierron II* Court noted that the children's move to Howell and proposed change of schools would not affect the father's weekend parenting time to any significant degree. *Id*. at 87-88. The Court emphasized that its holding was limited to the facts presented and stated, "we do not hold here that a proposed change of school will *never* modify an established custodial environment." *Id.* at 93 n 6 (emphasis in original).

In contrast to the facts of *Pierron II*, the proposed move to Oakland Township and accompanying change of schools in the present case would have altered the child's established custodial environment. This is because the established midweek split in parenting time had enabled the child to look to both parents during the school year "for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(c). The child's move to Oakland Township and accompanying change of schools would have consigned plaintiff to weekend-only parenting time during the school year. From the child's perspective, weekend-only parenting time with plaintiff would not have adequately substituted for the day-to-day interaction he previously enjoyed with plaintiff. See *Pierron II*, 486 Mich at 89 (observing that whether a move will alter a child's established custodial environment should be evaluated from the perspective of the child). Accordingly, under the facts presented in this case, the circuit court was correct to determine that defendant's move with the child and enrollment of the child in the Lake Orion schools would have constituted a change in the child's established custodial environment. *Brown v Loveman*, 260 Mich App 576, 596; 680 NW2d 432 (2004). Quite simply, defendant failed to meet her burden of establishing by clear and convincing evidence that the proposed move and change of schools was in the child's best interests. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 529-530; 752 NW2d 47 (2008).

We further conclude that the trial court correctly weighed the best-interest factors under MCL 722.23 to determine that granting additional parenting time to plaintiff on Friday afternoons was in the child's best interests.[1] Although the parties were equally situated with respect to many of the best-interest factors, at least two of the factors favored plaintiff. The evidence concerning factor (d) (the length of time the child has lived in a stable, satisfactory environment), indicated that the child had attended the same school for three years and had been an active participant with plaintiff in the local cub scout group. Although the child's schoolwork had faltered after the parties' separation, the child was still earning the same grades he had previously earned. The circuit court properly determined that additional parenting time with plaintiff would allow the child to continue in a stable school and extracurricular environment.

In addition, the evidence demonstrated that factor (h) (the home, school, and community record of the child), favored plaintiff. The child performed well in the Ionia schools, and apparently enjoyed participating with plaintiff in the local cub scout group. Moreover, the testimony revealed no significant problems concerning the child's living arrangements or home environment in Ionia. Given that there were no significant issues or concerns related to the child's existing home, school, or community record, the circuit court properly determined that the child would benefit from remaining in plaintiff's home and the Ionia schools.

After having thoroughly reviewed the record in this matter, we perceive no error in the circuit court's determinations that defendant's proposed move to Oakland Township and accompanying enrollment of the child in the Lake Orion schools would have altered the child's established custodial environment and that defendant failed to meet her burden of establishing by clear and convincing evidence that the move was in the child's best interests. Nor do we perceive any error in the circuit court's determination that plaintiff's parenting time should be slightly extended on Friday afternoons to accommodate the child's school schedule.

Defendant also argues that the circuit court erred by determining that her objections to the referee's recommended order were untimely. We review this unpreserved issue for plain error affecting defendant's substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). We find no plain error. The circuit court correctly applied MCR 3.125(E)(4) in this case. See *Rivette*, 278 Mich App at 329; see also *Hollis v Zabowski*, 101 Mich App 456, 458; 300 NW2d 597 (1980).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering

[1] In the alternative, we note that the record supports a change in parenting time under the factors delineated in MCL 722.27a(6).