STATE OF MICHIGAN

COURT OF APPEALS

EVAN DIXON, Plaintiff-Appellant,	UNPUBLISHED June 14, 2016
v	No. 329914 Houghton Circuit Court Family Division
STEPHANIE DIXON, Defendant-Appellee.	LC No. 2006-013135-DM

Before: STEPHENS, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Plaintiff-father and defendant-mother separated in 2004 and divorced in 2008. Throughout the years, the parties repeatedly clashed over custody, parenting time, education, and medical treatment of their three sons. At issue in this appeal, plaintiff sought sole physical custody of the couple's youngest child and additional parenting time with the elder two.

The circuit court discerned no ground to revisit the custody order in relation to the couple's older two sons, a decision soundly supported by the record. The court found that plaintiff established cause to reconsider an order granting defendant sole physical custody of the parties' youngest son but then failed to adequately consider on the record whether its award of joint physical custody was in the child's best interests. Accordingly, we affirm the circuit court's order as it relates to the older children but remand for further proceedings in relation to the youngest.

I. BACKGROUND

During the parties' brief marriage, defendant gave birth to two sons in close succession: J, who is now 14, and A, who is 13. The parties' 2004 separation was not a clean break and defendant gave birth to a third son, R, on February 19, 2006. Unable to reconcile the marriage, plaintiff finally secured a divorce judgment in 2008.

In the early days of marital strife, plaintiff frequently sought court intervention in the couples' disagreements over the children, but he and defendant usually reached a compromise on their own. For example, defendant preferred not to vaccinate the children and relied on homeopathic treatment for minor illnesses. However, she agreed to allow plaintiff to vaccinate

the children and take them to the doctor if he thought it was in their best interests. The parties often rearranged the parenting time schedule to meet each other's scheduling needs.

The parties' relationship remained rocky, however, and each made severe errors in judgment. Defendant once changed the children's school district and then pulled the children out of school to homeschool them without consulting plaintiff despite that they shared legal custody. Ultimately, the court ordered defendant to keep A and R enrolled in public school and hesitantly allowed defendant to homeschool J, who indisputably has special needs that were not being met in the small, rural school district. In January 2010, plaintiff drove while intoxicated with the children in his car. He careened off I-75 and into the median. Upon plaintiff's arrest, the officers found an open can of beer and marijuana in the car. Plaintiff spent four months in jail, one month in an inpatient treatment center, and one year on probation. He apparently has remained sober since that incident.

The court's last order in 2010 awarded the parties joint legal custody with defendant retaining sole physical custody of the children. For the next several years and without court interference, plaintiff exercised ever increasing parenting time with his children. By 2015, plaintiff spent the most time with R, who even defendant admits preferred to be in his father's care and custody. A vacillated between his parents' homes. J, on the other hand, stayed mostly with his mother, making only short visits to plaintiff's home.

On August 27, 2015, plaintiff filed a motion to change custody so that he would officially share joint physical custody of the children. In reality, plaintiff sought sole physical custody of R, noting that he "has had de facto primary custody of [R] for almost a year now and seeks joint custody of the other two children to ensure that their medical and educational needs are met[.]" Plaintiff accused defendant of having "a long history of investigation and intervention from Child Protective Services" (CPS)[1] and of suffering "from Borderline Personality Disorder." Plaintiff emphasized defendant's history of changing the children's schools or keeping them out of school altogether. He also accused defendant of withholding the children's insurance cards to prevent him from seeking medical assistance for the children and of withholding dental care for the past several years. Ultimately, plaintiff contended that R preferred to live with him, while J preferred to live with defendant and A had asserted no preference.

[1] This history was apparently created by plaintiff's "anonymous" reports to CPS. Plaintiff accused defendant of sexually molesting one of their sons when he was an infant. The charges were never substantiated and plaintiff agreed to a shared custody arrangement shortly thereafter, belying his belief in his own claim.

In 2014, plaintiff transferred ownership of his home to defendant in exchange for forgiveness of a child support arrearage totaling more than $24,000. Plaintiff left the home cluttered and in poor condition and then reported to CPS that defendant was living with the children in unsanitary conditions. When CPS arrived to investigate, they found defendant diligently working to remedy the home's state.

Upon the court's order, Houghton County Friend of the Court (FOC) Jeffrey Rule conducted an investigation. In Rule's October 2, 2015 recommendation, he noted that plaintiff had enrolled R and A in the Houghton School District and defendant agreed to support this decision. Plaintiff desired to enroll J in public schools and allowed his continuation of homeschooling under protest. Rule found that the homeschool program employed by defendant "offers all the core curriculum" and defendant promised to keep plaintiff informed of J's progress.

In relation to the children's medical care, defendant admitted that "she does not believe in the benefit of immunizations" and "will use home remedies or alternative medicine before bringing [the children] to the Doctor." Defendant asserted that she would "not actively prevent" plaintiff from having the children immunized and "would not make an issue" if plaintiff took the children to the doctor. Defendant did not deny that the children had not had a dental checkup or cleaning "for years" but asserted this was because the family had an outstanding bill. "The parties verbally agreed to split the bill so they can make appointments for the children."

The parties each informed Rule that R had "spent more time with [plaintiff] for most of the past year." Defendant indicated that she allowed this additional parenting time "because [R] enjoys spending time with his Father and she will not prevent it." Defendant asserted that J had spent very little time with plaintiff during that same period and defendant had to convince him to visit his father. Defendant described that A wanted to visit with his father on some occasions, but not others. After a mediation session, plaintiff asserted that that he wanted to split parenting time with A and R 50/50. Defendant wanted to keep A's residence with her, while allowing parenting time. Although she admitted that R "really enjoys being with his Father," defendant expressed discomfort "with a 50/50 split."

Rule ultimately noted that many of the parties' disagreements related to legal custody and they had reached successful resolutions during mediation. In relation to physical custody, Rule analyzed and weighed the best interest factors of MCL 722.23. For the most part, Rule found the parties equal in this regard. However, Rule determined that certain factors favored defendant and the current custodial arrangement: factor (a) (love, affection and other emotional ties), (e) (permanence as a family unit in the parents' homes), and (k) (domestic violence between the parties). Rule concluded that plaintiff failed to present clear and convincing evidence supporting that a change in the custody arrangement would be in the children's best interests. Modification of parenting time to allow R additional time with his father was warranted, however, Rule determined.

Plaintiff did not file objections to the FOC investigation because he did not receive Rule's report until the day of the October 5, 2015 hearing. In the meantime, however, plaintiff filed a motion to present testimony from several witnesses by telephone.

At the hearing, the circuit court judge noted that he had been presiding over the parties' custody disputes for nearly a decade. The judge had reviewed plaintiff's current motion and the FOC report and indicated, "[I]t would appear that the claims here after all this time would not meet the threshold necessary under Michigan law for a reconsideration of actual custody." Specifically, the court found a lack of just cause or a significant change of circumstances meriting reconsideration of the court's last custody order. The current dispute centered on

parenting time, the court discerned, and the court intended to proceed on that basis. The court gave plaintiff an opportunity to object to the FOC recommendation at that time and to convince the court that it should reconsider its earlier custody order.

Plaintiff contended that the court must first consider the children's established custodial environments. Plaintiff stated his intent to present evidence supporting that he had been R's primary custodian for the past year and therefore R's established custodial environment lay with him. He clarified that he wanted to continue having primary custody of R with defendant having parenting time. Plaintiff further contended that the parties' long battle over the children's school enrollment over the prior five years amounted to a change of circumstances warranting reconsideration of the custody order. To support this claim, plaintiff was prepared to present testimony from the county truancy officer. He also intended to present Lynette Boree, a psychologist who had evaluated J in late 2010.

The court agreed to consider evidence regarding R's primary residence in the past year to resolve any factual dispute regarding the child's established custodial environment. In relation to R alone, the court would consider the motion as seeking a change in custody. Plaintiff took the stand first and testified that R "has been living primarily with me for the past many months." There was no agreement or arrangement in place; rather, plaintiff testified that "it started [with] his mother just not picking him up when she was scheduled" to do so. A had also spent time in excess of the parenting time order with plaintiff, but not as much as R.

The court interjected that parenting time schedules merely set a minimum floor for the time the noncustodian parent enjoys with the children and the court would not consider an expansion of that schedule a significant change warranting reconsideration of the custody order. Plaintiff continued, "[R] has actually lived primarily with me," and asserted that he only discussed defendant failing to pick the children up at the end of scheduled parenting time sessions because these extensions were not discussed or agreed upon. Since this change in residence had occurred, defendant had not exercised parenting time with R on any schedule and sometimes waited two weeks in between visits.

Defendant testified that R lived primarily with her through February 2015. She then moved into a house that had previously been plaintiff's residence and moved the location of her therapeutic massage business into a smaller space, requiring her to store many of her business assets in her home. Defendant "found [her]self overwhelmed with housework to do" and "allowed [R's] father to keep him more often so that I could make some head way on making a nice, comfortable home for us." Accordingly, defendant conceded that R "spent a majority of time with dad from February until the end of July." During that period, R spent two to three days at defendant's home each week, but there was not a regular schedule. Beginning in August 2015, defendant resumed her previous schedule, keeping R approximately 50% of the week. Defendant claimed that she reverted to this schedule despite that R enjoyed spending time at plaintiff's house because R spent too much time on the computer instead of playing outside or doing other fun summer activities. Defendant testified that she permitted all three boys to spend extended time with plaintiff in the last week of August because plaintiff's relatives from the Detroit area were in town visiting. Since the schoolyear had resumed, however, defendant insisted that R and A had lived primarily with her, except for a long weekend when her 19-year-old daughter from a previous marriage was in the hospital in Marquette.

David Bezot, longtime friend of both parties and plaintiff's landlord and roommate, also testified at the hearing. Bezot indicated that R had lived in the home he shared with plaintiff since the previous winter. Since the 2015 schoolyear began, Bezot recalled that R took the bus to his house almost every day after school, but had divided his overnights equally.

At the close of the hearing, the court found "a significant change of circumstances with regard to [R's] residency that would allow the Court to look further into the issue with regard to [R]." The court discerned that "there has been essentially joint physical custody of the child [R] throughout the course of most of the past year."

> There have been roughly six months where the Court is persuaded [R] was primarily with his mother, another six months where [R] was primarily with his father; and I say primarily because, as one might expect, there has been no absolute uniformity in this, nor is that required based upon the child's needs and the parties' needs from time to time.

The court also acknowledged the parties' concession that R "would prefer to be with his father." Given the child's stated preference and the actual parenting time that had occurred during the prior year, the court concluded "it would seem justified . . . that the Court should revisit the issue of [R's] custody" and issue an order "consistent with that reality." The "reality" observed by the court based the witnesses' testimony "is what I call roughly half way back and forth over the course of some months; changing during some months and then remaining consistent or more consistent I think during this school year." The court therefore ordered the preexisting custody order changed to reflect joint legal and physical custody of the parties over R, but with primary physical custody of J and A with defendant. The court indicated acceptance of the structured parenting time recommended by Rule but emphasized that the parties were free to modify and extend parenting time whenever they so agreed.

Plaintiff demurred, "I guess I'm a bit taken back, surprised." He indicated that he had witnesses prepared to testify on the best interests of the child, including a child psychologist, the county truancy officer, an assistant prosecutor, and a CPS investigator. Plaintiff noted that the court never ruled on his motion to present these witnesses telephonically. He requested that the court "reconsider and continue this for a proper . . . hearing." The court denied plaintiff's request: "where the Court finds that the claims made do not meet the threshold it's not [un]usual for a party to be disappointed in such a finding, the moving party, and because they are indeed foreclosed from presenting some of the evidence."

In a written order entered on October 8, 2015, the court clarified that although plaintiff had not established a change of circumstances or significant cause to alter the custody order in relation to J and A, he had done so with respect to R. The court further clarified that it found an established custodial environment for R with both parents. The change of circumstances, however, was that R had spent equal time with his parents rather than residing primarily with defendant as provided in the court's 2010 order. Accordingly, the court reiterated that its custody order was amended to be consistent with the reality that the parties shared joint physical custody of R.

II. ANALYSIS

> Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. [*Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014).]

We must affirm custody orders " 'unless the trial judge made findings of fact against the great weight of evidence[,] committed a palpable abuse of discretion[,] or [made] a clear legal error on a major issue.' " *Butler v Simmons-Butler*, 308 Mich App 195, 200; 863 NW2d 677 (2014), quoting MCL 722.28.

When faced with a request to change custody, the court must first determine whether the proponent has "established a change of circumstances or proper cause for a custodial change under MCL 722.27(1)(c)." *Kubicki*, 306 Mich App at 540, citing *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003).

> The next step in a court's custody analysis requires a determination of the appropriate burden of proof. The child's established custodial environment governs this decision. A court may not modify or amend a previous judgment or issue a new custody order that changes a child's established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). [*Kubicki*, 306 Mich App at 540.]

The circuit court determined that in relation to R alone plaintiff had established a change of circumstances warranting reconsideration of the 2010 child custody order. The 2010 order awarded defendant sole physical custody of all three boys with reasonable parenting time for plaintiff. Circumstances had changed, the court reasoned, because R was spending significant amounts of time in plaintiff's care. This conclusion comports with the evidence gathered by the FOC and presented at the October 5, 2015 hearing.[2]

In his appellate brief, plaintiff briefly contends that proper cause or a change of circumstances warranted reconsideration of the custody award in relation to all three children. In this regard, plaintiff emphasizes that defendant had not secured immunizations for the children or taken them to the dentist, had pulled the children out of school, and was living with the children "in unsafe and unsanitary conditions." "Proper cause" to reconsider a custody order refers to situations where there are "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*, 259 Mich App at 511. A change in circumstances exists when "since

[2] Plaintiff contends that the circuit court should have permitted him to present additional evidence to establish that a change of circumstances had occurred in relation to R. Plaintiff apparently misunderstood the court's ruling in this regard.

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" in some manner above and beyond "normal life changes." *Id*. at 513 (emphasis in original).

However, plaintiff is equally to blame for the children's lack of dentistry as he shared responsibility for paying their medical bills. Plaintiff reported the "unsafe and unsanitary" condition of defendant's home to CPS approximately two weeks after plaintiff transferred the home to defendant. Defendant asserted that much of the clutter and mess was left by plaintiff and defendant was already diligently working to remedy the situation when CPS came to investigate. And the parties resolved issues regarding immunizations and schooling during mediation with the FOC. Accordingly, we discern no error in the circuit court's conclusion that plaintiff failed to establish cause to revisit the custody arrangement in relation to J and A.

The court then determined that R enjoyed an established custodial environment with both parties on an equal basis. Plaintiff contends that the court should have found that R's established custodial environment involved primary custody with his father based on the child's living arrangements for the past several months.

> A custodial environment "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." [MCL 722.27(1)(c).] Whether an established custodial environment exists is a question of fact to which the great weight of the evidence standard applies. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). In evaluating this issue, the focus is on the care of the child during the period preceding the custody trial. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). [*Kubicki*, 306 Mich App at 540.]

The court must also consider "[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship." MCL 722.27(1)(c). Overall, "[a]n established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

At the October 5 hearing, the circuit court took evidence solely on the issue of R's established custodial environment. The court heard testimony from both plaintiff and defendant, as well as the family friend with whom plaintiff had been living during the relevant period. Contrary to plaintiff's contention, the parties' agreement to temporarily alter R's living arrangements did not destroy R's established custodial environment with his mother. As stated in *Berger*, 277 Mich App at 706-707:

> The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian. [*Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981);] *Moser v Moser*, 184 Mich App 111, 114-116; 457 NW2d 70 (1990). A custodial environment can be

> established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order. *Hayes*[, 209 Mich App at 388]. An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort. *Foskett*[, 247 Mich App at 8].

The witnesses agreed that R had lived primarily with defendant until she moved her residence and business in the winter of 2015. For approximately six months, then nine-year-old R lived mostly in his father's home to allow defendant to unpack, declutter, and arrange her new home. During that time, all agreed that defendant exercised irregularly scheduled parenting time with R. Although R's primary residence was temporarily changed, the record evidence supports that his overall established custodial environment was not. Accordingly, we discern no error in this regard.[3]

As plaintiff proposed to change R's established custodial environment from equal time between his parent's homes to primary custody with plaintiff, plaintiff was required to present clear and convincing evidence that this change was in R's best interests. *Kubicki*, 306 Mich App at 540. The circuit court determined based on the FOC report that plaintiff had not met his burden.

The best interests of the child control in child custody actions. MCL 722.25(1). To this end, when making a custody determination, a circuit court must consider the 12 best interest factors of MCL 722.23 and state its factual findings and conclusions as to each factor on the record. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). The Child Custody Act (CCA) "places an affirmative obligation on the circuit court to 'declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act' whenever the court is required to adjudicate an action 'involving dispute of a minor child's custody.' " *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), quoting MCL 722.24(1). It is the sole duty of the court to determine what custody arrangement would be in the child's best interests and the court may not defer its judgment to the FOC. *Id.* at 194. To this end, MCL 552.507(4) of the FOC act requires the circuit court to conduct a de novo hearing if either parent objects to an FOC recommendation in writing within 21 days. *Id.*[4]

Neither the court nor the FOC allowed the parties an opportunity to file written objections to the report before the court's hearing. Rule first provided his recommendation to the parties just moments before the hearing. Plaintiff voiced his objection that the FOC recommendation

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[3] Plaintiff suggests that the circuit court should have considered evidence from his other proposed witnesses before making this determination. However, the truancy officer, agents involved in investigating the cleanliness of defendant's home, and a psychologist who evaluated J in 2010 could provide no insight into the matter of where R had an established custodial environment.

[4] The relevant statutory language was previously found in MCL 552.507(5).

was not in R's best interests at the hearing and reminded the court that he had served notification three days earlier that he planned to call witnesses to testify in this regard. Yet, the court asserted that it would hear evidence only regarding R's established custodial environment. Besides R's undisputed preference to remain in his father's primary care, the court made no consideration of the best-interest factors and did not discuss the FOC's analysis of any factor on the record. Given the circuit judge's long history with this case and familiarity with the parties, we do not question the soundness of his ultimate custody decision. However, the failure to give the parties an opportunity to object to the FOC recommendation and to present evidence at a hearing in this regard, and the omission of record findings by the circuit court regarding the best interest factors does not comport with the CCA or the FOC act. Accordingly, we are bound to remand for further consideration of R's best interests at a continued hearing at which the parties must be allowed to present up-to-date information and evidence. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994); *Ritterhaus*, 273 Mich App at 475-476.

We affirm the circuit court's judgment in relation to J and A. We remand for further proceedings regarding R's custody consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher