STATE OF MICHIGAN

COURT OF APPEALS

CHERI JO PACE, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED May 17, 2016
v	No. 330341 Missaukee Circuit Court
NICHOLAS MICHAEL BEDNOREK, Defendant/Counter-Plaintiff-Appellant.	LC No. 2012-008077-DS

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

The circuit court denied defendant-father Nicholas Bednorek's bid to take sole physical custody of his son and move eight hours away to Fenelon Falls, Ontario to live with his girlfriend. Because Bednorek failed to establish proper cause or a change in circumstances meriting this drastic change in the child's established custodial environment or that the move was in the child's best interests, we affirm.

I. BACKGROUND

Cheri Pace and Bednorek were romantically involved for several years and in 2010, had a son together—CRB. After their separation, both parties lived in the Houghton Lake area. On July 11, 2012, the parties entered a stipulated order for joint physical and legal custody of the child. Pursuant to that order, Bednorek was the child's primary caregiver and Pace paid him negligible child support. According to an April 2013 motion filed by Pace, however, the parties agreed to an alternating week parenting time schedule only one month after the court entered its original order. She sought a new order reciting that schedule and eliminating her child support obligation. The parties entered a new stipulated order on May 23, 2013, reflecting this schedule.

In November 2014, Bednorek moved for a change of domicile, custody and parenting time. Bednorek wished to relocate with CRB to Fenelon Falls, Ontario, Canada, to live with his new girlfriend and her son. At the evidentiary hearing regarding his motions, Bednorek accused Pace of smoking marijuana in front of CRB and asserted that CRB was unsafe in Pace's care

because her older son had sexually molested CRB when he was one year old.[1] Bednorek decried Pace's allegedly lax parenting style and claimed that she overmedicated their child for imaginary illnesses. The parties' ability to communicate had deteriorated, Bednorek lamented, and Pace tried to pit CRB against his new girlfriend.

Pace, on the other hand, presented evidence that moving CRB to a remote location and essentially eliminating the mother-child relationship was not in CRB's best interests. She also elicited evidence that the problems perceived by Bednorek were either exaggerated or of his own making. Specifically, Bednorek owned and operated a heating and cooling company in Houghton Lake. He planned to abandon this business even though he had not secured the proper licenses or a work visa to continue his career in a foreign country. Pace noted that her immediate family as well as Bednorek's resided in the Houghton Lake area and often provided free child care, but that Bednorek would have no support system in Canada. Pace further emphasized Bednorek's prior marijuana use and his alcohol addiction. Bednorek self-reported that he had been sober for 14 months.

During the proceedings, CRB began treating with a child psychologist. Dr. Stephen Osborn testified that CRB is equally attached to and loves both his parents. Osborn acknowledged that CRB's transitions between households was not seamless, but believed it would be more difficult on the child to have his time with either parent significantly reduced. Osborn had offered to meet with Pace and Bednorek together to work on their communication issues. Pace had been receptive, but Bednorek had not.

Following three days of evidence, a circuit court referee entered a detailed recommendation that Bednorek's motions be denied. The referee posited that the move was solely for Bednorek's romantic advantage, that the disagreements between Bednorek and Pace were not as significant as Bednorek contended, and that CRB was best served by enjoying a close relationship with both parents. Bednorek objected to the referee's findings and the circuit court conducted a de novo hearing. The court reaffirmed the referee's conclusions. Bednorek now appeals.

II. LEGAL PRINCIPLES

> 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).]

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

[1] Pace admitted the truth of the latter allegation. However, her older son had been placed outside the home in an adult foster care facility and a psychologist determined that CRB did not remember the incident.

under MCL 722.27(1)(c)." *Id.* 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). 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." *Id.* 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.]

In this case, Bednorek proposed to change custody by moving the child's domicile to a distant location. MCL 722.31(1) prohibits "a parent of a child whose custody is governed by court order [from changing] a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued."

> A motion for a change of domicile essentially requires a four-step approach. First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4) . . . support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence. [*Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013).]

> The best-interest analysis called for in motions to change domicile is identical to that required for motions to change a child's custody. In both circumstances, the touchstone is the child's best interest. In reviewing [the proponent's] best-interest arguments, we remain mindful that a trial court's findings on each factor should be affirmed unless the evidence clearly preponderates in the opposite direction. [*Kubicki*, 306 Mich App at 542 (first alteration in original, some quotation marks and citations omitted.]

III. ANALYSIS

A. CHANGE IN CIRCUMSTANCES OR PROPER CAUSE

Bednorek failed to make the threshold showing that proper cause or a change in circumstances existed to revisit the earlier custody order. To establish "proper cause,"

> 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 [in MCL 722.23], and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Vodvarka*, 259 Mich App at 512.]

With respect to a change of circumstances, this Court in *Vodvarka* explained:

> [T]o 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. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id*. at 513-514 (emphasis in original).]

In determining a change of circumstances, a court may only consider changes that have occurred since the last custody order. *Id*. at 514. In *Vodvarka*, this Court stated that while proper cause can be reviewed looking at the entire custody history, "we believe a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order." *Id*. at 515.

First, Bednorek incorrectly argues that he was not required to present evidence concerning proper cause or a change of circumstances because the trial court's initial custody decision was based on an agreement between the parties. A negotiated settlement agreement "does not diminish the court's obligation to examine the best interest factors and make the child's best interests paramount," and when a trial court enters a custody order, it implicitly indicates that (1) it has examined the best interest factors, (2) it has engaged in "profound deliberation" as to its discretionary custody ruling, and (3) it is satisfied that the custody order is in the child's best interests. *Harvey v Harvey*, 470 Mich 186, 193; 680 NW2d 835 (2004); see also *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994).

Second, the record evidence does not support Bednorek's cause. The parties shared joint legal and physical custody of CRB with equal parenting time pursuant to a May 2013 order, and in practice since August 2012. In support of his motion to change that arrangement, Bednorek insisted that he and Pace could not communicate or agree on a parenting strategy or CRB's

medical issues. "[A] change in circumstances or a proper cause to . . . review a custody order" may exist where "[t]he record demonstrates that the parties' disagreements have escalated and expanded to topics that could have a significant effect on the child's well-being." *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011). In *Dailey*, the parties disagreed over educational concerns as well as how best to treat the child's asthma and allergies. The parties' disagreements delayed treatment to the detriment of the child's health. *Id.*

The record now before us does not demonstrate such significant disagreements. Both parents were willing to treat CRB's allergies and colds. It appears that Pace was more apt to seek medical intervention for these concerns while Bednorek primarily relied on homeopathic methods. However, CRB's medical needs were never ignored and neither parent delayed treatment. The parties' other disagreements concerning pick-up times, methods of discipline, and food choices do not evidence parenting style disputes so great as to significantly affect the child's well-being. Pace and Bednorek admittedly employ different parenting styles. Even so, Dr. Osborn noted that CRB loves both parents, enjoys being with each parent, and misses the other parent when outside of his or her custody. The difficulty experienced by CRB could be resolved through improved communication, Dr. Osborn opined. While Bednorek originally expressed interest in meeting with Pace and Osborn to work on this issue, his interest dimmed as the hearing drew closer. Bednorek also pointed to Pace's alleged disparagement of him and his new girlfriend as a change in circumstances. However, Dr. Osborn testified that CRB never reported that Pace spoke negatively about his father or his father's girlfriend. The reports of this conduct came solely from Bednorek.

Given this record, we discern no error in the circuit court's conclusion that Bednorek failed to make the threshold showing to alter the trial court's earlier custodial order.

B. BEST INTERESTS

Even if Bednorek had met his threshold burden, we would affirm the circuit court's denial of his motions to change custody, domicile, and parenting time. Bednorek failed to establish that a change in the equal-time custody arrangement was in CRB's best interests. CRB has an established custodial environment with both parents. He spends equal time with his mother and father, and both parents equally provide for his care. Changing his domicile would alter CRB's established custodial environment and would require a fundamental change in custody. Accordingly, Bednorek was required to present "clear and convincing evidence" to support that his request was in CRB's best interests. *Kubicki*, 306 Mich App at 540; MCL 722.27(1)(c).

First, Bednorek failed to establish that the factors under MCL 722.31(4) supported his request to change CRB's domicile. MCL 722.31(4) requires the trial court to consider the following factors when a parent requests such a move, keeping the child as the primary focus:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether

the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

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

The burden is on the party requesting the change of domicile to establish by a preponderance of the evidence that these factors support the change. *Rains*, 301 Mich App at 325-327.

Bednorek failed to establish that the move had "the capacity to improve the quality of life for both" he and CRB. MCL 722.31(4)(a). The court determined that the Canadian school district had many advantages to Houghton Lake. This was the sole benefit of changing CRB's domicile, however. In moving, CRB would lose his opportunity to enjoy a close and personal relationship with his mother, grandparents, aunts, uncles and cousins. These individuals could assist CRB with his education. The only improvement to Bednorek's quality of life would be his proximity to his girlfriend. To gain this proximity, Bednorek would have to abandon his business for an uncertain employment future in Canada. Bednorek would also lose the childcare support system he enjoyed with his parents.

Moreover, each parent fully utilized his or her parenting time. Although there is no evidence that Bednorek's wish to relocate was motivated by a desire to separate CRB from Pace, this would be the inevitable result. With an eight-hour drive between Houghton Lake and Bednorek's proposed residence, CRB would only be able to visit Pace on school holidays and long weekends. The circuit court found that meaningful visitation would not be possible on these long weekends given the travel time. In between, Pace and CRB would be limited to telephonic and electronic communication. Given CRB's young age, the court concluded that these alternate communication methods were not preferable to "parenting time hands on." These conclusions under MCL 722.31(4)(b) and (c) were also supported by the evidence.[2]

Nor did Bednorek establish that awarding him sole physical custody would be in CRB's best interests under MCL 722.23. Pursuant to this provision of the Child Custody Act,

[2] The circuit court found MCL 722.31(4)(d) and (e) irrelevant and we discern no grounds for error in that regard.

[The] "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

The record evidence supports that both parties share a loving relationship with CRB, provided for CRB emotionally and financially, and were generally equal in relation to most best-interest factors. However, CRB had spent his entire young life having significant contact with both parents and living between their homes. Dr. Osborn testified that CRB would be best served by continuing this significant contact with both parents. That situation was stable. On the other hand, Bednorek and his new girlfriend had not enjoyed a stable and continuous relationship. They once broke up after an alcohol-fueled incident. In addition, Bednorek acknowledged that as of the October 2015 de novo hearing, things with his girlfriend were

"tough" and that she had not been to Michigan since the April hearing before the referee. Bednorek also ignored that CRB's family unit also included his grandparents who often provided for his care. Given this record, we find no clear error in the circuit court's conclusion that altering the existing custodial arrangement was against the child's best interests.

C. PSYCHOLOGICAL EVALUATION

Finally, Bednorek challenges the circuit court's rejection of his motion to compel Pace to submit to a psychological examination pursuant to MCR 2.311(A). Bednorek believed such evaluation was necessary because Pace professed to have certain intuitions or other psychic abilities. However, Bednorek and his counsel exaggerated Pace's claims before the court, accusing her of delusions that she could speak to the dead, a claim Pace never made. In fact, Dr. Osborn testified that he had spoken to Pace several times and observed no evidence that Pace suffered from delusions or any other mental disorder. Given this evidence from a mental health professional chosen by Bednorek himself, we discern no ground to find that the circuit court abused its discretion in failing to order a more in-depth examination. See *Burris v KAM Transp, Inc (On Remand)*, 301 Mich App 482, 487, 492; 836 NW2d 727 (2013).

We affirm.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly