

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER ANN WAGNER,

Plaintiff-Appellant,

v

RICHARD ALLEN REBBIE, JR.,

Defendant-Appellee.

UNPUBLISHED
September 18, 2012

No. 309676
Menominee Circuit Court
LC No. 06-011848-DP

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion to modify parenting time. Because the trial court failed to consider whether there was proper cause or a change of circumstances sufficient to warrant revisiting the prior parenting time order and failed to make any finding regarding the existence of an established custodial environment, we reverse and remand for further proceedings consistent with this opinion.

This case arises from the parties' disagreement about the parenting time arrangement in regard to their minor child. The minor child was born out of wedlock, and the parties entered into a consent judgment of filiation in 2007 after paternity was established. The consent judgment provided for joint legal custody, but gave plaintiff sole physical custody of the minor child. In August 2011, the custody order was amended. The new custody order provided for alternating weekly parenting time so that each party would have parenting time for an entire week during the summer months; however, during the school year defendant was entitled to parenting time every other weekend and Sunday evening during the weekends that he did not have the child. On January 20, 2012, defendant filed a pro se motion requesting the trial court to modify the parenting time order to provide for alternating weekly parenting time year-round instead of only during the summer months. A hearing on defendant's motion was held on February 27, 2012. At the hearing, defendant was represented by counsel but plaintiff represented herself. Following the hearing, the trial court granted defendant's motion to modify parenting time. A new parenting time order was entered on March 1, 2012. The new order provided that "the parties shall have the minor child on a week on/week off basis." Plaintiff now appeals as of right.

"This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or

the court made a clear legal error on a major issue.” *Berger v Berger*, 277 Mich App 700, 705, 716; 747 NW2d 336 (2008).

On appeal, plaintiff argues that the trial court erred by failing to determine whether proper cause or a change of circumstances existed to justify revisiting the parenting time order that was already in place.

The Child Custody Act, MCL 722.21 *et seq.*, governs matters relating to parenting time. MCL 722.27a. The act provides for the modification of a parenting time order by the trial court, stating that the court may “[m]odify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances.” MCL 722.27(1)(c). A parenting time order may only be modified if proper cause or a change of circumstances is first established. *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010).

In this case, the parties did not address proper cause or change of circumstances in their written filings with the trial court or during the hearing. Moreover, the trial court did not make any factual findings regarding proper cause or a change of circumstances in its opinion issued orally from the bench at the conclusion of the hearing. The written order entered following the hearing similarly did not address proper cause or change of circumstances. Therefore, we conclude that the trial court made a clear legal error by modifying parenting time without first finding that proper cause or a change of circumstances existed. Accordingly, we remand this case to the trial court for determination whether defendant established proper cause or a change of circumstances to justify revisiting the trial court’s previous parenting time order.

Plaintiff also argues that the trial court erred by failing to make a finding regarding the existence of an established custodial environment.

The trial court is required to make a determination regarding the existence of an established custodial environment¹ every time it considers issues affecting custody, including modification of parenting time schedules. MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010). The trial court’s conclusion regarding the existence of an established custodial environment determines the moving party’s burden of proof. *Wright*, 291 Mich App at 23. Following the determination that proper cause or a change of circumstances exists, the trial court must decide whether modification of parenting time is in the child’s best interests. *Id.*; MCL 722.27(1)(c). “When a modification would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is

¹ MCL 722.27(1)(c) provides that 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.” Courts should also consider the child’s age, environment, and the permanency of the relationship. MCL 722.27(1)(c). “An 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.” *Berger*, 277 Mich App at 706. It is an environment that fosters a relationship between custodian and child that is “marked by security, stability, and permanence.” *Id.*

in the child's best interest." *Wright*, 291 Mich App at 23. If the change would not alter an established custodial environment, the movant must establish by a preponderance of the evidence that the change is in the child's best interests. *Id.* Whether the proposed parenting time modification would alter the established custodial environment also controls the definitions of "proper cause" or "change of circumstances."² *Id.* at 27-28.

In this case, the parties did not present any argument in regard to the existence of an established custodial environment. Accordingly, the trial court did not make any factual findings in regard to the existence of an established custodial environment or whether any established custodial environment would be changed by the proposed modification of parenting time in its oral decision from the bench. The trial court's written order following the hearing is similarly devoid of any reference to an established custodial environment. Plaintiff retained counsel after the trial court issued its order granting defendant's motion for modification of parenting time, and plaintiff's counsel filed a motion for rehearing where the issue of a change in the established custodial environment was raised for the first time. The trial court denied plaintiff's motion for rehearing, stating that defendant did not "seek a change in custody" and that it "did not alter the established custodial environment." Accordingly, the trial court concluded that it was not "necessary" to "consider the threshold issues."

The trial court's order denying plaintiff's motion for rehearing did not explicitly make any factual findings in regard to whether an established custodial environment existed before its conclusory statement that its order modifying parenting time did not alter the established custodial environment. Further, the trial court did not explain whether the established custodial environment existed with plaintiff, defendant, or both parties. Moreover, the trial court appeared to erroneously conclude that modification of parenting time does not require consideration of the same threshold issues required in modification of custody. However, as discussed *supra*, modification of parenting time as well as modification of custody requires the trial court to make determinations regarding proper cause or change of circumstances and the existence of an established custodial environment. See *Id.* at 22-23.

"Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). In light of the fact that the issue was not addressed by the parties or the trial court during the hearing on defendant's motion to modify parenting time, we conclude that the record in this case does not contain sufficient information for this Court to make a de novo determination regarding the existence of an established

² The definitions of "proper cause" or "change of circumstances" set forth by this Court in *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003), apply when the change in parenting time will also change the established custodial environment. *Wright*, 291 Mich App at 27. However, when modification of parenting time will not alter the established custodial environment, a more expansive definition of "proper cause" or "change of circumstances" as explained by this Court in *Wright* will apply. *Id.* at 28.

custodial environment. Accordingly, we reverse the trial court and remand for a determination regarding the existence of an established custodial environment and the effect the proposed parenting time modification would have on such an environment if one exists.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens