STATE OF MICHIGAN

COURT OF APPEALS

JAMES N. CLARK III,

Plaintiff-Appellant,

v

JUDY L. FERRANTE, f/k/a JUDY L. CLARK,

Defendant-Appellee.

UNPUBLISHED
March 3, 1998

No. 201917
Kent Circuit Court
LC No. 95-002294-DM

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered on February 21, 1997 and subsequent order of March 7, 1997 denying his motion to set aside the judgment of divorce with respect to parenting time. We reverse and remand for further proceedings.

I

Plaintiff and defendant were married on April 30, 1982, and have two children, Angela, born on July 18, 1988, and James, born on May 16, 1992. The parties separated on August 15, 1995, and plaintiff commenced divorce proceedings on October 11, 1995. On January 16, 1996, a stipulation and temporary order was entered providing that the parties had joint legal custody while defendant had physical custody of the children. Regarding visitation rights, plaintiff had visitation rights for every other weekend from Friday at 6:00 p.m. through Tuesday morning, every other Monday through Tuesday morning, alternate holidays from December 27, 1995, to January 3, 1996, and two ten-day visits between January 3, 1996 and June 1, 1996.[1] It was also agreed that plaintiff could seek summer visitation. On June 10, 1996, the temporary order was amended to add three nonconsecutive weeks in the summer to plaintiff's parenting time. On November 25, 1996, the trial court entered another order modifying parenting time. Plaintiff had visitation during the school year beginning every other weekend after school on Friday through Sunday evening, one afternoon or evening a week for four hours, and alternate holidays and spring break.

The judgment of divorce modified plaintiff's parenting time. Although the parenting time would remain as it had been set forth in the order of January 16, 1996, plaintiff's parenting time would change

beginning with the 1997-1998 school year (on September 1, 1997). The trial court modified plaintiff's parenting time to: alternate weekends beginning after school on Friday through 8:00 p.m. on Sunday, Wednesday afternoons until 8:00 p.m., every other holiday and birthday, alternate spring breaks each year between the parties, half the Christmas break each year, and three nonconsecutive weeks in the summer. Plaintiff moved to set aside the judgment of divorce with respect to parenting time, but the trial court denied the motion in an order dated March 7, 1997.

II

Plaintiff first argues that the trial court erred in not requiring defendant to prove by clear and convincing evidence that it was in the best interests of the children to modify plaintiff's parenting time.

MCL 722.27a; MSA 25.312(7a) provides guidelines regarding parenting time. Specifically, § 7a(2) provides that if the parents agree on parenting time terms, the court shall order the parenting time terms unless the court determines on the record by clear and convincing evidence that the parenting time terms are not in the best interests of the children. Section 7a(3) also provides that a child has a right to parenting time unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health. Further, under MCL 722.27(1)(c); MSA 25.312(7), the court may modify or amend its previous orders or judgments for proper cause shown or because of a change of circumstances. However, the court shall not modify or amend its previous judgments or orders so as to change the established custodial environment of the children unless there is clear and convincing evidence that it is in the best interest of the children. *Id.*

Our review of the trial court's decision is controlled by MCL 722.28; MSA 25.312(8), which provides that all orders and judgments of the circuit court shall be affirmed on appeal unless the trial court made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. See also, *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

In the present case, the evidence showed that plaintiff provided guidance, discipline, comfort, and the necessities of life for Angela and James. Moreover, plaintiff exercised virtually all of his parenting time with Angela and James. Therefore, we hold that a custodial environment was established with plaintiff from August 1995 through September 1, 1997. See MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Because there was an established custodial environment, the trial court could not modify plaintiff's parenting time unless it found by clear and convincing evidence that it was in the best interest of the children to do so. *Id.* In reviewing the trial court's findings, we believe that the trial court committed clear legal error on a major issue. That is, the trial court failed to apply a clear and convincing evidence standard to determine whether it was in the best interest of the children to modify the order regarding custody and visitation in the judgment of divorce.

Moreover, the trial court's finding that it would be in the best interest of the children to reduce plaintiff's visitation with the children during the school year does not appear to be supported by clear and convincing evidence on the record. The trial court's findings in this regard were:

> I believe at present we have a system which was probably designed to award plaintiff maximum time with the children before his departure for Oregon. Little did anyone know he would be back again in a couple of months. I believe the system is probably not one which during the long pull over the school year is beneficial. It's probably not a problem, given the early stage of education that we're engaged in, but parents have no idea how complicated this becomes as we get up into junior high and high school or even in the higher elementary grades.
>
> I'm reluctant to upset the current arrangement immediately, but I do think it will have to be modified. I'm willing to leave the custody time, parenting time, plans in place as they currently are certainly for the current school and through the summer. This basically will entail the plaintiff having these long weekends on an alternating basis, apparently Thursday into – Thursday night into – or through Monday night, as I understand it, basically having a four-day weekend on an alternating basis.

Anticipated future problems that *may* occur with respect to schooling do not constitute clear and convincing evidence on the record that parenting time should have been modified. This is further supported by the evidence that the children were not having any problems in school, and, in fact, were performing quite well in school. Angela's and James' teachers testified to not having noticed any negative effects on the children caused by the extended parenting time schedule. Expert testimony also established that plaintiff's house was adequate for the children, that plaintiff's girlfriend interacted well with plaintiff's children, and that the children of plaintiff's girlfriend also interacted well with plaintiff's children.

Accordingly, the trial court's failure to apply the clear and convincing standard to justify modification of plaintiff's parenting time cannot be deemed harmless, especially where the evidence before us does not appear to reach the clear and convincing threshold that plaintiff's parenting time should have been modified. See *Fletcher, supra*, p 882 (upon a finding of error, appellate courts should remand to the trial court unless the error was harmless). On remand, the trial court should consider up-to-date information, and any other changes in circumstances arising since the original custody order. *Id.* We emphasize that the trial court cannot modify the original custody and visitation order unless the court finds by clear and convincing evidence that it is in the best interest of the children to do so.

III

Plaintiff next claims that the trial court erred by not making findings of fact on all the factors enumerated under MCL 722.23; MSA 25.312(3) (best interests of child defined). MCL 722.7a; MSA 25.213(7a) provides for parenting time and directs that parenting time shall be granted in accordance with the best interests of the children. "It is presumed to be in the best interests of a child to have a strong relationship with both of his or her parents." MCL 722.7a(1); MSA 25.213(7a)(1). Section 7a(6) provides factors that a trial court may consider when determining the frequency, duration, and type of parenting time to be granted. On remand, the trial court is free to consider those factors listed in § 7a(6), if applicable. Moreover, MCR 2.517(A)(2) provides that brief, definite, and pertinent

findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts. See also, *Fletcher, supra,* pp 883-884 (the trial court need not comment on every matter in evidence or declare acceptance or rejection of every position argued).

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] Plaintiff moved to Oregon on January 16, 1996, but returned to Kent County on May 6, 1996. During the time that he lived in Oregon, plaintiff had twenty overnight visits with his children. Most of the visits occurred in a duplex that plaintiff rented in Grand Rapids. Apparently, the January 16, 1996 order was entered with the parties knowing that plaintiff would be living in Oregon and the parties stipulated to the order to accommodate plaintiff living in another state.