STATE OF MICHIGAN

COURT OF APPEALS

BRUCE L. SWITZER,

Plaintiff-Appellant,

v

COLLEEN A. McCARTHY,

Defendant-Appellee.

UNPUBLISHED
November 13, 1998

No. 207327
Chippewa Circuit Court
LC No. 92-009775 DP

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying his petition to transfer primary physical custody of the parties' minor child from defendant to plaintiff. We affirm the order denying plaintiff's petition, but we reverse the order of sanctions against plaintiff.

I

Plaintiff claims that the trial court committed a palpable abuse of discretion by failing to transfer custody of the minor child. Plaintiff says that the trial court's finding that defendant's intrastate change of residence from Sault Ste. Marie to Lansing and her new employment status did not constitute a change of circumstances was clearly erroneous. We review discretionary decisions in child custody cases under a "palpable abuse of discretion" standard. MCL 727.28; MSA 25.312(8), *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Custody may be modified if a change is in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). However, the party seeking change bears the burden, *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991), of showing the proper cause or change in circumstances before a trial court considers the existence of an established custodial environment and the best interest factors, *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Plaintiff maintains that the parties' current custody arrangement is predicated upon the determination that the parties should maintain the status quo, which was based on evidence that the child was well adjusted and performing well in school. Accordingly, plaintiff argues that the intrastate change of residence represents a change in circumstances. Plaintiff relies on *Schubring v Schubring*, 190

Mich App 468, 471; 476 NW2d 434 (1991), in which the custodial parent planned to relocate the children from their Michigan community, where they were thriving socially and academically, to a Florida air base. *Id.*, 469-471. This Court held that a change in circumstances was established and therefore, that a change in custody was warranted to "preserve the highly successful status quo as much as possible". *Id.*, 471. In contrast, defendant here merely moved from Sault Ste. Marie to Lansing. In *Dehring v Dehring*, 220 Mich App 163, 165-166; 559 NW2d 59 (1996), this Court held that an intrastate move from Alpena to Kalamazoo did not constitute a sufficient change in circumstances. The Court distinguished an interstate move, which removes the child from the jurisdiction of the Michigan courts and requires court approval under MCR 3.211(C)(1), from an intrastate move, which requires only that the parent notify the friend of the court, MCR 3.211(C)(2). *Id.*, 166. Although this Court recognized the importance of community ties, it concluded that ties to the custodial parent are paramount and override competing ties to the community. *Id*. at 167. The Court commented that "a decision to award custody cannot necessarily tie a custodial parent to a particular community until the minor children reach the age of majority, nor should the custodial parent be fearful of losing custody if a decision is made to make an intrastate move." *Id.* Based on *Dehring*, we conclude that the intrastate move did not constitute a change in circumstances sufficient to warrant review of the best interest factors or a change of custody. *Id*.

Plaintiff also contends that because defendant obtained employment, the trial court should have ruled that this was a "change of circumstances". This Court has noted that a custodial parent's decision to acquire employment may constitute a change of circumstances sufficient to abate child support obligations, but is insufficient to negate them. *Watkins v Springsteen*, 102 Mich App 451, 455; 301 NW2d 892 (1980). Although *Watkins* involved abatement of child support, and not a proposed change of custody, both abatement of child support and modification of custody issues depend on the determination of whether a "change of circumstances" has taken place. We therefore conclude that the analysis in *Watkins* provides appropriate guidance in the present case. Applying the rationale of *Watkins*, we conclude that a custodial parent's acquisition of employment does not constitute a change of circumstances that warrants a change of custody. Finally, we note that plaintiff's additional complaints regarding "visitation and contempt" also represent an insufficient basis for changing custody. *Adams v Adams*, 100 Mich App 1, 13-14; 298 NW2d 871 (1980).

II

Plaintiff argues that the trial court committed a palpable abuse of discretion by failing to address several of the twelve statutory best interest factors, MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Because the trial court properly concluded that plaintiff failed to establish a change in circumstances, it was not required to address the best interest factors. *Dehring, supra* at 163.

III

Plaintiff also alleges that the trial court abused its discretion by awarding defendant her actual costs based on its conclusion that plaintiff's petition was filed for purposes of harassment. This Court will not disturb a trial court's determination that a claim was frivolous unless that determination was clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A claim is

frivolous if: (1) its primary purpose was to harass, embarrass or injure the prevailing party; (2) there was no reasonable basis to believe its underlying facts were true; or (3) it was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a).[1]

Although we conclude that defendant's intrastate move and new employment status do not constitute a sufficient change in circumstances, we cannot say that plaintiff's position is devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a). While the *Schubring, supra* case is distinguishable, it arguably lends some support to plaintiff's claim. We also note the original judge's findings that the parties were "constantly in the courtroom because [of defendant]." This statement appears to contradict the conclusion that *defendant* is entitled to costs, and that plaintiff filed his petition for purposes of harassment.[2] MCL 600.2591(3)(a); MSA 27A.2591(3)(a). We therefore conclude that the trial court's determination that plaintiff interposed this action for purposes of harassment is clearly erroneous. We therefore reverse the sanctions award.

Affirmed in part and reversed in part.

/s/ Henry William Saad
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] See also MCR 2.114(D), providing that the attorney's or party's signature on document certifies that the document has not been interposed for improper purpose and that the signer has made reasonable investigation into the factual and legal support for the document, and MCR 2.114(E), providing sanctions for violations of (D).

[2] See *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992) (trial court did not abuse its discretion in awarding attorney fees to defendant where the plaintiff continually violated custody and visitation orders, causing defendant to incur attorney fees).