

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BERNIE J. MALIN,

Plaintiff-Appellee,

v

PATRICIA L. MALIN,

Defendant-Appellant.

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UNPUBLISHED

April 3, 2001

No. 230958

Kent Circuit Court

Family Division

LC No. 98-011598

Before: Saad, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right the order denying her “motion for temporary and permanent change in custody” of the parties’ two minor children. We affirm.

The parties were divorced on May 14, 1999. Joint legal custody of the two minor children was awarded to the parties, while primary physical custody was granted to plaintiff. The judgment of divorce provided that “[e]ach party [would] foster, encourage, and support the relationship between the children and the other parent” and “work together in a cooperative spirit to assure consistency in discipline, schooling, and other matters affecting the upbringing of the children.” The judgment further provided that parenting time with the children was to be “reasonable and liberal as agreed upon by the parties,” but that in the event that the parties were unable to agree on such time, defendant would receive at a minimum alternate weekends and holidays, one evening per week, and one-half of the children’s school breaks.

On October 2, 2000, defendant moved for a change of custody on the ground that the two children had lived with her on an “every other week basis” from December 1999 to September 2000. Defendant further alleged that it was in the best interests of the children that she be awarded physical custody or, in the alternative, that the judgment be modified to provide joint physical custody “with the parenting time being shared on an every other week basis as has been the custom and practice of the parties over the course of the past nine months.”

The trial court held a hearing on the motion and entertained arguments on November 9, 2000. Following the hearing, the trial court found that defendant demonstrated only that the parties had engaged in experimental parenting time authorized by the judgment of divorce and that, as a matter of law, defendant had not met her burden of establishing a sufficient change in circumstances to warrant review of the custody issue. The court denied defendant’s request for a

change of custody on that basis. The court also encouraged the parties to contact the friend of the court in an attempt to resolve issues surrounding parenting time.

Defendant argues that the trial court erred in denying her request for a change of custody without first conducting an evidentiary hearing to reanalyze the statutory best interest factors pursuant to MCL 722.23; MSA 25.312(3). Under the circumstances presented, we disagree.

A custody award can be modified on a showing of proper cause or change in circumstances that establishes that the modification is in the children's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). However, a party seeking such modification must first establish the existence of such cause or circumstance before the court will be permitted to revisit the issue of custody. *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). In *Rossow*, this Court stated:

The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors. [*Id.* at 458.]

Thus, unless this initial burden is met, an evidentiary hearing to reanalyze the statutory best interest factors is neither required nor permitted. *Dehring, supra*.

Here, the trial court's decision to deny defendant's motion was based on its finding that defendant had failed in meeting this initial burden. We find no error in this conclusion. Defendant's motion is devoid of any reference to a "change in circumstances." Defendant does not allege that she is now in a better position to care for the children than at the time the judgment of divorce was entered, nor does she assert that plaintiff has since failed to provide the children with adequate supervision or care. Cf. *Sweet v Sweet*, 329 Mich 251, 255-256; 45 NW2d 58 (1950). Rather, she asserts merely that on the basis of the parties' prior voluntary parenting time arrangements, "it is in the best interests of the children that [she] be awarded full time custody." Defendant failed to provide any allegations of fact to support this contention. Nonetheless, despite the insufficiencies in the motion itself, the trial court held a hearing on the motion and permitted argument from both parties. Defendant again failed to assert any material change in circumstances and instead continued to rely on the voluntary parenting arrangement in support of her motion. Because defendant failed to meet the burden of establishing a material change of circumstances, the trial court was not permitted to hold an evidentiary hearing to reexamine the statutory best interest factors. *Dehring, supra*.

Defendant's reliance on *Schlender v Schlender*, 235 Mich App 230; 596 NW2d 643 (1999), in support of her argument that an evidentiary hearing is mandated on every motion to change custody is misplaced. In *Schlender*, the panel was called upon to address the validity of an administrative policy of the Kent Circuit Court that limited the availability of evidentiary

hearings in custody matters. After finding the policy at issue invalid as a local court rule not approved by our Supreme Court as required by MCR 8.112(A)(2), the *Schlender* panel reversed the trial court's order, stating:

We find that the petitioner in a custody matter cannot be deprived by local court rule of an evidentiary hearing. This Court has held that it is improper for a trial judge to decide the issue of custody on the pleadings and the report of the friend of the court when no evidentiary hearing was held. *Stringer v Vincent*, 161 Mich App 429, 432; 411 NW2d 474 (1987). The trial court must determine the best interests of the child as defined in MCL 722.23; MSA 25.312(3), and must make findings on each factor. A hearing is required before custody can be changed on even a temporary basis. *Mann v Mann*, 190 Mich App 526, 529-530; 476 NW2d 439 (1991). The court rules also recognize the right to a hearing in custody cases. MCR 3.210(C).

The policy at issue eliminates the right of a party seeking a change of custody to have an evidentiary hearing. Because postjudgment motions in domestic relations actions are governed by court rule, see MCR 3.213, a local court rule regarding domestic relations actions is invalid. [*Schlender, supra* at 233.]

Notwithstanding these comments, the panel's decision cannot be read as mandating an evidentiary hearing in every instance where a motion to change custody has been filed. The policy held invalid in *Schlender* allowed the trial court to decide the merits of a party's motion for change of custody without the benefit of an evidentiary hearing *even where the moving party had met its initial burden of demonstrating a proper purpose or change in circumstances*. *Schlender* does not, however, relieve the moving party of his responsibility to carry that initial burden of establishing the existence of such cause or circumstance. *Rossow, supra*. As discussed above, defendant was given a hearing on the motion and failed to meet her initial burden and, therefore, the trial court was neither obligated nor permitted to reexamine the prior custody decision.

Affirmed.

/s/ Henry William Saad  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell