

STATE OF MICHIGAN  
COURT OF APPEALS

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LISA LYNN HOLDEN,

Plaintiff-Appellee,

v

WILLIAM GEORGE HOLDEN, JR.,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2004

No. 250104

Kalamazoo Circuit Court

LC No. 93-002966-DM

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from the order denying his motion seeking sole physical custody of the parties' minor children. Defendant also challenges the trial court's ruling modifying "parenting time," which placed the children with plaintiff during the school year and with defendant during the summer, and which, according to defendant, effectively awarded physical custody to plaintiff, where the parties had previously stipulated to joint physical custody. We reverse.

On October 8, 1993, plaintiff filed a complaint for divorce. The judgment of divorce was entered on December 5, 1995, which granted joint legal custody of the children to both parties and primary physical custody to plaintiff. On March 7, 2001, defendant petitioned for change of custody. Pursuant to a stipulated order entered on October 30, 2001, the parties agreed to joint legal and physical custody of the children. The joint physical custody was to be exercised by the parties on an alternating weekly basis. On September 26, 2002, defendant again moved for change of physical custody. Defendant sought sole physical custody, and, in the alternative, he requested joint physical custody with him having the children during the school year and plaintiff having the children during the summer.

Defendant contends that the trial court erred in finding that there was no change of circumstances or proper cause shown. We agree. In custody appeals, the great weight of the evidence standard applies to all findings of fact. MCL 722.28; *Vodvarka v Grasmeyer*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 248058, issued December 2, 2003, slip op at 5). An abuse of discretion standard applies to discretionary trial court rulings such as custody decisions. *Id.* And questions of law are reviewed for clear legal error. *Id.*

In order to change custody, defendant had the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances existed before the trial court

was required to consider or visit issues concerning the established custodial environment and the statutory best interest factors, MCL 722.23. MCL 722.27(1)(c); *Vodvarka*, slip op at 6. “The plain and ordinary language used in MCL 722.27(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.” *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Therefore, if 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 by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.” *Id.* Not any change will do, but rather “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* impact on the child’s well-being, have materially changed. *Vodvarka*, slip op at 8 (emphasis in original). “[T]he evidence must demonstrate something more than the normal life changes . . . that occur during the life of a child.” *Id.* The question here is whether the trial court’s finding, that there had been no change of circumstances or proper cause, was against the great weight of the evidence.

Although defendant cites numerous facts in support of his claim that there was a change of circumstances and proper cause shown, we need only review some of defendant’s contentions, which are sufficient. Defendant alleged, and the record reflects, that plaintiff lived in four different residences with two different boyfriends, under questionable conditions, in a period of eleven months following entry of the stipulated order for joint custody in October 2001.<sup>1</sup> One of those boyfriends, who is now plaintiff’s husband, has a criminal record for felonious assault involving his ex-wife and is on probation.<sup>2</sup>

Minimally, there has been a significant change of circumstances in the lives of plaintiff and the minor children such that the trial court was required to determine the nature of the established custodial environment and address the statutory best interest factors. Four different residences in an eleven-month period does not constitute “normal life changes,” nor does the introduction to the children of a stepfather who has a felony conviction for domestic assault against an ex-wife. We also opine that the allegations, as supported by the record, reflect proper cause to revisit custody.<sup>3</sup> The trial court’s conclusion that the allegations referenced above were

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<sup>1</sup> The record also reflects that plaintiff filed for bankruptcy protection in 2002. The other matters raised by defendant about plaintiff’s life after entry of the stipulated order for joint physical custody give us concern, as they did the trial court, and arguably also reflect a change of circumstances and proper cause.

<sup>2</sup> Plaintiff’s current husband could not recall whether he plead no contest or guilty to the assault charge. He acknowledged that the allegations concerning the assault charge were that he had threatened his ex-wife with a bat and a knife, although he denied the use of those weapons at the custody hearing.

<sup>3</sup> “[P]roper cause means one or more appropriate grounds that have or could have a significant impact on the child’s life such that a reevaluation of the child’s custodial situation should be undertaken.” *Vodvarka*, slip op at 7.

similar to those made in defendant's prior custody petition is inapposite and incorrect because the current allegations regard different factual matters and individuals than those referenced previously. The March 2001 motion makes no mention of numerous moves in a short time frame, which can create instability in the children's lives, nor does the 2001 motion mention plaintiff's current husband. The trial court's ruling that there was no change of circumstances or proper cause was against the great weight of the evidence, and is thus reversed.<sup>4</sup>

Defendant also contends, in the context of the "parenting time" modification, that the trial court effectively made a change in the primary physical custody of the children without making findings with regard to the established custodial environment and the best interests factors. A court can modify or amend its previous orders of parenting time only for proper cause shown or because of a change of circumstances. *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999). "Parenting time shall be granted in accordance with the best interests of the child." MCL 722.27a(1)(best interests of the child is determined through review of the factors set forth in MCL 722.23; § 27a(6) provides factors the court may consider regarding parenting time). Pursuant to MCL 722.27(1)(c), when a modification of parenting time amounts to a change in the established custodial environment, the trial court should apply the standard used for a change in custody and refuse modification unless it is persuaded by clear and convincing evidence that the change would be in the best interests of the child. *Stevens v Stevens*, 86 Mich App 258, 270; 273 NW2d 490 (1978); *Stevenson v Stevenson*, 74 Mich App 656, 659; 254 NW2d 337 (1977).<sup>5</sup>

Should the trial court on remand deny defendant's motion for sole physical custody and once again address the alternating weekly arrangement versus a school year – summer custodial arrangement, the court shall comply with the case law and statutes cited in the preceding paragraph before rendering a decision.<sup>6</sup>

For purposes of clarity, we give the following direction on remand. With respect to defendant's motion seeking sole physical custody, the trial court, through review of the record, is to determine the nature of the established custodial environment, which impacts the burden of

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<sup>4</sup> The trial court's statement that had it addressed the best interest factors, it would have found the parties equal on all factors except two (favoring defendant) is simply factually and legally insufficient to preclude our decision to reverse. MCL 722.23; MCR 3.210(D); MCR 2.517; *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001)(court must consider and explicitly state its findings and conclusions with respect to each of the statutory child custody factors). In reversing the trial court, we wish to note and recognize the detailed and thoughtful effort made by the court with respect to the opinion. But the recitation of facts and the court's conclusions are not made in the context of the statutory best interest factors and the applicable burden of proof.

<sup>5</sup> We leave it to the trial court to determine, if necessary, whether any modification amounts to a change in the established custodial environment.

<sup>6</sup> The current custodial arrangement, i.e., children with defendant in the summer and with plaintiff during the school year, shall remain in place pending the trial court's resolution of this case in accordance with this opinion.

proof, and then address the statutory best interest factors, rendering sufficient findings on each of the factors, and thereafter render a ruling on custody. The parties shall be permitted oral argument on these matters and the opportunity to submit briefs. If the trial court determines that there have been relevant factual events which have occurred since trial and the filing of this appeal, the court may, in its discretion, reopen proofs. If the trial court denies defendant's motion seeking sole physical custody and revisits the matter of the alternating weekly custodial arrangement versus a school year – summer arrangement, the trial court shall render specific findings in regard to whether there has been a change of circumstances or proper cause shown *relevant as to this particular custodial arrangement matter*. Further, the trial court shall determine, assuming a finding of a change of circumstances or proper cause shown, whether it is in the “best interests” of the children to modify the current custodial arrangement, applying the appropriate burden of prove, predicated on the court's conclusion whether such a modification would effectively change the established custodial environment. Once again the parties shall be permitted oral argument and briefing on this issue, and the trial court may, in its discretion, reopen proofs if deemed necessary to a full and fair hearing on the matter. We decline defendant's request to remand to a different judge because the issue is not properly presented in his appellate brief, MCR 7.212(C), and, furthermore, we find it unwarranted on review of the record.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Michael J. Talbot