STATE OF MICHIGAN

COURT OF APPEALS

LYNETTE S. GETTER, also known as LYNETTE BRAIL, Plaintiff-Appellee, v DONALD C. GETTER, JR., Defendant-Appellant.	UNPUBLISHED May 20, 2004 No. 249854 Ingham Circuit Court LC No. 90-069187-DM

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant Donald Clare Getter, Jr., appeals as of right from an order denying his motion to modify custody. We affirm.

Defendant first argues that the trial court erred by dismissing his petition to change custody of the parties' daughter without first holding an evidentiary hearing.[1] We disagree.

This Court reviews a trial court's findings of fact in custody cases to determine if they are supported by the "great weight of the evidence;" the trial court's discretionary findings are reviewed for an abuse of discretion, and legal questions are examined for clear error. MCL 722.28; *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). The latter standard – clear legal error – applies where "the trial court errs in its choice, interpretation, or application of the existing law." *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001), citing *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

[1] At oral argument on appeal, counsel for defendant-appellant indicated that custody of the parties' daughter has been voluntarily changed to defendant which would render this argument moot on appeal. However, there is no record of the change of custody or of the circumstances under which it might have occurred before this Court. Accordingly, we will decide the issue of whether defendant was entitled to an evidentiary hearing on his motion to change custody. We find it more than a little disingenuous that counsel waited until he was well into his argument to even mention these circumstances to the Court.

A trial court can modify a custody order only where the moving party establishes by a preponderance of the evidence that "proper cause" or a "change in circumstances" supports a finding that a change in custody is in the child's best interest. MCL 722.27(1)(c); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003), citing *Dehring v Dehring*, 220 Mich App 163; 559 NW2d 59 (1996). If this initial burden is not met, "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." *Rossow*, *supra* at 458; MCL 722.27(1)(c). If the court finds that there is proper cause or a change in circumstances, it determines "whether an established custodial environment exists." *Id*. The answer to this inquiry determines the moving party's burden of proof. *Id*., citing *LaFleche, supra* at 695-696. If an established custodial environment exists with either or both parents, the moving party must prove by clear and convincing evidence that custody should be changed. *LaFleche*, *supra* at 696, citing *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992). If the court does not find that an established custodial environment exists with either or both parents, then the burden is a preponderance of the evidence. *LaFleche*, *supra* at 695, citing *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991). After determining the moving party's burden, the court's third step is to determine whether the moving party has demonstrated that a change in custody is in the child's best interest. *Rossow*, *supra* at 458. Only then can the court examine the best interest factors from MCL 722.23. *Id.*

This Court recently elaborated on what suffices as "proper cause" or a "change of circumstances" that will justify reconsidering a custody order. *Vodvarka*, *supra*. The Court defined "proper cause" as "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511. While noting that there are no "hard and fast rule[s]" in determining what constitutes proper cause, we stated that trial courts could consider the twelve best interest factors "in deciding if a particular, legally sufficient fact raised by a party is a 'proper' or 'appropriate' ground to revisit custody orders." *Id*. at 511-512. And regarding what constitutes a "change in circumstances," we held,

> [I]n order to establish a "change of circumstances," 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* effect on the child's well-being, have materially changed. . . . This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Id*. at 513-514 (emphasis in original).]

The trial court accepted defendant's allegations as true and still found that he failed to meet his burden to show proper cause or a change in circumstances; therefore, the court found that an evidentiary hearing was unwarranted. The trial court applied the correct standard and properly refrained from holding a hearing in this case. See *Id.* at 513-514.

Defendant also argues that the trial court's decision not to hear evidence in the custody matter violated his right to procedural due process. We disagree.

The trial court can accept a party's pleadings as true and decide the threshold issue without hearing evidence. See *Id.* at 512, citing MCR 3.210(C)(7). Moreover, defendant was not deprived of an opportunity to respond to evidence because no evidence was taken. The only thing considered were his pleadings, which were accepted as true. Defendant's due process rights were not violated. *Cummings v Wayne Co.*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

Defendant next argues that he is entitled to either an evidentiary hearing or a de novo hearing regarding child support orders predating April 26, 2001. We decline to consider this issue for lack of jurisdiction. MCR 7.203(A)(1); MCR 7.202(7)(a)(iii).

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio