

STATE OF MICHIGAN
COURT OF APPEALS

JULIE ANN BARNES, a/k/a JULIE ANN
GEISTEL,

Plaintiff-Appellee,

v

PAUL RICHARD BARNES,

Defendant-Appellant.

UNPUBLISHED
December 28, 2004

No. 255607
Jackson Circuit Court
LC No. 96-075272-DM

Before: Griffin, P.J., and O'Connell and Saad, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying his motion for change of custody. We find that defendant established a change in circumstances that warrants revisitation of the prior custody order, vacate the trial court's order, and remand for an evidentiary hearing on defendant's motion.

Defendant and plaintiff are the parents of three sons.¹ The 1996 judgment of divorce granted the parties joint legal and physical custody of the children. In June 2002, the parties agreed that the two older children would reside with defendant. Accordingly, in March 2004, defendant filed a motion for change of custody on the grounds that there had been a material change in circumstances. Finding that defendant had not demonstrated that a change of circumstances had occurred, the trial court declined to hold an evidentiary hearing and denied the motion.

Three standards of review apply in custody cases. MCL 722.28. We review a trial court's findings of fact under the great weight of the evidence standard, discretionary rulings, including custody decisions, for an abuse of discretion, and questions of law for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

¹ DOBs 2-6-87, 4-11-88, and 9-5-89

A custody award may be modified on a showing of proper cause or change in circumstances that establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The party that seeks a change of custody must establish, by a preponderance of the evidence, proper cause or a change in circumstances before the existence of an established custodial environment and the best interest factors may be considered. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Proper cause to change custody exists when an appropriate ground which has or could have a significant impact on the child's life merits a reevaluation of the child's custodial situation. A change in circumstances meriting a change in custody exists when conditions pertaining to the child's custody, which have or could have a significant impact on the child's well being, have materially changed. In determining whether proper cause or a change in circumstances exists, a trial court should consider the best interest factors. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509-514; 675 NW2d 847 (2003).

To establish the requisite change in circumstances to support a change in custody, the party seeking the change must prove by a preponderance of the evidence the existence of a basis for the trial court's decision. An appropriate ground should be relevant to at least one of the statutory best interest factors set out in MCL 722.23, must constitute something more than normal changes that occur in a child's life, and must have had or most certainly will have a significant effect on the child. After the movant has established a change in circumstances, the trial court can then reevaluate all the statutory best interest factors. *Vodvarka, supra*, at 513-514.

We find that defendant established the existence of a change of circumstances that warrants revisitation of the prior custody order, vacate the trial court's order denying defendant's motion for change of custody of the older children, and remand for an evidentiary hearing on defendant's motion.² No evidence showed, and defendant did not allege, that plaintiff agreed that the older children could reside with defendant only in order to protect the children's interests. Cf. *Dowd v Dowd*, 97 Mich App 276; 293 NW2d 797 (1980). The undisputed evidence showed that at the time defendant brought his motion, the older children had resided with him on a voluntary and permanent basis for nearly two years. The preference of a child as to his living arrangements is a statutory best interest factor a trial court must consider when resolving a custody dispute. MCL 722.23(i). Here, the parties' older children are seventeen and sixteen years of age, clearly are of sufficient age to be able to express a preference as to with which parent they would prefer to reside, and have expressed a desire to reside with defendant on a permanent basis. By asserting that the older children had resided with him on a permanent basis for nearly two years, defendant demonstrated the existence of a change in circumstances that would support a reevaluation of the existing custody order. *Vodvarka, supra*. The trial court's finding to the contrary was against the great weight of the evidence. *Phillips, supra*.

² Defendant's motion also included a request to modify child support. We express no opinion on that portion of the motion. The parties may address that issue in the trial court at a later time if circumstances warrant.

On remand, the trial court is to hold an evidentiary hearing on defendant's motion for change of custody of the older children to determine if such a change would be in the children's best interests. MCL 722.27(1)(c). The trial court must consider and explicitly state its findings and conclusions regarding each factor. *Foskett, supra* at 9. The trial court need not give equal weight to each factor, but may consider the relative weight of each factor as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998).

Vacated and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell

/s/ Henry William Saad