STATE OF MICHIGAN

COURT OF APPEALS

STEVEN R. RADULOVICH,

Plaintiff-Appellant,

v

MONICA KAUFMAN, f/k/a MONICA RADULOVICH CROWDER,

Defendant-Appellee.

UNPUBLISHED
May 26, 2005

No. 252647
Wayne Circuit Court
LC No. 88-803552-DM

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals by leave granted a trial court order regarding private schooling and an order regarding child support. We reverse and remand.

I. FACTS

Plaintiff and defendant were divorced on February 23, 1990. Plaintiff was awarded sole legal custody and physical custody of the parties' then two minor children, Steven, then age four, and Alexis, then age five. Steven resided with plaintiff from February 1990 to August 2002. In August 2002, Steven left his father's home and went to live with defendant after experiencing academic and behavioral problems. Defendant arranged for Steven to live with his paternal grandparents so that he could remain in Grosse Pointe North High School, the school he attended before leaving plaintiff's home.

On August 28, 2002, defendant filed a motion for change of custody. Defendant asserted that plaintiff threatened to arrange for Steven to live outside of plaintiff's home. Defendant argued that it was in Steven's best interest that she be given immediate custody of Steven. On January 31, 2003, the trial court issued an order changing physical custody of Steven to his paternal grandparents, Steven Radulovich, Sr., and Edith Radulovich. Joint legal custody was vested in Steven's paternal grandparents, as well as plaintiff and defendant. The order directed that the friend of the court investigate and make a recommendation regarding child support to be paid to Steven's paternal grandparents by plaintiff and defendant. The order also stated that the friend of the court must consider plaintiff's payments towards Alexis' college expenses in its calculations. In addition, the order provided that plaintiff reimburse defendant for child support funds received from September 2002 to January 2003.

Steven was arrested on March 6, 2003, for possession of marijuana and drug paraphernalia. He was expelled from his public high school. Defendant and Steven's paternal grandparents investigated several alternatives for Steven. They decided to send Steven to Northwest, a private school in Idaho. Northwest offered an accelerated program to allow Steven to graduate on time in August 2004. The program also offered group and individual counseling. The monthly tuition for Northwest was $5,665.

On July 11, 2003, the friend of the court issued a child support recommendation. The friend of the court recommended that plaintiff pay $644 a month and defendant pay $735 a month in child support to Steven's paternal grandparents. The friend of the court further recommended that if Steven was enrolled in the Ivy Ridge Academy Boarding School to complete his high school education, the support payments should shift over to defendant to help pay the approximate costs of $40,000 per year. The recommendation did not consider Steven's enrollment in Northwest.[1]

On July 30, 2003, defendant filed an objection to the friend of the court recommendation. Defendant requested that the trial court order plaintiff to pay a pro-rata portion of fees and expenses for Steven to attend Northwest. On September 18, 2003, the trial court held a hearing on defendant's objection to the recommendations of the friend of the court. The trial court decided that Steven would attend Northwest and that attendance was in Steven's best interest. The trial court concluded that three of the four joint legal custodians (i.e., the paternal grandparents and defendant) could make the decision to send Steven to Northwest.

On September 19, 2003, the trial court issued a scheduling order. The order scheduled an evidentiary hearing to determine the amount of support to be paid by the parties involved. The order stated that the parties were to submit proposed findings of fact by October 20, 2003. The trial court stated that failure to submit proposed findings of fact may result in the trial court refusing to receive exhibits and hear testimony.

Consistent with its prior ruling, the trial court entered an order regarding private schooling on October 9, 2003. The order provided that Steven was to "attend Northwest and other therapeutic programs that Northwest deem[ed] essential, until he graduat[ed]." The order provided that communication between Steven and his parents would be in the discretion of Northwest school officials. The order also provided that an evidentiary hearing would be conducted on October 27, 2003, to determine the amount plaintiff should pay toward Steven's schooling.

On October 27, 2003, the trial court held an evidentiary hearing to determine the amount of child support to be paid by the parties. The trial court found that plaintiff did not submit findings of fact and that there were no issues of fact. Plaintiff asserted that he never received the scheduling order that required the parties to submit findings of fact. Plaintiff opposed this action and requested to make an offer of proof before the trial court. The trial court initially denied

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[1] Apparently, the friend of the court was unaware of the decision to send Steven to Northwest. Therefore, the friend of the court used another boarding school to determine support payments.

plaintiff's request, citing his failure to comply with the scheduling order and stating that there were no issues of fact. Eventually, the trial court allowed plaintiff to present an offer of proof regarding issues of fact in dispute. Plaintiff made an offer of proof that he earned $1,500 a week on a draw against commission. Plaintiff also asserted that he has been on the job for less than a month and could not definitively specify his income. Plaintiff opposed defendant's proposed finding of fact that he earned $2,400 a week. The trial court entered an order that plaintiff pay two-thirds of the expenses related to Northwest, retroactive to the date of enrollment.

On December 9, 2003, plaintiff filed a delayed application for leave to appeal. This Court subsequently granted plaintiff's delayed application for leave to appeal.

II. EVIDENTIARY HEARING

Plaintiff's first issue on appeal is that the trial court erred when it failed to hold an evidentiary hearing before making a custody decision regarding the minor child because there were disputed factual issues. We agree.

A. Standard of Review

There are three standards of review in child custody cases. The great weight of the evidence standard applies to all findings of fact. Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Finally, a trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *LaFleche v Ybarra,* 242 Mich App 692, 695; 619 NW 2d 738 (2000).

B. Analysis

Joint custody in this state by definition means that the parents share the decision-making authority with respect to the important decisions affecting the welfare of the child. Where joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child. *Lombardo v Lombardo,* 202 Mich App 151, 159; 507 NW2d 788 (1993). Custody disputes are to be resolved in the child's best interests, as measured by the factors set forth in MCL 722.23. Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor, and the failure to do so is usually error requiring reversal. *Ybarra, supra*at 700. A trial court is not to change an established custodial environment unless there is clear and convincing evidence that it is in the best interest of the child. MCL 722.27(1)(c); *Hawkins v Murphy,* 222 Mich App 664, 674; 565 NW2d 674 (1997).

Before a motion hearing held in the trial court, the minor child's paternal grandparents and defendant decided that the minor child would attend an out-of-state private institution with a monthly tuition of $5,665. The decision of the minor child's grandparents and his mother to send him to the school was an important decision which affected the minor child's welfare. *Lambardo, supra at* 159. Pursuant to an order issued before the hearing, defendant, plaintiff, and the minor's paternal grandparents all received joint legal custody of the minor child. Plaintiff

opposed sending the minor child to the school. Therefore, there existed a dispute regarding an important decision affecting the minor child's welfare. The trial court found the following:

> I'll mention that on the question of whether or not he should . . . go to that school . . . it's not an issue. Three of the four custodians says he should and this court will decide that three of the four custodians can make that decision.

The trial court also found that it was in the minor child's best interest to attend the private school. However, the trial court did not evaluate the custody dispute according to the factors delineated in MCL 722.23. *Ybarra*, *supra* at 700. The trial court failed to consider or state its findings and conclusions regarding each factor. This is error requiring reversal. *McCain v McCain,* 229 Mich App 123, 124; 580 NW2d 485 (1998). Instead, the trial court decided that the decision of three out of four of the minor child's custodians was sufficient to satisfy the best interest of the child. The trial court's decision to do so was a legal error. Nothing in the record indicates that the trial court used the "best interest" factors set for in MCL 722.23 to make its decision. It can hardly be said that the decision of three out of four legal custodians constitutes clear and convincing evidence that the minor child's custodial environment should have been changed. The decision of the trial is reversed.

III. CHILD SUPPORT GUIDELINES

In plaintiff's second issue on appeal, he asserts that trial court abused its discretion in deviating from the child support guidelines without holding an evidentiary hearing.

A. Standard of Review

A trial court has the power to modify a support order upon a showing by the petitioning party of a change in circumstances which justifies modification. MCL 552.17(1); *Kosch v Kosch,* 233 Mich App 346, 350; 592 NW2d 434 (1999). If there is a factual dispute concerning the circumstances relating to modification, the court must hold an evidentiary hearing to determine the factual issues. *Varga v Varga*, 173 Mich App 411, 415-416; 434 NW2d 152 (1988). Modification of a child support order is a matter within the trial court's sole discretion. *Burba v Burba,* 461 Mich 637; 610 NW2d 873 (2000).

B. Analysis

The modification of child support in the instant case was prompted by the fact that the minor child changed custodial environments and lived with his paternal grandparents. Plaintiff was receiving child support payments before this time. In addition, the minor child was ordered to attend the private school before the modification hearing. Therefore, there was a change in circumstance to warrant a modification hearing.

At a conference before a scheduled hearing, the trial court directed the parties to file proposed findings of fact. Defendant filed proposed findings of fact, while plaintiff failed to do so. At the hearing, the trial court found that plaintiff did not submit findings of fact and that there were no issues of fact. The trial court informed the parties that it outlined a decision based on the findings of fact defendant submitted. Plaintiff opposed this action, asserting that he never received the scheduling order, and requested to make an offer of proof before the trial court. The

trial court refused to allow plaintiff to make an offer of proof, stating that plaintiff had not complied with the scheduling order. Eventually, the trial court allowed plaintiff to present an offer of proof regarding issues of fact in dispute.

Plaintiff contends that the trial court erred when it refused to conduct an evidentiary hearing on the child support modification issue. However, plaintiff's counsel was in attendance at a conference before the hearing and noted on his file that something was to be filed "one week prior to hearing." Plaintiff was also served with defendant's proposed findings of fact before the hearing and did not respond. In addition, the trial court allowed plaintiff to make an offer of proof regarding what he wished to establish at an evidentiary hearing. Plaintiff made an offer of proof regarding a change in jobs and opposed defendant's proposed finding of fact that he earned substantially more money than he actually did. Plaintiff also noted that his new job was not necessarily a reduction in income because he did anticipate percentage kickers which may have enhanced his income. Therefore, plaintiff conceded that his income had not "necessarily" been reduced. Even after trial court allowed plaintiff to make an offer of proof, it held that there was no factual dispute and that an evidentiary hearing was unnecessary. Plaintiff was entirely aware that he was to submit proposed findings of fact to the trial court. His failure to do so resulted in clearly articulated court sanctions. In addition, plaintiff was able to make an offer of proof regarding factual disputes. Therefore, the trial court did not err in accepting defendant's proposed findings of fact.

Plaintiff also contends that the trial court erred in deviating from the child support guidelines when it required him to pay two-thirds of the minor child's tuition at the private school. In determining the contributions to support that parties must make, the trial court must generally follow the formula developed by the friend of the court. MCL 552.17; *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003). The assessment of support and the support formula are based on the child's needs and circumstances and each parent's ability to pay. *Id.* A court may deviate from the support formula only if application of the formula would be unjust or inappropriate. MCL 552.17; *Ghidotti v Barber*, 459 Mich 189, 196; 568 NW2d 883 (1998). The Court must specify in writing or on the record all of the following: 1) the support amount determined by application of the child support formula; 2) an alternative support recommendation and all factual assumptions upon which the alternative recommendation is based; 3) how the support order deviates from the child support formula; and 4) the reasons why application of the child support formula would be unjust or inappropriate. MCL 552.17; *Ghidotti*, *supra* at 196. All relevant factors must be considered, including the child's needs and the parties' abilities to pay. *Varga*, *supra* at 415-416.

In the instant case, the friend of the court recommended that plaintiff pay $644 a month and defendant pay $735 a month in child support to the minor child's paternal grandparents. The friend of the court further recommended that if the minor child was enrolled in the Ivy Ridge Academy Boarding School to complete his high school education, the support payments should shift over to defendant to help pay the approximate costs of $40,000 per year. The decision to send the minor child to Northwest was made after this recommendation. The recommendation of the friend of the court made no mention of support payments were the minor child to attend the private school that he eventually enrolled in. Therefore, defendant filed an objection to the friend of the court recommendation. Defendant requested that the trial court order plaintiff to pay a pro-rata portion of fees and expenses for the minor to attend the selected private school.

Defendant submitted recommendations pursuant to child support guidelines. The trial court announced its deviation from support guidelines without an evidentiary hearing. The trial court entered an order that plaintiff pay two-thirds expenses related to the selected private school, retroactive to the date of enrollment.

The trial court took judicial notice of the child support guidelines submitted with defendant's proposed findings of fact. Pursuant to the guidelines, plaintiff's support payment would have been $258 per week. The trial court articulated the reasons why the application of the support guidelines would be unjust or inappropriate. MCL 552.17; *Barber*, *supra* at 196. The trial court stated that the minor child had "independent" and "special" needs and that "this [was] an exceptional case." The trial court determined that the child support formula would be inappropriate given the exceptional nature of this case. However, the amount of the trial court's deviation from the guidelines is questionable. The amount of child support according the guidelines was $258 per week. The expenses associated with the minor child attending the selected private school amounted to $5,665 per month. Plaintiff earned a substantially higher income than defendant. Plaintiff's weekly income was $2,400 and defendant's weekly income was $1,020. The parties relative income alone does lend credence to the trial court's finding that plaintiff pay two-thirds of the minor child's tuition to attend the selected private school. However, the trial court did not consider its own prior support order granting plaintiff credit for any monies used to support the parties' other child's college education. At the hearing, the trial court only considered the parties' incomes and did not consider its prior order regarding finances plaintiff contributed to the other child's college education. In light of the prior support order, a subsequent order for plaintiff to pay two-thirds of the minor child's tuition without taking into account the credit received for paying the parties' other child's educational expenses is an abuse of discretion. Therefore, we reverse the trial court's child support order.

The trial court's orders regarding private schooling and child support are reversed and this case is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette