

STATE OF MICHIGAN  
COURT OF APPEALS

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TIXKETJE GREENLEE,

Plaintiff-Appellant,

v

MICHAEL LASHAWN DAVIS,

Defendant-Appellee.

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UNPUBLISHED

December 11, 2008

No. 285036

Saginaw Circuit Court

LC No. 06-059393-DP

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this child custody case, plaintiff appeals as of right the trial court's order denying her motion to modify parenting time. Plaintiff also appeals the trial court's custody order, which granted defendant parenting time and joint legal custody of the parties' son. Because we conclude that the trial court did not commit clear legal error or make factual findings against the great weight of the evidence, we affirm the custody order. In addition, because we conclude that the trial court did not abuse its discretion in denying plaintiff a hearing on her motion to modify parenting time, we affirm the trial court's order denying the motion.

Following a child custody hearing, the trial court granted the parties joint legal custody of their son and awarded plaintiff sole physical custody. The trial court awarded defendant parenting time. This Court must affirm a child custody order unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008).

Plaintiff first argues on appeal that the trial court committed clear legal error when it determined that the custody order in the consent judgment of filiation<sup>1</sup> was not a valid custody order for purposes of MCL 722.27, such that it was not required to find proper cause or change of circumstances before modifying or amending the order. See MCL 722.27(1)(c). We disagree.

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<sup>1</sup> This custody order granted plaintiff sole legal and physical custody of the parties' son.

The trial court held that it could modify or amend the custody order in the consent judgment of filiation without finding proper cause or change of circumstances because the order had been inserted into the judgment of filiation by the prosecutor ex parte, without consultation of the parties. Plaintiff, however, argues that, because MCR 2.612(C) allows a party one year to seek relief from a judgment, and because defendant did not challenge the custody order for more than a year after the judgment of filiation was entered, the custody order was a valid order. Plaintiff's argument is without merit. First, the argument does not address the trial court's reasoning for concluding that it was not required to find proper cause or change of circumstances before modifying or amending the custody order. Second, MCR 2.612(C) is not applicable to the present case. The rule provides that a motion for relief from judgment "must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken." MCR 2.612(C)(2). Defendant filed a motion for change of custody, not a motion for relief from judgment. Plaintiff has provided no authority suggesting that a motion for change of custody is governed by the time limits in MCR 2.612(C).

Moreover, the trial court did not incorrectly interpret or apply the law when it concluded that it could modify or amend the custody order in the judgment of filiation without first finding proper cause or change of circumstances. A custody dispute is to be resolved in the best interest of the child. *Mason v Simmons*, 267 Mich App 188, 194-195; 704 NW2d 104 (2005). The best interest of a child is determined by analyzing the 12 statutory factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The trial court must state on the record its factual findings and conclusions regarding each best interest factor. *Treutle v Treutle*, 197 Mich App 690, 694; 495 NW2d 836 (1992).

MCL 722.27(1) provides in relevant part:

If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

(a) Award the custody of the child to 1 or more of the parties involved . . .

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(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

The first sentence of MCL 722.27(1)(c) only applies to cases in which a party is attempting to alter or modify a previous custody order, such that the trial court would be required to reconsider a previous determination of the best interest factors. *Thompson v Thompson*, 261 Mich App 353, 361; 683 NW2d 250 (2004); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

In the present case, when the trial court awarded the parties joint legal custody of their son and granted defendant parenting time, the trial court did not reconsider a previous determination of the best interest factors. Rather, this custody award resulted from the trial court's first consideration of the best interest factors. According to the trial court, the custody order in the judgment of filiation was placed there by the prosecutor ex parte, without consultation of the parties. Plaintiff does not contest the trial court's statement, and nothing in the record indicates that the trial court, before signing the judgment of filiation, considered the best interest factors. Thus, the trial court was not required to find proper cause or change of circumstances before modifying or amending the custody order in the judgment of filiation.<sup>2</sup>

Plaintiff also argues on appeal that the trial court's findings on factors a, b, c, d, e, f, j, and l of the best interest factors, MCL 722.23, are against the great weight of the evidence. We review the trial court's findings on the best interest factors under the great weight of the evidence standard, and we will affirm the findings unless the evidence clearly preponderates in the opposite direction. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). The trial court's findings were based on the testimony presented at the custody hearing, and we are not convinced by plaintiff's argument that any of the findings are against the great weight of the evidence. Accordingly, we affirm the trial court's factual findings as to the best interest factors.

Although plaintiff argues that the trial court's factual findings as to the best interest factors are against the great weight of the evidence, plaintiff does not articulate any argument that the trial court abused its discretion in granting the parties joint legal custody of their son or in awarding defendant parenting time. Moreover, based on our review of the record, we see no basis to conclude that the trial court abused its discretion in granting defendant parenting time or in awarding joint legal custody. We therefore affirm the trial court's custody order.

Finally, plaintiff argues that the trial court erred when it refused to hear her motion to modify parenting time, which was based on her allegation that defendant abused the parties' son during the son's first overnight visit with defendant. We disagree.

Before it refused to hear plaintiff's motion to modify parenting time, the trial court reviewed a letter from the Department of Human Services, in which a Child Protective Services (CPS) employee summarized CPS's investigation of a complaint alleging physical abuse of the parties' son and its findings following a separate welfare check of the child. The CPS employee informed the trial court that CPS found no evidence of the son being abused. The employee stated that the child "was happy, healthy and very active with no injuries." Based on this letter, written by a neutral third-party, the trial court did not abuse its discretion in refusing to grant plaintiff a hearing on her motion to modify parenting time.

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<sup>2</sup> Because we conclude that the trial court did not commit clear legal error in concluding that it could modify or amend the custody order in the judgment of filiation without finding proper cause or change of circumstances, we decline to address whether the trial court abused its discretion in determining that, in fact, proper cause or change of circumstances did exist.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio