STATE OF MICHIGAN

COURT OF APPEALS

ANGELA LYNN BURKE, a/k/a ANGELA LYNN PYRYT, Plaintiff-Appellee,	UNPUBLISHED April 17, 2014
v	No. 317022 St. Clair Circuit Court Family Division
SCOTT ANDREW LOBODZINSKI, Defendant-Appellant.	LC No. 01-003422-DS

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's June 13, 2013 order regarding custody of the parties' minor child, which modified parenting time following plaintiff's motion for a change of custody.[1] We reverse and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant, who were never married, had one daughter together. An order of filiation entered March 28, 2002, established defendant's legal paternity. The order granted the parties joint legal and physical custody of the child, but did not establish a parenting time schedule or the child's primary residence. It appears that the parties shared custody of the child in a week-on, week-off arrangement until early 2004. At that point, plaintiff was deployed to Iraq and the child lived with defendant in the Bay City area until sometime around August 2005. When she returned from Iraq, plaintiff sought to change the child's primary residence to St. Clair County. The trial court entered an order in September of 2005 denying the request and awarding defendant primary custody of the child during the school year and plaintiff primary custody of the child during the summer. Rather than adhering to this schedule, plaintiff moved to Bay City

[1] The trial court's final order states that it grants plaintiff's motion to change custody. However, in its written opinion, the court stated that this case involved a change in parenting time, not a change in custody. Although the court granted plaintiff's request that the minor child primarily live with her during the school year, it did not grant plaintiff sole physical custody.

and the parties resumed their week-on, week-off parenting time schedule. The trial court entered an order on January 16, 2008, that reflected this arrangement, but provided that the child's primary residence would continue to be with defendant for the school year.

On December 4, 2012, plaintiff filed a motion "regarding change of custody." At this time, plaintiff was married to Justin Burke and the couple had two children together. Burke obtained employment in Troy, Michigan, so he and plaintiff planned to move from Bay City to St. Clair, where they had purchased a home. Plaintiff wanted the child to move to St. Clair and attend school there. Plaintiff asserted that the move would improve the child's quality of life. Plaintiff also alleged that she would not work and that she would be better able to meet the child's needs by remaining in the home. Plaintiff noted that the child was 12 years old and beginning her "physical and emotional development." Plaintiff requested custody of the child during the school year, with defendant having custody during the summer.[2]

At a hearing on December 20, 2012, the trial court found that plaintiff's move from Bay City to St. Clair constituted proper cause or change in circumstances that would permit it to reevaluate the January 16, 2008 custody order. The court noted that plaintiff's move to St. Clair, which was less than 100 miles, made it difficult for the child to travel to school in Bay City during plaintiff's week of parenting time. The trial court determined that it would hold an evidentiary hearing to decide if one party should receive sole physical custody or if parenting time should change.

The trial court held an evidentiary hearing on February 5, 2013. At the hearing, the trial court heard testimony from plaintiff, plaintiff's husband, defendant, defendant's wife, and defendant's mother. Among other things, plaintiff testified that she was a stay-at-home mother. She also testified that staying at home gave her the time she felt she needed with the child. Plaintiff's husband, Justin Burke, testified that he earns a higher salary at his new job in Troy, so plaintiff does not need to work. He said that he prefers that plaintiff be a stay-at-home mom, and he thinks it is in the minor child's best interests for plaintiff to be a stay-at-home mother. Burke also said that he and plaintiff planned to continue with this arrangement, where he worked and she stayed at home.

On February 14, 2013, the trial court issued a written opinion. The court noted that although plaintiff filed the motion to change custody, both parties agreed that the existing schedule was not practical and not in the child's best interests. The court concluded that this case required only a change in parenting time, not a change in custody. In part because plaintiff's move was less than 100 miles from Bay City, the trial court concluded that it was possible for the child to maintain an established custodial environment with both parents while altering the parenting time schedule to address the change in circumstances caused by plaintiff's move.

[2] Plaintiff did not request sole physical custody of the child. Rather, it appears she wanted to change the parenting time schedule and the child's primary residence.

The court then evaluated the parenting time factors listed in MCL 722.27a(6), concluding that only factors (e) and (f) were applicable in this case. With respect to factor (f), the court found that there was "no question given the history of the parties in this case that whatever parenting time schedule is established both parents will follow it." With respect to factor (e), the court again noted that the current schedule must change, as it was not sustainable and not in the child's best interests. The trial court noted that the parties recognized that the child should attend school from one home or the other, but not from both, because of travel issues. As such, the child would have to reside primarily with one parent during the school year.

Next, the court evaluated the best interest factors set forth in MCL 722.23. The court found the parties equal on most factors. Regarding factor (c), the court noted that plaintiff is a stay-at-home mother. With respect to factor (h), the court observed that if the child lived with plaintiff, she would be able to attend school directly from home and return home after school. Consequently, it would be easier for her to participate in extracurricular activities. In addition, if the child remained in the Bay City School District, she would have to be accepted under a school of choice program or registered using her grandparents' home address.

After examining the record, the trial court concluded that it was in the child's best interests to live with plaintiff during the school year because she would not have to leave home early to go to school or be delayed in returning home from school. This arrangement would give the child more time for studying and extracurricular activities. In addition, the trial court found that plaintiff, who was not working, could be home for the child when she left for school and when she returned, while defendant, who worked, could not be home at those times. The court awarded defendant parenting time every other weekend during the school year and during most of the child's breaks from school, including the summer.

On June 5, 2013, before the court entered an order in accordance with its written opinion, defendant filed a motion for rehearing or reconsideration, citing MCR 2.119(F). Defendant noted plaintiff's testimony that she was a stay-at-home mother, and the implication that she would continue to be a stay-at-home mother. Defendant alleged that after the trial court issued its written opinion, he had discovered that plaintiff either had a job at the time of her testimony at the evidentiary hearing or that she had obtained a job only weeks after the evidentiary hearing. In support of this assertion, defendant attached an article from the Detroit News that included plaintiff's name and photograph and identified her as a clerk for the Macomb Circuit Court. Defendant also alleged that plaintiff's parents now live with plaintiff and her husband. Defendant asked the trial court to delay entering an order consistent with its February 14, 2013, written opinion and hold a supplemental evidentiary hearing because these newly discovered facts presented "distinctly different circumstance[s]" than those which plaintiff presented at the February 5, 2013, evidentiary hearing.

The trial court denied defendant's motion for rehearing or reconsideration on June 11, 2013. The trial court held that because defendant asked the court to consider evidence that arose after the evidentiary hearing, the motion for reconsideration was "too far removed from the evidentiary hearing and evidence sought at that hearing for granting the [m]otion."

On June 13, 2013, the trial court entered a written order consistent with its February 14, 2013 written opinion.[3] The order granted plaintiff's motion for a change of custody and ordered that plaintiff would have custody of the child during the school year and defendant would have custody during the summer.

II. CHANGE OF ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant contends that the trial court erred in concluding that the June 13, 2013 order did not change the child's established custodial environment. We agree.

When reviewing a custody order, this Court applies three standards of review. See MCL 722.28; *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009). First, this Court must determine if the trial court made a clear legal error on a major issue; a clear legal error occurs when the trial court "errs in its choice, interpretation, or application of the existing law." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010) (quotation omitted). Second, this Court will not disturb the trial court's findings of fact unless they are against the great weight of the evidence. *Brausch*, 283 Mich App at 347. Finally, this Court reviews the trial court's discretionary rulings for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). In custody cases, an abuse of discretion occurs when "the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.*

A party seeking to modify custody or parenting time must first show, by a preponderance of the evidence, a "proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision." *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011). See also MCL 722.27(1)(c). In the case at bar, the trial court found that plaintiff's move constituted a proper cause or change of circumstances to warrant reconsideration of the January 16, 2008 custody order. Defendant does not contest this finding.

Once the moving party has shown proper cause or a change of circumstances, the trial court must determine if the proposed modification would change the child's established custodial environment. See MCL 722.27(1)(c); *Parent v Parent*, 282 Mich App 152, 154-155; 762 NW2d 553 (2009). A custodial environment is established "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). It is "marked by security, stability, and permanence." *Berger*, 277 Mich App at 706. If the proposed custody or parenting time modification would alter the child's established custodial environment, the party seeking the modification must show, by clear and convincing evidence, that the modification is in the best interest of the child. *Parent*, 282 Mich App at 155. If the modification would not alter the child's established custodial environment, the moving party need only show that the modification is in the child's best interest by a preponderance of the evidence. *Id.*

[3] It appears the delay in entering this order was caused by plaintiff's failure to submit an order for filing within 14 days of the trial court's February 14, 2013 written opinion.

Here, the court found that the child had an established custodial environment with both parents; neither party contests this finding. The trial court then concluded that its parenting time modification did not change the child's established custodial environment. Finally, the court held that plaintiff showed that the parenting time modification was in the child's best interests by a preponderance of the evidence.

A change in parenting time does not always disrupt an established custodial environment. See *Gagnon v Glowacki*, 295 Mich App 557, 576; 815 NW2d 141 (2012). For example, in *Gagnon*, this Court affirmed the trial court's decision that the defendant's move did not disrupt the established custodial environment where the parenting time schedule essentially stayed the same. *Id.* at 572-573. However, the established custodial environment does change when both parents are equally involved in their child's life and the change in parenting time relegates one "to the role of a 'weekend' parent." *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). See also *Brown v Loveman*, 260 Mich App 576, 596-597; 680 NW2d 432 (2004). In *Brown*, the parents initially shared equal parenting time. *Id.* The proposed move and parenting time modification would have given one party parenting time during the school year and the other parenting time during the summer. *Id.* This Court held that this proposed modification, which reduced the plaintiff's parenting time from six months out of the year to three months of the year, constituted a change to the child's established custodial environment. *Id.* at 596. The significant facts in the instant case are nearly identical to the facts in *Brown*. Before the court's order, plaintiff and defendant shared parenting time equally in a week-on, week-off arrangement. The trial court's order changed defendant's parenting time to every other weekend and the child's summer vacation. The trial court's order relegated defendant to the role of weekend parent and cut his parenting time in half. Thus, the parenting time modification changed the child's established custodial environment and plaintiff had the burden of proving, by clear and convincing evidence, that the parenting time modification was in the child's best interests. See *Powery*, 278 Mich App at 528-529; *Brown*, 260 Mich App at 596-597. The trial court committed legal err by concluding that the proposed modification did not change the child's established custodial environment and by applying the incorrect burden of proof. See *Brown*, 260 Mich App at 598.

In light of this error, we reverse and remand for the trial court to determine if plaintiff proved, by clear and convincing evidence, that the proposed parenting time modification is in the child's best interests. On remand, the trial court "should consider up-to-date information, including the children's current and reasonable preferences, as well as the fact that the children have been living with the plaintiff during the appeal and any other changes in circumstances arising since the trial court's original custody order." *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). See also *Shelters v Shelters*, 115 Mich App 63, 68; 320 NW2d 292 (1982).

Among the information that the trial court should consider is defendant's claim that plaintiff committed a fraud on the court when she testified that she was and intended to remain a stay-at-home mother. Plaintiff's proffered evidence at that February 5, 2013, evidentiary hearing indicated that she was a stay-at-home mother and planned to stay that way to best serve the interests of her child. The trial court relied on this information in finding that the proposed change of parenting time would be in the child's best interest, as it noted that plaintiff could be home for the child when she left for school and when she returned, and that defendant could not

do so. In support of his allegation that plaintiff's testimony constituted fraud, defendant provided an article from the Detroit News that showed a photograph of plaintiff and indicated that she works as a clerk for the Macomb Circuit Court. The caption of the photograph indicates it was taken on March 5, 2013. At a minimum, this evidence conflicts with plaintiff's proffered evidence that she planned to continue to be a stay-at-home mother. Given defendant's specific allegations of fraud and his offer of proof that plaintiff may have committed a fraud on the court, the trial court abused its discretion by denying defendant's request for an evidentiary hearing on this matter. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 405; 651 NW2d 756 (2002). Accordingly, on remand, the trial court shall hold an evidentiary hearing on this matter.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering