STATE OF MICHIGAN

COURT OF APPEALS

JESSICA LYNN HARPER, Plaintiff-Appellee,	UNPUBLISHED January 21, 2016
v	No. 328093 Kalamazoo Circuit Court
ROGER DEAN COMBS, JR., Defendant-Appellant.	LC No. 2006-005110-DC

Before: BOONSTRA, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order granting plaintiff primary physical custody of the parties' two minor children, reducing defendant's parenting time, and changing the children's school. Defendant argues (1) that the evidentiary hearings violated his procedural and substantive due process rights and (2) that the trial court changed custody, the school, and parenting time without following the Child Custody Act (CCA), MCL 722.21 *et seq*. We decline to address defendant's constitutional claims but agree that the trial court's failure to fully comply with the CCA requires that we reverse and remand for a new evidentiary hearing.

I. FACTS

Plaintiff and defendant never married, but defendant signed affidavits of parentage for each child. After the parties ended their romantic relationship around 2006, the trial court granted the parties "joint legal and physical custody" of the children with "equal and shared authority with respect to all major decisions affecting the child(ren), including . . . schooling." The trial court ordered the parties to alternate physical custody on a weekly basis, to notify the court of any address change within 21 days, and to seek court approval to move the children out of state.

On January 9, 2009, the trial court amended the 2006 custody order to provide for the parties' continuing their joint physical and legal custody of the children; however, the court gave defendant physical custody from Monday through Friday and the third weekend of the month during the school year. The order further stated that the children would attend "Mattawan School District," where defendant lived, "unless there is a mutual agreement by the parties to change the school district or upon further order of the court." In the summer, the children primarily lived with plaintiff, but they spent every other weekend and one full week with defendant. For holiday parenting time, the parties split winter break and alternated spring break and all other holidays.

All non-inconsistent provisions of the 2006 judgment of custody, such as the requirement to notify the court of any address change, remained in effect.

On January 5, 2015, the parties signed an agreement providing that the children would move from Mattawan to Vicksburg Community Schools. Accordingly, plaintiff transferred the children to Vicksburg Schools on January 5, 2015. The agreement further stated that "the current order—[presumably the January 9, 2009 modified order]—will remain intact with the exception of parenting time which we have agreed to trade. The children will stay with the mother during the father[']s parenting time and the father will take the mother's time according to the court order already in place until an agreement is placed with the court." The agreement was not filed with the court but has a stamp of receipt by the Friend of the Court (FOC).

Plaintiff testified that near the end of March 2015, defendant picked up one child from Vicksburg schools and the other from his bus stop because he was unhappy with the 2015 agreement. According to plaintiff, defendant sent her a phone message indicating that she "need[ed] to go through the court system" to change the children's custody. Defendant testified that the January 5, 2015 agreement was premised on an oral agreement between the parties allowing him to move to Florida but that because the move did not occur, he believed that the 2009 custody order still controlled. Defendant further explained, and plaintiff agreed, that he had parenting time with the children over spring break 2015 and that he picked the children up from school on the last day before spring break. After spring break, defendant used the 2009 court order to re-enroll the children in Mattawan schools.

After defendant picked up the children, plaintiff moved the trial court ex parte to uphold the January 5, 2015 agreement, to allow the children to return to Vicksburg Schools, to return the children to her, and to prevent defendant from leaving the state with the children. The trial court denied plaintiff's motion but set the matter for an evidentiary hearing on April 20, 2015. It sent notice of the hearing to defendant at a Western Avenue address, but when it was returned on April 13, 2015 with a sticker reading "RETURN TO SENDER; NOT DELIVERABLE AS ADDRESSED; UNABLE TO FORWARD," the trial court adjourned the hearing to May 11, 2015. It then sent notice of the May 11, 2015 hearing to defendant at an Eighth Street address, but it was returned on May 6, 2015 with a sticker reading "RETURN TO SENDER; NOT DELIVERABLE AS ADDRESSED; UNABLE TO FORWARD." The envelope contains the following handwritten comments: "FOC has SAME Address Just updated 4-1-15 at FOC" and "Called Plaintiff 5/6/15 @ 2:05 pm & check to see if she knows address."

Defendant did not appear at the May 11, 2015 evidentiary hearing. The trial court stated that defendant was "playing some games" with regard to his address, verified that the address used matched the address that defendant had given the FOC, and commented that it did not know why the post office failed to deliver the notice. In response, the trial court took "the discretion . . . pursuant to MCR 2.105(I) on a showing [that] a service of process cannot . . . reasonably be made . . . [to] permit service of process to be made in any other manner reasonably calculated to give the Defendant actual notice[,]" and stated that it believed defendant "knows about this [hearing] through the phone contacts [and] through the Friend of the Court mail . . . ." Then, the trial court scheduled an additional evidentiary hearing for May 27, 2015. Plaintiff elected to leave the children with defendant until the next hearing. The trial court sent defendant notice of the new hearing at the Eight Street address.

Defendant appeared at the May 27, 2015 hearing and confirmed that the Eighth Street address was his correct address. The trial court characterized the hearing as addressing evidence regarding the parties' January 5, 2015 agreement to reverse parenting time. When the trial court referenced this agreement, defendant responded that "I don't have the agreement. I've got no notification on nothing that is going on today. The only thing I got was to appear from the Court. . . . I was never served with anything. So I am here just on my obligation from the Court." Further, defendant explained that "I don't even know what the motion entails, so I haven't had a chance to review it." The clerk stated that the court has had "a couple of [motions] come back." When the trial court asked defendant about presenting witnesses, defendant explained that he "didn't even get served" and "didn't get a motion."

The hearing proceeded and plaintiff testified that after defendant picked up the children from school at the end of March 2015, defendant only allowed her to spend two, three-hour time periods with the children during the next 25 days. Additionally, she explained that defendant kept the children over Easter contrary to their parenting time agreement. When explaining her preference for Vicksburg schools, plaintiff told the trial court that "Vicksburg is better for me." Plaintiff characterized her children's progress at Vicksburg schools as "fantastic," explaining that they had a structured environment where they completed homework every night. Additionally, plaintiff testified that she had a "good home" for the kids and asked that they be returned to her at the conclusion of the hearing. She also requested two months of make-up parenting time and that the children be allowed to attend Vicksburg schools.

Defendant testified that he believed that the 2009 custody order controlled the children's custody, school, and parenting time and that before January 5, 2015, the children had attended Mattawan schools their entire lives. He explained that he learned that Vicksburg "gauged [the children as learning] two years behind the learning curve at Mattawan." Additionally, he said his daughter had problems at Vicksburg, such as a poor learning environment in math class, other students stealing her cell phone, and riding the bus home with 14-year-old boys who made her feel uncomfortable. Therefore, defendant explained, he had followed the 2009 order to transfer the children back to Mattawan schools.

At the conclusion of the hearing, the trial court signed the parties' January 5, 2015 agreement, making it a "temporary order" for the children to attend "Mattawan Schools and . . . stay with [plaintiff] until further Order of this Court." The trial court stated that it would issue a final order after speaking to the children.

On June 8, 2015, the trial court entered a final order, finding a "change in circumstances" to award plaintiff "primary physical custody and continue[d] joint legal custody" of the children. It also ordered that the children attend Vicksburg Schools for the 2015-2016 school year. The trial court gave defendant parenting time "every other weekend." It ordered that plaintiff would have 25 days of makeup parenting time during the summer and that the remainder of the summer would be split equally between the parents "in alternating 7 day periods" while allowing each party a "14 day period of uninterrupted parenting time."

II. CUSTODY, SCHOOLING, AND PARENTING TIME

Defendant argues that the trial court changed the children's custody, school, and parenting time without following CCA procedure. We agree.

Defendant failed to preserve this issue, and we review unpreserved custody issues for plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328-329; 750 NW2d 603 (2008). Further, we must affirm all custody orders unless the trial court's findings of fact were against the great weight of evidence, or the court committed a palpable abuse of discretion or made a clear legal error on a major issue. MCL 722.28; see also *Butler v Simmons-Butler*, 308 Mich App 195, 200; 863 NW2d 677 (2014). The CCA governs alterations of custody, a child's school district—an important decision affecting a child's welfare—and parenting time. *Pierron v Pierron*, 486 Mich 81, 85-86, 91-93; 782 NW2d 480 (2010) (schooling); *Shade v Wright*, 291 Mich App 17, 31-32; 805 NW2d 1 (2010) (parenting time); *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009)(custody).

1. CUSTODY

To change a child's custody, the trial court must make reviewable findings of fact required by the CCA. *In re AP*, 283 Mich App at 605; *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). An existing custody order can only be modified "for proper cause shown or because of [a] change of circumstances.' MCL 722.27(1)(c); *In re AP*, 283 Mich App at 600. This occurs when or more grounds have, or could have, occurred that may have a "significant" impact on the child's life or well-being. *Shade*, 291 Mich App at 23, citing *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). "[T]he party seeking a change . . . must first establish proper cause or change of circumstances by a preponderance of the evidence." *In re AP*, 283 Mich App at 600. Once it does so, the trial court can determine the burden of persuasion and conduct an evidentiary hearing. *Id*.

The threshold question for a custody change is whether a child has an established custodial environment, which occurs " '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' . . . consider[ing] the 'age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship,' " *AP*, 283 Mich App at 601, quoting MCL 722.27(1)(c). If an established custodial environment exists with only one parent, "the noncustodial parent bears the burden of persuasion and must show by clear and convincing evidence that a change of the custodial environment is in the child's best interests." *Id*. at 601. If such an environment exists with both parents, "the party seeking to modify the custody arrangement bears the burden of rebutting the presumption in favor of the custodial environment established with the other parent." *Id*. at 602.

After the trial court determines the burden, it "must next determine whether a change in the established custodial environment is in the child's best interests" by weighing the 12 best interest factors listed in MCL 722.23. *Id*. at 602. Although the trial court need not weigh each best interest factor equally, *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006), it must state its factual finding and conclusions as to each factor so that the record is sufficient to allow an appellate determination of whether the evidence clearly preponderates

against the trial court's findings. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005). If the trial court fails to consider the best interest factors mandated by the CCA and make reviewable findings of fact concerning them, we must remand for a new custody hearing. *Rittershaus*, 273 Mich App at 475. Without such findings, we cannot determine whether the court's findings underlying its custody determinations are against the great weight of the evidence. *In re AP*, 283 Mich App at 607. While the trial court need not make extensive findings, they must be sufficient to show this Court that the requirements of the CCA have been satisfied and the fundamental rights of the parties protected. *Id*. at 608.

In this case, the trial court plainly erred in changing custody without making the necessary CCA findings. The trial court noted in its final order that there had been a "change in circumstances" and awarded plaintiff" "primary physical custody," but it did not articulate what grounds led to this change that had a significant impact on the children's lives and well-being. *Vodvarka*, 259 Mich App at 511. And there is no indication that plaintiff, the party seeking the custody change, established a change in circumstances by a preponderance of the evidence. *In re AP*, 283 Mich App at 600. The trial court never stated whether an established custodial environment existed. *Id*. at 601-602. As such, it is unclear whether the presumption of MCL 722.27(1)(c) applied and whether the trial court properly allocated the appropriate burden of proof. *In re AP*, 283 Mich App at 600-602. The burden of proof was never defined.

Finally, the record does not show that the trial court considered all the best interest factors of MCL 722.23. To be fair, the trial court collected evidence pertaining to some factors. See, e.g., MCL 722.23(d), (h), and (i). But the children's preferences, if any, are not included in the record. And even if the trial court inquired into issues that overlapped with the best interest factors, it never stated its factual findings and conclusions as to each factor. In light of the trial court's failure to make pertinent findings required by the CCA, clear error occurred that affected defendant's substantial rights. *Rivette*, 278 Mich App at 328-329. Because the trial court committed clear legal error, *Butler*, 308 Mich App at 200, we reverse the custody order and remand for a new hearing. *Rittershaus*, 273 Mich App at 475.

2. SCHOOLING

In changing the children's school—an important decision affecting the welfare of the children—the trial court also plainly erred. When a trial court makes such a decision, it must determine whether the change would modify an established custodial environment. *Pierron*, 486 Mich at 92. If so, the parent proposing the change bears the burden of establishing by clear and convincing evidence that the change is in the child's best interests. *Id*. If the change would not modify an established custodial environment, the parent proposing the change has the burden to establish only by a preponderance of the evidence that the change is in the child's best interests. *Id*. at 93. In the latter situation, the trial court must consider each best interest factor to determine whether it is relevant and make findings regarding the factors it deems pertinent. *Id*. at 93-94. As in a change in custody, the trial court must make sufficient findings on the record to facilitate appellate review. *In re AP*, 283 Mich App at 605; *Rittershaus*, 273 Mich App at 475.

In this case, the trial court did not determine whether moving the children from Mattawan to Vicksburg schools would change the children's established custodial environment; therefore, it did not determine the burden proof required for changing the children's school. The trial court

did not specifically address any best interest factors. Thus, the trial court committed clear error affecting defendant's substantial rights to make major decisions that affect the children. *Rivette*, 278 Mich App at 328-329. Because the trial court committed clear legal error, *Butler*, 308 Mich App at 200, we reverse and remand for a new hearing. *Rittershaus*, 273 Mich App at 475.

3. PARENTING TIME

Finally, the trial court plainly erred in altering defendant's parenting time. An order modifying parenting time is a "child custody determination" subject to the requirements of the CCA. *Shade*, 291 Mich App at 22, citing MCL 722.1102(c). Therefore, if a change in parenting time alters a child's established custodial environment, the trial court must make the same CCA findings as in a custody change. *Id*. at 22-23. But if the established custodial environment is not altered by a parenting time change, then the trial court uses a "more expansive definition of 'proper cause' or 'change of circumstances' " because "the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Id*. 27-29. A strong relationship with both of his or her parents is presumed to be in the best interests of a child. *Id*. at 29; MCL 722.27a(1). To accomplish this goal, a trial court "may consider" a separate set of nine best interest factors listed in MCL 722.27a(6). *Shade*, 291 Mich App at 27-29.

In this case, the trial court did not determine whether changing defendant's parenting time altered the children's established custodial environment. Therefore, this Court does not know whether the trial court should have followed the traditional change in circumstances framework, *Shade*, 291 Mich App at 22-24; *Vodvarka*, 259 Mich App at 513-514, or the "more expansive definition," *Shade*, 291 Mich App at 26-29. If the trial court should have followed the traditional framework, it did not determine whether an established custodial environment existed with one parent or both, and, thus, the trial court did not determine the appropriate burden of proof necessary to alter parenting time. *Id*. at 23. Moreover, as discussed in the custody section, there is no indication that the trial court followed MCL 722.23 to weigh best interest factors.

If the established custodial environment did not change, the trial court could have, instead, followed the more expansive definition of "change of circumstances," as discussed in *Shade*, 291 Mich App at 26-29. While some testimony could have related to MCL 722.27a(6)(f) and (g), there are no explicit factual findings indicating that the trial court considered the best interest factors in MCL 722.27a(6).

Therefore, the trial court committed clear error that affected defendant' substantial rights because it reduced his parenting time. *Rivette*, 278 Mich App at 328-329. Because the trial court committed clear legal error in failing to follow CCA procedures, *Butler*, 308 Mich App at 200-201, we reverse the parenting time order and remand for a new hearing. *Rittershaus*, 273 Mich App at 475.

IV. CONCLUSION

Because the trial court committed plain error in changing the children's custody, school, and parenting time without following the CCA procedures, we reverse. On remand, the trial court shall set aside the order modifying custody, schooling, and parenting time and conduct a new hearing on these issues. Then, after considering up-to-date information and any other

changes in circumstances of the parties and the children since entry of the June 8, 2015 order, the court must articulate its factual findings consistent with the requirements of the CCA,.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jane E. Markey