# STATE OF MICHIGAN

# COURT OF APPEALS

JEFFREY LEE CORNELL,

Plaintiff-Appellant,

v

DIANE MARIE CORNELL, a/k/a DIANE MARIE SMITH,

Defendant-Appellee.

UNPUBLISHED
February 18, 2016

No. 329558
Branch Circuit Court
LC No. 10-050354-DM

Before: MURPHY, P.J., and WILDER and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion to change the minor child's school district and denying plaintiff's motion to modify parenting time. We affirm.

The parties were married in Coldwater, Michigan, in 2005 and have one minor child. The parties divorced in 2011, and pursuant to the stipulated judgment of divorce, they had joint legal and physical custody of the child, with parenting time to be exercised on an alternating weekly basis. However, plaintiff eventually remarried and moved to Kalamazoo County, prompting a stipulated modification of the parenting time arrangement. Under the new arrangement, set forth in the trial court's May 10, 2013 order modifying parenting time, the parties maintained joint legal and physical custody of the child, defendant was awarded parenting time during the school year, subject to plaintiff having parenting time on alternate Thursdays and alternate weekends while school was in session, and plaintiff was awarded parenting time during the child's summer vacation, subject to defendant having parenting time on alternate weekends during the vacation, plus a two-week consecutive block of time.

The parties operated under the above parenting time order for approximately two years until October 2014, when defendant filed a motion seeking approval to change the child's school district to Gull Lake. In support of her motion, defendant asserted that she intended to move from Coldwater to Battle Creek, falling within the Gull Lake school district. Plaintiff objected to the motion and requested that the trial court instead change the child's school to the Portage school district, where he resided. Plaintiff also moved to modify the parenting time arrangement, seeking to return to "an alternating week-on, week-off basis." Plaintiff alleged in his motion that there had been a change of circumstances warranting the requested modification; namely, that the child was now going to be moving closer to plaintiff's residence, such that the parents would

be able to exercise "equal custody and parenting time." In closing arguments at the evidentiary hearing on the competing motions, plaintiff's counsel, consistently with plaintiff's motion, urged the court to modify parenting time such that each party would have the child on alternate weeks. In his testimony at the hearing, plaintiff expressed that he desired parenting time in any manner that would make the situation most workable, including giving him parenting time during the school year and giving defendant parenting time during the summer vacation, essentially reversing the current arrangement.

Following the hearing, the trial court issued a written opinion and order granting defendant's request to change the child's school district to Gull Lake and denying plaintiff's requests to modify the parenting time arrangement and to change the child's school district to Portage. In the opinion and order, the trial court indicated that defendant "has had actual primary physical custody of the child[] since the parties' agreement in 2013," that there was a joint established custodial environment, that the case did not entail a proposed modification of parenting time that would actually alter the joint established custodial environment, that plaintiff had to show proper cause or a change of circumstances by a preponderance of the evidence in order for the court to contemplate changing the parenting time arrangement, and that, upon review and analysis of the statutory best interest factors, plaintiff failed to establish by a preponderance of the evidence that a change in the parenting time arrangement would be in the child's best interests. The trial court found that the parties were equal on all of the best interest factors. The trial court did not specifically determine that plaintiff had shown proper cause or a change of circumstances, but given that the court reviewed and made findings on the best interest factors and ruled on the basis of those factors, we surmise that the court either implicitly found proper cause or a change of circumstances, assumed such a finding, or simply made a mistake.[1] Plaintiff appeals as of right.

An order concerning parenting time is to be affirmed on appeal unless underlying findings of fact made by the trial court were against the great weight of the evidence, the court committed a palpable abuse of discretion, or unless the trial court made a clear legal error

[1] The trial court stated that in determining whether proper cause or a change of circumstances was shown, it was necessary to make reference to and consider the best interest factors. Indeed, in *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003), this Court explained that "the criteria outlined in the[] [best interest] factors should be relied on by a trial court in deciding if a particular fact raised by a party" constitutes proper cause or a change of circumstances. In other words, contemplation of the best interest factors can provide a reference point in analyzing whether there is proper cause or change of circumstances sufficient to revisit a custody order. The trial court here simply launched into a full blown examination of the best interest factors and made a substantive ruling on the basis of those factors without ever expressly tying them back to the threshold issue of proper cause or change of circumstances. Moreover, the trial court examined the general best interest factors, MCL 722.23, absent consideration of the parenting time factors enumerated in MCL 722.27a(6). See *Shade v Wright*, 291 Mich App 17, 26; 805 NW2d 1 (2010). "Both the statutory best interest factors . . ., MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Id.* at 31. That said, plaintiff does not raise an appellate issue on the matter.

regarding a major issue. *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010); *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005), citing MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003). In the context of parenting time decisions, a finding is against the great weight of the evidence when the facts clearly preponderate in the opposite direction, a clear legal error occurs when a trial court incorrectly chooses, construes, or applies the law, and a court abuses its discretion when its decision is so palpably and grossly violative of logic and fact that it evidences a perversity of will, a defiance of judgment, or the exercise of bias or passion. *Shade*, 291 Mich App at 21.[2]

We believe that it would be beneficial to initially set forth the proper analytical framework applicable to this case in order to provide context to plaintiff's appellate arguments. The dispute between the parties, as relevant to this appeal, concerns parenting time and plaintiff's attempt to modify the existing parenting time order. Under MCL 722.27(1)(c), proper cause or a change of circumstances must be shown in order to allow modification of a parenting time order. *Shade*, 291 Mich App at 22-23. "A modification of such a judgment or order is only permissible when it is in the minor child's best interests." *Id.* at 23. When a modification of a parenting time order would change the established custodial environment of a child, the party seeking modification must prove by clear and convincing evidence that the alteration would be in the child's best interests. *Id.* When the proposed change in parenting time would not alter the established custodial environment, "the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Id.*

Here, setting aside for the moment the issue of proper cause or a change of circumstances, the trial court concluded that there was a joint established custodial environment, which ruling is not being challenged. And it is abundantly clear that plaintiff's proposed change in parenting time, whether to alternating weeks or a flip-flopping of the current parenting time arrangement, would not have changed the joint established custodial environment, nor is that an issue posed on appeal. Accordingly, assuming proper cause or a change of circumstances, plaintiff was required to show by a preponderance of the evidence that modifying the existing parenting time order was in the best interests of the minor child. Regarding the threshold issue of proper cause or change of circumstances, *in the context of parenting-time modifications that do not change the established custodial environment*, "a more expansive definition of 'proper cause' or 'change of circumstances' is appropriate[,]" as compared to the definition enunciated in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), and made applicable in cases involving a true change of custody. *Shade*, 291 Mich App at 28. In *Shade*, this Court observed that "the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time." *Id.* at

[2] While the jurisprudential landscape has generally shifted to a less deferential "abuse of discretion" standard, see *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), the old stricter standard under *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), remains applicable in child custody disputes, given that MCL 722.28, the statute setting forth review standards for custody cases, employs language that was used in *Spalding*. *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006).

30. Neither party raises any arguments about proper cause or change of circumstances, and the trial court's implied ruling on the issue, or failure to rule on the issue, was to plaintiff's benefit. With the legal foundation or framework set, we now proceed to address plaintiff's arguments on appeal.

Plaintiff first argues on appeal that the trial court "went outside the verbiage" of the May 10, 2013 custody order by indicating, in the order being appealed, that defendant had "primary custody" of the child. This error, according to plaintiff, deprived him of an "equal" opportunity to seek a modification of the parenting time arrangement. Plaintiff's argument lacks merit. The trial court did state at one point in its opinion that defendant had primary physical custody of the child; however, when the full opinion is examined, it is clear that the court was simply recognizing that defendant was the child's primary caregiver during the school year. Regardless, the trial court ultimately ruled that there was a joint established custodial environment for purposes of determining the applicable burden of proof, and the court correctly employed the preponderance-of-the-evidence standard. Had the trial court applied the clear-and-convincing standard on the basis that the established custodial environment rested solely with defendant, with plaintiff seeking to modify it, the ruling would have been problematic, but this did not occur. Accordingly, any presumed error by the trial court was entirely harmless. MCR 2.613(A).

Jumping ahead to plaintiff's third issue on appeal, which is connected to the preceding discussion, plaintiff maintains that "[t]he trial court committed clear legal error by indicating that plaintiff[] must prove by clear and convincing evidence rather than by a preponderance of evidence that changes to parenting time would be in the child's best interest." First, the trial court did not demand that plaintiff prove by clear and convincing evidence that changing the parenting time arrangement was in the child's best interests. In its opinion and order, the trial court stated, multiple times, that it was applying the preponderance-of-the-evidence standard. The court concluded its opinion by ruling that "[p]laintiff has NOT establish[ed] by [a] preponderance of the evidence that a change in . . . parenting time . . . would be in the best interest of the child." Plaintiff, who filed this appeal as a pro per litigant, appears to be suggesting that the court necessarily applied a clear-and-convincing standard because the court had never before, in earlier proceedings, made a best-interest determination, but there is absolutely no logic to this argument, and it is rejected.

Finally, plaintiff argues that the trial court erred in its examination, analysis, and application of MCL 722.23 for purposes of the best-interest determination, where the court failed to consider or weigh certain facts that would have favored plaintiff relative to many of the statutory factors.[3] We have carefully scrutinized plaintiff's assertions and claims, and while some of his points may be arguable, we cannot conclude that the trial court's factual findings

[3] Plaintiff does not directly challenge the trial court's ruling concerning the child's school district. He does, however, in the context of challenging the court's ruling on the best-interest factors, allude to evidence related to the child's schooling, suggesting that the child would be better off in the Portage school district, which in turn would support plaintiff's request to change the parenting time arrangement.

clearly preponderated in the opposite direction, that the court committed clear legal error, or that the court's disposition was so palpably and grossly violative of logic and fact that it evidenced a perversity of will, a defiance of judgment, or the exercise of bias or passion. Reversal is unwarranted.

Affirmed. Having fully prevailed on appeal, defendant is awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello