STATE OF MICHIGAN

COURT OF APPEALS

AMANDA LEE HORGAN f/k/a AMANDA LEE BROWN, Plaintiff-Appellant,	UNPUBLISHED May 26, 2016
v	No. 331047 Tuscola Circuit Court Family Division
JOSHUA RAY BROWN, Defendant-Appellee.	LC No. 11-026520-DM

Before: OWENS, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right a December 18, 2015, trial court order denying her motion to modify parenting time and granting defendant's motion to dismiss her motion. For the reasons set forth in this opinion, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The parties had three minor children during their marriage, CB, JB, and CRB, and they lived in Caro, Michigan. On October 18, 2011, the court entered a judgment of divorce (JOD), wherein the court awarded joint legal custody to both plaintiff (mother) and defendant (father). With respect to physical custody, the court awarded joint custody with parenting time to be determined by what was "mutually agreeable" between the parties. Under this arrangement, the parties initially alternated parenting time on a week-on/week-off basis, exchanging the children every Wednesday.

Beginning in 2012, the parties filed several motions to alter the parenting time arrangement. On July 30, 2012, plaintiff moved to alter parenting time, requesting that the children stay with her for a "majority of the time" during the school year because she alleged that she was better able to care for the children. It appears that the parties were unable to reach an agreement regarding parenting time going forward, and on January 4, 2013, the trial court entered a custody and parenting time order wherein the court ordered joint legal and joint physical custody alternating on a weekly basis every Sunday.

On July 12, 2013, plaintiff again moved for "an immediate change of custody," but the trial court denied her request on August 22, 2013, ordering the parties to abide by the January 4, 2013 order. The trial court entered another order on October 3, 2013, indicating that the January 4, 2013, custody order remained in effect.

On March 7, 2014, defendant moved for full physical custody, alleging that plaintiff received a promotion that required her to relocate to Lansing. Defendant alleged that the move amounted to changed circumstances sufficient to change physical custody.

On May 5, 2014, the trial court entered a new order, wherein the court altered parenting time but did not change custody. Specifically, the court ordered joint legal and physical custody with parenting time as agreed upon by the parties. Both parties were to share week-to-week custody of the children during the summers and defendant would receive "physical domicile" of the children during the school year.

On November 4, 2015, plaintiff filed a motion to modify parenting time, explaining that she arranged with her employer to set up a "remote work schedule" that allowed her to work one week in the office and one week at home. She asserted that this change in circumstances would allow her to move back to Caro, which justified a return to the previously existing week on/week off parenting-time arrangement. Plaintiff specifically cited *Shade v Wright*, 291 Mich App 17, 805 NW2d 1 (2010), for the proposition that this change in circumstances allowed the trial court to revisit the parenting time issue. In response, defendant argued, in part, that plaintiff's motion was an attempt to change custody disguised as an attempt to modify parenting time. Defendant argued that *Shade* was inapplicable, that plaintiff's request to change parenting time would actually change custody, and that under *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), plaintiff failed to demonstrate the requisite proper cause or change of circumstances sufficient to change custody.

At a hearing, a referee denied defendant's motion to summarily dismiss because it was "not timely filed." The referee then took testimony and later filed a report and recommendation, which stated that the more expansive understandings of proper cause and change in circumstance articulated in *Shade*, 291 Mich App at 17, applied to plaintiff's request for a change in parenting time. The referee recommended finding that the children have an established custodial environment with both parents, and that the change in circumstances regarding plaintiff's work schedule was sufficient to warrant a review of parenting time. After analyzing the best-interest factors, the referee recommended that the trial court grant plaintiff's request for week on/week off parenting time on a year-round basis once plaintiff returned to Caro. An "Order After Referee Hearing Regarding Parenting Time" that effectuated the referee's recommendation was contemporaneously filed with the report.

Thereafter, defendant re-noticed his motion to summarily dismiss to be heard by the trial court rather than the referee. Plaintiff responded, arguing that the referee already addressed plaintiff's motion to modify parenting time, and by extension, defendant's motion to dismiss. At a hearing, defendant argued that plaintiff's motion was a disguised attempt to change custody and that plaintiff did not demonstrate a proper cause or change of circumstance under *Vodvarka*. Defendant emphasized that based on the pleadings alone, not what occurred at the referee hearing, the matter "should be dismissed summarily." The trial court asked plaintiff whether she

plead a proper change in circumstance under *Vodvarka*, and plaintiff cited her change in working hours and the fact that she recently purchased a home in Caro. Plaintiff also emphasized that both parties already had joint legal and physical custody and that defendant only had primary domicile.

Ultimately, the trial court agreed with defendant that the motion to modify parenting time was actually a request to modify the custodial environment. Accordingly, the trial court concluded that *Vodvarka* controlled. The trial court then explained that plaintiff's circumstances had changed, but that her pleadings did not specify a change of circumstances or proper cause relating to the children, aside perhaps from their joy and preference in the matter, which was insufficient under *Vodvarka*. The trial court entered an order granting defendant's motion to dismiss, dismissed plaintiff's parenting time motion, set aside the order following the referee hearing and reinstated the court's May 5, 2014 custody order.

Plaintiff moved for reconsideration and the trial court denied her motion. The trial court concluded that plaintiff was correct that it made its determination without taking testimony from the parties and explained that it did so because defendant's motion was pursuant to MCR 2.116, which required an examination of the pleadings alone. The trial court reiterated that it determined that plaintiff's request was for a change in custody rather than parenting time and that plaintiff's decision to move did not constitute a change in circumstances with respect to the children's routine or their established custodial environment. The court reasoned that under MCR 2.116 and *Vodvarka*, it could dismiss plaintiff's motion where the pleadings did not demonstrate a proper cause or change in circumstance. This appeal then ensued.

II. STANDARD OF REVIEW

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21. In child custody cases, "[a]n abuse of discretion exists 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Clear legal error occurs "when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

III. ANALYSIS

On appeal, plaintiff argues, in part, that the trial court erred in determining that she moved for a change of custody as opposed to a change in parenting time. As a consequence of this error plaintiff argues, the trial court applied the wrong legal standard in determining that she failed to show a proper cause or changed circumstances as required under the *Vodvarka* standard for changing custody. Plaintiff argues that the issue before us then is whether the trial court correctly found that plaintiff's motion constituted a change of custody. Our review of the record leads us to conclude that plaintiff was not seeking a change in the established custodial

environment and the trial court's repeated rulings to the contrary constituted factual and legal errors.

"The term '[c]hild-custody determination' means a judgment, decree, or other court order providing for legal custody, physical custody, *or parenting time* with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order . . . ." *Shade*, 291 Mich App at 22, quoting MCL 722.1102(c). A court may not modify a parenting time order without conducting a threshold inquiry to determine if there has been a "change of circumstances" or "proper cause shown." *Terry v Affum (On Remand*), 237 Mich App 522, 534-535; 603 NW2d 788 (1999).

"The framework for evaluating 'proper cause' or 'change of circumstances' when a party requests to modify a parenting time order depends on whether an established custodial environment is affected and the type of modification requested." 1 Kelly, Curtis & Roane, Michigan Family Law (7th ed) (ICLE, 2011), § 12.33, p 679. "If a change in parenting time results in a change in the established custodial environment, then the . . . framework [set forth in *Vodvarka*, 259 Mich App at 499] is appropriate." *Shade*, 291 Mich App at 27. However, if the proposed modification does not change the established custodial environment, but merely alters the duration or frequency of parenting time, then the framework set forth in *Shade*, 291 Mich App at 28-30 governs and the court should apply "a more expansive definition of 'proper cause' or 'change in circumstances' . . . for determinations regarding parenting time." *Id*. at 28. In particular, the *Shade* framework considers "the type of normal life changes that occur during a child's life and that do not warrant a change in the child's custodial environment." *Id*. at 29.

In the event that a court determines that changed circumstances or proper cause warrants modification of a parenting time order, the focus of any new parenting time order must always be "to foster a strong relationship between the child and the child's parents." *Shade*, 291 Mich App at 29. Therefore,

> Parenting time shall be granted in accordance with the best interests of the child. *It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents*. Except as otherwise provided in this section, *parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time*. [MCL 722.27a(1) (emphasis added).]

To ensure that parenting time orders foster a strong parent-child relationship, our Legislature has provided the following list of non-exhaustive factors that a court should consider when entering or modifying a parenting time order:

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors. [MCL 722.27a(6).]

In this case, the trial court determined that plaintiff's motion was a request to modify the custodial environment. In doing so, the trial court implicitly assumed that a custodial environment existed only with defendant. To have made such an assumption without the benefit of testimony was further compounded by the trial court failing to announce on the record what evidence, if any, it relied on when making the decision that plaintiff was requesting a change in custody. Hence, without the benefit of testimony or any legal or factual rationale for its finding that plaintiff was requesting a change in custody, the trial court erred from the outset by not making a proper inquiry into whether *Shade* or *Vodvarka* governed the analysis. "Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000) (quotation marks and citations omitted). Here, because of testimony taken during the referee hearing, there is sufficient information within the record for this Court to make a determination regarding whether a custodial environment existed with both parents.

An established custodial environment exists where, "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). Unlike the trial court, the referee heard testimony and determined that an established custodial environment existed with both parents based on the guidance, discipline, and stable environment provided by each. This finding was supported by the May 5, 2014, custody order. Under that order, the parties shared joint legal and physical custody. While defendant had primary domicile of the children during the school year, during the summers the parties alternated parenting time on a week-on/week-off schedule. During the school year, plaintiff had parenting time every other weekend. This arrangement lasted approximately 18 months while plaintiff lived and worked in Lansing. The referee considered this arrangement after hearing testimony and determined that there was an established custodial environment with both parents. See *Foskett v Foskett*, 247 Mich App 1, 8, 634 NW2d 363 (2001) ("Whether an established custodial environment exists is a question of fact").

Defendant suggests that he alone has an established custodial environment because plaintiff only has the children every other weekend. However, it has long been settled that a custodial environment can be established in more than one home. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). Further, the fact that the children's primary residence is with one parent does not extinguish a custodial relationship with the other parent. *Jack*, 239 Mich App at 671. In short, we cannot find anything in the record that would lead us to conclude that the referee erred in finding that there was an established custodial environment with both parents.

After the referee properly found that there was an established custodial environment with both parents, the referee properly determined that the proposed parenting time modification would not alter the established custodial relationship. Although changing the parenting-time schedule as requested would *impact* the custodial environments, there is no evidence it would *change* them. The children would still look to each parent, as the custodians of their own custodial environments, "for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Instead, plaintiff merely proposed to alter the duration and frequency of parenting time; thus, the referee properly determined that the framework set forth in *Shade*, 291 Mich App at 28-30, governed and the trial court erred as a matter of law in holding that plaintiff's motion was governed by *Vodvarka*, 259 Mich App at 499.

Under the *Shade* framework, a parent's physical relocation closer to a child with whom she has a custodial relationship with is "the type of normal life changes that occur during a child's life" that constitute proper cause or changed circumstances sufficient to reexamine the parenting time arrangement. *Shade*, 291 Mich App at 29. Accordingly, the referee did not err in concluding that plaintiff's relocation to Caro amounted to proper cause or changed circumstances to reexamine the parenting time arrangement.

Finally, the referee did not err in finding that the a return to the week-on/week-off parenting time schedule was in the children's best interests and the trial court failed to articulate how this finding amounted to error. See *Shade*, 291 Mich App at 29 (holding that the central focus of a new parenting time order must always be "to foster a strong relationship between the child and the child's parents."). The referee considered the testimony of the parties and took account of the children's preferences after interviewing them in private. Although the referee erroneously applied the best interest factors set forth in MCL 722.23 as opposed to the factors specifically tailored to parenting time decisions set forth in MCL 722.27a(6), many of the findings overlapped. Specifically, the referee found that both parents loved the children and exhibited affection, both parents were able to provide affection and guidance, both parents contributed to the children's educational and religious learning, and both parents contributed financially. The referee found that there was permanence in both parents' homes and the children were accustomed to living with both parents, although they had spent more time in defendant's home. The referee found that both parents were morally fit and had strong moral character and neither parent had health concerns. The referee noted that the new parenting time arrangement maintained the established home, school and community of the children in Caro and there was no evidence of domestic violence or interference with either parties' parental relationship. The referee then concluded that plaintiff had established by a preponderance of the evidence that a week-on/week-off schedule was in the children's best interests. Nothing in the record supports that the referee erred in reaching this conclusion.

In summation, the trial court erred as a matter of law in holding that plaintiff's motion to modify parenting time was governed by *Vodvarka* when plaintiff did not propose to alter an existing custodial environment. The record supports that the referee did not err in finding that there was an established custodial relationship with both parties. Further, the record supports that plaintiff's proposed parenting time modification would not alter the existing custodial relationship and that plaintiff's relocation to Caro was sufficient cause to modify the parenting time schedule, and that the proposed modification was in the children's best interests. *Shade*, 291 Mich App at 29-31. Accordingly, we reverse the trial court's order and remand with direction to enter an order effectuating the referee's proposed order.[1]

Reversed and remanded for further proceedings consistent with this opinion. Plaintiff having prevailed in full, may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens

[1] Given our resolution of this issue, we need not address plaintiff's arguments that the trial court did not have legal authority to hear defendant's motion and erroneously relied on MCR 2.116 in dismissing her motion.