STATE OF MICHIGAN

COURT OF APPEALS

STEPHANIE L. DUHL, formerly known as STEPHANIE L. LADOMER, Plaintiff-Appellee,	UNPUBLISHED March 14, 2017
v	No. 334307 Wayne Circuit Court Family Division
WILLIAM P. LADOMER, Defendant-Appellant.	LC No. 12-102882-DM

Before: RIORDAN, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order modifying legal custody and parenting time. We affirm.

Plaintiff and defendant were married on April 2, 2003, and share one daughter, BL, born on January 3, 2005, and one son, GL, born on October 17, 2006. The parties divorced on February 8, 2013. The judgment of divorce awarded the parties joint legal and physical custody, with shared parenting time. Defendant would exercise parenting time one week from Monday after school and overnight through Thursday morning, and the next week from Sunday at 5:00 p.m. and overnight through Thursday morning. The weeks alternated accordingly. Plaintiff exercised parenting time the rest of the week.

On March 13, 2015, plaintiff filed a motion to enforce the judgment of divorce and modify parenting time. She requested that the trial court award defendant parenting time every other weekend during the school year, and every other week during the summer. In support of her motion, plaintiff alleged, among other things, that issues existed with regard to the school attendance of the children, GL's academic performance, and defendant supporting the children with their extra-curricular activities. On July 21, 2015, the trial court entered an order that plaintiff's motion requesting a modification of parenting time be scheduled for an evidentiary hearing, finding: (1) an established custodial environment existed with both parties; (2) plaintiff's requested modification would not change either established custodial environment; (3) plaintiff's motion amounted to a motion to modify parenting time, not custody; and (4) plaintiff met the threshold required by *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010) to consider a modification of parenting time. Following the six-day evidentiary hearing that

spanned a time period from October 2015 to May 2016, the trial court granted plaintiff sole legal custody of the children, and modified parenting time. Under the new schedule, defendant would exercise parenting time every other weekend during the school year, from Thursdays after school and overnight to Monday morning, and every other week during the summer. For a summer schedule, the trial court's order provides that the parties alternate parenting time on a weekly basis beginning the second week that school recesses, until the week before school resumes. Plaintiff is to have parenting time the week after school ends and the week before school resumes.

Defendant first argues on appeal that the trial court erred in its determination that its parenting time modification would not alter the children's established custodial environment, and when it modified parenting time without clear and convincing evidence that such a modification would be in the children's best interests. We disagree.

" '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.' " *Shade*, 291 Mich App at 20-21, quoting *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). The same is true for custody orders. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28. The existence of an established custodial environment "is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Berger*, 277 Mich App at 706, citing MCL 722.28 and *Mogle v Scriver*, 241 Mich App 192, 196-197; 614 NW2d 696 (2000).

Findings are against the great weight of the evidence if the "facts clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21 (citation omitted). This Court must defer to the trial court's credibility determinations. *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009). "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.' " *Shade*, 291 Mich App at 21, quoting *Berger*, 277 Mich App at 705 (alteration in original). Finally, "[t]he clear legal error standard applies 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).

"An established custodial environment exists '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.' " *Pierron v Pierron* (*Pierron I*), 282 Mich App 222, 244; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010), quoting MCL 722.27(1)(c). In other words, it is " 'a custodial relationship of a significant duration in which [the child is] provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Pierron I*, 282 Mich App at 244 (alteration in original), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Children may have established custodial environments with both parents at the same time. *Pierron I*, 282 Mich App at 244.

" 'When a modification in parenting time would amount to a change of the established custodial environment, it should not be granted unless the circuit court is persuaded by *clear and convincing evidence* that the change would be in the best interest of the child.' " *Rains v Rains*, 301 Mich App 313, 340; 836 NW2d 709 (2013) (emphasis added), quoting *Pierron I*, 282 Mich App at 249. On the other hand, "[i]f the proposed change does not change the 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." *Shade*, 291 Mich App at 23 (emphasis added), citing *Pierron v Pierron (Pierron II)*, 486 Mich 81, 93; 782 NW2d 480 (2010). The same is true for modifications of custody. MCL 722.27(1)(c); *Shade*, 291 Mich App at 23; *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). If a parenting time modification " 'will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed.' " *Rains*, 301 Mich App at 340, quoting *Pierron II*, 486 Mich at 86.

The record evidence supported the trial court's determination that the parenting time modification did not alter the children's established custodial environment with defendant. In the initial schedule the parties followed after the entry of the judgment of divorce and until the modification of parenting time, defendant had seven overnights with the children every 14 days, effectively exercising equal parenting time with plaintiff. The overnights occurred mostly during the children's school week. Under the modified schedule, defendant has four overnights with the children every 14 days, some during the school week and some on the weekends. However, a reduction in overnights does not necessarily lead to a change in the established custodial environment. See *Rains*, 301 Mich App at 341. Although it is true that the new schedule reduces defendant's parenting time and he will now have to exercise parenting time on days that he is working, he still has the opportunity to spend time with the children in the afternoons and evenings. The same was true under the previous schedule, where the children attended school on the days defendant exercised parenting time. The new schedule also does not preclude defendant from participating in the children's schooling. He can still attend Parent Teacher Association (PTA) meetings and classroom events, and still assist the children with their homework on Thursdays evenings and throughout his parenting time weekends. The children will therefore have ample opportunity to seek defendant's guidance, discipline and parental comfort. The trial court's finding that the modified parenting time schedule would not alter the children's established custodial environment with defendant was not against the great weight of the evidence. Accordingly, the trial court properly applied the preponderance of the evidence standard to its best-interest determination.

Defendant next argues that the trial court erred by significantly altering the amount of days he would be able to spend with the children without first determining if proper cause or a change of circumstances warranted such a modification in compliance with *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). We disagree.

"This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009), citing *Vodvarka*, 259 Mich App at 507-508. Findings are against the great weight of the evidence if the "facts clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21, citing *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007).

"MCL 722.27(1)(c) provides that if a child custody dispute has arisen from another action in the circuit court, the court may '[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . .' " *Vodvarka*, 259 Mich App at 508 (alteration in original). The moving party must prove, by a preponderance of the evidence, the existence of proper cause or a change of circumstances before the trial court may conduct a hearing to review the best-interest factors. *Id.* at 509. However, the trial court is not required to conduct a hearing on the topic. *Corporan*, 282 Mich App at 605.

For proper cause, "a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Vodvarka*, 259 Mich App at 512. Generally, in making its determination, the trial court should "limit its consideration to events occurring after entry of the most recent custody order but . . . there will be unusual cases where that rule is not applicable." *Id*. at 501. To demonstrate a change of circumstances, "a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*. at 513. Further, "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514.

To make its determination regarding proper cause or change of circumstances in the context of a request to modify parenting time, a trial court should first look to the children's established custodial environment. "If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Shade*, 291 Mich App at 27 (citations omitted). In contrast, "a more expansive definition of 'proper cause' or 'change of circumstances' is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment." *Id*. at 28. Under this more expansive definition, "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 30.

Our review of the record confirms that the trial court properly determined that plaintiff met the threshold to revisit parenting time set forth in *Shade*. Under the parties' previous parenting time schedule, the children split time during the school week between the parties' homes. However, as the evidence demonstrates, over time, the children began to experience normal life changes that no longer made such a schedule appropriate. For example, the children began participating in extracurricular activities that require time and dedication. The record evidence demonstrated that defendant does not encourage these activities to the same degree as plaintiff. Specifically, plaintiff testified that she had to exclusively schedule dance and gymnastics classes for the children during her parenting time because defendant was uncooperative and unwilling to take the children during his parenting time. Defendant himself conceded during his testimony that he only took BL to dance class four or five times in three years. As a result, the children were not progressing to their full capabilities in extra-curricular activities given their restrictions on participation as a result of defendant's lack of cooperation.

See *Shade*, 291 Mich App at 30-31 ("[I]n a case where a modification of parenting time does not alter the established custodial environment, the fact that a child has begun high school and seeks to become more involved in social and extracurricular activities . . . constitutes a change of circumstances sufficient to modify parenting time.").

The children also began to get older and advance in grade level, requiring a stronger focus on school and homework. The record demonstrated that lack of consistency between the parties' homes made such a focus difficult, especially for GL. Plaintiff testified that GL often came to her for parenting time with his homework incomplete, and that his grades had suffered partly as a result of defendant's lack of participation in his academics. For example, defendant seemed reluctant to acknowledge that GL bore any fault for cheating on a math test. In addition, plaintiff testified that she employed the homework rewards system suggested by GL's fourth grade teacher, but to her knowledge, defendant did not. An evaluation conducted at the New Oakland Adolescent and Family Center recommended more structure and stability for GL. With regard to BL, plaintiff acknowledged that she consistently did well in school, but believed she could be doing better. From this evidence, proper cause or change of circumstances as set forth in *Shade*, 291 Mich App at 30-31, existed to revisit the parties' parenting time schedule. Thus, the trial court correctly determined that plaintiff met the necessary threshold.[1]

Defendant next argues that the trial court abused its discretion by allowing plaintiff to request modification of legal custody on the last day of the evidentiary hearing. We disagree.

"This Court must affirm all custody orders unless the trial court's findings of fact 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." *Berger*, 277 Mich App at 705, citing MCL 722.28. "An abuse of discretion with regard to a custody issue 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.' " *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012), quoting *Berger*, 277 Mich App at 705.

The trial court did not abuse its discretion by awarding plaintiff sole legal custody without plaintiff requesting such relief in her motion. A court's decision regarding custody should reflect the best interests of the children involved. *Berger*, 277 Mich App at 705. Despite defendant's argument to the contrary, the record contained evidence regarding the parties' inability to communicate and effectively co-parent, and demonstrated that granting plaintiff sole legal custody would be in the children's best interests. Defendant conceded that he and plaintiff

[1] As concluded above, the trial court properly determined that the parenting time modification would not alter the children's established custodial environment with defendant. Further, although the trial court only conducted a threshold analysis to determine whether proper cause or change of circumstances existed to revisit parenting time with regard to the modification originally requested by plaintiff, the final schedule the trial court ordered in fact provided defendant more time than that originally requested by plaintiff. Thus, a second analysis regarding proper cause and change of circumstances, as defendant suggests on appeal was necessary, would not have altered the trial court's determination.

could not effectively co-parent, and that plaintiff was not responsive to his e-mails and text messages. Further, the trial court expressed its concerns regarding legal custody well before the final day of the evidentiary hearing. For example, at the first day of the evidentiary hearing on October 5, 2015, the trial court made very clear its reservations about the parties' ability to co-parent on the basis of their acrimonious communication. Additionally, plaintiff's counsel stated that the motion was based on the entirety of the evidence adduced throughout the evidentiary hearing regarding the parties' inability to effectively co-parent for the best interests of the children. Moreover, MCR 2.119(A)(1) provides that a motion may be made during a hearing such as the evidentiary hearing that took place in this case. [2]

Finally, defendant argues that, in its best interest determination, the trial court should have specified which best-interest factors pertained to legal custody. Further, he argues that the trial court's findings with regard to best interest factors (a), (b), (d), (e), (h), and (k) are against the great weight of the evidence, and that the trial court improperly considered defendant's anger in its review of the factors. We disagree.

"The child's best interests govern a court's decision regarding parenting time." *Shade*, 291 Mich App at 31, citing MCL 722.27a(1) and *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). Further, "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). The best-interest factors in MCL 722.23, as well as the parenting time factors listed in MCL 722.27a(7), are relevant to a trial court's parenting time determination. *Shade*, 291 Mich App at 31. "While a trial court must make findings under all of the MCL 722.23 factors for a custody decision, 'parenting time decisions may be made with findings on only the contested issues.' " *Demski v Petlick*, 309 Mich App 404, 457; 873 NW2d 596 (2015), quoting *Shade*, 291 Mich App at 31-32. A court's findings of fact related to each of the best-interest factors are subject to the great weight of the evidence standard. *McIntosh*, 282 Mich App at 475.

Our review of the record confirms that the trial court considered each of the best-interest factors, and it is clear from its findings that it did so with regard to both parenting time and legal custody. Thus, the record is sufficient for this Court to make a determination regarding whether the evidence presented clearly preponderates against the findings. See *Rittershaus*, 273 Mich App at 475. Further, although defendant challenges the trial court's consideration of what the trial court characterized as defendant's angry, uncooperative and petulant demeanor and "reprehensible" way of interacting with plaintiff, such matters are properly weighed in an

[2] At the close of the six-day evidentiary hearing, the trial court also determined that granting plaintiff sole legal custody would not alter the children's established custodial environment with defendant. To the extent that defendant challenges this determination, we conclude that the record supports the trial court's decision where defendant's ability to spend significant time with the children, participate in their education and provide guidance, support, discipline and parental comfort will not be diminished.

evaluation of defendant's credibility, and we will defer to the trial court's determinations in that regard. *McIntosh*, 282 Mich App at 474.

In making its custody and parenting time determinations, the trial court analyzed each of the best-interest factors, and weighed factors (b), (d), (h), (j), and (k) in plaintiff's favor; and factors (a), (c), (f), (g), and (j) in favor of both parties. For factor (e), the trial court made extensive findings, and appeared to weigh factor (e) equally in favor of both parties. With regard to factor (i), the trial court noted that it conducted *in camera* interviews to determine the children's preferences. Finally, for factor (l), the trial court said that it considered plaintiff's delays in responding to defendant as part of their communication, as well as the fact that defendant may benefit from counseling.

Factor (a) involves "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). Despite defendant's argument to the contrary, our review of the record confirms that the trial court did indeed render findings with regard to factor (a). Defendant asserts that the trial court did not adequately account for the bond between him and the children. However, the record supports the trial court's findings regarding factor (a). Plaintiff testified that she and BL have a strong relationship and that BL confides in her. She said that she has the same type of relationship with GL. Defendant also testified regarding his bond with the children, stating that the children look to him for guidance, care, and understanding. The trial court duly considered this evidence before rendering its factual findings. The trial court's findings for factor (a) were not against the great weight of the evidence.

Under factor (b), a trial court must consider "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court found that both parties had the capacity and disposition to provide the children love, affection, and guidance, but weighed the factor in plaintiff's favor, noting that defendant struggles with setting aside his personal feelings and putting the children first. On appeal, defendant argues that the trial court allowed its personal feelings about him to cloud the trial court's judgment. Defendant also strenuously argues that both children are doing well in school. According to defendant, the parties' animosity does not affect the children.

The trial court's findings with regard to factor (b) were not against the great weight of the evidence. The record contains substantial evidence that defendant's animosity toward plaintiff impacted the children as well as plaintiff and defendant's ability to communicate effectively regarding the children. Plaintiff testified that defendant was uncooperative and difficult regarding taking the children to extracurricular activities during his parenting time. Defendant referred to plaintiff as "princess" in text messages, and often replied to plaintiff's attempts to communicate regarding the children's needs in an uncooperative manner. According to plaintiff, she often delayed communication with defendant about the children because she wanted to avoid (1) getting yelled at by him or (2) what she characterized as an inevitable argument. While we acknowledge that the record evidence at the close of the evidentiary hearing reflected that BL was doing well in school, and that GL in particular had shown improvement, the trial court's findings for factor (b) were not against the great weight of the evidence.

Under factor (d), a trial court must consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court weighed this factor in plaintiff's favor, finding that having a home base would benefit the children, and observing that the parties' current parenting time arrangement was not serving the children's best interests. Defendant argues that the court's determination was inconsistent with its finding that the children had an established custodial environment with him.

The record supports the trial court's findings with regard to factor (d). The evidence demonstrates that plaintiff provides the type of stable environment the children need during the school week. She testified that she helped both children, especially GL, with their homework, and kept well-apprised of the children's school assignments. She also participated in a homework rewards program recommended by GL's teacher to encourage GL to excel at school. Further, plaintiff actively supported the children's involvement in extracurricular activities. In contrast, the record reflected that defendant often sent GL to parenting time with plaintiff with incomplete homework. He also did not acknowledge the serious issue of GL cheating in his math class and, to plaintiff's knowledge, was not actively participating in the homework rewards program suggested by GL's teacher to help GL improve in school. While defendant testified that he did actively support the children with their homework and understood the importance of their schoolwork, the trial court's findings with regard to factor (d) were not against the great weight of the evidence.

With regard to factor (e), a trial court must consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court expressed its concern that Desmond Johansen, plaintiff's fiancé, and plaintiff had not yet married, and that she could be dispossessed of the home they shared. Defendant argues that the record demonstrates that his home is more stable and permanent than plaintiff's. The trial court's conclusion that plaintiff offered the children a stable, acceptable home was not against the great weight of the evidence. We acknowledge that Johansen conceded that he once asked plaintiff to leave their Garden City home during a disagreement, and both he and plaintiff admitted that he owned the home solely in his name. However, Johansen also said that he considered his home to be a permanent residence for plaintiff and the children, and the children were able to decorate their own rooms and had dedicated spaces to do their homework and for play. Therefore, the record evidence supported the trial court's conclusion on factor (e).

For factor (h), a trial court must consider "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court weighed factor (h) in plaintiff's favor, finding her best equipped to take primary responsibility for the children's success in school. Defendant argues that the evidence, particularly toward the latter part of the evidentiary hearing, demonstrated that the children were doing well in school, and had an excellent home, school, and community record under the parenting time schedule existing before the trial court's modification. However, the record supports the trial court's findings for factor (h). The record confirms that plaintiff actively encouraged the children's participation in extracurricular activities, and provided structure and discipline, especially with regard to the children's homework and academic responsibilities. On the other hand, the record demonstrated that defendant was not an active participant in the children's extracurricular activities, sent GL to plaintiff's home with incomplete homework assignments, and refused to fully acknowledge some

of GL's difficulties with school. The trial court's findings with regard to factor (h) were not against the great weight of the evidence.

With regard to factor (k), a trial court must look to "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court weighed factor (k) in plaintiff's favor, based on plaintiff's testimony. Defendant argues that he was never arrested for, or convicted of, domestic violence, and that GL had actually been the victim of domestic violence when he had his mouth taped shut during plaintiff's parenting time. The record supports the trial court's findings and conclusion with regard to factor (k). Plaintiff testified that defendant previously put his hands on her without her consent three or four times. There was also testimony that defendant had pulled a gun on plaintiff when BL was an infant. On the other hand, defendant confirmed that Child Protective Services (CPS) did not substantiate GL's claims that his mouth was taped shut during plaintiff's parenting time. Thus, the trial court's findings under factor (k) were not against the great weight of the evidence.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood