STATE OF MICHIGAN

COURT OF APPEALS

DARLA K. GAFFORD,

Plaintiff-Appellant,

v

ROBERT A. GAFFORD,

Defendant-Appellee.

UNPUBLISHED
October 29, 2020

No. 350078
Livingston Circuit Court
Family Division
LC No. 17-051631-DM

DARLA K. AFRIN, formerly known as DARLA K. GAFFORD,

Plaintiff-Appellant,

v

ROBERT A. GAFFORD,

Defendant-Appellee.

No. 350371
Livingston Circuit Court
Family Division
LC No. 17-051631-DM

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

On July 18, 2019, the trial court entered an order modifying plaintiff's parenting time with the parties' minor children and granting defendant $2,000 in attorney fees. In Docket No. 350078, plaintiff appeals as of right the attorney-fee award. In Docket No. 350371, plaintiff appeals by delayed leave granted[1] the same circuit court order, challenging the parenting-time modification. We reverse and remand for further consideration consistent with this opinion.

[1] *Afrin v Gafford*, unpublished order of the Court of Appeals, entered January 17, 2020 (Docket No. 350371).

I. BACKGROUND

The parties married on April 23, 2012. Their marriage produced four children. Plaintiff filed a complaint for divorce on January 4, 2017. She asked for joint legal and joint physical custody of the children. A consent judgment of divorce was issued in October 2017, that *inter alia* granted plaintiff's request for joint custody. On September 24, 2018, defendant filed a petition for the entry of an ex parte order regarding temporary custody and parenting time and/or, in the alternative, an emergency motion to modify custody, parenting time, and support based on allegations that plaintiff was assaulted by her boyfriend. The trial court entered an ex parte order awarding defendant interim sole legal and physical custody and granted plaintiff liberal parenting time supervised by a family therapist. Plaintiff filed a motion opposing the supervised parenting time and requested a return to the joint custody arrangement in the consent judgment of divorce.

On October 19, 2018, the court held an evidentiary hearing on the motion to modify custody, and on December 3, 2018, entered a consent order which provided that the parties would resume joint legal custody and joint physical custody with the caveat that plaintiff's overnight parenting time would be supervised by plaintiff's friend. The consent order also provided that a parenting time coordinator (PTC) would reevaluate whether plaintiff's time would need to be supervised after plaintiff consistently participated in individual therapy for three months. The order further stated that apart from plaintiff's grandfather, plaintiff was to "not allow any unrelated males, persons with PPO's against them, persons with criminal histories, or persons with domestic violence histories . . . to be present when the minor children [were] present."

On March 25, 2019, defendant filed a motion for sole legal custody and modification of parenting time, arguing, in relevant part, that plaintiff violated the consent order by allowing her new husband to be present during her parenting time even though he allegedly assaulted plaintiff in 2017. Defendant requested that the trial court award him sole legal custody and to issue an interim order granting plaintiff supervised parenting time. Defendant also requested that the trial court award him his attorney fees and costs for filing the motion and for the trial court to sanction plaintiff "financially or through jail, for her contemptuous actions." The trial court entered an ex parte order to show cause, which ordered that plaintiff's parenting time be supervised. Plaintiff filed a competing motion, denying that her new husband ever assaulted her, requesting that the trial court enforce the December 2018 consent order and modify or rescind the ex parte order to show cause. Following a May 2019 hearing on defendant's motion to show cause and plaintiff's objection to the ex parte order, the trial court ordered that plaintiff have one hour of supervised visitation per week. In July 2019, after an evidentiary hearing on the competing motions, the trial court ordered that the parties resume parenting time "pursuant to the prior court's orders" and ordered a parenting time schedule that provided plaintiff with two days of parenting time the first week and three days the second week. The court found that the plaintiff was not credible in her denial of domestic violence between herself and her husband and ordered modifications designed to address domestic violence. The trial court denied defendant's request for sole legal custody. The trial court also declined defendant's request to hold plaintiff in contempt, but it awarded defendant $2,000 in attorney fees.

In Docket No. 350078, plaintiff challenges the trial court's award to defendant of $2,000 in attorney fees. In Docket No. 350371, plaintiff challenges the trial court's modification of custody and parenting time.

II. DOCKET NO. 350078

Plaintiff argues that the trial court appeared to order her to pay the $2,000 in attorney fees on equitable grounds without making any findings that the fees were incurred or reasonable. We agree.

We review a trial court's decision to award attorney fees for an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). "An abuse of discretion occurs when the result falls outside the range of principled outcomes." *Richards v Richards*, 310 Mich App 683, 699; 874 NW2d 704 (2015).

Generally, "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). MCL 552.13[2] and MCR 3.206(D)[3] authorize an award of attorney fees in domestic relations cases. See *id*.

In addition to MCL 552.13 and MCR 3.206(D), there is the common-law exception "that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Id*. at 164-165 (quotation marks and citation omitted). The party requesting the award of attorney fees has the burden of showing that the attorney fees were incurred and that they were reasonable. *Id*. at 165-166. Although a trial court may award attorney fees incurred as a result of the other party's misconduct, "the attorney fees awarded must have been incurred *because of* misconduct."

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[2] MCL 552.13(1) provides:

> In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. . . .

[3] At the time of the trial court's order, MCR 3.206(D) provided:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Id. at 165 (emphasis added). When determining whether to award attorney fees resulting from a party's misconduct, a trial court must consider three factors: (1) whether unreasonable conduct occurred, (2) whether the attorney fees awarded were incurred due to this unreasonable conduct, and (3) whether the fees incurred were reasonable. *Id*. at 165-166.

When determining the reasonableness of an attorney fee, the trial court should first determine the fee customarily charged in the locality for similar legal services. *Smith v Khouri*, 481 Mich 519, 529; 751 NW2d 472 (2008). "This number should be multiplied by the reasonable number of hours expended in the case . . ." *Id*. at 531. The trial court should then consider the following nonexhaustive factors when determining the reasonableness of an attorney fee:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
>
> (3) the amount in question and the results obtained,
>
> (4) the expenses incurred,
>
> (5) the nature and length of the professional relationship with the client,
>
> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
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> (7) the time limitations imposed by the client or by the circumstances, and
>
> (8) whether the fee is fixed or contingent. [*Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 282; 884 NW2d 257 (2016).]

"In order to facilitate appellate review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors." *Id*.

The trial court erred by failing to address any of the three required factors on the record. "The trial court may not award attorney fees . . . solely on the basis of what it perceives to be fair or on equitable principles." *Reed*, 265 Mich App at 166. Therefore, we vacate the trial court's award of attorney fees and remand to the trial court to make the required analysis.[4]

III. DOCKET NO. 350371

Plaintiff argues that the trial court abused its discretion by amending the parenting-time order because it made insufficient factual findings regarding proper cause or change in

[4] To the extent that the trial court awarded attorney fees on the basis of plaintiff's misconduct, we note that it does not appear that defendant submitted billing records to show that he incurred the fees because of plaintiff's misconduct.

circumstances, an established custodial environment, and the best-interest factors. "[A]ll orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Upon a finding of error, this Court should remand unless the error was harmless. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994).

Under MCL 722.27(1)(c), the party seeking to modify a child custody or a parenting-time order "must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests." *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003), provides the standards regarding proper cause or a change of circumstances with respect to requests to modify custody. *Id*. The *Vodvarka* standards do not apply to requests to modify parenting time unless the modification would alter the child's established custodial environment. *Shade v Wright*, 291 Mich App 17, 25-26; 805 NW2d 1 (2010). If the modification of parenting time would not alter the child's established custodial environment, "a more expansive definition of 'proper cause' or 'change of circumstances' " applies. *Id*. at 28.

If the party seeking to change custody or parenting time establishes proper cause or a change of circumstances, the trial court must determine that the change would be in the best interests of the child. *Lieberman*, 319 Mich App at 83. If the modification in the change in custody would modify the child's established custodial environment, the movant must prove by clear and convincing evidence that the change would be in the best interests of the child. *Shade*, 291 Mich App at 23. If the modification would not modify the child's established custodial environment, the movant must prove by a preponderance of the evidence that the change would be in the best interests of the child. *Id*. Similarly, for parenting-time matters, if the proposed change does not alter the established custodial environment, there must be a showing by a preponderance of the evidence that the change would be in the best interests of the child. *Lieberman*, 319 Mich App at 84.

Once the trial court identifies the proper burden of proof, it proceeds to consider the best-interest factors. *Id*.[5] Generally, "[c]ustody decisions require findings under all of the best interest

[5] These factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The 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.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

factors, but parenting time decisions may be made with findings on only the contested issues." *Shade*, 291 Mich App at 31-32.

Contrary to the plaintiff's argument, we find that the trial court's findings were sufficient to support that there was proper cause or change in circumstances under the *Vodvarka* or *Shade* standard. However, the trial court committed legal error by failing to make a determination regarding whether an established custodial environment existed, and this error was not harmless because such a finding determines what burden of proof applies to the best-interests analysis. See *Kessler v Kessler*, 295 Mich App 54, 62; 811 NW2d 39 (2011). Therefore, we must remand because this Court is precluded from making a de novo determination as to whether an established custodial environment existed with plaintiff, defendant, or both. *Id*. On remand, the trial court should make findings regarding an established custodial environment and whether the proposed change would alter the established custodial environment, and it should apply the best-interest factors under the proper standard. The trial court should consider all relevant, up-to-date information. *Fletcher*, 447 Mich at 889.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering