

STATE OF MICHIGAN
COURT OF APPEALS

JOHN ELLWOOD MITCHELL,

Plaintiff-Appellee,

UNPUBLISHED
September 15, 2011

v

KATE ANN MITCHELL a/k/a KATE ANN
GODLEWSKA,

No. 303257
Newaygo Circuit Court
LC No. 08-008195-DM

Defendant-Appellant.

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

On February 15, 2011, Newaygo Circuit Court Judge Graydon W. Dimkoff changed custody of two minor children based solely on the defendant mother's inability to force a third party to provide his personal information to the plaintiff father or the Friend of the Court. This action was in direct violation of the Child Custody Act, MCL 722.21 *et seq.*, which demands that all custody decisions be made for the best interests of the child. Accordingly, we vacate the circuit court's order changing the parties' existing custody arrangement and remand for continued proceedings consistent with the Child Custody Act.¹

I. FACTUAL AND PROCEDURAL HISTORY

The parties were married in 1991, and had two minor children together, born in 2003 and 2006. The parties were divorced on March 30, 2009. That judgment awarded the parties joint physical and legal custody of the children. Six months later, the court allowed defendant to move to Texas with the children and modified the parenting time order accordingly. Following

¹ This Court previously erred in classifying defendant's appeal as a timely filed claim of appeal. *Mitchell v Mitchell*, unpublished order of the Court of Appeals, entered May 27, 2011 (Docket No. 303257). The final order affecting custody was entered on February 15, 2011 and defendant's March 28 claim of appeal was not timely filed within 21 days as required by MCR 7.204(A)(1). As custody cases must be decided on the best interests of the children, and not procedural discrepancies, we will consider defendant's claim on the merits as a delayed application for leave to appeal under MCR 7.205(F).

defendant's move, the parties continuously disagreed regarding child support, travel expenses and the method and frequency of plaintiff's communications with the children. On October 4, 2010, defendant filed a motion requesting the court to release her from the following provision in the judgment of divorce: "IT IS FURTHER ORDERED that neither party shall be allowed to have third parties of the opposite sex overnight in the presence of the minor children until further order of this Court." Defendant apparently brought the motion after learning that plaintiff was cohabitating with his former mistress. It was later revealed, however, that plaintiff and his partner had since married.

After a hearing, the circuit court ordered that the overnight restriction would remain in effect, but would be suspended for a party who had "been in an exclusive and uninterrupted relationship" for a six-month period. During the hearing, plaintiff accused defendant of allowing her boyfriend, Todd Smith, to spend the night while the children were present. The court ordered defendant to "provide a date of birth or any necessary identifying information about Todd Smith to the plaintiff for purposes of a background check." No similar requirement was proposed for plaintiff's current wife. Smith subsequently submitted an affidavit to the court indicating that he would not provide his personal information to plaintiff or any court in Michigan. At a December 29, 2010 hearing, the court ordered defendant to provide Smith's information to the Newaygo County Friend of the Court. The court reasoned that a background check of Smith was required to protect the safety of the children. And, the court threatened to grant temporary custody of the children to plaintiff unless defendant and Smith complied with the court's order.

Neither defendant nor Smith supplied the Friend of the Court with Smith's personal information by the court's deadline of January 28, 2011. The court entered an order on February 15, 2011, requiring defendant to temporarily transfer custody of the children to plaintiff. It does not appear on the record, however, that plaintiff has actually taken physical custody of the children.

II. THE CIRCUIT COURT CHANGED CUSTODY IN VIOLATION OF THE CHILD CUSTODY ACT AND TO PUNISH DEFENDANT'S CONTEMPT OF COURT

Defendant argues that the circuit court improperly altered its previous custody order without conducting a best-interest analysis. We agree. All custody orders 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. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010).

In a custody dispute, the circuit court has the power to modify or amend a previous judgment or order affecting custody of the minor children. MCL 722.27. Before modifying or amending an existing custody order, however, the circuit court must determine whether there has been a change in circumstances or if proper cause exists to revisit the custody decision. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). In the absence of proper cause or a change in circumstances, a circuit court may not revisit the custody issue. Even upon a showing of proper cause or a change in circumstances, the circuit court may not modify or amend a previous custody order "so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is

in the best interest of the child.” MCL 722.27(1)(c). In determining the best interests of the child, the circuit court must consider and evaluate the best-interest factors listed in MCL 722.23. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008). The circuit court “must explicitly state its findings and conclusions regarding each” best-interest factor on the record, and its failure to do so demands a new hearing. *Id.* at 330.

The current custody dispute arose incidentally from the dispute over the third-party overnight restrictions contained in the judgment of divorce. Even so, the court was required to follow the procedure outlined in MCL 722.27(1). Yet, the circuit court failed to make the prerequisite determination that plaintiff had established proper cause or a change of circumstances supporting a change in custody. MCL 722.27(1)(c). The court never considered whether the children had an established custodial environment with their mother in Texas, which would impose the stricter “clear and convincing evidence” burden on plaintiff. *Id.* Moreover, the circuit court never considered whether a change in custody was in the best interests of the children as required for any action under MCL 722.27(1). See *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995) (absent an established custodial environment, the moving party must show by a preponderance of the evidence that a change in custody is in the child’s best interests). The court completely failed to acknowledge the statutory best interest factors of MCL 722.23. Accordingly, the circuit court committed clear legal error in modifying the custody order.

We further note that the circuit court improperly used custody as a means to punish defendant for her contempt in failing to provide her boyfriend’s personal information. The procedural safeguards in a change of custody dispute “are intended to ‘. . . minimize unwarranted and disruptive changes of custody orders.’” *Vodvarka*, 259 Mich App at 509, quoting *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995). Changing custody is not a proper method to force compliance with a circuit court’s order. *Kaiser v Kaiser*, 352 Mich 601, 603-604; 90 NW2d 861 (1958); *Adams v Adams*, 100 Mich App 1, 13-14; 298 NW2d 871 (1980); *Parrott v Parrott*, 53 Mich App 635, 639-640; 220 NW2d 176 (1974); *Bylinski v Bylinski*, 25 Mich App 227, 229; 181 NW2d 283 (1970). Rather, the proper means for enforcing a direct court order, even in a custody action, is through the court’s contempt powers. The court is statutorily limited to imposing a fine or imprisonment in punishment of a contempt. MCL 600.1701.

For these reasons, we vacate the provision of the February 15, 2011 order requiring defendant to cede custody of the children to plaintiff. As the issue was not raised on appeal, we make no decision regarding the legality of the court’s underlying order for Smith to provide his identifying information to the Friend of the Court. We remand for continued proceedings conducted consistent with the Child Custody Act, but we do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens