STATE OF MICHIGAN

COURT OF APPEALS

DANIEL W. STICKEL, Plaintiff-Appellee,	UNPUBLISHED December 22, 2011
v	No. 304401 St. Clair Circuit Court Family Division
ANGIE M. STICKEL a/k/a ANGIE M. EUBANKS, Defendant-Appellant.	LC No. 07-001435-DM

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals from a final order of the circuit court that denied her motion to change custody. For the reasons set forth below, we reverse and remand.

I. FACTS AND PROCEEDINGS

Defendant and plaintiff married in 1997 and divorced in 2007. During the divorce proceedings, the parties were not represented by counsel and agreed to a judgment of divorce that provided for joint legal and physical custody of the parties' two minor children. The judgment contained a stipulation that the children would live with plaintiff for the purposes of schooling. When the children were young and not in school, the parties exercised flexible parenting time and often adjusted parenting time according to changing circumstances. During the summers, the parties split their time with the children evenly, although the length of the visits varied.

When the children began to attend school full time in 2010, they stayed with plaintiff during the week and with defendant every other weekend because mid-week visits became increasingly difficult to manage. However, this schedule only lasted until the middle of September 2010, when plaintiff asked defendant to take the children for the remainder of the month because he had applied for, and received, a transfer to a different state police post. As a result of his transfer, plaintiff planned to move to Pinconning, Michigan. Shortly afterward, plaintiff ended a relationship with his live-in girlfriend, who was planning to move with him to Pinconning. Plaintiff asked defendant to take the children on a permanent basis because he said his work schedule prevented him from caring for the children.

For the remainder of 2010, plaintiff only saw his children occasionally, around major holidays. In January 2011, plaintiff did not return the children to defendant after a weekend visit. Plaintiff testified that he was concerned about an injury to the older child's lip. The child claimed that defendant's fiancé hit him. Child Protective Services investigated the allegation, but did not substantiate any claims.

Thereafter, defendant filed a motion to change custody, alleging "a change of circumstances consisting of plaintiff's emotional instability and inability to care for" the children. Defendant also alleged that plaintiff had moved the children more than 100 miles from their established legal residence without her consent or the permission of the trial court. The trial court held an evidentiary hearing, but expressly limited its scope and precluded defendant from introducing evidence to support some of her allegations. The trial court stated that the hearing was "an evidentiary hearing on a limited issue as to the established custodial environment."

Following the hearing, the trial court found that plaintiff had moved more than 100 miles from the established custodial residence, but that this move was made with defendant's consent. The trial court ruled that the threshold showing of proper cause or change of circumstances warranting a reexamination of the children's custody order was not warranted. However, the court found that plaintiff's move constituted a change of circumstances sufficient to warrant modification of the parenting-time order. The court ordered that the children would spend the first three weekends of each month with defendant during the school year, and that each party would have the children at two week intervals during the summer.

II. STANDARDS OF REVIEW

This Court will affirm a trial court's entry of a custody order unless the 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). A court's findings are against the great weight of the evidence where the evidence clearly preponderates in the opposite direction. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). An abuse of discretion exists when the result 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. *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006). A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

A party seeking a change of custody must first establish proper cause or a change of circumstances by a preponderance of the evidence. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). If the moving party does not establish proper cause or a change in circumstances, the trial court is precluded from holding a custody hearing. *Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996). The movant has the burden of proving by a preponderance of the evidence that proper cause or a change in circumstances exists, *Dailey v Kloenhamer*, 291 Mich App 660; ___ NW2d ___ (2011), slip op p 2, and that modification is in the child's best interest, *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). When a modification of custody would change the established custodial environment of the child, the moving party must show the change to be in the child's best

interest by clear and convincing evidence. MCL 722.27(1)(c); *Hunter v Hunter*, 484 Mich 247, 258; 771 NW2d 694 (2009).

To constitute a change of circumstances meriting a consideration of a change in custody, there must have been a change in conditions pertaining to custody since the entry of the last custody order that has had or could have a significant impact on the child's well-being. *Corporan*, 282 Mich App at 604. Generally, the determination of a change of circumstances should be based on the statutory best interest factors. *Brausch v Brausch*, 283 Mich App 339, 355; 770 NW2d 77 (2009). However, a change in the location of the custodial residence of more than 100 miles without the consent of the other parent or the approval of the trial court can constitute a change in circumstances meriting consideration of a change in custody. MCL 722.31.

III. CHANGE OF CIRCUMSTANCES

The trial court appears to have misapprehended the nature of defendant's motion for change of custody. The trial court appeared to believe that a change of circumstance could not be established absent a move of more than 100 miles to which defendant did not consent or that was not approved by the court. However, defendant did not allege a change of circumstances based merely on plaintiff's move of more than 100 miles. Rather, she alleged several additional changes of circumstance based on plaintiff's alleged inappropriate discipline, physical abuse, domestic violence, alcohol consumption, and inability to care for the children. The trial court, however, expressly refused to allow defendant to present testimony concerning many of her allegations, despite the fact that they are based on the best interests of the child factors set forth in MCL 722.23, and thus were relevant for consideration of whether a change of circumstances had occurred. *Brausch*, 283 Mich App at 355.

While the trial court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued, *MacIntyre v MacIntyre* (*On Remand*), 267 Mich App 449, 452; 705 NW2d 144 (2005), the trial court's discretion did not extend to denying defendant her opportunity to present all evidence relevant to her claim of change of circumstances because that the trial court subsequently ruled on the threshold issue of change of circumstances. A parent has a fundamental liberty interest in the care and custody of his or her child. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). Due process requires an opportunity to be heard in a meaningful time and manner. *Hinky Dinky Supermarket, Inc, v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004). Here, defendant did not receive a meaningful opportunity to be heard concerning several of her allegations of a change of circumstance that warranted a review of her children's custody order.

We hold that the trial court abused its discretion and committed a clear error of law in denying defendant the opportunity to present her other allegations of a change of circumstances warranting a custody review. Because this error was not harmless, the appropriate remedy is to remand for further proceedings. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). On remand, the trial court should consider up-to-date information, including the children's current and reasonable preferences, and any other changes in circumstances arising since the original custody order. *Pierron*, 282 Mich App at 262.

IV. CONSENT TO PLAINTIFF'S MOVE

Defendant also argues that the trial court's finding that plaintiff's move was made with her consent was against the great weight of the evidence. MCL 722.31(1) provides that "a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." A child whose parental custody is governed by court order has a legal residence with each parent. *Id.* A change of the child's legal residence is not restricted if (1) the other parent consents to the change or (2) the court, after analysis of the factors contained in MCL 722.31(4), permits the residence change. MCL 722.31(2). The only consent that can be recognized under the statute is consent to a specific, identifiable change of legal residence. *Delamielleure v Belote*, 267 Mich App 337, 341; 704 NW2d 746 (2005).

Defendant argues that the trial court effectively required her to prove her lack of consent rather than requiring plaintiff to prove that she consented to the move. This assertion is predicated on a mischaracterization of the court's ruling. Defendant argues that the court ruled that because she did not present any evidence other than her testimony that she opposed the move, the court inferred that she gave her consent. However, the record is clear that the court's finding on the issue of consent was based on all the evidence presented, including the testimony of both parties.

Plaintiff testified that he told defendant about the move in September 2010. Plaintiff testified that he had spoken to defendant about school districts and his intent to put the children in school in Pinconning. Plaintiff testified that defendant had agreed to the move and that they were discussing a modification of parenting time. Defendant's testimony shows that she knew of the plan to move the children and provided assistance to plaintiff in making this move possible. Defendant testified that she knew plaintiff was moving to Pinconning as early as the middle of September 2010, when she agreed to transport the children back and forth to school so that defendant and his girlfriend could get the house ready. Defendant testified that plaintiff told her the children "were going to start school over there and everything like that."

In sum, the evidence offered does not clearly preponderate in the direction urged by defendant. *Berger*, 277 Mich App at 705. The trial court could reasonably infer from the evidence that defendant had agreed to the move, and that her objection did not come about until after plaintiff took the children and refused to return them to her care.

V. BEST-INTEREST FACTORS

Defendant also claims that the court should have held a best-interest hearing on parenting time before changing the existing schedule. A parenting time provision in a judgment of divorce may be modified without the consent of both parties when a change of circumstances has arisen since the original decree that warrants modification. *DenHeeten v DenHeeten*, 163 Mich App 85, 89; 413 NW2d 739 (1987). When considering a modification of a parenting-time order, the trial court must first consider whether a change in the parenting-time schedule would effectively amount to a change in the child's established custodial environment. *Brown v Loveman*, 260 Mich App 576, 605; 680 NW2d 432 (2004). If a proposed modification would alter the

established custodial environment, the trial court should not grant a modification unless it is proved by clear and convincing evidence that the change would be in the best interests of the child. *Pierron*, 486 Mich at 89-90. If the proposed modification will not alter the established custodial environment, the proponent of the change must only prove by a preponderance of the evidence that the change is in the best interests of the child. *Id.*

The trial court attempted to preserve the established custodial environments with both parents by insuring that "the minor children be with each parent with considerable frequency." The trial court ordered that the children would spend the first three weekends of each month with defendant during the school year, and that each party would have the children at two week intervals during the summer. The summer schedule would thus remain roughly equivalent to the summer schedule the parties had maintained since the divorce, and the school year schedule would result in a similar, if not exactly identical, number of days per month of parenting time for defendant.

A trial court is not required to explicitly address the best-interest factors in its written opinion when modifying parenting time without changing custody. *Shade v Wright*, 291 Mich App 17, 32; 805 NW2d 1 (2010). However, many of the statutory best-interest factors, MCL 722.23, were contested in the motion and response filed by the parties. The trial court prevented the parties from eliciting evidence on and arguing several of these issues at the evidentiary hearing. Given the court's posture on these matters, it is not clear from the written record that the trial court considered the children's best interests. See *Powery v Wells*, 278 Mich App 526, 530-531; 752 NW2d 47 (2008).

The trial court abused its discretion and committed a clear error of law in limiting the scope of the evidentiary hearing to a determination of whether an established custodial environment exists, and precluding defendant from arguing other grounds for a change of circumstances warranting a custody review other than an unconsented move by plaintiff of more than 100 miles. Additionally, the trial court abused its discretion in modifying parenting time without considering the best-interest factors.

We accordingly reverse the decision of the trial court and remand for reevaluation consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause