STATE OF MICHIGAN

COURT OF APPEALS

CRYSTAL LYNN THORNTON, f/k/a CRYSTAL LYNN SCHIPPA, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED July 23, 2013
v	No. 313291 Allegan Circuit Court
JOSEPH JOHN SCHIPPA, Defendant/Counter-Plaintiff-Appellee.	LC No. 07-042388-DM

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

This case arises out of defendant Joseph John Schippa's motion to change custody and plaintiff Crystal Lynn Thornton's motion to change the school of the parties' minor children. The trial court granted defendant-father's motion to change custody and denied plaintiff-mother's motion to change the minor children's school. Plaintiff-mother appeals as of right. We affirm.

Plaintiff-mother and defendant-father were married in 2002 and had two minor children during their marriage. They divorced in 2008, and plaintiff-mother was awarded primary physical custody of the children. After moving with the children several times, plaintiff-mother moved again from Wyoming, Michigan, to Hartford, Michigan, to live with her current husband, Scott Thornton. At the time, the children attended school in the Grandville school district. Unbeknownst to defendant-father, plaintiff-mother removed the children from their school in Grandville and enrolled them at a school in Hartford. Upon learning of her actions, defendant-father obtained an ex parte motion requiring plaintiff-mother to return the children to their original school. Plaintiff-mother then filed a motion to change the children's school, citing in part the approximately 70-mile distance, one way, between her home in Hartford and the children's school in Grandville. Defendant-father opposed the motion and filed a motion to change custody of the children. After a four-day evidentiary hearing, the trial court granted defendant-father's motion to change custody and denied plaintiff-mother's motion to change the children's school. This appeal followed.

"There are . . . three different standards of review applicable to child-custody cases." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). First, "[t]he clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law." *Id*. Next, the trial court's findings of fact "are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this Court will sustain the trial court's factual findings unless the evidence clearly preponderates in the opposite direction." *Id*. (internal citation and quotation marks omitted). Finally, "[d]iscretionary rulings, including a trial court's determination on the issue of custody, are reviewed for an abuse of discretion." *Id*. In the context of child-custody proceedings, "[a]n abuse of discretion exists when the trial court's decision is palpably and grossly violative of fact and logic . . . ." *Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011) (internal citations and quotation marks omitted); see also MCL 722.28 (a trial court's decision in a child-custody dispute "shall be affirmed on appeal unless the trial judge . . . committed a palpable abuse of discretion").

To determine the best interests of the child in a custody dispute, this Court looks to the 12 factors delineated in MCL 722.23. See, e.g., *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). "A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors." *Id*. "The trial court need not necessarily engage in elaborate or ornate discussion because brief, definite, and pertinent findings and conclusions regarding the contested matters are sufficient." *Id*. at 12.

The goal in awarding custody under MCL 722.27 "is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan*, 282 Mich App 599, 603; 766 NW2d 903 (2009). When a parent seeks a modification of an existing custody order, he or she must, as a threshold matter, demonstrate "proper cause or a change of circumstances." *Id*. If the moving parent does not establish proper cause or a change of circumstances, "then the court is precluded from holding a child custody hearing . . . ." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003).

In *Vodvarka*, *id*. at 512-514, this Court explained what constitutes "proper cause" or "a change of circumstances."

> [T]o establish "proper cause" necessary to revisit a custody order, 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.
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> [T]o establish 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. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, 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. [Emphasis in original.]

If the moving parent demonstrates proper cause or a change of circumstances, then the trial court may revisit the best-interests factors found in MCL 722.23 to determine whether a change of custody is in the best interests of the children. *Vodvarka*, 259 Mich App at 512.

In *Pierron v Pierron*, 282 Mich App 222, 263; 765 NW2d 345 (2009), aff'd 486 Mich 81; 782 NW2d 480 (2010), this Court opined that a parent's decision to move her children 60 miles from their previous home did not in and of itself demonstrate a change of circumstances. However, this Court found that a 60-mile move, combined with a change in the children's schools, "would likely constitute a sufficient change of circumstances to warrant consideration of a change of custody." *Id.* Similarly, in *Sinicropi v Mazurek*, 273 Mich App 149, 177-178; 729 NW2d 256 (2006), this Court found that an 89-mile move, combined with a change in the child's schooling, established a change of circumstances because the move and school change "had or could have had a significant effect on the child's life."

In the case at bar, the trial court found a change of circumstances "due in large part to Plaintiff's instability in her life and her decision to abruptly change the schools of the minor children." Based on the record before this Court, the trial court's finding was not against the great weight of the evidence. The record revealed that plaintiff-mother moved several times after the judgment of divorce was entered and that her most recent move was to Hartford, which was approximately 70 miles from her previous residence. Further, plaintiff-mother admitted that she struggled to find stable housing. Also, and significantly, plaintiff-mother attempted to, without consulting anyone about the decision, abruptly change the children's school from West Elementary in Grandville to a school in Hartford. Plaintiff-mother's history of unstable housing, her move, and her secretive decision to change the children's schools "had or could have had a significant effect on the child[ren's] li[ves]." *Sinicropi*, 272 Mich App at 178. Contrary to plaintiff-mother's contentions, the move and accompanying school change was not a normal life change because it would have altered the children's living arrangement and would have suddenly forced them to attend a new school in the middle of the school year. The trial court's finding that there was a change of circumstances was not against the great weight of the evidence. *Pierron*, 282 Mich App at 263; *Sinicropi*, 273 Mich App at 177-178.

Plaintiff-mother challenges several of the trial court's findings of fact in connection with the change-of-custody motion.[1] The trial court found that the children's established custodial environment was with plaintiff-mother. Defendant-father sought to modify that established custodial environment by obtaining primary physical custody of the children. Thus, defendant-

[1] We note that although the trial court did not separate out, with precision, its findings on each best-interests factor, its ruling makes clear that it was aware of and considered the various factors. While the court's opinion does not make clear whether the children expressed a preference concerning custody (see MCL 722.23[i]), plaintiff-mother does not raise this as an issue on appeal, and the trial court noted that the children did express a preference to remain in their original school.

father had the burden to prove, by clear and convincing evidence, that a change of custody was in the best interests of the children. *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010).

Plaintiff-mother challenges the trial court's finding that defendant-father was able to provide for the children's needs better than plaintiff-mother because he was employed and earned $62,000 per year and because plaintiff-mother's employment was seasonal and sporadic. The trial court's finding pertained to MCL 722.23(c), which deals with "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . ." Contrary to plaintiff-mother's arguments, job considerations can be relevant when making a custody determination. *Pierron*, 486 Mich at 90. As explained by this Court in *Berger v Berger*, 277 Mich App 700, 711-712; 747 NW2d 336 (2008), MCL 722.23(c) does not simply consider which party earns more money; rather, the factor evaluates the parties' capacity to provide for the children. Here, plaintiff-mother, by her own admission, had a history of unstable employment and her current job did not provide a regular, steady paycheck. On the other hand, defendant-father had full-time, stable employment. Thus, the trial court's finding that defendant-father's job situation weighed in favor of granting his motion to change custody was not against the great weight of the evidence because defendant-father's employment demonstrated that he had a greater capacity to provide for the children's needs. See *Berger*, 277 Mich App at 711-712.[2]

Plaintiff-mother argues that the trial court's finding that she had several residences was against the great weight of the evidence. The trial court repeatedly noted that plaintiff-mother lived in several residences. This fact was relevant under MCL 722.23(d), which pertains to the length of time the children lived in a stable environment, or (e), which pertains to the permanence, as a family unit, of the children's home or homes. See *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). The court's finding was not against the great weight of the evidence. Indeed, the evidence supported that plaintiff-mother lived in ten different residences since the divorce proceedings began. Contrary to her assertions, the trial court could consider evidence from before the judgment of divorce was entered, see, generally, *Vodvarka*, 259 Mich App at 515 (discussing "proper cause" to revisit custody and indicating that circumstances predating a custody order *can* sometimes be relevant), especially because there was evidence that plaintiff-mother moved seven times *after* the judgment of divorce was entered.[3] Given her *continuing pattern* of moving frequently, the court acted properly and its finding was not against the great weight of the evidence.

Plaintiff-mother challenges the trial court's finding that she provided little evidence about her residence. The trial court noted that defendant-father presented considerable evidence with regard to his home and neighborhood, including photographs. On the other hand, the trial court

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[2] While defendant-father's job (as compared to plaintiff-mother's) *standing alone* might not be sufficient to warrant a change of custody, see *Corporan v Henton*, 282 Mich App 599, 606-607; 766 NW2d 903 (2009), case law makes clear that it can be a consideration.

[3] Plaintiff admitted at a hearing on March 19, 2010, that she had "move[d] 7 times since the divorce was entered[.]"

noted that plaintiff-mother did not provide as much information about her home. The trial court's finding of fact concerned MCL 722.23(h), which pertains to the home, school, and community record of the children. Regarding her home in Hartford, plaintiff-mother only presented her own testimony. By contrast, regarding his home and neighborhood in Grandville, defendant-father presented his own testimony, his wife Jessica's testimony, and a neighbor's testimony. He also presented pictures of his home. Thus, the trial court's finding that defendant-father presented more evidence than plaintiff-mother regarding the appropriateness of his home and neighborhood was not against the great weight of the evidence. *Shulick*, 273 Mich App at 323.

Plaintiff-mother also challenges the trial court's findings regarding a domestic assault by a prior boyfriend and the trial court's assessment that this domestic violence weighed against plaintiff-mother. This assault was pertinent under MCL 722.23(k), which deals with domestic violence. The trial court's findings were not against the great weight of the evidence because there was testimony that the boyfriend assaulted plaintiff-mother in the presence of the children. Also, although this incident occurred before the judgment of divorce was entered, we conclude that the trial court could consider it in its evaluation of the best-interest factors under MCL 722.23, because it tied in with a pattern of general instability. See, generally, *Vodvarka*, 259 Mich App at 514-515 (limitation on considering past events only applies to determining whether a *change of circumstances* exists).[4]

Next, plaintiff-mother protests that the trial court considered the length of the commute the children faced when they lived in Hartford and attended school in Grandville, as well as the secretive method in which plaintiff-mother attempted to change the children's school. The trial court was within its rights to consider these factors under MCL 722.23(*l*), the catch-all provision. Significantly, plaintiff-mother's abrupt and secretive decision to change the children's schools weighed in favor of granting defendant-father's motion to change custody because it demonstrated that plaintiff-mother engaged in deceptive behavior that was designed to mislead defendant-father. See *Ireland*, 451 Mich at 464 n 7 (explaining that MCL 722.23[*l*] is a catch-all provision that permits the trial court to consider any factor it considers to be relevant). Plaintiff-mother's decision to secretly change the children's school was relevant to a custody decision because it demonstrated that when plaintiff-mother had primary physical custody of the children, she engaged in secretive behavior and misled defendant-father. Moreover, if the children lived in defendant-father's custody, they would not have to travel over 140 miles each day to attend their existing school, which evidence indicated was superior to the alternative and which they wanted to continue to attend. The trial court's findings were not against the great weight of the evidence because the evidence did not clearly preponderate in the opposite direction. *Shulick*, 273 Mich App at 323.

Lastly, plaintiff-mother challenges the trial court's finding that she had a history of unstable romantic relationships. We tend to agree that the trial court erred in mentioning this

[4] Moreover, even if this domestic-violence incident were disregarded, there was still ample evidence of life instability (i.e., multiple residence changes) concerning plaintiff-mother.

factor because there was no evidence offered that plaintiff-mother's dating relationships, aside from the one involving domestic violence, affected the children or the stability of their family environment. At any rate, the numerous residence changes alone were enough to establish a pattern of instability.

This Court reviews the trial court's ultimate custody determination for an abuse of discretion. *Id.* "An abuse of discretion exists when the trial court's decision is palpably and grossly violative of fact and logic . . . ." *Dailey*, 291 Mich App at 664-665 (internal citations and quotation marks omitted). In reaching its custody decision, the trial court does not need to give equal weight to all the factors. *Sinicropi*, 273 Mich App at 184. As noted by this Court in *Foskett*, 247 Mich App at 9:

> A child custody determination is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge, one in which he must not only listen to what is said to him and observe all that happens before him, but a task requiring him to discern and feel the climate and chemistry of the relationships between children and parents. This is an inquiry in which the court hopes to hear not only the words but the music of the various relationships. [Internal citation and quotation marks omitted.]

We find that the trial court did not abuse its discretion. Indeed, based on the trial court's findings that plaintiff-mother failed to provide the children with a stable environment and engaged in subterfuge concerning the schooling issue, that defendant-father offered an appropriate, safe, and stable home close to the superior school the children desired to attend, and that defendant-father had greater capacity to provide for the children, the trial court's decision was not palpably and grossly violative of fact and logic so as to constitute an abuse of discretion. *Dailey*, 291 Mich App at 664-665.[5] Plaintiff-mother argues that the trial court erred in its award of parenting time, but her argument is intertwined with her arguments regarding a change of custody;[6] plaintiff-mother has not demonstrated any basis from which to conclude that the court's award of typical amounts of parenting time[7] was an abuse of discretion.

Plaintiff also takes issue with the court's decision concerning plaintiff-mother's motion to change schools. We note that not every factor delineated in MCL 722.23 will be relevant to a trial court's analysis of such an issue, although the court must acknowledge the various factors.

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[5] While the court *could* have placed emphasis on certain potentially negative information about defendant-father, our standard of review is deferential and we are simply not convinced, on the record before us, that the court committed an abuse of discretion in making its decision. Ample evidence was presented that defendant-father was a good father who loved his children.

[6] For example, plaintiff-mother states, "The court failed to articulate how or why it is in the children's best interest to reduce her parenting time from 10 overnights in a two week span to only 2."

[7] The court's order stated that "Plaintiff is granted parenting time pursuant to FOC [Friend of the Court] policy guidelines."

Pierron, 486 Mich at 91. In its ruling, the trial court found, and neither party contests, that the children's established custodial environment was with plaintiff-mother. Thus, with respect to her motion to change schools, plaintiff-mother had the burden to prove by a preponderance of the evidence that changing the children's schools was in the children's best interests. See *Shade*, 291 Mich App at 23 (if a proposed change does not alter the established 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 children's best interests).

Plaintiff-mother argues that the trial court misapplied the burden of proof in deciding the change-of-schools motion. However, despite making some clearly inadvertent misstatements and using some earlier wording that was inartful, the trial court concluded its findings on plaintiff-mother's motion to change schools as follows: "For all of the above reasons, this Court finds, by clear and convincing evidence[,] that a change in schools from Grandville to the Hartford area is not in the best interests of the minor children. Accordingly, approval of that change is denied." It is obvious that the trial court would have reached the same conclusion had it properly applied the lower burden of proof, i.e., a preponderance of the evidence. Indeed, if the trial court found clear and convincing evidence that changing the children's school was not in their best interests, it is only logical to assume that the trial court would find, by a preponderance of the evidence, that changing the children's school was not in their best interests. As such, we find that any error was harmless and does not entitle plaintiff-mother to relief. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994) (applying the harmless-error standard to custody decisions); see also MCR 2.613(A) ("an error or defect in anything done or omitted by the court or by the parties is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.").

Plaintiff-mother takes issue with certain of the trial court's findings concerning the change-of-schools motion. However, the change-of-schools motion and the change-of-custody motions were obviously and necessarily intertwined. For the reasons stated above, the trial court did not abuse its discretion in changing custody, and given that custody was being changed, the change to a school requiring a 140-mile commute every day would make no sense. At any rate, the trial court's decision was supported by the abrupt and secretive manner in which plaintiff-mother attempted to change schools, by the evidence that the children's existing school was superior to the alternative and that the children were doing well there, and because the children expressed a preference to remain in the original school.

Plaintiff-mother lastly argues that the trial court erred when it permitted her attorney to withdraw between the third and fourth evidentiary hearings. Plaintiff-mother's trial counsel, Frederick W. Jensen, Jr., moved to withdraw as plaintiff's counsel on December 2, 2011, because plaintiff failed to pay several invoices as they became due. Jensen argued that continuing the representation would cause him unreasonable financial hardship. The trial court required Jensen to remain as plaintiff-mother's attorney until the cross-examination of plaintiff-mother was finished at the evidentiary hearing on April 10, 2012. After plaintiff-mother's cross-examination, redirect examination, and a brief examination by the trial court at the April 10, 2012, evidentiary hearing, Jensen was permitted to withdraw as plaintiff's counsel.

"An attorney who has entered an appearance may withdraw from the action or be substituted for only with the consent of the client or by leave of the court." *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). "We review a trial court's decision regarding a motion to withdraw for an abuse of discretion." *Id*. In *In re Withdrawal of Attorney*, *id*., this Court considered Michigan Rule of Professional Conduct 1.16(b) to determine whether an attorney should be permitted to withdraw as counsel. MRPC 1.16(b) provides that

> a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
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> (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client . . . .

Contrary to plaintiff-mother's contentions, the trial court did not abuse its discretion when it permitted Jensen to withdraw. Jensen filed to withdraw on December 2, 2011. Nonetheless, the trial court required Jensen to remain as plaintiff-mother's attorney for approximately four more months, until April 2012. Accordingly, plaintiff-mother had ample notice of the desired withdrawal and presumably could have secured new counsel. Yet, in the approximately three months between the December and April evidentiary hearings, plaintiff-mother did not retain new counsel. Because she had notice and several months to take action, and because she did not sufficiently contest Jensen's allegation that continued representation presented him with an unreasonable financial burden, the trial court did not abuse its discretion in permitting Jensen to withdraw. Cf. *Bye v Ferguson*, 138 Mich App 196, 207-208; 360 NW2d 175 (1984) (where the attorney's client did not have notice of the attorney's intent to withdraw, the trial court's decision to allow the attorney to withdraw was an abuse of discretion); see also *Wykoff v Winisky*, 9 Mich App 662, 669-670; 158 NW2d 55 (1968).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ /Michael J. Riordan