STATE OF MICHIGAN

COURT OF APPEALS

ABIGAIL ANNE JACKSON, f/k/a ABIGAIL ANNE SWANSON, Plaintiff-Appellant, v RYAN JAMES ANDERSON, Defendant-Appellee.	UNPUBLISHED December 19, 2013 No. 315648 Eaton Circuit Court LC No. 11-000748-DP

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals an order of the trial court that increased defendant's parenting time in connection with the parties' minor child. We affirm.

I. FACTS

The parties filed a consent judgment of filiation regarding their child, born October 16, 2010, in September 2011. Plaintiff had primary physical custody of the child, while the parties shared legal custody. The parties stipulated to several parenting-time arrangements over the years. Those arrangements consistently increased defendant's share of parenting time as he developed a meaningful bond with the child, but this case resulted when the parties could no longer agree on an apportionment of parenting time.

A July 2012 stipulated order reflecting the parties latest agreement provided defendant with parenting time every Wednesday from 9:00 a.m. until 5:00 p.m. and alternate weekends from Friday at 11:00 a.m. until Saturday at 11:00 a.m. The parties' subsequent disagreement led to involvement of the Friend of the Court (FOC), whose investigator recommended that, through the child's completion of kindergarten, defendant have parenting time one weekday evening each week for two hours, alternate weekends from 6:00 p.m. on Friday until 6:00 p.m. on Sunday, alternate holidays, and four non-consecutive weeks during the summer. The investigator further recommended that, following the child's completion of kindergarten, defendant have parenting time one evening per week from 5:00 p.m. until 8:00 p.m., alternate weekends from 6:00 p.m. on Friday until 6:00 p.m. on Sunday, alternate holidays, and alternate weeks during the child's summer break.

The parties filed objections. Plaintiff was not specific, but defendant requested an immediate expansion of weekend parenting time, overnights each Wednesday, and alternate weeks from June through September. Defendant further requested that, after the child completed kindergarten, his parenting time include alternating weekends at the conclusion of school on Friday and ending on Monday at 8:00 p.m., and one overnight each week beginning at the end of the school day.

Following an FOC hearing, the referee adopted the investigator's proposal. Plaintiff filed a two-page objection, but failed to serve it upon defendant, who became familiar with only the first page as a result of the involvement of the FOC.

At the de novo hearing that followed, the trial court responded to the failure of service by limiting the case to the objections plaintiff presented on the single page of which defendant had actual notice. This encompassed plaintiff's objection that the alternate weekend parenting-time schedule through the child's completion of kindergarten would prevent her from taking the child to church every Sunday, along with her objection, absent explanation, to defendant's proposed two hours of weekday parenting time through the child's completion of kindergarten.

Following the hearing, the trial court entered an order, which provided that plaintiff's "primary physical custody of the parties' minor child, . . . as previously ordered[,] is to be continued[.]" However, the order awarded defendant parenting time every Tuesday and Wednesday from 6:00 until 9:00 p.m., every Monday from 6:00 until 9:00 p.m., but only if plaintiff is at work during those Monday hours, and alternate weekends from Friday at 6:00 p.m. until Monday at 9:00 a.m. The trial court further awarded defendant four weeks of parenting time during the summer through the child's completion of kindergarten, and alternate weeks of parenting time for summers thereafter.

II. STANDARDS OF REVIEW

"Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its 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 v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008), citing MCL 722.28 and *Borowsky v Borowsky*, 273 Mich App 666, 688; 733 NW2d 71 (2007).

III. APPELLATE JURISDICTION

Plaintiff filed a claim of appeal, and a party may appeal as of right "a post-judgment order affecting the custody of a minor" in a domestic relations action, thereby triggering our jurisdiction. MCR 7.202(6)(a)(iii); MCR 7.203(A)(1). Defendant argues that the trial court's order, while impacting parenting time, did not affect the "custody" of a minor. Therefore, according to defendant, plaintiff was required to instead file an application for leave to appeal and we are without jurisdiction. In the interest of judicial economy, and assuming that the filing of an application for leave to appeal was the sole proper jurisdictional route, we hereby exercise

our discretion and treat plaintiff's claim of appeal as an application for leave, grant leave, and address plaintiff's appellate arguments. *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).[1]

IV. CHANGE OF THE ESTABLISHED CUSTODIAL ENVIRONMENT VERSUS A MERE MODIFICATION OF PARENTING TIME NOT AFFECTING SUCH ENVIRONMENT

MCL 722.27 provides in relevant part as follows:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> . . .
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> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. Parenting time of the child by the parents is governed by [MCL 722.27a].
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> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . . The court shall not modify or amend its previous judgments or orders or issue a new 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. The custodial environment of a child is established 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency

[1] We note that this Court's recent ruling in *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013), could be viewed as supporting a conclusion that plaintiff here properly filed an appeal of right, where the panel stated that an appeal of right existed under circumstances in which a change of domicile "would *potentially* cause a change in the established custodial environment." (Emphasis added.) In the case at bar, plaintiff is contending that the parenting time change effectuated a change in the established custodial environment. We additionally note that an order wherein a motion to change custody has been denied, which leaves the existing custody arrangement in place, is an order subject to an appeal as of right. *Id.* at 321.

of the relationship shall also be considered.[2]

"While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified." *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010). When parenting time adjustments do not change whom a child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then it cannot be said that the established custodial environment has been altered. *Id.*

Plaintiff argues in part that modification of the parenting time schedule effectively resulted in a change in the established custodial environment, regardless of the phrasing of the trial court's order. And, accordingly, proper cause or a change of circumstances, as defined in *Vodvarka v Grasmeyer*, 259 Mich App 499, 509-517; 675 NW2d 847 (2003), had to be established, but was not,[3] and clear and convincing evidence relative to the statutory child best-interest factors, MCL 722.23, had to be established pursuant to MCL 722.27(1)(c), *Pierron*, 486 Mich at 86, but was also not shown. We hold that the trial court's order increasing defendant's parenting time did not amount to a change of the child's established custodial environment.

There is no dispute by the parties that plaintiff had sole or primary physical custody of the minor child under the previous orders. And, more importantly, there is no dispute that the minor child's established custodial environment had always been with plaintiff, given that, over an appreciable time, the child naturally looked to plaintiff, in the environment of plaintiff's home, for guidance, discipline, the necessities of life, and parental comfort. Although the trial court's mere pronouncement in the challenged parenting time order that plaintiff retained primary physical custody cannot, by itself, end our analysis, it does reflect that the court did not

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[2] "Where no established custodial environment exists, the trial court may change custody if it finds, by a preponderance of the evidence, that the change would be in the child's best interests." *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000); see also *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). "An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Berger*, 277 Mich App at 707, citing *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). "Custody orders, by themselves, do not establish a custodial environment." *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993), citing *Baker*, 411 Mich at 579.

[3] As will be discussed in greater detail below, under MCL 722.27(1)(c), proper cause or a change of circumstances must nonetheless be established for purposes of simply modifying or amending a previous order in regard to parenting time, but those terms provide a less stringent hurdle in the context of a mere parenting time change than the construction given those terms in *Vodvarka*, considering that *Vodvarka* addressed the more intrusive disruption of the established custodial environment. *Shade v Wright*, 291 Mich App 17, 25-31; 805 NW2d 1 (2010); see also *Rains*, 301 Mich App at 339-342.

envision the parenting time change as a disruption and change in the established custodial environment. And, substantively, the new parenting time order did not change the established custodial environment, i.e., it did not change whom the child naturally looked to for guidance, discipline, the necessities of life, and parental comfort.

Under the July 2012 stipulated order, defendant enjoyed parenting time for eight hours each Wednesday, from 9:00 a.m. until 5:00 p.m., and twenty-four hours every other weekend, from Friday at 11:00 a.m. until Saturday at 11:00 a.m. That stipulation thus had the child spending approximately 12 percent of regular two-week periods with defendant. The modification at issue awarded defendant six hours of parenting time during the week, with an additional three hours if plaintiff is scheduled to work on Monday evenings, and sixty-three hours every other weekend, from Friday at 6:00 p.m. until Monday at 9:00 a.m. The new arrangement thus approximately doubled defendant's share of parenting time for regular fourteen-day periods, *but it still left the child with plaintiff three-quarters or 75 percent of the time* and even more so if plaintiff does not work on any given Monday.

We further note that the trial court took into account the parties' respective work schedules and the minor's normal sleeping hours. Plaintiff testified that she worked from 3:00 until 11:00 p.m. three to four days per week, but usually not on Mondays. Defendant testified that he usually worked Monday through Friday from 6:00 or 6:45 a.m. until 6:00 or 7:00 p.m., worked Saturday from 8:30 a.m. until 2:00 p.m., and had Sunday as his only day off. The parties agreed that the child typically went to sleep for the night at around 10:00 p.m., and plaintiff testified that he normally slept until 10:00 a.m. The trial court thus granted defendant parenting time on weekday evenings when plaintiff was working, and extended defendant's alternate-weekend parenting to Monday at 9:00 a.m., giving defendant a full day and night with the child on his only day off.

Although we do not deem this extension of defendant's parenting time insignificant, neither do we consider it a change in the child's established custodial environment.

V. MODIFICATION OF PARENTING TIME NOT AFFECTING THE ESTABLISHED CUSTODIAL ENVIRONMENT – PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Plaintiff argues that the trial court improperly modified defendant's parenting time without proper cause or a change of circumstances. In *Shade v Wright*, 291 Mich App 17, 25-28; 805 NW2d 1 (2010), this Court discussed the differences relative to proper cause and a change of circumstances when a simple parenting time modification is sought as opposed to a true change in the established custodial environment, which *Vodvarka* had addressed:

> Concluding that plaintiff's evidence regarding a change of circumstances is not sufficient to constitute a change of circumstances under *Vodvarka* does not end the inquiry in this case, however, and we conclude that the definitions of "proper cause" and "change of circumstances" from *Vodvarka* do not control the facts of this case because this case involves a modification of parenting time rather than a change in custody. *Vodvarka* was a custody case, and this Court's definitions of "proper cause" and "change of circumstances" in *Vodvarka* specifically related to "the child's custodial situation" and "the conditions

surrounding custody of the child." Furthermore, the definitions of "proper cause" and "change of circumstances" as articulated in *Vodvarka* are guided by the best interest factors in MCL 722.23(a) through (l), and do not take into account the parenting time factors in MCL 722.27a(6)(a) through (i). We discern nothing in the *Vodvarka* opinion that requires the standards used to determine the existence of proper cause or change of circumstances for custody determinations to apply to determinations regarding parenting time, absent a conclusion that a change in parenting time will result in a change in an established custodial environment. If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate. In this case, however, the trial court's modification of parenting time was not so significant that it resulted in a change in the minor child's custodial environment. For reasons that will be explained below, we hold that 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.

The *Vodvarka* definitions of "proper cause" and "change of circumstances" are inapplicable to this case, in part, because the rationale for imposing more stringent constructions on the terms "proper cause" and "change of circumstances" with respect to custody determinations is far less applicable with respect to parenting time determinations. With respect to child custody disputes, "[t]he goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." "Providing a stable environment for children that is free of unwarranted custody changes . . . is a paramount purpose of the Child Custody Act. . . ." Therefore, in the context of a child custody dispute, the purpose of the proper cause or change of circumstances requirement is "to 'erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.'"

Such concerns do not exist, however, when a modification of parenting time does not alter the established custodial environment because determinations regarding child custody and parenting time serve different purposes. Whereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents. [Citations and footnotes omitted; ellipses in original.]

Shade applies here and not *Vodvarka*, given our ruling that the modification in parenting time did not alter the established custodial environment. The *Shade* panel ruled that normal life changes, such as a child growing older or changes in the child's activities and developmental stages, while insufficient under *Vodvarka* to justify a change in the established custodial environment, are precisely the types of considerations that trial courts should accept as establishing proper cause or a change of circumstances in regard to a modification in parenting time. *Shade*, 291 Mich App at 30-31.

The record in this case supports the conclusion that defendant's growing bond with the child and the child's swiftly increasing ability to understand and recognize his surrounding environment constituted a sufficient proper cause or change of circumstances to warrant augmenting his parenting time in furtherance of fostering a strong relationship. Plaintiff testified that defendant's parenting time had been increasing through several stipulated orders because he did not have an established relationship with the child as a newborn. Defendant similarly testified that he understood the parties' stipulated orders to reflect his initial inability to bond with the child as a newborn, but then his growing ability to do so as defendant began to show and develop an inclination to be "fully involved" with his son. Indeed, parenting time is to "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).

Given the focus of parenting time, the parties' history of amicably increasing defendant's parenting time, and the testimony that defendant's bond with the child was growing with his increasing involvement in the child's life, the trial court did not err in tacitly identifying proper cause or a change of circumstances sufficient to justify revisiting the question of defendant's parenting time. See *Rains v Rains*, 301 Mich App 313, 341-342; 836 NW2d 709 (2013) (the trial court's analysis demonstrated that its parenting time ruling was based on evolving circumstances and thus "the trial court's failure to explicitly state the change in circumstances justifying review of the best-interest factors was not a clear legal error"). Here, the trial court observed that it set the parenting time schedule in order for the child to continue developing a relationship with both parents, so as to create "a strong emotional bond." Reversal is unwarranted.

VI. PARENTING TIME – BEST INTERESTS

Plaintiff next argues that the trial court erred by increasing defendant's parenting time without considering the bests interests of the child. 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). Under the parenting-time statute, "[i]t is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents," and parenting time must be "reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). MCL 722.27a(6) provides as follows:

> The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:
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> (a) The existence of any special circumstances or needs of the child.
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> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
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> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. . . .

(i) Any other relevant factors.

"Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Shade*, 291 Mich App at 31. However, a trial court need not have specifically addressed the best interest factors in MCL 722.23 when the modification of parenting time did not result in a change of custody. *Id.* at 32. Custody decisions require findings under all of the best interest factors set forth in MCL 722.23, "but parenting time decisions may be made with findings on only the contested issues." *Id.* at 31-32. In modifying parenting time, a court need not explicitly address the factors under MCL 722.27a(6) if it is "clear from the trial court's statements on the record that the trial court was considering the minor child's best interests in modifying . . . parenting time." *Id.* at 32. If a proposed change in parenting time would not alter the established custodial environment, the burden is on the parent proposing the change to show, by a preponderance of the evidence, that the parenting-time change is in the child's best interests. *Id.* at 23.

Plaintiff testified that the child did not have any special needs, circumstances, or conditions, that she did not believe he was in danger of abuse or neglect while in defendant's care, that she had not experienced any abuse by defendant during any parenting-time exchange, and that travel was not problematic because she and defendant lived less than twenty minutes apart. Defendant similarly testified that the minor had no special needs, that no abuse or neglect had occurred while the child was in his presence, that there had not been any "incidents" with plaintiff during any parenting-time exchange, and that he lived within fifteen minutes of plaintiff's house. Plaintiff also testified that defendant was late in delivering the child for a parenting-time exchange on one occasion and had joked about taking the child with him to Mexico, but defendant testified that he had never seriously threatened to detain the child and that his failure to timely deliver the child for the exchange noted by plaintiff was unintentional.

The trial court recited that it is presumptively in the child's best interests to have a relationship with plaintiff and defendant and that it was required to enter a parenting-time order that facilitated a strong relationship with both parents. The court acknowledged that there were "specific factors related to parenting time" and stated that defendant's counsel "thoroughly addressed the factors under MCL 722.27a(6)." The court further noted that plaintiff asked it to

consider MCL 722.23(b)—"[t]he capacity and disposition of the parties involved to . . . continue the education and raising of the child in his or her religion or creed, if any."

Plaintiff stated that the prior parenting-time schedule "was working out . . . pretty well," but she complained that an expansion of defendant's alternate-weekend parenting time through Sunday evenings would prevent her from taking the child to church every Sunday. The trial court concluded, however, that MCL 722.23(b) did not provide a churchgoing parent with the right to deprive a non-churchgoing parent of full weekend privileges. The trial court advised plaintiff that she could ask the court for help with other religious issues should they arise. On appeal, plaintiff does not argue that the trial court erred in its consideration of MCL 722.23(b), and to the extent she now relies on other best interest factors under MCL 722.23, the arguments were not preserved for appeal. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Further, as indicated earlier, the *Shade* panel observed that the best interest factors in MCL 722.23 need not be specifically addressed if, as occurred here, the parenting time change does not amount to a change in the established custodial environment. *Shade*, 291 Mich App at 32.

The trial court discussed the best interest factors under MCL 722.27a, stating that they were "really not persuasive" because the child was not nursing, and there were no issues of abuse, neglect, or excessive travel. The trial court then noted that it was guided by the statutory directive to set a parenting schedule that would allow the child to have a strong relationship with both parents.

After the trial court announced its modification of the parenting-time arrangement, plaintiff asked why defendant was receiving parenting time three days per week when the FOC referee recommended just one, and the trial court explained that plaintiff was normally working during defendant's weekday parenting time, that it was important for defendant and the child to have consistent contact, and that the child would still be returning to plaintiff's home and sleeping in the same bed on those days. We conclude that the trial court well considered the child's best interests, including each of the contested issues, and there was no error warranting reversal.[4]

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

[4] Plaintiff complains that the trial court awarded more parenting time than that recommended by the FOC referee, as well as the amount recommended for non-custodial parents by the Michigan Parenting Time Guideline and Eaton County guidelines. This argument is unconvincing because ultimately these recommendations cannot bind a trial court. See *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989) ("While the trial court may consider the FOC report and recommendation, plaintiff is unable to direct our attention to any legal authority in support of the proposition that it must do so.").