STATE OF MICHIGAN

COURT OF APPEALS

NICKLAS PALMER,

Plaintiff-Appellant,

v

KAYLA ANAYA,

Defendant-Appellee.

UNPUBLISHED
March 26, 2019

No. 345368
Wayne Circuit Court
LC No. 16-111682-DC

Before: BORRELLO, P.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

In this child custody dispute, plaintiff appeals as of right an order granting defendant's motion to change custody. For the reasons set forth in this opinion, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff and defendant, who were never married, are the parents of the minor child AP. Plaintiff had acknowledged his paternity of AP by signing an affidavit of parentage.

The instant appeal stems from defendant's recent attempts to regain custody of AP after the September 2016 transfer of venue for the parties' case from the Gratiot Circuit Court to the Wayne Circuit Court. At that time, previous court orders of the Gratiot Circuit Court had granted plaintiff sole legal and physical custody of AP, granted defendant reasonable supervised parenting time with no overnights, and permitted plaintiff to move with AP to North Dakota where plaintiff had pursued a higher-paying employment opportunity with a company where several of his relatives worked.

On January 30, 2017, defendant moved the Wayne Circuit Court to change parenting time. Defendant explained that it had been difficult for her to have regular personal contact with AP since AP was living in North Dakota and defendant continued to reside in Michigan. The trial court entered a parenting time order on March 30, 2017, ordering that defendant would have unsupervised overnight parenting time for three nights while plaintiff and AP were planning to be in Mackinaw City, Michigan; that defendant would have parenting time during AP's spring

break each year; and that defendant would have parenting time during 8 consecutive weeks each summer. The order further provided for how Christmas break would be divided between the parents each year, as well as a procedure for defendant to schedule weekend parenting time if she traveled to North Dakota.

Subsequently, on January 11, 2018, defendant filed a motion to change custody in which she requested joint legal custody and sole physical custody of AP. Following a hearing on the motion, the trial court found that there was an established custodial environment with both plaintiff and defendant and that defendant had "demonstrated by a preponderance of the evidence that a change of physical custody is in [AP's] best interests." In reaching this conclusion, the trial court discussed its findings with respect to the statutory best-interests factors. The court ordered that the parties would share joint legal custody of AP and that defendant would have sole physical custody. The court also entered an additional parenting time order, stating that plaintiff would have parenting time during the summer from two weeks after school ended until two weeks before school resumed. The parenting time order further provided a parenting time schedule for holiday breaks.

On appeal, plaintiff argues that the trial court committed clear legal error by employing the incorrect burden of proof in making its best-interests determination with respect to the ordered change in custody.

II. STANDARD OF REVIEW

The relevant standard of review is well established:

> MCL 722.28 provides that in child-custody disputes, "all 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." Our Supreme Court has explained that MCL 722.28 "distinguishes among three types of findings and assigns standards of review to each." Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision is "palpably and grossly violative of fact and logic . . . ." Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. [*Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011) (citations omitted; ellipsis in original).]

Further, the applicable burden of proof in child custody matters presents a question of law that this Court reviews de novo on appeal. *Griffin v Griffin*, 323 Mich App 110, 118; 916 NW2d 292 (2018).

III. ANALYSIS

"[T]o determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in MCL 722.23(a)-(*l*) applying the proper burden of proof, and

the proper burden of proof is based on whether or not there is an established custodial environment." *Id*. at 119-120 (quotation marks and citations omitted). "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. However, where an established custodial environment does exist, a court is not 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." *Id*. at 119 (quotation marks and citations omitted). See also MCL 722.27(1)(c) (stating in relevant part that 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 higher clear-and-convincing-evidence standard "also applies when there is an established custodial environment with both parents." *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). To summarize, when a matter affects custody and the child has an established custodial environment with each parent, the movant seeking a change in custody must prove that the change is in the child's best interests *by clear and convincing evidence*; in contrast, however, when the matter only involves a proposed change in parenting time that would not affect the established custodial environment, then the movant need only prove by a preponderance of the evidence that the change is in the child's best interests. *Lieberman v Orr*, 319 Mich App 68, 83-84; 900 NW2d 130 (2017).

In this case, the trial court found that an established custodial environment existed with both plaintiff and defendant,[1] and the trial court proceeded to grant defendant's motion to change custody. While plaintiff previously had sole legal and physical custody, the trial court ordered that the parties would now share joint legal custody and that defendant would have sole physical custody. With respect to parenting time, plaintiff and defendant essentially switched roles as well, with plaintiff assuming the role of summertime parent instead of defendant. The trial court concluded that the change in custody was warranted because defendant had proven by a *preponderance of the evidence* that the change was in AP's best interests. However, the trial court was prohibited from changing custody under these circumstances where an established custodial environment existed with both parents unless defendant, as the party moving for the change in custody, established by *clear and convincing evidence* that the proposed change was in AP's best interests.[2] *Id*. Because the trial court misapplied the pertinent law by applying the

[1] The parties do not dispute the trial court's finding in this respect. "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 of the relationship shall also be considered." MCL 722.27(1)(c).

[2] We note that the trial court did not make an explicit finding regarding whether the proposed change would actually affect the custodial environment, but it seems that changing the custodial arrangement from one of sole legal and physical custody with plaintiff to one of joint legal custody and sole physical custody with defendant, coupled with making plaintiff the summertime rather than school-year parent, would clearly constitute a change in custody that would affect the established custodial environment. Cf. *Lieberman*, 319 Mich App at 84-87, 90-91 (concluding

preponderance-of-the-evidence standard of proof rather than the clear-and-convincing-evidence standard to its best-interests determination before changing custody where an established custodial environment existed with both parents, the trial court committed clear legal error.[3] *Dailey*, 291 Mich App at 665.

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that proposed changes to parenting time that resulted in substantially reducing the number of overnights spent with the parent who had sole physical custody effectively amounted to a change in physical custody to the other parent that affected the established custodial environment). Defendant in this case does not argue on appeal that the trial court's order to change custody was not one that affected the established custodial environment. Moreover, the trial court did not make a finding that the established custodial environment was unaffected, such that employing the preponderance-of-the-evidence standard to the best-interests determination would be warranted. See *id*. at 84. We further note that the trial court only made its findings regarding the established custodial environment *after* announcing its findings regarding each of the best-interest factors. This was also improper because the finding regarding whether an established custodial environment exists is a threshold issue that determines the applicable burden of proof for the best-interests determination. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995) ("[T]he first step in considering a petition to change custody is to determine whether an established custodial environment exists; it is only then that the court can determine what burden of proof must be applied."). In short, the trial court in this case misapplied the pertinent legal framework and thus committed clear legal error. *Dailey*, 291 Mich App at 665. For the reasons discussed subsequently in this opinion, the trial court's error was not harmless.

[3] We note that the party moving to change custody must also first establish that proper cause or a change in circumstances exists sufficient to permit revisiting the custody order "*before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-514; 675 NW2d 847 (2003). "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken. *Id*. at 511. "[I]n order to 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." *Id*. at 513. This must be "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." *Id*. at 513-514. The *Vodvarka* Court has explained that "[t]hese initial steps to changing custody—finding a change of circumstance or proper cause and not changing an established custodial environment without clear and convincing evidence—are intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Id*. at 509 (quotation marks and citation omitted).

In this case, the trial court indicated that defendant had established proper cause or change in circumstances. However, we are unable to discern from the record before us what

We conclude that this error was not harmless and that remand is required because, as we have previously explained with respect to a trial court's erroneous application of the preponderance standard to the best-interests determination, "applying the clear-and-convincing-evidence standard rather than the less demanding preponderance-of-the-evidence standard can dramatically alter the number of factors favoring either party." *Griffin*, 323 Mich App at 123 n 8. On remand, the trial court shall consider all relevant, up-to-date information. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994); *Griffin*, 323 Mich App at 128. However, our Supreme Court has made clear that on remand under circumstances such as these, it is not the case that "the events which have taken place during the appellate process give rise to an 'established custodial environment' that, pursuant to MCL 722.27(1)(c), alters the burden of proof in favor of the party who has enjoyed custody during the appeal." *Fletcher*, 447 Mich at 889 n 10. Accordingly, we reverse the trial court's order changing custody and remand this matter for further proceedings.[4]

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Brock A. Swartzle
/s/ Thomas C. Cameron

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factual circumstances the trial court considered to be sufficient "proper cause" or "change in circumstances." Nonetheless, plaintiff does not challenge this finding on appeal. For purposes of resolving the issues actually raised on appeal, we assume without deciding that defendant met the *Vodvarka* standard.

[4] In light of the above disposition, plaintiff's remaining arguments regarding the propriety of the trial court's findings on each of the best-interests factors are moot and we decline to address them. See *Griffin*, 323 Mich App at 124 n 10.