

STATE OF MICHIGAN
COURT OF APPEALS

TIFFANY SHIPLEY,

Plaintiff-Appellee,

v

JONATHAN SHIPLEY,

Defendant-Appellant.

UNPUBLISHED

April 2, 2020

No. 349502

Wayne Circuit Court

LC No. 18-110949-DC

Before: M. J. KELLY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

In this child-custody dispute, defendant, Jonathan Shipley, appeals as of right the trial court order granting plaintiff, Tiffany Shipley,¹ sole physical custody of the parties’ minor children. For the reasons stated in this opinion, we reverse the court’s order and remand for further proceedings.

I. BASIC FACTS

Jonathan and Tiffany divorced in April 2017. The judgment of divorce provided that the parties would share joint legal and joint physical custody over their children, M and A. Primarily, the children would reside with Jonathan, who was living in Missouri at the time. The judgment specifically provided that they would go to school in the area where Jonathan resided. During the majority of the summer, the children would reside with Tiffany, who was planning to live in Michigan. In accordance with the agreement, the children were picked up by Tiffany in June 2017, and she flew back to Michigan with them. The children were supposed to travel back to Missouri over the 4th of July holiday, but Jonathan and Tiffany agreed that they would instead stay with Tiffany and that Jonathan would pick them up ten days earlier than indicated in the judgment of divorce.

¹ According to Tiffany’s lawyer, Tiffany is now known as Tiffany Kunecke. However, it is unclear whether she formally changed her name following the parties’ divorce. For ease of reference and consistency, this Court will refer to both parties by their first names.

In August 2017, Jonathan contacted Tiffany and asked that she “flip” the agreed upon schedule so that he would have them in the summer and she would have them in the school year. Tiffany agreed and drafted a written agreement to that effect. The agreement was signed and notarized, but was not filed with the court in Missouri. According to Jonathan, the agreement was temporary. He explained that he had moved to California because he could not find work in Missouri, and he needed time to acquire appropriate housing. Tiffany, however, believed that the agreement was not temporary. The written agreement does not indicate the duration of the “flipped” custody schedule.

In August 2018, Jonathan registered the original child custody order, as contained in the parties’ judgment of divorce, in a California court. Jonathan then attempted to exercise physical custody in accordance with the original child custody order, and he expected Tiffany to place the children on a flight to California before school started in September 2018. Tiffany, despite agreeing to do so and showing proof of a scheduled flight, did not allow the children on the plane to California. When Jonathan, who was at the airport to pick the children up, asked where they were, she told him that she had been advised that she did not have to return them to his care.

In late August 2018, Tiffany filed a petition to modify child custody under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.* She sought to have the child custody order modified to reflect that the children would remain in her custody during the school year and spend four weeks and alternating holidays with Jonathan. However, before a hearing on the petition could be held in the trial court, Jonathan took the children out of school in Michigan during a school day without Tiffany’s knowledge. He and the children flew back to California. The children remained in his custody and were enrolled in a school in California until the trial court ordered Jonathan to return the children to Tiffany’s custody in December 2018.

An evidentiary hearing regarding the petition for modification of the child custody order was held in March 2019. At the hearing, the trial court found that (1) proper cause *and* a change of circumstances justified review of the original custody order, (2) an established custodial environment existed solely with Tiffany, and (3) modification of the child custody order was in the children’s best interests. Accordingly, the trial court entered an order awarding Tiffany sole physical custody of the children.

II. CHILD CUSTODY

A. STANDARD OF REVIEW

“[I]n child custody disputes, all orders . . . of the circuit court shall be affirmed . . . 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.” *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014) (quotation omitted). “In the context of a child custody dispute, an abuse of discretion is found only in extreme cases wherein the trial court’s decision is so palpably and grossly violative of fact and logic that it evidences the exercise of passion or bias or a perversity of will.” *McRoberts v Ferguson*, 322 Mich App 125, 133-134; 910 NW2d 721 (2017). “[C]lear legal error occurs when the trial court chooses, interprets, or applies the law incorrectly.” *Diez*, 307 Mich App at 389 (quotation marks and citation omitted). This Court reviews all findings of

fact under the “great weight of the evidence” standard. *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017). This Court “should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction . . . [and] review the record in order to determine whether the verdict is so contrary to the great weight of the evidence as to disclose an unwarranted finding” *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

B. ANALYSIS

Jonathan argues that the trial court erred by finding that there was proper cause or a change of circumstances to justify revisiting the custody decision. “[A] party seeking a change in the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change of circumstances.” *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009); MCL 722.27(1)(c). If the party seeking to change custody fails to establish proper cause or a change in circumstances, the trial court is precluded from holding a custody hearing. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). The threshold requirement is “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, quoting *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995). The movant bears the burden of proving by a preponderance of the evidence that proper cause or a change of circumstances exists so as to warrant a review of the statutory best interest factors. *Vodvarka*, 259 Mich App at 509.

In *Vodvarka*, this Court articulated the framework for analyzing whether proper cause or a change of circumstances has been established. The Court explained that “[p]roviding a stable environment for children that is free of unwarranted custody changes (and hearings) is a paramount purpose of the Child Custody Act.” *Id.* at 511. Therefore, with respect to a finding of proper cause, the movant must establish “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.* The court may “look for guidance” with the best-interest factors set forth in MCL 722.23(a)-(l). *Id.* Yet, the “grounds presented must be ‘legally sufficient,’ i.e., they must be of a magnitude to have a significant effect on the child’s well-being to the extent that revisiting the custody order would be proper.” *Id.* at 512.

To prove a change of circumstances, the movant “must prove that, since the entry of the last custody order, the conditions surrounding the custody of the child, which have or could have a *significant* effect on the child’s well-being, have materially changed.” *Id.* at 513. The court stressed that “not just any change will suffice, for over time there will always be some changes in a child’s environment, behavior, and well-being.” *Id.* Therefore, “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.” *Id.* at 513-514. The relevance of the facts used to determine whether there is a change of circumstances are “gauged by the statutory best interest factors.” *Id.* at 514.

In seeking to demonstrate a change of circumstances, a party cannot rely on facts that existed before the entry of the last custody order. *Id.* at 514. Proper cause may be established on the basis of facts that existed before the entry of the last custody order, but “a party would be hard-

pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order.” *Id.* at 515.

In this case, the court found:

All of the changes to the initial custody order outlined in the Judgment and Decree of Dissolution, along with the fact that both Missouri and California have relinquished jurisdiction, results in this Court finding proper cause and a change in circumstances to warrant a review of the custody factors.

The court did not identify “all” the changes since the entry of the judgment of divorce, but it did note that since the judgment was entered, the children “experienced a lot of bounding back and forth between parents and states” and it found that the children had spent more time overall with Tiffany than they had spent with Jonathan. Yet, the record plainly reflects that the original custody agreement and the parties subsequent informal custody agreement both contemplated the children regularly moving between parents and states. Moreover, even considering the fact that Jonathan moved from Missouri to California and the fact that the parties “flipped” the original custody schedule so that the children went to school in Michigan for the 2017-2018 school year, there has been no showing—and the trial court did not find—that those changes have or could have a significant effect on the children’s wellbeing. Instead, the court’s findings reflect that despite the “instability” caused by the children bouncing around, both parties were able to provide a stable and satisfactory home for their children. Further, the court found that the children appeared to be “well adjusted in all of their schools.” Because a finding of proper cause and a finding of a change of circumstances both require the children’s wellbeing to be significantly affected, we conclude that the trial court erred by finding proper cause and a change of circumstances based on the changes arising since the entry of the original custody order.

Furthermore, the court erred by finding proper cause and a change of circumstances based on the fact that both Missouri and California relinquished jurisdiction under the UCCJEA. The effect of Missouri and California declining jurisdiction under the UCCJEA is that Michigan, as the children’s home state, has jurisdiction to hear the parties’ custody dispute. Although the children are certainly affected to the extent that a court in a different state is now evaluating custody disputes between their parents, the fact that Michigan has jurisdiction is not likely to have a significant impact on the children’s wellbeing.

Additionally, even if we assume *arguendo* that the court properly determined that Tiffany met her burden under MCL 722.27(a)(c) to show that proper cause or a change in circumstance warranted revisiting the custody determination, reversal is still required because the trial court erred by finding that the children only had an established custodial environment with Tiffany. As a result, the court erroneously applied the preponderance-of-the-evidence standard as opposed to the clear-and-convincing evidence standard.

Before making a custody determination, the trial court must determine whether an established custodial environment exists with one or both parents. *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). If a proposed change would modify an established custodial environment, then the proponent of the change must demonstrate by clear and convincing evidence

that the proposed change is in the child's best interests. *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). If the proposed change would not modify an established custodial environment, then the proponent of the change need only demonstrate by a preponderance of the evidence that the proposed change is in the child's best interests. *Id.* at 92-93. When there is a joint established custodial environment, neither parent's custody may be disrupted absent clear and convincing evidence that the change is in the child's best interests. *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008).

This court has previously stated that an established custodial environment is an environment

of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

In this case, the trial court found that the children's established custodial environment existed with Tiffany because the children had spent more time with Tiffany since the divorce and because the children expressed a preference to remain in Michigan. We agree that the evidence supported a finding that the children had an established custodial environment with Tiffany. It did not, however, support the court's implicit determination that the children did not have an established custodial environment with Jonathan. "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. The court found that both parents were equally capable of providing loving care and emotional support for the children, and it is undisputed that the children spent an appreciable amount of time with both parents throughout the custody proceedings. The court also found that both parties provided appropriate homes for the children. Significantly, the court did not credit Tiffany's testimony that Jonathan did nothing for or with the children. Instead, the court found that Jonathan played with the children, took them to multiple activities, and had previously coached them in sports. When considering the court's express findings relating to Jonathan's relationship with the children, it is apparent that for a significant duration of time Jonathan provided his children with care, discipline, love, guidance, and attention. As a result, we conclude that the court's implicit finding that the children did not have an established custodial environment with Jonathan is against the great weight of the evidence. The trial court, therefore, clearly erred by applying the preponderance of the evidence standard to determine whether a change of custody was warranted.

III. CONCLUSION

As recently stated by our Supreme Court, "it is critical that trial courts, in the first instance, carefully and fully comply with the requirements of MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment" as "[a]ny error in this regard may have lasting consequences yet effectively be irreversible." *Daly v Ward*, 501 Mich 897, 898 (2017). In this case, because proper cause or a change of circumstances was not established, the trial court was without authority to make a determination regarding the existence of an established custodial environment or to reconsider the statutory best interest factors. Accordingly, we reverse the order

granting Tiffany's motion to modify custody and remand for further proceedings. On remand, the trial court shall consider updated information before making any decisions regarding the custody of the children.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello