

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ROBERT KUEHNLE,

Plaintiff-Appellee,

v

LYNETTE ELIZABETH KUEHNLE,

Defendant-Appellant.

UNPUBLISHED

July 2, 1996

No. 184220

LC No. 93173233 DM

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Defendant, Lynette Kuehnle, appeals as of right from an amendment of the parties' consent judgment of divorce. Defendant asserts that plaintiff failed to demonstrate a change in circumstances warranting modification of the parties' stipulated judgment. She also argues that the judge abused his discretion by amending the consent judgment without factual support for the change. We affirm.

On August, 30, 1993, the parties entered into a consent judgment of divorce. According to its terms, the parties were given joint legal custody of their minor child. Defendant was awarded physical custody even though she lived in California, whereas plaintiff resided in Michigan. Plaintiff was awarded visitation rights for at least one month per year during the summer. The parties were to share transportation expenses.

On August 2, 1994, plaintiff filed a petition for change of custody. Following a hearing, the judge determined that the consent judgment was no longer in the best interest of the child; it effectively severed the child's relationship with her father and her extended family. The judge ruled that the parties would continue to have joint legal custody and that defendant would retain physical custody on the condition that she relocate to Michigan. If she chose to remain in California, physical custody would be changed to plaintiff.

* Circuit judge, sitting on the Court of Appeals by assignment.

Judgment provisions concerning child custody cannot be revisited unless the party seeking modification has shown proper cause or a change in circumstances. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994); *Schubring v Schubring*, 190 Mich App 468, 470; 476 NW2d 434 (1991); *Mann v Mann*, 190 Mich App 526, 536; 476 NW2d 439 (1991). Moreover, no modification is allowed unless there is clear and convincing evidence that the modification is in the child's best interest. MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

In this case, we find that there was proper cause for modifying the consent judgment. Evidence revealed that defendant subverted the terms of the consent judgment by effectively denying plaintiff his visitation rights. The numerous conditions which defendant placed on plaintiff's one month's visitation effectively stifled it.

Defendant argues that the judge should have decided this case on the basis of the test set forth in *D'Onofrio v D'Onofrio*, 144 NJ super 200; 365 A2d 27 (1976), aff'd 365 A2d 716 (1976). However, that test is used to determine if a custodial parent should be allowed to remove a child from the state. See *Overall v Overall*, 203 Mich App 450, 458-459; 512 NW2d 851 (1994). It is inapplicable in the present case.

The judge's findings of fact with respect to the best interest factors contained in MCL 722.23; MSA 25.312(3) were not against the great weight of the evidence. *Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994). Moreover, the judge did not abuse his discretion by modifying the divorce judgment. *Id.*, pp 880-881.

Plaintiff presented an abundance of evidence regarding the important role played by the child's extended family, all of whom lived in Michigan. Dr. Sommerschild, who was appointed by the court, testified extensively that it was important for the child to have regular exposure to her extended family. Extended family members could provide her with stability, structure and learning experiences important to her development. The judge properly modified the parties' judgment of divorce.

Affirmed.

/s/ Marilyn Kelly

/s/ Myron H. Wahls

/s/ M. Richard Knoblock