

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BARRY K. JOHNSON,

Plaintiff/Counter-Defendant-  
Appellant,

v

CHARLENE G. JOHNSON,

Defendant/Counter-Plaintiff-  
Appellee.

UNPUBLISHED  
September 20, 2007

No. 276538  
Oakland Circuit Court  
LC No. 2005-715560-DM

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Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff/counter-defendant (“plaintiff”) appeals as of right from an order granting defendant/counter-plaintiff’s (“defendant”) motion to modify the consent judgment of divorce (“judgment of divorce”). We vacate the order modifying the judgment of divorce and remand for an evidentiary hearing to determine whether there was an established custodial environment and, if so, whether the modification of parenting time amounted to a change in this custodial environment, and to determine if the change in parenting time was in the children’s best interests.

**I. FACTS**

This case arises out of the decision of Benjamin Johnson, the parties’ 16-year-old child, to begin living with plaintiff after the circuit court entered the judgment of divorce.<sup>1</sup> On appeal, plaintiff first argues that the court erred in failing to find that an established custodial environment existed between plaintiff and Benjamin. Second, plaintiff contends that the court failed to treat defendant’s motion to change parenting time as a motion to change custody. We will address each argument separately.

**II. STANDARD OF REVIEW**

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<sup>1</sup> The judgment of divorce reflected that the parties’ agreed that parenting time would be determined by the parties’ children on an individual basis.

MCL 722.28 provides that all child custody judgments and orders “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.” See also *Fletcher v Fletcher*, 447 Mich 871, 877-881; 526 NW 2d 889 (1994). A finding of fact is against the great weight of the evidence if “the evidence ‘clearly preponderates in the opposite direction.’” *Id.* at 879, quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). This Court reviews the trial court’s discretionary rulings for an abuse of discretion. *Id.* at 879-881. This Court reviews questions of law for clear legal error, which occurs “[w]hen a court incorrectly chooses, interprets, or applies the law.” *Id.* at 881.

### III. ANALYSIS

Plaintiff argues that the trial court erred in failing to find an established custodial environment between himself and Benjamin. Plaintiff also argues that the trial court erred in failing to treat defendant’s parenting time motion as a motion affecting custody. We find that the trial court failed to determine whether there was an established custodial environment and also failed to determine if there was proper cause or a change of circumstances to support the change of parenting time.

“The controlling factor in determining visitation rights [parenting time] is the best interests of the child.” *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993); see also MCL 722.27a. However, a trial court may not examine the best interest factors<sup>2</sup> and modify a

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<sup>2</sup> The best interest factors are as follows:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.

(continued...)

prior parenting time order without first conducting a threshold inquiry to determine whether there has been “proper cause shown” or a “change of circumstances.” *Terry v Affum*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999); see also MCL 722.27(1)(c).

Here, the trial court failed to make the threshold inquiry into whether defendant demonstrated proper cause or a change of circumstances. The trial court also failed to make findings of fact or determine the best interest factors before modifying its prior order of parenting time, under which parenting time was left to the children to determine of their own accord. Findings of fact and conclusions of law are required on contested post-judgment motions to modify a final judgment or order. MCR 3.210(D)(1). Therefore, the trial court committed clear legal error because it failed to determine whether there was proper cause or a change of circumstances. *Terry, supra* at 535.

Notwithstanding this, it appears defendant established proper cause and a change of circumstances in this case. “[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 [see MCL 722.23(a)-(1)], and must be of such magnitude to have a significant effect on the child’s well-being.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003). “[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.” *Id.* at 513 (emphasis in original). Normal life changes do not constitute a change of circumstances; rather, material changes must “almost certainly have an effect on the child.” *Id.*

Before entry of the judgment of divorce, the parties determined parenting time in accordance with the recommendations in the Friend of the Court report.<sup>3</sup> During this time,

(...continued)

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

<sup>3</sup> We note that since entry of the judgment of divorce, the parties continued to follow the Friend of the Court’s parenting time recommendation with respect to their other children, Savannah Johnson and Arianna Johnson. It is Benjamin’s situation that underlies this appeal.

Benjamin lived with defendant, obeyed a fixed curfew imposed by defendant, and had no attendance problems at school. The judgment of divorce changed this arrangement. Between entry of the judgment of divorce on November 3, 2006, and entry of the order modifying that judgment, on February 7, 2007, Benjamin lived at plaintiff's house and moved all of his belongings there, did not have a fixed curfew, began having attendance problems at school, and skipped one of his final exams. In addition, defendant testified that when she would call plaintiff's house to speak with Benjamin, plaintiff often did not know Benjamin's whereabouts. Brandon Koehn, defendant's son and plaintiff's step-son before the divorce, even testified that during this time Benjamin once called Koehn to tell Koehn he was drunk and noted that Benjamin would call as late as 10:30 p.m. on weeknights.

Given this, it appears that, since entry of the judgment of divorce, guidance for Benjamin has been dubious at best, thereby creating an unstable environment adversely affecting Benjamin's life in a significant manner. MCL 722.23(b), (d), (h). Consequently, proper cause and changed circumstances appear evident; however, a finding to that effect on the record is required, as previously noted.

Plaintiff's next argument—that the trial court erred in failing to treat defendant's parenting time motion as a motion affecting custody—is dependent on whether there was an established custodial environment. When a change in parenting time amounts to a change in an established custodial environment, a trial court is required to conduct a hearing to determine whether, by clear and convincing evidence, the change in parenting time is in the best interests of the child. *Brown v Loveman*, 260 Mich App 576, 596-598; 680 NW2d 432 (2004). However, before making a determination regarding a child's best interests, a trial court must address whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

Here, the judgment of divorce provided that besides holidays, birthdays, and four weeks in the summer, the children “will determine individually when they will have parenting time with each parent.” The order modifying the judgment of divorce effectively eliminated the children's discretion with respect to parenting time by adopting the Friend of the Court's recommendation that plaintiff may have parenting time on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m., one mid-week evening “depending on the child's school schedule” from 4:00 p.m. until 7:30 p.m., Father's Day, and time during holidays occurring in even numbered years, while defendant would have parenting time at all other times and on Mother's Day.

“A custodial environment 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.” *Brown, supra* at 595.

Here, the court failed to conduct an evidentiary hearing and made no finding with respect to whether an established custodial environment existed. Consequently, we are unable to determine whether the change in parenting time amounted to a change in an established custodial environment. In light of this, the court's order modifying parenting time before determining whether there was an established custodial environment was improper. *Brown, supra* at 600.

We vacate the trial court's order modifying the judgment of divorce and remand for an evidentiary hearing to determine whether there was an established custodial environment and, if so, whether the modification of parenting time amounted to a change in this custodial environment, and to determine if the change in parenting time was in the children's best interests. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello