

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN KOLB,

Plaintiff-Appellee,

v

KRISTIN GARN,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

No. 287534

Bay Circuit Court

LC No. 07-007275-DC

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

In this child custody dispute, the trial court awarded defendant sole legal and physical custody of the parties' minor child after determining that the child had an established custodial environment with defendant that should not be disturbed, but reserved a decision regarding plaintiff's parenting time. The trial court thereafter awarded plaintiff parenting time pursuant to a two-week schedule whereby plaintiff would receive overnight parenting time for seven days within each 14-day period. The court also required defendant to contribute \$1,500 toward plaintiff's attorney fees. Defendant now appeals as of right. We reverse the trial court's custody determination, vacate the award of attorney fees, and remand for proceedings consistent with this opinion.

In cases involving an award of custody or parenting time under the Child Custody Act, MCL 722.21 *et seq.*, we must affirm a trial court's orders and judgments unless the trial court "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." MCL 722.28; *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008). A trial court's findings of fact are evaluated under the great weight of the evidence standard, *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), the palpable abuse of discretion standard applies to the custody or parenting time award, and we review questions of law for clear legal error, which occurs "when a trial court incorrectly chooses, interprets, or applies the law." *Berger*, 277 Mich App at 705, 706, 716. Any error that occurs is subject to a harmless error analysis. See *Ireland v Smith*, 451 Mich 457, 468-469; 547 NW2d 686 (1996).

Defendant first argues that the trial court committed clear legal error by ruling that the child had an established custodial environment with her that should be retained and awarding her sole physical custody of the child, but then awarding parenting time to plaintiff that effectively

both changed the child's established custodial environment and established a joint physical custody arrangement. We agree that the trial court's decision is legally inconsistent.

In a custody dispute subject to the Child Custody Act, a court may award "custody" of the child to one or more parties and provide for "reasonable parenting time of the child by the parties involved." MCL 722.27(1). "Joint custody" is defined as an arrangement in which one or both of the following is specified:

(a) That the child shall reside alternately for specific periods with each of the parents.

(b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child. [MCL 722.26a(7).]

A trial court determines whether an award of joint custody is in a child's best interests by considering the factors in MCL 722.23 and "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1). If the child has an established custodial environment, clear and convincing evidence is required to change the established custodial environment. MCL 722.27(1)(c); *Ireland*, 451 Mich at 461 n 3.

An established custodial environment is one 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 a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

Parenting time also requires consideration of the child's best interests, but is governed by MCL 722.27a. *Pickering v Pickering*, 268 Mich App 1, 570 NW2d 835 (2005). Under MCL 722.27a(1), parenting time is granted in accordance with the child's best interests and "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(6) sets forth a number of relevant factors for a trial court to consider when determining parenting time. However, if a change in parenting time amounts to a change in a child's established custodial environment, it should not be granted unless the trial court determines by clear and convincing evidence that it is in the child's best interests to change the established custodial environment. *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008).

We disagree with defendant's argument that the trial court's finding that the parties are unable to cooperate on important matters necessarily precluded an award of joint physical custody. The parties' ability to cooperate is only one factor for a court to consider when

deciding whether to award joint legal or physical custody. MCL 722.26a(1); *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987).¹

Nonetheless, we agree that the trial court substantively created a joint physical custody arrangement when it approved the two-phase parenting time schedule that, effective September 7, 2008, allowed plaintiff to exercise overnight parenting time for seven days out of each 14-day period. This equal-time schedule cannot be construed as anything but a joint physical custody arrangement within the meaning of MCL 722.26a(7)(a), because the child is residing “alternately for specific periods with each of the parents.” We also agree that this change in plaintiff’s parenting time from the previous arrangement of four afternoons and two overnight visits in a two-week period amounts to a change in the child’s established custodial environment. Cf. *Powery*, 278 Mich App at 528-530 (Holding that a change in a child’s residence that would be accompanied by a change from the parties’ nearly equal parenting time to a situation where one parent would become a weekend parent changed the child’s established custodial environment that existed with each parent); *Brown v Loveman*, 260 Mich App 576, 595-597; 680 NW2d 432 (2004) (Holding that a change in equal parenting time to a schedule where one parent would have parenting time approximately nine months during the school year and the other parent would have parenting time approximately three months during the summer amounted to a change in the child’s established custodial environment).

However, we do not find the labels given by the trial court to the physical custody and parenting time arrangement to be dispositive of whether it committed a clear legal error warranting relief. The frequency and duration of parenting time is a matter that a trial court determines, regardless of whether the parent has physical custody or is being awarded specific parenting time under MCL 722.27a. We must look to the standard of proof that the trial court applied in its determinations of physical custody and parenting time to determine if clear legal error occurred.

In this case, the trial court found that the child had an established custodial environment with defendant and that the “factors favor not upsetting that.” Further, the trial court acted within the framework of MCL 722.23 in determining the amount of plaintiff’s parenting time, as evidenced by the trial court’s articulation of specific findings with respect to the best interest factors when expanding on its decision at the hearing on defendant’s motion for reconsideration evidence. In neither case, however, did the trial court indicate that it applied the appropriate clear and convincing standard in making its determination.

Ordinarily, we may presume that a judge followed the law, absent proof to the contrary. See *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971); see also *People v Lanzo Constr Co*, 272 Mich App 470, 485; 726 NW2d 746 (2006). Here, however, a presumption that

¹ We also note that, regardless of the nature of the custody arrangement, the parent with whom the child is residing makes routine matters concerning a child. See MCL 722.26a(4) (“During the time a child resides with a parent, that parent shall decide all routine matters concerning the child.”); MCL 722.27a(9) (“During the time a child is with a parent to whom parenting time has been awarded, that parent shall decide all routine matters concerning the child.”).

the court applied a clear and convincing evidence standard in deciding to phase in equal parenting time in a manner that effectively changed the child's established custodial environment is inconsistent with its prior decision that the child had an established custodial environment with defendant that should not be changed.² A court is not permitted to reach inconsistent results. See *People v Ellis*, 468 Mich 25, 27-28; 658 NW2d 142 (2003); *People v Burgess*, 419 Mich 305, 310-311; 353 NW2d 444 (1984). Therefore, the trial court's parenting time order is legally inconsistent and constitutes clear legal error.

Although we cannot conclude that this error is harmless, we disagree with defendant's argument that the appropriate remedy is to limit plaintiff's parenting time to that specified by the trial court as part of the first phase of the parenting time schedule. Because the trial court failed to articulate the standard of proof that it applied, and the results reached are inconsistent if they are considered within the applicable statutory framework, we remand for a reevaluation of the entire physical custody decision and parenting time schedule. The trial court may consider any up-to-date information and change of circumstances on remand as deemed appropriate. *Ireland*, 451 Mich at 468-469. Because the trial court's clear legal error requires reversal, it is unnecessary to consider defendant's challenges to the trial court's findings with respect to various best interest factors. On remand, the trial court will have the opportunity to consider the present circumstances of the child and the parties when evaluating the physical custody and parenting time arrangement. *Id.* at 469 n 12.

With regard to defendant's appeal of the trial court's order that she contribute \$1,500 toward plaintiff's attorney fees, we agree that the trial court abused its discretion. A party in a domestic relations action may request a court order at any time requiring the other party to pay attorney fees and expenses. MCR 3.206(C)(1). To be entitled to attorney fees, the requesting party must allege facts sufficient to show an inability "to bear the expense of the action, and that the other party is able to pay." MCR 3.206(C)(2)(a); see also *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007) ("The party requesting attorney fees has the burden of showing facts sufficient to justify the award."). In addition, the party must show that reasonable attorney fees were incurred. *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009). We review a trial court's decision to grant attorney fees for an abuse of discretion. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.*

² It is for this reason that we find *Potts v Potts*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2009 (Docket No. 289992) distinguishable. In *Potts*, the trial court made clear that "in order to change that custodial environment, it must find reason to do so by clear and convincing evidence" and the panel stated "the court only granted custody to Jeffrey Potts after it found clear and convincing evidence to do so." *Id.* at 6. Furthermore, in *Potts*, the trial court was clear that it was making a change from its original determination that both parents had an established custodial environment. In the present case, the trial court never gave any indication that it was making a change.

In this case, plaintiff's complaint requested attorney fees and alleged that he did not have sufficient funds to bear the expense of the action, but he continued to prosecute the action through the bench trial and posttrial proceedings, without an award of attorney fees. Further, plaintiff offered no evidence of his actual attorney fees at trial. Although the evidence indicated that there was a disparity between the parties' incomes, plaintiff failed to present evidence that he lacked the ability to bear the expense of the litigation, or that defendant was able to pay plaintiff's attorney fees out of her income. Because defendant failed to meet his burden, *Borowsky*, 273 Mich App at 687, the trial court abused its discretion in ordering defendant to pay \$1,500 toward plaintiff's attorney fees. Accordingly, we vacate the award of attorney fees.

We reverse the trial court's custody determination, vacate the award of attorney fees, and remand to the trial court for reevaluation of the entire physical custody decision and parenting time schedule, and for such other proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro