

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

---

LAWRENCE TUCKER,

Plaintiff-Appellee/Cross-Appellant,

V

TAMI DEVEROUX,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

April 19, 2011

No. 299191

Macomb Circuit Court

Family Division

LC No. 2002-001711-DC

---

LAWRENCE TUCKER,

Plaintiff-Appellant,

v

TAMI DEVEROUX,

Defendant-Appellee.

No. 300257

Macomb Circuit Court

Family Division

LC No. 2002-001711-DC

---

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In Docket No. 299191, defendant appeals as of right the trial court's opinion and order dated July 5, 2010, regarding plaintiff's motion to change custody. Plaintiff cross-appeals in Docket No. 299191. In Docket No. 300257, plaintiff appeals as of right the trial court's order dated September 13, 2010, denying his motion for appellate attorney fees. The two matters have been consolidated for the purpose of appellate review. We affirm in part, reverse in part, and remand the case to the trial court with instructions to hold a hearing regarding which school the child shall attend considering the child's best interest.

**I. STANDARD OF REVIEW**

Three standards of review govern custody appeals. First, we review the trial court's factual findings under the great weight of the evidence standard. *Berger v Berger*, 277 Mich

App 700, 705; 747 NW2d 336 (2008). Such findings must be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* Second, we review the trial court's discretionary decisions, including custody and parenting time, for an abuse of discretion. *Matczak v Matczak*, 482 Mich 1022, 1024; 759 NW2d 645 (2008); *Berger*, 277 Mich App at 716. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705. Third, with regard to the interpretation and application of law, we review the trial court's decisions under the clear error standard. *Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994). The trial court clearly errs "[w]hen [it] incorrectly chooses, interprets, or applies the law." *Id.* at 881.

## II. PROPER CAUSE OR A CHANGE OF CIRCUMSTANCES

The parties first dispute whether the trial court erred in finding that plaintiff established proper cause or a change in circumstances sufficient to revisit the custody order. MCL 722.27(1)(c) provides that the trial court may modify a child custody order for proper cause or a change in circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). Thus, a party seeking a change in custody must, as a threshold matter, demonstrate proper cause or a change in circumstance, and the failure to do so precludes the trial court from holding a child custody hearing to revisit the custody order. *Brausch v Brausch*, 283 Mich App 339, 355; 770 NW2d 77 (2009).

"[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." *Vodvarka*, 259 Mich App at 511. In determining whether such ground or grounds exist, trial courts appropriately turn to the twelve "best interest of the child" factors for guidance. *Id.* As stated by a panel of this Court in *Vodvarka*:

[N]ot just *any* fact relevant to the twelve factors will constitute sufficient cause. Rather, 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. Obviously, trial courts must make this factual determination case by case. [*Id.* at 512 (emphasis in original).]

With regard to establishing a change in 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. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, 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. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Id.* at 513-514 (emphasis in original).]

Here, defendant claims that the trial court failed to make a determination regarding whether proper cause or a change in circumstances existed until after the evidentiary hearing, and that this error is evidenced in the trial court's order. This argument lacks merit. In the trial court's order, it clearly stated that it found proper cause or a change in circumstances from the face of plaintiff's motion, well before it held an evidentiary hearing on the matter:

The change of circumstances and good cause alleged in Plaintiff's motion to Change Custody of 12/12/08 were the changes in residence of Defendant, the several criminal charges and the interference with his parenting time. However, the court was unable to address Plaintiff's Motion till the end of June early July 2010 because Defendant left the State of Michigan and did not return till February 2010.

Further, despite the fact-sensitive nature of the inquiry, a trial court, as here, need not hold an evidentiary hearing to resolve the threshold question of proper cause or a change in circumstances. *Vodvarka*, 259 Mich App at 512. "Often times, the facts alleged to constitute proper cause or a change of circumstances will be undisputed, or the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard." *Id.*

In the instant case, plaintiff's motion stated that defendant had been charged with multiple acts of fraud in the last several months, had been the subject of several eviction proceedings, was currently being evicted, was arrested in the child's presence, and was currently in jail. He also argued that defendant posed a flight risk if released from bond. Finally, he argued that defendant suffers from emotional problems that make her unable to properly provide for the child. Accepting these alleged facts as true, as the trial court may properly do, the trial court found the facts legally sufficient to satisfy the standard for proper cause or a change in circumstances. It is also relevant that the movant's burden in this threshold inquiry is the preponderance of the evidence standard. *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008). For all these reasons, we hold that the trial court did not abuse its discretion in finding proper cause or a change in circumstance sufficient to revisit the custody order.

Defendant next argues that the trial court erred in considering events occurring only after the last custody order, rather than before and after the last custody order. According to defendant, although plaintiff alleged that defendant changed residences, was charged with various crimes, absconded with the child, and interfered with plaintiff's parenting time, this same course of conduct occurred before the last custody order. Defendant argues that continuation of long-standing problems does not, and cannot, constitute proper cause or a change in circumstances.

Although we agree that evidence of "change" is required, we disagree that such change was not established in this case:

Because a "change of circumstances" requires a "change," the circumstances must be compared to some other set of circumstances. And since the movant is seeking to modify or amend the prior custody order, it is evident that the circumstances must have changed since the custody order at issue was entered. Of course,

evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order. As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a “change” of circumstances.

The same is not necessarily true for proving proper cause, though in most cases it will hold true. The phrase “proper cause” is not by the words themselves tied to a change in events as is “change of circumstances.” Rather, proper cause is geared more toward the significance of the facts or events or, as stated earlier, the appropriateness of the grounds offered. However, we believe 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. [*Vodvarka*, 259 Mich App at 514-515 (footnotes omitted).]

Here, very clearly, the trial court considered events occurring *after* the last custody order. Even assuming, as defendant argues, that defendant was evicted, faced criminal charges, and fled the jurisdiction before entry of the last custody order, the abundance of incidents occurring since the last custody order establish a more definite pattern of this behavior, calling into greater question defendant’s stability and judgment, the lack of which could profoundly affect the child. Defendants continued failure to pay rent and absconding of the child without informing plaintiff evidences a change sufficient to revisit the parties’ custody order. To hold otherwise would result in absurdity, permitting parents to engage in criminal or otherwise improper behavior without risk of compromising their custodial rights so long as they engaged in such criminal or otherwise improper behavior in the past.

In addition, defendant argues that most of her alleged improper behavior relates to parenting time interference, and that interference with parenting time is not a proper basis for changing custody. While defendant correctly states the law, that “[d]isputes regarding visitation and contempt are not a proper basis for changing custody,” *Adams v Adams*, 100 Mich App 1, 13; 298 NW2d 871 (1980), here, there was more. Plaintiff alleged acts of fraud and kidnapping. For this reason, defendant’s argument lacks merit.

### III. ESTABLISHED CUSTODIAL ENVIRONMENT WITH BOTH PARENTS

Plaintiff argues that the trial court erred in finding an established custodial environment with both parents and, consequently, held the parties to the incorrect burdens of proof on the issue regarding whether modifying custody and parenting time were in the child’s best interest. We disagree.

The pertinent statute, MCL 722.27(1)(c), provides:

The court shall not ... 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 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.

Although the clear and convincing evidence standard applies in cases where the movant seeks a change in the child's established custodial environment, this heightened evidentiary burden is not applicable in cases where the desired relief would not constitute a change in the child's established custodial environment. *Pierron v Pierron*, 486 Mich 81, 89-90; 782 NW2d 480 (2010). Rather, in such case, the movant need only prove by a preponderance of the evidence that the relief sought is in the child's best interest. *Id.*

Here, plaintiff argues that the trial court should have found an established custodial environment with plaintiff because the child lived exclusively with him for the 15 months preceding the evidentiary hearing, and, therefore, it erred in holding him to the heightened evidentiary burden. As stated in *Berger*, however:

The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian. A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order. 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 706-707 (internal citations omitted).]

The fact that the child resided with plaintiff for the 15 months preceding the evidentiary hearing is not dispositive on the inquiry. In accordance with *Berger*, as well as MCL 722.27(1)(c), the trial court properly found:

In spite of the stubborn insistence on their own way and the litigation instituted by each of them, from April 8, 2003 till April 3, 2009, while in the custody of each parent, Ashleigh looked to that parent for fulfillment of her physical and her psychological needs. . . . The court finds that there was an established custodial environment existing when plaintiff filed his motion. The Plaintiff and the Defendant exercised a roughly 50 – 50 parenting time with Ashleigh from April 2003 to April 2009.

As here, where there exists an established custodial environment with both parents, neither parents' established custodial environment may be disturbed unless the movant proves that such change is clearly and convincingly in the child's best interest. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). Accordingly, the trial court in this case did not err in requiring plaintiff to show by clear and convincing evidence that awarding him sole physical custody of the child was in her best interest.

Plaintiff next argues that the trial court erred in ordering week-on, week-off parenting time throughout the summer without first requiring defendant to prove by clear and convincing evidence that doing so was in the child's best interest. Certainly, there are cases in which a

change in parenting time is so great that it necessarily changes the child's established custodial environment. See *Brown v Loveman*, 260 Mich App 576, 595-598; 680 NW2d 432 (2004). As indicated above, however, the child in this case had an established custodial environment with both parties. A week-on, week-off parenting time schedule in the summer, i.e., giving the parties equal parenting time, would not constitute a change in the child's established custodial environment with both parents. Rather, such a parenting time schedule is consistent with the current, dual custodial environment.

#### IV. MODIFICATION OF CUSTODY AND PARENTING TIME

In resolving custody disputes, a trial court turns to MCL 722.23, which sets forth the "best interest of the child" factors:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

- (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.
- (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.

On appeal, defendant challenges the trial court's findings with regard to factors b, c, d, e, f, j, and l. Only these factors are addressed below.

With regard to factor b, the capacity to give the child love, affection, and guidance, and to continue the education and raising of the child in her religion, the trial court stated:

The evidence is clear and convincing that the Plaintiff is slightly favored on this factor. The Defendant's refusal to abide by normal and necessary regulations regarding extra curricular activities of Ashleigh at school are not in Ashleigh's best interest. However, Defendant shows a disposition of love, affection, guidance and continuation of Ashleigh's education.

Defendant argues that the trial court placed undue weight on a field trip incident at the Detroit Science Center and school principal's testimony in considering this factor. According to defendant, the principal was biased and her testimony lacked veracity, and other testimony indicated that defendant never caused difficulties while participating in extracurricular activities. We disagree.

Because the trial court is in the best position to judge the credibility of witnesses, we may properly defer to the trial court's credibility determinations. *Berger*, 277 Mich App at 707. Further, there exists no record evidence of any actual bias on the principal's part.

Likewise, the trial court is also better positioned to engage in fact finding, and we will not substitute our judgment for that of the trial court on questions of fact unless such findings are against the great weight of the evidence. *Berger*, 277 Mich App at 707-708. Here, the evidence indicates that defendant did, in fact, fail to follow instructions from school officials regarding attending the field trip at the Detroit Science Center, which required alerting the police. The evidence also indicates that defendant became angry and upset when denied access to the child's classroom, which the principal indicated was school policy.

With regard to factor c, the capacity to provide the child with food, clothing, and medical care, the trial court stated:

The evidence is clear and convincing that Plaintiff is slightly favored on this factor. Again Defendant has shown an antagonism to following court orders or rules of authorities regarding this child. Defendant does show at the present time the physical capacity to fulfill the requirements of this factor.

We agree with defendant that factor c has nothing to do with following court orders or respecting authority, but deals with the parent's capacity to provide the child with food, clothing, and medical care. Moreover, there is no indication that defendant failed to adequately provide food, clothing, and medical care for the child, and the trial court's last sentence seemingly concedes

this point. Accordingly, we find that the trial court's determination with regard to factor c weighing slightly in favor of plaintiff was against the great weight of the evidence.

With regard to factor d, the time that the child has lived in a stable environment and desirability of maintaining continuity, the trial court stated:

The evidence is clear and convincing that this factor favors the Plaintiff. He has lived at the same residence since 2003. He continue [sic] to reside in the same address. Defendant on the other hand moved several times between May 16, 2007 and February 2010. The court is aware of defendant's purchase of a home in 3/20/10 and has considered the same.

Defendant argues that she has changed her residence in the past for financial reasons and that, given the purchase of her new home, her financial difficulties in maintaining a residence no longer exist. Defendant also argues that it is plaintiff who instigated many of her evictions. An inability to provide a stable environment due to financial problems is, nonetheless, an inability to provide a stable environment. Accordingly, the trial court did not err in considering that defendant has been evicted from several residences for her failure to pay rent. In addition, although it is significant that defendant recently purchased a home free and clear, thereby eliminating, or at least abating, her financial difficulties, the trial court properly considered the parties' long-term capacity to provide a stable environment. Plaintiff has lived at the same residence since 2003, without any financial difficulties, and there is no indication that he will neglect his responsibilities in the future. Defendant, on the other hand, has moved constantly since the child's birth. The trial court's determination on this factor was not against the great weight of the evidence.

With regard to factor e, permanence of the family unit, the trial court found that the factor weighed in favor of plaintiff, for the same reasons stated in its analysis of factor d, and because of defendant's relationship with her daughter-in-law. As noted above, the trial court did not err in its determination that factor d favored plaintiff. We fail to understand how the admittedly cacophonous relationship with the daughter-in-law relates to the permanence of the family unit. For the purposes of this case, the family unit relates to the persons in residence at the parties' homes or having a significant role in the child's upbringing. The record does not reflect that the daughter-in-law was a member of the family unit as defined. It is also not logically relevant to this issue that defendant has a poor relationship with her adult sons. We cannot find any basis to find that this factor favors either party.

With regard to factor f, the moral fitness of the parties involved, the trial court found the parties equal, noting that the criminal charges against defendant did not involve the child. Defendant argues that this factor clearly and convincingly favors her. To this end, she points out that plaintiff lied when he said that defendant absconded with the child in 2002 and 2009 and he did not know the child's whereabouts, and also made disparaging remarks against defendant to the child's principal. We disagree. The trial court is in the best position to find facts and judge the credibility of witnesses. *Berger*, 277 Mich App at 707-708. Because the evidence does not clearly preponderate in the opposite direction, this Court should defer to the trial court's determination that the parties in this case are of equal moral fitness.

With regard to factor j, the willingness and ability of each parent to facilitate and encourage a close relationship between the child and the other parent, the trial court found both parties deficient on the factor, but plaintiff slightly favored. Although defendant claims that she has exhausted the ways in which to communicate with plaintiff to no avail, the record suggests that plaintiff also attempts to communicate with defendant to no avail. Further, we cannot disagree with the trial court's conclusion that plaintiff is slightly favored given that defendant took the child out of the state on a number of occasions without providing plaintiff adequate notice. The trial court's findings regarding this factor are not against the great weight of the evidence.

Finally, with regard to factor l, any other relevant factor, the trial court stated:

The evidence is clear and convincing that this factor favors the Plaintiff. The Defendant left the State of Michigan with the minor child on 2 occasions in violation of the Court Order. The issue of whether she intended to return is very difficult to prove. On the first occasion in 2003 she filed an action for custody of the minor child in North Carolina without having the required residency to give the North Carolina Court jurisdiction. She also obtained a PPO against Plaintiff in North Carolina. Both these actions were dismissed by the North Carolina Court. In addition the Defendant ignored an Order to Show Cause that was served on her and a subsequent Bench Warrant for her arrest for failure to appear. These actions by Defendant indicate an intention not to return to Michigan.

The second time Defendant left with the minor child in violation of the Court Order in April 2009 there is little evidence of her intention. Both times she left the state with the minor child in violation of the Court Order required Plaintiff to spend funds for transportation and attorneys to protect himself from the unlawful actions of Defendant.

On a separate issue the evidence is clear and convincing that both parties are equally deficient. Both Plaintiff and Defendant have filed numerous motions on minor issues which indicates an inability on both parties to problem solve even when doing so is in the best interest of Ashleigh.

Defendant argues that the trial court erred in focusing on events occurring before entry of the last custody order. With respect to the inquiry whether proper cause or a change in circumstances exists, "the court should generally limit its consideration to events occurring after entry of the most recent custody order." *Vodvarka*, 259 Mich App at 501. Even then, however, "there will be unusual cases where that rule is not applicable." *Id.* In any case, the trial court also considered the more recent incident in which defendant, again, absconded with the child to North Carolina, which was entirely proper. Accordingly, finding plaintiff slightly favored on this factor is not against the great weight of the evidence.

In sum, despite the trial court's error with regard to factors c and e, on the whole, the trial court's best interest analysis was sound and supported by the evidence. Accordingly, we hold that the trial court did not abuse its discretion in deciding to modify the parties' custody order to vest plaintiff sole physical custody of the child.

Defendant next challenges the trial court's modification of the parenting time schedule. In its order dated July 5, 2010, the trial court changed defendant's parenting time from alternating weeks during the school year to every other weekend with an additional overnight on Thursdays on weeks in which defendant does not have weekend parenting time. It also ordered alternating-week parenting time through the summer months. Although defendant insists that such modification changes the child's established custodial environment, as addressed above, the trial court properly found that the child had an established custodial environment with both parents. This is because the child looked to both parties to fulfill her physical and psychological needs. For this reason, we cannot conclude that the trial court abused its discretion in reaching this determination. Alternating parenting time, whether it be on a week-on, week-off basis, or alternating weekends with alternative Thursday overnights, will still allow the child to look to both parties to fulfill her physical and psychological needs. Therefore, the trial court's modification of parenting time did not constitute a change in the child's custodial environment, and resort to the best interest analysis was unnecessary.

#### V. THE CHILD'S SCHOOL

Defendant next argues that the trial court wrongly stated that, because plaintiff has sole physical custody of the child, he has the right to choose her school. We agree.

In *Bowers v Vandermeulen-Bowers*, 278 Mich App 287, 295-296; 750 NW2d 597 (2008), a panel of this Court held that parents having joint legal custody of a child share the authority to decide important decisions affecting the child's welfare, including what school he or she shall attend. It further held that, when parents fail to agree on a school for a child, the trial court must resolve the dispute considering the child's best interest, i.e., pursuant to the best interest analysis set forth in MCL 722.23. *Id.* at 296. This holding was cited approvingly in *Parent v Parent*, 282 Mich App 152, 156; 762 NW2d 553 (2009).

Here, based on its order, it is apparent that the trial court mistakenly believed that the parent with physical custody has the authority to decide the child's school, when in actuality it is legal custody that carries such authority. The trial court stated, "Plaintiff is awarded physical custody of the child. This means that [he] has the authority to make everyday decisions concerning the child, e.g., medical decisions, *school child shall attend*, etc." (Emphasis added.) Because the parties in this instant appeal have joint legal custody of the child, they share the authority to decide the child's school. In this regard, the trial court abused its discretion.

Also, it is apparent that the parties cannot, and will not, come to an agreement on this important decision. Accordingly, the trial court should have resolved the issue considering the child's best interest. Although the trial court conducted a best interest analysis, this analysis was only with regard to "changing the custodial environment." "[W]hen making a determination regarding a child's best interest, a trial court is required to state factual findings and conclusions with regard to each relevant statutory best interest factor listed in MCL 722.23." *Parent*, 282 Mich App at 156. Where, as here, "a trial court fails to make reviewable findings of fact, the proper remedy is a remand for a new hearing." *Id.*

#### VI. TRIAL ATTORNEY FEES AND TRAVEL EXPENSES

Both plaintiff and defendant contest the award of attorney fees, and defendant additionally contests the award of travel expenses. With regard to attorney fees, plaintiff argues that he requested in excess of \$16,000 but the trial court only awarded him \$5,000. The trial court stated that it was not awarding fees incident to the custody motion, but only incident to defendant's violation of court orders. Plaintiff argues that this was error because MCR 3.206 requires a trial court to award attorney fees if one party is unable to bear the expense of litigation and the other party has the ability to pay.

MCR 3.206(C), relating to requests for attorney fees and expenses, provides:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

"Attorney fees ... are awarded only as necessary to enable a party to prosecute or defend a suit." *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). Further, they are awarded in the trial court's discretion, and this Court shall not reverse a decision to grant or deny attorney fees absent a manifest discretionary abuse. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). The trial court may not require a party to invade his or her assets to satisfy an award of attorney fees if the party is relying on the same assets for his or her own support. *Id.*

As an initial matter, contrary to plaintiff's assertion, MCR 3.206 does not require a court to take any action. Rather, MCR 3.206 sets forth requirements for the movant seeking attorney fees. Specifically, the movant must allege sufficient facts to support the award of attorney fees. Although plaintiff continually repeats that he is unable to bear the costs of litigation and defendant has the ability to pay, we disagree that he has alleged sufficient facts to prove such assertions. Although \$16,000 in attorney fees is not insignificant, considering plaintiff earns approximately \$65,000, we are not convinced that he is unable to bear the expense. He has not shown that his bank accounts are depleted or that he has insufficient funds to sustain himself and the child. On the other hand, plaintiff did allege sufficient facts indicating that defendant has failed to comply with several court orders and that he has incurred additional expenses as a result. For example, plaintiff took off work on several occasions in which defendant failed to appear in court. Although the exact amount of lost wages is unclear from the record, there is no indication that the trial court abused its discretion in assessing defendant \$5,000 in attorney fees.

Defendant argues that the trial court abused its discretion in awarding \$5,000 in attorney fees because (1) plaintiff failed to allege facts sufficient to prove his inability to pay and (2) he

failed to request attorney fees in his motion to change custody. As indicated above, defendant is correct that plaintiff failed to allege facts sufficient to prove his inability to pay. The trial court, however, did not assess defendant attorney fees on this basis. Rather, in accordance with the court rule, the trial court assessed defendant attorney fees for her failure to follow court orders, which resulted in unnecessary expenses for plaintiff. With regard to defendant's second argument, MCR 3.206 very clearly states that a party may request attorney fees at any time. As such, defendant's argument that plaintiff failed to request attorney fees in his motion to change custody lacks merit.

With regard to the award of travel expenses, defendant argues that, at most, the trial court should have assessed her \$2,608.15, the specific amount that plaintiff incurred to retrieve the child from Florida. We disagree. Although the record indicates that plaintiff's out-of-pocket expenses amounted to \$2,608.15, it is possible that the trial court factored in the lost wages that plaintiff incurred over the considerable amount of time that plaintiff spent in Florida to retrieve the child and return her to the State of Michigan. In any case, there is no indication that the trial court's award of travel expenses was "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705.

## VII. JOINT LEGAL CUSTODY

MCL 722.26a(1) requires the trial court to determine whether joint custody is in the child's best interest considering the best interest factors and whether the parents can cooperate and generally agree on important decisions affecting the child's welfare. Plaintiff argues that the trial court granted the parties joint legal custody without making such considerations. We disagree. The trial court went through each and every best interest factor. After conducting its analysis, it awarded plaintiff physical custody of the child and joint legal custody of the child to both parties. Although plaintiff points out that the parties had difficulty communicating with one another, the trial court established a system in which the parties would correspond via email, and required the parties to check their email every night at 6:00 p.m. Further, although plaintiff and defendant have strong feelings regarding which school the child shall attend, and will likely not agree on the matter, there is no evidence of such "deep-seated animosity between the parties and an irreconcilable divergence in their opinions" that they cannot foster the child's well-being more generally. *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008).

## VIII. CHILD SUPPORT

Plaintiff next argues that the trial court's order granting plaintiff temporary custody of the child, entered on April 9, 2009, ordered defendant to pay child support, and that it impermissibly modified that award retroactively. The order provides that defendant "SHALL PAY CHILD SUPPORT TO THE PLAINTIFF PURSUANT TO THE MICHIGAN CHILD SUPPORT GUIDELINES" and "AFTER THE CHILD IS RETURNED TO THE PLAINTIFF, PLAINTIFF'S COUNSEL SHALL CONTACT THE COURT TO SCHEDULE A FULL EVIDENTIARY HEARING REGARDING ... CHILD SUPPORT." The trial court did not specify when such support payments would commence. Therefore, it cannot be said that the trial court retroactively changed defendant's child support obligation when it later ordered that such payments commence on July 5, 2010.

Moreover, the trial courts statements at the evidentiary hearing held on April 9, 2009, reflect that the trial court did not intend child support payments to begin until plaintiff received permanent custody, as opposed to temporary custody, of the child. The trial court stated, "I am also going to suspend parenting time for [defendant] and we will talk about – she will be liable for child support. I'm setting child support at the time that he gets custody of the child." The trial court addressed the issue of permanent custody of the child on July 5, 2010. Accordingly, consistent with its earlier statement, the trial court properly ordered that defendant's child support obligation commence as of that date.

#### IX. APPELLATE ATTORNEY FEES

Plaintiff filed a motion in the trial court seeking an award of \$20,000 in appellate attorney fees to allow him to adequately defend against defendant's appeal. The trial court denied the motion, stating that it believed that the Court of Appeals should rule on the issue first.

Defendant first argues that the trial court erred in finding that it lacked jurisdiction to award appellate attorney fees. Contrary to defendant's assertion, however, the trial court did not say that it lacked jurisdiction to award attorney fees. Further, as indicated above, attorney fees are awarded in the trial court's discretion, and the grant or denial of attorney fees should not be disturbed absent manifest discretionary abuse. *Maake*, 200 Mich App at 189. Before the trial court may award attorney fees, under MCR 3.206(C)(2), the party making the request must allege facts sufficient to show that he or she is unable to bear the expense of the action, and that the other party has the ability to pay. Bare allegations, unsupported by facts, fail to satisfy this standard.

Here, as with the issue of trial attorney fees, plaintiff has not alleged facts sufficient to show his inability to pay, such as depleted bank accounts or other indication that he has insufficient funds to provide necessities for himself and the child. Further, although counsel estimated that the costs to defend the appeal would amount to \$20,000, it is, after all, an estimate. Logically, then, the trial court decided that the Court of Appeals would be in a better position to address the issue of appellate attorney fees.

Still, to this date, the record lacks sufficient information from which to render a decision regarding appellate attorney fees. For example, plaintiff's savings and other assets are unknown. In addition, plaintiff brings in a reasonable income of \$65,000, which we believe is adequate to support himself and the child, and even defend an action on appeal. We also note that, in light of a terrible automobile accident, defendant is unemployed and receives no income. Although she received a partial settlement, much of that has been spent on a home and other necessities, and she must live off the balance for an indeterminate time. Accordingly, we deny plaintiff's request for appellate attorney fees.

## X. CONCLUSION

We affirm the trial court's orders except with regard to the child's school, and remand the issue of which school the child shall attend to the trial court with instructions that it hold a new hearing to give proper consideration to the child's best interest. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ Mark J. Cavanagh

/s/ Cynthia Diane Stephens