

STATE OF MICHIGAN
COURT OF APPEALS

MANDI ROBBINS,

Plaintiff-Appellant,

v

KENNETH MCISAAC,

Defendant-Appellee.

UNPUBLISHED

May 22, 2014

No. 318800

Macomb Circuit Court

Family Division

LC No. 2009-007396-DM

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order referring the issues of parenting time and custody to the Friend of the Court (FOC), not adopting the FOC's recommendation, and in the interim, awarding the parties joint legal custody of the minor child, awarding defendant physical custody of the minor child, and awarding plaintiff parenting time pursuant to the 16th Circuit Court parenting time schedule. We affirm.

Pursuant to the October 29, 2010 judgment of divorce, the parties were awarded joint legal and physical custody of their minor child, with the child's primary residence for school purposes with plaintiff. In March 2012, plaintiff moved from Michigan to Texas (then later to Alabama), and subsequently, plaintiff sought to change the child's domicile to Texas, where she was working. The matter was referred to the FOC, which recommended that the trial court deny plaintiff's motion for a change of domicile. However, the parties were able to reach an agreement, which was reflected in the March 26, 2013 consent order entered by the trial court. The consent order provided that the parties were to retain joint legal and physical custody of the child, with the primary residence for school purposes with defendant. Plaintiff was to be provided eight consecutive weeks of parenting time during the summer, as well as parenting time during the holidays and school breaks. Any time plaintiff returned to Michigan for two consecutive days, she was to be afforded at least one overnight with the child. If she returned to Michigan for more than five days, she was to be afforded at least two overnights with the child. The agreement also provided that if plaintiff returned to Michigan, as a legal resident, custodial time with the child would revert back to the terms set forth in the judgment of divorce. But this particular provision was only applicable for a period of one year from March 26, 2013 to March 26, 2014. If plaintiff wished to change the custodial time after that, she had to file a motion.

On August 29, 2013, within the one-year period, plaintiff moved to revert the custodial time back to the terms set forth in the judgment of divorce, claiming that she had changed her legal residence back to Michigan. The referee issued a recommended order granting plaintiff's motion. Defendant sought de novo review and a hearing was held before the trial court. At the hearing, defendant moved to amend the consent order to require plaintiff to remain in Michigan for six months to properly establish her legal residence, and he also sought primary physical custody. After hearing what the parties had to say, the trial court entered an order referring the matter to the FOC for investigation and recommendation on custody and parenting time. In the interim, the trial court awarded the parties joint legal custody, but awarded physical custody to defendant. Plaintiff was awarded parenting time pursuant to the 16th Circuit Court's parenting time schedule. The trial court noted that referring the matter to the FOC was in the best interests of the child, noting that the parties cannot "arrive at agreements over the best interest factors." The trial court determined that plaintiff should not automatically get custody because she returned to Michigan. The trial court's decision was driven by the fact that the child missed cheerleading practice while under plaintiff's care, it was unclear where the child was sleeping at plaintiff's temporary residence, and plaintiff did not make it clear whether she intended to stay in Michigan permanently, given that her husband still resided in Alabama.

On appeal, plaintiff argues that the trial court abused its discretion by ignoring the consent order, which provided that the custodial time revert back to the terms set forth in the judgment of divorce upon plaintiff reestablishing legal residency in Michigan and by awarding physical custody to defendant without a proper cause or change in circumstances.

"To expedite the resolution of a child custody dispute by prompt adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Under the great weight of the evidence standard, "a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderate[s] in the opposite direction." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (quotations and citation omitted). "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 v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010).

First, with regard to whether the trial court erred in declining to revert the custodial time to the terms set forth in the judgment of divorce, we find no error. According to the consent order, for the custodial time to revert to those terms set forth in the judgment of divorce, plaintiff was required to show that she reestablished legal residency in Michigan. According to the referee who recommend that provision in the order, the intent of that language was that plaintiff show that she moved back to Michigan, had a Michigan driver's license, and that her intent was to remain in Michigan. The record shows that plaintiff returned to Michigan, still had a Michigan driver's license, and was residing with her mother in a two-bedroom flat. Plaintiff's husband, however, was still residing in Alabama. According to plaintiff, he was supervising the clearing of land they owned so they could rent out their house. She stated that he intended to move to Michigan to be with her. Plaintiff did not present evidence that she was employed. The

trial court asked plaintiff why she returned to Michigan and she stated that she wished to be with her child. The trial court, however, was skeptical given that plaintiff had no problem leaving her daughter previously. Based on the testimony the trial court heard, it determined that there were a number of things that concerned it regarding plaintiff's "ability" to move back to Michigan. Keeping in mind the deference we afford to the trial court's credibility determinations, *Pierron*, 486 Mich at 108, we conclude that the trial court's findings of fact on this issue do not clearly preponderate in the opposite direction.

Second, with regard to whether the trial court abused its discretion by awarding defendant physical custody when there was no proper cause or change of circumstances, we also find no error. Pursuant to MCL 722.27(1)(c), the trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances" This Court has defined "proper cause" as "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 v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003).

[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, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Id.* at 512.]

Additionally, "in order to 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). "[T]he 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.

In this case, the trial court had proper cause to modify the previous custody order that granted the parties joint physical custody. Although plaintiff had returned to Michigan, she had been gone for approximately 18 months. During that time, the record indicates, that the child maintained a stable living environment with defendant. When plaintiff returned she was temporarily residing in her mother's residence and did not have a stable living situation. Plaintiff's husband remained in Alabama. The child had to sleep on an air mattress because there was not a bedroom for her. The child also missed two cheerleading practices while under plaintiff's care and plaintiff stated that she had issues with transportation to the practices because she lived far from the child's school. However, plaintiff did not reach out to defendant for help in getting the child there. Based on plaintiff's testimony, the trial court found that plaintiff did not show a clear intent to move back to Michigan, it was concerned about the stability of plaintiff's living situation, and it was concerned that the child was being "tossed around" since plaintiff's return. This evidence relates directly to the best interests factors (d) and (e)—the need for the child to maintain a stable living environment. MCL 722.23. It also evident that

plaintiff's failure to provide a stable environment and show her intent to remain in Michigan results in the child being "tossed around," after she enjoyed 18 months of stability. This certainly would have a significant impact on the child's well being to warrant revisiting the custodial situation. As the trial court noted, plaintiff cannot keep changing her mind and decide to move again. Thus, we find there was proper cause.

Once it is determined that there is proper cause to modify a previous order, the trial court must find that the modification is in the child's best interests. *Shade*, 291 Mich App at 23, citing MCL 722.27(1)(c).

When a modification would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest[s]. If the proposed change does not change the custodial environment, however, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests. [*Id.* (citations omitted).]

An established custodial environment is one in which "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

In this case, there is no evidence that the modification of the custody order would change the child's established custodial environment. Before plaintiff moved out of Michigan, the record shows that the child had a joint established custodial environment. Further, the record shows that in March 2012, plaintiff relocated to Texas (and then to Alabama), and although the parties had joint physical custody, the child's primary residence was with defendant. Per the consent order, plaintiff was allowed parenting time on the various holidays and school breaks, as well as overnight visits if she made trips to Michigan. The record indicates that plaintiff resided out of Michigan for approximately 18 months. Presumably, the distance resulted in plaintiff no longer being equally active in the child's life, particularly because the child's primary residence was no longer with plaintiff, and thus, the move changed the established custodial environment to defendant. See *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008) (noting that the plaintiff's move 60 miles away would make one parent become the "weekend" parent and the parties would no longer be equally active in the child's life). The trial court's modification of the custody order, granting defendant temporary physical custody of the child, does not change the established custodial environment that existed with defendant. Thus, defendant was required to show, by a preponderance of the evidence, that the change was in the child's best interests, and defendant met this burden. Although the trial court did not specifically address the best interest factors in MCL 722.23, it is easily inferred from its statements on the record that it considered the child's best interests before modifying the custodial agreement. *Shade*, 291 Mich App at 32. The trial court specifically stated that plaintiff should not automatically get custody because she returned to Michigan. The trial court also stated that it was referring the matter to the friend of the court for investigation because the focus is the child's interests, and the parties could not "arrive at bargains . . . over the best interest factors." The trial court noted that although it had approved the consent order, circumstances change, and given plaintiff's actions and its concern over the child being "tossed around," the trial court determined that it was proper to revisit the custodial situation.

Additionally, we note that the trial court only granted defendant temporary physical custody, pending an investigation by the FOC. Pursuant to MCL 552.505(1)(g), the trial court is permitted to refer the matter to the FOC to investigate all relevant facts regarding custody and parenting time “if the court finds that proper cause has been shown or that there has been a change of circumstances.” It is clear by the trial court’s decision that it was concerned whether plaintiff intended to move back to Michigan. It is also clear that the trial court was concerned about plaintiff being able to provide a stable environment for the child. Thus, the trial court had proper cause to refer the matter to the FOC to investigate plaintiff’s intent to move back to Michigan, as well as make recommendations regarding custody and parenting time. Ultimately, the trial court’s order respected the purpose of the Child Custody Act, which is to provide “a stable environment for children that is free of unwarranted custody changes.” *Vodvarka*, 259 Mich App at 511. Accordingly, we cannot conclude that the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly