

STATE OF MICHIGAN
COURT OF APPEALS

ANNA ARANOSIAN-BARGER,
Plaintiff-Appellant,

UNPUBLISHED
December 30, 2014

v

BRENT BARGER,
Defendant-Appellee.

No. 322720
Oakland Circuit Court
Family Division
LC No. 2013-804658-DM

Before: O’CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting defendant temporary physical custody of the parties’ minor children, AB and MB, and suspending plaintiff’s parenting time. For the reasons set forth in this opinion, we reverse the order in its entirety and remand for further proceedings.

I. BACKGROUND

Plaintiff, mother, and defendant, father, are the parents of AB and MB. A judgment of divorce, entered November 4, 2013, granted plaintiff sole physical custody of the children and gave the parties joint legal custody. Defendant was awarded parenting time.

Following entry of the divorce judgment, both parties filed various motions and affidavits, each alleging various wrongful conduct including drug use, on the part of the other parent. Both parents denied the allegations. The trial court ordered both parents to undergo drug testing and to submit the results to the trial court.

Of particular relevance to this appeal, on June 16, 2014, defendant, acting in propria persona, filed an emergency motion for change of custody. Defendant asserted that AB found drugs in plaintiff’s room. According to defendant, AB described what he found as a “[b]lack box with a smoky thing,” green stuff on a tray, and a small metal canister on a tray that smelled like a “skunk.” Defendant alleged that the children stated that plaintiff and her boyfriend and the garage at plaintiff’s house smelled like a “skunk.” Defendant asserted that he told the police, schools, and Child Protective Services (CPS) “about the drug use and the boyfriend selling,” but no one helped. Defendant attached the results of his drug test to his motion. The test was negative for marijuana, cocaine, amphetamines, opiates, and PCP.

On June 25, 2014, the trial court held a hearing on defendant's emergency motion. Defendant appeared in propria persona, but plaintiff was not present. Defendant stated that he served plaintiff's attorney with notice of the motion hearing. The trial court had defendant sworn in, stating that it was going to hold a brief hearing because it could not "make a change to a custody order without taking some testimony." Defendant testified that he had not seen plaintiff's hair follicle test results because plaintiff would not release them. Defendant also answered "correct" when the trial court stated:

I did review the motion that you filed and you indicate that you have significant concerns about the safety of the children due to ongoing drug use by mother. There have been allegations of this nature that have kind of gone back and forth during the course of the case, but you're indicating that this is [sic] fresh statements by the kids that there's ongoing, at least marijuana use, it seems, in the garage.

The trial court then stated that it would sign an order giving defendant temporary custody of the children and requiring plaintiff to undergo a full substance abuse evaluation. After plaintiff complied, she could "refile and we'll talk about what is in the best interest of the kids, but you are being awarded full custody of the kids on a temporary basis." The trial court later stated that it considered defendant's "testimony with regard to the concerns as far as [plaintiff's] ability to safely care for the kids to be well founded." Defendant indicated that he had parenting time with the children that day, and the trial court approved defendant's plan to pick up the children and retain custody of them. The trial court entered a written order that reflected its oral decision. The order awarded defendant temporary custody of the children and required plaintiff to submit to a substance abuse evaluation at her cost. The order also suspended plaintiff's parenting time and abated child support until further order.

On June 26, 2014, plaintiff filed an emergency motion asking the trial court to rescind its June 25, 2014 order, return custody to her, order supervised parenting time for defendant, and award her attorney fees. Plaintiff asserted that she was not served with defendant's motion or given notice of the motion hearing. Plaintiff explained that defendant tried to serve the motion by giving it to her former attorney, Todd Fox. According to plaintiff, Fox notified defendant in an email that he no longer represented plaintiff, and defendant would need to serve plaintiff according to the Michigan Court Rules. Plaintiff stated that she learned defendant had custody of the children through Facebook. Plaintiff also made various allegations concerning defendant's failings as a parent.

Defendant responded to plaintiff's motion and asserted that Fox was plaintiff's attorney in every post-judgment motion. He denied receiving the email informing him that Fox no longer represented plaintiff, claiming that the email was sent to a former work email address.

The trial court heard plaintiff's motion on July 2, 2014. The trial court noted that Fox represented plaintiff in post-divorce proceedings, including a parenting motion filed in December 2013. Consequently, the trial court found it proper for defendant to serve Fox given that Fox had not withdrawn as counsel and there were no other indications that he did not represent plaintiff. Plaintiff's new attorney informed the trial court that plaintiff completed the hair follicle testing in December 2013. Plaintiff's attorney informed the trial court that the test was positive for

marijuana, but claimed that plaintiff had a medical marijuana card. However, counsel conceded that plaintiff did not have a card at the time of the test. The trial court refused to modify its June 25, 2014 order. The trial court instructed plaintiff's counsel to forward the test results to the referee who would schedule an expedited hearing "to figure out what's in these kids' best interest."

The trial court denied plaintiff's request for parenting time, stating:

She stood there and told me I'm not using, I'm not smoking, and I'm going to test negative. And the fact is that she was using, she was smoking, and she tested positive. I want to find out more about what the drug use is. The entire reason that I granted his motion last week was allegations that I found credible through the children that it's [sic] ongoing drug use in the garage, in the house, in the presence of the kids. So I am not going to grant her parenting time until the referee hearing takes place.

The trial court stated that plaintiff could have telephone contact with the children at 7:00 p.m. every night. The trial court entered a written order consistent with its oral rulings. Plaintiff appeals the order as of right.

II. ANALYSIS

Plaintiff argues that the trial court erred in (1) concluding that defendant properly served plaintiff his emergency motion for custody and notice of the motion hearing, (2) changing custody of the minor children without holding an evidentiary hearing, and (3) changing custody without making findings of fact with respect to the children's established custodial environment and the statutory best interest factors.

When reviewing a custody order, this Court applies three standards of review. *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009). First, this Court will not disturb the trial court's findings of fact unless they are against the great weight of the evidence. *Id.* A trial court's factual findings are against the great weight of the evidence if the facts "clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). Second, this Court reviews the trial court's discretionary rulings for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW 2d 336 (2008). In custody cases, an abuse of discretion occurs 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." *Id.* Finally, this Court must determine if the trial court made a clear legal error on a major issue; a clear legal error occurs when the trial court "errs in its choice, interpretation, or application of the existing law." *Shade*, 291 Mich App at 21.

A. NOTICE

The trial court erred in holding that defendant properly served plaintiff with his emergency motion for custody and notice of the motion hearing. A written motion, notice of the motion hearing, and any supporting briefs must be served on the opposing party. MCR 2.119(C)(1). These documents must be served at least nine days before the motion hearing if served by mail, and at least seven days before the motion hearing if delivered to the party or his

attorney directly. MCR 2.119(C)(1); see also MCR 2.107(C). In this case, on June 16, 2014, defendant hand-delivered the motion and the notice of hearing to Fox's office. Fox's legal assistant sent defendant an email on June 17, 2014, advising him that Fox no longer represented plaintiff, so plaintiff "will need to be served pursuant to the court rules."

MCR 2.107(B) addresses whether service should be made on an attorney or a party. It provides that when required or permitted, service must be made on the attorney *except*:

After a final judgment or final order has been entered and the time for an appeal of right has passed, *papers must be served on the party* unless the rule governing the particular postjudgment procedure specifically allows service on the attorney. [MCR 2.107(B)(1)(c) (emphasis added).]

In this case, defendant filed his emergency motion for custody more than three months after a final order had been entered and Fox was plaintiff's attorney.¹ On March 5, 2014, the trial court found defendant in contempt for failing to comply with its previous orders, which required defendant to abide by the judgment of divorce and pay Fox \$2,000, in attorney fees. The time for filing an appeal as of right from the contempt order was 21 days. See MCR 7.204(A)(1)(a). Therefore, after March 26, 2014, all papers were required to be served on plaintiff, and not Fox. See MCR 2.107(B)(1)(c).

The trial court erred as a matter of law in concluding that defendant's act of personally delivering the motion and notice of hearing to Fox's office constituted sufficient service on plaintiff. Given the unambiguous requirement of MCR 2.107(B)(1)(c) that "papers must be served on the party" after a final order has been entered and the time for appealing as of right has past, the trial court committed clear error. See *Shade*, 291 Mich App at 21. As a result of defendant's improper service, plaintiff did not have notice of defendant's motion or the motion hearing. This was a violation of plaintiff's procedural due process rights, because due process generally requires "notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." See *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). Because she was not notified of the motion or motion hearing, plaintiff did not have the opportunity to file a response to defendant's motion, to be heard at the motion hearing, to cross-examine defendant during his brief testimony, or to present her own witnesses. Consequently, and for the reasons discussed below, the trial court erred in granting defendant temporary custody of the children.

B. CUSTODY AND PARENTING TIME

The trial court committed clear legal error in changing physical custody of the children without making factual findings regarding proper cause or a change of circumstances, the children's established custodial environment, and the children's best interests. Under the Child

¹ On May 12, 2014, the court entered an order dismissing "the Order of Reference regarding child support . . . for the parties [sic] failure to respond." However, this order was not sent to Fox or any other attorney; it was sent to both parties individually.

Custody Act (CCA), MCL 722.21 *et seq.*, the court must make such findings before changing custody. See *Mitchell v Mitchell*, 296 Mich App 513, 520; 823 NW2d 153 (2012); *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011).

“Before modifying a child custody order, the circuit court must determine that the moving party has demonstrated either proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision.” *Gerstenschlager*, 292 Mich App at 657. In this case, the trial court stated that it reviewed defendant’s motion, which alleged “significant concerns about the safety of the children due to ongoing drug use by mother.” The trial court noted that such allegations had been made by both parties throughout the case, but defendant’s allegations related to new statements by the children that there was ongoing marijuana use in plaintiff’s garage. The trial court later stated that it considered defendant’s testimony “with regard to the concerns as far as [plaintiff’s] ability to safely care for the kids to be well founded.” The trial court did not specifically state that defendant demonstrated proper cause or a change of circumstances sufficient to warrant reconsideration of the custody arrangement.

Moreover, even if the trial court’s statements do constitute a finding of proper cause or a change of circumstances, the trial court did not make any findings with respect to the children’s established custodial environment or best interests, from which this Court can review. If a moving party has shown proper cause or a change in circumstances, the trial court must determine if the proposed modification would alter the child’s established custodial environment. See MCL 722.27(1)(c); *Mitchell*, 296 Mich App at 520. In this case, the trial court did not determine if the children had an established custodial environment with plaintiff, defendant, or both parents.

Additionally, if the proposed custody change would alter the child’s established custodial environment, the trial court was required to find by clear and convincing evidence that the change was in the children’s best interests, considering all of the statutory best interest factors set forth in MCL 722.23. *Mitchell*, 296 Mich App at 520. The trial court must make findings of fact with respect to each factor. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). Alternatively, in the event the change in custody would not alter an established custodial environment, the trial court was required to find by a preponderance of the evidence that the modification was in the children’s best interests. *Parent v Parent*, 282 Mich App 152, 155; 762 NW2d 553 (2009).

In this case, the trial court did not comply with the CCA. Specifically, the trial court did not determine if there was an established custodial environment, it did not determine the applicable burden of proof, it did not hold a proper evidentiary hearing, and it did not make findings with respect to the best interest factors. Although a hearing was held on defendant’s emergency motion for custody on June 25, 2014, it was not an evidentiary hearing. The trial court had defendant sworn in but defendant testified very little about the allegations in his motion. Furthermore, plaintiff was unable to cross-examine defendant on his brief testimony because she was not properly notified of the motion hearing. It is clear that the trial court only considered the allegations in defendant’s motion when it changed custody and suspended plaintiff’s parenting time. This did not comport with the CCA as it is improper for the trial court to order a change in custody based solely on one party’s pleading. See *Schlender*, 235 Mich App at 233.

Plaintiff also argues that the court erred in denying her parenting time. “An appellate court must affirm a trial court’s parenting-time orders unless the trial court’s findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.” *Sturgis v Sturgis*, 302 Mich App 706, 709-10; 840 NW2d 408 (2013). Here, the trial court clearly erred as a matter of law in suspending plaintiff’s parenting time without making any findings regarding whether parenting time would endanger the children’s physical, mental, or emotional health.

“Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents.” MCL 722.27a(1). The CCA recognizes that parenting time is a right of both the parents and the child. *Delamielleure v Belote*, 267 Mich App 337, 340; 704 NW2d 746 (2005). MCL 722.27a(3) provides that “[a] child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child’s physical, mental, or emotional health.”

After the trial court denied plaintiff’s request to return to the children to her custody, plaintiff asked for parenting time. The trial court denied her request:

[Plaintiff] stood there and told me I’m not using, I’m not smoking, and I’m going to test negative. And the fact is that she was using, she was smoking, and she tested positive. I want to find out more about what the drug use is. The entire reason that I granted his motion last week was allegations that I found credible through the children that it’s [sic] ongoing drug use in the garage, in the house, in the presence of the kids. So I am not going to grant her parenting time until the referee hearing takes place.

In doing so, the trial court failed to make the requisite findings regarding the effect of parenting time with plaintiff on the children’s physical, mental, or emotional well-being. Indeed, there was no actual evidence of endangerment; defendant’s allegations were the only basis for the trial court’s decision. Although the trial court indicated that it found credible the children’s statements regarding drug use in plaintiff’s house and in their presence, there is no indication that the trial court interviewed the children and it did not hold an evidentiary hearing. Given the lack of admissible evidence, the trial court was unable to make findings of fact with respect to the effect that plaintiff’s parenting time had on the children’s physical, mental, or emotional health. See MCL 722.27a(3). The trial court’s failure to properly address these factors amounted to clear legal error.

In sum, the trial court erred as a matter of law in concluding that defendant effectively served plaintiff with his emergency motion and notice of hearing, erred in changing physical custody of the children without adhering to the procedures set forth in the CCA, and erred in suspending plaintiff’s parenting time. Because of the errors set forth in this opinion, we reverse and remand this matter to the trial court for further proceedings consistent with this opinion. So as to facilitate the prompt resolution of this matter, we order the trial court to hold a hearing on this matter within 14 days of the date of this opinion. As an additional mechanism to ensure prompt resolution of this matter, we retain jurisdiction.

Reversed and remanded for further proceedings consistent with this opinion. Plaintiff having prevailed may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher