

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN LENGAUER DONOHUE,
Plaintiff-Appellant,

UNPUBLISHED
May 13, 2014

v

No. 318230
Ingham Circuit Court
Family Division
LC No. 06-001387-DM

WILLIAM ANTHONY DONOHUE,
Defendant-Appellee.

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant temporary legal and physical custody of the minor child. We vacate the trial court's order, reinstate the previous custody order, and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The parties married in 1986 and had a son together in 1997.¹ The parties divorced in 2007, and the judgment of divorce provided for joint legal and physical custody of the child with parenting time alternating on a weekly basis. Several disagreements ensued. While plaintiff sought a change in custody in 2007, and asserted child support issues, she eventually withdrew her motion.

In August of 2009, defendant filed a motion to amend the judgment of divorce, contending that the parties were disagreeing about the holiday parenting time schedule, medical decisions, and the minor's extracurricular activities. On December 18, 2009, the court adopted the lawyer-guardian ad litem's recommendation establishing, *inter alia*, a holiday parenting time schedule. On May 16, 2011, plaintiff filed a motion to amend the order adopting the lawyer-

¹ The parties' eldest son, born in 1988, was not a minor at the time of the divorce. The parties had another son, born in 1991, who had severe mental and physical disabilities. The parties gave him up for adoption when he was approximately five years old. Neither of these children is at issue in this appeal.

guardian ad litem's recommendation, asserting that the parties still disagreed about holiday parenting schedules. The parties eventually stipulated to an order amending the judgment of divorce and altering the holiday schedule.

On October 14, 2011, plaintiff filed a motion to change custody, asserting that the week on/week off arrangement was no longer in the minor's best interests and that she should be awarded sole legal and physical custody. Defendant filed a motion to dismiss and sought sanctions. A conciliator recommendation supported the continuation of joint legal and physical custody, which the trial court adopted on March 13, 2012. Plaintiff filed a motion to set aside that order, and the court conducted a hearing on disputed issues such as extracurricular activities.

Defendant subsequently filed an ex parte motion to show cause why plaintiff should not be held in contempt, a motion for definitive parenting time, and a motion for attorney fees. He argued that plaintiff was being uncooperative and would not agree to when and where the parenting time exchanges should occur. After a hearing on the matter, the court entered an order on September 28, 2012, delineating when and where the parenting time exchanges should occur.

On July 11, 2013, defendant filed a motion for sole legal and physical custody. He alleged that the parties were unable to cooperate or agree on important decisions. He also argued that plaintiff was refusing to take the minor to counseling, coercing the minor to lie, preventing the minor from having medical procedures, and detrimentally affecting the minor's mental and emotional health. Plaintiff denied the allegations as untrue.

At a subsequent hearing, the court heard arguments from the attorneys and posed a few questions to the court-appointed conciliator. This hearing lasted for five minutes, and the court took no sworn testimony nor admitted any evidence. Plaintiff's counsel objected to any change of custody as plaintiff was not even in attendance, there had not been a full evidentiary hearing, and no facts had been addressed. Despite such protests, the court entered an order on July 26, 2013, awarding temporary sole legal and physical custody to defendant.

Plaintiff subsequently filed an emergency motion to establish parenting time, a motion for reconsideration, and notice that a custody hearing was requested. The court denied plaintiff's motion for reconsideration, and ordered the lawyers to "arrange a time for all of them to meet with [the minor] to talk about what he would like to have done since it's his life and without [him] there is no case." Plaintiff now appeals.²

II. CUSTODY

A. STANDARD OF REVIEW

As this Court stated in *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009):

² Plaintiff filed a motion for peremptory reversal and defendant filed a motion for dismissal in this Court. Both motions were denied.

We apply three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. This Court defers to the trial court's determinations of credibility. Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. Third, discretionary rulings are reviewed for an abuse of discretion. [Quotation marks omitted.]

B. CHANGE OF CUSTODY

In the instant case, the parties' judgment of divorce provided for a week on/week off custody arrangement. Approximately six years later, the lower court issued a temporary order granting defendant sole legal and physical custody of the parties' child. Inexplicably, the trial court did so without holding an evidentiary hearing. This was in error. As we have clearly held, "[a]n evidentiary hearing is mandated before custody can be modified, even on a temporary basis." *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005); see also *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); *Mann v Mann*, 190 Mich App 526, 529-530; 476 NW2d 439 (1991); MCR 3.210(C). Further, defendant has not established that this was a case where an "immediate change of custody is necessary or compelled for the best interest of the child pending a hearing," nor did the trial court consider "facts established by admissible evidence [such as] affidavits, live testimony, documents, or otherwise." *Mann*, 190 Mich App at 533; MCL 722.27(1); MCR 3.207.

Therefore, we vacate the trial court's order and remand for the court to conduct a proper evidentiary hearing, if it has not done so already.

C. CHILD INTERVIEW

Plaintiff also alleges that the lower court erred in ordering the attorneys to interview the child regarding any custody preference. We agree.

In order to determine a child's reasonable preference, MCR 3.210(C)(5) provides:

The court may interview the child privately to determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. The court shall focus the interview on these determinations, and the information received shall be applied only to the reasonable preference factor.

In the instant case, the lower court ordered the attorneys to meet with the child to discuss what he "would like to have done" with the case. Yet, MCR 3.210(C)(5) only provides for the court to conduct such interviews. It further specifies that such interviews should be conducted privately. Thus, these interviews are meant to be confidential exchanges between the court and the child. Forcing the minor to voice his preference in front of his parents' attorneys—as ordered in this case—is the opposite of a private and confidential interview. Not only does it

provide the parties with an opportunity to exert influence over the minor, it further exposes the minor to emotional turmoil.

Thus, we again agree with plaintiff that the trial court was in error.

III. CONCLUSION

On remand, the trial court should adhere to the statutory requirements of MCL 722.27(1)(c). The court cannot modify or amend its previous judgment unless the movant has established by a preponderance of the evidence proper cause or a change of circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). “Although the threshold consideration of whether there was proper cause or a change of circumstances might be fact-intensive, the court need not necessarily conduct an evidentiary hearing on the topic.” *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). “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.” *Vodvarka*, 259 Mich App at 512; see also MCR 3.210(C)(8).

However, if the court endeavors to modify custody—even on a temporary basis—an evidentiary hearing must be conducted. *Grew*, 265 Mich App at 336. If the threshold showing of proper cause or change of circumstances is made, the trial court must determine whether the child has an established custodial environment with one parent, both, or neither. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001); *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). If the proposed change would alter the established custodial environment, the movant must prove by clear and convincing evidence that the modification is in the child’s best interests. MCL 722.27(1)(c); *Dailey v Kloenhamer*, 291 Mich App 660, 667; 811 NW2d 501 (2011). If the proposed change would not alter the established custodial environment, then the court may change custody if a preponderance of the evidence establishes that the change is in the child’s best interests. *Pierron v Pierron*, 486 Mich 81, 93; 782 NW2d 480 (2010).

When determining the best interests of the child, the court must review the best interest factors found in MCL 722.23. *Dailey*, 291 Mich App at 667. One best interest factor, MCL 722.23(i), is “[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.” As discussed above, the trial court, not the attorneys, should interview the child.

Therefore, we vacate the trial court’s order, reinstate the previous custody order, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan