STATE OF MICHIGAN

COURT OF APPEALS

CASEY L. SHIMEL,

Plaintiff-Appellee,

v

JENNIFER L. MCKINLEY f/k/a JENNIFER L. SHIMEL,

Defendant-Appellant.

UNPUBLISHED
February 23, 2016

No. 329144
Presque Isle Circuit Court
Family Division
LC No. 10-083507-DM

Before: O'CONNELL, P.J., and OWENS and BECKERING, JJ.

PER CURIAM.

Defendant, Jennifer McKinley, appeals as of right the order that determined the parties' minor child, MS, would attend school at the Onaway Public Schools and reside primarily with plaintiff, Casey Shimel, during the school year, with defendant receiving parenting time on alternate weekends, alternate holidays, and for seven weeks during the summer. Because the order failed to appreciate that this shift in parenting time altered the child's established custodial environment, we reverse the order and remand for further proceedings.

I. FACTUAL BACKGROUND

Plaintiff and defendant were divorced on October 10, 2011. The parties' judgment of divorce provided for joint legal and physical custody of MS, with alternate parenting time every three days. Both parties were originally residing in Rogers City, Michigan. At some point after the initial custody action, defendant moved to Gaylord. In April 2013, defendant moved for a change in parenting time. Defendant's request stated that the child had been enrolled in Gaylord Public Schools and asked the court to modify the parenting-time schedule during the school year to allow the child to reside with her. In response, plaintiff filed a motion to change custody. On July 1, 2013, the trial court entered an interim order regarding parenting time and modified the parenting-time schedule such that the parties had alternating weeks of parenting time. The parties withdrew their respective motions. During the next school year, the child attended two different preschools, depending on which parent she was staying with at the time.

This present action began after the parties were unable to agree on which school MS should attend for kindergarten in the fall of 2015. The parties agreed that the child should attend

one school, rather than attending different schools like she did in preschool, but disagreed about which school that should be. On May 13, 2015, plaintiff moved the trial court to modify parenting time and to decide which school the child would attend. Plaintiff wished for MS to attend school at the Onaway Public Schools, where his other daughter and MS's sister, LS, attended and to reside primarily with him during the school year. Defendant wished for MS to attend school in Gaylord, initially requesting MS attend the Gaylord Community Schools and later requesting that she attend Otsego Christian Schools, and reside primarily with her during the school year.

A two-day hearing was held on July 21, 2015 and August 17, 2015. Plaintiff presented testimony that, on the weeks MS resided with him during the 2014/2015 school year, she attended a preschool program at Onaway Public Schools. Colleen Janeczek, MS's teacher at Onaway Public Schools, testified that MS had done well in her class and that, if she attended kindergarten there, she would have a class size of about 22 students.

Defendant had enrolled MS in preschool at Otsego Christian Schools during the weeks that MS resided with her for the last two school years. James Huber, the Otsego Christian Schools administrator, testified that MS had performed well in both her years and that she would have a class size of about 11 students if she attended kindergarten at Otsego Christian Schools. Defendant's father, Matthew McKinley, testified that he had provided and would continue to provide the financial assistance needed for MS to attend Otsego Christian Schools. Defendant testified that she preferred Otsego Christian School because of its small class size and faith-based environment.

In a ruling given from the bench, the trial court recognized that the parties shared joint legal and physical custody of MS. It also determined that MS had an established custodial environment with both plaintiff and defendant. The court reflected on the fact that MS had been attending multiple schools, depending on which parent she stayed with, and acknowledged that such an arrangement could not continue. Thus, the court had to select a school for MS to attend. The court explained that it "ha[d] to review the best interests [of the child] in accordance with the statute"—meaning MCL 722.23. After reviewing some, but not all, of the best interest factors, the court determined that MS would attend Onaway Public Schools and that this "necessitates a change not in custody but in parenting time." The court then modified the parties' parenting-time schedule, granting parenting time to defendant on alternating weekends from Friday evening until Monday morning. In addition, the court ordered defendant to have parenting time on what it described as some of the "extra days" off that occur during the school year. With regard to summer parenting time, the court granted defendant seven weeks—one three-week visit plus a four-week visit—of parenting time during the summer months. The parties were to alternate holidays. At all other times, MS was to reside with plaintiff. The trial court did not comment on whether this change would alter the child's established custodial

environment, nor did it articulate the standard (preponderance or clear and convincing evidence) it used in making its decision.[1]

II. STANDARD OF REVIEW

Three standards of review are applied in custody cases. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "The great weight of the evidence standard applies to all findings of fact." *Id.* A finding of fact is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (citation and quotation marks omitted). "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Phillips*, 241 Mich App at 20. For child custody matters, this Court has adopted the definition of "abuse of discretion" that was first articulated in the Supreme Court case of *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959). *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). Pursuant to that definition, a court's action constitutes "abuse of discretion" when it is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Id.* at 324 (citation omitted). "Questions of law are reviewed for clear legal error" which exists in cases where "[a] trial court . . . incorrectly chooses, interprets, or applies the law." *Phillips*, 241 Mich App at 20.

III. ANALYSIS

We begin our analysis by examining the issue that brought the parties before the trial court in the first instance: where should MS attend school? The parties shared joint legal custody of MS. When parents share joint legal custody, the Child Custody Act provides that they " 'shall share decision-making authority as to the important decisions affecting the welfare of the child.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.26a(7)(b). "However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child." *Id.*, citing *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993). See also *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 296; 750 NW2d 597 (2008).

The first consideration for a court contemplating an important decision that affects the welfare of the child is "whether the proposed change would modify the established custodial environment." *Pierron*, 486 Mich at 85. An established custodial environment "is the environment 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.' " *Id.* at 85-86, quoting MCL 722.27(1)(c).

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[1] However, it appears that the court utilized the preponderance of the evidence standard because, after reviewing the best-interest factors, it stated that "on balance," the factors favored plaintiff. As will be discussed below, the preponderance standard is to be used when the change would not alter the child's established custodial environment.

In *Pierron*, our Supreme Court recognized that a trial court's decision about which school a child should attend could require changes in parenting-time orders. See *id.* at 86 ("an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules . . ."). Changing parenting time, however, "does not necessarily mean that the [child's] established custodial environment will have been modified." *Id.* "If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Id.* In such a case, the party proposing the change in schools must prove, by a preponderance of the evidence, that the change is in the best interest of the child, using the best-interest factors set forth in MCL 722.23. *Id.* at 89-90. However, if the child's established custodial environment would change, a heightened standard applies. *Id.* at 86. In that case, "[t]he court may 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." *Id.* (citation and quotation marks omitted).

Here, defendant argues that the trial court's decision results in a change in the child's established custodial environment. We agree. Before the parties moved the trial court to decide which school MS should attend, MS spent an equal amount of time with each parent, as plaintiff and defendant had alternating weeks of parenting time. The trial court's decision about which school MS should attend drastically altered the amount of time MS would spend with defendant. Instead of equal time with both parents, MS would only spend alternate weekends with defendant during the school year, with seven weeks of parenting time during the summer. Thus, for a vast majority of the year, defendant would be relegated to being not just a "weekend-only" parent, but an every-other-weekend only parent. This drastic shift in parenting time amounts to a change in the child's established custodial environment. *Powery v Wells*, 278 Mich App 526, 528, 530; 752 NW2d 47 (2008) (holding that where the parties' previous parenting-time schedule afforded them a "roughly equal amount of parenting time," the trial court's modification of parenting time, which "relegated [one of the parents] to the role of a 'weekend parent'" modified the child's established custodial environment). See also *Brown v Loveman*, 260 Mich App 576, 596-597; 680 NW2d 432 (2004); Cf. *Gagnon v Glowacki*, 295 Mich App 557, 573; 815 NW2d 141 (2012) (finding no change in the child's established custodial environment where the defendant kept his midweek parenting time under the amended parenting-time order, and thus was not reduced to the role of a "weekend-only" parent).

In the case at bar, the trial court did not account for the fact that its ruling amounted to a change in the established custodial environment, nor is it apparent that the court utilized the clear and convincing evidence standard. This was error requiring reversal. See *Pierron*, 486 Mich at 86 (describing the appropriate standard to employ when the choice of school and resultant adjustment to the parenting-time schedule modifies the child's established custodial environment). Accordingly, we remand for the trial court to determine if plaintiff, as the party seeking to change MS's school, established, by clear and convincing evidence, that the change—and resultant modification of parenting time—was in the child's best interest, utilizing the factors

set forth in MCL 722.23.[2] In making this determination, the court can consider up-to-date information and any relevant changes in circumstances. *Fletcher*, 447 Mich at 889.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Donald S. Owens
/s/ Jane M. Beckering

[2] In this regard, we agree with defendant's contention that the trial court's findings on some of the factors in its August 17, 2015 opinion were unclear. On remand, we encourage the court to specify which party is favored under the particular factors.