

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

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LEE ABSHIRE,

Plaintiff-Appellee,

v

COURTNEY MILLER ABSHIRE, a/k/a  
COURTNEY PARKER,

Defendant-Appellant.

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UNPUBLISHED  
May 23, 2013

No. 313503  
Kent Circuit Court  
LC No. 06-009711-DM

Before: SERVITTO, P.J., and WHITBECK and SHAPIRO, JJ.

PER CURIAM.

Defendant Courtney Miller Abshire appeals as of right the trial court's order granting plaintiff Lee Abshire's motion to change custody and change parenting time for the parties' three minor children, R.M.A., B.M.A., and A.M.A. We affirm because there was a change in circumstances sufficient to justify a change in custody and the trial court did not clearly err in finding that the children's best interests would be served by granting primary custody to the father.

Defendant-mother and plaintiff-father were married on April 17, 2004, and had three minor children together. The parties divorced on May 31, 2007, and under the judgment of divorce, defendant received primary physical custody of the children. Plaintiff received one overnight visit with the children during the week, as well as weekend parenting time, summer parenting time, and holiday parenting time. On September 6, 2012, defendant, who lived in Jenison, obtained employment in Ludington, and informed plaintiff on that day that she was moving with the children and enrolling them in school in Ludington the next week. At the time, the children attended school in Jenison. Upon learning of defendant's intentions to move the children to Ludington and enroll them in a new school, plaintiff obtained an ex parte order that required the children to remain in Jenison Public Schools until a hearing could be held. Plaintiff subsequently filed a motion to change custody and parenting time. Defendant objected to this motion, as well as to the ex parte order. After an evidentiary hearing, the trial court granted the

motion to change custody because it found that it was in the best interests of the children to live primarily with plaintiff during the school year.<sup>1</sup>

In granting plaintiff's motion to change custody, the trial court first found that plaintiff established proper cause to revisit the custody order contained in the judgment of divorce. Defendant challenges this finding. "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "In accord with that standard, this Court will sustain the trial court's factual findings unless the evidence clearly preponderates in the opposite direction." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006) (quotation omitted).

The goal in awarding custody under MCL 722.27 "is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan*, 282 Mich App at 603. When a parent seeks to change an existing custody order, he or she must, as a threshold matter, demonstrate a "proper cause or a change of circumstances." *Id.*, citing MCL 722.27(1)(c). If the moving parent does not establish proper cause or a change of circumstances, "then the court is precluded from holding a child custody hearing . . . ." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). In *Vodvarka*, we explained what constitutes "a change of circumstances":

[T]o 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. 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. [*Id.* at 513-514. (Emphasis in original).]

The trial court discussed several reasons why it found a change of circumstances, but found that by itself, defendant's move to Ludington and the accompanying proposed change in the children's school district demonstrated a change of circumstances. This finding was not against the great weight of the evidence.

In *Sinicropi v Mazurek*, 273 Mich App 149, 177-178; 729 NW2d 256 (2006), we found that an 89-mile move, combined with a change in the child's school and living arrangements, established a change of circumstances. The facts in this case are nearly identical. Defendant moved approximately 90 miles and intended to move the children as well and to enroll them in a new school district. Further, defendant agreed that the move required the children to live exclusively with her during the week, where they previously had a midweek overnight visit with

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<sup>1</sup> The trial court directed that defendant receive liberal parenting time including two out of every three weekends during the school year and six weeks of parenting time in the summer.

plaintiff every week.<sup>2</sup> Accordingly, the trial court’s finding that defendant’s move to Ludington was sufficient to constitute a change of circumstances was not against the great weight of the evidence. *Id.*

In so holding, we reject defendant’s argument that our discussion of a change of circumstances in *Sinicropi* was dicta. “[A]n issue that is intentionally addressed and decided is not dictum if the issue is germane to the controversy in the case, even if the issue was not necessarily decisive of the controversy in the case.” *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). In *Sinicropi*, 273 Mich App at 152-153, the panel remanded because the trial court erred by ruling that the child in that case had two legally recognized fathers under both the Acknowledgment of Parentage Act and the Paternity Act. Despite remanding on those grounds, the panel, “for purposes of judicial expediency,” intentionally addressed other matters related to the trial court’s custody determination. *Id.* at 155. One of the issues that this Court intentionally addressed was whether, based on a move by one of the parties, there was a change of circumstances. *Id.* at 177-178. Although this issue “was not necessarily decisive of the controversy,” it was nonetheless “germane to the controversy,” and was intentionally addressed. Thus, the discussion regarding change of circumstances in *Sinicropi* is binding precedent and is not obiter dictum. *Griswold Props, LLC*, 276 Mich App at 564.

Next, defendant argues that the trial court should have addressed the issue of whether there was a change of circumstances before it conducted the evidentiary hearing in this case. This argument is without merit. A trial court is not required to make a determination as to whether there was a change of circumstances before holding a hearing to modify custody. See *Mitchell v Mitchell*, 296 Mich App 513, 518; 823 NW2d 153 (2012). Instead, “[t]he trial court is merely required to preliminarily determine whether proper cause or a change of circumstances exists before reviewing the statutory best-interest factors with an eye to possibly modifying a prior custody order.” *Id.*

After finding a change of circumstances, the trial court found that the children had an established custodial environment with both parents, and that defendant’s move to Ludington and her stated intention to move the children upset the established custodial environment. Defendant challenges that finding. We review the trial court’s finding regarding a change in the established custodial environment against the great weight of the evidence standard. *Gagnon v Glowacki*, 295 Mich App 557, 572; 815 NW2d 141 (2012).

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<sup>2</sup> We note that defendant proposed that if the children moved to Ludington, plaintiff would lose all of his midweek parenting time. She offered to make up for this loss by giving plaintiff more weekend and summer parenting time. Although the overall number of plaintiff’s overnight visits would have been approximately equal under defendant’s proposal, her proposal nonetheless would have modified the children’s established custodial environment with both parents because it would have effectively reduced plaintiff to a “weekend-only” parent, where before he exercised parenting time during the week. *Gagnon*, 295 Mich App at 573; *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008).

Initially, we note that plaintiff, not defendant, was the moving party, as plaintiff filed a motion to change custody, and defendant never filed a formal motion to change the children's schools. In spite of this, the trial court found that defendant was the moving party and assigned the burden of proof to her. Such an error is generally not harmless. Cf. *Kessler v Kessler*, 295 Mich App 54, 62; 811 NW2d 39 (2011) (holding that where the trial court fails to require the appropriate party to satisfy the applicable burden of proof, the error is not harmless). In this case, however, after assigning the burden of proof to defendant the trial court concluded that even if plaintiff had the burden of proof, he established, by clear and convincing evidence, that changing custody was in the best interests of the children. Because the trial court ultimately analyzed the issue, assigning the burden of proof to the correct party, the issue has no effect on the outcome of this appeal. *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004).

Defendant also challenges the trial court's findings on the best interest factors found in MCL 722.23, and argues that the trial court's custody determination was an abuse of discretion. The trial court's findings on the best interest factors are reviewed under the great weight of the evidence standard. *Kessler*, 295 Mich App at 64. Additionally, "[d]iscretionary rulings, including a trial court's determination on the issue of custody, are reviewed for an abuse of discretion." *Shulick*, 273 Mich App at 323.

To determine the best interests of the child in a child custody dispute, this Court looks to the 12 factors delineated in MCL 722.23. See, e.g., *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). A trial court is not required to give equal weight to the factors. *Sinicropi*, 273 Mich App at 184.

Here, the trial court found that factors (a), (f), (j), and (l) did not favor either party, and defendant does not challenge those factors. She challenges the trial court's findings on the remaining factors, each of which the trial court found favored plaintiff. She first argues that the trial court should not have found that factors (g) and (i) favored plaintiff because plaintiff, in his motion for a change of custody, argued that those factors were neutral. This argument is meritless because parties to a custody dispute cannot limit the factors considered by the trial court. *Harvey v Harvey*, 470 Mich 186, 193; 680 NW2d 835 (2004).

Next, defendant challenges the trial court's findings on factor (b). MCL 722.23(b) directs the trial court to consider "[t]he 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." The trial court found that this factor favored plaintiff because plaintiff raised a concern about R.M.A.'s school attendance when he lived with defendant, and produced a letter from R.M.A.'s school explaining the issue. Defendant argues that she refuted plaintiff's concerns with her own testimony; however, the trial court specifically found that her testimony lacked credibility as it found that plaintiff "raised a credible concern about the children's school attendance . . . ." "We defer to the trial court's credibility determinations given its superior position to make these judgments." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

Next, defendant challenges the trial court's findings as to factor (c). MCL 722.23(c) requires the trial court to consider "[t]he 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.” The trial court found that this factor favored plaintiff because: (1) he had a higher earning capacity and earned more money.

We find that the trial court’s first finding under this factor was against the great weight of the evidence because despite the fact that plaintiff earned more money than defendant did, there is no evidence that he had a greater capacity and disposition to provide for the children’s financial needs. See *Berger v Berger*, 277 Mich App 700, 711-712; 747 NW2d 336 (2008). Indeed, although defendant earned less than plaintiff did, she testified that she always provided for the children’s needs.

Next, defendant challenges the trial court’s finding for factors (d) and (e). MCL 722.23(d) directs the trial court to consider “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” MCL 722.23(e) is similar to factor (d), and directs the trial court to consider “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.” The trial court found that these factors favored plaintiff because he provided a permanent home for the children with his new wife, Megan Abshire, and that defendant did not provide stability because she moved several times and because two different adults, Tom Parker, her ex-husband, and Tim Offringa, lived in her home at various times.

The trial court’s findings on these factors were not against the great weight of the evidence. The trial court found credible plaintiff’s testimony that he offered a stable home. Additionally, living with plaintiff would provide the children with stability because it would allow them to stay at their current school. And, with regard to defendant’s different live-in companions, our Supreme Court has held that the stability of a child’s home may be affected by “live-in romantic companions for the custodial parent . . . .” *Ireland v Smith*, 451 Mich 457, 465 n 9; 547 NW2d 686 (1996). The trial court’s findings were not against the great weight of the evidence because the evidence does not clearly preponderate in the opposite direction. See *Shulick*, 273 Mich App at 323 (quotation omitted).

Defendant disagrees, and argues that her home was more stable because it had more bedrooms for the children than plaintiff’s home did, and because she testified that her home was cleaner than plaintiff’s home. Defendant’s argument is without merit because, despite her concerns with plaintiff’s home, there is no indication in the record that plaintiff’s home was not a “satisfactory environment” for the children under MCL 722.23(d).

Defendant next challenges the trial court’s findings under factor (g). MCL 722.23(g) requires the trial court to consider “[t]he mental and physical health of the parties involved.” The trial court found that this factor favored plaintiff because defendant was diagnosed with bipolar disorder. We find that the trial court’s decision to weigh this factor in favor of plaintiff was against the great weight of the evidence because although it was undisputed that defendant suffered from bipolar disorder, both parties testified that, through medication and treatment, defendant was not affected by the disorder. Thus, this factor should not have favored either party.

Next, defendant challenges the trial court's findings on factor (h). Factor (h) considers "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court found this factor favored plaintiff because of plaintiff's concerns about R.M.A.'s school attendance while in defendant's care. Defendant again argues that the trial court erred in finding plaintiff's concerns to be credible. We will not disturb the trial court's credibility determination. *Shann*, 293 Mich App at 305.

Defendant also challenges the trial court's findings as to factor (k). Pursuant to MCL 722.23(k), the trial court is to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." The trial court found that this factor favored plaintiff because the children were exposed to domestic violence that Parker perpetrated against defendant. Defendant admitted that Parker abused her on one occasion, but argues that the factor should not favor plaintiff because the children never witnessed the incident. However, defendant ignores the plain language of MCL 722.23(k), which requires the trial court to consider acts of domestic violence, "regardless of whether the violence was directed against or witnessed by the child."

In light of the forgoing factors, we find that the trial court did not abuse its discretion in awarding custody to plaintiff. Even though the trial court erred in its findings under factors (c) and (g), none of the factors favored defendant, and there was ample evidence on the five factors that favored plaintiff. Further, as the trial court emphasized in its findings, plaintiff provided the children with more stability than defendant did. Because the trial court did not commit a palpable abuse of discretion, we affirm its custody decision. See *Shulick*, 273 Mich App at 325.

Finally, we reject defendant's argument that the trial court erred by failing to find a "compelling reason" to change custody. She cites our decision in *Carson v Carson*, 156 Mich App 291, 302; 401 NW2d 632 (1986), where we held that there must be a compelling reason to change custody when an established custodial environment has been proven. The protections against removing a child from an established custodial environment absent compelling circumstances are accounted for in the requirement that the trial court not change a custody order absent proper cause or a change of circumstances. *Vodvarka*, 259 Mich App at 511. Because the trial court did not err in finding there was a change of circumstances sufficient to revisit the custody order contained in the judgment of divorce, defendant's argument is meritless.

Affirmed.

/s/ Deborah A. Servitto  
/s/ William C. Whitbeck  
/s/ Douglas B. Shapiro