

STATE OF MICHIGAN
COURT OF APPEALS

NAZAR MOHAMED NASSER,
Plaintiff-Appellant,

UNPUBLISHED
May 28, 2013

v

ANISSA SALEM YAFAI, f/k/a ANISSA SALEM
NASSER,

No. 311085
Wayne Circuit Court
LC No. 02-219004-DM

Defendant-Appellee.

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

In this custody dispute, plaintiff Nazar Mohamed Nasser appeals by right the trial court's order modifying the parties' custody and parenting time with their minor child. On appeal, Nasser argues that the trial court erred when it ordered that defendant Anissa Salem Yafai should have joint legal custody over the child and modified the parenting time without complying with the statutory requirements for changing custody and parenting time. We conclude that the trial court erred when it failed to address the best interests of the child before modifying the previous custody order on the basis of an agreement, but did not err when it modified the parties' parenting time. For these reasons, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

The trial court had previously granted joint physical custody over the child, but gave sole legal custody to Nasser. In an opinion and order entered in May 2012, the trial court modified the prior custody order to provide for joint legal custody over the child in accordance with an agreement signed by the parties in August 2010 and modified the parties' parenting time.

Nasser argues that the trial court lacked the authority to conduct a custody hearing because it failed to first find that Yafai had established proper cause or a change of circumstances to warrant revisiting the prior custody award. Specifically, he contends that the sole basis for Yafai's motion to revisit custody was premised on allegations that he physically abused the child and those allegations were later determined to be unfounded. In child custody matters, this Court must affirm "all orders and judgments" unless the trial court's findings of fact were "against the great weight of evidence" or the trial court "committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). In order to modify a custody award, the moving party must

first show proper cause or a change of circumstances sufficient to warrant modification. MCL 722.27(1)(c); *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012). This threshold requirement does not necessarily require an evidentiary hearing. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009); MCR 3.210(C)(8). “The 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 proper custody order.” *Mitchell*, 296 Mich App at 518.

Here, Yafai originally asserted that Nasser’s use of inappropriate corporal punishment alone constituted grounds for revisiting custody. After her initial allegations of physical abuse, Yafai asserted additional grounds for revisiting custody: she alleged that Nasser was coaching the child, promising the child gifts to win his support, making negative comments about Yafai, and refusing to communicate with Yafai regarding the child’s activities. And the trial court apparently determined that Yafai had established proper cause or a change in circumstances sufficient to warrant revisiting custody. However, Nasser has not provided, and the record does not contain, the transcripts of the initial proceedings and there is otherwise no record of the trial court’s findings on this issue. However, in its May 2012 opinion and order changing the legal custody of the child from Nasser’s sole legal custody to joint legal custody, the trial court stated that it strongly disagreed with Nasser’s assertion that it did not find proper cause or a change in circumstances. Rather, it stated that allegations of abuse “may give rise” to cause for revisiting custody and stated that it had “found that proper cause exists” on the basis of the “facts alleged by” Yafai.

Although mere allegations of abuse—standing alone—are insufficient to establish proper cause or a change in circumstances, the fact that a state agency determined that the allegations were unfounded does not preclude the trial court from independently considering the evidence that Nasser might have used inappropriate corporal punishment, which might then constitute proper cause or a change in circumstances. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 516-517; 675 NW2d 847 (2003). Yafai’s additional allegations could also serve as proper grounds for revisiting custody. See, e.g., *Mitchell*, 296 Mich App at 518-519. And, in the absence of record evidence to show that the trial court failed to make the requisite finding of proper cause or that its finding was against the great weight of the evidence, we will not disturb its decision. *Berger*, 277 Mich App at 705.

Nasser also argues that the trial court erred in ordering a change in legal custody on the basis of the parties’ written agreement without making an independent determination that the change was in the child’s best interests. We agree that the trial court appeared to believe that it was bound by the parties’ agreement under the decisions in *Buzynski v Buzynski*, 369 Mich 129, 132; 119 NW2d 591 (1963), and *Keyser v Keyser*, 182 Mich App 268, 271; 451 NW2d 587 (1990). Those cases did not, however, involve custody. When considering a custody dispute, the trial court is required to consider the child’s best interests before entering an order affecting the child’s custody. *Harvey v Harvey*, 470 Mich 186, 192-193; 680 NW2d 835 (2004). If the parties agree to a custody arrangement, the trial court need not engage in intensive fact-finding, but must still satisfy itself concerning the child’s best interests. *Id.* at 193. Indeed, MCL 722.26a(2) provides that “[i]f the parents agree on joint custody, the court shall award joint custody unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child.” As such, the trial court had a duty to

independently verify that joint legal custody would not be contrary to the child's best interests. Because the trial court did not address the best interests of the child, we vacate the trial court's opinion and order to the extent that it modified the prior custody arrangement and remand this case to the trial court for a best-interests determination. MCL 722.26a(2).¹ The trial court may consider new information in making the determination considering this matter. *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996).

Nasser also challenges the sufficiency of the trial court's decision to order summer parenting time in a manner that differed from the specific schedule set forth in the parties' written agreement. He argues that the trial court failed to articulate a basis for the modification and failed to consider whether its parenting time order served the child's best interests. Having reviewed the record, we find no basis for disturbing the trial court's order regarding summer parenting time.

A trial court's parenting time order is subject to the same standards of review under MCL 722.28 as a custody order. *Berger*, 277 Mich App at 716. Both the best-interest factors in MCL 722.23 and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to the decision. *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010). The trial court is only required to make findings on contested issues. *Id.* at 32. We review the trial court's decision regarding parenting time for a palpable abuse of discretion. *Berger*, 277 Mich App at 716.

Unlike the trial court's decision to award the parties joint legal custody, it is clear from the record that the trial court expressly considered the child's best interests when evaluating the parties' agreement regarding Yafai's summer parenting time in Oregon. The trial court's May 2012 opinion and order reflects that the court delayed entry of its final decision until after Yafai had had an opportunity to spend extended parenting time with the child in the summer of 2011, subject to certain conditions to enable the child to return to Michigan early and attend counseling.

The trial court had previously awarded Yafai summer parenting time with the child from July 14 through August 31, 2011, consistent with the parties' written agreement. The trial court's modification of the summer parenting time in its May 2012 opinion and order to a period "from two weeks after the minor child[] is dismissed from school for the summer until two weeks before the school year resumes" does not significantly alter the number of parenting time days. The change benefits the child by providing him with additional time to readjust to his home in Michigan before beginning school. And while the trial court denied Nasser's motion for reconsideration, the trial court ordered a status conference for September 2012 to provide an opportunity for further review of the summer parenting time. The trial court also took steps to foster each party's relationship with the child by ordering frequent telephone communications.

¹ To the extent that Nasser suggests that the August 2010 agreement is unenforceable because he was coerced into signing it, Nasser has not established grounds for relief. Nasser asserts that he "felt coerced into entering an agreement," but does not otherwise address this issue in his brief. By failing to meaningfully address this issue on appeal, he has abandoned it. *McIntosh v McIntosh*, 282 Mich App 471, 484-485; 768 NW2d 325 (2009).

Given this record, we reject Nasser's argument that the trial court failed to consider the child's best interests. Because he has not established any deficiency in the trial court's findings or shown that the trial court abused its discretion in determining Yafai's summer parenting time, we affirm the trial court's parenting time decision. MCL 722.28; *Berger*, 277 Mich App at 716.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither of the parties having prevailed in full, neither may tax their costs. MCR 7.219(A).

/s/ Jane M. Beckering

/s/ Kathleen Jansen

/s/ Michael J. Kelly