

STATE OF MICHIGAN
COURT OF APPEALS

JOHN P. STELMAN,

Plaintiff-Appellant,

v

TRACY ANNE STELMAN,

Defendant-Appellee.

UNPUBLISHED

August 3, 2010

No. 294105

Oakland Circuit Court

Family Division

LC No. 2006-719628-DM

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

SHAPIRO, J. (*concurring*).

I agree that MCL 722.27(1)(c) permits modification or amendment of a previous order only for “proper cause shown or because of a change in circumstances” and that this Court applied that standard to changes in parenting time in *Terry v Affum*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999). However, I disagree with the majority’s reliance on *Vodvarka*, 259 Mich App 499; 675 NW2d 847 (2003) for the definitions of proper cause and change of circumstances in this context. The definitions of a change in circumstances and proper cause found in *Vodvarka*, by their terms, are specifically limited to application a change in a child’s custodial situation and make no reference to parenting time decisions:

Therefore, we conclude that in context, proper cause means one or more appropriate grounds that have or could have a significant effect on the child’s life to the extent that a *reevaluation of the child’s custodial situation* should be undertaken.

* * *

In light of these definitions and purposes, we hold that in order to establish a “change in 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. [259 Mich App at 511, 513 (emphasis added except for “significant” which appears in the original).]

Obviously, where a modification in parenting time will result in a change to the child’s established custodial environment, the *Vodvarka* standards are appropriate. *Powery v Wells*, 278

Mich App 526, 528; 752 NW2d 47 (2008). However, where a modification in parenting time will not alter a child's established custodial environment, I believe that a more-relaxed standard for showing a change in circumstances or proper cause is appropriate.

The determinations of custody and parenting time serve different purposes. Custody determinations are designed to foster stability by maintaining established custodial environments and minimizing unwarranted and disruptive changes. See *Vodvarka*, 259 Mich App at 511; MCL 722.27(1)(c). Parenting time serves a different purpose, however. Parenting time is about fostering and maintaining a strong the parent/child relationship and “shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.” MCL 722.27a(1); see also MCL 722.31(4)(c) (requiring a trial court to consider whether a parenting time modification “can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent” when determining whether to permit a legal residence change); *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009) (Recognizing that even when children are in foster care, DHS ““must use parenting time to maintain and strengthen the relationship between the parent and child [citation omitted]”). Thus, reasons that may not rise to the level of a change in circumstances or proper cause to change the custodial environment may be sufficiently interfering with the parent/child relationship to support a modification to parenting time.

Consistent with these separate purposes, MCL 722.27a provides an additional set of factors that must be considered with respect to parenting time, which are not part of the custodial environment determination or the best interests factors. The proper cause and change in circumstances standards under *Vodvarka*, however, are tied to the best interests factors and do not take these parenting time factors into account. *Vodvarka*, 259 Mich App at 512, 514.

For example, when considering whether there has been a sufficient change in circumstances to reevaluate the custodial environment, “not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being.” *Vodvarka*, 259 Mich App at 513. Thus, because children will always grow older, that change is, rightly, insufficient to require a change in the custodial environment. However, as children grow older, their relationships with their parents may change and the parenting time standards reflect this. For example, MCL 722.27a(6)(b) requires the trial court to consider whether a child is nursing. This factor obviously favors more parenting time with the mother when the child is nursing at the time parenting time is decided. As the child grows up and no longer nurses, it may be beneficial for the child to have more time with the father to develop that relationship. And yet, the fact that the child no longer nurses and, therefore, no longer needs to be with the mother for that purpose, would not be sufficient under *Vodvarka* to alter the parenting time.

Additionally, as children mature, they may want to participate in extracurricular activities or get a job, which may require changes in parenting time to accommodate those schedules. MCL 722.27a(6)(e) requires consideration of “[t]he inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.” Again, however, these are “normal life changes . . . that occur during the life of a child,” *Vodvarka*, 259 Mich App at 513, and are insufficient for a trial court to consider altering parenting time. Notably, the Michigan Parenting Time Guideline, promulgated by the SCAO for use in the state's Friend of the Court offices provide:

As child(ren) grow, they are involved in different activities. As their developmental needs change, both parents need to be flexible with their parenting time schedule and allow room for readjustment. Because continuity in activities is important, parents must be willing to alter the parenting time schedule.

* * *

The age of a child(ren) is an important factor in determining the frequency and duration of parenting time. Earlier in a child(ren)'s development, the child(ren) will need more frequent contact with each parent, but the duration of the contact should be shorter. As a child(ren) becomes older, the contact may become less frequent but of greater duration. When a child(ren) reaches school age, school and associated activities along with the age of the child(ren) will need to be considered. The practical implications of the developmental stages of a child(ren) may require that schedules, including joint custody scheduled, be modified. [pp 21, 24.]

Thus, the very things that *Vodvarka* finds insufficient to justify a modification to custodial environment are precisely the things referees and trial courts are instructed to consider to determine and modify parenting time. And yet, by utilizing the *Vodvarka* definitions, these types of changes in a child's life will not result in the ability to modify parenting time.

Further, our legal system already recognizes differences between the two types of determinations. Although custody and parenting time determinations both require consideration of the best interest factors found in MCL 722.23, custody determinations require findings under all of the best interest factors, while parenting time decisions may be made with findings only on disputed factors. See e.g. *Hoffman v Hoffman*, 119 Mich App 79, 83; 326 NW2d 136 (1982). Also, although hearings are required when a parent's proposed parenting time schedule amounts to a change in circumstances, *Powery*, 278 Mich App at 528; *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004), no hearing is required for changes in parenting time that do not change the custodial environment. See *Perun v Patterson*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2008 (Docket No. 284497) (Citing *Powery*, 278 Mich App at 528 for the premise that, "Because the trial court's modification of parenting time did not change the children's establish[ed] custodial environment, no evidentiary hearing was required"). It seems inequitable to require the same change of circumstances or proper cause as defined under *Vodvarka* for a change in parenting time that does not amount to a change in the custodial environment where the trial court is not required to hold a hearing. The fact that we permit these decisions to be made without an evidentiary hearing favors a less burdensome standard.

That parenting time changes should have a different standard than changes in custody is also evident from the fact that the Supreme Court Administrative Office (SCAO) has separate forms for motions regarding custody and motions regarding parenting time. Compare SCAO form FOC 87 and FOC 65. FOC 65, "Motion Regarding Parenting Time," does *not* instruct the movant to provide any information concerning proper cause or change in circumstances, and provides only for the movant to state why the requested parenting time would be in the best interests of the children. Although the form cannot trump the dictates of MCL 722.27 or *Terry*, the discrepancy certainly suggests that there are different standards used to evaluate parenting time decisions than are used for custodial decisions.

Based on the foregoing, I do not agree with the majority's reliance upon the proper cause and change in circumstances definitions found in *Vodvarka*, particularly where there is no binding authority requiring that we do so in the context of parenting time. However, even utilizing a more relaxed standard, I find that plaintiff failed to show either a change in circumstances and proper cause to justify a modification of parenting time.

The only parenting time factor plaintiff discussed was the minimization of transitions between homes. However, as both parties indicated, the children were performing well and having no problems under the current exchange system. Furthermore, the high number of transitions was a factor that was to be taken into consideration in the initial decision. In the absence of any evidence of any detriment to the children or specific, demonstrable problems with the schedule, I fail to see any justification for revisiting the parenting time issue based solely on a change in the number of exchanges.

Plaintiff did indicate that the alternative schedule provided more continuity for increasing and scheduling extracurricular activities. However, there was no evidence that the current schedule was interfering with scheduling these activities. Plaintiff also noted that the children were getting older. Although this is certainly a consideration under the parenting time factors, in this case there was no evidence that the children's increased age had caused changes that necessitated a revisiting of the parenting time.¹

Thus, although I disagree with the majority's reliance on the *Vodvarka* standards for change in circumstances and proper cause, because I conclude that plaintiff failed to show either change in circumstances or proper cause under the lesser burden that should be imposed for changes in parenting time, I concur in the result.

/s/ Douglas B. Shapiro

¹ I am not suggesting that a change in age of two years is never sufficient. However, there is no evidence in the record that these children, whose ages changed respectively from roughly 11 and 8 to 13 and 11, were experiencing differing needs that would necessitate a reevaluation of parenting time.