

STATE OF MICHIGAN
COURT OF APPEALS

MERCY WHITNEY,

Plaintiff-Appellant,

v

DEREK MARK BLOCK,

Defendant-Appellee.

UNPUBLISHED

April 5, 2011

No. 299799

Washtenaw Circuit Court

Juvenile Division

LC No. 08-001015-TS

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Mercy Whitney contests the trial court's order changing physical custody of the parties' minor child to Derek Block. We vacate.

In 2002, when the parties' minor child was approximately one year of age, an order was entered granting Whitney sole physical custody of the child with Block to have parenting time and the parties to share joint legal custody. In 2010, Block filed an ex parte emergency motion seeking a change of custody premised primarily on allegations that Whitney struck the minor child while driving her to school and a concern pertaining to Whitney's failure to take medication prescribed for a psychological condition. The trial court ruled that an established custodial environment existed with both parents and then changed physical custody of the minor child to Brock.

At the outset, our review of the record demonstrates that the trial court clearly lacked an accurate understanding that the issue to be addressed was a change in custody and not, as it suggested, simply a modification in parenting time. It is also obvious that the trial court failed to comprehend or implement the proper procedure to undertake such a review.

In order to seek a change of custody, the following procedure must be followed:

A party that seeks a change in custody has the initial burden of establishing, by a preponderance of the evidence, that either proper cause or a change of circumstances exists to warrant a change in custody. Thereafter, the trial court then determines whether an established custodial environment exists and analyze[s] the best-interest factors set forth in MCL 722.23. If the court finds that an established custodial environment exists, it may not change the established

custodial environment unless it finds clear and convincing evidence that a change of custody is in the child's best interest.¹

By undertaking a review of the best interest factors before having made a determination regarding the existence of a proper cause or change in circumstances, the trial court effectively put the cart before the horse.

Specifically, the trial court began receiving evidence and testimony without having first established that a proper cause or change of circumstances existed necessitating a review of the current custody order. A modification in custody can only be granted following demonstration of a “proper cause” or “change in circumstances” demonstrating that such modification is in the child’s best interests.² The trial court erred in failing to make this initial determination.

In addition, the trial court found the existence of a joint custodial environment, which is inconsistent with the factual history of this case based on Whitney’s long standing role as the physical custodian for this child. A custodial environment is established “if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.”³ “An established custodial environment is one of significant duration ‘in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.’”⁴ A court is precluded from changing an established custodial environment unless clear and convincing evidence is presented that such a change is in the child’s best interests.⁵

Had the lower court followed the proper procedure, the burden would have been on Block to demonstrate by clear and convincing evidence that a change of custody was warranted as there can be no doubt that, at the time Block sought the ex parte order, the established custodial environment for the minor child had been with Whitney for an extended time period. The trial court’s imposition of a temporary or ex parte custody order, did not, “by itself, establish a custodial environment.”⁶

¹ *Powery v Wells*, 278 Mich App 526, 527-528; 752 NW2d 47 (2008) (internal citations omitted).

² MCL 722.27(1)(c).

³ *Id.*

⁴ *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1982).

⁵ MCL 722.27(1)(c).

⁶ *Pluta v Pluta*, 165 Mich App 55, 60-61; 418 NW2d 400 (1987).

It is generally recognized that the legislative goal underlying the Child Custody Act was to prevent sudden and disruptive changes in custody that do not serve to benefit children.⁷ Such an improper change occurred in this case. Based on the lower court record we find that Block failed to meet his initial burden of demonstrating either a proper cause or sufficient change in circumstances to proceed on a motion for change of custody. Based on this failure, further proceedings were unnecessary. We, therefore, vacate the trial court's order granting custody to Block with immediate reinstatement of the original order granting physical custody to Whitney.

Vacated. This opinion is to have immediate effect, MCR 7.215(F)(2).

/s/ Joel P. Hoekstra

/s/ Michael J. Talbot

⁷ *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (internal citations omitted).