

STATE OF MICHIGAN
COURT OF APPEALS

JULI A. VLIET, f/k/a JULI A. COGSWELL,

Plaintiff-Appellant,

v

BRIAN R. COGSWELL,

Defendant-Appellee.

UNPUBLISHED

October 26, 2004

Nos. 253749; 254258

Montcalm Circuit Court

LC No. 00-000742-DM

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the denial of her motion to change custody, and she appeals by leave granted from the order granting defendant's motion to reduce plaintiff's parenting time with the parties' two minor children. We reverse and remand for proceedings consistent with this opinion.

This case has a very acrimonious legal history. The records of the various proceedings below reflect not only the animosity between the parties, but also that the relationship between their attorneys is less than conducive to a cooperative, mutually beneficial resolution of the differences which exist regarding custody and parenting time. Unfortunately, as is often the case, those most likely to suffer from the contest of post-marital discord are the children.

I

Regarding the trial court's decision to reduce plaintiff's parenting time, plaintiff argues that the trial court clearly erred in deciding this matter without considering the best interest factors set forth by MCL 722.23. We agree. We review parenting time orders de novo; such an order will not be reversed, however, unless (1) the factual findings on which the order is based are against the great weight of the evidence; (2) the court abused its discretion; or (3) it committed a clear legal error. *Booth v Booth*, 194 Mich App 284, 292; 486 NW2d 116 (1992).

We agree with plaintiff's argument that several of the court's factual determinations are against the great weight of the evidence. Most troubling is the court's finding that plaintiff

pleaded guilty to child abuse and neglect. Plaintiff did not plead guilty to child abuse, and, in fact, she was not convicted of child abuse and neglect. Instead, she agreed with the prosecutor's office that she would relinquish physical custody of the children¹ in exchange for the charge being dropped. Thus, *all* of the evidence presented below preponderates against this finding.

Equally unsupported by the record is the court's finding regarding the parties' ability to communicate via telephone. While there was ample testimony regarding the conflicts that ensued when the parties exchanged the children, there was no testimony regarding conflicts on the telephone.

It seems from the court's opinion that the effect the midweek, overnight stays had on the children's school performance and schedule weighed heavily in its decision. There was no documentary evidence regarding the children's school performance or attendance. There was only defendant's testimony that a "couple times," Brandon returned from plaintiff's house so "tired and ornery he didn't go to school and he slept the whole day." Even if we accept the testimony that plaintiff was often late to return the children from their midweek visits, it does not necessarily follow that her tardiness disrupted the children's schedule absent some proof of that. Finally, with regard to the school issue, there was no evidence supporting the court's finding that plaintiff did not give the children "the support they need in doing home work [sic] or in preparing for school on days following the mid week parenting time." To the contrary, plaintiff testified that she took it upon herself to provide the children's teachers with self-addressed, stamped envelopes in which the teachers could mail the boys' schoolwork to her.

However, even if we assume *arguendo* that the court correctly determined that defendant met his burden under MCL 722.27(1)(c) to show that proper cause or a change in circumstances supported his position that plaintiff's midweek parenting time should be eliminated, we cannot overlook the court's failure to consider whether this modification of parenting time served the children's best interests. There is no dispute that the children's best interests are to govern in a court's decision regarding parenting time. MCL 722.27a(1); *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993). MCL 722.27a(1) provides in relevant part, "Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." "Best interests of the child" as used in the Child Custody Act, which includes the preceding statute, is defined by MCL 722.23:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The 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.

¹ The judgment of divorce granted plaintiff physical custody of the children.

(c) The 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.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

See *Terry v Affum (On Remand)*, 237 Mich App 522, 535-537; 603 NW2d 788 (1999). Accordingly, we reverse the court's decision eliminating plaintiff's midweek parenting time and remand for a determination of whether a change in plaintiff's parenting time would serve the children's best interests in light of all of the factors enumerated by MCL 722.23.

II

Regarding custody, plaintiff argues that the trial court clearly erred in its failure to consider whether her motion for a change of custody was supported by proper cause. We agree. A court can modify a custody order only if the moving party establishes by a preponderance of the evidence that "proper cause" or a "change in circumstances" supports a finding that a change in custody is in the children's best interest. MCL 722.27(1)(c); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003), quoting *Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996). If this initial burden is not met, "the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors." *Rossow, supra*.

We recently explained what constitutes proper cause in *Vodvarka, supra* at 512:

In summary, to establish “proper cause” necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child’s well-being.

The language of the trial court’s opinion reflects that it was concerned almost exclusively with whether plaintiff demonstrated a change in circumstances. In so limiting its consideration of plaintiff’s motion, the trial court clearly erred. See *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001).

Reversed and remanded for proceedings consistent with this opinion. On remand, the trial court should determine whether a change in plaintiff’s parenting time serves the children’s best interests in light of all of the factors enumerated by MCL 722.23. Regarding custody, the trial court should determine whether plaintiff demonstrated proper cause in light of the best interests factors to support a change in custody, and if so, whether a change would be in the children’s best interest. Because of the strained nature of the relationships among the parties and their attorneys, we direct that the trial court address and make findings on each statutory best interest factor. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Bill Schuette