

STATE OF MICHIGAN
COURT OF APPEALS

SHARON P. GRIFFIN,

Plaintiff-Appellee,

v

CURT D. GRIFFIN,

Defendant-Appellant.

UNPUBLISHED

June 5, 2012

No. 305889

Livingston Circuit Court

LC No. 07-040094-DM

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

In this divorce case, defendant appeals the trial court's order adopting a Friend of the Court referee recommendation awarding plaintiff sole legal and physical custody of the parties' minor child. We reverse and remand.

In a child custody case, this Court reviews findings of fact under the great weight of the evidence standard, discretionary rulings for an abuse of discretion, and questions of law for clear error. *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). On appeal, all custody determinations must be affirmed unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005). A trial court's factual findings are against the great weight of the evidence if they clearly preponderate in the opposite direction. *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004).

The parties married on April 11, 2000, and plaintiff filed for divorce on October 29, 2007. Plaintiff sought sole physical custody and joint legal custody of the parties' minor daughter, Grace. The parties placed a settlement on the record, and the trial court entered a judgment of divorce. The trial court awarded the parties joint legal custody of Grace, yet no physical custody determination was made; instead, the parties were ordered to cooperate and participate with a parenting time coordinator (PTC).

Several months later, plaintiff moved for modification of custody, seeking sole legal and physical custody of Grace. Defendant moved to provide after-school care for Grace when plaintiff was not available during her parenting time; for the right of first refusal; to enforce provisions of the judgment of divorce with regard to joint legal custody; for expanded parenting

time; and for a specific parenting schedule. A hearing was held on the motions before a family court referee.

Plaintiff moved for the custody hearing pursuant to MCL 722.27(1)(c), which authorizes a court to “[m]odify or amend its previous [custody] judgments or orders for proper cause shown or because of change of circumstances....” The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances. And, a trial court may modify a custody award only if the moving party first establishes proper cause or a change of circumstances. Accordingly, a party seeking a change in the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change of circumstances. If a party fails to do so, the trial court may not hold a child custody hearing. *Corporan v Henton*, 282 Mich App 599, 603–604; 766 NW2d 903 (2009).

Here, the referee repeatedly stated that the hearing was being held in order to examine proper cause or a change of circumstances because there was never an initial determination of permanent custody. We conclude that an inquiry into proper cause or change of circumstances was not warranted. Although the judgment of divorce indicated that it was a final judgment, it did not contain an order of permanent physical custody. Instead, it ordered the parties to cooperate and participate with a PTC. The order was not the result of findings on the best interest factors and there was no hearing on those factors.

MCL 722.27(1)(c) provides for modification of a custody order on “proper cause shown” or “change of circumstances.” *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). “On the basis of this language . . . if the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing[.]” *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). However, temporary custody orders are an exception to this rule. *Thompson v Thompson*, 261 Mich App 353, 357; 683 NW2d 250 (2004). “By definition, a temporary custody agreement is only a *temporary* order pending further proceedings.” *Id.* A temporary custody order is not an original or initial order. *Id.* at 361-362. As such, this type of order is outside the scope of the Child Custody Act. MCL 722.27(1)(c). Accordingly, a party may not be denied a full evidentiary hearing just because he or she has agreed to “cooperate and participate” with a PTC. See *id.* at 357 (a party “may not be denied a full evidentiary hearing just because [he or] she stipulates with regard to ‘temporary custody’”).

Although the parties in this case agreed to cooperate and participate with a PTC, this did not absolve the trial court of the requirement of determining the best interests of the child before entering a permanent order. *Id.* at 359-360 (although a trial court will enforce temporary custody agreements, “parties cannot conclusively agree regarding child custody”). A trial court must “independently determine what is in the best interests of the child.” *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). Thus, because an original custody order was never entered, an initial examination of proper cause or change of circumstances was procedurally improper. Therefore, an evidentiary hearing to determine custody based on the best interests of the child must be held. *Thompson*, 261 Mich App at 363. Indeed, an examination of proper cause or change of circumstances presupposes that an analysis of the best interest factors has previously occurred. *Vodvarka*, 259 Mich App at 512 (“[w]hen a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors”).

Although the trial court concluded that the hearings conducted by the referee did encompass an analysis of the best interest factors, our review of the record reveals that during all nine days of the hearings, the parties focused on proper cause and change of circumstances. Although the referee and the parties discussed the potential for moving forward with the “next portion” of considering whether an established custodial environment existed and conducting a review of the best interest factors, on each of the nine days of hearings, the referee and the parties discussed that they were only addressing the matter of proper cause and change of circumstances. Without an explicit indication by the referee that the proceedings were advancing to the custody determination phase, the parties were not afforded a full opportunity to present evidence due to differing burdens of proof. The burden of proof for proper cause or change of circumstances (preponderance of the evidence) may differ from that used to determine custody based on the best interest factors, which is dependent upon an established custodial environment (preponderance of the evidence or clear and convincing evidence). *Vodvarka*, 259 Mich App at 509. While there is overlap between the evidence relevant to proper cause or change of circumstances and whether a modification of custody is in the child’s best interests, the differing burdens of proof may alter the posture of the case, the manner in which the evidence is presented, and the extent of that evidence. See *Rivette*, 278 Mich App at 331 (“[h]ad [the] defendant known that the hearing would determine custody [as opposed to just parenting time] . . . the custody determination may have turned out differently”). Indeed, “[c]ustody is a weighty issue and merits careful consideration.” *Id.* The trial court erred in deeming meritless defendant’s argument that he did not have a full opportunity to present evidence regarding the best interest factors.

Therefore, we remand in order for the trial court to conduct the requisite evidentiary hearing on the best interest factors. Because we conclude that this matter should be remanded, we do not reach defendant's remaining arguments on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter