STATE OF MICHIGAN

COURT OF APPEALS

JOHN E. WILBER,

Plaintiff/Counter-Defendant-Appellant,

v

SKYE D. CARTER,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
May 20, 2010

No. 293804
Eaton Circuit Court
LC No. 99-000882-DP

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

PER CURIAM.

In this custody dispute, plaintiff appeals an order granting joint legal custody of the parties' minor child (DOB 4/20/99). Because the trial court erred in awarding custody without determining a change in circumstances, just cause, the existence of an established custodial environment, and without considering the best interest factors, we reverse the order and remand for further proceedings.

Plaintiff argues that the court erred in modifying a prior custody award without a motion being submitted and without a finding that there was proper cause or a change in circumstances to justify the modification. A custody order must be affirmed on appeal 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; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Id*. at 706.

The Child Custody Act of 1970 (CCA), MCL 722.21 *et seq*., governs child custody disputes between parents, agencies, or third parties. The purpose of the CCA is to promote the best interest of children, and it is to be liberally construed. MCL 722.26(1); *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). The CCA creates "presumptions and standards by which competing claims to the right of custody are to be judged, sets forth procedures to be followed in litigation regarding such claims, and authorizes the forms of relief available in the circuit court.". *Ruppel v Lesner*, 421 Mich 559, 565; 364 NW2d 665 (1984).

Plaintiff states that the court changed custody because it issued an order on March 31, 2009, awarding plaintiff sole legal and physical custody of the child and then, on August 11,

2009, ordered "[d]efendant's joint legal custody of the minor child is restored. Hence both parties shall now share joint custody of the minor child." The August 11, 2009, order followed a hearing that was scheduled in the order dated March 31, 2009, to review the matter.

Since the original February 2000 award of joint legal and physical custody, the court changed the custody arrangement several times. In May 2005, after motions from both parties, the court awarded temporary physical custody to plaintiff pending a referee hearing. After a referee hearing and a motion by defendant, the court ordered that the parties again have joint legal and physical custody, and set a review hearing for February 2006. Following motions by both parties and a referee hearing, the court awarded temporary physical custody to plaintiff and suspended defendant's parenting time pending further orders and a referee hearing in December 2006.

In February 2007, after a referee hearing, the court continued temporary physical custody with plaintiff and supervised visits with defendant. In July 2008, after defendant petitioned for parenting time and plaintiff sought child support, the court ordered parenting time for defendant and required defendant to secure different living conditions within four months. In a March 31, 2009, order, after another motion by plaintiff to limit defendant's parenting time and a scheduled review hearing at which the court interviewed the child, the court granted plaintiff sole legal and physical custody and scheduled the matter for review in August 2009. After the review hearing and a second interview with the child, the court ordered on August 11, 2009, that defendant's joint legal custody was restored. The court also scheduled a hearing to review child support.

During the August 2009 review hearing, the court reviewed the history of the case and indicated that the intent had long been to expand defendant's involvement in the child's life, but that the real question was whether to reinstate the original joint physical custody arrangement of the parties. The court indicated that it was not entirely comfortable with defendant's involvement with the child in the past but that defendant began to resume more typical parenting time. The court indicated that it was likely to restore joint legal custody because plaintiff was relying on sole legal custody in order to make things difficult for defendant.

Because the court issued temporary orders on May 25, 2005, and February 16, 2007, scheduled hearings to review the matter, made comments regarding its general intention to restore the original custody arrangement, and in its August 11, 2009, order referred to restoring joint custody rather than awarding custody, it is possible that the court believed it was managing the custody of the parties with temporary orders to preserve, and not modify, the original custody arrangement as intended. Indeed, this Court has affirmed the "good public policy to encourage parents to transfer custody of their children to others temporarily when they are in difficulty by returning custody when they have solved their difficulty." *Straub v Straub*, 209 Mich App 77, 81; 530 NW2d 125 (1995). However, under these circumstances, any finding that the court was modifying temporary orders until joint custody could be restored would be based on speculation. Only two of the court's six orders changing the custody arrangement of the parties were characterized as temporary. The August 11, 2009, order followed a March 31, 2009, order granting sole legal and physical custody to plaintiff that did not state that it was a temporary order.

MCL 722.27(1) provides in part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
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> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

Thus, the party seeking a change of custody must first establish proper cause or change of circumstances by a preponderance of evidence. *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009). If a party fails to establish proper cause or change of circumstances, the trial court may not hold a child custody hearing. *Corporan v Henton*, 282 Mich App 599, 603-604; 766 NW2d 903 (2009).

Here, there was no discussion of the threshold question of proper cause or a change in circumstances during the August 5, 2009, hearing or in the August 11, 2009, order to consider a change in the March 31, 2009, custody order. Neither party filed a motion to change custody following the March 31, 2009, order. A trial court must determine if the moving party has shown that the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed since the entry of the last custody order. *Brausch v Brausch*, 283 Mich App 339, 355-356; 770 NW2d 77 (2009). Here, there was no such motion and no findings presented on the matter.

Additionally, the first step in considering a change in custody is to determine whether an established custodial environment exists. It is only then that the court can determine what burden of proof is applied. *Curless v Curless*, 137 Mich App 673, 676; 357 NW2d 923 (1984).[1] Further, above all, custody disputes are to be resolved in the best interests of the child, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor and the failure to do so is reversible error. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007); *Daniels v Daniels*, 165 Mich App

[1] According to MCL 722.27(1)(c), 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."

726, 730; 418 NW2d 924 (1988). Even in fairness to the parties this standard cannot be abrogated. *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996).

In the instant case, there was no discussion or findings regarding an established custodial environment, the standard of proof required to change custody, or the statutory best interest factors in the courts order or during the hearing. This Court has consistently held that when deciding a custody matter the trial court must evaluate each of the factors contained in MCL 722.23 and state a conclusion on each, thereby determining the best interests of the child. *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004). It is vitally important for the protection of the fundamental rights of the parties involved to have some indicia on the record showing that the court has satisfied itself that its custody determination was in the child's best interests. *In re AP*, 283 Mich App at 608. The goal of the CCA is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances. See *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001).

When a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing. *Foskett*, 247 Mich App at 12. Also, where this Court concludes that the trial court committed clear legal error on a major issue, the appropriate remedy is to remand for reevaluation. *Fletcher v Fletcher*, 447 Mich 871, 888-889; 526 NW2d 889 (1994); *Rittershaus*, 273 Mich App at 475-476. We therefore reverse and remand. On remand, the trial court should consider up-to-date information, including the child's current and reasonable preferences and any other changes in circumstances arising since the original custody order. *Fletcher*, 447 Mich at 889.

Reversed and remanded. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio