

STATE OF MICHIGAN
COURT OF APPEALS

TIFFANY WEAVER,

Plaintiff-Appellee,

v

JORael MARVIN MCGEE,

Defendant-Appellant.

UNPUBLISHED

August 7, 2012

No. 308036

Genesee Circuit Court

LC No. 07-278289-DS

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right from an order modifying his parenting time with respect to the minor child he has with plaintiff. We affirm in part, reverse in part, and remand.

I. BASIC FACTS

The parties, who never married, had one child born on January 25, 2003. On March 24, 2008, the parties entered into a consent judgment, which gave plaintiff sole legal and physical custody of the child and gave defendant parenting time “as the parties agree.” The consent judgment included a domicile provision that prohibited plaintiff from changing the child’s legal residence to one that is more than 100 miles from their address at the time in Flint, “except in compliance with section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31.” Additionally, the judgment required the parties to keep the friend of the court informed of their current addresses.

A subsequent order entered on December 1, 2009, specified that defendant was to have parenting time on alternate weekends, the third week of every month, and alternate holidays. The order also provided that “all prior orders of the Court not specifically modified herein shall remain in full force and effect.”

Although the record indicates that plaintiff married another man, who was a member of the United States military, it is not known when the marriage happened. It is apparent, however, that plaintiff’s husband was stationed at or being transferred to a military base in Alaska. On April 26, 2011, plaintiff filed a motion to change her and the child’s domicile to Alaska. On May 13, 2011, defendant filed an emergency motion “for sole legal and physical custody, support, and to force plaintiff to reveal current address.” Defendant’s prayer for relief sought “an immediate pick up order” for the child and sole legal and physical custody.

On May 16, 2011, the trial court held a hearing on defendant's motion. Plaintiff appeared at this hearing, but has not appeared at any proceedings since. On May 18, 2011, the trial court entered an order denying defendant's request for the "immediate pick up" of the child and set a hearing date of July 14, 2011, to hear both defendant's change of custody motion and plaintiff's change of domicile motion. According to defendant, plaintiff and the child moved to Alaska in mid-June. At the July 14, 2011, hearing, defendant appeared but plaintiff did not. The register of actions indicates that the matter was "to proceed before referee as scheduled." On July 20, 2011, a new attorney entered his appearance on behalf of defendant. At the July 25, 2011, hearing before the referee, the matter was adjourned.

On August 12, 2011, defendant filed a new motion to "enforce order and for pick up order for minor child."¹ Defendant requested that the domicile provision of the March 24, 2008, consent judgment be enforced, that the trial court issue an order to return the child to Michigan, and that he be awarded temporary physical custody of the child. The motion alleged several reasons for granting these requests, including, *inter alia*, the following:

- Plaintiff filed her motion to change domicile but moved to Alaska in mid-June before the court decided on the motion;
- Plaintiff did not appear at the July 14, 2011, hearing to decide on her motion;
- As a result of the foregoing, plaintiff has clearly disregarded the trial court's prior orders;
- The Genesee County friend of the court filed a show cause proceeding against plaintiff for her failure to provide parenting time to defendant;
- Plaintiff did not appear at that hearing;
- Plaintiff failed to leave a current address with the court, contrary to the court's original order;
- Defendant has had no contact with the child since plaintiff refuses to answer defendant's calls;
- Plaintiff's move to Alaska destroyed the custodial agreement, as well as defendant's parenting time schedule;
- Plaintiff's actions amount to parental kidnapping.

¹ It is not clear from the record what the final disposition of defendant's May 13 motion was. Regardless, it appears that for all intents and purposes, defendant's August 12 motion with his new attorney essentially "replaced" it.

After multiple adjournments by the referee, the trial court held a hearing on defendant's motion on December 14, 2011. Once again, plaintiff did not appear, and, as requested by defendant, the trial court dismissed plaintiff's motion to change her domicile without prejudice. In apparent recognition that the child was living in Alaska, the trial court also sua sponte modified defendant's parenting time so that the child would spend Christmas breaks and most of summer vacation with defendant in Michigan. Defendant and plaintiff were to split the travel expenses. As to defendant's request for a change in custody, the trial court appeared to deny the motion when it stated, "[I]f you were looking at a custody change, [that] would be considered [later] and I think counsel is aware of the threshold and the standards of proof that would be involved." On December 21, 2011, the trial court entered a written order reflecting its oral ruling from the December 14, 2011, hearing. Plaintiff was served with this order on December 21, 2011, through hand-delivery to her husband at their home in Alaska.

The child did not come back to Michigan for defendant's parenting time over the 2011-2012 Christmas break as ordered by the trial court. Defendant appeals as of right to this Court.

II. ANALYSIS

A.

Defendant first argues that the trial court erred by implicitly granting plaintiff's motion to change domicile without evaluating the factors enumerated under MCL 722.31. We disagree.

The application and interpretation of statutes is reviewed de novo. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d (2006). The interpretation of the meaning of a court order also is reviewed de novo. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). "This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). In custody cases, an abuse of discretion occurs when "the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.*

The portion of the consent judgment at issue is under the section called "Domicile." In this section, the judgment stated in its entirety:

A parent of a child whose custody is governed by Court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued, except in compliance with section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31.

Section 11 of the Child Custody Act provides a list of five factors² that a court is to evaluate in "all cases in which a parent wishes to change the legal residence of a child whose

² The five factors are found in MCL 722.31(4).

custody is governed by court order.” *Grew v Knox*, 265 Mich App 333, 338; 694 NW2d 772 (2005) (quotations omitted), citing MCL 722.31(1). However, section 11 and the enumerated factors “do[] not apply if the order governing the child’s custody grants sole legal custody to 1 of the child’s parents.” MCL 722.31(2); see also *Spires v Bergman*, 276 Mich App 432, 436-437; 741 NW2d 523 (2007). Thus, by its very terms, MCL 722.31 did not apply to or govern the domicile of the child because the consent judgment granted plaintiff sole legal custody of the child, and the trial court had no authority under MCL 722.31(4) to evaluate plaintiff’s desire to relocate to Alaska with her child. In other words, because she was the sole legal custodian and was not required to satisfy the factors enumerated by MCL 722.31(4), plaintiff was fully “in compliance” with the domicile provision of the consent judgment.

We acknowledge that MCR 3.211(C)(1) requires that all judgments or orders awarding custody of a minor must provide that “the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge’s successor.” However, the original consent judgment referred only to MCL 722.31 and failed to contain the required provision that a parent moving a minor child from Michigan to another state must first seek the approval of the trial. Although the trial court should not have signed a judgment that failed to include the requisite MCR 3.211(C)(1) provision, a trial court speaks through its orders, and plaintiff was entitled to rely on the judgment as written. *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009). As written, nothing in the consent judgment required plaintiff to first obtain the trial court’s approval before changing the child’s domicile to Alaska.³ The trial court’s decision to dismiss plaintiff’s motion to change domicile was consistent with this premise, and we find no error in the trial court’s dismissal. We recognize that the trial court based its dismissal of plaintiff’s motion on the fact that plaintiff never appeared to argue her motion, and not because nothing in the consent judgment or MCL 722.31 required plaintiff to seek the trial court’s permission, but “we will not reverse a trial court’s ruling when it reaches the right result for the wrong reason.” *Majestic Golf, LLC v Lake Walden Country Club, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 300140, issued July 10, 2012), slip op, p 15.

Moreover, even if we were to accept defendant’s contention that permission was necessary and that the trial court’s handling of plaintiff’s motion amounted to a “de facto” granting of the motion, we would find no error. Any approval, tacit or otherwise, of plaintiff’s motion to relocate to Alaska would not have been an abuse of discretion. The trial court would not have abused its discretion in authorizing plaintiff, the sole legal custodian of the child, to take the child to Alaska with her when she moved to be with her husband, who was stationed there as a member of the United States military. Cf. *Spires*, 276 Mich App at 440 (“Once the court had determined that it was not required to consider the factors of MCL 722.31(4) [because plaintiff had sole legal custody], it properly approved plaintiff’s proposed move to Texas.”) Such a decision is not “so palpably and grossly violative of fact and logic that it evidences a perversity

³ Although, as noted, *supra*, plaintiff still was required to keep the friend of the court informed of her address and apparently failed to do so.

of will, a defiance of judgment, or the exercise of passion or bias.” *Berger*, 277 Mich App at 705.

Defendant next argues that the trial court erred by failing to conduct a hearing to determine whether there was a change in the established custodial environment and whether the domicile change is in the minor child’s best interests. We disagree. Defendant is correct that, generally, “[a]fter granting a change of domicile, the trial court must determine whether there will be a change in the established custodial environment and, if so, determine whether the relocating parent can prove, by clear and convincing evidence, that the change is in the child’s best interest.” *Gagnon v Glowacki*, 295 Mich App 557, 570; ___ NW2d ___ (2012). But an inquiry into the best-interest factors is only necessary in the “situation where both parents share joint physical custody.” *Brown v Loveman*, 260 Mich App 576, 598 n 7; 680 NW2d 432 (2004). Here, the original judgment established that plaintiff had sole legal and physical custody of the child, and the trial court’s subsequent order granting defendant a specific parenting-time schedule did not alter custody. Therefore, no best-interest analysis was necessary in order for plaintiff to change the child’s domicile.

B.

Defendant next argues that the trial court erred when it failed to adequately address his motion for change of custody at the December 2011 hearing. We agree.

Defendant’s August 12, 2011, motion was titled “motion to enforce order and for pick up order for minor child.” Even though the title did not use the word “custody,” we find that the motion is properly treated as one for a change of custody, given that defendant’s prayer for relief included a request for the court to “[a]ward the Defendant temporary physical custody of the minor child” See *Grew*, 265 Mich App at 337 (“A trial court should not temporarily change custody by a postjudgment interim order when it could not do so by a final order changing custody.”).

At the December 14, 2011, hearing, the trial court never ruled on defendant’s motion for a change in custody or made any pertinent findings of fact. The only reference to defendant’s motion came in the court’s discussion regarding its decision to dismiss plaintiff’s motion to change domicile:

As far as her motion, it’s something that can be refiled. It’s going to be dismissed without prejudice. It’s pretty clear that there’s all of the issues that would come into consideration, if you were looking at a custody change, would be considered and I think counsel is aware of the threshold and the standards of proof that would be involved.

* * *

[I]f she doesn’t wish to comply once the order is entered or indicates that she’s not going to, then I have to deal with that through a show cause and that may – that may trip the threshold as far as the Court’s concerned if – if she is not complying with – with the Court’s order as far as parenting time. That would

certainly be the basis to trigger [*Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003)], as far as I'm concerned.

While not entirely clear, it appears that the trial court advised defendant that it would consider defendant's motion for a change in custody if plaintiff refiled her motion to change domicile, or alternatively, when plaintiff failed to comply with the court's new parenting-time schedule. Regardless, the record *is* clear that the trial court failed to make *any* factual findings related to defendant's motion for a change of custody. This failure was error. MCR 3.210(D)(1) requires a trial court to make findings of fact as provided in MCR 2.517 on contested postjudgment motions in a domestic relations case, and therefore, we remand for the trial court to do so.

A custody award may be modified on a showing of proper cause or a change in circumstances that establishes that the modification is in the best interests of the child. MCL 722.27(1)(c); *Vodvarka*, 259 Mich App at 508. The trial court need not hold an evidentiary hearing to determine whether the movant established a proper cause or change in circumstances. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). But if the threshold proper cause or change of circumstances is shown, the trial court must then conduct an evidentiary hearing to evaluate the best interests of the child. *Grew*, 265 Mich App at 336. However, even if defendant can establish proper cause and that the modification would be in the child's best interests, "a court may not change a child's established custodial environment unless the moving party proves by clear and convincing evidence that the change is in the child's best interest." *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009).

Here, since the child clearly had an established custodial environment with plaintiff, defendant would have to show through clear and convincing evidence that his proposed change in custody would be in the child's best interest, assuming his proposed change in custody affected this established custodial environment.

Therefore, on remand, the trial court is to properly evaluate defendant's motion to change custody, and the bases alleged in support of the motion, consistent with *Vodvarka* and its progeny.⁴

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder

⁴ We note that at a trial court hearing subsequent to the claim of appeal being filed with this Court, the trial court suggested to defendant that he may want "to take some type of concurrent action in the state of Alaska." On remand, we remind the trial court that in order to decline to exercise jurisdiction, it must do so in conformity with the Uniform Child Custody Jurisdiction Act, specifically MCL 722.1207(2).

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FITZGERALD, J. (*concurring*)

I concur with the result only.

/s/ E. Thomas Fitzgerald