STATE OF MICHIGAN

COURT OF APPEALS

NICOLE YOLANDA NAKISH BROWN, also known as NICOLE YOLANDA NAKISH JACKSON,

Plaintiff-Appellant,

v

DAMON DUPREE BROWN,

Defendant-Appellee.

UNPUBLISHED
December 22, 2020

No. 352767
Calhoun Circuit Court
LC No. 2012-003312-DM

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

PER CURIAM.

Plaintiff-mother appeals by right the trial court's order granting joint physical and legal custody of the parties' minor children to defendant-father. For the reasons stated in this opinion, we reverse.

I. BACKGROUND

The parties divorced in 2013. The judgment of divorce granted mother sole physical and legal custody of the older child and ordered that the child's domicile would remain in Michigan. In 2015, the trial court granted mother's motion to change domicile, permitting mother to move to Georgia where she was to undergo several months of training for her new position as a flight attendant. In 2016, the trial court consolidated a separate case concerning the parties' younger child and reaffirmed that mother "shall have the care, custody and control" of both children. The order also granted father parenting time. In 2017, father moved to modify parenting time. Acknowledging that he did not contest mother's relocation to Georgia, father alleged that it was in the children's best interests to establish a specific parenting-time schedule. Father also alleged that mother had left the children primarily in the care of their maternal grandparents and was living in Georgia without them. Following a hearing, the trial court entered an order modifying parenting time and child support. The trial court granted father standard parenting time but determined that "[t]here is no change in custody" and that "[l]egal and physical custody will remain with" mother.

In July 2018, father filed a motion alleging that mother had repeatedly violated the trial court's parenting order. The motion further alleged that the children were now, without the trial court's knowledge, enrolled in school and living in Battle Creek, Michigan. Father additionally alleged that mother was now working as a flight attendant and often left the children with their maternal grandparents for days or weeks at a time. Father sought additional parenting time while mother was traveling for work. The trial court held mother in contempt for denying father parenting time and in December 2018 amended its order to reflect that father would have additional parenting time during periods when the children were residing in Michigan. Specifically, father was awarded overnight parenting time on alternating weekends, Wednesday evenings, alternating holidays and one-half of Christmas and summer vacation.

In January 2019, father filed a motion to change custody requesting joint legal and physical custody. Father alleged that the children had been residing in Battle Creek, primarily with their maternal grandparents, for six months and were enrolled in school. He asserted that it was in the children's best interests that he have an equal legal right in making decisions concerning their upbringing, especially because mother continued to travel as a flight attendant and was away "for days at a time." At an initial hearing regarding father's motion to change custody, for which mother was not present, the referee agreed to give father a hearing on whether custody should change because the previous orders "were clearly premised based upon the assumption that these children are going to be spending a lot of time out of state," which was not currently the case. In the interim, the trial court held mother in contempt a second time for denying or otherwise interfering with father's parenting time.

After an evidentiary hearing, the referee found that there was proper cause or change of circumstances for revisiting the existing custody arrangement. The referee cited the children's enrollment in school in Michigan; mother's lack of candor concerning her living arrangements; the orders of contempt against mother for denying father parenting time; and mother accepting a job as a flight attendant based in Dallas, Texas with the intent to move there permanently. Subsequently, in July 2019 the referee submitted her recommendation including written findings that proper cause or change of circumstances existed and that the children had an established custodial environment with both parents. After examining the best-interest factors, the referee submitted that it was in the children's best interests for the trial court to grant father joint physical and legal custody.

In August 2019, mother moved to set aside the referee's recommendation, challenging the established custodial environment finding and asserting that each and every best-interest factor actually favored her. Mother also filed a separate motion seeking to change the children's domicile to Dallas, Texas. After a de novo hearing before the trial court, the trial court found that there was an established custodial environment with both parents and, although it differed from the referee respecting several individual factual findings on the children's best interests, held that it was in the children's best interests for both parents to share joint physical and legal custody. The trial court denied mother's motion to change the children's domicile. This appeal followed.

II. ANALYSIS

We first consider mother's argument that the trial court committed clear legal error because it did not make a threshold finding whether father proved that there was proper cause or a change of circumstances warranting a change of custody before referring the matter to the referee.[1]

Section 7 of the Child Custody Act, MCL 722.21 *et seq.*, allows a trial court to "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances," so long as the modification would be in the child's best interests. MCL 722.27(1)(c). For purposes of revisiting custody orders, "proper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). "[I]n order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed." *Id.* at 513. "[T]he evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-514.

Relying solely on our decision in *Bowling v McCarrick*, 318 Mich App 568; 899 NW2d 808 (2016), mother argues that the trial court needed to make a threshold finding that there was proper cause or change of circumstances and that it erred by referring that initial question to a referee. In *Bowling*, the motion to change custody was referred to the Friend of Court for "conciliation," a process governed by the circuit court's administrative order. *Id.* at 570. This Court held that the trial court could not rely on the conciliator's report that the proper-cause threshold was met because MCL 552.505, outlining the Friend of Court's duties, provides that "[i]f custody has been established by court order, the court shall order [a Friend of Court] investigation only if the court first finds that proper cause has been shown or that there has been a change of circumstances." *Id.* at 571-572, quoting MCL 552.505(1)(g). In contrast, there is no statute or court rule so limiting referees. Rather, with certain exceptions not relevant to this case, a referee may hear all motions in a domestic relations matter. MCL 552.507(2)(a); MCR 3.215(B)(1). See also *Harvey v Harvey*, 257 Mich App 278, 291; 668 NW2d 187 (2003), aff'd 470 Mich 186 (2004)

[1] In child custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. We review questions of law for clear legal error. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). A trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances is reviewed under the great weight of the evidence standard. *Id.* Under that standard, "this Court defers to the trial court's findings of fact unless the trial court's findings clearly preponderate in the opposite direction." *Id.* (quotation marks and citation omitted).

(recognizing that "[a] child-custody dispute may be submitted to a friend of the court referee for hearing"),

Moreover, a finding of proper cause or change of circumstances was not against the great weight of the evidence. Mother had been held in contempt on at least two separate occasions for denying father his court-ordered parenting time, which was a valid ground for finding proper cause or a change of circumstances to revisit the existing custody order. See *McRoberts v Ferguson*, 322 Mich App 125, 132; 910 NW2d 721 (2017). See also *Mitchell v Mitchell*, 296 Mich App 513, 518; 823 NW2d 153 (2012) (recognizing that a parent's repeated failure to facilitate visitation or comply with a parenting-time order "related to the statutory best-interest factors and constituted facts that have or could have a significant effect on the children's lives"). Further, the children were now living fulltime in Michigan and mother was planning a permanent move to Texas. Cf. *Simms v Verbrugge*, 322 Mich App 205, 217 n 4; 911 NW2d 233 (2017) (concluding that a parent's relocation out of state "undoubtedly constitutes a change of circumstances under MCL722.27(1)(c) . . . .").

Next, mother argues that the trial court erred by finding that an established custodial environment existed with both parents.[2]

The existence of an established custodial environment, and the effect of the proposed change on that environment, determines the movant's evidentiary burden. "If an established custodial environment exists with either or both parents, the trial court must find clear and convincing evidence that a change in the established custodial environment is in the child's best interests." *Riemer v Johnson*, 311 Mich App 632, 641; 876 NW2d 279 (2015). See also MCL 722.27(1)(c). We have described an established custodial environment as "one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). It is "marked by security, stability, and permanence." *Id*. MCL 722.27(1)(c) provides:

> The custodial environment of a child 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.

A child can have an established custodial environment with both parents. *Berger*, 277 Mich App at 707.

Relying primarily on *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), mother argues that the children's long-time residence with her was the most instructive

[2] "Whether a custodial environment is established is a question of fact." *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1995), aff'd 451 Mich 457 (1996). A trial court's factual finding is against the great weight of evidence when "the evidence clearly preponderates in the opposite direction." *Id*. at 242.

consideration. Although mother is correct that the children's physical residence was relevant, this was but one relevant factor, as the standard for determining a child's established custodial environment requires an inquiry into not only where the child lives but whether "the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Overall, mother seems to focus on her history with the children. While this historical context is helpful, it ignores that the trial court was tasked with evaluating the children's current established custodial environment. Cf. *Thompson v Thompson*, 261 Mich App 353, 357; 683 NW2d 250 (2004) (recognizing that the trial court "must consider all pertinent and relevant factors" existing at the time of the hearing). At the time of the hearing, father had received an increasing amount of parenting time over the preceding two years. Moreover, the children had been living in Battle Creek for an extended period of time while mother was often out-of-state. Mother testified that the children were excited to see father and that they had a bond with him. There was also evidence that the children looked to father for guidance and assistance while in his care. For these reasons, it was not against the great weight of the evidence for the trial court to conclude that the children had an established custodial environment with both parents.

We agree with mother, however, that at this point in the analysis the trial court improperly conflated father's motion to change custody with mother's motion to change domicile. As noted, the evidentiary burden in a motion to modify a custody order turns on whether the change will alter an established custodial environment. The trial court's analysis largely tracked the referee's recommendation so we examine both in order to clearly understand the court's ruling. In her recommendation, the referee concluded that father's request for joint custody would not change the established custodial environment. Mother does not challenge that finding, and we see no error in it. "If the change does not alter the established custodial environment, then the proponent of the change need only demonstrate by a preponderance of the evidence that the requested change is in the child's best interests." *Marik v Marik*, 325 Mich App 353, 362; 925 NW2d 885 (2018), citing *Pierron v Pierron*, 486 Mich 81, 89-90, 782 NW2d 480 (2010). See also *Parent v Parent*, 282 Mich App 152, 155; 762 NW2d 553 (2009). Accordingly, father had the burden to show by a preponderance of the evidence that his motion for joint custody was in the children's best interests.

However, the referee did not address father's burden of proof and instead concluded concluded that *mother* had the burden to prove by clear and convincing evidence that changing the children's domicile to Texas was in their best interests.[3] Finding that mother did not meet that burden, the referee recommended that father be granted joint legal and physical custody. At the de novo hearing, the trial court did not expressly state the applicable burden of proof for father's motion for joint custody before it evaluated the best-interest factors. However, in conclusion, it followed the referee's analysis:

[3] Mother had not filed a motion to change domicile at that time but informed the referee of her intent to move to Texas. Mother subsequently filed a motion to change domicile concurrent with her objections to the referee's recommendation.

> [L]ooking at all of the evidence in this particular matter, and the considerations, the Court will find that [mother] has not presented sufficient evidence, by clear and convincing evidence, to change the established custodial environment that the Court finds with both parties.
>
> So, the Court is going to grant joint legal and joint physical custody, in this matter.

The trial court then evaluated mother's motion to change domicile. The court considered the factors set forth in MCL 722.31(4) and indicated that they supported a change in domicile, but found that moving the children to Texas would alter the established custodial environment and that mother had not shown by clear and convincing evidence that the change was in the children's best interests.

To summarize, the trial court effectively placed the burden of proof on mother for *both* motions. This was clear legal error. That mother was seeking a change of domicile for the children did not relieve father of his burden to prove by a preponderance of the evidence that granting him joint legal custody was in the children's best interests. Like the referee, the trial court conflated the motions, and reasoned that unless mother could show by clear and convincing evidence that moving to Texas was in the children's best interests then father was entitled to joint custody. But mother's proposed move and father's motion for joint custody were separate issues and should have been treated as such. While this may have involved duplicate efforts as to the best-interest factors, we cannot overlook the trial court granting a parent's motion for joint custody by erroneously placing the evidentiary burden on the other parent. Addressing the question in that fashion is inconsistent with the procedure established by statute and caselaw for changing a custody arrangement.

On remand, the trial court shall evaluate father's motion for change of custody under a preponderance of the evidence standard with father having the burden of proof. The court shall then separately address mother's motion to change domicile. The court "should consider up-to-date information" in rendering its custody decision on remand. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). Also, "[t]he court should consider all the statutory factors and conduct whatever hearings or other proceedings are necessary to allow it to make an accurate decision concerning a custody arrangement that is in the best interests of [the children]." *Ireland v Smith*, 451 Mich 457, 468-469; 547 NW2d 686 (1996). Accordingly, the trial court may, in its discretion, conduct an evidentiary hearing concerning events since its ruling granting joint custody.[4]

[4] Because we are remanding for reconsideration of the parents' motions based on up-to-date information, we decline to address at this time mother's argument that the trial court erred in evaluating the best-interest factors and in its decisions to grant father joint custody and deny mother's motion to change domicile.

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

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro