# STATE OF MICHIGAN

# COURT OF APPEALS

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| JESSICA J. SPRAGUE,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 3, 2012 |
| v | No. 303343<br>Eaton Circuit Court |
| SCOTT M. MCMILLAN,<br><br>Defendant-Appellant. | LC No. 08-001235-DC |

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

PER CURIAM.

In this child custody case, defendant appeals as of right the circuit court's order granting plaintiff's motion to maintain her new domicile with the children, but finding her in contempt for taking that action before she had the court's permission. We affirm in part, reverse in part, and remand for further proceedings.

## I. FACTS

The parties never married, but their romantic involvement of seven years produced three children, born respectively in 2003, 2004, and 2007. By 2008, the parties' relationship ended and plaintiff filed a petition for custody and child support. The parties cooperated with Alana Fox, an investigator with the friend of the court (FOC), who issued a report and recommendation in 2009. Defendant objected to the recommended order, and a hearing before a FOC referee followed, at which the parties reached an agreement that was not placed on the record. Once the proposed order was prepared, defendant refused to sign it, stating that he had not agreed to the terms contained within the proposed order. In response to defendant's objections, defendant's attorney withdrew from the case because his attorney did not agree with defendant's objections.

Thereafter, on November 4, 2009, another hearing took place before FOC referee Allen Schlossberg regarding child custody, parenting time, and child support. At this hearing, the parties came to another agreement, which was placed on the record. However, once the proposed order was drafted, defendant again objected that he had not agreed to the terms within the order and requested a de novo hearing.

On October 13, 2010, this matter was brought before the trial court. A full day's hearing regarding whether the parties had entered into an agreement on November 4, 2009, followed. During the hearing, both plaintiff and defendant offered testimony. Defendant testified that

although he chose to represent himself at the November 4th FOC hearing, he was confused or pressured by Schlossberg, not allowed to ask questions, and did not really agree to the terms within the parties' agreement. However, on cross-examination defendant admitted that he was never forced to agree to anything. Defendant acknowledged that parenting time was discussed at the hearing, and that he did come to an agreement on parenting time. However, defendant also testified that his real wish all along was to maintain joint physical custody and insisted that the proposed order did not reflect the terms to which he had agreed. Conversely, plaintiff testified that a compromise agreement was worked out at the FOC hearing, and that no force was used by Schlossberg to get anyone to agree to the terms placed on the record. She further testified that no one was rushed or hurried, and that nothing that occurred at the hearing was confusing to her. Plaintiff opined that the FOC's proposed order accurately detailed the agreement.

After a detailed review of the record of the FOC hearing, as well as the testimony from the parties, the trial court concluded that both plaintiff and defendant had voluntarily entered into an agreement at the November 4th FOC hearing. Thus, on October 20, 2010, the trial court signed the proposed custody order from the November 4th FOC hearing without engaging in a best interests analysis. However, that order initially determining custody left some issues for later resolution. Those issues included how the trial court would respond to plaintiff's having moved with the children to the Traverse City area, more than one hundred miles away from their former home in Eaton County, with no initial notice to defendant, and in violation of the court's interim orders. Thereafter, in a December 15, 2010, order, the trial court granted plaintiff's motion to maintain her new domicile with the children, but found her in contempt for taking that action before she had the trial court's permission. The trial court denied defendant's motion for a change of custody premised on that move, but ordered that, for the year to follow, plaintiff endure the greater commuting distance for purposes of exchanging parenting time with defendant, and further ordered that defendant receive five additional weekends of parenting time within a specified period, which would make up for time lost as an initial consequence of the move.

## II. ANALYSIS

On appeal, defendant argues that the trial court erred in granting plaintiff primary physical custody without determining whether an established custodial environment existed in the first instance, in failing to determine whether proper cause or change of circumstances warranted reconsideration of the custody arrangement, and in failing ever to apply the statutory best-interest factors set forth in MCL 722.23. Defendant additionally argues that the court erred in allowing a change of domicile without any consideration of the statutory best-interest factors set forth in MCL 722.31(4), and in denying defendant's own motion for primary physical custody that was filed mainly in response to that move.

### A. STANDARDS OF REVIEW[1]

[1] Plaintiff's response brief was submitted to this Court without regard for several Michigan Court Rules. The statement of facts had no citation to the record in violation of MCR 7.212(C)(6), the

All custody orders must be affirmed on appeal unless the trial court's factual findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court committed a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A trial court's general conduct of a trial is reviewed on appeal for an abuse of discretion. See *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990). This includes a trial court's decision on whether to conduct an evidentiary hearing. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004).

In child custody matters, an abuse of discretion occurs where the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Shulick v Richards*, 273 Mich App 320, 324-325; 729 NW2d 533 (2006) (preserving this extremely deferential formulation for cases decided under the Child Custody Act, MCL 777.21 *et seq.*), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), overruled on other grounds *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, a court abuses its discretion when it makes an error of law, *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996), or fails to exercise its discretion when properly asked to do so, *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998).

## B. CUSTODY AGREEMENT

Defendant, citing MCL 722.27(1)(c), argues that the trial court erred in issuing an order that reflected a change from what had been a joint custody arrangement without first identifying proper cause or a change in circumstances. We begin by noting that MCL 722.27(1)(c) provides that a custody order cannot be modified or amended absent "proper cause shown or because of change of circumstances." Thus, this subsection requires a *reassessment* of the best-interest factors in response to a motion to depart from an existing custody order; it does not apply in connection with a court's initial custody determination. *Thompson v Thompson*, 261 Mich App 353, 360-361; 683 NW2d 250 (2004). In this case, there were preliminary or interim orders involving custody, but "[b]y definition, a temporary custody agreement is only a *temporary* order pending further proceedings." *Id.* at 357. (Emphasis in the original.) Accordingly, a temporary custody order is not an initial or "new" order for purposes of MCL 722.27(1)(c). *Id.* at 361-362. Because the order of October 20, 2010, was an initial custody determination, the trial court did not err for failing to determine the existence of proper cause or change of circumstances in connection with that order.

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index of authorities was apparently duplicated from defendant's brief, and the only case cited by plaintiff was *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976), a nonbinding New Jersey case that has been replaced by statute. Although plaintiff submitted a revised brief, the first brief's mistakes were glaring and beyond what should be filed with this Court. We strongly advise plaintiff's counsel to review the court rules before submitting another brief to this Court.

However, where the children at issue have an established custodial environment, a court may order a change in that environment, including when making its initial custody determination, only upon a finding on clear and convincing evidence that the change is in the child's best interests. *Thompson*, 261 Mich App at 361, citing MCL 722.27(1)(c). Defendant argues that the trial court erred in concluding that the parties had entered into an agreement at the November 4th FOC hearing. Additionally, defendant challenges the changing of joint physical custody to sole physical custody to plaintiff without first determining the existence of an established custodial environment, and then applying the statutory custody factors.

Generally, when determining child custody, the trial court must consider and articulate its findings and conclusions regarding each best-interest factor. See *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). A court inquiring into a child's best interests must consider the factors set forth in MCL 722.23. See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Further, while the trial court may encourage parents to reach agreements regarding child custody, it may not "blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000).

However, if the parties have agreed to a custody arrangement, the court need not "conduct a hearing or otherwise engage in intensive fact-finding." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). Rather, in that situation, the court need only "satisfy itself concerning the best interests of the children." *Id*. at 192-193. "When the court signs the order, it indicates that it has done so[,]" because "[a] judge signs an order only after profound deliberation and in the exercise of the judge's traditional broad discretion." *Id.* at 193. Accordingly, the trial court's acceptance of the parties' agreement concerning custody signals the court's determination that the agreed-upon arrangement is in the child's best interests. See also *Koron v Melendy*, 207 Mich App 188, 192-193; 523 NW2d 870 (1994) ("Implicit in the court's acceptance of the parties' agreement is its determination that the arrangement is in the child's best interest."). In this case, although the trial court signed the order, we cannot say from the record that the trial court considered whether the custodial arrangement was in the children's best interests.

To begin, we note that a review of the November 4th FOC proceeding confirms the trial court's findings, including defendant's eventual assent to plaintiff's assuming primary physical custody of the children. Defendant expressed no concern when the referee stated his intention to prepare an order, or the referee's admonishment that "at this point you couldn't object because you change your mind or anything else." As the hearing concluded, plaintiff's attorney acknowledged that defendant had some grievances in connection with earlier FOC proceedings, but stated, "regardless of any grievance or anything else, there's an agreement independent of that that's been reached on the record today that controls this case going forward." The hearing referee promptly agreed, and defendant confirmed that he had a grievance without disputing that he also had an agreement. In fact, the hearing referee asked defendant, "Dad, now with everything now that we've said, if we prepare an order, will you agree to the entry of this order?" To which defendant replied, "[c]an you read it back to me again, so that I'm clear on what it is?" Then, the following conversation occurred:

*The Referee*: Sure. Yeah, I'll be happy to. It's going to be joint legal custody. Physical custody to Mom. The schedule is going to be the same as it is in the recommended order by the Fried of Court, except that the transition is only going to be for the younger child until the youngest child is two and a half years of age.

* * *

[The schedule will] be Thursday through Sunday. However, if Mom opts to have the child stay an extra night due to her schedule, then the child can spend an extra night even though the paternal grandmother is not involved. However, if the paternal grandmother is involved during the parenting time, then you'll have the same schedule with all the kids, you know, with the youngest as with the rest.

* * *

[The paternal grandmother being involved means the children would be] [s]taying at the paternal grandmother's home. Dad will have one week summer parenting time. He had to notify Mom and the Friend of Court in writing by May 1st of each year what weekend he has. Mom has a – apparently both parties have a family reunion, and that will be – the parties will work together to make sure that those family reunions occur without hindrance by the scheduling of the parenting time. The children will be free to contact each other while in the home of the other party by phone. That the parties will be free to contact the children at any time on reasonable frequency and duration. That there's no disparagement of either party, or their significant third others will not disparage the other party in any way. There will be zero tolerance of that. The phone calls will be zero tolerance. They should be free to communicate with no negativity. Spring break will be split each year mathematically by the number of days off from school. We'll say that in even years Dad has the first week. In odd year, Mom has the first half, I mean. Mom has the first half. So, that way, we'll know who has the first half of spring break each year. I'll put that in the order, so that way there will be no – or as you otherwise can agree. You might swap them, but – the parenting time exchange will be pursuant to paragraph four of the proposed order that Mr. Abood sent to Dad. I'll make a copy of that today for both parties. That – let's see. It looks like – that for 2009 and all subsequent tax years, pending the further order of the Court, Mom will have the deduction exemptions for the minor children. I think that covers it. And the uninsured medical – uninsured meds will be pursuant to whatever the last recommendation is.

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The tribal money to Mom to be utilized for the benefit of the children pending the further order of the Court. I think that covers it.

*Mr. Abood*: Is that agreeable to you, Jessica?

*Ms. Sprague*: Yes.

*The Referee*: Dad?

*Mr. McMillan*: Yes.

*The Referee*: Alright. I'll get you both an order.

In light of defendant's agreement to this custodial arrangement and his lack of direct challenges to the trial court's particularized findings concerning what went on at the FOC proceeding, the trial court did not err in concluding that defendant had entered an agreement to which he might be bound. MCL 722.28; MCR 2.507(G).

Despite this conclusion, we find that the record lacks any evidence or suggestion that the trial court satisfied itself that the parties' agreement would operate in furtherance of the children's best interests. *Harvey*, 470 Mich at 192-193. Although the parties reached an agreement, they "cannot stipulate to circumvent the authority of the circuit court in determining the custody of the children. In making its determination, the court must consider the best interests of the children." *Id*. at 194. This is because the Child Custody Act "makes clear that the best interests of the child control the resolution of a custody dispute between parents[.]" *Id*. at 192. It "impose[s] on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child." *Id*. The record presented to us is void of any evidence that the trial court considered whether the parties' agreement was in the best interests of the children before it signed the order. To the contrary, the trial court was so focused on determining whether the parties' had reached an agreement, that it refused several requests by both parties to present evidence regarding the best-interest factors. Indeed, had the record been silent on the issue, and the court signed the order revealing its deliberation and approval of the arrangement, we may have affirmed under *Harvey's* rationale. However, as noted above, the record shows that the trial court *refused* to consider any evidence regarding the children's best interests, and in light of the continuous failure to reach a harmonious agreement, we are compelled to remand for the trial court to determine if the parties' November 4th agreement was in the children's best interests.[2]

C. CHANGE OF DOMICILE/CUSTODY

Defendant also argues that the trial court erred in allowing a change of domicile without applying the relevant statutory criteria, and erred in denying his motion for change of custody. We reject this argument for three reasons. First, as the trial court found, the parties agreed to this arrangement, and at the time of the agreement plaintiff already had moved to the Traverse City area, which was the primary basis for both motions. Second, the trial court addressed plaintiff's flagrant contempt of court and responded with sanctions less harsh than outright denying the move, or changing custody from plaintiff to defendant. In particular, the court ordered that, for the year to follow, the drop-off location for the children would require a longer drive for plaintiff

[2] This does not necessarily require a full evidentiary hearing, as *Harvey* makes clear. However, under these circumstances the court should at minimum allow written submissions and any relevant exhibits to help guide its decision on this issue.

than for defendant, and that defendant would receive make-up parenting time. Third, to the extent plaintiff's move impacts the decision whether the agreement is in the children's best interests, that fact can be considered by the trial court on remand. For these reasons, defendant has failed to show that the trial court abused its discretion in how it responded to defendant's motion for change of domicile and motion to change custody.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

No costs to either party, neither having prevailed in full. MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray