STATE OF MICHIGAN

COURT OF APPEALS

SEANN E. WILLSON CARR, Plaintiff-Appellee,	UNPUBLISHED July 3, 2012
v	No. 308794 Shiawassee Circuit Court Family Division
JOHN A. CARR, Defendant-Appellant.	LC No. 09-008241-DM

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right an order denying a change of custody and modifying parenting time in this child custody action. For the reasons set forth in this opinion, we reverse and remand the matter to the trial court for additional proceedings consistent with this opinion.

Defendant first contends that the trial court erred in relying on a study or studies that were not introduced as evidence. "Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact 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." *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008). "Clear legal error exists when the trial court incorrectly chooses, interprets, or applies the law." *In re AP*, 283 Mich App 574, 590; 770 NW2d 403 (2009). "[U]pon a finding of error, appellate courts should remand to the trial court unless the error was harmless." *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994).

"A court must base its decision on testimony given in open court, not extrajudicial information." *Gubin v Lodisev*, 197 Mich App 84, 86; 494 NW2d 782 (1992). In making its findings relative to the issues presented in this appeal, the trial court stated: "I'm also a big believer in the study that kids should be wake up [sic] in his [sic] own bed and that's why I ruled the way I did on the parenting time." As defendant argues, there was no study introduced as evidence at the hearing and no witness testified regarding the findings of any study. Although it is not clear that the trial court relied on an actual study, based on this statement, it appears that at a minimum, the trial court relied on a belief, idea, or theory that children should wake up in their own beds. There was nothing in the record evidence to support this conclusion. Therefore, as

defendant argues, he was not given an opportunity to challenge this study or theory, or argue whether it applied to this case.

Plaintiff argues that the trial court made this statement after making its findings and did not indicate that it relied on this study, and that the trial court's findings were based on evidence in the record, which supported its findings. Similarly, plaintiff argues that this case is distinguishable from *Gubin*, the trial court based its decision on testimony given at the hearing, and defendant only speculates that the judge's comments influenced its decision. Although the trial court made this statement after making its findings, it explicitly stated that it "ruled the way [it] did" because of its belief in the study. Thus, it is not mere speculation that the study influenced the trial court's decision.

By referencing and then relying on a study not introduced into evidence or part of the record, the trial court committed "clear legal error," *Berger*, 277 Mich App at 716, in relying on this "extrajudicial information," *Gubin*, 197 Mich App at 86. The trial court's statement that it "ruled the way [it] did" because of its belief in the study indicates that the error was not harmless and that the error affected the outcome. Whether defendant should receive additional overnights was one of the main issues at the hearing, hence, the trial court's error is "a clear legal error on a major issue." *Berger*, 277 Mich App at 716. See also *In re AP*, 283 Mich App at 590. Because this error was not harmless, we remand to the trial court. See *Fletcher*, 447 Mich at 882.

Defendant contends that the trial court erred in finding an established custodial environment with plaintiff prior to hearing evidence and then requiring defendant to show by clear and convincing evidence that his proposed parenting time adjustment was in the child's best interest.

The trial court can only modify a previous order or judgment for proper cause or change of circumstances. *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010).[1] Therefore, a party seeking to change parenting time must establish proper cause or change of circumstances. See *id.* The definitions of proper cause and change of circumstances are "more expansive" with regard to parenting time determinations that do not alter the established custodial environment. *Id.* at 27-30.

> When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment. The established custodial environment is the environment in which "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified. If the

[1] "The term '"c]hild-custody determination" means a judgment, decree, or other court order providing for legal custody, physical custody, *or parenting time* with respect to a child.'" *Shade*, 291 Mich App at 22, quoting MCL 722.1102(c) (emphasis in *Shade*).

> required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed. The court may not "'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.'" [*Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010) (citations omitted).]

"[I]f the proposed change would *not* modify the established custodial environment of the child, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Id.* at 93.[2] "Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Shade*, 291 Mich App at 31.

Defendant sought to modify the parenting time schedule.[3] Defendant requested the trial court adopt the schedule proposed by Crescent Norman, the Friend of the Court investigator. The trial court found proper cause to hear the motion to change parenting time and defendant does not dispute this finding on appeal. The trial court was then required to consider whether the proposed change would have modified the established custodial environment in order to determine the applicable burden on defendant, the parent proposing the change, to show that the proposed change was in the child's best interest. See *Pierron*, 486 Mich at 85-86, 92-93.

The trial court found an established custodial environment with plaintiff and found that the burden was clear and convincing evidence. However, the trial court made this finding before hearing any evidence and did not explain why an established custodial environment existed with plaintiff and not defendant. Hence, the trial court failed to articulate any findings regarding whether the child looked to plaintiff for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). The trial court did not even consider this definition. The trial court also failed to address whether an established custodial environment existed with defendant.

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[2] "[U]nder those circumstances, although the trial court must determine whether each of the best-interest factors applies, if a factor does not apply, the trial court need not address it any further." *Pierron*, 486 Mich at 93.

[3] Defendant's motion suggests that he also sought a hearing regarding custody and the trial court's order indicates that it denied defendant's motion to change custody. However, at the hearing, defendant argued that he was not seeking to change custody. Therefore, we view defendant's motion as one to modify parenting time. However, plaintiff argues that defendant was seeking to change the established custodial environment. In plaintiff's motion, she sought both a change of custody and to modify parenting time to a schedule giving defendant parenting time only on alternate weekends. However, at the hearing, she proposed a schedule giving defendant additional parenting time in the evening on Monday and Wednesday. Her motion was denied and is not at issue on appeal.

Accordingly, although the trial court did state that an established custodial environment existed with plaintiff, because the trial court failed to rely on any evidence in reaching this conclusion, did not explain its findings, and did not consider whether an established custodial environment also existed with defendant, it committed "clear legal error" that was not "harmless" and we must therefore remand, *Kessler*, 295 Mich App at 62, as this Court is precluded from making a de novo determination as to whether an established custodial environment existed with plaintiff, defendant, or both. *Id.*

The trial court also failed to "consider whether the proposed change would modify the established custodial environment." *Pierron*, 486 Mich at 85. Rather, the trial court simply stated that the burden was clear and convincing evidence. The trial court did not specify who had the burden, although defendant acknowledged in closing argument that the court had placed the burden on him. If, however, defendant's proposed change would not have altered the established custodial environment, then the burden would have been a preponderance of the evidence. See *id.* at 93. The parenting time schedule proposed by defendant would have given defendant parenting time every other weekend with Sunday overnight, Thursday overnight on the off weeks, and Monday overnight. Plaintiff argues that because defendant's proposed change would have altered the established custodial environment, the trial court properly applied the clear and convincing evidence standard. Without a determination whether an established custodial environment existed with plaintiff, defendant, or both, we cannot determine whether the established custodial environment would have changed.

Defendant also contends that the trial court erred in denying his request to modify parenting time. The trial court considered the best interest factors and apparently found that defendant's proposed schedule was not in the child's best interest, as it adopted a different schedule giving defendant less time than he proposed. Plaintiff argues that the trial court correctly applied the law, its findings should be affirmed because they were not against the great weight of the evidence, and it did not commit clear legal error or abuse its discretion. However, as discussed, the trial court considered the best interest factors without making the requisite findings regarding an established custodial environment and whether defendant's proposed change would alter the established custodial environment. As a result, the trial court may have applied the wrong burden in considering the best interest factors. Therefore, we remand for the trial court to making findings regarding an established custodial environment, whether defendant's proposed change would alter the established custodial environment, and to apply the best interest factors under the proper standard.

Finally, defendant contends that the trial court erred in changing the established custodial environment. Defendant argues that the trial court's modification of the parenting time schedule had the effect of changing the established custodial environment. Instead of defendant's proposed parenting time schedule, the trial court adopted a schedule that gave defendant parenting time every other weekend with Sunday overnight, and Monday and Wednesday after school until 7:15 p.m. Defendant contends that this changed custody from "joint physical custody" to "primary physical custody" with plaintiff. Defendant further argues that because the change altered his established custodial environment, plaintiff had the burden of showing that the change was in the child's best interest by clear and convincing evidence. Plaintiff argues that the trial court's modification of the parenting time schedule did not change the established custodial environment. According to plaintiff, the trial court's order increased defendant's parenting time

and did not modify legal or physical custody. Plaintiff argues that because the trial court's order did not alter the established custodial environment, plaintiff did not have a higher burden. Given the lack of findings regarding the established custodial environment, we cannot determine whether the trial court's change had the effect of changing the established custodial environment or whether the trial court applied the proper standard.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded to either party. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Peter D. O'Connell
/s/ Michael J. Talbot