# STATE OF MICHIGAN

# COURT OF APPEALS

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| TAMMY A. HAGER,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>July 2, 2013 |
| v | No. 314104<br>Iosco Circuit Court<br>Family Division |
| DEREK T. DIEHL,<br><br>Defendant-Appellee. | LC No. 09-004781-DP |

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

When asked by dueling parents to decide the custody of their five-year-old daughter, the circuit court ordered the child to remain in her father's care during the school week and attend class in his community. The mother, upset by the loss of her alternating days of parenting time, challenges the lower court's decision. The circuit court relied on the evidence and made tough but necessary decisions to support the best interests of this child. We affirm.

## I. BACKGROUND

Plaintiff mother and defendant father were never married. They share one daughter, D, who was born on June 8, 2007. The parties separated while the mother was pregnant and she put the name of another boyfriend on D's birth certificate. When D was 18 months old, the parties reconnected, entered a consent filiation order, and resided together for two years while caring for their child. The parties again parted ways and they enjoyed joint custody with parenting time on alternating days. This situation worked until the child was ready to begin kindergarten. The parents live in neighboring townships—the mother in Tawas and the father in Hale. D attended a public preschool program in Hale. For kindergarten, however, the parents each enrolled D for school in their separate districts. The parties were unable to resolve their disagreements about D's education and the child was forced to attend kindergarten in both school districts on alternating days.

On October 31, 2012, the circuit court conducted a hearing on the parties' cross motions for a change in the parenting time schedule,[1] with each seeking parenting time during the school week so D could attend classes in the parent's local district. The court found that the child had an established custodial environment with both parents. In order to change the parenting time schedule, the court instructed that the successful party would have to present clear and convincing evidence that the change was in the child's best interests. After hearing a full day of evidence, the court found the parties equal in relation to the majority of the statutory best interest factors. Regarding factors (b) and (h) pertaining to the child's education, the court found that the evidence weighed in the father's favor. The court therefore granted the father's motion for a change in the parenting time schedule, continuing joint custody with the father having parenting time during the school week. This appeal followed.

## II. LEGAL STANDARDS

Under the Child Custody Act, MCL 722.21 *et seq.*, parents with joint custody have shared authority to make important decisions for their children, such as where their child will attend school. MCL 722.26a(7)(b). When the parents reach an impasse, the court may intervene and "resolv[e] the issue in the best interests of the child." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The court must first answer a gateway question: whether the moving party has "establish[ed], by a preponderance of the evidence, that either proper cause or a change of circumstances exist . . . ." *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008), citing MCL 722.27(1)(c), and *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). This is required when a requested change in parenting time would affect the child's established custodial environment. *Powery*, 278 Mich App at 528.

The court must naturally then determine "whether the proposed change would modify the established custodial environment." *Pierron*, 486 Mich at 85. "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." MCL 722.27(1)(c).

> 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. *Brown v*

[1] The parties incorrectly titled their cross motions as involving a change in "custody." The parties had "joint custody" before they filed their motions and would continue to have "joint custody" regardless of which party's motion was granted by the court. See MCL 722.26a(7)(a) (defining what courts colloquially refer to as "joint physical custody" although that term is not used in the statute: "'joint custody' means an order of the court . . . [t]hat the child shall reside alternately for specific periods with each of the parents"). Accordingly, the parties actually sought to modify the parenting time schedule to allow D to attend a single school. See MCL 722.27(1)(b) (allowing the court to "[p]rovide for reasonable parenting time of the child"), MCL 722.27(1)(c) (allowing the court to "[m]odify or amend its previous [parenting time] judgments and orders"), and MCL 722.27a (governing the allotment of parenting time).

> *Loveman*, 260 Mich App 576, 595-596; 680 NW2d 432 (2004). If the 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. See *id.* 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.'" *Id.* at 585, quoting MCL 722.27(1)(c). [*Pierron*, 486 Mich at 86.]

The factors relevant to the best interests of the child under the Child Custody Act are enumerated in MCL 722.23, which provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Our review of a circuit court's custody or parenting time decision is well settled. We must affirm "all orders and judgments of the circuit court" under the Child Custody Act "unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error." MCL 722.28; *Pierron*, 486 Mich at 85. Our review is thereby limited:

> Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision is []palpably and grossly violative of fact and logic[.] Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. [*Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011) (citations omitted).]

## III. ANALYSIS

The circuit court did not use the magic words "proper cause" or "change in circumstances" when opening the gate to consider the parties' motions to alter the parenting time schedule. See MCL 722.27(1)(c). The parties impliedly agreed upon such a condition, however, in filing competing motions to change "custody" to facilitate D's attendance at a single school for kindergarten and subsequent grades. The circuit court accepted this ground as proper cause to reconsider the standing parenting time order. Given the stress placed on the child from being shuffled between two learning environments, the court's judgment was not in error.

Plaintiff mother complains that the circuit court did not need to alter the parties' parenting time arrangement and change the child's established custodial environment to effectuate a judgment regarding the child's schooling. Rather, she claims, as the parties live only 20 minutes apart, the court could have ordered the child's attendance at one school and permitted the parties to continue parenting time on alternating days. This is contrary to the position taken by the mother in the circuit court. Plaintiff mother's motion specifically sought for D "to be with [her] during the week for school, and every other weekend." The mother sought a change in the child's established custodial environment and cannot complain that the court ordered just that.

We also find no error in the circuit court's consideration of the statutory best interest factors. The circuit court found the parties equal in relation to the majority of the statutory factors. The court found that factor (k), domestic violence, slightly favored the mother. The court made this ruling because, on September 5, 2012, D told each parent a different story regarding her feelings about the first day of school. Defendant father had parenting time with D that evening and spanked the child after deeming she had told one of the parents a lie. Plaintiff mother reacted in a manner "that wasn't very appropriate" by instigating a Child Protective Services investigation. The court disapproved of both parties' actions but found the mother slightly less culpable. Plaintiff mother argues that the court should have given this factor greater weight in rendering its judgment. However, "the trial court has discretion to accord differing

weight to the best-interest factors." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

In relation to factor (b) ("The capacity and disposition of the parties involved to give the child love, affection, and guidance *and to continue the education* and raising of the child in his or her religion or creed, if any") and factor (h) ("The home, school, and community record of the child"), the circuit court found as follows:

> The child does well in both schools. She's been in Hale longer and has more friends there.
>
> The dad, to me, is more concerned about the education. She . . . was enrolled in preschool. He attends all school events. Almost daily contact. Classes are small. Technology is there. The elementary is meeting the standards. He's more active in the home education through computer, flashcards and reading.
>
> Mom didn't attend any preschool events. There was a conflict between her testimony about her wanting the child to be in preschool. She put the child, on school days, either with her parents or kept her home, even though the dad offered to pick her up and drop her off.
>
> As I mentioned the other day, the top of the class in most schools does equally well no matter where they are. Everything in the child's history that was presented indicates that she's a very academic child. With two supportive parents she'll probably remain in the top of the class and do very well. Tawas has achievers out of their top of the class. Hale has its achievers. I do find that dad's learning environment and his home is better, and that factor goes to dad, as well as the Factor [h].

The evidence supports the circuit court's consideration of these factors. Although plaintiff mother testified at the hearing that she had enrolled D in preschool in Tawas, she admitted that she did not follow through and take D to classes. The mother claimed to understand the value of preschool but took no interest in D's education while attending the Hale "Head Start" program. The father also testified to engaging in more activities to assist his daughter's academic progress.

Because D had attended preschool in Hale, she was already familiar with the majority of her kindergarten classmates at that school. D had fewer social connections in Tawas. Moreover, despite evidence that the Hale school system historically had problems, defendant father presented evidence that the system was improving under the leadership of a new superintendent. The Hale elementary school had greater technological resources than Tawas and much smaller class sizes.

The circuit court also found certain miscellaneous factors in defendant father's favor. The court considered that plaintiff mother kept defendant father from his child for over a year, waivered on the stand when asked about her older son's drug use, failed to adequately explain the sleeping arrangements in her small home, and kept D from playing soccer because "she

didn't want to have the weekend confrontation." The evidence also supported these conclusions. Although plaintiff mother testified that she never hid D's paternity from defendant father and instigated the father-daughter reunion, defendant father testified to the contrary. Such credibility determinations are left to the circuit court. *Berger*, 277 Mich App at 705. Plaintiff mother initially denied drug use by her 19-year-old son who lived in the home with her and D. Upon further questioning, however, the mother finally admitted that her son abused marijuana and the father testified that he once caught the older son smoking marijuana while he was babysitting D. Plaintiff mother admitted on the stand that D and her older son shared a bedroom but then inexplicably claimed that D slept with her and her son slept on the couch. The court's consideration of these factors was not against the great weight of this evidence.

Ultimately, the court ruled, "So the school system's going to be Hale. The alternating weekends with mom. . . . . The only thing that's being changed is the parenting time during the school week. Monday through Friday will be with dad." The court acted within its sound discretion in rendering this award. Given plaintiff mother's attitude toward the child's education, the court could reasonably determine that D's best interests would be served by remaining with her father during the school week. Absent any error described in MCL 722.28, we must affirm the circuit court's decision.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens