STATE OF MICHIGAN

COURT OF APPEALS

SEANN E. WILLSON CARR, Plaintiff/Counterdefendant - Appellee,	UNPUBLISHED July 16, 2013
v	No. 315011 Shiawassee Circuit Court Family Division
JOHN A. CARR, Defendant/Counterplaintiff- Appellant.	LC No. 09-008241-DM

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order modifying parenting time in this custody dispute concerning the parties' minor son. Because the trial court did not fail to determine whether an established custodial environment existed with defendant, the court's determination that an established custodial environment existed solely with plaintiff was not against the great weight of the evidence, and the new parenting time schedule did not result in a change of custody, we affirm.

I. FACTS

The parties separated in 2009 and divorced in 2010. The judgment of divorce awarded the parties joint legal and physical custody of their minor son and specified that the child's "primary residence" was to be with plaintiff. Defendant was awarded parenting time on alternate weekends from Friday at 6:00 p.m. to Monday at 6:00 p.m., every Wednesday from 9:00 a.m. to 5:00 p.m., and on the "off Monday" from 12:30 p.m., or 11:30 a.m. if defendant picked the child up from preschool, to 6:00 p.m.

According to defendant, he adjusted his work schedule so that he could spend all of his time with the child when the child was in his care. Plaintiff entrusted a nanny to care for the child in her home while she was at work. Plaintiff initially stayed in the marital home, but moved to East Lansing in December 2010. Defendant purchased a home in Flushing in December 2009, and a condominium in East Lansing in July 2011, the latter to facilitate his relationship with the child.

Both parties sought to modify the parenting arrangement when the child began school. Plaintiff filed a motion for sole legal custody of the child and to reduce defendant's parenting time, and defendant sought a substantial increase in his overnight parenting time. Following a hearing on the motions in October 2011, the trial court determined that the child had an established custodial environment with plaintiff and left the existing parenting time schedule in place but for extending defendant's parenting time from 6:00 p.m. to 7:15 p.m. on Monday and Wednesday evenings. The court denied plaintiff's motion for sole legal custody.

On appeal, this Court remanded this case to the trial court for further proceedings, among other reasons, because the court decided the question of the child's established custodial environment without hearing evidence, failed to consider whether an established custodial environment existed with defendant, and failed to consider whether a modification of parenting time effected a change in the child's established custodial environment. *Carr v Carr*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2012 (Docket No. 308794). On remand, the trial court held a two-day evidentiary hearing, following which it entered an order declaring that "the established custodial environment was with the Plaintiff in October of 2011," and continuing the terms of its previous order modifying the parenting time schedule along with "any previous orders of this Court, not inconsistent herewith."

On appeal, defendant argues that the trial court again failed to consider whether an established custodial environment existed with him as well as with plaintiff, that the evidence clearly indicated that an established custodial environment existed with him, and that the modification of the parenting time schedule improperly effected a change of custody from joint physical custody to primary physical custody with plaintiff without requiring plaintiff to present clear and convincing evidence that the change was in the child's best interests.

II. STANDARDS OF REVIEW

"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). Further, whether a trial court followed this Court's directives on remand is a question of law, which this Court reviews de novo. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

III. ESTABLISHED CUSTODIAL ENVIRONMENT

When an established custodial environment exists, custody may not be changed unless clear and convincing evidence establishes that a change is in the child's best interests. *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996). Where no established custodial environment exists, a court may modify custody on the basis of a mere preponderance of the evidence. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). An established custodial environment may exist with more than one parent. *Rittershaus v Rittershaus*, 273 Mich App

462, 471; 730 NW2d 262 (2007). Where there exists a joint established custodial environment, custody may not be modified absent clear and convincing evidence that modification is in the child's best interests. *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008).

Defendant concedes that an established custodial environment existed with plaintiff, but asserts that an established custodial environment also existed with him and argues that the trial court erred by failing to address that possibility as this Court directed in its previous opinion. Following the evidentiary hearing on remand, the trial court stated:

> I still have to find that there is an established custodial environment with the plaintiff, Mother, and the reasoning, as I'm going to try to go through at this point. One is: [The] parties have agreed that the Mother was the primary residence and the primary child care giver for the child, along with a nanny . . . .
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> [I]t's testified to and agreed by both that the Mother is a lot more nurturing and does a lot more of the care giving.
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> [Defendant] agrees that [plaintiff's] been the primary care giver, both during the marriage and since the parties separated, along with the nanny.

The trial court also regarded as instructive the statutory best-interest factors set forth in MCL 722.23 for deciding child custody disputes. The court determined that the parties were equal with respect to all but two of the factors that the court deemed applicable. Regarding the length of time that the child had lived in a stable and satisfactory environment, see MCL 722.23(d), the court determined that the factor favored plaintiff. The court also determined that plaintiff had a "slight" advantage with respect to the permanence of the family unit. See MCL 722.23(e). The court then stated that, in light of plaintiff's advantage on those two factors, and for the other reasons explained on the record, "the Court has to find that Mother does have the established custodial environment."

Considering this Court's previously expressed concern regarding the trial court's initial failure to consider whether the child had an established custodial environment with defendant, it would have been preferable for the trial court to explicitly address that concern on remand. But, we interpret the trial court's statements as reflecting its determinations that an established custodial environment existed with plaintiff *and* that an established custodial environment did not exist with defendant. In particular, the court noted that the judgment of divorce provided for the child's primary residence with plaintiff and cited evidence that plaintiff had always been the more nurturing parent and the primary caregiver. The trial court's statements clearly indicate that the court had both parents in mind when it made its determinations. In addition, we note that there was no protestation below, either upon receiving the court's findings or in a post-hearing motion, that the court failed to consider whether an established custodial environment existed with defendant.

Defendant also fails to establish that the trial court's determinations were against the great weight of the evidence. Whether an established custodial environment exists is a question of fact. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995).

> 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. [MCL 722.27(1)(c).]

In *Baker*, 411 Mich at 579-580, our Supreme Court applied this statutory language, stating:

> Such an environment depended . . . upon a custodial relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.

The existence of a parenting time order does not itself establish a child's custodial environment. *Pierron v Pierron*, 486 Mich 81, 87 n 3; 782 NW2d 480 (2010). "A custodial environment can be established as a result of a . . . custody order, in violation of a custody order, or in the absence of a custody order." *Berger*, 277 Mich App at 707.

Defendant characterizes his allotment of parenting time in the judgment of divorce as 7 out of every 14 days, adding up to just over 60 of the child's waking hours every two weeks. Defendant suggests that, if one takes into account that he has endeavored to spend all of his parenting time with the child and that plaintiff has spent much of her parenting time at work and thus away from the child, the "actual parenting time that each party spent with the minor child while the child was awake was relatively similar." Plaintiff, in contrast, focuses on the apportionment of total time and overnights, calculating a 72 to 28 percent split favoring her, and notes that she has 11 overnights with the child every two weeks to defendant's three. Defendant also notes plaintiff's testimony that "when he's with his Father, there is a custodial environment there, and when he's with me, he has a custodial environment with me," but plaintiff contends that she immediately followed that testimony by stating, "[b]ut then his primary residence is with me, which has been the order all along." Plaintiff's testimony, considered in context, better reflected the divorce judgment's provision for joint physical custody but the child's primary residency with her.

Among the factual findings that the trial court recited, and that defendant does not refute, is that a Friend of the Court investigator testified in an earlier proceeding that the parties had admitted that plaintiff was the primary caregiver for the child both during the marriage and after the parties' separation. Defendant also agreed that plaintiff was the more nurturing parent. The trial court further observed that in the instant proceeding defendant testified that plaintiff had had the child the majority of the time since the parties' separation.

Defendant argues that plaintiff places too much emphasis on where the child sleeps and points out that a parent does not provide guidance or discipline to a child who is asleep. But also bearing on the question of the child's established custodial environment is to whom the child looks for "the necessities of life, and parental comfort," MCL 722.27(1)(c), and whether the parent-child relationship is "marked by qualities of security, stability and permanence." *Baker*,

411 Mich at 580. Where a child spends the great majority of his nights bears heavily on those considerations. Further, where a child sleeps is obviously indicative of where he begins and ends his days. In this case, more often than not and even on days that the child spends most of his waking hours with defendant, he begins and ends those days with plaintiff.

Defendant also argues that the trial court erred by deviating from the proper criteria for determining the existence of an established custodial environment and looking to the statutory factors for determining a child's best interests in a custody dispute. Defendant, however, cites no authority for the proposition that a court determining a child's established custodial environment may not treat the best-interest factors as instructive. In any event, the best-interest factors did not lead the court astray in this case because the court deemed some factors inapplicable, regarded the parties as equal regarding most factors, and the two factors regarding which the court determined that plaintiff had the advantage substantially mirrored the language in MCL 722.27(1)(c) directing courts to consider to whom the child looks for the provision of "the necessities of life, and parental comfort."

Defendant alternatively asserts that the trial court erred by finding that plaintiff had the advantage with respect to best-interest factors (d) and (e). Factor (d) pertains to "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity[,]" see MCL 722.23(d), and factor (e) examines "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes, see MCL 722.23(e). The fact that the child has always spent the great majority of his time and overnights with plaintiff supports the trial court's findings that factors (d) and (e) favor plaintiff. The testimony indicating that plaintiff was always the primary caregiver and the more nurturing parent also supported the court's findings.

Because we conclude that the trial court did in fact determine whether an established custodial environment existed with defendant, and the court's determination that the child's established custodial environment was solely with plaintiff was not contrary to the great weight of the evidence, we decline defendant's invitation to decide the question anew from the cold record on appeal. See *Kessler v Kessler*, 295 Mich App 54, 62; 811 NW2d 39 (2011).

IV. CHANGE OF ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant next argues that although the trial court's order maintained the status quo but for adding 2-½ hours to defendant's parenting time each week, the modification effectively resulted in a change of custody from joint physical custody to primary physical custody with plaintiff. Defendant notes that the child's schooling now accounts for much of the child's time while defendant previously spent all of his time with the child when the child was in defendant's care. Defendant again argues that plaintiff often left the child with a nanny while she was at work.

Defendant cites no authority for the proposition that the child's starting to spend his days at school constitutes a reduction of parenting time. Nor does he cite authority for the proposition that a parent effectively forfeits, or renders ineffectual, parenting time to the extent that the parent spends time at work or otherwise away from the child. At no point did the parties' parenting time schedule differentiate between time actually spent together and time that the child

was not with the parent. The trial court's orders left the parties free to adjust their personal and professional schedules as they wished. The court was not obliged to consider, let alone assume, that defendant would always spend all of his parenting time actually in the company of the child, or that plaintiff would always spend a substantial part of her parenting time at work while a nanny cared for the child. Nor do we accept the proposition that meaningful parenting time necessarily requires that the child and parent be physically together at all times. In fact, as this case demonstrates, school and work schedules make it impossible for a parent and child to be physically together at all times.

"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." *Pierron*, 486 Mich at 86. Because the modification of parenting time maintained the status quo but for increasing defendant's parenting time slightly, we reject defendant's argument that the modification effected a change in custody.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio