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STATE OF MICHIGAN

COURT OF APPEALS

NICOLE SATTLER,

Plaintiff-Appellee,

v

JAY TARJEFT,

Defendant-Appellant.

UNPUBLISHED
April 21, 2022

No. 358163
Wayne Circuit Court
Family Division
LC No. 13-154523-DS

NICOLE SATTLER,

Plaintiff-Appellee,

v

JAY TARJEFT,

Defendant-Appellant.

No. 358164
Wayne Circuit Court
Family Division
LC No. 20-105882-DS

Before: JANSEN, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

In each of these consolidated appeals,[1] defendant appeals as of right substantively identical orders awarding plaintiff full legal custody of the parties' two children and a favorable parenting-time schedule. For the reasons set forth below, we vacate the trial court order, and remand for further proceedings consistent with this opinion.

[1] *Sattler v Tarjeft*, unpublished order of the Court of Appeals, entered August 17, 2021 (Docket Nos. 358163 and 358164).

I. BACKGROUND

In February 2020, plaintiff moved to enforce and modify a 2015 custody order regarding the parties' eldest child, KT. Plaintiff explained that the parties reconciled for a short period, during which time plaintiff gave birth to the parties' second child, CT. After the parties separated again, they shared parenting time for both children under a slightly modified version of the court-ordered schedule for KT. Plaintiff was exercising parenting time Sunday through Tuesday, defendant was exercising parenting time Wednesday and Thursday, and the parties alternated weekend parenting time. Plaintiff complained that the locations of parenting-time exchanges and KT's school were unfairly favorable to defendant. Plaintiff further asserted that because of defendant's employment as a cross-country truck driver, defendant was rarely present during his parenting time and the children spent most of their time with their paternal grandparents or aunt. Among other requests, plaintiff asked the court to modify parenting time to give her an additional parenting-time day each week and include CT in the modified custody and parenting-time order. Plaintiff subsequently amended her motion to seek sole legal custody of both children.

After the trial court determined that it did not have jurisdiction over CT in lower court case number 13-154523-DS, plaintiff initiated the second action, lower court case number 20-105882-DS, by filing a complaint to establish custody, parenting time, and support for CT. The complaint requested that the 2020 case be consolidated with the 2013 case, and defendant agreed with the request. Although it does not appear that the matters were formally consolidated, they proceeded together for the remainder of the relevant procedural history. After hearing testimony over four days of evidentiary hearings, the trial court granted plaintiff's motion and awarded her sole legal custody of both children. Plaintiff was also awarded parenting time Sunday morning through Thursday morning during the school year, with defendant exercising parenting time Thursday afternoon through Sunday morning.[2]

II. STANDARDS OF REVIEW

In matters involving child custody, " '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.' " *Pennington v Pennington*, 329 Mich App 562, 569-570; 944 NW2d 131 (2019), quoting MCL 722.28. Factual findings, including the existence of proper cause or a change of circumstances, whether the children have one or more established custodial environments, and analysis of the statutory best-interest factors, are reviewed under the great weight of the evidence standard. *Pennington*, 329 Mich App at 570; *Marik v Marik*, 325 Mich App 353, 359; 925 NW2d 885 (2018). "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Pennington*, 329 Mich App at 570. "Discretionary rulings, including the ultimate award of custody and the award of parenting time, are reviewed for an abuse of discretion." *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014). "[A]n abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will,

[2] The trial court did not alter the summertime parenting-time schedule.

a defiance of judgment, or the exercise of passion or bias." *Yachcik v Yachcik*, 319 Mich App 24, 31; 900 NW2d 113 (2017) (quotation marks and citation omitted).

III. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

On appeal, defendant first argues that the trial court erred by finding proper cause and a change of circumstances to reconsider KT's custody and parenting time. We agree.

"As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests." *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). The trial court may not "revisit an existing custody decision and engage in a reconsideration of the statutory best-interest factors" unless the moving party demonstrates proper cause or a change of circumstance by a preponderance of the evidence. *Pennington*, 329 Mich App at 571. This Court's opinion in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), articulates the threshold requirements a party seeking a change of custody must satisfy:

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors.
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> . . . [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. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the 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. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Id*. at 512-514.]

The trial court found both proper cause and a change of circumstances of sufficient magnitude to reconsider KT's parenting time and legal custody, citing defendant's limited knowledge of what happened during his parenting time, limited availability to provide the children with guidance, the change in his employment that prompted the children to live with defendant's parents for a period of time, and several potentially dangerous activities the children engaged in that raised questions regarding defendant's judgment. The trial court erred in this regard.

Although the trial court emphasized at the evidentiary hearing that it was not holding defendant's employment against him, it appears from the opinion and order entered after the hearing that the court did just that. The court noted that defendant's job for a different trucking company with different hours was a "significant change since the last custody order," and that his schedule precluded defendant from providing KT with guidance as provided under factor (b) of MCL 722.23. The court noted that defendant took this job in the fall of 2019, and found that defendant's new job was "one of the reasons to consider a review of the best interest factors as it amounts to a proper cause and a change in circumstances." We disagree. Defendant cannot be faulted for maintaining a job and obtaining income. Like many other working parents, defendant relied on his family to provide childcare while defendant was at work. Initially, defendant dropped the children off at his parents' house before bedtime before defendant left for his overnight shift. After plaintiff raised issue with this arrangement, the children's bunkbeds were moved from the grandparents' home to defendant's, and defendant's sister moved in to defendant's home to be there with the children while defendant worked.[3] Additionally, defendant brought the children to work with him on occasion. This was not against the rules, and we find no safety concerns with the children accompanying defendant on his shifts. These were reasonable accommodations to suit the nature of defendant's job, and although his job changed since the previous 2015 custody order was entered, it does not establish proper cause or a change of circumstances sufficient to review the custody order pertaining to KT that was already in place.

Nor do we find the other circumstances listed by the trial court in its opinion and order to rise to the level of proper cause or a change in circumstances. The trial court noted that it was not illegal for children to ride on defendant's motorcycle, but still considered this cause to question defendant's judgment. The court was also concerned with the incident wherein KT put slime in the microwave, but took notice of the testimony at trial indicating that the paternal grandfather was home at the time, but outside when the incident occurred.

Thus, plaintiff did not meet her burden of proving by a preponderance of the evidence that proper cause or a change of circumstances existed to proceed to an analysis of whether plaintiff's proposed modification to KT's custody was in her best interests. *Lieberman*, 319 Mich App at 81. As such, the trial court's determination that proper cause or a change of circumstances existed was against the great weight of the evidence, *Pennington*, 329 Mich App at 570, and we vacate the trial court order modifying the custody and parenting time of KT. Because a finding of proper cause or change of circumstances is the initial step in modifying custody or parenting time, this conclusion renders analysis of defendant's remaining arguments on appeal unnecessary as it pertains to KT.[4]

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[3] We see no distinction between childcare provided by family in comparison to a daycare facility, babysitter, or before or after school provided care, which many working and single parents must rely on. Indeed, it is oftentimes preferable to have childcare provided by family or grandparents.

[4] As it pertains to the parties' other child, there was no current order entered for custody or parenting time because CT was born after the 2015 custody order was entered, and plaintiff filed for an initial custody determination. The court noted in its opinion and order that no threshold

IV. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant next argues that the trial court erred by concluding that the children had an established custodial environment with plaintiff and not with defendant. Given our conclusion regarding KT in the previous section, the remaining analysis pertains to CT only. We agree with defendant's contention that the trial court erred in concluding that an established custodial environment existed with plaintiff only.

"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." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). This determination "is a pivotal step in a custody battle because it dictates the applicable burden of proof." *Bofysil v Bofysil*, 332 Mich App 232, 243; 956 NW2d 544 (2020). "A child's 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.' " *Pennington*, 329 Mich App at 577, quoting MCL 722.27(1)(c). "An established custodial environment may exist in more than one home," and is not dependent on the nature or existence of a custody order. *Marik*, 325 Mich App at 361 (quotation marks and citation omitted).

The trial court found that, between the parties in this case, the children had an established custodial environment with plaintiff only. Defendant argues that the trial court erred in this regard because it ignored his strong relationship with the children and improperly punished him for being a working parent. According to defendant, this case is analogous to *Bofysil*, 332 Mich App at 243-244, wherein this Court concluded that the minor child had an established custodial environment with both parents because both were actively involved in the child's care, despite the fact that one parent worked outside the home. The Court explained:

> Both parties agreed that from AB's January 2016 birth until Sarah left the home with AB in the middle of June 2018, both parents shared in the care of AB. Although Bridget worked outside of the home, she arranged her schedule to maximize her time home during AB's waking hours. Even Sarah conceded that Bridget was usually the one to make lunch for the family and that the whole family often would be present when Bridget took on side jobs training dogs. AB clearly had a homelife in which both her parents provided for her care and needs. Although AB might have looked to her parents to fulfill different needs and likely understood at some level their distinct household roles, both provided her with "security, stability, and permanence." [*Id*.]

We agree that this passage from *Bofysil* supports defendant's position. Like Bridget, defendant selected his overnight work schedule because it allowed him to spend more time with

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hearing was held for CT's case because custody had not yet been established. Although not formally consolidated in the trial court, the cases were heard together, and the court entered nearly identical orders, and granted plaintiff full legal and primary physical custody of CT. As such, the remaining analysis of this opinion applies to CT only.

the children when they were awake and not in school. There was also evidence that defendant frequently took one of the children, primarily CT, with him to work. And when defendant was home, he cooked meals, helped with homework, and took the children to church on Sundays. Like many working parents, defendant relied on family members to provide childcare during his working hours. This does not detract from defendant's ability to nonetheless provide the children with "guidance, discipline, the necessities of life, and parental comfort," *Pennington*, 329 Mich App at 577, when he was home. Therefore, the trial court's finding that the children only had an established custodial environment with plaintiff was against the great weight of the evidence.

V. BEST-INTEREST FACTORS

Next, defendant challenges the trial court's findings regarding best-interest factors (b), (c), (d), (h), and (*l*).

Because the trial court erroneously concluded that an established custodial environment only existed with plaintiff, it applied the wrong burden of proof. When a proposed change in a child's custody would not modify the child's established custodial environment, as the trial court erroneously concluded here, the moving party must establish by a preponderance of the evidence that the change is in the child's best interests. *Bofysil*, 332 Mich App at 243. However, "[i]f a child has an established custodial environment with both parents, neither parent's custody may be disrupted absent clear and convincing evidence that the change is in the child's best interests." *Id*. This is the proper burden of proof to be applied in this case. Whether a change is in the child's best interests is guided by the statutory factors set forth in MCL 722.23. *Griffin v Griffin*, 323 Mich App 110, 119; 916 NW2d 292 (2018).

Best-interest factor (b) considers 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." MCL 722.23(b). The trial court observed that the parties both had the capacity and disposition to give the children love and affection and that defendant took the children to church, but found that factor (b) ultimately favored plaintiff because defendant lacked the capacity to provide proper guidance for the children. As explained in Part II, the trial court's reasoning regarding defendant's inability to guide KT was misguided. The same rationale applies to CT. Defendant's decision to work outside the home does not detract from his ability to give CT love, affection, and guidance, nor does defendant's decision to leave the children with family for childcare. See *Bofysil*, 332 Mich App at 246 ("The fact that the parties agreed before conceiving that one parent would stay at home to raise the child while the other would financially support the family does not equate with one parent loving the child more or having more affection for the child."). Thus, the trial court's finding that factor (b) favored plaintiff as to CT was against the great weight of the evidence. This factor favored both parties equally.

Best-interest factor (c) considers 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." MCL 722.23(c). The court found that this factor favored plaintiff because she was more attentive to the children's medical care and needs, while defendant had a history of being dismissive of what turned out to be serious medical conditions. Defendant complains that factor (c) should have favored him because plaintiff was financially dependent on her boyfriend and did not personally have the

capacity to provide for the children. Defendant's position lacks merit because best-interest factor (c) considers not only the parties' ability to provide for the children, but also their disposition or tendency to do so. While plaintiff was indeed financially dependent on her long-term boyfriend, there was no evidence that the children's material needs were not met in her care. To the contrary, plaintiff testified that she purchased school supplies and clothes for the children that were often not returned after defendant's parenting time. More importantly, plaintiff consistently recognized and sought treatment for the various medical conditions the children had throughout their lives.

However, the trial court's conclusion that factor (c) favors plaintiff was still against the great weight of the evidence. The court relied on the fact that defendant uses his family for childcare, stating, "The Court recognizes that the children's medical concerns are attended to by Defendant's mother during his parenting time." Again, we do not believe that defendant leaving his children with family for childcare while he is working detracts from defendant's ability to provide the children with food, clothing, or medical care. MCL 722.23(c). Indeed the court recognized that the children's health insurance is covered by defendant's employment. And there was no evidence that the children were not appropriately provided for during defendant's parenting time, whether or not he was present. Thus, the trial court's finding that factor (c) favored plaintiff as to CT was against the great weight of the evidence. This factor favored both parties equally.

Best-interest factor (d) considers the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). Defendant argues that the trial court erred by finding that this factor favored the parties equally and contends that it should have favored him because he owned the home he has been in since the 2015 consent order, while plaintiff moved four times and was living in her boyfriend's home. The trial court took these facts into consideration, but also found it noteworthy that plaintiff's frequent moves always improved the children's living situation, and that the children were actually living with defendant's parents during his parenting time for at least a year. Defendant takes issue with the trial court's characterization of the children's living arrangement, and we have discussed our disagreement with the trial court's sentiment that defendant's use of family for childcare was inappropriate. However, the trial court's reasons for assessing this factor equally were sound, and its finding was not against the great weight of the evidence.

Best-interest factor (h) considers the "home, school, and community record of the child." MCL 722.23(h). The trial court found that this factor favored plaintiff, reasoning that

> [KT] is doing well in school, in the fall she will begin middle school. [CT] was enrolled in day care by Defendant-Father, and then removed, as there was no agreement for him to be enrolled during the COVID-19 Pandemic.
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> Plaintiff wants the children to go to school out of her district, where they will both be near her home, making her drop off and pick-ups more manageable. She testified that [KT] could walk to school and be seen from the house, and since she stays home, she would be readily available for all of their school needs.
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> Defendant does not want things to change. He indicates that [KT] is thriving and has all of her friends at the current school. [KT] transitions to middle school in the fall and several classmates will follow. However, the Court takes

notice that he is never available during school hours or to drive the kids to school; instead, he is dependent on his mother and his sister.

We agree with defendant that the trial court's finding regarding this factor was contrary to the great weight of the evidence. The trial court's acceptance of plaintiff's reasons for wanting to change school districts failed to appreciate that every factor in MCL 722.23 must be focused on determining the children's best interests, while plaintiff's reasons were primarily motivated by her own convenience. Her only complaints regarding the Gibraltar schools were the distance she would be required to drive and the gap between the start and end time for each child's school. Again, these were issues of convenience, rather than the children's home, school, and community records. Because the great weight of the evidence demonstrated that KT had a positive record in the Gibraltar school district and CT did not have a significant record in either location, we conclude that the trial court erred by finding that this factor favored plaintiff.

Lastly, best-interest factor (*l*) permits the court to consider any other factor relevant to the particular dispute. MCL 722.23(*l*). Defendant takes issue with the trial court's opinion that he delegated his decision-making duties to his mother, and argues that his mother was only involved because plaintiff blocked his phone number and refused to communicate with him directly. Again, we cannot stress our opinion enough that defendant should not be faulted for using his mother as childcare so defendant could work and earn a living to support his children. The court also took into account defendant's monitoring of KT's social media usage and reliance on others for that purpose, as well as the dangerous activities he allowed the children to engage in. Although defendant does not address these issues, we do not find that they rise to the level of concern that the trial court gave them, and that this factor should not have favored either party.

VI. PARENTING TIME AND LEGAL CUSTODY

Based on our previous conclusions and on the record before us, we agree with defendant's argument that the trial court abused its discretion by granting plaintiff sole legal custody of CT and imposing the new parenting-time schedule.

Plaintiff failed to establish by clear and convincing evidence that it was in CT's best interests to award her sole legal custody and primary physical custody. Although best-interest findings are subject to harmless error review, see *Brown v Brown*, 332 Mich App 1, 26; 955 NW2d 515 (2020) (finding error regarding one factor harmless when remaining factors overwhelmingly supported decision), a majority of the factors favored both parties. The trial court's primary concern was defendant's alleged inability to provide necessary guidance. However, defendant's work schedule and family-provided childcare did not hinder his ability to provide guidance to his children, and he should not be punished for maintaining a steady job and income.

With respect to legal custody, the trial court concluded that plaintiff should have sole legal custody because defendant delegated his decision-making duties to others. Joint legal custody refers to the arrangement in which parents "share decision-making authority as to the important decisions affecting the welfare of the child." *Dailey*, 291 Mich App at 670; MCL 722.26a(7)(b). The trial court's belief that defendant delegated his decision-making authority did not focus on the proper question, i.e., whether the parties were able to cooperate and generally agree on important decisions affecting the children's welfare. *Bofysil*, 332 Mich App at 249.

As this Court recently reiterated:

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making and discipline—and they must be willing to cooperate with each other in joint decision-making. If two equally capable parents whose . . . relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. [*Id.*, quoting *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982).]

Here, the evidence demonstrated that the parties disagreed on important decisions like when to seek medical attention for the children and, more recently, the children's schooling. The latter issue remained an ongoing problem, with each party choosing to act unilaterally and deal with the consequences later. CT's preschool enrollment is a prime example of this practice. Defendant enrolled CT in preschool twice—the first time, defendant did so without consulting plaintiff at all, and the second time, he did so even after plaintiff communicated her objection. In each instance, CT was only able to attend preschool for a short period before being abruptly removed from the program. The parties were also unable to agree on whether KT should attend school in person or virtually, though this disagreement fortunately did not result in the same level of upheaval that CT had to endure.

However, based on our conclusion that plaintiff failed to meet her burden that sole custody was in CT's best interests by clear and convincing evidence, we conclude that the trial court abused its discretion by awarding her sole legal custody.

Defendant argues that the final parenting-time schedule selected by the trial court constituted an abuse of discretion because it gave plaintiff parenting time during most school days and on Sundays, even though defendant did not work weekday afternoons or Sundays. We agree. As with all other custody questions, the child's best interests is the controlling consideration in establishing a parenting-time schedule. *Luna v Regnier*, 326 Mich App 173, 179; 930 NW2d 410 (2018). Because there is a statutory presumption that a child's best interests are fostered by having a strong relationship with both parents, "parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." *Id.*, quoting MCL 722.27a(1) (quotation marks omitted).

The trial court gave plaintiff parenting time from Sunday morning until Thursday after school during the school year. During the summer, plaintiff would exercise parenting time Sunday evening through Tuesday evening and every other weekend. Given the fact that most of the best interest factors favored both parties, and defendant made it clear that Sunday was his only day off, we conclude that the trial court abused its discretion in imposing this parenting-time schedule.

VII. CONCLUSION

The trial court order awarding plaintiff sole legal custody and parenting time in regards to KT is vacated because the trial court erred in determining that proper cause or change of

circumstances existed to warrant review of the existing custody order. The trial court order in regards to CT is also vacated because plaintiff failed to meet her burden that her proposed custody arrangement was in CT's best interests, and therefore, the trial court abused its discretion in awarding plaintiff sole legal custody and favorable parenting time. This matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Michael J. Riordan