STATE OF MICHIGAN

COURT OF APPEALS

MITCHELL LEE HOEVE, Plaintiff-Appellee,	UNPUBLISHED October 15, 2009
v	No. 288954 Ottawa Circuit Court
KATY AUSTIN HOEVE, Defendant-Appellant.	LC No. 05-052134-DM

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

In this child custody matter, defendant appeals as of right the circuit court's order granting plaintiff's motion for sole physical custody of the parties' minor child. We affirm.

The parties married in 2003 and divorced in 2006. The judgment of divorce granted the parties joint legal and physical custody of the sole child born during the marriage. After the divorce, the child spent alternate weeks with each parent. In December 2007, plaintiff filed a petition seeking sole legal and physical custody of the child. Plaintiff's petition asserted that the parties currently resided 45 minutes apart and in separate school districts, the child would begin school in Fall 2008, and defendant had failed to provide the child with a stable, satisfactory home environment. Defendant's response denied that she inadequately cared for the child, acknowledged that the child "will eventually need to be enrolled in one school system," but requested that the court award her legal and physical custody. In June 2008, the circuit court commenced a custody trial, and on October 14, 2008, the court entered an opinion and order granting plaintiff sole physical custody of the child.

Defendant now challenges the circuit court's opinion and order in several respects, first contending that the court erred in finding proper cause to revisit its previous custody order. Child custody orders "shall be affirmed on appeal 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 on a major issue." MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877, 526 NW2d 889 (1994). A trial court commits clear legal error when it "incorrectly chooses, interprets, or applies the law." *Fletcher*, 447 Mich 881.

The Child Custody Act "is intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d

205 (1995). Before a circuit court may consider whether an established custodial environment exists or review the statutory best interest factors, it first must ascertain whether the movant has set forth either proper cause or a change in circumstances warranting revisitation of a prior custody order. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511.

In the circuit court's opinion and order, it noted,

> At the beginning of the hearing, both parties agreed that there was proper cause for the Court to proceed with this action. Further, during closing arguments, the parties again agreed that custody was properly before the Court. Given the distance between the two parental homes and the fact that the parents have enrolled [the child] in two separate preschool programs, the Court agrees that proper cause has been met to address custody.

The transcript of the commencement of the custody trial confirms that when the circuit court inquired, "Is there a proper cause to review this," defense counsel responded, "Yes, based on the school district issue." Because defense counsel agreed that proper cause supported consideration of a custodial change, defendant has waived this issue on appeal. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) (internal quotation omitted), aff'd 478 Mich 348; 733 NW2d 1 (2007). Similarly, "[a] party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Moreover, we detect no error in the circuit court's independent determination that proper cause existed to consider the parties' competing motions for sole physical custody. Because the child resided with his physically distant parents on alternating weeks, his impending enrollment in school constituted an event that "could have a significant effect on the child's life." *Vodvarka*, 259 Mich App 511.

Defendant next asserts that the circuit court incorrectly changed the child's physical custody arrangement without conducting a hearing, as directed by *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993). In *Lombardo*, this Court held that because parents awarded joint legal custody share decisionmaking authority concerning important decisions affecting a child's welfare, "where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child." *Id*. at 159. During a *Lombardo* hearing, the circuit court must consider and evaluate the best interest factors listed in MCL 722.23, in attempting to resolve custodial parent disputes about important decisions affecting the welfare of the child. *Pierron v Pierron*, 282 Mich App 222, 247; 765 NW2d 345, lv gtd 483 Mich 1135 (2009).

Here, however, we reject that the circuit court failed to follow *Lombardo*. The circuit court conducted a lengthy trial during which it considered the best interest factors, and issued a detailed opinion and order that addressed the best interest factors and concluded that the child's best interests would be served by attendance at one school rather than two. The circuit court reasoned, in relevant part,

> [T]he current situation creates instability and confusion for [the child]. [The child's] ability to "bond" with his classmates or teacher is reduced as [the child] attends the respective preschools every other week. During the "off" week, [the child] is exposed to a different teacher and different classmates. Of course, one may conclude that the lesson plans at different preschools vary. As such, it is questionable if [the child] is fully benefiting from these programs.
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> Further, neither party advocated, and the Court does not find, that it is in [the child's] best interests to be shuttled back and forth at least an hour a day to attend one preschool or school for one-half of the school year in an attempt to salvage a joint physical custody situation.

We find no clear error in this determination, and hold that it fully satisfies the requirements of *Lombardo*.

Lastly, defendant challenges the circuit court's evaluation of the best interest factors. Defendant complains that the circuit court's analysis of factor (b), the parties' capacity and disposition to give the child love, affection and guidance, improperly focused on her "social life" instead of her parenting ability, and that the court improperly considered "morality" issues that it labeled as "guidance" issues. The circuit court explained its analysis regarding this factor as follows:

> The Court gives the advantage on this factor to PLAINTIFF, primarily because of Plaintiff's greater disposition to give proper guidance. This relates to comprehension and/or perception issues present with Defendant. For example, Defendant, while claiming that she has an exclusive relationship with Mr. Diaz, nevertheless openly seeks the companionship of other males. Defendant demonstrated a lack of basic knowledge regarding the number of prior partners with whom Mr. Diaz has had children. This lack of the ability to make basic inquires of those closest to Defendant does not bode well for her ability to discern and provide proper guidance for [the child] as he grows and develops.
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> The Court believes that Mr. Cotton's observations in the December, 2005 FOC report continue to be accurate: "Katy presents as a girl who enjoys having a child, but also enjoys the freedom of her social scene." Plaintiff is the more responsible parent; he is more inclined to provide superior guidance for [the child] than Defendant.
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> Defendant is still formulating her life plan. Defendant has hopes and aspirations, but the Court questions her ability to follow through with her goals. Instead, the Court views Defendant as being dependent, on a long-term basis, on [the child's] maternal grandmother. Certainly, it is admirable and often times advisable for young parents to rely on the grandparents for support. But, in this case, it appears that while Plaintiff uses the paternal grandparents and his new spouse for secondary support, Defendant relies upon the maternal grandparents for primary support. It is more difficult to provide guidance and education in life skills when the "teacher" requires significant help and basic guidance.

The record amply supports the circuit court's factual findings that (1) defendant's comprehension and perception difficulties impair her ability to make good judgments, (2) on several occasions, defendant left the child with her mother so that she could spend time at a bar, and (3) defendant's mother otherwise had provided defendant with substantial parenting support. Contrary to defendant's contention, these findings do not reflect in any manner on her "moral fitness." The circuit court appropriately focused its analysis on facts that gave insight into defendant's ability to guide a child's healthy development. Given the circuit court's well-supported factual findings, the evidence did not clearly preponderate against the court's determination that best interest factor (b) favored plaintiff.

With respect to factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," defendant maintains that the circuit court improperly considered only "future" and temporary circumstances, not the parties' present situation. The circuit court found that both parties offered the child a satisfactory and stable home, but that plaintiff's schedule afforded him "the greater ability to be with [the child] for breakfast, supper, and bedtime." The circuit court further emphasized that "[d]efendant has a schedule involving work and school that often makes her unavailable in the evenings," and that she "leaves [the child] in the care of his maternal grandparents in order to engage in social activities during the weeks that [the child] is in Defendant's care." The record evidence supports that plaintiff arranged his schedule around the child to maximize the time that he spent in the child's company. We find no clear error in the circuit court's determination that currently, and for the foreseeable future, plaintiff's work and home schedules afforded him a better opportunity to give the child a predictable, stable, and secure environment.

Defendant next avers that the circuit court erroneously scored factor (j), which considers the willingness and ability of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, because it discounted plaintiff's "spiteful" and "childish" act of withholding a medical insurance card. We reject defendant's assertion that the circuit court improperly scored this factor. The circuit court plainly took into account this instance of plaintiff's "spite[ful]" conduct, but also noted that defendant "is often late and/or inconsiderate in exchanging [the child] for parenting time," and that defendant had made inappropriate comments in the child's presence. We detect no basis for disturbing the circuit court's ruling that this factor favored plaintiff.

Finally, we find no support for defendant's contention that the circuit court improperly "restrict[ed]" the custody options solely on the basis of the distance between the two available school districts. The record simply lends no support to this claim. The circuit court found that the child's best interests would be served by attending a single school, rather than being "shuttled back and forth at least an hour a day to attend one preschool or school . . . in an attempt to salvage a joint physical custody situation." We conclude that the circuit court did not err in any

respect in finding that the child's enrollment in one school would reduce the child's stress level and enhance the child's likelihood of bonding with his teacher and fellow students.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher