FROM *VODVARKA* TO *SHADE* AND EVERYTHING IN BETWEEN

THE CONTINUUM FROM "CAN'T CHANGE THIS" TO "CAN"

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I. Modifying Custody vs. Modifying Parenting Time

A. What Is The Difference?

- "Change" in Established Custodial Environment Requires Appropriate Grounds: "…[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…." *Vodvarka v. Grasmeyer*, 259 Mich App 499, 514 (2003)(emphasis in original).

  The reason for this requirement is that "… [p]roviding a stable environment for children that is free of unwarranted custody changes (and hearings) is a paramount purpose of the Child Custody Act, *Baker v. Baker*, 411 Mich. 567, 577, 309 N.W.2d 532 (1981), and **therefore allowing any 'appropriate ground for legal action' to be sufficient to revisit custody orders would in no way further that purpose**." *Vodvarka*, 259 Mich App at 511 (emphasis added).

- On The Other Hand…: Parenting time and parenting schedules can be modified, as long as the modifications do not "change custody." *Shade v. Wright*, 291 Mich.App 17, 22; 805 NW2d 1 (2010). In *Shade*, under the parenting time change affirmed by the Court of Appeals "… defendant received very close to the same number of parenting time days under the judgment of divorce and under the modified parenting time order. Thus, the modified parenting time did not affect the established custodial environment." *Id*. at p. 4, fn 3 (emphasis added).

- The Distinction: "Changes in parenting time are distinct from changes in custody, and only if a 'change in parenting time results in a change in the established custodial

environment' should the court apply the '[*Vodvarka*] proper cause and change of circumstances' framework to a proposed change in parenting time." *Rains v. Rains,* 301 Mich.App 313, 340; 836 NW2d 709 (2013)(quoting *Shade v. Wright,* 291 Mich.App 17, 22; 805 NW2d 1 (2010)).

If the number of overnights had changed under the new *Shade* order, the *Shade* court might have reversed the trial court's modification of the existing custodial order, because the facts in *Shade*, "… under *Vodvarka*, would not, and should not, constitute a sufficient change of circumstances to warrant a change of custody. Simply put, the minor child in this case is growing up; she is a freshman in high school and her school and extra-curricular schedule is changing. The existing parenting schedule precluded the minor child from participating in certain activities. These are the type of normal life changes that occur during a child's life and that do not warrant a change in the child's custodial environment. *Vodvarka*, 259 Mich.App at 513." *Shade v. Wright,* 291 Mich.App 17, 22; 805 NW2d 1 (2010).

B. Framework for Making Any Change

- **STEP ONE**: Is There An Established Custodial Environment? The trial court is required to make a determination regarding the existence of an established custodial environment every time it considers issues affecting custody, including modification of parenting time schedules. MCL 722.27(1)(c); *Pierron v. Pierron*, 486 Mich. 81, 85–86; 782 NW2d 480 (2010). "Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Jack v. Jack,* 239 Mich.App 668, 670; 610 NW2d 231 (2000).

- **STEP TWO**: Will The Change Alter The Established Custodial Environment? A trial court is required to make "…a determination regarding the existence of an established custodial environment and the effect the proposed parenting time modification would have on such an environment if one exists." *Wagner v. Rebbie,* 2012 WL 4093575, p. 2.

- **STEP THREE**: Have The Applicable Thresholds Been Met To Make the Change? Next – depending entirely on whether the change will alter the established custodial environment – the trial court then follows one of two standards to determine whether there has been (1) a threshold **change in circumstances** (by a preponderance of evidence) sufficient to warrant a modification, and (2) whether the change is in **the child's best interests**, in light of (a) relevant statutory factors for that particular standard, and (b) whether the proofs have met or exceeded the required evidentiary burden.

> The trial court is also required to make a determination regarding the existence of an established custodial environment every time it considers issues affecting custody, including modification of parenting time schedules. MCL 722.27(1)(c); *Pierron v. Pierron*, 486 Mich. 81, 85–86; 782 NW2d 480 (2010). This is necessarily so, as the trial court's conclusion regarding the existence of an established custodial environment determines the moving party's burden of proof. *Shade*, 291 Mich.App at 23. Following the determination that proper cause or a change of circumstances exists, the trial court must decide whether modification of parenting time is in the child's best interests. *Id.;* MCL 722.27(1)(c). "When a modification would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Id.* at 23. If the change would not alter an established custodial environment, the movant must establish by a preponderance of the evidence that the change is in the child's best interests. *Id.*

Caulk v Vinulan, 2013 WL 6481250, p. 3.

II. Deciding Whether a Proposed Change Alters the Established Custodial Environment

The proposed change must alter whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort in order to alter the established custodial environment. Even where a proposed change results in a different number of overnights, there still might *not* be a change in the established custodial environment. *Rains v. Rains,* 301 Mich.App 313, 341; 836 NW2d 709 (2013).

> Under the new parenting-time schedule, plaintiff and defendant each have roughly 182 overnights. This reduces plaintiff's parenting time by 27 overnights, which gives plaintiff about 2.25 fewer overnights a month. This change was not likely to "change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort" and, therefore, does not rise to the level of a change in custody. *Pierron II,* 486 Mich. at 86, 782 N.W.2d 480.

Id. See also, *Jackson v Anderson*, 2013 WL 6689324, p. 2 (holding that "the trial court's order increasing defendant's parenting time did not amount to a change of the child's established custodial environment.").

III. If the Proposed Change *Will Alter* the Established Custodial Environment

A. Threshold of "Proper Cause" or "Change in Circumstances" That Must Be Met (By A Preponderance of Evidence)

Before modifying a child custody order, the circuit court must determine that the moving

party has demonstrated either proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision. "To establish a change of circumstances, the moving party must prove, by a preponderance of the evidence, 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.'" *Gerstenschlager v. Gerstenschlager*, 292 Mich.App. 654, 657 (2011) (quoting *Vodvarka v. Grasmeyer,* 259 Mich.App. 499, 508–509, 675 N.W.2d 847 (2003)).

If a party fails to show proper cause or a change in circumstances sufficient to make the requisite preliminary showing, the trial court is not required to conduct an evidentiary hearing. *Dehring v. Dehring*, 220 Mich.App 163, 164-165; 559 NW2d 59 (1996).

- Something New: A party cannot rely on facts that existed before the entry of a custody order to establish a "change" of circumstances:

  > Of course, evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but **the change of circumstances must have occurred *after* entry of the last custody order.** As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a "change" of circumstances.

  Vodvarka, 259 Mich App at 514 (emphasis added; italics in original).

- Significant Effect on the Child's Well-Being: A party requesting a change in the established custodial environment must, as a threshold matter, demonstrate either proper cause or a change in circumstances sufficient to warrant a change before a trial court may order such a change. *Foskett v. Foskett*, 247 Mich.App 1, 6; 634 NW2d 363 (2001). "[T]he grounds presented must be 'legally sufficient,' i.e., they must be of a magnitude to have a significant effect on the child's well-being to the extent that revisiting the custody order would be proper." *Vodvarka*, 259 Mich App at 512.

  > [In] 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.

  Vodvarka, 259 Mich App at 513-514 (emphasis added).

  > These initial steps to changing custody – finding a "change of circumstance or proper cause" and not changing an "established custodial environment" without clear and convincing evidence – are 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. AAA Sulewski* (After Remand), 209 Mich.App. 587, 593, 532 N.W.2d 205 (1995). See also *Foskett v. Foskett*, 247 Mich.App. 1, 6, 634 N.W.2d 363 (2001) (recognizing the Legislature's intent in enacting the Child Custody Act was to prevent the removal of children from established custodial environments" '**except in the most compelling cases,**'" quoting *Baker v. Baker*, 411 Mich. 567, 577, 309 N.W.2d 532 [1981]).

Id. (emphasis added). See also, *Rossow v. Aranda*, 206 Mich App 456, 458 (1994).

- Boarders in Home Not Sufficient: Having boarders in the house is not necessarily a significant change that would materially impact a child's well-being, particularly when "the only evidence concerning the boarders suggested that their presence in the house was a matter of minimal consequence to the child." *Gerstenschlager v. Gerstenschlager*, 292 Mich.App. 654, 657 (2011).

- Superiority of One Home Over Another Not Sufficient: "Defendant's only other significant argument to substantiate his request for modification is the alleged superiority of his residential environment over that afforded by plaintiff. Defendant contends the absence of the minor child's stepfather from plaintiff's home, while serving a military assignment overseas, results in plaintiff maintaining a single-parent household, which defendant implies is deficient in comparison to the home he has now established in Ann Arbor and which includes his new wife. Defendant has failed to demonstrate that absence of the minor child's stepfather from plaintiff's home has had a 'significant effect on the child's well-being.' *Vodvarka*, *supra* at 513." *Schemanski v Skank,* 2005 WL 1923826 (Mich.App.), p. 2.

B. Factors the Court Is To Consider When Deciding Whether to Allow Change: *All Best Interest Factors*

"[I]f a requested modification in parenting time amounts to a change in the established custodial environment, it should not be granted unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child." Powery v Wells, 278 Mich.App. 526, 528 (2008)(quoting *Brown v. Loveman*, 260 Mich.App. 576, 595, 680 N.W.2d 432 (2004)).

"To determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in M.C.L. § 722.23(a)-(l) applying the proper burden of proof. A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors." *Foskett v. Foskett*, 247 Mich. App. 1, 9, 634 N.W.2d 363, 368 (2001)

C. Evidentiary Standard and Burden Of Proof: *Clear and Convincing Evidence*

- Statute: A "court shall not modify or amend its previous judgments or orders or issue a new order ***so as to change the established custodial environment*** of a child unless there is presented clear and convincing evidence that it is in the best interests of the child." MCL §722.27(1)(c) (emphasis added).

- Case Law: If a modification of custody would change the child's established custodial environment, the moving party must demonstrate that the change is in the child's best interests by clear and convincing evidence. MCL 722.27(1)(c); *Hunter v. Hunter*, 484 Mich. 247, 259; 771 NW2d 694 (2009). When an established custodial environment exists, a court may not change the established custodial environment **for either parent** unless it finds clear and convincing evidence that a change in custody is in the child's best interest. *Powery v. Wells*, 278 Mich.App. 526, 528; 752 N.W.2d 47, 49 (2008).

Evidence is "clear and convincing" if it produces in the trier of fact a firm conviction regarding the truth of the precise facts at issue. *Hunter*, 484 Mich. at 265.

IV. If the Proposed Change *Will Not* Alter the Established Custodial Environment

A. Threshold of "Proper Cause" or "Change in Circumstances" That Must Be Met (By A Preponderance of Evidence)

"In order to modify a parenting-time schedule, if the modification ***would not*** constitute a change in an established custodial environment, the party proposing the change must show by a preponderance of the evidence that the change is in the child's best interests." *Rains v. Rains*, 301 Mich.App 313, 340; 836 NW2d 709 (2013).

- Something New: A party cannot rely on facts that existed before the entry of a custody order to establish a "change" of circumstances sufficient to modify parenting time:

> [D]efendant has failed to demonstrate that his remaining allegations, pertaining to problems with communication between the parties, is a new phenomena and did not previously exist between the parties. If the alleged problems do not comprise a recent change in behavior or circumstances and have not interfered with the parties' respective relationships with the minor child or their parenting time, they fail to comprise a sufficient change of circumstances to necessitate revision of the current parenting time or custody order.

Schemanski v Skank, 2005 WL 1923826 (Mich.App.), p. 2.

- Getting Older May Be Enough: In *Shade*, the Court held that the normal life changes experienced by the minor child – now being a high school student with changing school and extracurricular activities – **were sufficient** to establish proper cause or change of circumstances necessary to modify the parenting time schedule where the current schedule and the distance between the parents' homes prohibited the child from engaging in certain activities. (See also, *Wagner v. Rebbie*, 2012 WL 4093575, p. 2., fn 2.)

- But Just Getting Older *By Itself* Is Not Enough: "We reject the proposition that a child's age, by itself, is a normal life change sufficient to modify a parenting time order. Such a proposition would render the terms "proper cause" and "change of circumstances" in MCL 722.27(1)(c) meaningless in cases involving requests to modify parenting time orders." *Ulloa v. Lafave*, 2012 WL 593141, p. 3.

  > Because every child grows older, there would be proper cause or change of circumstances in every case. Moreover, we conclude from Shade that a normal life change is sufficient proper cause or change of circumstances to modify a parenting time order **if the child's needs, as a result of the child growing up, cannot be met by the current order.** Here, defendant presented no evidence that the three children had experienced any changes in their needs as a result of growing older that were negatively affected or could not be met by the current parenting time order. There were no "practical implications" of the children growing up that required an increase in defendant's parenting time.

  Ulloa v. Lafave, 2012 WL 593141, p. 3 (emphasis added). See also, *Garofali v. Renaud*, 2013 WL 1137142, p. 2 ("[P]laintiff lives within five miles of defendant[,] … spends a lot of time helping his child with his homework, the child is able to participate in extracurricular activities, and plaintiff is able to attend those activities. The current parenting time schedule clearly fosters the child's relationship with plaintiff. The child's age, alone, is not a "change in circumstances" sufficient to support modification of parenting time, particularly here where the growing child's needs are not negatively affected and are met by the current schedule.")

- Growing Bond With Parent Is Sufficient: "The record in this case supports the conclusion that defendant's growing bond with the child and the child's swiftly increasing ability to understand and recognize his surrounding environment constituted a sufficient proper cause or change of circumstances to warrant augmenting his parenting time in furtherance of fostering a strong relationship." *Jackson v Anderson*, 2013 WL 6689324, p. 2.

- Child's Preference Not Sufficient: "Defendant's primary contention in support of his request for modification of parenting time is the preference of the minor child to attend school in Ann Arbor. While the child's preference is not disputed, this Court has previously indicated that such an allegation, standing alone, does not constitute a

proper cause or change of circumstances, for modification of custody. *Curlyo v. Curlyo,* 104 Mich.App 340, 349; 304 NW2d 575 (1981). The child's stated preference, unaccompanied by any demonstration by defendant of the child's dissatisfaction, academic failure or the substandard nature of her current educational setting, is insufficient to constitute proper cause or a change in circumstances." *Schemanski v Skank,* 2005 WL 1923826 (Mich.App.), p. 2.

- Selling Home and Moving Is Sufficient: "[T]he trial court based the decision to modify the parenting-time schedule on plaintiff's testimony that (1) she sold her home, (2) she was engaged to a man who was moving to Traverse City, and (3) if her motion to change domicile were denied, she would rent an apartment in Grand Blanc and commute between Traverse City and Grand Blanc. Accordingly, the trial court's failure to explicitly state the change in circumstances justifying review of the best-interest factors was not a clear legal error." *Rains v. Rains,* 301 Mich.App 313, 341-2 (2013).

  Given that the child would no longer be shifting between just two homes, but now three homes, this change constituted a sufficient proper cause or change in circumstances to justify the parenting-time modifications that reduced the number of transfers of the child. Accordingly, the trial court did not err because its modification of parenting time was justified by a change in circumstances.

Id.

B. Factors The Court Is To Consider When Deciding Whether to Allow Change: *Findings On Only The Contested Factors From Both MCL 722.23 and 722.27a*

"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 v. Wright*, 291 Mich.App 17, 31; 805 NW2d.1 (2010). **While custody decisions require findings under all of the best interest factors, parenting time decisions may be made with findings on only the contested issues.** *Id.* at 32. In fact, "[i]f a proposed important decision affecting the welfare of the child will not modify the established custodial environment, evaluating best-interest factors that are irrelevant to the particular issue before the court distracts from the proper focus of the proceeding and poses the risk that one parent's preference will prevail even though that preference is not in the best interests of the child." *Pierron v Pierron*, 486 Mich. 81, 91 (2010). Among those factors is that parenting time is to "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." MCL 722.27a(1).

The trial court's findings must take into account the best interests of the minor child. In modifying parenting time, a court need not explicitly address the factors under MCL 722.27a(6) if it is "clear from the trial court's statements on the record that the trial court

was considering the minor child's best interests in modifying ... parenting time." *Shade*, 291 Mich.App at 31.

Where the trial court's decision is not based on the best interests of the minor child – in light of the relevant contested issues – the decision will be vacated. "In modifying plaintiff's parenting time, the trial court did not make any findings regarding the factors listed in MCL 722.27a(6) or enunciate any reliance on the MCL 722.23 factors it considered earlier in the opinion in the context of the motion to modify custody. Further, the trial court did not make any statements in its findings that would support a conclusion that a modification of parenting time was in the minor child's best interests." *Richmond v Richmond*, 2013 WL 5762989, p. 7.

> Because it is not clear from the trial court's opinion and order whether or how the court was considering the minor child's best interests in modifying plaintiff's parenting time, we vacate the portion of the trial court's opinion and order modifying plaintiff's parenting time.

Id.

C. Evidentiary Standard and Burden of Proof: *Preponderance of the Evidence*

In order to modify a parenting time schedule, where the modification does not constitute a change in the established custodial environment, the change must be shown to be in the child's best interest by a preponderance of the evidence. *Rains v. Rains*, 301 Mich.App 313, 340; 836 NW2d 709 (2013).

> If the proposed change does not change the custodial environment, ... the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child[ren's] best interests. A trial court may use "[b]oth 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)" when deciding whether to award parenting time. When a trial court makes a parenting-time decision, it may limit its findings to the contested issues.

Sturgis v. Sturgis, 302 Mich.App. 706, 710 (2013) (citations omitted).