

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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OLGA ORTIZ BUTTON,

Plaintiff-Appellant,

v

RANDALL R. BUTTON,

Defendant-Appellee.

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UNPUBLISHED

October 12, 2004

No. 255282

Allegan Circuit Court

LC No. 91-013859-DM

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

In this custody dispute, plaintiff appeals by right from the trial court's dismissal of her motion requesting a change in custody of her two minor children from defendant to plaintiff and requesting the appointment of a guardian ad litem for the children. We reverse the trial court's order and remand this case to the trial court for a determination of whether plaintiff has shown by a preponderance of the evidence either proper cause or a change in circumstances warranting a review of the existing custody order.

Plaintiff and defendant were divorced in 1993 and have three children together: Joshua, currently age eighteen; Jordan, age fifteen; and Elijah, age thirteen. While plaintiff originally received physical custody of all three children in the divorce judgment, the trial court, on petition by defendant, amended the judgment of divorce in February 1996 and awarded physical custody of the children to defendant. In April 2000, the parties stipulated to, and an order was entered, changing custody of the oldest son, Joshua, from defendant to plaintiff. On February 25, 2004, plaintiff filed a motion requesting an order amending the judgment of divorce regarding physical custody of the two remaining minor children. On April 8, 2004, the trial court dismissed plaintiff's motion without an evidentiary hearing after finding that there were no contested issues of fact that needed to be resolved before the court could make an informed decision regarding the motion.

Plaintiff asserts that the trial court abused its discretion in dismissing her motion without holding an evidentiary hearing because there were contested factual issues which needed to be

resolved before such a decision. We disagree.<sup>1</sup> All custody orders must be affirmed on appeal unless the trial court's findings 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. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.); 526 NW2d 889 (1994). The abuse of discretion standard applies to the trial court's discretionary rulings, while questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (quotation and citations omitted).

A trial court can modify a custody order only where the moving party establishes by a preponderance of the evidence that "proper cause" or a "change in circumstances" supports a finding that a change in custody is in the child's best interest. MCL 722.27(1)(c); *Vodvarka*, *supra* at 508. The party seeking change must establish proper cause or a change in circumstances before the existence of an established custodial environment and the best interest factors may be considered. *Id.* at 509. If this initial burden is not met, "the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors." *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Therefore, the first inquiry for the trial court to make is whether plaintiff has shown either proper cause or a change in circumstances warranting a custody hearing. This Court has previously recognized that an evidentiary hearing is not always needed to resolve this initial issue, stating, "Often times, the facts alleged to constitute proper cause or a change in circumstances will be undisputed, or the court can accept as true the facts allegedly comprising proper cause or a change in circumstances, and then decide if they are legally sufficient to satisfy the standard." *Id.* at 512, citing MCR 3.210(C)(7) [now (C)(8)]. Specifically, the court rule states:

In deciding whether an evidentiary hearing is necessary with regard to a post-judgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

During the March 26, 2004, hearing regarding plaintiff's motion, the trial court requested an offer of proof by plaintiff in response to defendant's argument that an evidentiary hearing was unnecessary. After hearing plaintiff's arguments, the trial court found that, even accepting all of her allegations as true, plaintiff had not met her burden so as to justify an evidentiary hearing on custody. While plaintiff continually argues that the trial court could not make this determination

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<sup>1</sup> Plaintiff first asserts that the trial court failed to determine that an established custodial environment existed with defendant before applying a clear and convincing burden of proof to plaintiff's case. However, this argument is without merit as the trial court never reached the question of whether a custodial environment existed; rather, the trial court found that plaintiff failed to satisfy her initial burden of showing that either proper cause or a change in circumstances existed to warrant a review of the current custody order.

without an evidentiary hearing because there were contested issues of fact, the trial court was allowed instead to accept plaintiff's allegations as true when resolving this preliminary question. *Vodvarka, supra* at 512.

However, in dismissing plaintiff's motion in this case, the trial court stated:

The Court has to look at whether or not, and I think it's appropriate for the Court to look at the history in making a determination. There are contested factual issues that would have to be resolved that would rise to the level of *clear and convincing evidence* that it's in the best interest of those children. If I accepted everything you said as true, based on the history of this case I don't believe that to be here. [Emphasis added.]

As noted above, a party requesting a review of an existing custody order must first show by a *preponderance of the evidence* either proper cause or a change in circumstances warranting review of the order. In this case, the trial court appears to mistakenly have used the higher clear and convincing standard. Because it is unclear whether the trial court's decision would have been different under the less strict standard, we find it is necessary to remand this case to the trial court to determine whether plaintiff has shown by a preponderance that review of the custody order is warranted.

In making this determination, the trial court may accept all of plaintiff's allegations as true. *Vodvarka, supra* at 512. The trial court should keep in mind that to constitute proper cause meriting a consideration of a custody change, there must be appropriate grounds which have or could have a significant impact on the child's life such that a reevaluation of custody should be made. The determination of proper cause should be based on the statutory best interest factors, on a case-by-case basis. *Id.* In unusual circumstances, matters which occurred before the entry of the last custody order may be considered. *Id.* at 515. To constitute a change of circumstances meriting a consideration of a custody change, there must have been a change in conditions pertaining to custody since the entry of the last custody order which has had or could have a significant impact on the child's well-being. *Id.* at 513. The determination of a change of circumstances should be based on the statutory best interest factors, on a case-by-case basis. *Id.* at 514.

Plaintiff also asserts that the trial court abused its discretion in refusing to appoint a guardian ad litem to represent the children in the custody dispute. We disagree. MCL 722.24(2) grants the trial court discretion in appointing guardians ad litem, stating, "If, at any time in the proceeding, the court determines that the child's best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child." Because the trial court in this case dismissed plaintiff's petition for a failure to show proper cause or a change in circumstances, there was no longer a custody dispute before the court and, therefore, no need for a guardian ad litem. Regardless, plaintiff has offered no evidence that the children's best interests would not have been adequately protected through the representation of the parties' attorneys.

We reverse the April 8, 2004, order of dismissal and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Bill Schuette