STATE OF MICHIGAN

COURT OF APPEALS

TINA B. MEINKE,

Plaintiff-Appellant,

v

BRUCE J. MEINKE,

Defendant-Appellee.

UNPUBLISHED
November 29, 2007

No. 277033
Calhoun Circuit Court
Family Division
LC No. 05-000741-DM

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of divorce entered by the trial court on March 7, 2007, following mediation and the parties' subsequent discharge from a bankruptcy proceeding. We affirm.

Although not raised as an issue by the parties, we questioned whether the trial court could direct the parties to participate in a facilitative mediation to address the issue of property division while a stay from a bankruptcy proceeding was in place. After consideration of supplemental briefs filed by the parties with regard to this issue, we conclude that no error occurred. In *Lopez v Lopez*, 191 Mich App 427, 428; 478 NW2d 706 (1992), this Court stated that a "stay of proceedings under the bankruptcy act is for the benefit of the debtor who had the right to proceed in the divorce action if he so chose." Here, both parties were debtors in the bankruptcy proceeding, both parties agreed to participate in a facilitative mediation, and neither party nor the bankruptcy trustee invoked the protections of the automatic stay provisions of 11 USC 362.[1]

Plaintiff first raises issues concerning violations of MCR 3.216(H)(8) and MCR 3.216(H)(7). We review de novo the interpretation and application of court rules as a question of law. *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

[1] Further, neither the order for a facilitative mediation, nor the mediation itself, affected the parties' property. The trial court did not enter any order affecting ownership or division of the property until after the parties had received a discharge in bankruptcy and after the automatic stay had lifted.

Under MCR 3.216(H)(8),

> Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to mediation are confidential and shall not be disclosed without the written consent of all parties.

Plaintiff moved to prohibit the mediator from signing an affidavit concerning the terms of the settlement agreement on the basis that it would violate MCR 3.216(H)(8). The record reveals that the mediator never signed such an affidavit. Thus, MCR 3.216(H)(8) was not violated in this case.

Under MCR 3.216(H)(7),

> If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording. After a settlement has been reached, the parties shall take steps necessary to enter judgment as in the case of other settlements.

Stated another way, the terms of a settlement reached by mediation must be reduced to a signed writing by the parties to be binding. In this case, the mediator filed a status report following mediation that indicated that the case was not settled and that mediation "will be continued because of pending bankruptcy matters." The mediator later filed an amended mediation status report indicating that the case was settled, but that the parties "reserved on one issue, to be brought back to the Court if a bankruptcy discharge is denied them." Discharge in bankruptcy subsequently occurred. The parties thereafter concurred that a settlement agreement had been put into writing following mediation, but they disagreed regarding the reason why they had not signed the agreement. Defendant argued that the only reason the settlement agreement was not signed was because of the bankruptcy proceeding, but plaintiff disagreed. The parties thereafter agreed to allow the trial court to contact the mediator to inquire whether the only reason the parties had not signed the settlement agreement was due to the pending bankruptcy. The parties did not agree that, as a matter of law, if the agreement was not signed because of the bankruptcy, it was binding.

The mediator later apprised the trial court that the parties had reached a settlement. Specifically, the mediator indicated that he initially reported that the divorce case had not been settled because of the pending bankruptcy, but that he subsequently filed an amended mediation report, stating that the parties had reached a settlement but had reserved on the bankruptcy issue, to accurately convey that the parties had, in fact, reached an agreement. The mediator also informed the trial court that he reduced the agreement to writing, and that each party reviewed it and accepted it. According to the mediator, the only reason the parties did not sign the written settlement at the time was because the bankruptcy matter was still pending. In light of this information, the trial court directed the parties to submit a judgment of divorce in conformity with the settlement agreement.

When construing a court rule, we begin by looking at the plain language. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). If the language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. *Id*. Under the plain language of MCR 3.216(H)(7), the settlement agreement at issue here was not binding because it was not signed by the parties. See *Rivkin v Rivkin*, 181 Mich App 718; 449 NW2d 685 (1989). However, "absent a showing of prejudice resulting from noncompliance with the [court] rules, any error is harmless." *Baker v DEC Int'l*, 218 Mich App 248, 262; 553 NW2d 667 (1996), aff'd in part, rev'd in part on other grounds, 458 Mich 247 (1998) (rule set forth in the context of affidavits violating court rules). Prejudice refers to a matter that would prevent a party from having a fair trial, or a matter which a party could not properly contest, e.g., when surprised. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 657; 213 NW2d 134 (1973). Here, plaintiff has not asserted, let alone demonstrated, prejudice by the trial court's decision to find that a settlement was reached even though it was not signed by the parties. Moreover, the trial court noted that the parties' actions in the months following the settlement confirmed the fact that the parties had in fact reached an agreement at the mediation session. Absent a showing of prejudice, any noncompliance with MCR 3.216(H)(7) was harmless. The agreement was reduced to writing. The trial court found the mediator credible when he asserted that the agreement was not signed only because of the bankruptcy. But for the passage of time needed to resolve the bankruptcy, there would be no question of a binding settlement. The trial court did not err in enforcing the settlement agreement even though it was not signed by the parties.

Plaintiff next argues that the trial court erred in finding that she failed to establish proper cause or a change of circumstances sufficient to revisit the prior custody and parenting time order.[2] In a child custody dispute, "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 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). In order to revisit the custody and parenting time order, plaintiff was required to prove by a preponderance of the evidence that either proper cause or a change of circumstances existed. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003); MCL 722.27(1)(c) (the court may "[m]odify or amend its previous orders for proper cause shown or because of change of circumstances. . . .").

To establish proper cause meriting a consideration of a custody change, the movant must prove appropriate grounds that have had or could have a significant impact on the children's life to the extent that a reevaluation of the children's custodial situation should be undertaken. *Vodvarka*, *supra* at 511. To constitute a change of circumstances meriting a consideration of a custody change, the movant must prove that, since the entry of the last custody order, the

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[2] Plaintiff's argument that the order she sought to modify was temporary, and that, based on *Thompson v Thompson*, 261 Mich App 353, 358-359; 683 NW2d 250 (2004), she was not required to show proper cause or change of circumstances before the trial court could revisit it, is meritless. Both parties agreed that the custody order entered by the trial court was intended to be a final order regarding custody and parenting time, and plaintiff's treatment of the issue belies her assertion on appeal.

conditions surrounding custody of the children which have had or could have a significant effect on the children's well-being have materially changed. *Id*. at 513. Both of these determinations should be based on the statutory best interest factors, on a case-by-case basis. *Id*. at 511-513. If the movant does not establish proper cause or change of circumstances, the trial court is precluded from holding a hearing on the matter. *Id*. at 508.

Here, plaintiff argued that a modification of parenting time was warranted based on her allegations that defendant failed to properly feed the children and did not bathe them or help with their homework during his parenting time, that defendant consumed alcohol and then drove with the children in the car, that Breanna wet the bed and developed an eye twitch following parenting time with defendant, and that Curtis was scared of defendant following an incident in which defendant reprimanded Curtis for urinating on Breanna's bed. The trial court found that, based on the pleadings, plaintiff failed to meet the threshold requirement of demonstrating the requisite proper cause or change of circumstances necessary to warrant a reexamination of the custodial/parenting time arrangement already in place.

The Legislature's directives that a trial court must find proper cause or change of circumstances before determining the existence of an established custodial environment, and before conducting a review of the statutory best interest factors, were designed to be obstacles to revisiting custody orders. *Id*. at 511. This is because "[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." *Id*. Merely allowing any appropriate ground for legal action to be sufficient to revisit custody orders would not further that purpose. *Id*. Trial courts can look to the best interest factors, MCL 722.23, for guidance. *Vodvarka*, *supra* at 511. The grounds presented must be legally sufficient; that is, 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." *Id*. at 512.

If the moving party does not meet the initial burden of establishing proper cause or a change of circumstances, the trial court must end its analysis, and is not authorized to consider whether an established custodial environment exists (thus establishing the proper burden of proof), or to conduct a review of the best interest factors. *Id*. at 509.[3] The trial court's finding that plaintiff failed to establish proper cause or change of circumstances sufficient to revisit the custody and parenting time order already in place was not against the great weight of the evidence.

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[3] An evidentiary hearing is not always necessary to resolve this initial question if "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." *Vodvarka*, *supra* at 512. Plaintiff argues that the trial court erred in failing to conduct a full evidentiary hearing. However, in determining that an evidentiary hearing was not warranted, the trial court regarded plaintiff's allegations as true, and found that they simply did not rise to the level required to consider changing the current custody and parenting time arrangement.

Plaintiff's argument for the change in parenting time centered on the children's education, proper nutrition, bathing, general well-being, defendant's alleged driving after having consumed alcohol, and defendant's disciplinary tactic on an isolated occasion. While the appropriate grounds advanced by plaintiff were relevant to certain statutory best interest factors,[4] they were not "of such magnitude to have a significant effect on the child[ren]'s well-being." *Id*. at 512. It cannot be disputed that ingesting snack foods on occasion is a normal childhood event having no significant impact on the children's well being. Additionally, not bathing the children before returning them home also had no significant impact on their well-being, particularly where defendant explained to the trial court that his reason for not bathing them was that they were not dirty and that past practice was to bathe them in the morning. Plaintiff did not dispute this past practice. Breanna's bed-wetting also did not significantly impact her well-being such that it constituted a change in circumstances warranting the revisitation of custody. It occurred under the care of both parties, and had been determined to be a physical problem that the parties jointly agreed not to treat with medication. Failing to assist the children with the completion of their homework also cannot be said to have significantly impacted the children's well-being where that failure was not alleged by plaintiff to have affected their academic performance. Additionally, defendant's reprimand of Curtis, while not exemplary parenting, did not significantly impact his well-being. This is evidenced by the fact that the related Child Protective Services case was dismissed because no physical harm occurred. Finally, defendant's driving after consuming alcohol with the children would only significantly impact the children's well-being if defendant was impaired while operating his vehicle. Plaintiff alleged that defendant consumed alcohol and then drove with the children, but did not allege that defendant was intoxicated while doing so. According to defendant, his ability to drive was never impaired. Nothing in the record, including plaintiff's allegations, refutes this assertion. The trial court's finding that plaintiff did not meet her burden of proving by a preponderance of the evidence the existence of appropriate grounds for legal action to be taken by the trial court was not against the great weight of the evidence on the record. *Id*.

The trial court's finding that plaintiff also failed to prove that the conditions surrounding the custody of the children had materially changed was not against the great weight of the evidence. *Id*. at 513. As noted above, none of the allegations set forth by plaintiff constituted grounds of such magnitude to have a significant effect on the children's well-being. This Court has noted that "[n]ot just any change will suffice," and that "over time there will always be some changes in a child's environment, behavior, and well-being." *Id*. The evidence here did not "demonstrate something more than the normal life changes (both good and bad) that occur during the li[ves] of [the] child[ren]." *Id*.

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[4] MCL 722.23(c), "[t]he 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"; (f), "[t]he moral fitness of the parties involved"; (h), "[t]he home, school, and community record of the child"; and (k) "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child."

Consequently, we conclude that the trial court's discretionary ruling denying plaintiff's motion for modification of the custody and parenting time order already in place did not constitute an abuse of discretion. *Id*. at 507-508.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey