STATE OF MICHIGAN

COURT OF APPEALS

TRISHA E. CRAIN, formerly known as TRISHA E. JOHNSON, Plaintiff-Appellant, v ROBERT RONALD SCHULTZ, Defendant-Appellee.	UNPUBLISHED February 17, 2009 No. 286292 Barry Circuit Court LC No. 02-000563-DP

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the modification of custody order entered by the trial court following an evidentiary hearing. For the reasons set forth in this opinion, we affirm.

This case arises from an on-going legal battle involving the minor child born to the parties during a brief relationship. An initial order of parentage, custody, parenting time and support was entered by the trial court in 2002. In that order, custody was awarded to plaintiff, and defendant received parenting time. The record reveals that since 2002, the parties have engaged in numerous and protracted court challenges, with both parties accusing the other of neglecting and sexually abusing the minor child. Since the trial court's initial order in 2002, defendant has moved to change or modify custody on four separate occasions. The record also reveals numerous hearings regarding child support and parenting time.

In February 2008, plaintiff accused defendant of sexually assaulting the minor child.[1] Following an investigation by Child Protective Services (CPS), CPS informed plaintiff that it could not find evidence to substantiate the claim of sexual abuse and recommended that defendant's parenting time be reinstated effective April 10, 2008. Around this time, defendant filed, *in propria persona*, a motion for more parenting time during summer and winter vacations as well as joint legal custody. On April 25, 2008, the parties appeared before the friend of the court but were unable to reach an agreement. As a consequence, friend of the court

[1] Defendant voluntarily suspended his parenting time during the investigation into plaintiff's complaint.

recommended that "all previous orders, not in conflict herewith, remain in full force and effect." The trial court entered the friend of the court's recommended order. Plaintiff then moved the trial court to suspend defendant's visitation, asserting that "[t]he actions of the defendant which were reported to [CPS] from the minor child are very disturbing." The trial court, under the belief that defendant may have been sexually assaulting the minor child, apparently granted plaintiff's motion. Defendant objected to the order, asserting that the CPS investigation was over and that he had been "found innocent of all charges."

The parties next appeared in court on May 6, 2008, on defendant's objection to the April 25, 2008, order. The trial court expressed its displeasure with plaintiff for making accusations against defendant when she knew that the claims had already been investigated by CPS and found to be without merit. Despite the trial court's admonishment, plaintiff continued to request that the court suspend defendant's parenting time. The trial court responded to plaintiff's request as follows:

> I've had a chance to go back about two-thirds of the way through your file, and I know this has been a contentious situation for both of you from the get-go with your child. I know you didn't have a long-term relationship, you didn't plan this child, and now you've got to—it's a difficult situation to try to cooperate with each other and raise a child when you're really not much more than strangers to each other. There have been allegations going both ways in the past.
>
> What I want to say to both of you is it's time to stop it. You're really ruining your daughter.
>
> And if you want to lose custody of your daughter, this is a great way to do it, because the court, based on the evidence that has been presented . . . [t]he court's finding is that the plaintiff's claim that the defendant has sexually abused his child . . . is found to be frivolous.
>
> It is further ordered and adjudged that the plaintiff is found to have intentionally made false reports during the CPS investigation of this matter.
>
> It is further ordered and adjudged that the plaintiff has intentionally failed to disclose to various authorities facts which exculpate the defendant from any sexual abuse of his daughter . . . .
>
> And it is further ordered and adjudged that the plaintiff will pay costs of one dollar to the defendant for violation of MCR 2.114(E) regarding filing a frivolous action.
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> * * *
>
> So now it's in writing and everybody involved is going to know what my determination is here today. I really don't understand why somebody would present a petition for an ex parte order to a court without disclosing all of the evidence they had to indicate what the truth of the matter was.

Three days before the parties were scheduled to appear for a referee hearing on defendant's objection to the friend of the court's recommendation, plaintiff took the minor child to the hospital where she filed another CPS complaint against defendant, alleging sexual abuse of the minor child. This complaint was investigated not only by CPS but also by a forensic examiner with the Michigan State Police. During this investigation, plaintiff made false statements regarding pictures the minor child allegedly drew and falsely asserted that a doctor who examined the minor child found redness in the minor child's genital area and indicated that the child had been "fondled."

During a later hearing on June 20, 2008, the trial court concluded that the issue of custody was before the court, stating:

> [Defendant] is proceeding *pro se*, and the petition he filed on April 4th, which is before the court today, says the changes requested are additional parenting time and then it says joint legal custody of [the minor child].
>
> So as far as I'm concerned, although the petition is inartfully drafted by a layperson, it does put the issue of custody before the court.

The trial court then ruled:

> In this case there is an established custodial environment with the plaintiff/mother, and therefore the burden is on the defendant to prove by clear and convincing evidence that a change of circumstances exists and that it would be in best interests of the child to have custody changed.
>
> * * *
>
> It's a very troubling case to me. I made a very unusual finding following the May 6th hearing. I made a finding that the plaintiff/mother intentionally made false reports to various persons during the child protective services investigation. I made a further finding that the plaintiff/mother had intentionally failed to disclose to various persons exculpatory facts about—relating to the defendant and allegations of sexual abuse on his part against his daughter.
>
> I found that her petition—I found that allegations had been filed which violated MCR 2.114(E) and assessed one dollar in costs just to make a point.
>
> And now I have the testimony of the protective services worker, which essentially buttresses those earlier findings. And so we have here basically a case where the mother has gone out of her way to destroy any relationship that the child might have with her father and in the process has caused emotional damage to the child. It's very troubling.

The trial court then listed and described the best interest factors and made its ruling:

> The defendant is granted legal and physical custody of [the minor child]. The plaintiff is granted parenting time on alternate weekends from 6:30 p.m. on

> Friday to 6:30 p.m. on Sunday commencing July 11. So [the minor child] is to be immediately transferred to the custody of her father.
>
> The plaintiff is found to have intentionally filed false police reports of sexual abuse against the defendant and to have engaged in a course of conduct intended to alienate defendant from his daughter.

The trial court effectuated its oral rulings in a written order entered on June 23, 2008. This appeal ensued.

Plaintiff argues that the trial court improperly modified custody of the minor child because defendant failed to establish proper cause or a change in circumstances to warrant a modification of the custody order. Pursuant to MCL 722.28, "[t]his Court must affirm all custody orders unless the trial court's findings of fact 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction. *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007). In a child custody context, "[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, *supra* at at 705. Clear legal error occurs "[w]hen a court incorrectly chooses, interprets, or applies the law." *Shulick v Richards*, 273 Mich App 320, 323, 325; 729 NW2d 533 (2006).

In modifying a child custody order, a trial court must first address whether the party seeking the modification in custody has established by a preponderance of the evidence that proper cause or a change in circumstances existed to warrant a change in custody. *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008). Next, the trial court must determine if a custodial environment exists. *Id.* at 528. Finally, the trial court must analyze the best interests factors set forth in MCL 722.23. *Id.*

If the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change in circumstances, 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). In the instant case, defendant did not specifically plead proper cause or a legally sufficient change in circumstances in his *in propria persona* filing regarding parenting time. Defendant did, however, use a "form" for modification of parenting time, which contained language suggesting a change in circumstances. Further, when defendant objected to the trial court's May 1, 2008, order he stated he was requesting "my day in court, for custody and parenting time." Thus, defendant did make an oral request for custody, and even if he had not, we would conclude that defendant's failure to plead proper cause or change in circumstances is not fatal to his motion where he provided ample evidence at the evidentiary hearing regarding proper cause. "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 change in circumstances, and then decide if they are legally sufficient to satisfy the standard." *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003).

While the trial court did not hold a separate inquiry or expressly rule on whether defendant established proper cause or change in circumstances to warrant a change in custody, reversal is not warranted. An evidentiary hearing is not always necessary to resolve this initial question of determining whether proper cause or change in circumstances exists. *Id.* Furthermore, there is ample record support for this Court to conclude that proper cause existed to warrant a change of custody. See *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981) (In child custody proceedings, the trial court is not required to "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued."); *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000) (Where a trial court fails to make a finding regarding an established 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.). Notably, the trial court found that defendant placed the issue of custody before the court.[2]

We find that the trial court did make some errors in this case. The trial court erred in treating the custodial environment determination as the threshold question. The trial court also erroneously opined that defendant must establish a change in circumstances by clear and convincing evidence. As noted previously, the threshold inquiry is whether the party seeking the modification in custody has established by a preponderance of the evidence that proper cause or a change in circumstances exists to warrant a change in custody. *Powery*, *supra* at 527. Despite these errors, we find that reversal is not warranted because the trial court reached the right result.

Under the facts of this case, there was proper cause to trigger the trial court's obligation to determine custody through a review of the statutory best interest factors. Proper cause is defined as "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." *Vodvarka, supra* at 511. The use of the phrase "could have" does not "invite speculation about facts that may arise in the future, but to signify that a court need not await some negative effect on a child before undertaking an examination of the child's best interests." *Id.* at 511 n 10. Significantly, "proper cause is geared more toward the significance of the facts or events." *Id.* at 515.

> [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. [*Id.* at 512.]

This case is analogous to *Vodvarka*, where we found that proper cause existed because the defendant submitted evidence that the plaintiff had been convicted of third-degree child abuse, had lost custody of her two other children, exhibited inappropriate behavior toward the defendant

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[2] See the trial court's oral statements from the hearing of June 20, 2008.

and attempted to prevent the defendant from visiting the child. *Id.* at 516. Here, defendant submitted evidence that plaintiff made false allegations of sexual abuse of the child by defendant to CPS on two occasions (in February and May 2008), which resulted in CPS and police investigations. Significantly, the child was subjected to a number of forensic interviews and a sexual assault examination. The record also demonstrates that plaintiff threatened the child's psychologist and teachers. CPS ultimately substantiated a claim of mental injury of the child by plaintiff. While we have stated that a trial court cannot speculate about facts that may arise in the future, it need not "await some negative effect on a child before undertaking an examination of the child's best interests." *Id.* at 511 n 10. We agree with the trial court's statement that the false allegations also demonstrated inappropriate behavior toward defendant, and clear attempts to prevent defendant from visiting the child. The trial court found that plaintiff "has gone out of her way to destroy any relationship that the child might have with [defendant]." We find that these facts are relevant to factor (j), the willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, and these facts are of such a magnitude to have a significant effect on the child's well-being. *Id.* at 512.

Ultimately, the evidence adduced by defendant amounts to more than minor allegations of contempt or visitation complaints, which are insufficient to establish proper cause. See *Adams v Adams*, 100 Mich App 1, 13; 298 NW2d 871 (1980). While the trial court erred by stating that a change in circumstances must be demonstrated by clear and convincing evidence, and it failed to make an express determination with respect to the threshold inquiry for modifying a custody order, we conclude that the trial court reached the right result. *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003) (where a trial court reaches the right result for the wrong reason, the ruling will not be disturbed). The trial court warned plaintiff that filing frivolous charges of sexual abuse could lead to her losing custody of her daughter, stating: "if you want to lose custody of your daughter, this is a great way to do it." Seemingly impervious to the trial court's admonishment, less than one month later, plaintiff filed another frivolous charge against defendant. By so doing, and with full knowledge of the consequences that such actions could bring, plaintiff made it clear that she did not intend to alter her course of behavior. We must therefore conclude that all the facts and factors considered by the trial court "constitute[d] proper cause to trigger the trial court's obligation to determine custody through a review of the statutory best interests factors." *Vodvarka*, *supra* at 516.

Next, plaintiff asserts that the trial court deprived her due process rights by failing to provide her with notice that the issue of physical custody was before the court. The issue of procedural due process was not raised below and thus not preserved for appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471-472; 628 NW2d 577 (2001). Nevertheless, due process notice requirements are "satisfied when interested parties are given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond." *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995).

While the hearing notice references only defendant's attached objection, which objected to the referee's findings for the "parenting time hearing," it is undisputed that plaintiff and plaintiff's counsel were present at the previous conciliation conference and referee hearing on defendant's motion, which raised the issues of parenting time and legal custody; thus, plaintiff

was aware of the subject matter of those proceedings. At the June 20, 2008, hearing before the trial court on defendant's objection to the referee's ruling, plaintiff's counsel asserted:

> [The referee] found on the record very clear that [defendant] had not met his burden that there had been a change of circumstances that would warrant a change in custody or parenting time. I entered an order to that effect . . . .

Given the history of the proceedings, where the trial court put the parties on notice at a previous hearing that baseless allegations could result in losing custody, the record provides clear support that custody of the child was at issue. Moreover, plaintiff never requested a continuance to call other witnesses or to present additional evidence. We conclude that under the circumstances, plaintiff received sufficient notice of the proceeding. The record reveals that plaintiff was apprised of the nature of the action, and she had an opportunity to present her objections. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504; 536 NW2d 280 (1995). Plaintiff has not established outcome-determinative plain error. *In re Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello