STATE OF MICHIGAN

COURT OF APPEALS

SARGUM C MANLEY a/k/a SARGUM C SOOD, Plaintiff-Appellee,	UNPUBLISHED April 19, 2016
v	No. 329754, 329760 Washtenaw Circuit Court Domestic Division
SHELTON H MANLEY, JR, Defendant-Appellant.	LC No. 10-0811-DM

Before: BOONSTRA, P.J., and WILDER and METER, JJ.

PER CURIAM.

Defendant appeals by right the trial court's September 29, 2015 post-judgment order denying defendant's motion to change legal custody of the minor children and ordering defendant to pay a portion of plaintiff's attorney fees related to the motion. We affirm in part and reverse in part.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties divorced in 2011. More specifically, the trial court entered a default judgment of divorce, following the taking of proofs, in part granting plaintiff sole legal custody and primary physical custody of the parties' minor children, then ages seven and nine. In 2015, defendant moved the trial court for change of custody. As is more particularly described below, defendant sought joint legal custody, contending that the default judgment had entered because he was not present at the time of the entry of judgment, and that the parties' actual course of conduct following the divorce was consistent with joint legal custody.

The register of actions indicates that the divorce proceedings were extensive and included the entry of a civil "no-contact" order in 2010. Also in 2010, plaintiff had initiated a personal protection order (PPO) proceeding against defendant; however, rather than issuing a PPO, the trial court had modified the no-contact order to provide that defendant was prohibited from entering plaintiff's property, from following plaintiff, from approaching or speaking to her except by phone in emergencies involving the children during parenting time, and from initiating any other form of communication with plaintiff. Plaintiff was also prohibited from contacting defendant except by phone in an emergency involving the children during parenting time.

In late 2014, nearly four years after the entry of the divorce judgment, the parties entered into a consent order entitled "Consent Order Regarding Parenting Time and Other Matters." The order provided for defendant to receive parenting time on alternate weekends from Thursday evening to Monday morning. The order additionally provided for a parenting coordinator, and delineated the scope of the coordinator's duties:

> **c. Scope of Parenting Coordinator Services.**
>
> > i. The parties agree that the parenting coordinator shall have the authority to issue a recommendation to expand Father's parenting time to include Wednesday overnights on the alternate weeks that Father has parenting time (as defined in paragraph 1 above).[1]
> >
> > ii. The parties shall each select up to three therapists for the minor children, who are [sic] participating insurance providers, and shall submit these names to the parenting coordinator before January 1, 2015. The parenting coordinator shall have binding authority to select a therapist from the names submitted by the parties.

In January 2015, the parties entered into a further consent order entitled "Consent Order for Appointment of Parenting Time Coordinator." The order contained the following section concerning the authority of the parenting coordinator:

> **4. Authority of the Parenting Coordinator**
>
> The Parenting Coordinator shall have authority to make decisions in his capacity as an arbitrator on the following specific issues:
>
> a. Implementation of an additional alternate Wednesday overnight parenting night for Defendant Father, which is contemplated to occur before January 1, 2016, as set forth in the consent order signed December 4, 2014.
>
> b. Selection of a mental health professional for the children if parties cannot agree, as set forth in the consent order signed December 4, 2014; and
>
> c. All matters ancillary to the above or upon which the parties agree.

Also in January 2015, defendant filed his first motion to modify the custody provision of the divorce judgment, to provide for joint legal custody; the trial court denied the motion without oral argument, finding that defendant had not established proper cause or change of circumstances to warrant revisiting the custody order. Defendant again moved to modify the

[1] Paragraph 1 defines defendant's parenting time as extending from 6:30 p.m. on Thursday to Monday morning on alternate weeks.

custody order in August 2015. Defendant essentially argued, as in the first motion, that the parties had been operating as though they possessed joint legal custody notwithstanding the terms of the divorce judgment, and additionally that neither party was following the no-contact order. Defendant argued that this newfound comity was a change of circumstances that warranted revisiting the custody arrangement.

The trial court held a hearing on defendant's second motion on September 29, 2015. Counsel for defendant argued that a change in custody to joint legal custody would merely "memorialize what the parents are doing in fact" in their parenting of the children. Defendant's counsel further argued that the parenting coordinator order was limited in scope to allowing the parties to select a counselor for the children and to "have someone help them fix a time that [defendant's] parenting time during the school year would increase." Finally, defendant's counsel argued that neither party was abiding by the terms of the no-contact order and asked the court to declare that the order no longer applied.

Plaintiff's counsel disputed defendant's characterization of the divorce proceedings, denying that sole legal custody was entered solely because of the default nature of the divorce judgment and noting the extensive and contentious nature of the divorce proceedings. Counsel further pointed out that although both parties attended extracurricular events involving the children, they did not interact at those events, which was permitted by the no-contact order. Counsel argued that plaintiff would be afraid for her safety if the order were lifted. Counsel for plaintiff denied that the parties were cooperative; in fact, counsel contended that the relationship between the parties remained acrimonious. Plaintiff's counsel also stated that plaintiff had requested that the parenting coordinator order defendant to attend several sessions with a social worker or therapist concerning his issues with plaintiff and how those issues affected the children. Counsel further asked that the trial court find defendant's motion to be frivolous and award costs and attorney fees.

The trial court denied defendant's motion, stating:

> As to father's motion for joint legal custody, I am going to deny that. There's no change of circumstances, no proper cause, it's the same motion. The Court went over the entire file in January when he filed for that and gave it due consideration at that time.
>
> When I denied it, he yet brought the same motion again despite the fact that I had already denied it, despite the fact that he was to consult the parenting coordinator for any change prior to bringing it to the Court, nonetheless he brought it to the Court anyway.
>
> Regarding the father's motion to remove the Civil No Contact Order, it's in the PPO file, so it's not even in this file, I'm denying that as well. It is appropriate that the Civil No Contact Order is in place, you are to follow that, sir.
>
> You're subject to the Court contempt powers should you violate that order, so I suggest you re-read that and that order remains in place and you are to follow it.

> I am also going to order that the father is to consult with the parenting coordinator, Mr. Reed. Mr. Reed is to suggest parenting class/therapist/education . . . any choice of what he thinks is appropriate. The father is to follow the recommendation that Mr. Reed gives you.
>
> As to attorney fees, the fact that this same motion was brought and considered by the Court in January, I find nothing has changed since January, nothing has changed prior to January that would lead the Court to show that there is a change in circumstance or proper case, the fact that they did not consult with the parenting coordinator prior to filing this motion, it is just the same issue again and again and again.
>
> I am going to order that the father pay $1,000 of mother's attorney fees.

This appeal followed.[2]

II. DENIAL OF CHANGE OF CUSTODY

Defendant first argues that the trial court erred in denying his request to change legal custody of the children to joint custody. We disagree. We will affirm a trial court's decision regarding change of custody 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. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010).

An order determining child custody may be modified if the party seeking modification can show a proper cause or change of circumstances that establishes that the modification is in the children's best interest. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009). The party seeking modification must establish proper cause or change of circumstances as a threshold requirement to consideration of the established custodial environment or the best interests of the children. *AP*, 283 Mich App at 600. A trial court is not required to hold an evidentiary hearing prior to the determination of whether proper cause or change of circumstances exists. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). The movant has the burden of proving by a preponderance of the evidence that proper cause or a change in circumstances exists. *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011).

For there to be proper cause to revisit a custody order; there must be appropriate grounds that have or could have a significant impact on the child's life such that a reevaluation of custody should be made; in determining whether these grounds exist, trial courts may look for guidance to the best-interest factors provided in the Child Custody Act, MCL 722.23(a)-(*l*). *Vodvarka v Grasmeyer*, 259 Mich App 499, 511-512; 675 NW2d 847 (2003). Similarly, for there to be a change of circumstances that merits consideration of a custody change, there must have been a change in conditions pertaining to custody since the entry of the last custody order that has had

[2] On appeal, defendant does not challenge the trial court's refusal to vacate the no-contact order.

or could have a significant impact on the child's well-being. *Corporan*, 282 Mich App at 604. Here also, the trial court may consider the statutory best-interest factors. *Brausch v Brausch*, 283 Mich App 339, 355; 770 NW2d 77 (2009). Normal life changes of a child do not warrant a reevaluation of custody. *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 658; 808 NW2d 811 (2011).

At the outset, defendant argues that no case law supports the proposition that normal life changes for children are insufficient to modify *legal* custody. In fact, however, numerous cases support the proposition that normal life changes are insufficient to revisit the issue of custody of any kind. See *Gerstenschlager*, 292 Mich App at 658; *Vodvarka*, 259 Mich App at 511-512; *Corporan*, 282 Mich App at 604. Further, *Brausch* explicitly dealt with a change in legal custody; this Court concluded, citing *Vodvarka*, 259 Mich App at 513-514, that the evidence presented did not demonstrate more than normal life changes and did not constitute a proper change of circumstances. *Brausch*, 283 Mich App at 358. Thus, to succeed in his motion, defendant was required to demonstrate more than normal life changes in the children. Defendant's argument that the children are older, more independent, involved in more school activities, and more able to participate with their father in activities such as running and computer programming, is irrelevant to whether the custody order should be revisited. Further, defendant's argument that the parties are acting as though de facto joint legal custody existed boils down to the fact that the parties were able to reach agreement on some issues concerning the children while operating within the current custody framework. Defendant presents no case law, and this Court has found none, in support of the proposition that amicable (or at least civil) communication between divorced parents on issues concerning their children's health is either proper cause or a change in circumstances sufficient to warrant revisiting a custody order.[3]

Further, the alleged "de facto joint custody" of the parties' children was flatly disputed by plaintiff. Plaintiff's counsel maintained at the hearing that the parties do not communicate except through a messaging program designed to allow them to comply with the no-contact order, and have substantial disagreements regarding appropriate discipline for the children. Further, defendant's own motion indicates that plaintiff has made many unilateral decisions regarding the children without discussing them with defendant.

Simply put, defendant has not alleged any proper cause or change of circumstances sufficient to warrant revisiting the custody order. The changes asserted in his motion, even if true, amount to normal changes in the children's lives as the result of aging and the ideally normal easing of acrimony between divorced parties due to the passage of time. The trial court did not err in concluding that defendant had failed to establish by a preponderance of the

[3] We note that the parties have clearly not reached a level of cooperation and amicability such that plaintiff would stipulate to either an end to the no-contact order or a modification of custody. Although not binding on the Court, which must conduct its own determination of the best interests of the children, see *Philips v Jordan*, 241 Mich App 17, 24; 614 NW2d 183 (2000), nothing prevents the parties to a custody arrangement from seeking to enter a stipulated order changing custody.

evidence that proper cause or change of circumstances existed. MCL 722.28; *Pierron*, 486 Mich at 85, *Dailey*, 291 Mich App at 665. Having concluded that defendant failed to clear this threshold, the trial court was not obligated to consider the existence of established custodial environments or the statutory best-interest factors, *AP*, 283 Mich App at 600, or to hold an evidentiary hearing, *Corporan*, 282 Mich App at 605.

III. PARENTING COORDINATOR ORDER

Defendant next argues that the trial court lacked the authority, under the parenting coordinator order, to order him to consult with the parenting coordinator concerning individual therapy or other instruction. We agree. We review issues of statutory interpretation de novo. See *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013).

MCL 722.27c(1) provides that a parenting coordinator "is a person appointed by the court for a specified term to help implement the parenting time orders of the court and to help resolve parenting disputes that fall within the scope of the parenting coordinator's appointment." MCL 722.27c(2) provides that a trial court "may enter an order appointing a parenting coordinator if the parties and the parenting coordinator agree to the appointment and its scope." The order must contain "[t]he scope of the parenting coordinator's duties in resolving disputes between the parties." MCL 722.27c(3)(e).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217; 801 NW2d 35 (2011). The best indicator of the Legislature's intent is the specific language of the statute. *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; 795 NW2d 101 (2009). Here, the language of MCL 722.27c unambiguously provides that the parenting coordinator possesses only the authority to decide matters within the scope of the parenting coordinator order to which the parties have consented.[4] The order in the instant case provides only for the implementation of additional Wednesday night parenting time for defendant, selection of mental health professionals for the children, and matters ancillary to those matters or matters that the parties agree to submit to the parenting coordinator. Nothing in the order permits the parenting coordinator to order defendant to attend individual counselling. Further, although MCL 722.27c(4) allows the trial court to terminate the appointment of the parenting coordinator, nothing in MCL 722.27c allows the trial court to unilaterally modify the scope of the parenting coordinator's duties or to issue a new parenting coordinator order absent the parties' consent. Further, comments made by the trial court suggest that defendant was obligated to bring the issue of a change of custody before the parenting coordinator before raising it by motion; however, although MCL 722.27c(12) *allows* the court to hear the testimony of the parenting coordinator if it finds the testimony useful to resolve a pending dispute, nothing in the parenting coordinator order or MCL 722.27c indicates that the

[4] Such a reading comports with the general jurisprudence surrounding consent orders and judgments, which are in the nature of contracts and are the product of an agreement between the parties. See *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994); *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990).

issue of a change in legal custody was within the scope of the parenting coordinator's duties or that defendant was *required* to bring the issue before the coordinator.

We therefore conclude that the trial court erred in ordering defendant to submit to the parenting coordinator's recommendations for individual counseling, and reverse the portion of the trial court's order related to that issue.

IV. ATTORNEY FEES

Finally, defendant argues that the trial court erred in finding his motion frivolous and awarding plaintiff attorney fees. We disagree.

We review a trial court's finding that a claim was frivolous for clear error. *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 534 (quotation omitted).

The signature of an attorney or a party, regardless whether the party is represented by an attorney, constitutes a certification that (1) the signer has read the document, (2) to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the document is well-grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(D). If a document is signed in violation of this rule, the court shall impose an appropriate sanction on the person who signed it, the represented party, or both. MCR 2.114(E). In addition to sanctions under MCR 2.114, a party who pleads a frivolous claim is subject to costs as provided in MCR 2.625(A)(2). Pursuant to MCR 2.625(A)(2), if a court finds that an action was frivolous, costs shall be awarded as provided by MCL 600.2591(A)(2). MCL 600.2591(A) provides, in pertinent part:

> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

The determination whether a claim is frivolous must be based on the circumstances at the time it was asserted. *Jericho Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). The mere fact that a plaintiff does not prevail does not render a claim frivolous. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). See also *Thomas Indus, Inc v C & L Electric, Inc*, 216 Mich App 603, 610-611; 550 NW2d 558 (1996) (holding that the plaintiff's claim was not frivolous because his legal argument was "feasible").

Here, the trial court found that defendant's motion was frivolous because it was essentially the same motion as the one that had been filed in January 2015 and denied in March 2015. The filing of repeated motions asserting identical grounds that have already been ruled upon may be frivolous. See *McCarthy v Sosnick*, 490 Mich 918; 805 NW2d 608 (2011). Here, defendant's August 4, 2015 motion is substantially identical to his January 22, 2015 motion, which the trial court had denied. Further, the August 4, 2015 motion does not allege any facts or changes in the law since the denial of defendant's previous motion that would demonstrate that proper cause or change in circumstances had developed since the denial of defendant's previous motion. Indeed, the only new facts alleged by defendant in the August motion contradicted his claim that the parties were essentially operating as de facto joint custodians, as he claimed that plaintiff had begun making decisions as sole legal custodian without seeking his input. Further, defendant's reference, in the August motion, to a recent unpublished case[5] concerning a motion to remove a condition placed on the exercise of a parent's parenting time did not aid his position that a change of legal custody was warranted. Additionally, a second unpublished case cited by defendant on appeal and at oral argument (but not in the motions below)[6] does not aid his position, as that case involved a trial court's failure to consider the impact of joint legal custody on a child's established custodial environment. In sum, the trial court did not clearly err in determining that defendant's August motion was devoid of legal merit and was therefore frivolous.[7] MCL 600.2591(A)(3)(iii).

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

[5] *Kaeb v Kaeb*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 319574).

[6] *Al-Awadhi v Al-Awadhi*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2015 (Docket No. 322727).

[7] Defendant does not contest the amount of the attorney fee awarded.