STATE OF MICHIGAN

COURT OF APPEALS

JORDAN B. MILLER,

Plaintiff-Appellee,

v

DANIEL A. MILLER,

Defendant-Appellant.

UNPUBLISHED
August 7, 2012

No. 308215
Washtenaw Circuit Court
LC No. 08-002869-DM

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

In this child custody dispute, defendant appeals the trial court's order that granted plaintiff's motion for a change of custody and awarded plaintiff sole legal and physical custody of the parties' child. For the reasons set forth below, we affirm.

I. PROPER CAUSE AND CHANGE OF CIRCUMSTANCES

Defendant argues that the trial court erred by holding that plaintiff met the threshold burden of demonstrating proper cause or a change of circumstances sufficient to warrant revisiting the previous custody order. A trial court's factual findings in a custody appeal are reviewed under the great weight of the evidence standard. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

The parties were awarded joint legal and physical custody of the child pursuant to a consent judgment of divorce. A custody award may be modified on a showing of proper cause or a change of circumstances. MCL 722.27(1)(c). "[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." *Vodvarka*, 259 Mich App at 512. "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." *Id.* "When a movant has demonstrated proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors." *Id.* "[I]n 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." *Id.* at 513. "[N]ot just any change will suffice . . .

[i]nstead, 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." *Id*. at 513-514.

Defendant challenges the trial court's decision to proceed with an evidentiary hearing to determine custody based on the allegations in plaintiff's motion. It is well settled that "an evidentiary hearing is [not] necessary to resolve th[e] initial question" whether proper cause or a change of circumstances exists." *Id*. at 512. Indeed, "the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard." *Id*.

Regarding proper cause, plaintiff established the existence of an appropriate ground for legal action to be taken by the trial court. Plaintiff alleged, and presented evidence to show that defendant was engaging in behavior that directly violated the existing custody order. Specifically, the judgment of divorce prohibited defendant from physically disciplining the child, making disparaging comments about plaintiff in the child's presence, or imposing on the child his views concerning the use of fluoridated water. Plaintiff presented evidence that defendant physically disciplined the child by pulling on his ears and hitting him, that defendant brought bottled, non-fluoridated water to the child's school each day, even on days when he did not have parenting time, and that defendant ridiculed plaintiff in the child's presence.

Conduct that directly contravenes restrictions in a divorce judgment constitutes an appropriate ground for legal action. Further, the grounds raised by plaintiff were relevant to several statutory best interest factors, including defendant's capacity and disposition to give the child guidance, MCL 722.23(b), defendant's capacity to provide the child with appropriate food and water, MCL 722.23(c), defendant's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and plaintiff, MCL 722.23(j), domestic violence, MCL 722.23(k), and other factors considered relevant to a particular child custody dispute as demonstrated by the particular restrictions in the parties' divorce judgment, MCL 722.23(l).

Defendant argues that the allegations in plaintiff's motion were "not of a magnitude to have a significant effect on the child." However, again, the allegations related to matters that were specifically prohibited by the divorce judgment and they concerned the effect of defendant's conduct on the child. Plaintiff made a sufficient showing that the allegations were "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 particular, plaintiff alleged that the child began to frequently complain about the reasoning for and degree of punishment inflicted by defendant. Plaintiff also alleged that the child asked that plaintiff not tell anyone about his concerns because he was scared of repercussions by defendant, and because defendant instructed him not to tell anyone. Similarly, plaintiff alleged that the child stated that he could not take much more of the situation, that he would "get [defendant] back[,]" and that he wanted to shoot defendant. These circumstances were "of such magnitude to have a significant effect" on the child's well-being. *Id*.

The same evidence supported a finding of a change of circumstances. Again, plaintiff presented evidence that, since the entry of the last custody order, a material change occurred in the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being. *Id*. at 513. As discussed, plaintiff alleged that, in violation of the judgment, defendant physically disciplined the child and disparaged her in front of the child. These allegations were sufficient to show that conditions surrounding the custody of the child had materially changed since entry of the last custody order. Further, the allegations, described above, about the child's complaints regarding defendant's discipline and its effect on him, demonstrate that defendant's conduct had a significant effect on the child's well being.

It is well settled that the Legislature's intent in the Child Custody Act was to "minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment' except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981). Defendant's direct violation of several provisions of the custody order constitutes a compelling basis to revisit the prior custody decision. Accordingly, plaintiff met her burden of showing both proper cause and a change of circumstances sufficient to warrant revisiting the custody order.

II. ADMISSION OF EVIDENCE

Defendant argues that the trial court erred in admitting several out-of-court statements the child made to plaintiff. The trial court ruled that the statements, although hearsay, were admissible under the state-of-mind exception, MRE 803(3). The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). MRE 803(3) permits admission of the following statements:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Here, plaintiff testified that after the child returned from a visit with defendant, the child

> was reporting having his ears grabbed, having his neck grabbed, punishments when he didn't know why he was being punished, getting in trouble very frequently, that the expectations of him he felt were almost impossible to—to live up to . . . [a]nd he was feeling really upset because he felt afraid that no matter what he did he was going to be punished.

Plaintiff also stated that the child "started expressing this fear of his father and saying things like, you know, I'm going [to] get him back for this or I can't take this anymore." Plaintiff explained that the statements were made while she was putting the child to bed, and the child pulled her in and began to explain why he was feeling upset and confused.

We hold that the challenged statements are admissible under MRE 803(3). The child's statements that defendant grabbed his ears and neck pertained to his then-existing state of mind

in which he expressed that he was confused and "feeling really upset" because he did not know why he was being punished. The child's statements that he felt upset and afraid related to his then-existing state of mind and emotion. Similarly, the child's statements that he could no longer handle the situation and that he wanted to engage in retribution by getting back at defendant and shooting him related to his then-existing state of mind, including his intent, plan, and motive to avenge defendant's actions. Accordingly, the trial court did not abuse its discretion in admitting the statements under MRE 803(3). See *In re Utrera*, 281 Mich App 1, 18-19; 761 NW2d 253 (2008).

Further, contrary to defendant's assertion, the record shows that the trial court did not admit the child's statements about whether he felt plaintiff betrayed him by telling the court what he said about his father. In reference to that testimony, the trial court remarked, "It doesn't sound like it's relevant, because it's just the child saying what he . . . believed . . . [s]o I'm not going to allow it in." Accordingly, defendant is not entitled to relief on this issue.

III. CHANGE IN CUSTODY

Defendant argues that plaintiff failed to present clear and convincing evidence to disturb the existing joint custody relationship and to award plaintiff sole legal and physical custody of the child. This Court must affirm all custody orders unless the trial court's findings of fact are 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*, 277 Mich App at 705. A trial court's findings with respect to the best interest factors in MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* This Court defers to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best interest factors. *Id.* The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. *Id.* An 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." *Id.*

Custody disputes are to be resolved in the child's best interests, as determined by the statutory best interest factors in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The trial court examined those factors to determine the child's best interests. Regarding factor (a), the love, affection, and other emotional ties existing between the parties involved and the child, the trial court found that defendant physically interferes with and dominates the child. Regarding factor (b), the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any, the trial court found that both parties display love for the child and provide him with tools to learn. Regarding factor (c), the capacity and disposition of the parties involved to provide the child with food, clothing, medical or other remedial care, and other material needs, the trial court found that both parties are attentive to the child's needs, but that the child is not always comfortable with defendant's treatment of him and believed that he could, as a child, try to prevent defendant from hitting and mistreating him.

Regarding factor (d), the trial court did not directly address the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity in the context of the best interest factors, but it did find the existence of an established custodial

environment with both parties, thereby indicating that the parties were on relatively equal footing with respect to this factor. Regarding factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes, the trial court found that the child's home with defendant could be very permanent if defendant refrained from imposing his beliefs on the child. Regarding factor (f), the moral fitness of the parties involved, and factor (g), the mental and physical health of the parties involved, the trial court found that the child was becoming preoccupied with his health at a young age due to defendant imposing his views on the child. The court appears to have considered these factors in relation to the child, as opposed to the parties. However, no evidence was presented concerning the mental and physical health of the parties involved, and there was no evidence of plaintiff's lack of moral fitness, whereas the evidence demonstrated that defendant physically disciplined the child in contravention of the divorce judgment, which could be viewed as negatively bearing on his moral fitness.

Regarding factor (h), the home, school, and community record of the child, the trial court found that the child has a good home and school record. Regarding factor (i), the reasonable preference of the child, the trial court found that the child's preference was unreasonable. Regarding factor (j), the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, the trial court found that plaintiff was dedicated to facilitating a continued relationship between the child and defendant, but that the time the child spends with defendant needed to be reduced because it is harmful to the child. Regarding factor (k), domestic violence, the trial court found that defendant was overly punitive and physically punitive with the child.

Considering the evidence presented, the trial court's findings are not against the great weight of the evidence. Further, the trial court did not err in holding, in light of its findings, that plaintiff met her burden of showing by clear and convincing evidence that a change in custody was in the child's best interests, and the court did not abuse its discretion in awarding plaintiff sole legal and physical custody of the child. Although the evidence showed that defendant was a good and caring parent overall, and that the child wanted to maintain a relationship with defendant, it also showed that defendant's conduct caused the child to be fearful of his physical safety and created anxiety about his ingestion of toxins. Under the circumstances, the trial court's decision is not "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*, 277 Mich App at 705.

IV. PARENTING TIME

Defendant argues that the trial court abused its discretion by reducing his parenting time, from an equal amount of time and overnights, to no overnights and one day a week. MCL 722.27a(1) provides:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his . . . parents. Except as otherwise provided in this section, parenting time shall 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.

The trial court ruled that, under the facts of the case, a reduction in defendant's parenting time to one day a week was appropriate "to start" and expressed hope that the parties could someday return to the previous schedule. The trial court noted that the child wants to see defendant and expressed love for defendant, but that the prior parenting time schedule had not worked out, and it was not in the child's best interests to have more than one day of parenting time a week at this time. The trial court's decision is supported by evidence that defendant repeatedly violated the custody order then in place, which specifically prohibited physical discipline, imposing views about alleged environmental pollutants on the child, and disparaging plaintiff in the child's presence. However, the award provides for weekly parenting time for a substantial period on Saturdays, in recognition of the child's continuing desire to see defendant. The trial court's parenting time award allows for parenting time in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and defendant under the circumstances. MCL 722.27a(1). The trial court's modification of its earlier parenting-time schedule is not a basis for finding a palpable abuse of discretion. *Berger*, 277 Mich App at 716.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering