

STATE OF MICHIGAN
COURT OF APPEALS

JEAN M. ROSS,

Plaintiff-Appellee,

v

MICHAEL T. ROSS,

Defendant-Appellant.

UNPUBLISHED

December 14, 2004

No. 255386

Oakland Circuit Court

LC No. 1999-630092-DM

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right an order denying his petition to change custody of the parties' three minor children. We affirm.

Plaintiff and defendant were divorced on January 14, 2002. Plaintiff and defendant have three minor children together. On January 14, 2002, the trial court ordered that plaintiff and defendant have joint legal custody of the children, that plaintiff have primary physical custody, and that defendant have parenting time every other weekend, every Tuesday evening during the academic school year, Thursday evenings preceding plaintiff's weekend with the children, four weeks in the summer, and alternating holidays.

On February 18, 2004, defendant filed a petition to change primary physical custody, alleging that he could provide a more nurturing environment than plaintiff and that he has encouraged enrichment opportunities and expansion of personal development while plaintiff has restricted and/or prevented such activities. Defendant further alleged that plaintiff's emotional/personality problems have affected her ability to do what is in the best interests of the children. Defendant further contended that plaintiff interferes with his role as a father and has refused and/or failed to present the children for parenting time. Lastly, defendant claimed that the children desire to reside with him rather than plaintiff. Plaintiff denied defendant's allegations as untrue and requested that defendant's petition be denied.

On February 25, 2004, a hearing was held regarding defendant's petition for change of custody. The trial court denied defendant's motion, concluding that defendant failed to show proper cause or change of circumstances, which would warrant a change of custody.

On April 2, 2004, defendant filed a motion for reconsideration, arguing that there was proper cause/change in circumstances that warranted an evidentiary hearing. This motion was also denied.

Defendant's first issue on appeal is that the trial court committed error requiring reversal in summarily dismissing his motion for change of custody by failing to conduct an evidentiary hearing, by failing to interview the minor children, by failing to seek an expert opinion, by failing to address the "best interest" factors, and by failing to apply the correct standard in determining defendant's right to an evidentiary hearing. We disagree.

When reviewing child custody cases, findings of fact are reviewed under the great weight of the evidence standard, discretionary rulings are reviewed for an abuse of discretion, and questions of law are reviewed for clear error. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000); MCL 722.28. A custody award may be modified on a showing of proper cause or change of circumstances which establishes that the modification is in the child's best interests. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001); 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 v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003). "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 such 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." *Vodvarka, supra* at 513 (emphasis in original). "Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being." *Id.* "Instead, 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. "[W]here the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of 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).

At the hearing regarding defendant's petition to change custody, defendant argued that he should receive primary physical custody of the children because plaintiff prevented the children from participating in extracurricular activities, failed to abide by the parenting time schedule, and maligned defendant in front of the children. Defendant further claimed that he is now settled into his new home and that the children wanted to live with him. The trial court held that there was not proper cause or change of circumstance to warrant a change of custody. In making this ruling, the trial court found that defendant's current problems with plaintiff were ongoing and existed at the time custody was decided. The trial court noted that defendant owned his own home at the time custody was decided. The trial court further noted that even if the children now preferred to live with defendant, their preference alone would not warrant a change in custody.

In order for the trial court to engage in a reevaluation of the statutory best interest factors, defendant had to show, by a preponderance of the evidence, either the existence of an appropriate ground for legal action to be taken by the trial court, or that the children's custodial environment had materially changed since the entry of the last custody order, which could have a significant effect on the children's well-being. *Vodvarka, supra* at 512-513. Defendant has shown neither. Before the entry of the last custody order, plaintiff and defendant were having problems with denigrating each other in front of the children, with agreeing on parenting time, and with deciding details regarding the children's extracurricular activities. These problems existed prior to the entry of the last custody award and do not amount to either a proper cause or a change of circumstances, as they neither warrant legal action nor amount to a material change of the custodial conditions. Further, defendant's claim that he is now settled into his new home is of little significance, as he owned the home at the time the last custody award was entered. Finally, defendant's allegation that the children now prefer to live with him was not based on any evidence. Even if the allegation was true, in light of the fact that the children's living situation has not materially changed since the entry of the last custody award, and in light of the fact that the children are doing extraordinarily well in school, this allegation alone would not constitute proper cause or change of circumstances warranting a change of custody. See *Curlyo v Curlyo*, 104 Mich App 340, 349; 304 NW2d 575 (1981) (the fact that the children may have expressed a desire to live with the plaintiff is not a sufficient basis upon which to revisit custody). For the above reasons, the trial court did not abuse its discretion in concluding that defendant failed to show proper cause or change of circumstances warranting a change of custody.

Defendant claims that the trial court was required to hold an evidentiary hearing before summarily denying his request for change of custody. We disagree. The plain and ordinary language of § 27(1)(c) evidences the Legislature's intent that the statutory best interest factors be considered only when a party seeking modification of a custody order has demonstrated either proper cause or a change in circumstances. *Rossow, supra* at 458. Having failed to make this preliminary showing, the trial court was not authorized to revisit the prior custody decision by reconsidering the statutory best interest factors. *Id.*; see also *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). Because defendant failed to show proper cause or change of circumstances, the trial court was not required to conduct an evidentiary hearing.

Defendant also claims that the trial court erred by failing to interview the children regarding their preference, by failing to seek the input of an expert psychologist, and by failing to address the best interest factors. We disagree. As stated above, because defendant failed to show proper cause or change of circumstances, the trial court was not required to conduct an evidentiary hearing. Since the trial court was not required to conduct an evidentiary hearing, it was also not required to interview the children or seek an expert opinion. Furthermore, defendant's claim that the trial court erred in failing to address the best interest factors is without merit. Since defendant failed to show proper cause or change of circumstances, the trial court was not authorized to revisit the prior custody decision by reconsidering the statutory best interest factors. *Rossow, supra* at 458.

Finally, defendant claims that the trial court erred in applying the "preponderance of the evidence" standard in determining whether he established proper cause or change of circumstances. We disagree. "The movant . . . has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court

can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors.” *Vodvarka, supra* at 509 (emphasis in original). The *Vodvarka* decision has not been overruled, and therefore, defendant’s claim is without merit.

Defendant’s next issue on appeal is that he is entitled to a remand for a full evidentiary hearing regarding the “best interests” factors pursuant to *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004). Defendant has failed to preserve this issue, as he did not raise it before the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Thus, we will review the issue for a plain error affecting defendant’s substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Defendant essentially argues that the trial court in this case never addressed the best interests factors before deciding custody of his children and that *Harvey, supra*, requires such before an entry of a custody award, and thus, he is entitled to a remand. We disagree for two reasons. First, this issue is not properly before us on appeal, as this issue deals with the improper entry of the original 2002 custody order. Defendant has only appealed the trial court’s denial of his petition to change custody, and therefore, we shall not address this issue on appeal, as our review is limited to issues involving the order appealed from and not the original custody order, which was never appealed. See MCR 7.101.

Second, even if this issue was properly before us on appeal, *Harvey, supra*, is inapplicable to this case. In *Harvey*, the parties agreed that the friend of the court would determine the custody of their children and that the circuit court could not review the decision. *Harvey, supra* at 187. Based on this agreement, the circuit court entered the friend of the court’s recommended order awarding the defendant sole custody of the children and denied the plaintiff’s motion for a hearing on the matter. *Id.* This Court vacated the circuit court’s order and remanded the case for a hearing. *Id.* The Michigan Supreme Court affirmed this Court’s opinion, holding that “the Child Custody Act requires the circuit court to determine independently what custodial placement is in the best interests of the children.” *Id.* The Court further held that “[a]n initial agreement between the parties cannot relieve the court of its statutory responsibility to ensure that its adjudication of custody disputes is in a child’s best interests.” *Id.* at 188 n 2.

Here, while the parties did agree to submit their case to binding arbitration, there was no issue regarding whether the arbitrator or the circuit court would decide the children’s best interests, as in *Harvey*. In fact, defendant never appealed the original custody award. Defendant misconstrues *Harvey* as holding that if the trial court does not address the best interest factors, then the case shall be remanded for an evidentiary hearing. This is not the holding in *Harvey*. *Harvey* holds that an initial agreement between the parties cannot relieve the court of its statutory responsibility to ensure that its adjudication of custody disputes is in a child’s best interests. This holding has no bearing on the order appealed in this case, which is a denial of defendant’s petition to change custody. Since the statutory best interest factors can only be considered when a party seeking modification of a custody order has demonstrated either proper cause or a change in circumstances, *Rossow, supra* at 458, which defendant has failed to show, the trial court cannot remand this case for an evidentiary hearing to address the best interest factors.

Defendant's final issue on appeal is that the trial court denied him his right of due process by failing to conduct a full evidentiary hearing pursuant to MCR 3.210(C)(8). Again, defendant has failed to preserve this issue, as he did not raise it before the trial court. *Fast Air, Inc, supra* at 549. Thus, we will review the issue for a plain error affecting defendant's substantial rights. *Kern, supra* at 336.

Defendant argues that he is entitled to an evidentiary hearing under MCR 3.210(C)(8) because there were contested factual issues in this case. MCR 3.210(C)(8) provides as follows:

In deciding whether an evidentiary hearing is necessary with regard to a postjudgment 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.

Here, the trial court did not claim that defendant's allegations were untrue, but rather, accepted defendant's allegations as true and still found that he failed to meet his burden to show proper cause or a change in circumstances, as the problems defendant alleged existed at the time the original custody award was entered. The only disputed allegation was regarding the children's residential preference, and this allegation alone is not a sufficient basis upon which to revisit custody. *Curlyo, supra* at 349. Because there were no contested factual issues that must have been resolved in order for the court to make an informed decision on the motion, defendant was not entitled to an evidentiary hearing pursuant to MCR 3.210(C)(8).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood