

STATE OF MICHIGAN
COURT OF APPEALS

LAURIE ANN DELEKTA,

Plaintiff-Appellant,

v

JAMES MATTHEW DELEKTA,

Defendant-Appellee,

and

MELISSA M. GOODRICH,¹

Appellee.

UNPUBLISHED

December 20, 2016

No. 331981

Presque Isle Circuit Court

Family Division

LC No. 08-083149-DM

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

In this custody dispute, plaintiff, Laurie Ann Delekta, appeals by right the trial court's opinion and order denying her motion to change physical custody of the minor children from being with defendant, James Matthew Delekta, to her. The trial court found that plaintiff did not prove by a preponderance of the evidence either proper cause or a change of circumstances. Because we do not find the trial court's findings to be against the great weight of the evidence, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

As noted by plaintiff in her brief on appeal, the trial court aptly described this case as having a "long and tortured" history involving multiple motions for change of custody that generated the admission of testimony from therapists, psychologists, and a psychiatrist, among others. The parents divorced in November of 2008, at which time they agreed to joint legal and physical custody of their two minor children. In May of 2009, plaintiff moved the court, in part, for primary physical custody. On October 5, 2009, after a hearing, the trial court entered an

¹ Goodrich serves as the children's lawyer-guardian ad litem.

order affirming the parents' joint custody of the children and establishing a "one week on and one week off" parenting-time schedule.

In December of 2012, plaintiff moved the trial court to grant her "full custody" of the children. Plaintiff gave a variety of reasons in support of her motion, which defendant contested as being largely false, and he requested that the court award him physical and legal custody of the children and order that plaintiff have supervised parenting time. In January of 2013, the trial court appointed Dr. Ted Stiger to "conduct a family assessment" of the parents and the children to assist the court in determining whether one parent should be awarded primary physical custody. The parties stipulated to Stiger conducting the assessment.

In February of 2013, plaintiff filed an ex parte motion to suspend defendant's parenting time, alleging inappropriate conduct by defendant involving one of the children. Douglas Gilmet, a CPS worker, testified at the subsequent custody trial that the complaint was not substantiated and opined that the child "was not being truthful" given the "[i]nconsistencies in her story . . ."

In April of 2013, defendant moved the trial court for temporary custody and for a suspension of plaintiff's parenting time, relying on Stiger's conclusion that plaintiff's "degree of rational and affective instability (and relative to [defendant's] overall psychological and parental functioning) clearly supports [defendant's] position in regard to the Court identifying him as the primary custodial parent" Plaintiff subsequently moved the trial court to allow her to relocate with the children to Nevada, informing the court that she had accepted a job offer, as a maintenance engineer with Molycorp Minerals, LLC.

On July 17, 2013, plaintiff filed a psychological evaluation conducted by Dr. Jeffrey Kieliszewski the previous month. According to the trial court, plaintiff was "not satisfied with Dr. Stiger's evaluation" and "obtained a second opinion from a psychologist solely of her own choosing." Kieliszewski concluded that plaintiff "presented somewhat prominent and classic characteristics of Borderline Personality Disorder" (BPD), but deferred a diagnosis. "There was also some indication of some narcissistic personality traits and some level of histrionic personality characteristics," Kieliszewski reported.

Beginning July 23, 2013, the trial court held a two-day hearing on the parents' competing motions seeking primary physical custody of the children. The court heard testimony from over 20 witnesses at that time, including Stiger. Stiger thought that defendant "is much more emotionally and psychologically healthier in contrast to [plaintiff]," although he agreed that defendant has numerous emotional and interpersonal shortcomings. Stiger testified in accordance with his written report to the court, in which he recommended that the court award defendant physical custody. He thought that plaintiff's "propensity to project, triangulate, distort and manipulate" was having "deleterious effects . . . upon her children." The court found Kieliszewski's report to be "completely consistent" with Stiger's report.

The trial court was aware that the children had expressed a preference to live with plaintiff and that they had a stronger bond with her. But the court concluded that the parties' mental health was "very significant" and "scored" that factor in defendant's favor after reviewing Stiger's and Kieliszewski's reports. The trial court was also aware that plaintiff had

“advanced false accusations” about defendant. Indeed, the testimony of the children’s former counselor, Judith Thompson, suggests that plaintiff encouraged one of the children to make false allegations of sexual abuse against defendant. Ultimately, the trial court determined that it would be in the children’s best interests to award defendant physical custody of the children, while the parents shared joint legal custody. The court ordered that plaintiff be awarded a maximum amount of parenting time with the children in Las Vegas, where she had already moved.

Plaintiff’s parenting time was subsequently limited to supervised visits after text messages provided to the trial court revealed that she was encouraging one of the children to make defendant’s life “miserable.” In the spring of 2015, plaintiff accepted a job with DPI-Alpena and moved back to Michigan. On May 1, 2015, she filed a motion seeking modification of several prior orders concerning custody, parenting time, and child support. Eventually, plaintiff’s parenting time was no longer subject to supervision and the parties agreed that she would have the children on alternating weekends.

Numerous other motions regarding custody were filed in this matter that need not be detailed here. This appeal stems from plaintiff’s December 2015 motion seeking primary physical custody. The trial court held an evidentiary hearing in February 2016 to determine whether proper cause or a change of circumstance existed that would warrant reconsideration of the custody arrangement.

At the February 2016 hearing, Derek Johnson, testifying telephonically as plaintiff’s therapist, explained that he diagnosed plaintiff with an “adjustment disorder with disturbance of conduct, as well as anxiety,” but that she did not have BPD. He felt she was benefitting from therapy and opined that he did not think plaintiff posed a risk of harm to her children. Licensed professional counselor Paula Wilson testified to her observations of plaintiff’s parenting time and her counseling sessions with the children. Wilson explained that the children continued to prefer more parenting time with plaintiff and that they had a stronger bond with plaintiff than with defendant. Wilson also testified that she filed a Children’s Protective Services (CPS) complaint after the children indicated that defendant hit his girlfriend. However, the CPS worker who investigated the case, Sarah Bruning, testified that the allegation was unsubstantiated. Bruning also informed the court that there have been 26 complaints made regarding this family since 2009. CPS investigated 17 of the complaints, but substantiated only one.²

The trial court concluded that plaintiff did not establish proper cause or a change of circumstances by a preponderance of the evidence. The trial court explained that the children’s desire to spend more parenting time with plaintiff was “nothing new.” The court stated that

² The children’s guardian ad litem (GAL) provided her written opinion to the court and noted her disappointment that plaintiff had not been transparent with her therapist, instead providing him with only information that was favorable to her. Although the GAL acknowledged the children’s’ unchanging preference to live primarily with their mother, the GAL noted that such preference did not demonstrate proper cause or a change of circumstances. The GAL recommended that plaintiff’s motion be denied based on a lack of proper cause or change of circumstances, and instead that parenting time and other issues raised by plaintiff be reviewed.

evidence showing that plaintiff was benefiting from counseling was a “positive development,” but noted that plaintiff “continues to make unsubstantiated allegations,” which it concluded “reveals her continuing struggles with the personality disturbances which so concerned Dr. Stiger and Dr. Kieliszewski.”

II. ANALYSIS

We affirm on appeal a trial court’s order resolving a child custody dispute “unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” MCL 722.28. “This Court reviews a trial court’s determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard.” *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Under this standard, we “defer to the trial court’s findings of fact unless the trial court’s findings clearly preponderate in the opposite direction.” *Id.* (quotation marks and citation omitted). We also “defer to the trial court’s credibility determinations given its superior position to make these judgments.” *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). The trial court’s custody decision we review for an abuse of discretion. *Id.* An abuse of discretion exists when the result 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.” *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012) (quotation marks and citation omitted).

A trial court may only consider a change of custody if the movant establishes proper cause or a change in circumstances. MCL 722.27(1)(c). One of the purposes of this requirement “is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 509, 513; 675 NW2d 847 (2003).

“[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.” *Id.* 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.*

To establish a “change in circumstances,” the movant has the burden of proving by a preponderance of the evidence 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 509, 513. “[T]he 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. Whether a change in circumstances exists is a fact-specific inquiry, “with the relevancy of the facts presented being gauged by the statutory best interest factors.” *Id.* at 514.

Plaintiff asserts on appeal that the trial court’s finding of no proper cause or change of circumstances sufficient to revisit the current custody order was against the great weight of the

evidence and that the court's denial of her motion to change custody was an abuse of discretion. We disagree.

Plaintiff's argument consists entirely of repeating the testimony of Wilson and Johnson that was favorable to her, and contending that the facts to which they testified established proper cause or a change in circumstances. By this, plaintiff merely implies that the trial court improperly considered the testimony of Wilson and Johnson. As this is a matter involving the credibility of witnesses, we "defer to the trial court's credibility determinations given its superior position to make these judgments." *Shann*, 293 Mich App at 305. Deference is particularly appropriate in cases such as this, where the parties have repeatedly come before the trial court over the course of several years.

Further, our review of the record does not convince us that the trial court's findings were against the great weight of the evidence. The record supports the trial court's observation that the children's stated preference to reside with plaintiff is not a changed circumstance or a proper cause; the evidence at the 2013 custody hearing indicated the same. See, also, *Vodvarka*, 259 Mich App at 515 (indicating that it is unlikely that a party would prevail arguing that an event the parties knew or could have known about before entry of the order constituted a proper cause to revisit the order). The record also indicates that, while the children would like defendant to show more affection toward them, his attention toward them has not deteriorated. In fact, Wilson reported that defendant and the children interact and have good times. In light of the foregoing, we cannot say the trial court's conclusion that the current relationship dynamics do not constitute proper cause or a change in circumstances sufficient to revisit the custody order is against the great weight of the evidence.³

Next, plaintiff's suggestion that defendant having physical custody is harming the children as they purportedly "become physically sick, anxious, and stressed when discussing their father" is also an old allegation. Defendant testified at the 2013 custody hearing that the children suffer "stomach cramps" while in his care. However, Wilson testified at the hearing at issue that since the children began counseling, "[t]he headaches and the stomachaches have dissipated over time" In addition, Wilson testified that the children's anxiety results from going back and forth between the parents, not simply from being with defendant. Moreover, CPS worker Bruning testified to the anxiety of the youngest child at having to submit to CPS interviews so many times. Thus, it is clear from the record that the children's anxiety is neither new nor attributable to the current custodial arrangements, but to the bitter environment created by the parties.

³ Plaintiff's assertion "that the [children] do not get to experience the excitement and frustrations of everyday life with their mother because by the time they see their mom they are done experiencing the event" is simply another way of saying that the children would like to spend more time with plaintiff. Moreover, it is a natural consequence of a shared custody arrangement that the children will miss some of the experiences of everyday life with one parent while the children are with the other parent.

Plaintiff's assertion that defendant is impeding her relationship with the children by not allowing them to telephone her or by listening in on their telephone conversations with her is belied by Wilson's testimony of the close bond between plaintiff and the children. In addition, plaintiff has not alleged, let alone shown, that defendant's alleged interference "[has] had or will almost certainly have an effect on the child[ren]." *Vodvarka*, 259 Mich App at 513-514. Thus, assuming for the sake of argument that defendant does somehow constrain the children's telephone communication with plaintiff, plaintiff has not shown that such constitutes a proper cause or change in circumstances sufficient to revisit the custody order.⁴

Finally, plaintiff's contention that Johnson's testimony that she does not have BPD is itself proper cause to revisit custody places too much stress on a diagnostic label. The trial court stated in October 2013 that the reports of Stiger and Kielisewski, who, respectively, diagnosed plaintiff with BPD and found that she "presented . . . characteristics" of the disorder, "figured prominently in the July 2013 custody trial." Nevertheless, it is not evident that the diagnostic label itself weighed in favor of defendant's obtaining primary physical custody; rather, the trial court indicated that it granted defendant custody because it was concerned about plaintiff's behavior, i.e., "concerned at that time about the impact which plaintiff's emotional dysfunction was having on the children." That this remained a concern for the court at the hearing at issue is evinced by the trial court's consideration of the text messages plaintiff sent to one of her children that incited and encouraged the child to make defendant's life "miserable."⁵ Thus, although the trial court found that Johnson's testimony regarding plaintiff's improved mental health constituted a positive development, the court concluded that plaintiff's continuing to make unsubstantiated allegations against defendant and her campaign to enlist the children in disrupting defendant's daily activities evinced her ongoing struggle with mental health issues.⁶ Given the entirety of Johnson's testimony, and not just those components favorable to plaintiff,⁷

⁴ We note that the trial court responded to plaintiff's concerns by ordering "scheduled telephone contact with the minor children" for each parent.

⁵ The text messages to which the court referred showed plaintiff's approval of one of the children's hiding defendant's keys and wallet, and taking things out of defendant's wallet.

⁶ It is not clear to what allegations the trial court was referring. If the trial court was referring to CPS complaints, testimony at the hearing indicated that Wilson submitted the only complaints filed since the last custody order. However, the reference could have been to various allegations set forth in plaintiff's motion for a change in custody, some of which had been the subject of CPS complaints that CPS had not substantiated.

⁷ Johnson testified at the hearing at issue that plaintiff was doing well in counseling and that he had no real concerns about her parenting abilities. However, he also testified to not reviewing Stiger's and Kielzewski's evaluations of plaintiff and agreed that he "took [plaintiff] at her word on what's been going on in this litigation and ha[d] not reviewed any of the multiple motions she's filed since 2008." The court explained to Johnson plaintiff's history of making false accusations and, after reading Johnson text messages between plaintiff and one of the children, wherein plaintiff encouraged the child to make life miserable for defendant, the court asked, "I'm just wondering, sir, as you hear these things, does it raise a concern that—that you may not have

and deferring to the trial court's credibility determinations, *Shann*, 293 Mich App at 305, we cannot say that the trial court's finding was against the great weight of the evidence.

We conclude that the evidence of record does not clearly preponderate against the trial court's finding that plaintiff failed to establish proper cause or a change of circumstance sufficient to revisit the custody order.⁸ *Corporan*, 282 Mich App at 605. Consequently, the trial court did not abuse its discretion in denying plaintiff's motion for a change in custody. *Shann*, 293 Mich App at 305. Plaintiff has not alleged that the trial court committed legal error. Therefore, because the trial court's findings were not against the great weight of the evidence, nor its custody decision an abuse of discretion, we affirm the trial court's order denying plaintiff's motion for a change in custody. MCL 722.28.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Jane M. Beckering

the whole picture here?" Johnson stated that although the information would not change his diagnosis, "having that history and stuff would have been beneficial."

⁸ The trial court apparently found sufficient evidence to modify parenting time, as it ordered that "[t]he summer parenting time shall be alternated with Plaintiff mother having two weeks and Defendant father having one week." However, "[t]he statutory requirement for a threshold finding of proper cause or a change of circumstances does not necessarily control a case involving modification of parenting time 'absent a conclusion that a change in parenting time will result in a change in an established custodial environment.' " *Kubicki v Sharpe*, 306 Mich App 525, 540 n 8; 858 NW2d 57 (2014), quoting *Shade v Wright*, 291 Mich App 17, 25-27; 805 NW2d 1 (2010).