STATE OF MICHIGAN

COURT OF APPEALS

ROBERT TALLMAN, Plaintiff-Appellant,	UNPUBLISHED December 20, 2016
v	No. 333348 Gratiot Circuit Court Family Division
CHRISTY LYNN SKIVER, also known as CHRISTY LYNN WOOD, Defendant-Appellee.	LC No. 10-000825-DP

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

PER CURIAM.

Plaintiff, Robert Tallman, appeals as of right the trial court's opinion and order denying his motion for a change of custody based on the court's conclusion that plaintiff did not satisfy the threshold showing of a proper cause or change in circumstances to justify reevaluation of the child's custodial situation. We affirm.

I. BASIC FACTS

The parties are the unwed parents of the minor child at issue. Pursuant to a February 2011 consent order, the parties share joint legal custody, while defendant has primary physical custody and plaintiff has reasonable parenting time, which typically includes at least three weekends each month, alternating holidays, and alternating weeks during the summer.

In September 2015, plaintiff moved for sole legal and primary physical custody of the child. Plaintiff alleged that defendant inadequately cared for the child's allergies and for certain ear and eye conditions. In addition, plaintiff alleged that conditions in defendant's home were causing the child to have "wetting issues," and that defendant failed to obtain counseling to address the child's anxiety. Plaintiff further alleged that defendant did not ensure consistency in the child's school attendance, did not maintain a stable living environment, and did not ensure that plaintiff had access to the child's school and medical records.

The evidence presented at the hearing on plaintiff's motion consisted primarily of contradicting testimony from plaintiff and defendant. Plaintiff introduced evidence that the child failed two hearing tests, which plaintiff attributed to defendant's alleged failure to give the child allergy medication at the recommended dosage. Plaintiff attributed the undisputed deterioration

in the child's vision to defendant's failure to maintain the child's eyeglasses and to have the child wear a patch to treat his lazy eye (amblyopia) for the length of time prescribed by his ophthalmologist. Plaintiff also attributed the child's wetting issues to the stress encountered at defendant's home. Plaintiff said that defendant's home was flea-infested for more than two months, a condition that he had reported to Child Protective Services (CPS). He also asserted that the stress of plaintiff's divorce and remarriage, her frequent relocations since 2011, and the yelling that went on at defendant's house had made the child anxious.

Defendant disputed the allegation that she did not attend to the child's medical needs. She testified that the child did not have wetting issues at her house or at school, and that the child's pediatrician indicated that the child's wetting was likely linked to constipation and did not require counseling. Defendant observed, and plaintiff agreed, that CPS had not substantiated any of the conditions alleged of her home.[1] Defendant further observed that she was unaware that plaintiff had taken the child to two counseling sessions in the summer of 2015 until plaintiff filed the instant motion for a change of custody. She reported that the child was doing well in school and presented documentary evidence indicating that the child had good grades, made the honor roll, had only one absence in the current reporting period, and had no health issues the entire school year.

Subsequent to the evidentiary hearing, the trial court asked the parties to submit closing briefs. After receipt of the briefs, the trial court issued a written opinion and order in which it evaluated the potential impact on custody of the child's two failed hearing tests, undisputed deterioration in vision, environmental changes that one might consider negative, and some anxiety. The trial court noted that the child was functioning well academically and behaviorally at school and at home. The court concluded that the evidence did not establish that the changes alleged by plaintiff were attributable to defendant's capacity or disposition to provide the child with medical care or that they had or would almost certainly have a significant effect on the well-being of the child; instead, they were normal life changes. Noting that plaintiff knew where the child attended school, at times participated at and had communications with the school, and had access to the child's medical records, the trial court rejected plaintiff's contention that defendant was violating the order of joint legal custody. The trial court concluded that the facts presented by plaintiff, taken individually or together, "did not establish by a preponderance of the evidence that there is a proper cause or that there have been material changes in the child's custodial environment which had or would almost certainly have a significant effect on the well-being of the minor." Accordingly, the court denied plaintiff's motion for a change in custody.

[1] In addition to allegations of flea-infestation, it was alleged that defendant's home had mice and rats. It is unclear who made the allegation.

II. STANDARD OF REVIEW

Three different standards govern our review of a trial court's decision in a child-custody dispute:

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted).]

III. ANALYSIS

Plaintiff based his motion to change custody on allegations that a change in circumstances since the last custody order called for reevaluation of the order. 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." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509, 513; 675 NW2d 847 (2003). This change cannot be just any change; "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. 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 does not dispute the factual findings of the trial court[2]; rather, he contends that they establish a change in circumstances sufficient to revisit the parties' 2011 consent custody order. After careful review of the record, we conclude that the trial court's determination that the preponderance of the evidence did not establish a change in circumstances sufficient to revisit the custody order was not against the great weight of the evidence or an abuse of discretion. *Corporan*, 282 Mich App at 605; see *Vodvarka*, 259 Mich App at 509, 513.

As the trial court noted, although the child failed two hearing tests, no evidence indicated that whatever ear condition the test results signified, the condition has "had or will almost certainly have an effect on the child." *Vodvarka*, 259 Mich App at 513-514. Defendant testified that the child's teachers, pediatrician, and ear, nose, and throat doctor had not indicated that the

[2] Although plaintiff asserts the trial court erred by failing to make a particular factual finding, which we will discuss below, plaintiff takes no issue with the factual findings that the court did make.

child had hearing problems, and plaintiff's description of the test results suggest that whatever condition they signify is undetectable apart from testing.[3] Further, the evidence presented at trial suggested that, to the extent the child's allergies affected his ear condition, both parents were treating the child's allergies in accordance with their respective physicians' recommendations.

Likewise, regarding the child's lazy eye and vision issues, the evidence established that each parent sought care for the child's conditions and each followed the recommendation of his or her respective care provider. Plaintiff speculated that defendant did not have the child use the eye patch as recommended or maintain the child's eyeglasses; defendant insisted that she did, and plaintiff presented no evidence belying her assertion. In addition, plaintiff's evidence did not indicate that the child's ear and eye conditions were in any way attributable to defendant's lack of capacity or disposition to provide the child with medical care. MCL 722.23(c); see *Vodvarka*, 259 Mich App at 514 (noting that the relevance of the facts presented should be gauged by the best interest factors found in MCL 722.23).

Plaintiff attributed the child's anxiety and wetting issues to the environment created by defendant's divorce, remarriage, and frequent moves since the 2011 custody order, and to other conditions allegedly occurring in defendant's home. However, he also admitted that the child's wetting issues had improved during the months prior to the evidentiary hearing, and that multiple CPS investigations had substantiated none of the unsanitary conditions alleged of defendant's home. Further, we find no record evidence to contradict the trial court's determination that defendant's relocations during the period since the last custody order were normal life changes, and we note that defendant has been in the same marriage and residence since 2014. Plaintiff made an offer of proof that a therapist who saw the child twice during the summer of 2015 would testify that the anxiety the child experienced resulted from conditions in defendant's home. However, the trial court found nothing in the record indicating that the child's anxiety was of such magnitude as to require counseling, and, based on our search of the record, we cannot say that this finding is against the great weight of the evidence.

Relying on *Dailey v Kloenhamer*, 291 Mich App 660; 811 NW2d 501 (2011), plaintiff contends that the trial court erred factually by failing to recognize that the parties' conflicts regarding the child's medical treatment could have a significant detrimental effect on the child. Plaintiff's reliance on *Dailey* is unavailing.

In *Dailey*, this Court determined that the "parties' disagreements [had] escalated and expanded to topics that could have a significant effect on the child's well-being." *Id*. at 666. Specifically, the parties were unable to agree on whether the child at issue in *Dailey* should have a pulmonary function test, how and when to wean the child from asthma medications, and whether to proceed with a skin test for allergies. *Id*. One parent's scheduling of a medical test would be met by the other's filing of a motion to prevent the test, resulting in delays in the child's medical treatment that this Court determined "could have a detrimental effect on the child's well-being." *Id.* Such is not the case here. Plaintiff presents no evidence that his

[3] Plaintiff explained that the child has a "borderline pressure imbalance in one of his ears . . . not big enough to say he actually has it, but close enough to catch when you test him."

disagreements with defendant have delayed treatment for the child. On the contrary, the child has received treatment for his allergies, hearing condition, and eye issues. Further, unlike the case in *Dailey*, the record in this case does not show that any disagreement between the parties regarding the child's physical and mental health "could have a detrimental effect on the child's well-being." *Id*. Consequently, we conclude that the trial court did not err by failing to find that the parties' conflicts regarding medical treatment constituted proper cause or a change in circumstances sufficient to re-evaluate the 2011 custody order.

Plaintiff also contends that the trial court erred in determining that a preponderance of the evidence did not establish proper cause for revisiting the 2011 custody order. Specifically, plaintiff argues that the trial court committed legal error by requiring a higher burden of proof than the law requires, asking plaintiff to demonstrate that the child's anxiety and medical conditions "were having or most certainly would have" a significant effect on the child, rather than merely having to show that they "could have" a significant effect on the child, as required by *Vodvarka*. See *Vodvarka*, 259 Mich App at 511. We disagree.

We first note that the sole basis plaintiff alleged in his motion for a change in custody was the existence of changes in circumstances that necessitated reevaluation of the prior custody order. Thus, the trial court's determination that a preponderance of the evidence did not show that the grounds presented have or "would almost certainly significantly effect [sic] the well-being of the minor" was consistent with language expressly used in *Vodvarka*. See *id*. at 513-514 (indicating that "there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child," and that the effect must be significant). Although plaintiff argued in his closing brief that a preponderance of the evidence established both proper cause and a change in circumstances sufficient to revisit the prior custody order, and the trial court stated that a threshold showing of a proper cause or a change in circumstances was required before proceeding further, plaintiff actually only alleged a change in circumstances.

We further note that *Vodvarka* does not support plaintiff's implication that the phrase "were having or most certainly would have" imposes a higher standard than that of "could have." In *Vodvarka*, this Court used both expressions, along with others, to stress that the grounds presented in support of a change in custody "must be 'legally sufficient,' i.e., they must be 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." *Id*. at 512. *Vodvarka* held that, "proper cause means 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[,]" *id*. at 511, but also that, "to 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. Likewise, it held that establishing a change in circumstances requires proving that "the conditions surrounding the custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed," *id*. at 513, but later reiterated that, "there must be at least some evidence that the material changes have had or will most certainly have an effect on the child[,]" *id*. at 513-514. Regardless of the interchangeable phrasing, the material point is that "not just *any* fact . . . will constitute sufficient cause"; rather, the cause or change must be legally significant. *Id*. at 512. In light of the foregoing, we conclude that the trial court did not commit legal error in its interpretation and application of the governing law. See *Corporan*, 282 Mich App at 605. Further, for the same

reasons that a preponderance of the evidence in this case did not establish a change in circumstances necessary to reevaluate the 2011 custody order, it also did not establish a proper cause to reevaluate the custody order.

Based on the evidence presented, we cannot conclude that the trial court's determination regarding whether plaintiff had demonstrated proper cause or a change of circumstances was against the great weight of the evidence. See *Corporan*, 282 Mich App at 605.

Affirmed.

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