

STATE OF MICHIGAN
COURT OF APPEALS

NICOLE MARIE KELLEY,

Plaintiff-Appellant,

v

GABRIEL CALEB JOHNSON,

Defendant-Appellee.

UNPUBLISHED
February 21, 2017

No. 334144
Shiawassee Circuit Court
LC No. 06-004766-DP

Before: HOEKSTRA, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying her motion to change the physical custody of the parties' minor child from defendant's physical custody in Georgia to plaintiff's physical custody in Michigan. Because the trial court did not err by denying plaintiff's motion to change custody, we affirm.

The parties' child was born in September 2006. The parties were never married. On February 9, 2007, an order of filiation was entered declaring defendant to be the child's father, and awarding plaintiff sole legal and physical custody of the child. Plaintiff subsequently decided to return to school. On November 16, 2010, the parties stipulated to change the prior custody order. The stipulated order provided for joint custody, but awarded sole physical custody of the child to defendant, who was living in Atlanta, Georgia. The 2010 order did not contain a specific visitation schedule, but the parties informally agreed that plaintiff would have parenting time during the summer, Christmas vacation, and over spring break.

When plaintiff visited the child in Georgia in October 2015, the child told her that he had a toothache. Plaintiff told defendant about the child's complaint and asked defendant to take the child to a dentist, which defendant said he would do. However, when the child returned to Michigan with plaintiff for the Christmas holiday, he continued to complain about his teeth. Plaintiff also noticed that the child had a broken tooth. Plaintiff took the child to a dentist in Michigan and an examination revealed that one baby tooth had decayed to the extent that it needed to be removed, another tooth needed a root canal, and cavities were discovered in other baby and adult teeth.

Plaintiff subsequently moved for a change of custody and to relocate the child to Michigan. The motion was based primarily on the child's dental situation, but other factors were also identified in support of the motion. Following a hearing, the trial court found that plaintiff

failed to establish proper cause or a change of circumstances to support her motion for a change of custody. The court further found, however, that the child had an established custodial environment and that plaintiff had failed to demonstrate by clear and convincing evidence that the proposed change would be in the child's best interests. Plaintiff now appeals as of right.

On appeal, plaintiff argues that the trial court erred in finding that she failed to meet her initial burden of showing a proper cause or a change of circumstances as required to revisit a custody order. In addition, plaintiff contends that, contrary to the trial court's determinations, the proposed modification of the custody order would not change the established custodial environment which exists with both parties. Consequently, plaintiff asserts that a preponderance of the evidence standard, rather than a clear and convincing, applies to her motion. Regardless of which standard applies, plaintiff maintains that the trial court erred in its evaluation of the best interests factors and abused its discretion by denying her motion to change custody.

"Three different standards govern our review of a circuit court's decision in a child-custody dispute." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014). "We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error." *Id.* Findings regarding the existence of a change of circumstances or proper cause to change custody are reviewed under the great weight of the evidence standard. *Dailey v Kloenhamer*, 291 Mich App 660, 664-665 n 1; 811 NW2d 501 (2011). With regard to discretionary rulings, such as the ultimate award of custody, an abuse of discretion "is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013) (quotation marks and citation omitted). "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

Plaintiff first argues that the trial court erred in finding that she failed to show proper cause or a change of circumstances to support her request for a change of custody. In particular, plaintiff contends that proper cause or a change of circumstances existed due to defendant's failure to provide the child with proper dental care, defendant's physical abuse of the child with a belt, defendant's transportation of the child on a motorcycle without a license, and defendant's failure to provide a proper bed for the child.

The Child Custody Act, MCL 722.21 *et seq.*, "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." *Pierron v Pierron*, 282 Mich App 222, 243; 765 NW2d 345 (2009), quoting MCL 722.26(1). "The purposes of the act are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Id.* Consequently, once an order or judgment has entered in a child custody action, that order may be modified or amended only when the proponent has "established a change of circumstances or proper cause for a custodial change under MCL 722.27(1)(c)." *Kubicki*, 306 Mich App at 539-540; *Pierron*, 282 Mich App at 243-244.

To establish "proper cause," "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 or grounds should be relevant to at least one of the twelve statutory best interest factors set forth in MCL 722.23(a)-(l). *Vodvarka*, 259 Mich App at 512. However, “not just *any* fact relevant to the twelve factors will constitute sufficient cause. Rather, the grounds presented 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.*

With respect to a change of circumstances, this Court in *Vodvarka* explained:

[T]o 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. 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. 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 (emphasis in original).]

In determining whether there has been a change of circumstances, a court may only consider changes that have occurred since the last custody order. *Id.* at 514.

The trial court found that plaintiff could not establish a change of circumstances or proper cause based on the child’s dental situation because the changes to the child’s dental health did not represent a “change” as contemplated under *Vodvarka*, but instead involved an ongoing process of deterioration over time, and plaintiff was partly blameworthy for not addressing the matter earlier. Given that plaintiff shared in the responsibility for the dental problems, the trial court reasoned that defendant’s shortcomings with respect to the child’s dental care did not constitute a proper cause for revisiting the custody order. The court also held that plaintiff had not demonstrated that the dental issues had the significant impact on the child as contemplated by *Vodvarka*.

The trial court’s findings are not against the great weight of the evidence. The dentist who examined the child testified that it had been some time since the child’s teeth had been cleaned, and that it was apparent that the child had not been flossing his teeth. The dentist stated that, while it was difficult to say how long the tooth decay had been occurring, the level of decay of the two worst teeth usually “takes a year or two of regression” for that level of decay to occur. Although the child spent most of the year with defendant, who should have taken the child to the dentist more regularly, he also spent the summer of 2015 with plaintiff, who did not take him to a dentist either. Plaintiff also did not take the child to a dentist in October 2015, when the child initially complained of a toothache. Yet, the dentist who examined the child “imagined” that the damage to the tooth requiring extraction would have been visual on inspection the previous summer, when the child was with plaintiff. With respect to the child’s other teeth, the dentist who examined the child testified that while the tooth problems had likely been developing for at least a year, it was uncertain whether *either* parent would have been able to diagnose them. Overall, the trial court’s finding that both parents were at fault with respect to the child’s dental problems is not against the great weight of the evidence. Given that plaintiff shared in the

responsibility for the child's dental concerns, plaintiff has not shown that *defendant's* failure to provide more appropriate dental care had 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 512-514.

In addition, although the tooth damage reported by the dentist could be considered relatively significant, the trial court did not clearly err in finding that the child did not suffer such a deterioration of health while in defendant's care as to amount to a significant change in circumstances or proper cause in the sense that it would require revisiting the prior custody arrangement. Some amount of tooth decay is not an uncommon occurrence with a child. Given that much of the tooth decay occurred in the child's baby teeth, and his adult teeth could be filled and sealed, it was not against the great weight of the evidence for the trial court to conclude that the child's "dental issues [do] not have the significant impact on [the child] envisioned by [*Vodvarka*]." See *id.* at 512-514.

Aside from the child's dental problems, plaintiff argues that other factors identified in her motion also supported a change of circumstances or proper cause to support her request for a change of custody. She claims that defendant took the child on a motorcycle ride without having a valid license. However, defendant testified that he actually took the child on a moped, which does not require a license, that he only went short distances, and that he stopped transporting the child in this manner after plaintiff asked him not to do so. Plaintiff also states that defendant admitted that he failed to provide a proper bed for the child. Although defendant admitted that he did not immediately assemble the child's bedframe after moving to a new house, defendant testified that the child had a mattress and a box spring in his bedroom and that the bedframe has since been assembled. Further, while defendant admitted that the child sometimes slept on a "pallet" on the floor in defendant's bedroom, defendant explained that the child liked doing so, particularly on the weekends when the family gathers in the room to "lay-up and watch movies." Finally, while plaintiff contends that defendant physically abused the child with a belt, the record demonstrates that, after conducting an investigation of plaintiff's allegations, Child Protective Services found no evidence of abuse in defendant's home. On the whole, the trial court did not err in finding that plaintiff failed to make the threshold showing of proper cause or a change of circumstances to alter the prior custody order.¹

Despite finding that plaintiff failed to demonstrate proper cause or a change of circumstances to revisit the prior custody order, the trial court also found that plaintiff could not

¹ With regard to showing a proper cause or change in circumstances, plaintiff maintains on appeal that she met her initial burden under the standard in *Vodvarka*, 259 Mich App at 512-514. However, alternatively, plaintiff also contends, although she entitled her motion as a "Petition to Change Custody," her motion was in actuality simply a motion to modify the parenting time arrangement, such that a more expansive understanding of proper cause and a change of circumstances should have been applied under *Shade v Wright*, 291 Mich App 17, 25-31; 805 NW2d 1 (2010). Given the change of custody proposed by plaintiff, the trial court did not commit clear legal error by applying the standards in *Vodvarka*, and we need not consider whether plaintiff satisfied the more expansive standard articulated in *Shade*.

prevail on her request for a change of custody because the child had an established custodial environment and plaintiff had not demonstrated by clear and convincing evidence that a change in custody would be in the child's best interests. Plaintiff also challenges these additional determinations on appeal. However, because plaintiff did not establish a proper cause or change in circumstances, there was no need for the trial court to reach these additional issues. See MCL 722.27(1)(c); *Vodvarka*, 259 Mich App at 508-509; *Corporan v Henton*, 282 Mich App 599, 609; 766 NW2d 903 (2009). "[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." *Vodvarka*, 259 Mich App at 508-509 (citation omitted). Given that plaintiff did not carry her initial burden, she was not entitled to a revisiting of the custody order and we find it unnecessary to consider the trial court's additional determinations on appeal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Michael J. Riordan