STATE OF MICHIGAN

COURT OF APPEALS

MEAGAN RACHEL EMMONS, formerly known as MEAGAN RACHEL VANCOURT

Plaintiff-Appellant,

v

JUSTIN ALLEN VANCOURT,

Defendant-Appellee.

UNPUBLISHED
March 15, 2018

Nos. 339528, 339678
Clinton Circuit Court
LC No. 12-023474-DM

Before: SAWYER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

This child custody matter was previously before this Court and comes before us now on appeal from proceedings in the trial court that occurred on remand after this Court vacated the trial court's order modifying the parties' parenting-time schedule. *Emmons v Vancourt*, unpublished per curiam opinion of the Court of Appeals, issued May 4, 2017 (Docket No. 335703). In the instant appeal, in Docket No. 339528, plaintiff appeals as of right the trial court's July 13, 2017 temporary order that continued parenting-time terms that were consistent with the terms of the previously mentioned order that was vacated by this Court. In Docket No. 339678, plaintiff appeals as of right the August 9, 2017 order modifying parenting time. This Court consolidated the two matters. *Emmons v Vancourt*, unpublished order of the Court of Appeals, entered August 25, 2017 (Docket Nos. 339528 and 339678). For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

The background facts leading up to the trial court's October 28, 2016 order are summarized in this Court's previous opinion, and there is no need to repeat them verbatim here. In short, a consent judgment of divorce was entered on September 10, 2012, which provided that the parties would have joint legal and physical custody of their then one-year-old daughter. *Emmons*, unpub op at 1. Pursuant to the judgment of divorce, defendant had three hours of parenting time on two evenings a week, and defendant also had parenting time on alternating weekends from Saturday morning until Sunday evening. *Id*. The parties apparently agreed verbally to a modified parenting time schedule at some point in 2014, where defendant had parenting time overnight on Wednesdays and on alternating weekends beginning at 4:00 p.m. on Fridays. *Id*.

In 2016, defendant moved to modify parenting time. Following a hearing on the motion, the trial court entered an order on October 28, 2016, modifying the trial court's September 10, 2012 consent judgment of divorce to provide defendant with overnight parenting time on Wednesday and Thursday of alternating weeks and Wednesday after school until Monday morning on the opposite alternating weeks. The holiday schedule for parenting time remained as stated in the judgment of divorce, and each party was to have two non-consecutive, uninterrupted weeks of parenting time during summers beginning in 2017.

As previously noted, this Court vacated the trial court's order modifying parenting time and remanded the matter back to the trial court. In doing so, this Court determined (1) that the trial court's finding that there was an established custodial environment with both parents was not against the great weight of the evidence and (2) that the trial court's order modifying parenting time constituted a change affecting the custodial environment because it significantly changed the amount of time that TFV spent with each parent by substantially decreasing the number of plaintiff's overnights from 265 to 182.5. *Emmons*, unpub op at 5. This Court concluded as follows:

> Because the trial court's parenting time order amounted to a change affecting the custodial environment, it committed clear legal error in its selection and application of the law from *Shade v Wright*.[1] Instead, the court was required to conduct a parenting-time analysis using the proper threshold under *Vodvarka*.[2] [*Lieberman v Orr*, 319 Mich App 68, 93; 900 NW2d 130 (2017).] Accordingly, the parenting time order is vacated. If the court, on remand, finds by a preponderance of the evidence that defendant met the standards for "proper cause" or "change of circumstances" under *Vodvarka*, defendant is then required prove by clear and convincing evidence that the parenting time modification is in the best interests of TFV. [*Id*. at 5-6.]

On remand, defendant immediately filed an emergency motion to maintain the status quo pending an evidentiary hearing. Specifically, defendant requested that "the parties continue to abide by the October 2016 Order in an effort to maintain stability for the minor child until further order of [the trial court.]" Following a hearing on the emergency motion, a temporary order was entered on July 13, 2017, that ordered in pertinent part that the terms of the parties' parenting time would remain consistent with those of the October 28, 2016 order, pending the trial court's decision after an evidentiary hearing.

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[1] *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010).

[2] *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). As the *Lieberman* Court explained, "*Vodvarka* addresses the requisite standards for showing proper cause or a change of circumstances relative to requests to modify child custody," and "*Shade* addresses the requisite standards for showing proper cause or a change in circumstances relative to requests to modify parenting time." *Lierberman*, 319 Mich App at 81.

Additionally, defendant filed an amended petition to maintain the terms of the October 28, 2016 order modifying custody after remand. Plaintiff filed a motion to dismiss defendant's amended petition, arguing that defendant had not included any allegations in his amended petition that would constitute proper cause or a change in circumstances under *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), and that the amended petition should therefore be dismissed without an evidentiary hearing.

A hearing was held on the amended petition on July 13, 2017. At the beginning of the hearing and after hearing oral argument, the trial court denied plaintiff's motion to dismiss and found that that initial threshold question of proper cause or change in circumstance under *Vodvarka* had been met based on the pleadings and the testimony taken at the evidentiary hearing that had occurred preceding the trial court's October 28, 2016 order. At the conclusion of the hearing, following testimony and argument, the trial court again addressed the threshold question under *Vodvarka* and trial court explained that the hearing testimony also supported its conclusion that the *Vodvarka* threshold standard was satisfied. In determining that there was proper cause under *Vodvarka* to justify reevaluating the custody order, the trial court focused on concerns about the parties' inability to effectively co-parent and communicate regarding important decisions affecting the minor child. The trial court also found that there was still an established custodial environment with both parties. Next, the trial court addressed the statutory best-interest factors found in MCL 722.23,[3] stating that it would apply a clear-and-

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[3] MCL 722.23 provides as follows:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (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.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.

convincing-evidence standard to determine whether the proposed modification was in the minor child's best interests. The trial court found that factor (b) weighed heavily in favor of defendant; that factors (i) and (j) weighed in defendant's favor; that factors (a), (c), (d), (e), (g), (h), and (*l*) were equal; and that there was no evidence that factors (f) and (k) were applicable in this case. The trial court concluded that clear and convincing evidence established that the parenting time change was warranted.

An order was entered on August 9, 2012, providing that defendant would have parenting time every other week on Wednesday and Thursday overnight, as well as Wednesday after school until Monday morning on the alternate weeks. The parties were also to each have two non-consecutive, uninterrupted weeks of parenting time during the summer, and the parties would alternate holidays with the minor child.

Plaintiff now appeals the trial court's July 13, 2017 and August 9, 2017 orders.

II. STANDARD OF REVIEW

"Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources (After Remand)*, 275 Mich App 121, 127; 737 NW2d 782 (2007). When an appellate court's instructions on remand are clear, the lower court may not exceed the scope of the remand order. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). "It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Id.* at 544-545 (quotation marks and citation omitted).

> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (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 or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

"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 the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings 'clearly preponderate in the opposite direction.' " *Id*. (citation omitted). This Court has further explained the standards of review applicable in child-custody matters as follows:

> MCL 722.28 provides that in child-custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal 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." Our Supreme Court has explained that MCL 722.28 "distinguishes among three types of findings and assigns standards of review to each." Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision is "palpably and grossly violative of fact and logic . . . ." Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. [*Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011) (citations omitted; ellipsis in original).]

III. ANALYSIS

In this Court's previous opinion, this matter was remanded to the trial court with instructions to apply the *Vodvarka* standard to the threshold question of whether there was proper cause or change in circumstances to justify revisiting the parties' custody order because the modification in parenting time proposed by defendant amounted to a change affecting the established custodial environment. *Emmons*, unpub op at 5-6. On appeal from the trial court's decision on remand, plaintiff now argues that the trial court erred again in ordering a modification to the September 10, 2012 consent judgment of divorce.

In a child custody action, a circuit court may only "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c). Accordingly, "[a]s set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests." *Lieberman*, 319 Mich App at 81. As the *Lieberman* Court explained, "*Vodvarka* addresses the requisite standards for showing proper cause or a change of circumstances relative to requests to modify child custody," and "when a proposed change of circumstances will affect a child's established custodial environment, the applicable legal framework for analyzing the matter is that set forth in *Vodvarka*." *Id*. This Court explained in *Vodvarka* that if the party moving for a change in custody "does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing." *Vodvarka*, 259 Mich App at 508. The *Vodvarka* Court defined "proper cause" as follows:

> In summary, 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. 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. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Id*. at 512.]

The *Vodvarka* Court also defined a "change of circumstances" as follows:

> [W]e hold that in 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. 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. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Id*. at 513-514.]

If the moving party seeking a change in custody or a change in parenting time that alters the established custodial environment shows that proper cause or a change of circumstances exists under the *Vodvarka* standard, then the trial court must next determine by analyzing the statutory best-interest factors whether the movant has proved by clear and convincing evidence that the proposed change is in the child's best interest. *Lieberman*, 319 Mich App at 83-84.

In this case, the trial court followed this Court's remand instructions and applied the legal framework set forth in *Vodvarka*. The trial court first found that the threshold question of proper cause or change in circumstance had been satisfied under the *Vodvarka* standard, explaining its concerns about the parties' inability to effectively co-parent and communicate regarding important decisions affecting the minor child. The trial court also related these concerns to the statutory best-interest factors. Continuous disagreements and communication problems over important matters affecting the child can satisfy the proper cause or change in circumstances requirement under *Vodvarka*. See *Dailey*, 291 Mich App at 666. Based on our review of the record, the trial court's determination on this threshold question was not against the great weight of the evidence. *Corporan*, 282 Mich App at 605.

The trial court then analyzed the best-interest factors under a clear and convincing evidence standard as required when a change in parenting time results in a change affecting the custodial environment, and the trial court found that factors (b), (i), and (j) favored defendant and that the remaining factors were equal or inapplicable. The trial court concluded that clear and convincing evidence established that the parenting time change was in the minor child's best interests. In child custody matters, we "defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger v*

Berger, 277 Mich App 700, 705; 747 NW2d 336 (2008). Based on our review of the record, we conclude that the trial court in this case did not make findings against the great weight of the evidence, did not abuse its discretion, and did not make a clear legal error on a major issue; we therefore affirm the trial court's August 9, 2017 order. *Dailey*, 291 Mich App at 664-665.

In light of the above conclusion, we need not address plaintiff's challenge to the July 13, 2017 temporary order because this issue is moot. "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Here, having determined that the trial court did not err in ultimately granting defendant's requested change in custody that paralleled the terms of the July 13, 2017 order, any challenge to whether the July 13, 2017 order was proper is moot. *Id*. We express no opinion about whether the July 13, 2017 order was proper because appellate courts generally do not decide moot issues. *Id*.

Affirmed. No costs are awarded. MCR 7.219(A).

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto