

STATE OF MICHIGAN
COURT OF APPEALS

JEREMY ROBERT GIORDANA,

Plaintiff-Appellee,

v

JENNA RAE GIORDANA,

Defendant-Appellant.

UNPUBLISHED

December 17, 2020

No. 354050

Marquette Circuit Court

Family Division

LC No. 16-054915-DM

Before: SWARTZLE, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her motion for modification of custody regarding the parties' minor children. We vacate the trial court's order and remand for an evidentiary hearing.

I. BACKGROUND

Plaintiff and defendant were divorced in July 2017. The judgment of divorce stated that the parties would have joint-legal and joint-physical custody, and provided for a parenting-time schedule. In May 2018, plaintiff filed a motion to modify parenting time on the basis that defendant had filed two reports falsely alleging that he was physically abusing the children. In September 2018, defendant filed a motion to show cause, asserting that plaintiff allegedly failed to abide by various provisions in the judgment of divorce. In January 2019, the trial court entered a stipulated order providing, in relevant part, that at the end of the 2019-2020 school year the parties would move to a week-on, week-off parenting-time schedule. The stipulated order addressed only issues regarding parenting time, and did not modify any provisions from the judgment of divorce regarding custody.

In July 2019, defendant filed a motion to modify custody, based on renewed allegations that plaintiff was physically abusing the children. In response, plaintiff argued that he never harmed or abused the children, that defendant continued to make false accusations, and that it had previously been found that defendant had coached the children to make false accusations. At the hearing on defendant's motion, the referee found that although defendant had made "a showing of smoke," she had failed to meet her burden of showing proper cause or change in circumstances to

warrant an evidentiary hearing. The trial court adopted the referee's findings and recommendation, and denied defendant's motion.

In March 2020, defendant filed another motion for change in custody and parenting time. Defendant requested that the trial court award her sole-legal and sole-physical custody primarily based on a parenting-time exchange that occurred in February 2020. Defendant also asserted that one of the children had disclosed multiple incidents of physical abuse by plaintiff directed towards the children. At the hearing on defendant's motion, defendant's counsel made an offer of proof regarding what various witnesses would testify, if an evidentiary hearing were held. The trial court declined to hold an evidentiary hearing, held that defendant had failed to meet her burden of showing proper cause or change in circumstances, and denied her motion for change of custody.

This appeal followed.

II. ANALYSIS

Regarding a child-custody dispute, "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." MCL 722.28. Therefore, there are three different standards of review that apply to child-custody appeals. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). "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." *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011). Under this standard, "a reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (cleaned up). "Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion." *Dailey*, 291 Mich App at 664. An abuse of discretion requires more than a difference in judicial opinion between the trial and appellate courts. *Fletcher*, 447 Mich at 879-880. Finally, a trial court commits clear legal error when it "incorrectly chooses, interprets, or applies the law." *Id.* at 881. "[U]pon a finding of error, appellate courts should remand unless the error was harmless." *Id.* at 882.

Under MCL 722.27(1)(c), the party seeking to modify a child-custody or a parenting-time order "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 v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). The *Vodvarka* standards do not apply to requests to modify parenting time unless the modification would alter the child's established custodial environment. *Shade v Wright*, 291 Mich App 17, 25-27; 805 NW2d 1 (2010).

On appeal, defendant argues that the trial court should have held an evidentiary hearing before concluding that she failed to meet the threshold issue of proper cause or change in circumstances. Although this issue "might be fact-intensive, the court need not necessarily conduct an evidentiary hearing on the topic." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Trial courts are often able to make this factual determination without an evidentiary hearing because "the facts alleged to constitute proper cause or a change of circumstances will be undisputed, or the court can accept as true the facts allegedly comprising

proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard.” *Vodvarka*, 259 Mich App at 512. MCR 3.210(C)(8) provides:

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.

Despite stating that defendant’s counsel did “an excellent job” of establishing her offer of proof, the trial court found that because there were reports of “good things” and because the parties needed to get along to maintain their relationship with the children, defendant had failed to meet her burden of proving by a preponderance of the evidence that proper cause or a change of circumstances existed to warrant revisiting the custody order. In doing so, the trial court failed to consider whether an evidentiary hearing was required to resolve contested factual issues in the case. See MCR 3.210(C)(8). Based on the record before us, we conclude that there was a contested factual issue, i.e., whether plaintiff committed physical abuse of any of the children, that needed to be resolved for the trial court to make an informed decision on defendant’s motion to modify custody. Furthermore, there was a contested factual issue regarding whether defendant was coaching the children to make false accusations against plaintiff. Defendant’s offer of proof and the other information contained in this record were sufficient to warrant an evidentiary hearing to determine whether defendant had met her burden of establishing proper cause or change in circumstances.

To establish proper cause, the movant must establish by a preponderance of the evidence “an appropriate ground for legal action” that is relevant to at least one of the best-interest factors and is “of such magnitude to have a significant effect on the child’s well-being.” *Vodvarka*, 259 Mich App at 512. A “change of circumstances” means 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 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.

In this case, defendant’s motion to modify custody implicated several best-interest factors—certainly MCL 722.23(k)—but also MCL 722.23(h), (i), and (j). Plaintiff’s counsel indicated that she received an e-mail from the prosecutor’s office stating that the allegations one of the children made during a forensic interview were unsubstantiated. The fact that authorities believed that these allegations were unsubstantiated is not dispositive when determining whether there is proper cause or change in circumstances. See *Shann v Shann*, 293 Mich App 302, 306-307; 809 NW2d 435 (2011). Here, defendant’s counsel made an offer of proof that if an evidentiary hearing were held, multiple witnesses would testify that they did not see defendant coaching the children and that the children were nervous and unwilling to go with plaintiff. Defendant’s counsel also stated that the child’s school counselor would testify that the child kept a journal about plaintiff’s alleged physical abuse. Assuming that defendant could have authenticated the journal at the hearing, see MRE 901, the journal would be admissible under MRE 401 and MRE 402. See *Bowling v McCarrick*, 318 Mich App 568, 572 n 4; 899 NW2d 808 (2016) (stating that custody decisions must be based on admissible evidence). We conclude that

defendant's offer of proof was sufficient to warrant a hearing to determine whether defendant could establish that there was proper cause or change in circumstances.

For a change in circumstance, "evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes" only, and "the movant cannot rely on facts that existed before entry of the custody order to establish a 'change' of circumstances." *Vodvarka*, 259 Mich App at 514. For proper cause, the same restrictions do not necessarily apply, "though in most cases it will hold true." *Id.* at 515. During consideration of the motion at issue in this appeal, the trial court and the parties proceeded on the premise that the stipulated order entered in January 2019 was the last custody order entered. As stated earlier, the stipulated order did not address any issues regarding custody. Therefore, the judgment of divorce was the last custody order entered.

Given our conclusion regarding the necessity of a hearing on the threshold issue, we need not consider defendant's argument that the trial court erred in failing to determine whether an established custodial environment existed. "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*, 259 Mich App at 509. If the movant fails to prove the existence of proper cause or a change of circumstances, the trial court is precluded from holding a child-custody hearing. *Id.* at 508. On remand, after the trial court conducts the threshold hearing, if it determines that defendant has established proper cause or a change of circumstances, then the trial court should consider whether an established custodial environment existed before conducting a review of the best-interest factors. See *id.* at 509.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher