

STATE OF MICHIGAN
COURT OF APPEALS

TRACY RENEE BOLO,

Plaintiff-Appellee,

v

TIMOTHY ANDREW MCMICHAEL,

Defendant-Appellant.

UNPUBLISHED

April 15, 2021

No. 355382

Ottawa Circuit Court

LC No. 2013-076404-DM

Before: SHAPIRO, P.J., and CAVANAGH and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right an order denying his motion for sole legal custody of the parties’ two minor children. We affirm.

The parties’ divorce judgment was entered in April 2014, and provided that the parties had joint physical and legal custody of their two children. Neither party was required to pay child support. Approximately four years later, defendant moved for child support, and the trial court modified the original order, ordering plaintiff to pay defendant child support. Shortly thereafter, defendant again moved to modify the child-support order, and the trial court once again modified it. A few months later, plaintiff moved to modify child support, noting that her salary had decreased because she had a new job. The trial court modified the child-support order, and defendant moved for reconsideration. After the trial court denied defendant’s motion, defendant appealed the modification order and the order denying his motion for reconsideration. This Court dismissed defendant’s appeal for lack of jurisdiction.¹

In June 2020, the Friend of the Court filed a petition to review child support, noting that there had been changes regarding childcare and defendant’s income because of the coronavirus (COVID-19) pandemic. When the referee held a hearing on the petition, defendant explained that his employer terminated his employment in May 2020, citing the COVID-19 pandemic as the

¹ *Bolo v McMichael*, unpublished order of the Court of Appeals, entered February 25, 2020 (Docket No. 352736).

cause, and that he was collecting unemployment benefits. The referee determined that, effective September 1, 2020, defendant should have income imputed to him. Following the hearing, both plaintiff and defendant objected to the referee's findings. Defendant argued that it was improper to have income imputed to him.

At about that time, defendant also moved for sole legal custody of the children on several grounds, including disputes over the children's medical care and domestic violence. Defendant also moved to recover an undeclared investment account, which he claimed that plaintiff misrepresented as a retirement account before the trial court entered the parties' divorce judgment. Defendant also moved regarding fraud on the court, and in his motion, he provided several allegations against plaintiff and her counsel. Plaintiff moved to strike defendant's motion regarding fraud on the court, and defendant later moved to replace his motion regarding fraud on the court with a new motion regarding fraud on the court that consolidated his allegations.

The trial court first held a hearing on child support, and it later held a separate hearing to address custody and the parties' other motions. During the hearing on custody and the parties' other motions, defendant withdrew his motion regarding fraud on the court and his motion to replace his motion regarding fraud on the court. He also withdrew his motion to recover the undeclared investment account, and in response, plaintiff reserved the right to bring a motion for attorney fees and costs. After the hearing, the trial court issued its order, which denied defendant's motion for sole legal custody, affirmed the referee's decision to impute income to defendant effective September 1, 2020, and struck down defendant's motions regarding fraud on the court. It also permitted plaintiff to bring a motion for attorney fees and costs, which she did and which the trial court granted. Defendant moved for reconsideration of the trial court's order, and in response, the trial court affirmed its order. Defendant now appeals.

Defendant first argues that he was entitled to an evidentiary hearing on his motions regarding fraud on the court. However, defendant has waived this issue for appeal. Defendant acceded to plaintiff's motion to strike his fraud on the court motion, and he withdrew his fraud on the court motion as well as his replacement motion regarding fraud on the court. Defendant specifically stated that he would not request a hearing on any of his motions after withdrawing them. He simply wanted a resolution on his motion for sole legal custody. See *Loutts v Loutts*, 298 Mich App 21, 36; 826 NW2d 152 (2012) ("It is unfair to harbor error and use it as an appellate parachute."); *Living Alternatives for Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994) ("A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court."). In his brief on appeal, defendant questions the trial court's failure to schedule an evidentiary hearing for his motions and requests that this Court remand this case for an evidentiary hearing. However, because defendant withdrew his motions, it would have been contrary to defendant's own wishes for the trial court to schedule an evidentiary hearing. Therefore, we deem this issue waived and decline to address it on appeal.

Defendant argues next that the trial court erred by finding there was not a change of circumstances or proper cause to revisit custody. We disagree.

In custody appeals, "[t]he great weight of the evidence standard applies to all findings of fact." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "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." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citation omitted). Additionally, "[a]n abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions," and "[q]uestions of law are reviewed for clear legal error." *Phillips*, 241 Mich App at 20. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id.* "An abuse of discretion exists when the trial court's decision 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The Child Custody Act of 1970, MCL 722.21 *et seq.*, governs most custody disputes in Michigan. *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). "MCL 722.27(1)(c) provides that if a child custody dispute has arisen from another action in the circuit court, the court may [m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . ." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (quotation marks and citation omitted; alteration in original). If the moving party does not prove that there is a proper cause or change of circumstances by a preponderance of the evidence, the trial court may not revisit custody. *Id.* at 508-509.

This Court defines "proper cause" as "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. "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.* at 512. Additionally, this Court held that "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." *Id.* at 513. The movant "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. Additionally, the determination must be "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 514.

"[E]vidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order." *Id.* Therefore, a "movant cannot rely on facts that existed before entry of the custody order to establish a 'change' of circumstances." *Id.* The same is not necessarily true for a finding of "proper cause." *Id.* at 515. However, "a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order." *Id.*

Defendant highlights plaintiff's lack of communication and refusal to consult with him regarding decisions involving the children as the change of circumstances or proper cause that requires a change in legal custody. He specifically notes that plaintiff concealed a head injury that one of the children suffered and then swore the children to secrecy regarding the injury. He also

highlights plaintiff's delay in immunizing the children. Additionally, defendant cites an incident in which plaintiff allegedly attacked him with socks that were filled with coins.

Although defendant failed to specify to which best-interest factors plaintiff's behavior was relevant, defendant's allegations regarding immunization and the head injury correlates with plaintiff's "capacity and disposition" to provide the children with "medical care of other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). However, the trial court did not abuse its discretion by determining that the issues with vaccination and the head injury did not amount to a change of circumstances or proper cause. See *Phillips*, 241 Mich App at 20.

Significant disputes over a child's medical treatment may warrant the trial court reviewing custody. See *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011) (holding that the trial court's finding that the parties' disagreements over the child's medical care constituted proper cause or a change of circumstances was not against the great weight of evidence). However, in this case, the trial court properly determined that the parties' disputes over the children's medical treatment did not warrant revisiting custody.

Regarding immunization, the record indicates that plaintiff was not opposed to vaccinating the children. Both parties agreed that the children needed to be vaccinated. They just disagreed on when the children should be vaccinated with the three vaccines that the children needed. The record indicates that the parties' disagreement on when to vaccinate the children and plaintiff delaying the vaccination contrary to defendant's wishes was not an issue that could have had a significant effect on the children's well-being. See *Vodvarka*, 259 Mich App at 512-513. Defendant first noted plaintiff's objection to the children receiving the three vaccines at a hearing in June 2019, and by November 2019, plaintiff had vaccinated the children with one of the three required vaccines. Plaintiff also explained at that hearing that the children did not need all three vaccines until November 2020, but at the referee's request, she would vaccinate the children with the two remaining vaccines required by the end of 2019. Additionally, although at the September 2020 hearing defendant claimed there was still an outstanding vaccine, plaintiff contended that the children were up to date on their vaccines, noting that the children were attending school without any waiver.

Defendant also claims that plaintiff delayed the children's vaccinations when they were younger, before the trial court entered the initial custody order. However, the only evidence in support of defendant's contention is his bare assertion on appeal and in the trial court. Additionally, even assuming defendant's allegation is true, this Court held that to establish a change of circumstances, "the change of circumstances must have occurred *after* entry of the last custody order." *Id.* at 514. Therefore, defendant did not demonstrate by a preponderance of the evidence that the vaccine issue could have or did have a significant impact on the children's well-being. See *id.* at 512-513.

Defendant also claims that plaintiff's concealment of a head injury suffered by one of the children amounted to proper cause or a change of circumstances. However, plaintiff denied that she ever concealed the child's injury, and defendant's own motion in the trial court for sole custody recognized that after the injury occurred, plaintiff notified him that the child was not feeling well. Therefore, defendant failed to show "by a preponderance of the evidence the existence of an

appropriate ground for legal action to be taken by the trial court” that would have “a significant effect on the child’s well-being.” *Id.* at 512. Additionally, he failed to provide “evidence that the [alleged] material changes have had or will almost certainly have an effect on the child.” *Id.* at 513-514.

Defendant’s allegation that plaintiff attacked him with socks is best analyzed under MCL 722.23(k), which is the best-interest factor regarding domestic violence. However, the record does not support defendant’s contention that this incident constituted proper cause or a change of circumstances. At the hearing on custody, defendant alleged that plaintiff attacked him with socks filled with coins in front of the children and that the incident constituted domestic violence. This incident was mentioned previously at a hearing in September 2018 regarding child support. However, at that hearing, plaintiff denied throwing coins at defendant and contended that she gave him socks filled with coins. Therefore, given the lack of evidence, the trial court’s finding that this incident did not amount to domestic violence and that the incident did not establish a proper cause or change of circumstances was not against the great weight of evidence. See *Phillips*, 241 Mich App at 20.

Defendant argues next that the trial court abused its discretion by failing to impute additional income to plaintiff and by imputing income to him. However, we decline to address this issue for lack of jurisdiction.

MCR 7.202(6)(a) provides that final judgments or orders constitute the following in civil cases:

- (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;
- (ii) an order designated as final under MCR 2.604(B);
- (iii) in a domestic relations action, a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile,
- (iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,
- (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity[.]

MCR 7.203(A)(1) provides that this Court has jurisdiction over appeals of right from final judgments or orders from the trial court. The court rule also provides that “[a]n appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.”

In this case, defendant is appealing from a custody order. Specifically, he is appealing from the trial court's order denying his motion for sole legal custody. A postjudgment order denying a motion to change legal custody is a final order or judgment over which this Court has jurisdiction. MCR 7.203(A)(1); MCR 7.202(6)(a)(iii). However, an appeal from an order under MCR 7.202(6)(a)(iii) "is limited to the portion of the order with respect to which there is an appeal of right," MCR 7.203(A)(1), and an order modifying child support is not considered a final order or judgment appealable as of right. MCR 7.202(6)(a)(iii). Therefore, we decline to address this issue for lack of jurisdiction.

Additionally, on appeal, defendant challenges the trial court's previous order, which imputed plaintiff's actual wages to her regarding her income for child support. However, defendant already appealed that order, and this Court already dismissed defendant's appeal for lack of jurisdiction, noting that the order was not a final order.² See also MCR 7.203(A)(1).

Finally, defendant argues that the trial court abused its discretion by ordering him to pay attorney fees and costs. We disagree.

This Court reviews for an abuse of discretion the trial court's decision to award attorney fees and costs. *Souden v Souden*, 303 Mich App 406, 414; 844 NW2d 151 (2013). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* (quotation marks and citation omitted).

MCR 1.109(E)(7) permits trial courts to subject a party to costs for pleading a frivolous claim. Additionally, under MCR 2.625(A)(2), "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides, in relevant part, as follows:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

In this case, defendant argues that the trial court should have considered his inability to pay attorney fees and costs before ordering him to do so. In support of his argument that the trial court

² See *Bolo*, unpub order.

should have considered his inability to pay, defendant highlights MCR 3.206(D)(2).³ MCR 3.206(D)(2) provides, in pertinent part, as follows:

A party who requests attorney fees and expenses must allege facts sufficient to show that:

(a) the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay

However, the trial court explicitly and repeatedly stated that it awarded attorney fees to plaintiff under MCR 1.109(E)(7) and MCR 2.625(A)(2), finding that MCL 600.2591 was satisfied. The trial court also explicitly stated that it was not awarding attorney fees under MCR 3.206(D)(2). MCR 1.109(E)(7) and MCR 2.625(A)(2) do not require the trial court to evaluate whether a party can afford to pay attorney fees and costs, and we will not read such a requirement into the court rule. See *Freysinger v Taylor Supply Co*, 197 Mich App 349, 355; 494 NW2d 870 (1992) (additional provisions will not be read into clear and unambiguous court rules). Therefore, the trial court did not abuse its discretion by ordering defendant to pay legal fees and costs without analyzing defendant's ability to pay.

Additionally, to the extent that defendant is challenging the trial court's decision to dismiss his motion to recover an undeclared investment account, we hold that defendant waived this issue for appeal because he withdrew that motion in the trial court. See *Loutts*, 298 Mich App at 36; *Living Alternatives for Developmentally Disabled Inc*, 207 Mich App at 484. Furthermore, defendant's motion in the trial court was untimely. Defendant was required to bring his motion for fraud or misrepresentation within one year after the trial court entered the divorce judgment. See MCR 2.612(C)(2).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Mark J. Cavanagh
/s/ James Robert Redford

³ Defendant actually cited MCR 3.206(C)(2) in his brief on appeal, but we believe that he meant MCR 3.206(D)(2) because that was the court rule he cited in his lower court motions and MCR 3.206(C) is unrelated to the issue that he raises on appeal.