

STATE OF MICHIGAN
COURT OF APPEALS

ERICA L. KAPSOKAVITHIS,

Plaintiff-Appellee,

v

MICHAEL C. KAPSOKAVITHIS,

Defendant-Appellant.

UNPUBLISHED

May 13, 2021

No. 355579

Oakland Circuit Court

Family Division

LC No. 2009-761005-DM

Before: K. F. KELLY, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's order denying his motion to change custody of the couple's minor children, MK, SK, and AK, for plaintiff's purported violations of court orders. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Following a consent judgment, the parties were divorced on July 9, 2010. According to the judgment's terms, plaintiff and defendant shared joint physical and legal custody of the children, but the children's principal residence was with plaintiff. By 2017, plaintiff and defendant agreed to exercise parenting time on an alternating weekly basis and agreed that defendant was permitted to exercise one additional week of parenting time each summer. Throughout the proceedings, the parties consistently raised objections regarding one another's parenting habits. These disputes culminated in an order appointing a guardian ad litem (GAL) for the children, an order prohibiting plaintiff and defendant from using corporal punishment, an order prohibiting plaintiff and defendant from making disparaging comments about one another in the children's presence, and an order providing that plaintiff shall not leave the children unattended in any vehicles.

Disputes also arose regarding the children's internet and social media use. In July 2019, following a motion filed by defendant, the circuit court stated on the record that MK was barred from using a cell phone, was barred from accessing social media, and was barred from accessing the internet for any purpose unrelated to school work. In March 2020, the GAL arranged an

agreement between the parties which provided that plaintiff and defendant would restrict the children's exposure to individuals outside of their homes for a period of time due to the COVID-19 pandemic.

After presiding over multiple hearings addressing child custody issues and claimed violations of the circuit court's written orders or oral pronouncements, the circuit judge recused herself, and a successor judge was assigned in August 2020. Following a hearing to address the status of the case, the newly assigned circuit judge instructed the parties to file a new motion and matters would be addressed anew instead of a hybrid review of transcribed proceedings and live testimony. In October 2020, defendant moved to modify custody and requested that the circuit court award him sole legal and physical custody of the children because plaintiff consistently violated the circuit court's orders as well as the parties' agreement regarding pandemic safety measures. Plaintiff opposed the motion to change custody and denied defendant's allegations. Plaintiff and defendant both supported their pleadings with extensive exhibits.¹ After reviewing the transcripts and the other documentary evidence presented by the parties, the circuit court denied defendant's motion to modify custody. This appeal followed.

II. ANALYSIS

On appeal, defendant argues that the circuit court made findings against the great weight of the evidence, committed a palpable abuse of discretion, or clearly erred when it held that defendant failed to establish proper cause or a change of circumstances sufficient to warrant an evidentiary hearing regarding a change of custody. We disagree.

“In 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.’” *Pennington v Pennington*, 329 Mich App 562, 569-570; 944 NW2d 131 (2019), quoting MCL 722.28. “Specifically, we review under the great-weight-of-the-evidence standard the trial court's determination whether a party demonstrated proper cause or a change of circumstances.” *Id.* at 570 (citation omitted). “A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction.” *Id.* (citation omitted). “An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions.” *Id.* “An abuse of discretion, for purposes of a child custody determination, exists when the result 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.” *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014) (citation omitted). “Questions of law are reviewed for clear legal error.” *Id.* “A trial court commits legal error when it incorrectly chooses, interprets or applies the law.” *Id.* (citation omitted).

“The purposes of the Child Custody Act, MCL 722.21[] *et seq.*, are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted

¹ Although the circuit court instructed that the matter would be resolved through live testimony, the exhibits submitted included the transcripts of several evidentiary hearings regarding defendant's prior motion to change custody held before the preceding circuit judge.

custody changes.” *Pennington*, 329 Mich App at 570-571 (citation and quotation marks omitted). “The Child Custody Act authorizes a trial court to award custody and parenting time in a child custody dispute and also imposes a gatekeeping function on the trial court to ensure the child’s stability.” *Id.* at 571 (citation omitted). Under MCL 722.27, “a trial court may modify or amend a previous child custody order or judgment for proper cause shown or because of change of circumstances if doing so is in the child’s best interests.” *Id.* (citation and quotation marks omitted). “Thus, a party seeking to modify an existing child custody order must first establish proper cause or a change of circumstances before the trial court may reopen the custody matter and hold a hearing to assess whether the proposed modification is in the child’s best interests.” *Id.* (citation omitted). “If the party seeking to change custody does not prove by a preponderance of the evidence either proper cause or a change of circumstances, the trial court is not authorized by the Child Custody Act to revisit an existing custody decision and engage in a reconsideration of the statutory best-interest factors.” *Id.* (citation omitted).

A. EVIDENTIARY HEARING

Despite defendant’s allegation that a remand is necessary for the circuit court to conduct an evidentiary hearing regarding the threshold issue, we conclude that defendant’s argument lacks merit. “Although the threshold consideration of whether there was proper cause or a change of circumstances 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) (citation omitted). “Often times, 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 v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003) (citation omitted).

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. [MCR 3.210(C)(8).]

We conclude that the trial court did not err in failing to conduct an evidentiary hearing prior to ruling on the motion for change of custody. Both parties presented extensive evidence in support of their respective positions including correspondence between the parties and the transcripts of the evidentiary hearings that were held before the previous circuit court judge recused herself. The record shows that the circuit court considered the evidence presented by the parties before determining that defendant failed to meet the threshold requirement of establishing proper cause or a change of circumstances. Accordingly, the circuit court did not err when it declined to hold an evidentiary hearing regarding the threshold issue.

B. PROPER CAUSE OR A CHANGE OF CIRCUMSTANCES²

The circuit court did not make a finding that was contrary to the great weight of the evidence when it determined that defendant failed to establish proper cause or a change of circumstances sufficient to warrant an evidentiary hearing regarding the children's best interests. To establish proper cause necessary to revisit a custody order, the movant must "prove by a preponderance of the evidence the existence of an appropriate ground; the ground must be relevant to at least one of the twelve statutory best-interest factors and must be of such magnitude that it has a significant effect on the well-being of the child." *Pennington*, 329 Mich App at 571-572 (citation omitted).

[I]n 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. [*Vodvarka*, 259 Mich App at 513-514.]

In *Vodvarka*, this Court noted that minor allegations of contempt and complaints regarding visitation are not sufficient to establish proper cause or a change of circumstances. *Id.* at 510. Nevertheless, "proper cause may be demonstrated when the parties' disagreements escalate to topics significant to the well-being of the child, such as the child's education or medical treatment." *Pennington*, 329 Mich App at 572 (citations omitted). "[A] movant cannot rely on facts that

² We note there is a disparity in the identification of the last order affecting custody. The circuit court concluded that the last order affecting custody was entered on October 9, 2017, when the circuit court entered a stipulated order in which regular parenting time was to occur on an alternating weekly basis. Defendant contends that a July 3, 2019 order clarifying parenting time was the last order affecting custody, but nonetheless asserts that under either date sufficient facts and circumstances occurred to warrant a change in custody. However, the last order affecting custody was the July 9, 2010 consent judgment of divorce in which the parties were awarded joint legal and physical custody of the children. Indeed, the standards to determine the existence of proper cause or change of circumstances for custody determinations are distinct from circumstances addressing parenting time unless a change in parenting time results in an alteration to the established custodial environment. See *Shade v Wright*, 291 Mich App 17, 25-28; 805 NW2d 1 (2010). Nonetheless, we agree with the trial court's ultimate determination that proper cause or change in circumstances was not demonstrated to warrant an evidentiary hearing and, in turn, a change in custody irrespective of whether the July 9, 2010, the October 9, 2017, or the July 3, 2019 date is employed.

existed before entry of the custody order to establish a ‘change’ of circumstances.” *Vodvarka*, 259 Mich App at 514. “The same is not necessarily true for proving proper cause, though in most cases it will hold true.” *Id.* at 515.

1. PANDEMIC SAFETY COMPLIANCE

Defendant relies upon several allegations in support of his assertion that plaintiff’s cumulative actions constituted proper cause or a change of circumstances. First, defendant asserts that plaintiff endangered the children’s physical health by failing to comply with pandemic safety measures. Plaintiff admitted that in March 2020, she took the children to two real estate showings and allowed MK to go to a coffee shop. Moreover, during the hearing regarding defendant’s motion to change custody, the GAL stated that plaintiff recently took the children somewhere they did not feel comfortable due to the COVID-19 pandemic. However, the record reflects that instances in which plaintiff failed to comply with pandemic safety measures occurred only occasionally rather than consistently.³ For this reason, these instances did not have a significant effect on the well-being of the children and did not materially change the conditions surrounding the custody of the children.

2. SOCIAL MEDIA

Next, defendant asserts that plaintiff allowed the children to have unsupervised access to social media in violation of the circuit court’s prior oral pronouncement. Throughout the proceedings, plaintiff and defendant had frequent disputes regarding the children’s internet and social media use. These disputes stemmed from MK’s use of social media to post inappropriate pictures of herself online.

The parties differed regarding their views on the children’s access to electronic devices. Plaintiff did allow the children to have access to cell phones, but defendant was adamant that the children were not mature enough to handle such access. Consequently, defendant did not permit cell phones during the children’s parenting time at his home. Defendant testified that he held a pool party at his home, and then 12-year-old MK attended with her friends. The girls took photographs while wearing bikinis. Defendant cautioned MK that the photographs should only be for personal use and should not be disclosed to others. Later, defendant learned that MK and her friends posted sexually inappropriate photographs taken in a bathroom at his home. Although MK did not have access to a cell phone, she indicated that a friend managed her account. In addition to the photographs, MK’s social media account or its “feed” contained references or images pertaining to vaping, marijuana use, and sexual acts.

In response to this incident which occurred during defendant’s parenting time, defendant moved to remove access to all devices from the children and a suspension of plaintiff’s parenting time for any violation. Plaintiff recognized the serious nature of MK’s conduct, but preferred a lesser sanction. When questioned about her recommendation, the GAL noted that plaintiff was

³ Plaintiff also questioned defendant’s compliance with safety measures in light of recent contact with relatives from Florida and his surgery practice.

dishonest because she failed to report acts involving the children. However, the GAL also characterized defendant as “hyper strict.”⁴

Following this incident, defendant alleged that plaintiff failed to supervise MK who obtained access to an electronic tablet. Plaintiff asserted that she supervised MK, but the child nonetheless removed the tablet and took it to her room. Although there was no evidence that MK posted inappropriate content to the internet from this incident, defendant nonetheless sought to penalize plaintiff by suspending all parenting time.

We note that it is common for children to test the boundaries established and to break the rules. Indeed, MK did not have a cell phone at defendant’s home because of his rules, but managed to circumvent his authority by having a friend post inappropriate content to the internet. However, the parent should not be judged or faulted for the child’s initial misconduct. Rather, the manner in which the parent addresses the child’s conduct presents the issue of concern. Plaintiff indicated that once she learned of the tablet’s removal, she obtained its return by advising she would use the device’s find feature to learn its location.

Although MK’s use of social media was a serious concern,⁵ the subsequent instances in which the children accessed the internet and social media did not have a significant effect on the well-being of the children and did not materially change the conditions surrounding the custody of the children.

3. VEHICLE SUPERVISION

Defendant also asserts that plaintiff allowed AK and SK to sit in plaintiff’s vehicle without supervision in violation of the circuit court’s June 30, 2018 order prohibiting such conduct. At a state swim meet located in Saginaw, Michigan, plaintiff apparently brought a new puppy with the family to the event. Defendant alleged that it was a hot day, AK and SK sat in plaintiff’s vehicle without supervision for a period of time, and there was a “creeper” man nearby. However, there was also evidence that plaintiff was approaching her vehicle immediately after defendant found AK and SK inside. AK and SK apparently informed defendant that they were only in the vehicle

⁴ Plaintiff acknowledged that she did not report every incident to the GAL. She explained that any conduct or occurrence that she raised became the subject of a motion for which she was called into court. Further, there were references in the record that defendant hired a private investigator to document plaintiff and her supervision of the children. Yet, neither parent’s approach yielded a positive impact on the children.

⁵ We concur that the use of social media by children presents a danger that every parent fears. Its prevalent use by children and teenagers as the primary source of communication among peers renders it a constant source of worry for parents. Indeed, although MK was punished for her inappropriate use by both her parents and the circuit court, she continued to seek ways to access the internet. Thus, plaintiff’s “reasonable” access and defendant’s “nothing” approach did not stop her behavior. Yet, the parents did not seek alternative ways to manage the behavior, such as employing a technology expert to address parental controls to limit inappropriate access, but continued to argue their belief in the merits of their respective positions in court.

for the purpose of feeding plaintiff's dog. Plaintiff asserted that it was not nearly as hot as defendant submitted. Further, another parent overheard plaintiff complain that she kept the air conditioning running on the car. Irrespective of any violation, this Court has noted that minor allegations of contempt are not sufficient to establish proper cause or a change of circumstances. *Id.* at 510. Accordingly, this incident did not have a significant effect on the well-being of the children and did not materially change the conditions surrounding the custody of the children.

4. HEALTH

Defendant also asserts that plaintiff used a harmful tool to clean earwax out of AK's ears after plaintiff was informed that the use of the tool was medically inappropriate. However, the children's pediatrician testified that she told plaintiff that the tool could be used to clean wax out of AK's outer ear. Notably, defendant failed to present any evidence that plaintiff continued to use the tool to clean wax out of AK's inner ear after speaking with the children's pediatrician. Accordingly, this incident did not have a significant effect on the well-being of the children and did not materially change the conditions surrounding the custody of the children.

Moreover, defendant asserts that SK and AK were in a physical altercation during plaintiff's parenting time in which SK cut AK's pinky finger with a kitchen knife. Defendant presented evidence that this occurred, but failed to present any evidence in support of his allegations regarding plaintiff's misconduct. In August 2020, the GAL addressed this altercation between SK and AK and recommended that the children should not be left unsupervised. Defendant references this email as support for the assertions that plaintiff failed to adequately supervise the children and later attempted to conceal the altercation from defendant and the GAL. However, the GAL's email is silent in regard to defendant's allegations. For this reason, the altercation did not have a significant effect on the well-being of the children and did not materially change the conditions surrounding the custody of the children.

Defendant also asserts that, on one occasion, plaintiff violated a court order by preventing AK from speaking with defendant on the telephone regarding the number of babysitters plaintiff used to care for the children. In support of this assertion, defendant relies upon a text message conversation in which defendant accuses plaintiff of preventing AK from speaking with defendant. During the conversation, plaintiff denied the accusation. Defendant failed to present any additional evidence to support his accusation. Again, minor allegations of contempt are not sufficient to establish proper cause or a change of circumstances. *Id.* at 510. Accordingly, this matter did not have a significant effect on the well-being of the children and did not materially change the conditions surrounding the custody of the children.

5. PARENTAL MANIPULATION

Lastly, defendant asserts that plaintiff coached the children to lie on her behalf, thereby harming the children's emotional well-being. During the hearing regarding defendant's motion to change custody, the GAL stated that the children felt as if they could not tell either plaintiff or defendant the truth about the other's conduct. The GAL stated that the children suffered emotional harm because plaintiff frequently lied about her conduct and defendant frequently overreacted to plaintiff's conduct. The GAL also noted that the distrust between plaintiff and defendant "has one set of negative effect[s] on the children in terms of how [plaintiff] interacts with them and has a

different set of negative effects on the children in terms of how [defendant] overreacts to them.” Considering that the GAL allocated blame to both plaintiff and defendant, this matter did not have a significant effect on the well-being of the children and did not materially change the conditions surrounding the custody of the children.

Moreover, the circuit court determined that the parties acted in a reactionary manner to an event and then took the children to therapy. Rather than change custody, the circuit court opined that consistent therapy and interaction with the therapist and GAL would prove more beneficial than the children being removed or restricted from seeing a parent. In light of the record, defendant failed to establish proper cause or a change of circumstances sufficient to warrant an evidentiary hearing regarding the children’s best interests.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Deborah A. Servitto

/s/ Anica Letica