STATE OF MICHIGAN

COURT OF APPEALS

KELLY HESSBURG, Plaintiff-Appellee,	UNPUBLISHED September 15, 2011
V	No. 299942 Wayne Circuit Court
THOMAS PETER HESSBURG, Defendant-Appellant.	LC No. 06-622030-DM

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this child custody matter, defendant appeals as of right from a circuit court order denying his motion for a custody hearing. Because defendant did not substantiate by a preponderance of the evidence either proper cause or a change in circumstances that would justify a modification to the parties' current custody arrangement, the circuit court properly denied defendant's motion for a custody hearing, and we affirm.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

The parties married in September 1997 and four children were born during the marriage. Nearly nine years later, plaintiff filed a divorce complaint. In November 2007, the parties settled the divorce, and the circuit court entered a divorce judgment reflecting the terms of the parties' settlement. Pertinent to the present appeal, the judgment awarded the parties joint legal custody of the four children and awarded plaintiff primary physical custody.

In October 2008, defendant filed a motion for a custody hearing. Defendant averred that "both proper cause and a change in circumstances" warranted a custody hearing in light of another in a series of groundless allegations, most recently in September 2008, that defendant had sexually abused one of the children. Defendant asserted that plaintiff had also made an inappropriate disclosure of the prior, unfounded allegations of sexual abuse to officials at the children's school.

Plaintiff responded that the substance of defendant's argument concerning the pre-2008 claims of sexual abuse "occurred prior to the last custody order" and were irrelevant to the motion to change custody. Regarding the September 2008 allegation, plaintiff explained that after the parties' youngest daughter had made allegations of physical abuse against defendant, plaintiff took the child to her pediatrician, "who then reported this matter to Protective Services."

Plaintiff denied having urged the pediatrician to do so, and also denied making any improper disclosures to school officials.

After many adjournments of a hearing to address the parties' arguments relating to defendant's motion for a custody hearing, defendant filed a second supplemental brief in support of his motion in May 2010. Along with the brief, he submitted a July 2009 report by a court-appointed psychologist, Dr. Daniel Swerdlow-Freed,[1] which defendant characterized as establishing that he never abused any of his children, and that plaintiff "is coaching and/or making suggestive statements to the parties [sic] children." In this supplemental brief and over the course of additional briefing, defendant complained that plaintiff had turned the children against the school they were required to attend pursuant to the judgment of divorce, and that she inappropriately disclosed the eldest daughter's unproven sexual abuse allegation against him during a hospitalization of the daughter in June 2010.

Plaintiff responded that when asked about medical history at the eldest daughter's June 2010 hospitalization, plaintiff simply mentioned the daughter's prior sexual abuse allegation. Plaintiff denied defendant's contention that she had criticized the children's school or denigrated defendant in front of the children. Plaintiff asserted that defendant had not proven a change in circumstances or shown proper cause to warrant a custody hearing.

In July 2010, the circuit court denied defendant's motion for a custody hearing on the basis that "he has failed to established [sic] by a preponderance of the evidence that proper cause or change of circumstances exist to warrant a change in custody at this time." In August 2010, the circuit court denied defendant's motion for reconsideration.

II. MOTION FOR A CUSTODY HEARING

A. STANDARD OF REVIEW

Defendant maintains that the circuit court erred in ignoring the large volume of documentary evidence he submitted to prove proper cause and a change of circumstances. This Court must affirm all custody orders on appeal "unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. The great weight of the evidence standard governs this Court's review of "a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances." *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*., quoting *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

[1] In October 2008, the circuit court appointed Dr. Swerdlow-Freed "to conduct a psychological evaluation regarding this matter," specifically to interview plaintiff, defendant, and the parties' children "regarding allegations of abuse and/or evidence of coaching or suggestions of false abuse allegations."

B. GUIDING LEGAL PRINCIPLES

Defendant moved for a custody hearing pursuant to MCL 722.27(1)(c), which authorizes a court to "[m]odify or amend its previous [custody] judgments or orders for proper cause shown or because of change of circumstances . . . ."

> The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances. And, a trial court may modify a custody award only if the moving party first establishes proper cause or a change of circumstances. Accordingly, a party seeking a change in the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change of circumstances. If a party fails to do so, the trial court may not hold a child custody hearing. [*Corporan*, 282 Mich App at 603-604 (internal citations ommitted).]

In *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), this Court expounded on the meanings of "proper cause" and "change of circumstances," explaining:

> [T]o 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.
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> . . . [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. [*Id*. at 512-514 (emphasis in original).]

In light of the parties' arguments concerning the scope of the evidence a court may consider when ascertaining whether a change of circumstance or proper cause exists in a particular case, we quote the following guidance from *Vodvarka*:

> Because a "change of circumstances" requires a "change," the circumstances must be compared to some other set of circumstances. And since

> the movant is seeking to modify or amend the prior custody order, it is evident that the circumstances must have changed since the custody order at issue was entered. Of course, evidence 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. As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a "change" of circumstances.
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> The same is not necessarily true for proving proper cause, though in most cases it will hold true. The phrase "proper cause" is not by the words themselves tied to a change in events as is "change of circumstances." Rather, proper cause is geared more toward the significance of the facts or events or, as stated earlier, the appropriateness of the grounds offered. However, we believe that 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. However, there can be such situations. . . . [*Id*. at 514-515 (emphasis in original, internal footnotes omitted).]

C. APPLICATION TO PRESENT CIRCUMSTANCES

Even when viewed in conjunction with the allegations of abuse predating the parties' divorce, we conclude that the evidence establishing a 2008 report of suspected abuse of the parties' youngest daughter, together with the other evidence submitted by defendant with his motion for a custody hearing, fails to establish by a preponderance of the evidence a change of circumstances or proper cause to revisit the parties' custody arrangement. For purposes of this appeal, we accept that no physical evidence confirms that defendant sexually abused his children. Nonetheless, defendant has not substantiated his insistence that plaintiff "coached" the children or planted false sexual abuse allegations in the children's minds.

The most recent evaluation of the parties, the children, the genesis of the children's sexual abuse allegations against defendant, and the multiple unsubstantiated investigations into the claims of abuse, fell to court-appointed psychologist Dr. Swerdlow-Freed. Dr. Swerdlow-Freed reviewed voluminous documents and interviewed the parties and the children, before rendering lengthy findings and conclusions in his July 2009 report. Dr. Swerdlow-Freed's 2009 evaluation and report reveals that he neither accuses nor reasonably implies that plaintiff has intentionally planted false sexual abuse allegations in the children's minds or otherwise purposefully coached the children.

Similarly, none of the wealth of documentation that defendant has appended to his brief on appeal that predates the custody provisions in the parties' judgment of divorce, which we have considered for contextual purposes, *Vodvarka*, 259 Mich App at 514, insinuates that plaintiff intentionally planted the allegations of sexual abuse. And none of the postdivorce documentation defendant has submitted substantiates his argument that plaintiff intentionally

suggested to the children any abuse by defendant.[2] Defendant places significant weight on a December 2009 letter authored by psychologist Dr. Michael M. Katz[3] and a June 2010 affidavit executed by psychologist Dr. Paul Jacobs. We decline to consider Dr. Katz's 2009 letter because it consists of hearsay. MRE 801(c), MRE 802. As this Court has explained in the context of a motion for custody modification, "Without considering admissible evidence—live testimony, affidavits, documents, or other admissible evidence—a court cannot properly make the determination or make the findings of fact necessary to support its action under" MCL 722.27(1)(c). *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991). With regard to Dr. Jacobs's abbreviated 2010 affidavit, it simply does not expressly opine that plaintiff intentionally coached or suggested the girls' reports of sexual abuse. Moreover, the affidavit declares in entirely conclusory fashion that "continuing the current custodial environment will be detrimental to all of the Hessburg children," a view that Dr. Jacobs offers despite that he apparently has had no contact with plaintiff or the children since at least 2007, when he drafted a 2007 report.

The available record regarding the current condition of the children in plaintiff's primary physical custody seemingly depicts that the children are doing well. The 2009 report by Dr. Swerdlow-Freed did not elaborate at length on plaintiff's more recent parenting of the children, but did mention that "[e]ach child presented neatly and cleanly dressed in clothing appropriate for the weather and readily separated from his or her parent." The eldest child told Dr. Swerdlow-Freed during an interview that "his mother told him to tell the truth and be nice." The 2009 report also mentioned that the two boys "characterized the relationships with their mother and father in normal terms. . . . Each child conveyed a reasonably positive view of his/her mother and father and there is no indication that . . . [any of the children] is alienated from their mother or father."

Defendant introduced no other evidence tending to suggest that plaintiff could not fulfill her role as the children's primary physical custodian or posed any danger to the children.[4] To the extent that defendant highlights recent evidence of one child's misbehavior at school and some

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[2] We have not considered exhibit 15 to defendant's brief on appeal, an affidavit that defendant prepared after filing his claim of appeal. This Court granted plaintiff's motion to strike that exhibit. *Hessburg v Hessburg*, unpublished order of the Court of Appeals, entered January 20, 2011 (Docket No. 299942).

[3] Dr. Katz prepared a report in December 2006 of his evaluation of the parties and the children. Notably, Dr. Katz referenced the children's "loving close relationship[s]" with plaintiff, and her "loving, nurturing, supportive" behavior toward the children. Dr. Katz also emphasized his "very strong opinion that both parents love their children very much and want what is best for them," and his "very strong opinion that all the children deeply love both parents and are strongly bonded and attached to both parents."

[4] None of the exhibits attached to defendant's brief on appeal confirm his assertions that plaintiff inappropriately conversed about the eldest daughter's past sexual abuse allegations with school officials, or with the eldest daughter's doctor during her June 2010 hospitalization.

of the children's expressions of displeasure with their current educational institutions, these incidents do not weigh in favor of a finding of proper cause or a change in circumstances. Instead, these occurrences fall squarely within the category of "normal life changes," which this Court has explained as follows:

> *Vodvarka* advises that "over time there will always be some changes in a child's environment, behavior, and well-being," and thus that "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child . . . ." *Vodvarka*, 259 Mich App at 513. The fact that a child is growing up, the fact that a child has started high school, and the fact that the child faces scheduling changes relating to school and extra-curricular activities "are the type of normal life changes that occur during a child's life and that do not warrant a change in the child's custodial environment." *Shade v Wright*, ___ Mich App ___; ___ NW2d ___ (Docket No. 296318, issued December 2, 2010). We conclude that, under the reasoning of *Vodvarka* and *Shade*, the circuit court committed clear legal error in determining that the child's changes in needs and desires in the ordinary course of growing up constituted a change of circumstances sufficient to warrant a reevaluation of the custody agreement. [*Gerstenschlager v Gerstenschlager*, ___ Mich App ___; ___ NW2d ___ (Docket No. 300858, issued May 19, 2011), slip op at 3.]

In conclusion, defendant failed to satisfy his burden of proving by a preponderance of the evidence either (1) his averments that plaintiff purposefully coached the girls' reports of sexual abuse, or (2) any other circumstance or condition that has or might have "a significant effect on the child[ren]'s well-being," i.e., proper cause or a change in circumstances. *Vodvarka*, 259 Mich App at 512-513.[5]

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause

[5] Although the circuit court did not explain its findings or conclusions, it reached the correct result when it denied defendant's motion for a custody hearing. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009) (stating the proposition that "this Court will affirm where the trial court came to the right result even if for the wrong reason").