

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SYLVIA LYNN PEARSON, a/k/a SYLVIA  
LYNN MOORE,

Plaintiff-Appellant,

v

WALTER D. STEWART,

Defendant-Appellee.

UNPUBLISHED  
October 4, 2011

No. 302499  
Wayne Circuit Court  
Family Division  
LC No. 97-704306-DM

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Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing her motion for physical custody of her minor daughter, Hannah. We affirm.

On August 27, 2009, the court awarded defendant sole physical custody of Hannah. On August 25, 2010, plaintiff filed a motion requesting sole physical and legal custody of Hannah. Plaintiff alleged that defendant verbally abused Hannah by calling her names. She also claimed that there had been a change in circumstances since the prior custody order because 14-year-old Hannah had learned about sex from other students in her school, was articulating explicit sexual behaviors, and was permitted to spend the night at her friends' homes where boys were present. Plaintiff further alleged that defendant was preventing her from obtaining information from Hannah's school. And plaintiff provided the court with her own analysis of the best-interest factors listed in MCL 722.23, which were primarily assessed in her favor.

On September 8, 2010, a hearing before a referee was conducted. Following the receipt of evidence, the referee concluded that (1) all of the allegations made by plaintiff were based upon hearsay, "from alleged statements made by the children in this matter (including a disgruntled 16 year old who had been punished for bad behavior in school);" (2) Hannah's sexually explicit behavior, including email, was generated while at plaintiff's house; (3) Hannah was permitted to spend the night at a friend's house and the friend had a brother, but a parent was home during the sleep over; (4) defendant denied calling Hannah names; (5) Hannah had called the police on defendant, but the police determined it was "a discipline issue with Hannah and closed the matter;" (6) Hannah was in counseling and was receiving tutoring after receiving poor grades; and (7) Hannah lost many privileges such as television and telephone use as discipline for bad behavior at school. The referee determined that plaintiff had failed to establish proper

cause or change of circumstances as required under MCL 722.27(1)(c) and recommended the motion be dismissed.

Plaintiff filed objections to the referee's recommendation. The "objections" included that (1) the high school Hannah was attending was on "Academic Watch" and she deserved a quality education, (2) defendant deliberately violated plaintiff's rights as a parent—which apparently pertained to parenting time issues, and (3) Hannah wanted to address the court. On January 18, 2011, a hearing was conducted before the circuit court. The court first considered the parenting time issues and resolved that matter. Then the court noted that it had read all of the information pertaining to plaintiff's motion for change of custody, including the referees' recommendation, and denied the motion. The court held that plaintiff failed to establish proper cause or change of circumstances pursuant to MCL 722.27(1)(c) and therefore no question of fact existed to decide. This appeal followed.

Our review of custody disputes is governed by the Child Custody Act (CCA), MCL 722.21 *et seq.* See MCL 722.26(1). Under the CCA, "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.

MCL 722.27(1)(c) of the CCA provides that a court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." Thus, as a threshold matter, a party seeking a change in child custody must first demonstrate to the trial court either proper cause or change of circumstances. *Brausch v Brausch*, 283 Mich App 339, 355; 770 NW2d 77 (2009). It is only if the moving party succeeds in making the threshold showing that the court must "weigh the statutory best interest factors of MCL 722.23 and make a factual finding regarding each factor in the context of a child custody hearing." *Id.* at 355 n 6.

In *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), this Court defined "proper cause" and "change of circumstances" as follows:

[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. . . . 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.]

*Vodvarka* emphasized that “not just *any* fact relevant to the twelve factors will constitute sufficient cause. Rather, the grounds presented must be ‘legally sufficient,’ i.e., they must be of a magnitude to have a significant effect on the child’s well-being to the extent that revisiting the custody order would be proper.” *Id.* at 512. Although this threshold question may be fact-intensive, the court is not required to hold an evidentiary hearing to decide it. *Id.*; see, also, *Brausch*, 283 Mich App at 356. In deciding whether an evidentiary hearing is necessary, the court must determine “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). And although the court must hold a de novo hearing on any matter that had been subject to a referee hearing upon a party’s request, MCL 552.507(4), the court may issue a new decision “based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee,” or “based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.” MCL 552.507(6)(a) and (c).

On appeal, plaintiff argues that Hannah should have been allowed to address the court to express her custody preference and describe what was happening in defendant’s home, as permitted by best interest factor MCL 722.23(i) [reasonable preference of the child]. We disagree.

First, the court was not required to hold a full evidentiary hearing, or to take testimony from Hannah, in answering the threshold question whether plaintiff had established proper cause or a change in circumstances justifying modification of the prior custody order. See *Brausch*, 283 Mich App at 356; *Vodvarka*, 259 Mich App at 512. It is clear, however, that the court considered the best-interest factors as they related to this threshold question. The court reviewed the referee’s post-hearing recommendation and all filings by each party with regard to plaintiff’s motion, including: (1) Hannah’s letter stating her wish to live with plaintiff and describing her views on the verbal altercations between herself and defendant, (2) a police report regarding the alleged altercations between Hannah and defendant that cited “no criminal action or signs of abuse,” and (3) information concerning Hannah’s poor academic performance, as well as the fact that her school was on “Academic Watch” by the state of Ohio. The court also heard arguments at the hearing and requested updates with regard to Hannah’s academic performance and psychological therapy. Then, the court concluded that neither proper cause nor a change of circumstances were demonstrated.

The court’s decision was not erroneous or against the great weight of the evidence. See MCL 722.28. This is an acrimonious case with each party regularly making accusations against the other party. Under the circumstances and in light of the evidence presented, the court reasonably was unconvinced that plaintiff’s most recent grounds for seeking a change in custody were “of a magnitude to have a significant effect on the child’s well-being to the extent that revisiting the custody order would be proper.” *Vodvarka*, 259 Mich App at 512. And because the court reasonably concluded that plaintiff had not established proper cause or a change of circumstances justifying modification of the prior order, the court was not required to hold a full custody hearing or make factual findings with regard to each best-interest factor. See *Brausch*, 283 Mich App at 355 n 6.

Further, plaintiff’s argument that she was denied due process also fails. Plaintiff claims that the trial court declined to permit her to argue or testify regarding her motion for custody and,

instead, cut her off while permitting defendant to testify extensively. But the record does not reveal that the court refused to permit plaintiff's testimony or argument at the motion hearing. On no occasion when the court was considering the custody motion did it deny any request to speak by plaintiff. And plaintiff did not appear to have any barriers with regard to addressing the court. She engaged in extensive dialogue with the court concerning her separate motion about parenting time. During the court's dialogue with defendant concerning custody, plaintiff interjected on occasion including, for example, to request copies of documents cited by defendant. Significantly, even now, plaintiff does not describe what she would have told the court or how her testimony would have differed from the documents and arguments she had already presented, which the court expressly reviewed. To the extent the court affirmatively requested more testimony from defendant than from plaintiff on the custody issue, this course of action was logical. Defendant was responding to the extensive allegations in plaintiff's motion by describing the children's current circumstances from his point of view as the custodial parent.

Finally, plaintiff also argues that the trial court erred in 2009 when it awarded physical custody of Hannah to defendant because the court did not consider whether Hannah had an established custodial environment with plaintiff and, if so, whether it was in Hannah's best interest to modify the custody arrangement, as required by MCL 722.27(1)(c). However, this Court does not have jurisdiction to consider plaintiff's belated argument. The August 28, 2009 custody order was a final order appealable by right under MCR 7.203(A)(1) because it was a "postjudgment order affecting the custody of a minor" in a domestic relations case. MCR 7.202(6)(a)(iii). Accordingly, if plaintiff wished to appeal this order, she generally was required to do so within 21 days of its entry. MCR 7.204(A)(1)(a) (appeals by right); MCR 7.205(A)(1) (appeals by leave). At most, she could have filed for a late appeal within 12 months of the entry date. MCR 7.205(F)(3). The deadlines for appeals are jurisdictional. See *Chen v Wayne State Univ*, 284 Mich App 172, 192-193; 771 NW2d 820 (2009).

Affirmed.

/s/ Amy Ronayne Krause

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen