STATE OF MICHIGAN

COURT OF APPEALS

PENELOPE SUE NAYLOR, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
v	No. 303937 Montcalm Circuit Court
LARRY DALLAS NAYLOR, Defendant-Appellant.	LC No. 2007-009205-DM

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In this custody case, the circuit court found that there was neither proper cause nor a change of circumstances sufficient to revisit the last custody order. On appeal, defendant argues that a change of custody is justified by plaintiff's relationship involving domestic violence, among other things. Because there was substantial support for the circuit court's finding that defendant's allegations were unfounded, we affirm.

The parties have one minor child, born on September 6, 1999. The parties divorced in December 2007, and the court awarded physical custody to plaintiff and joint legal custody to both parties. Defendant first sought physical custody on August 20, 2009. Defendant primarily alleged that plaintiff was involved in a relationship with Dave Rogers and that this relationship was marred by domestic violence. However, the referee found that there had not been a material change in circumstances or other proper cause to revisit the custody arrangement. The referee noted that the child was not present when the domestic violence took place and that he seemed to be happy and doing well in school. The circuit court denied the motion for change of custody but did follow the referee's recommendation to order that the minor child not have any contact with Rogers.

Defendant filed another petition to change custody on May 13, 2010. Defendant alleged that plaintiff's relationship with Rogers was ongoing, as was the domestic violence, and that plaintiff had violated the order that the child not have contact with Rogers. He further claimed that plaintiff had denied his parenting time by changing the schedule for the child's visits.

Defendant also claimed that plaintiff was neglecting the child's education by withdrawing him from his school in order to homeschool him.[1]

The referee found proper cause and a change of circumstances sufficient to revisit the earlier order based on the "continuing and consistent" allegations of domestic violence, and granted custody to defendant. However, the circuit court reversed this decision. It held that, although defendant had consistently alleged domestic violence between plaintiff and Rogers, there was no evidence of domestic violence other than the incident in July 2009. The court found that the child had not been harmed by the relationship between plaintiff and Rogers. The court also held that defendant agreed to the parenting-time change and that any dispute over current parenting time could be resolved in a more specific motion. The court therefore held that defendant had failed to establish either proper cause or a change of circumstances sufficient to revisit the custody order. The court further rescinded the no-contact order against Rogers.

Defendant argues that he has shown proper cause or a change in circumstances sufficient to warrant a revisiting of the prior custody decision. We disagree.

> To expedite the resolution of a child custody dispute by prompt and final adjudication, 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.]

"Clear legal error occurs when a trial court incorrectly chooses, interprets, or applies the law." *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008) (internal citations and quotation marks omitted). "This Court reviews a trial court's determination whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Under this standard, this Court defers to the trial court's findings of fact unless the findings "clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (internal citation and quotation marks omitted).

A court may only modify a custody order "for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c). The goal of the Child Custody Act is to "minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an established custodial environment, *except in the most compelling cases* . . . ." *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001) (internal citation and quotation marks omitted, emphasis added by *Foskett*). "Providing a stable environment for children that is free of unwarranted custody changes (and hearings) is a

[1] He also asserted that Rogers' home had burned down and that the fire was under investigation for arson. However, no evidence was presented that Rogers was involved in setting the fire and defendant does not discuss this further on appeal. With regard to the homeschooling, defendant later admitted that he had agreed to this arrangement.

paramount purpose of the Child Custody Act . . . ." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003).

> [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).]

Defendant argues that he has shown good cause or a change in circumstances serious enough to warrant a custody change on the grounds that plaintiff improperly allowed the minor child to have contact with Rogers and altered the parenting-time schedule.

The circuit court found that defendant had not proven most of his allegations. It is clear from the record that plaintiff allowed contact between the child and Rogers, despite the court's order prohibiting such interaction. However, the circuit court held that Rogers had not negatively impacted the child and did not pose a threat to the child's well-being going forward. This finding was based on the reports of the Friend of the Court investigator and the testimony of Dr. David Meyers, a psychologist who had interviewed and assessed plaintiff, Rogers, and the child. The actual trial testimony of the investigator was somewhat contrary to the trial court's finding, particularly with respect to the contents of a letter the investigator had allegedly received from one of plaintiff's neighbors. Additionally, there was some evidence that the child may have witnessed violent behavior, or at least arguing, between Rogers and plaintiff. However, plaintiff denied that Rogers had ever struck her, and a review of the record does not reveal any direct evidence to support defendant's claims of ongoing domestic violence or arson. In contrast, the testimony from Dr. Meyers strongly supported a finding that both plaintiff and Rogers were not aggressive or anti-social and did not pose a threat to the child, and that both had good parenting skills. Thus, there was substantial support for the court's conclusion with regard to Rogers, and the evidence does not clearly preponderate against the court's finding. *Fletcher*, 447 Mich at 878.

The record also does not support defendant's claim of an improper denial of parenting time. Indeed, defendant testified that the change to the parenting-time arrangement was originally his idea. The circuit court found that the parties agreed to the change of parenting time and that plaintiff simply refused later to return to the original schedule. Defendant has not demonstrated that the court's finding in this regard was against the great weight of the evidence. Nor has defendant adequately refuted the trial court's notation that a desired change in future parenting time could be addressed in a specific, more appropriate motion.

Under the circumstances, defendant has not shown that the trial court erred in determining that neither proper cause nor a change in circumstances significant enough to warrant revisiting its prior custody decision existed in this case.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering