

STATE OF MICHIGAN
COURT OF APPEALS

YUMIKO FUJIMAKI, a/k/a YUMIKO
ICHIKAWA,

UNPUBLISHED
December 15, 2011

Plaintiff-Appellee,

v

No. 304552
Washtenaw Circuit Court
LC No. 02-002455-DM

AKIO FUJIMAKI,

Defendant-Appellant.

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant-father appeals as of right from the trial court's order denying his motion to change the legal and physical custody of the parties' son from plaintiff-mother's sole custody to defendant's sole custody. We affirm.

This appeal involves one of numerous conflicts that have arisen between the parties with respect to their son's custody following the entry of a divorce judgment in 2004, and its May 2005 amendment continuing the parties' joint legal and physical custody of their son. On September 23, 2008, the trial court entered an order changing custody by awarding plaintiff sole physical custody, and awarding plaintiff sole legal custody on a temporary basis for the 2008-2009 school year, subject to a review hearing in August 2009. Defendant appealed that order and, in May 2009, this Court remanded the case for further proceedings because the trial court failed to make reviewable factual findings to support its decision. *Fujimaki v Fujimaki*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2009 (Docket No. 288752), slip op at 3. This Court also directed the trial court "to consider its parenting time decision in the context of its findings regarding custody." *Id.*, slip op at 5. The trial court was permitted, in its discretion, to conduct a new hearing that included updated information and any change of circumstances. *Id.* The September 23, 2008, custody and parenting time order was to "remain in effect until, and if, [the court] issues a new order, except that the trial court may modify the order to allow defendant to have parenting time every other weekend in the upcoming summer, as agreed by plaintiff in this appeal." *Id.*

Before this Court issued its decision in the prior appeal, plaintiff moved to terminate defendant's overnight parenting time and to require supervised daytime parenting time with defendant because defendant's relationship with the child had deteriorated. Defendant's

parenting time was temporarily suspended, but was later reinstated on a modified basis after evidentiary hearings were conducted in May and June 2009. The trial court received additional evidence regarding defendant's parenting time at a hearing on July 31, 2009, which also afforded the parties an opportunity to present updated information relevant to the court's custody determination. The trial court agreed to interview the child before issuing its decision. It interviewed the child in August 2009, but did not conduct any further evidentiary hearing regarding custody or parenting time.

On December 22, 2010, the trial court issued a decision addressing the statutory best-interest factors in MCL 722.23 and reaffirming its September 23, 2008, order awarding plaintiff sole physical custody and temporary legal custody of the child. The trial court considered the updated evidence presented by the parties in 2009 as part of a separate decision entered on March 29, 2011, to continue defendant's parenting time on a modified basis that did not allow for overnight parenting time. The trial court determined that plaintiff's sole legal custody was to continue with respect to all important decisions affecting the child's welfare.

Before the trial court issued its March 29, 2011, decision, defendant filed a motion to change the child's custody to award him sole legal and physical custody based on a change of circumstances that occurred after entry of the September 23, 2008, custody order. The trial court initially denied the motion at a hearing on March 10, 2011, but sua sponte referred the matter to a friend of the court evaluator to review parenting time. On May 24, 2011, the trial court denied defendant's motion for reconsideration of its March 10, 2011, order.

On appeal, defendant argues that the trial court erred in denying his motion for a change of legal and physical custody without conducting an evidentiary hearing or addressing the best-interest factors in MCL 722.23. 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. Under this statute, findings of fact must be affirmed on appeal unless the evidence clearly preponderates in the opposite direction, *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994), while discretionary rulings are reviewed for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court clearly errs under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). Any error is subject to a harmless error analysis on appeal. *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996); *Fletcher*, 447 Mich at 889.

MCL 722.27(1)(c) provides that a trial court may modify or amend its custody orders for proper cause or a change of circumstances. The purpose of this statute is to "minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). The moving party has a threshold burden of establishing either proper cause or a change of circumstances. *Id.* If this threshold showing is not made, a trial court is not required to hold a custody hearing to reevaluate the statutory best-interest factors. *Id.* at 603-604.

In *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003), this Court explained that the “proper cause” necessary to revisit a custody order requires the moving party to

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.

This Court further explained that the trial court must make its decision based on the facts of the case, but need not hold an evidentiary hearing to resolve this initial question. *Id.* “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).

In *Vodvarka*, 259 Mich App at 513-514, this Court determined that the alternative “change of circumstances” standard necessary to revisit a custody decision requires the moving party to

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. [Emphasis in original.]

In *Vodvarka*, the Court explained that because the moving party seeks to modify or change a prior custody order, it is evident that the circumstances must have changed since the custody order at issue was entered. *Id.*¹

This case is factually distinguishable from *Vodvarka* because defendant here moved for a change of physical and legal custody while a separate proceeding was pending in the trial court with regard to whether plaintiff’s temporary sole legal custody should continue. This case is also distinguishable from *Vodvarka* because the trial court gave the parties an opportunity to present updated information relevant to custody in 2009, and used that information in its March 29, 2011

¹ This requirement is not necessarily applicable to a “proper cause” analysis, which is geared more toward the significance of facts and events, or the appropriateness of the grounds asserted. *Vodvarka*, 259 Mich App at 515.

decision to address the issue left open by the September 23, 2008 order, namely, whether to continue plaintiff's sole legal custody.

It is true that the trial court's March 29, 2011 evaluation of the custody decision did not relate the evidence to the best-interest factors. However, when the trial court's findings on March 29, 2011 are considered in the context of the court's December 22, 2010 analysis of the best-interest factors and the focal point of the March 29, 2011 custody decision to evaluate the effect of updated information, the findings are adequate. Defendant has not established anything regarding the trial court's bifurcated approach on remand from this Court to both make reviewable findings and consider the effect of updated information that amounts to clear legal error. MCL 722.28; *McIntosh*, 282 Mich App at 475.

We are nonetheless troubled by the extraordinary amount of time it took the trial court to render its March 29, 2011 decision. Under MCR 3.210(A)(1), (C)(3), and (C)(7), where custody of a minor is contested in a divorce action, a court must enter a decision within 28 days of the hearing unless there is good cause for an extension of time to do so. Indeed, it was not until the trial court entered its decision denying defendant's motion for rehearing on May 24, 2011 that it expressly pulled together all of its custody decisions and considered them in light of the more extensive allegations and offer of proof made by defendant in support of his motion for reconsideration.

But because the trial court's delay did not preclude defendant from moving for a change of custody, the delay was harmless. *Ireland*, 451 Mich at 468; *Fletcher*, 447 Mich at 889. Indeed, it is apparent from the trial court's May 24, 2011 decision that it gave defendant a second opportunity to argue his motion for a change of custody and support it with an offer of proof, and to have the motion considered in light of the March 29, 2011 decision. MCR 3.213 provides that "[p]ostjudgment motions in domestic relations actions are governed by MCR 2.119." When deciding a motion for reconsideration under MCR 2.119(F)(3), a trial court has discretion to give a party a second chance with respect to a previously denied motion. *In re Estate of Moukalled*, 269 Mich App 708, 714; 714 NW2d 400 (2006).

Examined in this context, the dispositive question is whether the trial court abused its discretion in denying defendant's motion for reconsideration. That determination, in turn, depends on whether the trial court, without conducting an evidentiary hearing, properly could find that defendant failed to establish proper cause or a change of circumstances sufficient to revisit the custody decision.

In considering this issue, we initially conclude that defendant has failed to establish that the trial court's referral to the friend of the court evaluator provides a basis for disturbing the trial court's decision. While the record contains some inconsistencies regarding whether the referral was intended to address custody matters, the trial court's May 24, 2011 decision is clear that it was able to reach a decision without a friend of the court evaluation.

After reviewing the record, we conclude that the trial court's finding that defendant failed to establish proper cause or a change of circumstances sufficient to warrant reevaluation of the best-interest factors is not against the great weight of the evidence. MCL 722.28; *Fletcher*, 447 Mich at 879. As indicated previously, this case is distinguishable from *Vodvarka*, 259 Mich App

at 513-514 (stating that a moving party cannot rely on facts existing before entry of the last custody order to establish a “change of circumstances”), because defendant moved for a change of physical and legal custody while a separate matter was pending to determine whether plaintiff’s sole legal custody should continue. Substantively, the proper custody order to consider in evaluating whether there has been a change of circumstances is the September 23, 2008 order, as reaffirmed on December 22, 2010, and as supplemented on March 29, 2011, based on updated information. But regardless of which order is used to evaluate the “change of circumstances,” the trial court’s March 29, 2011 findings are material in determining whether any contested factual issues existed that required an evidentiary hearing to make an informed decision. MCR 3.210(C)(8). The unusual procedural posture of this case does not affect the “proper cause” alternative for revisiting a child custody decision because “proper cause” is geared more toward the appropriateness of the grounds offered. *Vodvarka*, 259 Mich App at 515.

We conclude that the trial court did not err in finding that defendant failed to establish proper cause or a change of circumstances to warrant an evidentiary hearing. We agree with defendant’s argument that the child’s academic progress and plaintiff’s decision to keep him home from school for two months before enrolling him in an alternative school relates to the best-interest factor in MCL 722.23(h) (“home, school, and community record of the child”). We also agree that MCL 722.23(g) (“mental and physical health of the parties involved”) was a relevant factor in assessing defendant’s motion, but note that this factor is concerned with the mental and physical health of plaintiff and defendant, not the child. Further, a court need not give equal weight to each statutory best-interest factor. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

The trial court’s finding that the child’s academic performance and struggles have been a recurrent theme in this case is not against the great weight of the evidence. Moreover, the trial court could reasonably conclude that this did not constitute sufficient proper cause or a change of circumstances to warrant review of the child’s custody in light of the child’s mental health issues and defendant’s inability to address those issues. The trial court’s December 22, 2010, decision reflects that it was defendant’s inability to process information regarding the child’s sense of well-being, unless it met defendant’s own rigid and narrow standards, that weighed heavily in the trial court’s decision to change custody in 2008. The trial court found that defendant’s personality issues “keep him from understanding and meeting the day-to-day emotional needs of his son.”

After considering the updated information presented by the parties in 2009, the trial court found in its March 29, 2011 decision that the child’s academic performance continues to fluctuate and that plaintiff encourages, but does not motivate, the child academically. At the same time, the trial court determined that the child’s evolving mental health crisis had become a weightier concern and the court increasingly questioned defendant’s ability to address that issue. The evidence presented to the trial court during the 2009 proceedings included that defendant reacted to being pushed by the child by taking him to a police department, and that defendant overwhelmed the child in the summer of 2009 by taking him to Japan to meet defendant’s fiancée and her twin sons. The child’s therapist recommended that the child have input into his relationship with defendant, while defendant testified that the child’s mental condition was unrelated to their relationship.

Accepting as true defendant's offer of proof regarding the child's academic performance, which was presented in support of his motion for reconsideration of his motion for a change of custody, the trial court could reasonably conclude that it did not constitute sufficient proper cause or a change of circumstances to warrant revisiting the custody decision. While academic issues might be sufficient to show a material change of circumstances or to constitute proper cause in an appropriate case, given the child's history of academic struggles and the weightier issue of the child's mental or emotional health, it cannot be said that the evidence clearly preponderates against the trial court's decision.

We find merit to defendant's argument that his additional offer of proof regarding plaintiff's decision to provide medication to the child without a proper prescription is relevant to the best-interest factor in MCL 722.23(c) ("capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs"). We note, however, that there was no allegation that plaintiff's poor judgment was continuing. Rather, defendant alleged that a Protective Services worker assisted plaintiff in finding a psychiatrist who prescribed new medication for the child, who was diagnosed with an anxiety disorder.

It is apparent that defendant's motion for reconsideration proposed the same type of rigid approach to the child's care and discipline that the trial court previously found would keep defendant from meeting the child's emotional needs. The trial court was faced with circumstances indicating that both parties had exercised poor judgment with respect to the child's well-being. When denying defendant's motion for reconsideration, the trial court clarified that it intended to use information gathered during a friend of the court evaluation to consider this issue and, in particular, determine what safeguards could be implemented for the child. That decision does not mean that proper cause or a change of circumstances sufficient to revisit the award of sole custody to plaintiff was established. Under MCL 722.27(1)(e), the trial court properly could take "any action considered to be necessary" for the best interests of the child. See also *Hunter v Hunter*, 484 Mich 247, 279 n 64; 771 NW2d 694 (2009).

In sum, because the trial court's finding that defendant failed to show proper cause or a change of circumstances of sufficient magnitude to revisit the custody decision is not against the great weight of the evidence, we affirm the trial court's decision. MCL 722.28; *Fletcher*, 447 Mich at 879. It was not necessary that the trial court conduct an evidentiary hearing because defendant failed to establish any contested fact that was necessary for the trial court to make an informed decision.²

² Because we find no basis for disturbing the trial court's decision, it is unnecessary to address defendant's request to have this case remanded for proceedings before a different judge.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto