

STATE OF MICHIGAN
COURT OF APPEALS

KAREN L. HEALY,

Plaintiff-Appellee,

V

BRADLEY M. DEVEREAUX,

Defendant-Appellant.

UNPUBLISHED

March 15, 2012

No. 306514

Gratiot Circuit Court

LC No. 05-009382-DS

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

In this custody dispute, defendant appeals from the trial court's denial of his motion for an ex parte order to maintain status quo and motion for change of custody. Because we agree with the trial court that defendant has not demonstrated a change in circumstances or proper cause sufficient to warrant a reexamination of the custody order, we affirm.

Plaintiff and defendant, who never married, are the parents of a thirteen-year-old boy. On January 18, 2006, the circuit court entered an order addressing custody, parenting time, and child support. Approximately six months after the entry of the order, plaintiff moved to modify defendant's parenting time to require supervision by a responsible third party, citing concerns about defendant's alleged drug use. At a conciliation conference, the parties met with the friend of the court who requested that defendant take a drug test before he left the courthouse. Defendant refused on several occasions and left the courthouse without submitting to a drug test. In an order dated July 27, 2006, defendant's parenting time was held in abeyance. Defendant's parenting time remained suspended for the next five years, although it is undisputed that plaintiff still allowed the child to spend time with defendant.

In August 2011, plaintiff moved the trial court to change the domicile and legal residence of the child to Florida. Defendant did not file an answer to this motion. The trial court held an evidentiary hearing on plaintiff's motion, and granted the motion after an analysis of the five factors set forth in MCL 722.31(4). Subsequent to this hearing, defendant moved the trial court to alter the custody order and grant him sole physical custody of the child. The trial court denied defendant's motion without a hearing, stating that defendant had not demonstrated proper cause or change of circumstances sufficient to warrant reexamination of custody. Defendant argues that the court erred in failing to hold a hearing addressing his motion. He also asserts that he alleged sufficient facts to establish a change in circumstances.

All custody orders shall be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010).

If the party moving for a change of custody does not establish proper cause or change in circumstances, the court is precluded from holding a child custody hearing or engaging in a reconsideration of the statutory best-interest factors. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). An evidentiary hearing is required before custody can be changed, *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999), but the preliminary determination whether proper cause or change of circumstances permits further consideration of a change in custody does not necessarily require an evidentiary hearing, *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

To establish a change of circumstances, the moving party must prove that since the entry of the last custody order, "the conditions surrounding the custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka*, 259 Mich App at 513 (emphasis in original). The evidence must demonstrate more than normal life changes that occur during the life of the child. *Id.* The same is generally true for a showing of proper cause. *Id.* at 514. Defendant, however, does not specifically allege that proper cause for reexamination of custody exists.

Although the court ruled from the bench on plaintiff's motion to change domicile, an order effectuating that ruling was not entered until September 12, 2011. Defendant filed his motion to change custody on September 8. Because "a court speaks through its written orders and judgments, not through its oral pronouncements," *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009), the last custody order for purposes of this analysis was the July 27, 2006 order. After reviewing the record, we conclude that defendant has failed to allege any change of circumstances that has occurred since the entry of that order that would warrant a review of custody.

The bulk of defendant's motion to change custody is focused on forestalling plaintiff's move to Florida. It is that move that defendant specifically asserts constitutes "a substantial change in circumstances." Thus, defendant's motion actually challenges the change of domicile, which the court addressed in full.

Defendant also alleges that plaintiff has a problem with alcohol abuse and recites plaintiff's past convictions for drunk driving and allowing minors in her home to consume alcohol. Plaintiff admitted to prior alcohol abuse and a "conviction, personal" in 2006, but also testified that she "no longer drink[s] alcohol at all." She also admitted to, on one occasion, allowing minors to use alcohol in her home, not for furnishing the alcohol. Plaintiff was unaware if this offense occurred in 2005 or 2006. Given the imprecision regarding the exact dates of plaintiff's alcohol-related convictions, it cannot be concluded that the convictions present a change in circumstances since the last custody order. But given that defendant did not bring these matters to the fore until years later and that plaintiff testified she no longer consumes alcohol, defendant failed to show a material change in circumstances that could have a significant effect on the child's well-being.

Defendant also cites plaintiff's fiancé's alcohol conviction, and asserts he is "concerned that placing two alcoholics together in an atmosphere such as Key West, Florida creates a substantial risk of harm to both the mental and physical well being of the child." Plaintiff admitted that her fiancé has an alcohol conviction on his record and that he wore a tether to work out of state for about six months. But she also indicated that he is very active in Alcoholics Anonymous and has been sober for over two years. Absent any allegation that the fiancé has a history of alcohol abuse, and given the speculation regarding the "atmosphere" in Key West, this allegation also does not amount to a material change in circumstances.

Finally, defendant alleges that plaintiff does not currently supervise the child adequately and asserts his belief that plaintiff will be unemployed in Florida. These allegations are entirely speculative. Moreover, plaintiff stated that she had obtained employment prior to the move.

Defendant contends that his allegations are sufficient to warrant a hearing. However, defendant's allegations in support of the motion for change of custody were presented at the evidentiary hearing regarding the change in domicile. The trial court did not make factual findings in support of defendant's position at this hearing. The trial court's factual findings are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). Additionally, we defer to the trial court's determination regarding the credibility of the witnesses. *Id.* The trial court did not give credence to defendant's allegations regarding potential alcohol use or abuse by plaintiff and her fiancé. Moreover, the trial court found that defendant acted as the "fun parent" who did not involve himself in the child's academics. Finally, the trial court ordered that defendant refrain from any drug use, legal or illicit, for 48 hours prior to any visit, and refrain from any drug use during the visits. In light of the presentation of evidence at the change of domicile hearing and the trial court's factual findings and ruling, we cannot conclude that the trial court erred in failing to conduct an evidentiary hearing on the motion for change of custody. Defendant's failure to establish either a change in circumstances or proper cause precluded further consideration of the motion. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Affirmed.

/s/ Amy Ronayne Krause

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood