

STATE OF MICHIGAN
COURT OF APPEALS

CHARLENE LUEBKERT a/k/a CHARLENE
ZOLLINGER,

UNPUBLISHED
March 21, 2013

Plaintiff-Appellee,

v

No. 311016
Saginaw Circuit Court
Family Division
LC No. 11-014659-DM

RYAN LUEBKERT,

Defendant-Appellant.

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right from the order of the circuit court denying his motion to modify custody, parenting time, child support, and tax deductions. We affirm.

Defendant and plaintiff were married and have two minor children together, aged three and “almost five” at the time of the motion hearing. After a contested divorce hearing, the judgment of divorce entered on January 12, 2011, awarded plaintiff sole physical custody and awarded defendant parenting time of three weekends a month and three additional evening hours a week. The parties share joint legal custody of the children. In February of 2012, defendant moved for a modification of custody, parenting, time, child support, and tax deductions. Defendant asserted that changes in circumstances had occurred warranting a change in the parties’ custody arrangement. Defendant generally contended that plaintiff’s new husband and new home were unsuitable, that plaintiff had failed to communicate with defendant regarding the children’s medical care, and that plaintiff had interfered with defendant’s relationship with the children.

The trial court held a hearing on the motion, during which it ordered that it wanted to have the oldest child physically come to court the next morning to investigate allegations that the children were being physically abused. The trial court subsequently found insufficient evidence of changed circumstances to merit a discussion of the statutory best-interest factors, MCL 722.23. The court did, however, address some of defendant’s concerns by prohibiting plaintiff’s new husband from attending parenting-time exchanges and prohibiting plaintiff from listing him as the father of the children. The trial court also advised plaintiff to make some communications to defendant by letter in the future “to cover [her]self.” However, the court restricted defendant

to one ten-minute phone call a week with the children and explained that while it “fe[lt] bad for the kids,” plaintiff was under no obligation to have the children attend events and activities that were scheduled by defendant during plaintiff’s parenting time. The trial court did not further comment on its in-camera interview with the oldest child.

Three standards of review apply to child custody cases. *LaFleche v Ybarra*, 242 Mich App 692, 659; 619 NW2d 738 (2000). “The great weight of the evidence standard applies to all findings of fact,” but “[a]n abuse of discretion standard applies to the trial court’s discretionary rulings such as custody decisions.” *Id.* at 695. “Questions of law are reviewed for clear legal error . . . A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.” *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citation omitted). To the extent that this matter involves assessing the credibility of the parties, we defer to the ability of the trial court to make this determination. MCR 2.613(C); *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

Before a custody arrangement may be modified, the moving party must establish either a proper cause or a change in circumstances by a preponderance of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003); MCL 722.27(1)(c). “Proper cause” requires “the existence of an appropriate ground for legal action to be taken by the trial court” that is “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.” *Vodvarka*, 259 Mich App at 512. “Change of circumstances” requires a showing 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.” *Id.* at 513 (emphasis in original). “[T]he 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.” *Id.* at 513-514.

Defendant first cites plaintiff’s remarriage as being a reason to revisit the custody arrangement. Defendant alleges that plaintiff’s new marital home houses his two children, plaintiff’s two children from a previous marriage, and her husband’s four prior children for a total of eight individuals in a single house. Defendant also alleges that the children were not properly clothed, were abused by plaintiff, her husband, and the other children in the home, and that plaintiff’s husband assaulted defendant twice and is a convicted felon.

Defendant has not explained how plaintiff’s remarriage, relocation, and integration of the children into a new home are anything other than “normal life changes.” Indeed, all of them are to at least some extent expected changes in circumstances after a divorce. Clearly, scale does matter: transitioning from a home with only one other sibling to seven other siblings—if that is indeed what occurred—has the potential for being a significant change, depending on various characteristics of the situation, such as the unique personality of the specific child at issue, the architecture and dynamics of the new house, or the personality of the other children. However, it is not the kind of change we could presume out of hand to be either significant or insignificant. The mere fact that the children have been integrated into a new family dynamic is not, without further evidence, *per se* a “change of circumstances” within the meaning intended by *Vodvarka*. Although defendant testified to a variety of alleged abuse and neglect being suffered by the

children, defendant did not articulate how merely living in a more-populous household was *itself* having a significant effect on the children.

As to those allegations of abuse and neglect, defendant claimed that complaints had been filed with Child Protective Services, but provided no documentary evidence to that effect, and plaintiff roundly denied the allegations. On the basis of the record provided to us, the trial court's superior opportunity to evaluate the credibility of witnesses, and the lack of other evidence supporting defendant's allegations, the trial court's conclusion that defendant failed to carry his burden of proving those allegations was within the range of principled outcomes. We further note that the trial court clearly took the matter seriously and even set up a meeting with the parties' oldest child to discuss the allegations of abuse and neglect; the fact that the trial court took no action after that meeting further suggests that the allegations were not substantiated. Further suggesting that the allegations were not substantiated, we decline to presume dereliction of duty on the part of the police and the Department of Human Services to investigate and properly respond to the reports defendant made to them.

Defendant's allegations of assault by plaintiff's new husband were addressed by the lower court, which barred plaintiff's new husband from attending parenting-time exchanges. Moreover, the lower court deemed the new husband's felony conviction irrelevant because it occurred more than 17 years previously. We do not believe the trial court abused its discretion by finding plaintiff's new husband's behavior insufficient to establish proper cause for modifying the custodial environment.

Next, defendant argues that plaintiff interfered with defendant's involvement in the children's medical care by changing medical doctor's without informing him, taking one of the children to psychotherapy sessions without obtaining his consent, and by listing her new husband as the children's father at the new doctor's office. Plaintiff denied failing to inform defendant of the psychotherapy sessions, but did not contest having taken the children to a new doctor. The lower court made no findings on the dispute, but it did specifically tell plaintiff to make sure she provided defendant a letter regarding any future counseling sessions and that it was inappropriate for plaintiff to list her new husband as the father of the children. Furthermore, the record reflects that defendant had attended the last few medical appointments and had gone to the new doctor's office to speak about the situation. The matters therefore appear to have been resolved in one way or another, either by the court or by the parties, so we find no abuse of discretion by the trial court failing to find that the parties' lapses in communication did not constitute a sufficient cause to modify the established custodial environment.

Finally, defendant argues that plaintiff interferes with his relationship with the children by restricting his telephone access to the children and by refusing to take the children to games, activities, and banquets related to sporting activities that defendant signs the children up for at his own expense. The lower court correctly noted, however, that defendant is not entitled to

unlimited phone contact with the children during plaintiff's parenting time, and while it expressed some sympathy for defendant, it correctly explained that defendant also is not entitled to dictate activities for the children during plaintiff's parenting time. As such, the alleged interference does not amount to proper cause to modify the parties' existing custody arrangement.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause