

STATE OF MICHIGAN
COURT OF APPEALS

JAY ROBERT JOHNSTON,

Plaintiff/Counter-Defendant-
Appellant,

v

AUTUMN NICOLE JOHNSTON,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
May 23, 2013

No. 314587
Lapeer Circuit Court
LC No. 09-041666-DM

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order granting a change of custody. For the reasons set forth in this opinion, we reverse.

This matter was before this Court on the initial divorce proceedings. In that case, we set forth the background of the case as follows:

[p]laintiff and defendant were married for over 10 years and had two children together, a son and daughter. The parties eventually decided to divorce for various reasons, including defendant's five year relationship with a married man. The judgment of divorce was entered on September 10, 2010, and the court ordered joint legal custody but sole physical custody to plaintiff, who was planning to move with the children to Midland, Michigan. Defendant's parenting time was every other weekend and every Wednesday (non-overnight) during the school year. Summer vacations and other holidays were divided equally. The trial court also ordered that plaintiff was allowed to move to Midland with the children and if defendant moved there as well, she could request the physical custody of the minor children to be shared.

After the judgment of divorce was entered, plaintiff moved to Midland with the children and worked at Dow Chemical, earning approximately \$72,000 a year. Defendant remained living in Columbiaville, Michigan, seeking better employment, as she only earned \$10,000 a year. Two months after the divorce was final and while still in Midland, plaintiff and the children began living with plaintiff's girlfriend and her two children. Plaintiff and his girlfriend eventually

married in September 2011. Also in September 2011, defendant began working at Quick Reliable Printing in Midland, earning \$15 an hour and working 40 hours a week. Because she wanted to be closer to the children and her new job was in Midland, defendant moved there in October 2011. She procured a three-bedroom apartment a few miles from where plaintiff was residing with the children. Defendant then filed a motion to change custody, requesting joint physical custody and parenting time on a week on/week off basis. [*Johnston v Johnston*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2012 (Docket No. 308247) (unpub op at 1)].

In her motion for a change of custody, defendant asserted that she had spent additional time with the children and that plaintiff was neglecting the children's educational, clothing, hygienic, medical and dental needs. Defendant also asserted that plaintiff was subjecting the children to improper discipline, and that the children of plaintiff's new wife were physically abusive to the minor children. Defendant also expressed a desire to spend more time with the children.

Plaintiff responded to these allegations by asserting that defendant did not establish a proper cause or change of circumstances to revisit the custody issue. Plaintiff stated that the allegations in defendant's motion were over six months old, and that defendant repeatedly asks plaintiff for more time with the children. Plaintiff denied that he ever denied the children proper medical care, improperly disciplined them or subjected the children to any unsafe practices.

The trial court conducted a best interest hearing on the matter. Following the conclusion of proofs, the trial court found:

. . . the good cause [for revisiting custody] is the relocation of the Defendant and her job situations as well as all the – you folks have a lot of little issues. Together they – they add up to a lot, but you got a lot of little issues regarding the children and I believe all of those would justify meeting the threshold on a hearing for change in custody.

The trial court went on to conclude that there was an established custodial environment with plaintiff, but that defendant had proven, by clear and convincing evidence that a modification was in the children's best interests. Based on its findings, the trial court ordered that the judgment of divorce be changed from sole physical custody for plaintiff to joint physical custody.

On January 5, 2012, plaintiff appealed the trial court's order granting defendant's motion to change custody of the parties' minor children. On August 21, 2012, this Court issued an unpublished opinion remanding the case to the trial court.¹ *Johnston*, unpub op at 5. This Court

¹ Judge Jansen filed a concurring opinion. *Johnston v Johnston*, unpublished opinion of Jansen, J., concurring in part, and dissenting in part, issued August 21, 2012 (Docket No. 308247) (unpub op at 1-4). Judge Jansen stated that a remand was unnecessary because the record from

ordered the trial court to make factual findings about whether there was proper cause or change of circumstances to justify a best interest hearing. *Id.* This Court specifically found that defendant's relocation and change of employment were normal life changes, which were not relevant to the proper cause or change of circumstances analysis. *Id.* at 4-5 (“[i]n regard to defendant's relocation and change of employment, which are merely normal life changes that occur frequently in the course of a parent's life,” and “it is unclear from the record whether the trial court would have still found proper cause or change of circumstances without considering the normal life changes of defendant's relocation or new employment.”) This Court additionally noted that defendant, “failed to demonstrate her relocation or new job has or will have ‘a significant effect on the child's well-being.’” *Id.*, quoting *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003). This Court concluded that the trial court had provided insufficient findings of fact by referring only to “little issues” between the parties as a basis for revisiting custody, and for failing to state whether it found defendant's allegations to be credible. *Johnston*, unpub op at 4. This Court reversed and remanded to the trial court but did not retain jurisdiction. *Id.* at 5.

On November 26, 2012, the trial court held a hearing on plaintiff's motion to implement its order reflecting this Court's instructions on remand. Plaintiff's proposed order did not include any further factual findings as this Court had requested and plaintiff's attorney stated that she believed that the proposed order reflected what this Court requested. Defendant's counsel informed the trial court that this Court wanted further factual findings.

On December 7, 2012, the trial court issued an opinion that listed defendant's allegations contained in her motion to change custody. The first two allegations related to defendant's relocation and job change. The trial court also listed: (1) plaintiff's changing the children's school without defendant's permission; (2) plaintiff moving Connor to first grade; (3) plaintiff's inappropriate disciplining of the children; plaintiff's neglect of the children's hygiene, medical care, dental care, and clothing needs; (4) plaintiff's refusal to inform defendant of the children's medical care and treatment; (5) the unsuitability of plaintiff's home; (6) plaintiff's decision to move Kristie into the house without sufficient time for the children to adjust; (7) the children's expression of a desire to spend more time with defendant; (8) Sheridan and Connor's behavioral problems; and (9) defendant's increased parenting time. The trial court concluded that “taken as a whole, that these accusations could have a significant effect on the children's lives to the extent that a reevaluation of the child's [sic] custodial situation should have been and was undertaken.”

On January 4, 2013, plaintiff filed a motion for the entry of an order consistent with the opinion of this Court. On January 14, 2013, the trial court held a hearing on plaintiff's motion. During the motion, plaintiff's attorney inquired whether the trial court was finding defendant's allegations in her motion to change custody credible. The trial court responded, “I believe that my written opinion follows the instruction of the Court of Appeals and it stands.” The trial court continued: “[i]f you think I haven't followed the remand instruction correctly you have to go to the Court of Appeals.” The trial court then denied plaintiff's motion to enter an order consistent with the opinion of this Court.

the best interest hearing should be used to determine that there was no proper cause or change of circumstances to justify revisiting the custody issue. *Id.*

This appeal then ensued. On February 4, 2013, plaintiff filed a motion in this Court for peremptory reversal because the trial court failed to make factual findings as ordered by this Court (Plaintiff's Motion for Peremptory Reversal, which was denied. *Johnston v Johnston*, unpublished order of the Court of Appeals, entered February 20, 2013 (Docket No. 314587).

“All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue.” *Pierron v Pierron*, 282 Mich App 222, 242-243; 765 NW2d 345 (2009), quoting MCL 722.28. We review a trial court's determination that a proper cause or a change of circumstances existed to determine if its decision was against the great weight of the evidence. *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011); *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 659; 808 NW2d 811 (2011). “Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction.” *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010).

“Before modifying a child custody order [or considering custodial environments or the children's best interests] the circuit court must determine that the moving party has demonstrated either proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision. MCL 722.27(1)(c).” *Gerstenschlager*, 292 Mich App at 657, citing *Vodvarka v Grasmeyer*, 259 Mich App at 501. The party requesting the custody change must establish a proper cause or a change of circumstances by a preponderance of the evidence. *Id.* at 508-509. The trial court is not required to conduct an evidentiary hearing on this threshold issue. *Corporan v Henton*, 282 Mich App 599, 604; 766 NW2d 903 (2009). “The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances.” *Shade*, 291 Mich App at 28. If a proper cause or change of circumstances does not exist, “the trial court may not hold a child custody hearing.” *Corporan*, 282 Mich App at 603-604.

“Proper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken.” *Vodvarka*, 259 Mich App at 511. The grounds presented must have a “significant effect on the child's well-being.” *Id.* The grounds to establish proper cause “should be relevant to at least one of the twelve statutory best interest factors.” *Id.*

Similarly, a change of circumstances requires the party requesting the change of custody establish 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). For the movant to show a proper cause or change of circumstances, she “must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child,” because “over time there will always be some changes in a child's environment, behavior, and well-being.” *Id.*

From the record, we find that this is not a compelling case justifying the revisitation of the custody order. Since our decision in *Vodvarka*, this Court has consistently found that the effect on the child's well-being must be extremely significant to justify the revisitation of custody.² Reviewing the record in its entirety, we conclude, as the trial court pointed out, that plaintiff presented only minor disagreements between the parties. Disagreements between divorced parents about the proper way to care for their children does not automatically create a compelling case for revisiting custody.

This Court need not address plaintiff's argument regarding the children's best interests because the trial court improperly held a hearing without first meeting the threshold showing of a proper cause or change in circumstances. Defendant's argument that plaintiff's appeal was vexatious also fails. An appeal is not vexatious if the appellant prevails, at least in part, on the appeal. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 182; 761 NW2d 784 (2008). Here, Plaintiff prevailed, and therefore, his appeal was not vexatious.

Reversed. Plaintiff having prevailed may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

² See *Mitchell v Mitchell*, 296 Mich App 513, 518-519; 823 NW2d 153 (2012) (proper cause or change of circumstances existed when the mother violated multiple court orders, and fabricated sexual abuse allegations against the father); *Shann v Shann*, 293 Mich App 302, 306; 809 NW2d 435 (2011) and *In re AP*, 283 Mich App 574, 603; 770 NW2d 403 (2009) (proper cause or change of circumstances existed when the government had removed the child from the home); *Corporan*, 282 Mich App at 601, 606 (allegations of the mother's unemployment, eviction notices, failure to have a telephone in the house, failure to provide a plane ticket for the child, and a decline in the child's school grades and activity level did not constitute proper cause); *Brausch v Brausch*, 283 Mich App 339, 358; 770 NW2d 77 (2009) (the mother's move to Canada and subsequent reduction in parenting time did not constitute proper cause); *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007) (the plaintiff's cross-country move constituted proper cause or change of circumstances); *Killingbeck v Killingbeck*, 269 Mich App 132, 147; 711 NW2d 759 (2005) (the defendant's reduced parenting time did not constitute proper cause or change of circumstances).