

STATE OF MICHIGAN
COURT OF APPEALS

PHILIP EDWARD KURAS,

Plaintiff-Appellant,

v

JESSICA ANN DIETZ, a/k/a JESSICA ANN
DIETZ-BIESKE,

Defendant-Appellee.

UNPUBLISHED
December 10, 2013

No. 316373
Jackson Circuit Court
LC No. 07-000237-DC

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the May 3, 2013, order denying his post-judgment motion for joint physical custody with equal parenting time. We affirm.

On May 30, 2007, the trial court entered an order of filiation giving the parties joint legal custody of the minor child and giving defendant sole physical custody of the child. Plaintiff initially received parenting time with the minor child two nights each week, but the filiation order provided father with increased parenting time as the child grew older.

On June 5, 2008, the trial court entered an order modifying plaintiff's parenting time in accordance with the parties' stipulations. Plaintiff received parenting time from 6:00 p.m. Friday to 6:00 p.m. Sunday on alternating weekends, a midweek parenting time for three hours, alternating holidays, four weeks during the child's summer vacation, the child's spring school vacation on odd numbered years, and any other parenting time that the parties could agree upon.

On January 4, 2013, plaintiff filed a motion for joint physical custody with equal parenting time. Plaintiff set forth a litany of allegations that he claimed constituted a change of circumstances, thereby permitting the trial court to conduct an evidentiary hearing to revisit the issue of custody. First, he alleged that he had been injured in his former job and that as a result both he and the child were awarded Social Security disability benefits per month. Second, he alleged that he received a worker's compensation settlement that allowed him to purchase his own home. Third and fourth, he alleged that because he was no longer working he had unlimited time available to be with the child and that his injuries did not preclude him from caring for the child. Finally, he alleged that defendant had married and obtained a new job. He stated that

defendant was required to travel for the new job and that, contrary to past practice, she would no longer allow plaintiff to exercise the “first option” to have the child when she was unavailable because she preferred the child to stay with her new husband. In her response to the motion, defendant denied that a material change of circumstances had occurred. She asserted that for the majority of his adult life plaintiff had been unemployed and that she had been awarded physical custody of the child despite the fact that she had always worked full time and plaintiff was generally unemployed and able to care for the child. Defendant also asserted that her new job required “almost no travel” and that no “right of first refusal” had ever existed.

On April 25, 2013, the trial court held a hearing on plaintiff’s motion. In addition to his allegations in his motion, plaintiff alleged that the child’s age difference between the entry of the 2008 stipulation and order modifying parenting time and the time he filed the motion constituted a change of circumstances. In its oral opinion, the trial court noted that it needed to “find proper cause or substantial change in circumstance . . . that would significantly impact the life of the child” in order to modify the preexisting custody and parenting time orders.

After reviewing plaintiff’s factual assertions, the court concluded that a change of circumstances did not exist and, therefore, denied plaintiff’s motion for joint physical custody with equal parenting time.

On appeal, plaintiff argues that the trial court improperly created and adopted a “wrongdoing” standard with regard to whether a change of circumstances existed in this case.

“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 499, 501; 675 nw2d 847 (2003). 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, he or 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.*

The trial court properly stated that to find proper cause or a change of circumstances, it must find that the proper cause or change of circumstances was “substantial” or “significant.” This statement of the law was consistent with *Vodvarka*’s holding that a proper cause or change of circumstances must have a “significant effect” on the child’s life. *Id.* at 511, 513. Plaintiff contends that the trial court improperly imposed a “wrongdoing standard” when evaluating plaintiff’s motion for a change of custody. However, plaintiff’s contention takes the trial court’s comments out of context. Rather, the trial court commented that if plaintiff presented evidence of a significant change of circumstances then it would be wrongdoing *on the part of the court* to not consider the evidence.

Indeed, the court considered the evidence presented by plaintiff in concluding that an evidentiary hearing was not necessary because plaintiff failed to carry the initial burden of establishing a change of material circumstances. In reaching that finding, the trial court considered (1) the fact that plaintiff was involved in the child’s school, (2) the fact that plaintiff and the child’s relationship had grown in the previous five years, (3) the fact that parent had obtained stable housing, (4) the fact that plaintiff had more availability to parent the child because plaintiff had an injury and was receiving Social Security income, and (5) the fact that the child had aged from one year of age to six years of age. Plaintiff does not challenge that the above facts were not changes of circumstances that would merit a custody change. Rather, he asserts that the trial court failed to also consider that (1) plaintiff had been caring for the child whenever defendant was unavailable, a practice that stopped after defendant married, (2) defendant lived in four different homes from the time of the prior custody order.¹ However, in child custody proceedings, the trial court is not required to “comment upon every matter in evidence or declare acceptance or rejection of every proposition argued.” *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 432 (1981). Accordingly, the trial court’s failure to expressly comment upon these two allegations does not, in itself, require reversal. Rather, the question is whether, in the context of the two facts the trial court did not consider in its opinion, the court’s

¹ Plaintiff also erroneously asserts that the trial court failed to consider that the child had aged since the time of the prior custody order.

finding that a change of circumstances that would merit considering a custody change did not exist was against the great weight of the evidence. We find that it was not. Plaintiff did not quantify how defendant's marriage and new job changed the amount of time he spent with the child. Additionally, plaintiff did not indicate when defendant's moves occurred, the distance of the moves, or how disruptive the moves were to the child's life. Without additional details regarding the move, plaintiff's factual assertion does not demonstrate that the moves constituted a change of circumstances that had a significant effect on the child. Accordingly, these facts do not clearly preponderate against the trial court's finding that a change of circumstances that would merit a custody change did not exist. MCL 722.28.²

Father also argues that the trial court did not address whether the proposed modification in parenting time would alter the established custodial environment. However, a review of plaintiff's motion reveals that plaintiff's request for equal parenting time was part and parcel of his "Motion for Joint Physical Custody with Equal Parenting Time." Plaintiff did not bring an independent motion to modify parenting time.³

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

² Alternatively, plaintiff argues that the trial court failed to make findings on each of the best interest factors within the child custody act, MCL 722.21 *et seq.* However, before a trial court may address the best interest factors in regard to child custody, "the party seeking a change of custody must first establish proper cause or change of circumstances by a preponderance of the evidence." *Vodvarka*, 259 Mich App at 509. Because the trial court found that there was no change of circumstances that would justify modification of the child custody order, the court did not clearly err by not addressing whether a change in custody was in the child's best interests. *Id.*

³ Nonetheless, at the hearing on the motion the trial judge stated that he had "spent a lot of time on this file over the years, and I have become quite familiar with the parties," and that "what I know is that [the child] has been virtually in the care of his mother all of his life."