STATE OF MICHIGAN

COURT OF APPEALS

DANA MARIE BAUER, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED July 25, 2017
v	No. 336876 St. Clair Circuit Court Family Division
TIMOTHY JOHN WAIDELICK, Defendant/Counter-Plaintiff-Appellant.	LC No. 14-000583-DM

Before: GLEICHER, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM.

Dana Bauer and Timothy Waidelick have repeatedly returned to the court system to resolve parenting disputes following their acrimonious divorce. In November 2016, Waidelick asked the circuit court to modify the equal parenting time arrangement and award him sole physical custody of the parties' two children based on parental alienation. The circuit court considered the evidence and allegations and determined that since it last resolved a parenting dispute between the parties, no change in circumstances had occurred or proper cause established to revisit the custody award. Accordingly, it did not further consider Waidelick's request. This determination did not preponderate against the evidence. We affirm.

I. FACTUAL BACKGROUND

In 2015, the parties entered a consent judgement of divorce, agreeing to share joint legal and physical custody of their nine-year-old son HW and six-year-old daughter AW. The divorce proceedings were highly contentious, as was coparenting thereafter. The parties disagreed on issues involving school, extracurricular activities, healthcare, and contact with extended family members. In January 2016, Bauer even filed two complaints against Waidelick with Child Protective Services (CPS).

Bauer's January 12, 2016 complaint alleged that Waidelick negligently allowed the children to visit their maternal grandfather. Bauer asserted that her father had sexually abused her and her sister when they were young. CPS could not substantiate the complaint and it was dismissed. Bauer followed up with a motion in the current case and the court entered an order prohibiting the children's contact with their grandfather.

On January 25, 2016, Bauer filed a CPS complaint alleging that Waidelick administered a breathing treatment to HW without a prescription and took AW to an allergist without Bauer's permission. CPS also rejected this complaint. Waidelick filed an emergency ex parte motion in the circuit court explaining that HW was on breathing treatments prescribed by his pediatrician and was suffering from ongoing infections and a recent diagnosis of "mono, micro-plasma bacteria, and strep throat." According to Waidelick, Bauer had not responded to his messages regarding HW's need to see an ear, nose, and throat specialist. The court entered a consent order requiring HW to be evaluated by a specialist. But the parties engaged in a four-day evidentiary hearing to establish whether AW suffered from allergies and if so, which allergist they should consult.

In September 2016, the parties' child-rearing disharmony took an alarming turn. It appears that one or both of the children told their mother or their therapist that Waidelick showered with them and slept in their beds. The complaint also alleged that Waidelick took inappropriate pictures of the children, took AW "to a doctor out of concern that her vagina was too small," and walked the children into school, had lunch with them, and then wandered around the school unsupervised. The children were subjected to two forensic interviews that month. On September 30, 2016, CPS concluded that there was insufficient evidence to "substantiate allegations of sexual abuse." The case was categorized as "Cat IV/ Low Risk level." During the investigation, it was revealed that the disturbing photograph was merely a picture of HW's bare chest taken by Waidelick and forwarded to Bauer to show a bruise he had developed. A CPS agent interviewed the school principal who expressed that it was normal for a parent to walk his or her children into the school and even to visit for lunch, and asserted that Waidelick had never wandered about the school inappropriately.

In the meantime, Bauer's sister filed a report with the St. Clair Police Department, claiming that Waidelick had sexually abused her son in the past. She asserted that while wrestling, Waidelick pulled her son's pants down to expose his penis. After a short investigation, the St. Clair police closed the case, concluding there was no evidence that Waidelick acted in a "sexually gratifying way." Specifically, the child told investigators that he did not actually remember the incidents but had his memory "refreshe[d]" by his mother.

On November 28, 2016, Waidelick filed a lengthy verified petition detailing the parties' history of disputes and seeking sole physical custody. Waidelick claimed that Bauer filed a series of CPS complaints with the goal of alienating him from the children. Waidelick described that since the children were interviewed in September, they no longer wanted to express affection with him. The children refused to sit with him to read stories and told him not to walk them into school because they did not want to get in trouble. The children were also fearful that their father would be arrested. Waidelick asserted that the children were experiencing academic trouble as well, requiring tutors.

The circuit court advised the parties that it was well versed in the history of the case and would not adjudicate anew issues that had already been resolved. Considering only the conduct since its last order, the court determined that Waidelick had not established proper cause or a change of circumstances warranting reevaluation of the custody arrangement. The court therefore declined to conduct an evidentiary hearing to further assess the motion. It thereafter denied Waidelick's motion for reconsideration. This appeal followed.

II. ANALYSIS

> Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). [*Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014).]

A court's factual findings are against the great weight of the evidence if "the evidence clearly preponderates in the opposite direction." *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003) (quotation marks and citation omitted).

A trial court may modify or amend "its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c). "The trial court may not modify or amend a previous judgment or order or issue a new order 'so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.' " *Kaeb v Kaeb*, 309 Mich App 556, 567; 873 NW2d 319 (2015), quoting MCL 722.27(1)(c). A party must first establish either proper cause or a change of circumstances "*before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors." *Vodvarka*, 259 Mich App at 509 (emphasis in original); see also *Kubicki*, 306 Mich App at 539-540. If the moving party "does not establish proper cause or a change of circumstances, then the court is precluded from holding a child custody hearing . . . ." *Vodvarka*, 259 Mich App at 508.

The existence of proper cause must be considered on a case-by-case basis, evaluated in light of the best-interest factors of the Child Custody Act, MCL 722.23, to determine if "the grounds presented [are] 'legally sufficient,' " i.e., whether the grounds raised are "of a magnitude to have a significant effect on the child's well-being to the extent that revisiting the custody order would be proper." *Vodvarka*, 259 Mich App at 512.

> [I]n order to establish a "change of circumstances," a movant must 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. [*Id*. at 513-514 (emphasis in original).]

In his change of custody petition, Waidelick outlined historical events leading up to the current request. This Court has described the timeline of evidence to be considered in determining whether a change of circumstances exists:

> Because a "change of circumstances" requires a "change," the circumstances must be compared to some other set of circumstances. And since the movant is seeking to modify or amend the prior custody order, it is evident that the circumstances must have changed since the custody order at issue was entered. Of course, evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order. [*Id*. at 514 (emphasis in original).]

Here, the circuit court did not conduct an evidentiary hearing to determine if a change in custody would be in the children's best interests because it determined that Waidelick had not made the prerequisite showing of proper cause or change in circumstances. This is a difficult case and we appreciate Waidelick's concern regarding the impact on his children of Bauer's CPS reports. However, we cannot conclude that the circuit court's findings preponderate against the evidence.

First and foremost, the circuit court had the opportunity to observe Bauer first-hand and found believable her statement that she acted of real concern for the children and not to alienate them from their father. Similarly, the court expressed doubt that Bauer was the individual who made the September CPS complaint regarding sexual abuse. Rather, the court opined that the children's therapist, a mandatory reporter, likely contacted the agency. We may not second-guess the court's assessment of the witness's credibility in this regard. See *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011).

Even accepting that Bauer had filed the CPS complaints, the circuit court determined that they were made out of a legitimate concern for the children's welfare. Specifically, Bauer was validly concerned that Waidelick allowed her father around the children given his history of child sexual abuse. Indeed, the court had already acknowledged the merit of Bauer's complaint and entered an order accordingly.

Bauer's second CPS complaint regarding medical issues was valid, in the court's estimation, because Waidelick had pursued treatment for the children without Bauer's knowledge and approval. As a result, the court was required to mediate the parties' dispute before ordering them to take HW to a specialist and notify each other about any future medical treatment.

The court also found valid Bauer's CPS complaint alleging sexual abuse. The children's forensic interviews verified that Waidelick slept in the same bed as they did. Waidelick had, in fact, taken AW to a doctor (without Bauer's prior approval) to investigate his concern that the child's vagina was too small. The doctor agreed with Waidelick's concern and prescribed a hormone cream, which Waidelick then personally applied to AW's vagina. The circuit court reasoned that parents are as much a mandated reporter as professionals and "[i]f they think something inappropriate has happened then they should file a complaint with CPS or with the

police." We acknowledge that certain evidence tends to suggest an improper purpose on Bauer's part, such as her report of Waidelick's "inappropriate" picture of HW's chest that actually documented an injury and her sister's coaching of her child to accuse Waidelick of wrongdoing. However, the record indicates that the court considered the rationale behind the reporting before rendering its decision, another credibility assessment with which we may not interfere. And the evidence of improper motive does not outweigh the evidence to the contrary.

Waidelick also asserted that the children's behavior changed due to Bauer's conduct and the aftermath of the CPS investigations. Waidelick cited the children's hesitation to sit on his lap to read books and their physically distancing themselves from him during parenting time. The children expressed fear that Waidelick would be arrested and that they could face punishment if Waidelick came into their school. The circuit court rejected Waidelick's proposition that the children's altered behavior was caused by being subjected to forensic interviews, noting that "[t]hey train forensic interviewers" so as "not to lead the children into the allegation. They're more kind of doing a general inquiry to see, you know, what comes up, is this going to happen or isn't it, and then they gradually get more targeted." The court continued that while some "astute children are going to put two and two together," Waidelick was "assuming adult knowledge in children that really don't understand what it is you're talking about." Instead, the court relied on a letter from Waidelick's own counselor, reciting that "children who live in a constant battle ground suffer emotionally and feel obligated to choose sides." Accordingly, the court determined that the contentious nature of the divorce and custody battle and the parties' hostile communications with each other were the more likely sources for the children's behavioral changes.

Waidelick further contended that the children's grades plummeted after the forensic interviews and presented an email from the children's school documenting this claim. In the weeks following the interviews, however, the children's grades quickly recovered, as demonstrated by evidence presented by Bauer. Again, the court faulted the parties' relationship for this dip in performance. The circuit court considered the evidence presented by both parties and accepted as true Waidelick's description of the children's altered behavior toward him. However, the court found incredible that the most significant cause of this change was the forensic interviews. As the conduct of both parties and their relationship with each other caused the change in the children's behavior and interactions with Waidelick, rather than the CPS complaint, the court found no change in circumstances or proper cause to modify its standing custody award. Again, as this decision relies heavily on the court's assessment of witness credibility and the evidence does not clearly preponderate in the opposite direction, we may not grant Waidelick's requested relief.

In a related argument, Waidelick contends that the circuit court should have accepted as true *all* allegations in his verified petition as Bauer did not file a verified answer in response. MCR 2.114(B)(2) provides that a document "may be verified by"

> (a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

(b) except as to an affidavit, including the following signed and dated declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief."

"[V]erification is a certification of truth." *Jackson v City of Detroit Bd of Ed*, 18 Mich App 73, 80; 170 NW2d 489 (1969). It is also defined as "[a] formal declaration made in the presence of an authorized officer, such as a notary public, . . . whereby one swears to the truth of the statements in the document." *Black's Law Dictionary* (10th ed), p 1793. A verified pleading is different from a sworn affidavit, which requires statements based on personal knowledge, using particular facts admissible as evidence, and can "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit." MCR 2.119(B)(1).

Contrary to Waidelick's assertions, the court was not required to accept as true the statements in his petition simply because it was verified. When Waidelick and his attorney signed the petition, they attested that to the best of their knowledge and after reasonable inquiry, the document was well grounded in fact and law. Waidelick could not, however, verify that no competing evidence would be produced. The court was entitled to consider the evidence presented by Bauer in rebuttal, regardless of whether she signed her answer in front of a notary or attested to the truth of the statements therein.[1]

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Douglas B. Shapiro

[1] Waidelick requests that this Court disqualify the circuit court judge and require assignment before a new judge in the event we remand for further proceedings. Given our resolution of this appeal, we need not reach this issue.