

STATE OF MICHIGAN  
COURT OF APPEALS

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PATRICIA ANN D'ITRI,

Plaintiff-Appellant,

v

TY MARTIN BOLLINGER,

Defendant-Appellee.

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UNPUBLISHED  
September 19, 2017

No. 337815  
Ingham Circuit Court  
Family Division  
LC No. 08-004088-DC

Before: HOEKSTRA, P.J., and METER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order, which dismissed plaintiff's petition to change custody of the parties' child, SB, from primary physical custody with defendant to primary physical custody with plaintiff. In the order dismissing plaintiff's petition, the trial court also awarded attorney fees to defendant in the amount of \$9,328.25. The trial court failed to articulate a basis for awarding attorney fees to defendant, and thus we vacate the award of attorney fees. Because disputed questions of fact remain regarding the existence of a proper cause or change of circumstances, the trial court abused its discretion by failing to hold an evidentiary hearing. Consequently, we also vacate the trial court's dismissal of plaintiff's petition to change custody and we remand for a *Vodvarka*<sup>1</sup> hearing.

The parties never married, but they have one child together, SB, who is currently 14 years old. In 2009, the parties entered into a stipulated order providing for joint legal custody of SB, while defendant received primary physical custody and plaintiff received parenting time. At the time of this initial custody order, defendant had married. He and SB lived with defendant's wife and her son JD.

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<sup>1</sup> *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003).

Pertinent to the present appeal, in February of 2016, plaintiff filed a motion to change custody.<sup>2</sup> Plaintiff alleged that defendant's wife—SB's stepmother—died in December of 2014 and that, since that time, defendant had proved unable "to provide a healthy living environment, both physically and emotionally," for SB. For instance, according to plaintiff, since his wife's death, defendant's house was filthy and he did not prepare healthy meals. Instead, he fed SB takeout, and SB had begun to gain weight. Plaintiff maintained that, after his wife's death, defendant also failed to facilitate SB's participation in extracurricular activities (such as tennis and karate), he did not buy her basic necessities (like school supplies and clothing), he did not celebrate her academic achievements, and he did not oversee SB's medical and dental needs. In terms of SB's emotional well-being following her stepmother's death, plaintiff asserted that SB felt no emotional connection with her father. She frequently ate meals alone in her room, and she felt unable to discuss her concerns with defendant, leading to numerous text messages to plaintiff, such as a message stating: "I want to see a doctor or a therapist or something. I'm going insane. The affects [sic] of holding in my feelings is [sic] starting to take an actual toll on my body. I'm going to shutdown if I don't get help." Indeed, SB expressed a desire to live with plaintiff following her stepmother's death. When she told this to defendant, defendant became upset and disparaged plaintiff, saying, for example, that plaintiff cheated on him. Defendant also stated that, if he had to fight a motion to change custody, he could not afford to send SB to the college of her choice. Plaintiff contends that defendant has undertaken other acts to undermine her relationship with SB, such as providing SB with a sexually explicit diary written by plaintiff.

In responding to plaintiff's petition, defendant acknowledged that the death of his wife had necessitated a difficult adjustment for him and SB, but he maintained that grief was simply part of life and that it did not constitute grounds for changing custody. Defendant denied plaintiff's more specific allegations regarding the effects of his wife's death on his home. He claimed that, even after his wife's death, he maintained a clean house, fed SB healthy meals, and provided for her needs. He also accused plaintiff of attempting to manipulate SB.

A conference was held before a conciliator, who made findings of facts and a recommendation regarding plaintiff's petition to change custody. The conciliator determined that custody should be revisited in light of the death of SB's stepmother and the conciliator recommended modifying the custody arrangement from primary physical custody with defendant to joint physical custody, an arrangement which afforded plaintiff additional time with SB. Both parties filed objections to the conciliator's findings and recommendation. While these proceedings were ongoing, SB began seeing a counselor. The parties also stipulated to the appointment of a guardian ad litem (GAL) for SB, who met with SB and prepared a report with recommendations regarding SB's custody. The GAL also recommended additional parenting time for plaintiff.

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<sup>2</sup> Previously, in 2010 and again in 2013, plaintiff unsuccessfully sought a change of custody, and in 2012, she filed a motion to change the parenting time schedule, which also proved unsuccessful.

On March 8, 2011, the circuit court held a hearing on the parties' objections to the conciliator's recommendation. The hearing was not an evidentiary hearing, but instead consisted simply of oral arguments. At the hearing, defendant's attorney presented a lengthy argument involving various objections to the conciliator's report, including arguments relating to proper cause and change of circumstances, the child's best interests, assertions regarding how generally "amazing" defendant is as a father, a recounting of plaintiff's past efforts to change custody, assertions that plaintiff is engaged in "counterparenting" and manipulation of SB, and attacks on plaintiff's moral character, including inaccurate representations to the effect that she had been disbarred for misconduct. Plaintiff, an attorney proceeding *in propria persona*, was then given a brief opportunity to speak. Plaintiff argued that the death of SB's stepmother constituted a proper cause and/or change in circumstances, particularly because in the aftermath of her death defendant had provided a "hostile home environment" where SB was "not happy living with her dad." Following this brief argument from plaintiff, the following exchange took place:

THE COURT. That's it?

MS. D'ITRI. That's it.

THE COURT. Well, that is not sufficient for you to trigger a custody analysis. That does not constitute proper cause—

MS. D'ITRI. A hostile home environment—

THE COURT. Don't talk when I'm talking. That doesn't constitute proper cause or change in circumstances. So if that's it, you're out.

Anything else that you have to say regarding proper cause or change in circumstances?

MS. D'ITRI. A hostile home environment is not proper cause or change of circumstance?

THE COURT. So you're restating what you just said now the record will reflect.

MS. D'ITRI. I said a hostile home environment—

THE COURT. The record will reflect that the plaintiff is making faces. No. That isn't sufficient. Your motion to change custody is denied for the reason that you have not met the threshold burden of proving proper cause or change in circumstances. And, therefore, you are not entitled to have a custody analysis.

After this hearing, defendant filed a motion for attorney fees, which the trial court granted without explanation or analysis. Plaintiff later filed a motion for reconsideration of the trial court's custody decision, which the trial court denied. Plaintiff now appeals as of right.

## I. *VODVARKA* HEARING

On appeal, plaintiff argues that a proper cause or change in circumstances warranted revisiting the parties' custody arrangement. In particular, plaintiff maintains that, because the trial court did not hold an evidentiary hearing, it was required to accept plaintiff's allegations as true. Accepting these allegations as true, according to plaintiff, the facts demonstrate that the death of SB's stepmother materially changed the child's circumstances and constituted a proper cause for changing custody because, following her death, defendant neglected SB's physical and emotional needs. Alternatively, if these assertions are not accepted as true, plaintiff complains that she was not given the opportunity to present evidence or to call witnesses, such as SB, to support her claims. In contrast, defendant maintains that, even without an evidentiary hearing, the trial court was free to simply reject plaintiff's contentions that defendant's home, or his ability to care for SB, changed in a negative way following the death of his wife. Defendant also argues that the death of his wife and the resulting adjustments in his home do not constitute proper cause or a change in circumstances, but are instead simply a tragic part of life.

"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; 765 NW2d 345 (2009). "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011) (citation omitted).

"The Child Custody Act, MCL 722.21 *et seq.*, applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." *Pierron*, 282 Mich App at 243 (citation and quotation marks omitted). "The purposes of the act are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Id.* For this reason, "[b]efore modifying a child custody order, 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." *Gerstenschlager*, 292 Mich App at 657. This is a threshold inquiry; that is, if proper cause or a change in circumstances is not established, the trial court may not reevaluate the statutory best interest factors and the court may not revisit a custody order. *Vodvarka*, 259 Mich App at 508, 512.

[T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be 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. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Id.* at 512.]

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[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.]

The threshold consideration of whether there is a proper cause or a change of circumstances is a factual determination that must be decided case-by-case. *Id.* at 512. This factual-intensive inquiry may involve an evidentiary hearing, but a hearing is not necessarily required. *Corporan*, 282 Mich App at 605. For instance, an evidentiary hearing is not required when (1) the facts are undisputed or (2) when the facts alleged, even if true, do not establish a proper cause or a change in circumstances. *Vodvarka*, 259 Mich App at 512. Whether to hold an evidentiary hearing is a matter within the trial court's discretion. *Bielawski v Bielawski*, 137 Mich App 587, 593; 358 NW2d 383 (1984). Under MCR 3.210(C)(8), “[i]n deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.” See *Bowling v McCarrick*, 318 Mich App 568, 572 n 4; \_\_\_ NW2d \_\_\_ (2016).

In this case, plaintiff sought an evidentiary hearing in the trial court following the conciliator's recommendation, and yet the trial court dismissed plaintiff's petition to change custody without making any findings that would justify the court's decision to resolve this case without holding an evidentiary hearing on the threshold proper cause or change in circumstances consideration. First of all, the facts are not undisputed. While the parties agree that SB's stepmother died, they strongly dispute the impact of her death on defendant's home, on his ability to provide care for SB, on his relationship with SB, and on SB's emotional and mental health. Given that the facts are disputed, the trial court could not have declined to hold an evidentiary hearing by concluding that the facts are undisputed. See *Vodvarka*, 259 Mich App at 512.

Second, it is clear that plaintiff's claims were not so facially deficient that, if true, they would not constitute a proper cause or a change in circumstances. See *id.* Plaintiff has alleged that the death of a primary caregiver in defendant's home resulted in material changes to SB's circumstances, which have had a significant impact on SB's well-being.<sup>3</sup> Plaintiff maintains that the death of SB's stepmother left defendant unable to ensure SB's physical and emotional well-

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<sup>3</sup> We do not suggest that the death of a stepparent constitutes a per se proper cause or a change in circumstances in every case. Obviously, the relationship between a child and a stepparent, and the role the stepparent plays in the family, can differ widely depending on various circumstances, including the dynamics of the family, the length of the relationship, etc.

being, including basic necessities that she previously enjoyed such as a clean home, healthy food, as well as participation in activities and social events. According to plaintiff, the child is now emotionally disconnected from defendant, she is unable to discuss her feelings and concerns with defendant, and she is turning to plaintiff for financial and emotional support with increasing frequency. Contrary to defendant's arguments, these are not merely normal life changes that accompany a child's growth and development. Cf. *Gerstenschlager*, 292 Mich App at 658 ("The fact that a child is growing up, the fact that a child has started high school, and the fact that the child faces scheduling changes related to school and extra-curricular activities are the type of normal life changes that occur during a child's life and that do not warrant a change in the child's custodial environment."). Instead, as alleged by plaintiff, SB has faced a significant loss in her life that has impacted not only her emotional health but also her day-to-day well-being, and defendant has shown himself unable, or unwilling, to meet SB's needs in the wake of his wife's death. Moreover, as it relates to proper cause, as alleged by plaintiff, these changes are relevant to several of the best interest factors to the extent that the death of defendant's wife has affected SB's respective emotional ties with her parents, MCL 722.23(a), defendant's capacity and disposition to provide for SB's needs, MCL 722.23(c), the permanency of defendant's family unit, MCL 722.23(e), and SB's preference, MCL 722.23(i).<sup>4</sup> See *Vodvarka*, 259 Mich App at 512. Overall, if true, these allegations would certainly constitute a proper cause or change in circumstances. Thus, the trial court could not have dismissed plaintiff's petition, without holding an evidentiary hearing, by accepting "as true the facts allegedly comprising proper cause or a change of circumstances, and then decid[ing] if they are legally sufficient to satisfy the standard." *Id.*

Instead, in these circumstances, where there are disputed facts and the allegations, if true, constitute proper cause and a change in circumstances, under MCR 3.210(C)(8), the trial court was required to decide whether an evidentiary hearing was necessary. Specifically, in making this decision, a trial court "must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion." MCR 3.210(C)(8). Yet, the trial court dismissed plaintiff's contentions out of hand without requesting an offer of proof from plaintiff, without considering the evidence attached to plaintiff's motions, and without otherwise considering whether an evidentiary hearing was necessary as required by MCR 3.210(C)(8). On the facts of this case, by failing to comply with MCR 3.210(C)(8) and by failing to even consider whether an evidentiary hearing was required, the trial court operated in the wrong legal framework and palpably abused its discretion. Indeed, considering the transcript of the lower court proceedings, we are at a loss

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<sup>4</sup> Defendant is correct that it is unlikely that SB's preferences, standing alone, would constitute a proper cause or change in circumstances. See *Curylo v Curylo*, 104 Mich App 340, 349; 304 NW2d 575 (1981). However, a child's reasonable preference is a factor to consider in a custody dispute. *Id.* And, it is clear that, at 14 years old, SB is capable of expressing such a preference. See *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991) (finding that children of 6 and 9 years of age were old enough to express a preference in a custody dispute).

as to how the trial court reached its decision without, at a minimum, requesting an offer of proof from plaintiff.<sup>5</sup>

Moreover, we are persuaded that this error by the trial court necessitates remand for an evidentiary hearing regarding the existence of proper cause and change in circumstances. Were there no support of plaintiff's allegations, they could be dismissed as unsubstantiated allegations and there would be no factual issue for the court to resolve. MCR 3.210(C)(8). But, the lower court record contains support for plaintiff's allegations. It is of course clear that defendant's wife has in fact died. In terms of the cleanliness of defendant's home following her death, there are photographs in the record of defendant's home and defendant conceded that a complaint about the condition of his home prompted a CPS investigation. Further, plaintiff has personal knowledge of some of her contentions, including her interactions with SB as well as her provision of necessities that defendant has failed to supply, such as school supplies, clothes, etc., and her facilitation of activities, such as karate and tennis. In terms of SB's mental and emotional health, the child is now in therapy. Moreover, we note that, at a prehearing conference, plaintiff stated her intention to offer testimony from SB, but the trial court perfunctorily dismissed this request without considering the fact that SB's testimony may be necessary to resolve factual conflicts regarding defendant's conduct and to protect plaintiff's due process rights. See *Surman v Surman*, 277 Mich App 287, 303; 745 NW2d 802 (2007). In this regard, the trial court also wholly failed to consider SB's various text messages, describing her unhappy home life with defendant since her stepmother's death and in fact expressing a desire to testify. These messages, while arguably hearsay,<sup>6</sup> may be considered by the court in determining whether SB should be called to testify. See MRE 104(a). Given this evidence in support of plaintiff's position, the trial court palpably abused its discretion by failing to hold an evidentiary hearing. See MCR 3.210(C)(8). That is, while defendant disputes plaintiff's allegations and evidence, this merely establishes that there are "contested factual issues that must be resolved in order for the court to make an informed decision on the motion." MCR 3.210(C)(8).

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<sup>5</sup> As noted, there was a conference before a conciliator, and there was a report and recommendation from the conciliator. It is not clear from the record whether the conciliator's recommendations and findings formed part of the trial court's decision. On appeal, both parties emphasize those aspects of the conciliator's report that are favorable to their position. However, "a conciliator's report may not be considered in regard to threshold question" of whether there was a proper cause or change in circumstances. *Bowling*, 318 Mich App at 571. Thus, the trial court could not have (or should not have) relied on the conciliator's findings or recommendations, and we will not consider those findings or recommendations when evaluating the trial court's decision.

<sup>6</sup> A determination regarding proper cause and change in circumstances must be based on admissible evidence. *Bowling*, 318 Mich App at 572 n 4. Arguably, the text messages constitute inadmissible hearsay. MRE 801; MRE 802. However, the trial court did not consider the admissibility of these messages, and we leave it to the trial court to determine whether these messages are inadmissible or whether some exception to the hearsay rule applies.

Consequently, we remand for an evidentiary *Vodvarka* hearing regarding whether a proper cause or change in circumstances warranted revisiting the existing custody arrangement.<sup>7</sup>

In sum, there is evidence to substantiate plaintiff's allegations and, because defendant disputed that evidence, the proper procedure was to hold an evidentiary hearing on the threshold issue of whether a proper cause or change in circumstance merited revisiting the parties' custody arrangement. See MCR 3.210(C)(8). Because the trial court failed to hold such a hearing, the trial court could not have made an informed decision on plaintiff's motion and the record does not support the trial court's determination that plaintiff failed to show a proper cause or change in circumstances. Consequently, we remand for a *Vodvarka* hearing.

## II. ATTORNEY FEES

Next, plaintiff argues that the trial court abused its discretion by awarding attorney fees to defendant. Plaintiff notes that the trial court failed to state a reason for the award. And, plaintiff contends that an award was not justified because, contrary to defendant's arguments, she did not fail to comply with a court order and her motion to change custody was not frivolous. We agree.

"We review a trial court's grant or denial of attorney fees for an abuse of discretion." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Factual findings underlying the award, including the determination that an action is frivolous, are reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Any questions of law are reviewed de novo. *Reed*, 265 Mich App at 164.

In this case, defendant's motion for attorney fees asserted (1) that plaintiff violated the custody order contrary to MCR 3.206(C)(2)(b), and (2) that plaintiff's motion to change custody was frivolous within the meaning of MCR 2.625(A)(1) and MCL 600.2591. The trial court granted defendant's motion without making any finding that plaintiff violated a court order, that plaintiff filed a frivolous motion, that plaintiff's conduct caused defendant to incur fees, and without finding that those fees were reasonable. This was an abuse of discretion.

To award fees based on violation of a court order, the trial court must make a factual determination that plaintiff violated a court order, that this misconduct caused defendant to incur fees, and that those fees were reasonable. *Reed*, 265 Mich App at 165-166. The trial court made no such findings and could not award attorney fees on this basis. See *id.* Moreover, any such finding would be clearly erroneous. Defendant asserts that plaintiff's efforts to change custody

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<sup>7</sup> After the trial court denied her petition, plaintiff filed a motion for reconsideration, and she included additional evidence, including a deposition from defendant in which he admitted to providing SB with plaintiff's diary, which contained sexually explicit entries. Because this evidence was not presented when plaintiff's motion was initially decided, the trial court had discretion not to consider it in relation to plaintiff's motion for reconsideration. *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). This up-to-date evidence may, however, be presented by plaintiff on remand. See *Parent v Parent*, 282 Mich App 152, 157; 762 NW2d 553 (2009).

are “akin to failing to comply” with the custody order under MCR 3.206(C)(2)(b). This is absurd. An existing custody order does not, and cannot, prevent a party from seeking to modify custody. See MCL 722.27(a)(c). It would be clearly erroneous to conclude that plaintiff violated a custody order by seeking to modify that order.

In terms of whether plaintiff’s motion to change custody was frivolous, the trial court likewise failed to make any findings that plaintiff’s motion was frivolous. Absent such a finding, the trial court could not award attorney fees on this basis. See *Kitchen*, 465 Mich at 661; *Reed*, 265 Mich App at 165-166. Moreover, it is apparent from the record that plaintiff’s motion cannot be considered frivolous. There are clearly disputed questions of material fact and, while the trial court denied plaintiff’s motion, a claim is not frivolous merely because the party does not prevail on it. *Kitchen*, 465 Mich at 662. Indeed, given the facts alleged and plaintiff’s supporting proofs, a reasonable trial court would be justified in revisiting custody. Cf. *Kaeb*, 309 Mich App at 573. Given the facts of this case, it cannot be said that plaintiff’s motion was brought to harass defendant, that it has no basis in fact, or that it is devoid of legal merit. See *Kitchen*, 465 Mich at 662. Consequently, plaintiff’s motion was not frivolous.

Overall, we conclude that the trial court abused its discretion by awarding attorney fees without making proper factual findings, particularly when it could not reasonably be concluded that plaintiff’s conduct violated a court order or that she filed a frivolous motion.

### III. REMAND TO A DIFFERENT JUDGE

Finally, plaintiff asks that we remand for proceedings before a different judge. Plaintiff contends that the trial court has demonstrated strong bias against plaintiff as shown through the perfunctory dismissal of her motion to change custody, the trial court’s refusal to reconsider plaintiff’s motion, and the trial court’s award of attorney fees to defendant.

“We may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.” *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). “However, we will not remand to a different judge merely because the judge came to the wrong legal conclusion. Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying.” *Id.* at 603.

In this case, the trial court was admittedly dismissive of plaintiff’s claims, the court did not provide plaintiff a fair opportunity to present her case, and the award of attorney fees was an obvious abuse of discretion. However, we are not persuaded that the trial court will be unable to put aside its errors or past views in order to consider plaintiff’s claims within the correct framework with the benefit of an evidentiary hearing. The trial court did not make any comments suggesting a particular bias against plaintiff, and we trust that the trial court will afford plaintiff a full and fair evidentiary hearing on remand with regard to proper cause and change in circumstances. Therefore, we decline to remand to a different judge. Cf. *Kaeb*, 309 Mich App at 574.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly