STATE OF MICHIGAN

COURT OF APPEALS

KELLY JEAN ROUSH,

Plaintiff-Appellant,

v

BRIAN STACEY ROUSH,

Defendant-Appellee.

UNPUBLISHED
November 18, 2021

No. 357198
Kent Circuit Court
LC No. 12-007687-DM

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying her motion for a change of custody and parenting time for the minor child. On appeal, plaintiff argues that her improved mental health and the child's poor academic performance create changes in circumstance that warrant a change in custody and parenting time. We affirm.

The parties had two children during their marriage, and the trial court issued a judgment of divorce in 2013. According to the judgment, the parties shared joint legal custody of the children, and defendant had sole physical custody.

Throughout the years, the parties' custody disputes continued. Plaintiff frequently sought to change the custody and parenting-time order, and argued repeatedly that defendant had not provided proper care for the children by not providing them proper food, clothes, or furniture in his house and that the children were missing school assignments and receiving poor grades. This culminated in one instance in which plaintiff called Children's Protective Services (CPS) and complained that defendant did not have proper food for the children. After a visit to defendant's home, CPS concluded that there was not a preponderance of evidence to support the allegations of physical neglect. Thereafter, defendant moved to restrict plaintiff's custody and parenting-time visits. The trial court ruled that plaintiff would have supervised parenting time because she continued to submit allegations that defendant was not properly caring for the children and she continued to tell the children that defendant was not providing suitable care.

Plaintiff eventually was given unsupervised parenting time and had her parenting time restored. Nevertheless, plaintiff filed again for a change in custody and parenting time, for only

one of the children, because defendant had not provided proper care when the child had poor academic performance, the child had allegedly run away from defendant's home when defendant was intoxicated, and the child was malnourished.[1]

The trial court found that plaintiff had not substantiated a change in circumstance or proper cause to support a revaluation of the custody and parenting-time order. This appeal followed.

This Court applies "three standards of review in custody cases." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. 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. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (quotation marks and citations omitted).]

"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." *Lieberman v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017) (quotation marks and citations omitted).

A trial court abuses its discretion when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reasons but rather of passion or bias." *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994) (quotation marks and citation omitted). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Selfeddine v Jaber*, 327 Mich App 514, 516; 934 NW2d 64 (2019).

With regard to custody and parenting-time orders, the trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." MCL 722.71(1)(c). The party seeking to modify or amend the order must "establish proper cause or change in circumstances, [otherwise] the court is precluded from holding a child custody hearing . . . ." *Vodvarka*, 259 Mich App at 508. "The movant . . . has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists before the trial court can consider whether an established custodial environment exists and conduct a review of the best-interest factors." *Id*. at 509. "[I]f the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing[.]" *Id*. at 508.

[1] At the time of plaintiff's motion, the other child had reached the age of majority.

Regarding a motion to amend a custody provision, this Court has defined the term "proper cause" to mean "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." *Id*. at 511. "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." *Id*. at 512.

It is not the case that any fact relevant to the best-interest factors will constitute sufficient cause. "Rather, the grounds presented must be legally sufficient, i.e., they must be 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." *Id*. at 512. "Although these decisions will be based on the facts particular to each case, we do not suggest that an evidentiary hearing is necessary to resolve this initial question." *Id*. "Often times, the facts alleged to constitute proper cause or a change of circumstances will be undisputed, or the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard." *Id*.

Similarly, this Court has defined the term "change of circumstances" in child custody disputes to mean 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. "[T]he evidence must demonstrate something more than the normal life changes 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. "[E]vidence 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.

Here, plaintiff argues that her improved mental health was a change in circumstance that warranted a review of the current order providing sole legal custody to defendant. Plaintiff characterizes the Friend of the Court (FOC) recommendation from January 24, 2018, that served as the investigation before the trial court made a ruling regarding custody, as a report that was determinative on plaintiff's mental health. The report stated that:

> While there is no doubt that [plaintiff] loves and cares deeply for [the children], it's quite obvious she harbors a tremendous amount of resentment towards [defendant.] Unfortunately, this resentment and lack of confidence in [defendant's] ability to provide for the children has seemingly manifested into a campaign of portraying [defendant] as being an unfit parent. Granted, [defendant] may have some deficits and room for growth in terms of parenting. However, his role has been made more difficult given [plaintiff's] repeated attempts to influence the children's perception of [him]. This was not only based upon the history of interactions in which she has involved or exposed them to negative comments about his ability to care for them, but involving CPS and healthcare providers by raising unfounded complaints. Even then, the undersigned still considered preserving the legal custody status as long as more restrictive measures were put into place to ensure that [defendant] was involved in or gave consent to major decisions impacting [the children]. However, based upon the combination of the history

> between the parents that was present during the divorce, and the previously mentioned details regarding the parent's respective psychological evaluations, the undersigned is not convinced [that plaintiff] has the capacity and disposition to coparent effectively without serving her own needs. Again, this may be due to her deep seeded resentment towards [defendant], but give prior reports (2013 FOC evaluation) the undersigned wonders if some of [plaintiff's] actions stem from unresolved mental health issues.

At the time of her motion for change in custody, plaintiff submitted a letter from her therapist stating that she "continued to work on addressing healthy communication skills, parenting skills, and assertiveness," and that the treating therapist was "pleased with [plaintiff's] efforts and progress in these areas."

Although the FOC report mentions that plaintiff's actions may stem from unresolved mental health issues, the FOC report did not base its conclusions on plaintiff's mental health alone. Instead, the report based its conclusions on plaintiff's unfounded complaints against defendant, including his ability to properly care for the children, which have occurred throughout the course of the proceedings. Those unfounded complaints continued in her motion to change in custody to the trial court when she stated that the child was malnourished, wore the same clothes every day, and was unwashed. Furthermore, to the extent that the FOC report relied on plaintiff's mental health to establish custody, the letter that plaintiff provided did not contain any clinical conclusions regarding plaintiff's mental health, or what has or has not improved. Therefore, the trial court did not err in finding that plaintiff failed to show by a preponderance of evidence that there was a change in circumstance sufficient to warrant a re-analysis of the custodial arrangement.

We also reject plaintiff's argument that an evidentiary hearing was required, as even though improved mental health may be a factor in deciding whether custody should be modified, the grounds presented here were not legally sufficient to warrant an evidentiary hearing. See *id*. at 512. Assuming plaintiff's mental health had improved, the trial court did not err in finding that plaintiff did not demonstrate that this change would have a significant effect on the child's well-being given that plaintiff continues to make unfounded allegations that defendant is not providing proper nourishment, housing, or clothing to the child. See *id*.

When analyzing a proposed modification to parenting time, if the "proposed change or circumstances will affect a child's established custodial environment, [then] the applicable legal framework for analyzing the matter is that set forth in *Vodvarka*." *Liebermann*, 319 Mich App at 81. An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.21(1)(c). However, if the proposed modification to parenting time would not change the established custodial environment, then "proper cause" and "change of circumstances" have a relaxed meaning. See *Shade v Wright*, 291 Mich App 17, 25; 805 NW2d 1 (2010) ("[T]he definitions of proper cause and change in circumstances from *Vodvarka* do not control the facts of this case because this case involves a modification of parenting time rather than a change in custody."). "[A]lthough normal life changes typically are insufficient to establish the proper cause or change of circumstances required to proceed to consideration of a child custody order, such changes may be sufficient for a court to consider modification of a parenting-time order unless the requested change would alter the established custodial environment." *Lieberman*, 319

Mich App at 83. Moreover, "[i]n a parenting time matter, when the proposed change would not affect the established custodial environment, the movant must prove by a preponderance of the evidence that the change is in the best interests of the child." *Id*. at 84.

Plaintiff argues that the child's poor academic record created proper cause, or a change in circumstance, to warrant her having additional parenting time pursuant to *Shade*, 291 Mich App at 17. Even though it is undisputed that the child was struggling with school, the record indicates that plaintiff was granted parenting time during the periods in which the child was not turning in assignments or otherwise not attending virtual school. There was no indication that increasing plaintiff's parenting time would positively impact the child's academic record and be in the child's best interests. Plaintiff simply argued in the trial court, and continues to argue on appeal, that the child's poor academic performance is a change in circumstance worthy to warrant a change in parenting time. Furthermore, plaintiff previously argued, before the current custody order, that the child was struggling academically under defendant's care. No evidence was provided on the record to substantiate that the child's recent academic struggle was a change to the academic struggles he faced before the custody order. The trial court considered these facts when it ruled, stating that plaintiff was present for many of the child's academic struggles when she was with him during her parenting time.

We are not left with a definite and firm conviction that the trial court made a mistake in denying plaintiff's motion for a change in custody and parenting time.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Michael J. Riordan