

STATE OF MICHIGAN
COURT OF APPEALS

LENA LUTFI REYES,

Plaintiff-Appellee,

v

ERIC DONIA HERRON,

Defendant-Appellant.

UNPUBLISHED

June 19, 2018

No. 342224

Clare Circuit Court

Family Division

LC No. 11-900338-DM

Before: CAMERON, P.J., and METER and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying his motion to change custody, parenting time, and support with respect to the parties' minor child. The trial court ruled that defendant failed to establish proper cause or change of circumstances sufficient to revisit the existing custody order. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

The parties' March 2015 judgment of divorce awarded plaintiff-mother sole legal and physical custody of the minor child, due, in part, to the fact that at the time of the divorce, defendant-father was incarcerated. In February 2016, after he was released from prison, defendant filed a motion seeking joint legal and physical custody of the minor child. The parties stipulated to the entry of an April 2016 order granting them joint legal custody; plaintiff retained sole physical custody, and defendant was given reasonable parenting time. In late 2016, the parties stipulated to the entry of an order allowing plaintiff to change the minor child's domicile and an order modifying the April 2016 custody order with respect to parenting time. The parties agreed that plaintiff would move with the minor child to Tennessee in March 2017. The parties further agreed that defendant would have parenting time "as the parties agree," or, in case of a disagreement, for the summer, alternating holidays, half of Christmas break, and spring break; the parties continued to share joint legal custody, and plaintiff retained sole physical custody.

In November 2017, defendant filed a motion to change custody, parenting time, and support, asking the trial court to award him joint legal custody and sole physical custody of the minor child, who was then 13 years old. The basis for defendant's motion was predicated, in part, on an altercation that had occurred between the minor child and another child, during which the child kicked the minor child and may have sprayed apple juice into his face. Plaintiff described the other child as "a lot smaller than [the minor child]" and denied that the child had

threatened her son with a knife, contrary to defendant's assertion.¹ Plaintiff contacted the police to report the incident. Plaintiff did not contact defendant about the incident; rather, defendant learned of the altercation through the minor child.

Another basis for the motion came after the minor child experienced an allergic reaction to Borax, an ingredient in some "slime" that the minor child and some other children had made. Plaintiff testified that she observed that the minor child's skin had become puffy and formed hives; that she recognized that he was having an allergic reaction and immediately brought him to the hospital, where he was treated with Benadryl and a steroid; that his condition improved almost instantly; and that he was able to breathe the whole time and was never in any danger. Defendant testified that he learned of the incident from the minor child more than a day later and that, according to the minor child's account, he experienced difficulty breathing, received "eight shots worth of steroids," and was instructed by plaintiff not to tell defendant.

Another basis provided by defendant was his contention that he had been experiencing communication issues with plaintiff since the move and that he purchased a cell phone for the minor child in order to communicate with him. Plaintiff testified that, while she had taken away this phone in order to discipline the minor child for "talking back" to her and for not cleaning his room, she had never taken away the phone in order to prevent defendant from speaking to the minor child. Defendant additionally asserted that the minor child's grades had declined following the move. While in Michigan, the minor child received A's and B's and was named on the honor roll; however, he had received C's in two separate classes in Tennessee. Plaintiff, on the other hand, testified that the difference in grades was due to a difference in the schools' grading systems and that the minor child's grades had not actually dropped.

Following the hearing, the trial court denied defendant's motion, finding that there was no proper cause or change of circumstances sufficient to revisit custody. The trial court noted that both parties had agreed to the move, and that all of the changes that had occurred were "foreseeable when you move a kid from Michigan all the way down to Tennessee." The trial court further reasoned that while the minor child's allergic reaction and altercation with another child were no doubt concerning for defendant, they were the types of circumstances that sometimes happened to 13-year-old boys, and that plaintiff had handled both situations appropriately.

II. ANALYSIS

On appeal, defendant argues that the trial court committed clear legal error in finding that there was no proper cause or change of circumstances. 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

¹ Defendant did not testify about the incident; however, he asserted, without any reference, in his brief in support of his motion (and continues to assert on appeal) that another child either kicked or punched the minor child in the groin and "pulled a knife on" the minor child. Defendant also asserts that this other child sprayed an "unidentified liquid" into the minor child's eyes.

App 599, 605; 766 NW2d 903 (2009). Under this standard, “a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderate[s] in the opposite direction.” *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (quotation marks and citations omitted; alteration in original). We review questions of law for clear legal error. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). Clear legal error occurs when a court “incorrectly chooses, interprets, or applies the law.” *Id.*, quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (quotation marks omitted).

The Child Custody Act of 1970, MCL 722.21 *et seq.*, states that before a court may modify a previous judgment or order concerning child custody, the movant must first show proper cause or change of circumstances. MCL 722.27(1)(c). The court cannot hold a child custody hearing until the movant demonstrates proper cause or change of circumstances, and the burden is on the movant to prove this by a preponderance of the evidence. *Vodvarka*, 259 Mich App at 508-509. Proper cause is “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. It “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. Change of circumstances requires proof 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. It must be “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.” *Id.* at 513-514. For both proper cause and change of circumstances, the trial court may consult and rely upon the statutory best-interest factors in MCL 722.23(a)-(l) when making its determination. *Id.* at 511-512, 514.

Here, the trial court listened to the testimony of the parties and determined that defendant had failed to demonstrate that proper cause and change of circumstances existed sufficient to revisit custody. Defendant argues, as noted above, that he brought forth sufficient evidence from which the trial court could conclude that there existed proper cause and change of circumstances sufficient to revisit custody. However, the record does not support defendant’s position. Even presuming the veracity of all of defendant’s arguments, we concur with the trial court that defendant’s assertions did not constitute a “material change[] [that has] had or will almost certainly have” a significant effect on the minor child’s well-being. *Vodvarka*, 259 Mich App at 513-514. Contrary to defendant’s assertions, the record clearly reveals that defendant was in regular contact with the minor child by voice and text. Further, defendant’s testimony revealed that the minor child was able to express his problems, (school altercation and the allergic reaction) to defendant without fear of retribution from plaintiff. Also lacking in defendant’s testimony is evidence, other than the move to Tennessee which was agreed to by defendant, that any of these actions constituted a material change in the minor child’s circumstances such that we could find a significant effect on the minor child’s well-being. *Id.* We concur with the findings of the trial court that the assertions which provided the basis for defendant’s motion are within the bounds of normal life circumstances typical of 13-year-old teenagers. To the extent the parties offered differing accounts of the incidents, the trial court had discretion to weigh each party’s credibility. *Berger v Berger*, 277 Mich App 700, 708; 747 NW2d 336 (2008).

We similarly find unpersuasive defendant's arguments that the minor child's decline in academic performance and the absence of extended family in Tennessee demonstrate the existence of proper cause or change of circumstances. The parties disputed whether the minor child's grades had actually dropped; nevertheless, assuming the veracity of defendant's assertion that they had, a minor decline in a child's academic performance following a move to a different state does not constitute a change of circumstances sufficient to revisit custody in the absence of evidence demonstrating that it "represents a 'material change[] [that has] had or will almost certainly have an effect on the child.'" *Corporan*, 282 Mich App at 609, quoting *Vodvarka*, 259 Mich App at 513-514 (alterations in original). Additionally, as noted by the trial court, the parties agreed to the move to Tennessee; rather than a material change of circumstances, it was a natural and probable result of this agreement that the minor child would be separated from defendant and extended family who reside in Michigan. Moreover, the record demonstrates that the minor child has an adequate familial support system in Tennessee through his mother, stepfather, and stepsiblings.

Defendant also argues in his brief on appeal that plaintiff's household has become a hostile, unloving environment. As with all other issues raised by defendant, the burden was on him as the movant to prove his case by a preponderance of the evidence. *Vodvarka*, 259 Mich App at 509. On this issue, defendant contends that the minor child told him that the other members of plaintiff's household verbally and mentally abuse him by telling him that he is not a part of the family and cannot appear in family photos. This contention, which defendant makes through his counsel, is not supported by the record. Actually, the record reveals that plaintiff presented undisputed testimony that indicates a loving, supportive household with a close relationship between the minor child and two of his stepsiblings.

Having considered all of the issues raised by defendant we conclude that the great weight of the evidence supports the trial court's conclusion that defendant failed to show by a preponderance of the evidence "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 (emphasis added). Additionally we conclude that the circumstances cited by defendant do not "demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child" *Id.* at 513.

Finally, defendant offers what can best be described as a cursory argument that the trial court committed clear legal error by failing to consider the best-interest factors in MCL 722.23(a)-(l). This argument was not raised before the trial court and is therefore unpreserved. *Elahham v Al-Jabban*, 319 Mich App 112, 119; 899 NW2d 768 (2017). Moreover, although a trial court "should" consider the best-interest factors when determining whether a party has established proper cause or change of circumstances sufficient to revisit a custody order,

Vodvarka, 259 Mich App at 511-512, there is no requirement that the court explicitly consider these factors or that it articulate its findings on the record.²

Affirmed. Because plaintiff did not file a brief in this matter we do not award costs. MCR 7.219(A).

/s/ Thomas C. Cameron
/s/ Patrick M. Meter
/s/ Stephen L. Borrello

² Defendant, citing *Vodvarka*, 259 Mich App 499, also briefly argues that he was entitled to an evidentiary hearing because there were disputed facts. In lieu of finding that counsel was intentionally trying to mislead this Court because an evidentiary hearing was, in fact, conducted, we instead conclude that his argument is simply misplaced. However, in the future, counsel should note that in *Vodvarka* we explicitly stated that we did “not suggest that an evidentiary hearing is necessary to resolve [the] initial question” regarding proper cause or change of circumstances. *Vodvarka*, 259 Mich App at 512. Instead, a “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.*