STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA S. KEHOE,

Plaintiff-Appellant,

v

DAVID F. CAMILLERI,

Defendant-Appellee.

UNPUBLISHED
March 26, 2019

No. 345432
Oakland Circuit Court
LC No. 2009-758071-DM

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

PER CURIAM.

Plaintiff, Patricia Kehoe, appeals as of right the order denying her motion to modify custody and parenting time of the parties' the minor child. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

This case arises from longstanding disputes between the parties regarding custody and parenting time of the minor child. The parties were married in 2000, and divorced in 2009. The consent judgment of divorce awarded Kehoe sole physical custody, both parties joint legal custody, and weekend parenting time to defendant, David Camilleri. However, in August 2016, Camilleri was awarded temporary sole legal custody, and the parties had an equal parenting time schedule. Due to concerns with Kehoe's mental health, Kehoe was ordered to complete various psychological and psychiatric evaluations, and her parenting time was decreased and supervised. In July 2017, Kehoe filed a motion to modify custody acting *in propria persona*. An evidentiary hearing began on October 20, 2017, but in lieu of its continuance on December 13, 2017, the court entered an opinion and order on March 14, 2018, adopting the recommendations of the Guardian ad Litem (GAL), including a graduated parenting time schedule, based on an agreement as negotiated by the parties. Kehoe's parenting time was conditional upon her attendance and progress in individual therapy.

The following month, April 2018, Kehoe filed an emergency motion to modify custody and parenting time, seeking legal and physical custody of the minor child. She alleged that the minor child was afraid of Camilleri, that Camilleri demonstrated violent behavior, and that

Camilleri continued to violate previous court orders. Consequently, she asserted that a change of custody was in the minor child's best interests. Camilleri filed a motion for sanctions in response. At a hearing on the motion, the court stated that it would not reopen custody, and denied Kehoe's motion. The court also awarded Camilleri $500 in sanctions. Kehoe moved for reconsideration, which was denied by the trial court.

II. JURISDICTION

As an initial matter, Camilleri argues that this Court lacks jurisdiction because Kehoe is challenging the order denying her motion to change custody and parenting time, but she appealed the order denying her motion for reconsideration. Camilleri contends that under MCR 7.202(6)(a)(*iii*) Kehoe was required to appeal each postjudgment order separately. We disagree.

This Court has jurisdiction of appeals as of right from final orders. MCR 7.203(A)(1). Under the version of MCR 7.202(6)(a)(*iii*) in effect at the time Kehoe filed her claim of appeal, a final order in a domestic relations action is a postjudgment order "affecting the custody of a minor."[1] Although Kehoe lists the order denying her motion for reconsideration as the order appealed from on the claim of appeal, and uses the standard of review for a motion for reconsideration, it is clear that she is challenging the order denying her motion to change custody and parenting time because her only issue on appeal is that the trial court erred by denying that motion. The order denying her motion to change custody and parenting time is a postjudgment order affecting child custody. Therefore, this Court has jurisdiction over Kehoe's claim of appeal as of right. MCR 7.203(A)(1); MCR 7.202(6)(a)(*iii*).

Camilleri's reliance on *Surman v Surman*, 277 Mich App 287; 745 NW2d 802 (2007), for the proposition that each postjudgment order in a domestic relations action must be separately appealed is misplaced. In *Surman*, the father failed to appeal an August 2005 order granting the mother custody, but later filed a claim of appeal of an order entered in March 2006, denying his motion to void the previous order. *Id*. at 292-293. This court determined that the August 2005 order was the postjudgment order affecting the custody of a minor, and because the father failed to timely file a claim of appeal from it, this Court lacked jurisdiction regarding the father's claims related to it. *Id*. at 293-294. Here, Kehoe timely filed a motion for reconsideration of the order denying her motion to change custody and parenting time, and timely filed her claim of appeal after the lower court denied reconsideration. Therefore, Camilleri's jurisdictional challenge lacks merit.

[1] Effective January 1, 2019, MCR 7.202(6)(a)(*iii*) was amended so that a final order in a domestic relations action is a postjudgment order "that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile."

III. CHILD-CUSTODY ORDER

A. STANDARD OF REVIEW

Kehoe argues that the trial court erred by denying her motion to modify custody and parenting time. In denying the motion, the trial court did not address or make any findings with regard to the statutory best interest factors in MCL 722.23. On appeal, Kehoe argues that this failure mandates reversal. This Court must affirm a custody order "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). Similarly, a trial court's decision regarding parenting time will not be reversed unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed clear legal error. See MCL 722.28; *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992).

B. ANALYSIS

Kehoe's only argument on appeal is that the trial court erred by failing to make findings of fact regarding the statutory best interest factors when it denied her motion to modify custody and parenting time.

Pursuant to MCL 722.27(1)(c), before a court may modify or amend a prior custody order, the party seeking the change must establish by a preponderance of the evidence the existence of proper cause or a change of circumstances to warrant the change. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). "[P]roper 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." *Id*. at 511. To demonstrate a change of circumstances sufficient to modify a previous order, "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." *Id*. at 513. Further, "not just any change will suffice . . . . 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." *Id*. at 513-514. Here, the March 14, 2018 order adopting the GAL's recommendations regarding parenting time and resolving the previously scheduled evidentiary hearing was the last order regarding custody of the minor child before Kehoe filed her emergency motion on April 25, 2018, making it the "custody order at issue" for purposes of determining whether a change of circumstances existed. See *Vodvarka*, 259 Mich App at 514.

The court did not expressly state that Kehoe failed to meet her burden of establishing proper cause or a change of circumstances. However, the court stated that it would not reopen custody given that the prior custody order had been finalized only a month earlier. Additionally, the court chose to impose sanctions on Kehoe for her actions in filing the motion to change custody. Based on those facts, it is plain that the court did not find that proper cause or a change of circumstances existed so as to warrant revisiting the custody issue. Given the lack of a clear record, however, we have reviewed Kehoe's voluminous pleadings in full. The pleadings

primarily refer to events going back to 2009 and do not clearly refer to new causes or events sufficient to warrant a revisiting of custody a mere six weeks since the prior order. And, as the court recognized, nothing of significance had changed in the six weeks since the prior order was entered.

Kehoe does not challenge the court's implicit determination that she failed to establish by a preponderance of the evidence that proper cause or a change of circumstances existed so as to warrant revisiting the custody issue. Instead, she only argues that the trial court erred by failing to make express findings on the best-interest factors in MCL 722.23. However, as explained in *Vodvarka*, the trial court is not authorized to revisit an otherwise valid prior custody decision, or to consider the statutory best interest factors under MCL 722.23, until *after* the party requesting a modification of a child's custodial arrangement has proven, by a preponderance of the evidence, that proper cause or a change of circumstances has occurred. *Vodvarka*, 259 Mich App at 508-509. Moreover, the trial court is not required to hold an evidentiary hearing to address the threshold question. *Id*. at 512. In this case, as the court did not find the threshold met, and as Kehoe has not challenged that aspect of the court's ruling on appeal, we conclude that the court was under no obligation to consider the best-interest factors.[2]

Affirmed. Camilleri may tax costs as the prevailing party. MCR 7.219(A).

/s/ Douglas B. Shapiro
/s/ Jane M. Beckering
/s/ Michael J. Kelly

[2] Given our conclusion, we decline to consider Camilleri's argument on appeal that Kehoe's failure to order certain transcripts on appeal precludes appellate review.