

STATE OF MICHIGAN
COURT OF APPEALS

TABETHA CORDELL, formerly known as
TABETHA ARGEL and TABETHA PINK,

Plaintiff-Counterdefendant-
Appellee,

v

GEORGE ELLIOTT ARGEL,

Defendant-Counterplaintiff-
Appellant.

UNPUBLISHED
December 26, 2019

No. 348686
Jackson Circuit Court
LC No. 16-001097-DM

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

In this child custody dispute, defendant-counterplaintiff, George Elliott Argel, appeals as of right the trial court’s order denying his request for a hearing on whether to consider a change in custody for the minor child. Because Argel alleged and presented evidence that, if proved, would constitute proper cause or a change of circumstances that warrants revisiting custody, we conclude that the trial court erred when it summarily dismissed his motion for failing to meet the threshold. Accordingly, we reverse and remand for further proceedings.

I. BASIC FACTS

As this Court observed in a previous appeal, Argel and plaintiff Tabetha Cordell were married in Texas in December 2012. Argel was then 24 years of age and Cordell was just 17 years of age. They had their daughter in January 2014. Argel agreed to move to Michigan after Cordell’s parents moved to this state. However, Cordell left the marital home with the child in March 2016. See *Argel v Argel*, unpublished per curiam opinion of the Court of Appeals, issued

June 12, 2018 (Docket No. 340148).¹ The trial court entered a judgment of divorce in August 2017. The court awarded the parties joint legal custody, but it ordered that Cordell had sole physical custody. The court gave Argel limited parenting time.

After a shoplifting incident involving Cordell, the trial court revisited the issue of parenting time and custody at an evidentiary hearing held in February 2018. Although the trial court determined that it would not alter the child's custody, it did modify Argel's parenting time. In an order entered in March 2018, the trial court provided that the child would spend alternating two-week periods with Argel in Texas and with Cordell in Michigan. The order provided that the arrangement would last until the child entered kindergarten.

In January 2019, Argel moved for a change in the child's legal and physical custody. He argued that the change in custody was necessary for her safety. He alleged that in July 2018 the child engaged in "extremely concerning behavior" in which she struck her head repeatedly and stated that that was what her "mommy" did to her. He stated that the child's self-injurious behaviors continued, and she also experienced bathroom accidents, night terrors, and extreme reluctance to return to Michigan for visits with Cordell. He presented evidence that the child confirmed her reports of physical abuse to three investigators and told an investigator with Child Protective Services that she had witnessed domestic violence between Cordell and Cordell's then boyfriend. He further alleged that the evidence showed that Cordell had engaged in inappropriate behaviors, made false accusations, had a tendency to lash out in anger, and was a destabilizing influence on the child with repeated failed relationships that exposed the child to new "pseudo-father-figure[s]." Argel stated that the evidence would show that the child now had an established custodial environment with him. Because he believed the evidence would show that it was in the child's best interests, he asked the trial court to award him sole legal and physical custody, and to temporarily suspend Cordell's parenting time. Argel attached photos, videos, e-mails, a Child Protective Service's report, a mental health report, and other documentation in support of his motion.

The trial court held a hearing on the motion in February 2019. At the hearing, Argel argued that the physical abuse, the repeated exposure to different men, and the instability of Cordell's life constituted reasons to revisit custody. Argel conceded that Child Protective Services in Texas did not substantiate the allegations of abuse, but he stated that the evidence of the child's allegations that she had been hit and had witnessed abuse were very concerning. The trial court indicated that it would not consider the video evidence. The trial court explained that Argel had to submit a transcript if he wished the evidence to be considered. After noting that Child Protective Services did not file a petition or initiate a safety plan, the trial court asked Argel "what else" he had that might warrant revisiting custody. Argel responded that there was evidence that Cordell repeatedly changed boyfriends and exposed the child to them. The constant change, he maintained, was detrimental to her stability. Argel also cited the evidence that the child had been exhibiting extreme behaviors.

¹ The present case is Argel's third appeal to this Court. See also *Argel v Argel*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2018 (Docket No. 344836).

Cordell related that she had been investigated, but no one found there was any abuse in the home. She also stated the behaviors that Argel noted only happened when the child visited Argel in Texas. She stated that she got married in December and that the child loved her new husband. She indicated that she moved to be closer to work and church.

At the close of the hearing, the trial court concluded that Argel had not demonstrated proper cause or a change in circumstances that would warrant an evidentiary hearing. After the trial court denied Argel's motion for reconsideration in April 2019, Argel appealed in this Court.

II. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

A. STANDARDS OF REVIEW

On appeal, Argel argues that the trial court erred in several respects when it determined that he had not established proper cause or a change of circumstances sufficient to warrant revisiting the governing custody order. This Court reviews the trial court's factual findings by examining whether the findings are against the great weight of the evidence. A finding is against the great weight of the evidence when it is so contrary to the weight of the evidence that it is unwarranted or is so plainly a miscarriage of justice that it would warrant a new trial. *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). This Court reviews a trial court's discretionary rulings in a custody dispute for a palpable abuse of discretion. MCL 722.28. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Finally, this Court reviews the trial court's selection, application, and interpretation of the law governing custody disputes for "clear legal error." MCL 722.28. The clear legal error standard is the same as the ordinary legal error standard. *Fletcher*, 447 Mich at 881. Accordingly, this Court reviews de novo the trial court's application of the law to the facts. See *Kaeb v Kaeb*, 309 Mich App 556, 564; 873 NW2d 319 (2015).

B. ANALYSIS

The Legislature has provided that a trial court may not modify or amend a previous judgment or order involving custody except for "proper cause shown or because of change of circumstances." MCL 722.27(1)(c). The Legislature established this burden to minimize disruptions to the child's custody. See *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981). Under MCL 722.27(1)(c), a party requesting a change must establish proper cause or a change in circumstances before the trial court may even hold a hearing to consider the requested change. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003).

This Court in *Vodvarka* considered what constituted "proper cause or a change of circumstances" sufficient to warrant a hearing to consider whether a proposed "custody" change was in the child's best interests. This Court noted that the terms had not been defined by the Legislature and that the ordinary understanding of the phrase "proper cause" could mean any appropriate ground for taking legal action. *Id.* at 510. But this Court disagreed that such an interpretation would serve the purpose of preventing "unwarranted custody changes (and hearings)." For that reason, this Court concluded that a proper cause must be something more: it

must involve “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. For similar reasons, this Court concluded that the phrase “change of circumstances” should be understood to require the movant “to prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have had or could have a *significant* effect on the child’s well-being, have materially changed.” *Id.* at 513. This Court stated that “not just any change” will suffice to justify revisiting custody—the “evidence must demonstrate something more than the normal life changes” to rise to the level of a change of circumstances that would warrant revisiting custody. *Id.* at 513-514.

This Court clarified in *Vodvarka* that the determination typically involved a question of fact, but stated its belief that trial courts would often be able to decide the question of proper cause or a change of circumstances without a hearing because the facts alleged would be undisputed or could be accepted as true for purposes of deciding whether to hold a custody hearing. *Id.* at 512, 517. When there is a question of fact, the Court stated, the moving party has the burden to prove by a preponderance of the evidence that there is either proper cause or a change of circumstance that warrants revising custody. *Id.* at 509; see also *Corporan v Henton*, 282 Mich App 599, 603-604; 766 NW2d 903 (2009).

Our Michigan Court Rules similarly provide that a trial court must normally hold a custody hearing within 56 days after the moving party filed notice of the request for the hearing. MCR 3.210(C)(1)(b). However, before a trial court should hold a hearing, it must first determine whether a custody hearing is necessary:

In 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. [MCR 3.210(C)(8).]

Although a trial court must determine whether there are contested issues by requiring an offer of proof, it is improper for a trial court to decide the merits of a custody dispute on the pleadings; normally, the trial court must hold an evidentiary hearing. See, e.g., *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). Where there is a dispute concerning the facts, the trial court may be required to hold an evidentiary hearing to decide whether the facts establish the threshold for holding a custody hearing. See *Vodvarka*, 259 Mich App at 512. It is only in cases where it is evident on the face of the allegations in the motion and the accompanying offer of proof that the moving party cannot meet his or her burden to establish proper cause or a change of circumstances that the trial court may summarily dismiss a motion for a change in custody without holding an evidentiary hearing.

In this case, Argel moved for a change in custody and cited several factors that he believed constituted proper cause or change of circumstances. He suggested that Cordell had mental health problems, and asserted that her moves and relationships were destabilizing the

child's home life.² Although a parent's mental health problems and poor relationship choices might rise to the level of proper cause or a change in circumstances that would warrant revisiting custody, not all will; many parents routinely manage mental health issues, and changes in relationships are part of normal life changes. In his motion, Argel did not offer any evidence that Cordell had since the last hearing developed a mental health problem that interfered with her ability to parent and did not present evidence that any mental health problem Cordell might have had actually had an adverse effect on the child. He likewise did not present any evidence beyond his speculation that Cordell's relationship decisions were adversely affecting the child. Although a change in residences could constitute a change in circumstances if it had a significant effect on the child, many such moves will constitute normal life changes that do not significantly alter the child's living arrangements. See *Brausch v Brausch*, 283 Mich App 339, 356-358; 770 NW2d 77 (2009). Without an offer of proof that demonstrated that these purported changes had actually affected the child's well-being, Argel's motion failed to show proper cause or a change of circumstances that warranted revisiting custody or even holding a hearing as to whether Argel met that threshold. See *Vodvarka*, 259 Mich App at 512; MCR 3.210(C)(8).

Argel did not, however, rely on these changes alone as grounds for revisiting custody. He asserted that the child had begun to exhibit concerning behaviors—such as hitting herself—and additionally indicated that the child had said that Cordell routinely hit her. Argel attached investigative reports and video evidence supporting his contention that the child had begun to engage in self-injurious behavior, including having emotional outbursts. He also presented evidence—including a video of an outburst and a recorded interview—that the child had said that Cordell had been hitting her. He further alleged and presented evidence that the child had told an investigator that she had witnessed domestic violence between Cordell and her then live-in boyfriend.

The fact that a parent has physically abused or neglected a child implicates several best-interest factors, in particular MCL 722.23(k), and in most cases will be a matter of such magnitude that it would constitute proper cause or a change of circumstances sufficient to warrant revisiting custody. See *Vodvarka*, 259 Mich App at 512-513; see also *Shann v Shann*, 293 Mich App 302, 306-307; 809 NW2d 435 (2011). Accordingly, if Argel could establish these facts, the facts would meet the proper cause or change of circumstances threshold. See *Vodvarka*, 259 Mich App at 512. In that case, Argel would be entitled to a full custody hearing at which the trial court could make the requisite findings of fact and determine the child's best interests.

² Argel raised several new grounds for revisiting custody in his motion for reconsideration. A trial court, however, does not err by refusing to consider a ground for relief raised for the first time in a motion for reconsideration. See *Pierron v Pierron*, 282 Mich App 222, 264; 765 NW2d 345 (2009). And we decline to consider those grounds as unpreserved for appellate review. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

Cordell responded to Argel's motion by arguing that Argel had fabricated his claims. She further got Argel to concede that Child Protective Services had not pursued any action against her. The evidence that the agency chose not to take action gave rise to an inference that the allegations were unfounded, or that they were not significant enough to warrant intervention, but the agency's decision was not controlling. See, e.g., *Shann*, 293 Mich App at 306-307. Moreover, Argel supported his motion with video evidence that tended to suggest that the child had developed behaviors that were troubling, which may be related to changes in discipline or to her custodial environment. A child's behavior changes can constitute a change in circumstances that would warrant revisiting custody if those changes have a significant effect on the child's life. *Vodvarka*, 259 Mich App at 512-513. Consequently, Argel's motion included allegations and evidence sufficient to establish—at the very least—that there were “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); see also *Vodvarka*, 259 Mich App at 512.

The trial court, however, refused to consider Argel's video evidence on the ground that the videos had not been transcribed. There is no rule of evidence that requires that a video be transcribed before it can be considered as evidence. Assuming that Argel could have authenticated the video evidence at the hearing, see MRE 901, the videos would be admissible under MRE 401 and MRE 402. See *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991) (noting that custody determinations must be made after determining facts that have been established by admissible evidence). The trial court should have considered his evidence and determined whether the evidence was such that, if left undisputed, it would satisfy the proper cause or change of circumstances threshold or, if it determined that there was a question of fact as to whether that threshold had been met, it should have held a hearing to make specific findings as to the underlying facts.

At the hearing on the motion, the trial court opined that Child Protective Services would have filed a petition if it had concerns. But the fact that child protective services might not have felt that the case warranted a petition did not establish that Cordell had not engaged in conduct that amounted to proper cause or a change in circumstances. See *Shann*, 293 Mich App at 306-307. Indeed, a change in disciplinary techniques to include corporal punishment may constitute a change in circumstances that has a significant effect on the child. See *Vodvarka*, 259 Mich App at 512-513.

The trial court also did not consider the evidence that the child had begun to engage in self-injurious behavior and that she was struggling with frustration. Such a dramatic change in behavior might warrant revisiting custody. *Id.* It is evident that Cordell disputed whether there had in fact been a behavior change. She dismissed Argel's claims by stating that whatever issues the child was having were confined to her visits to Texas. And she suggested that the child's problems might have arisen from Argel telling her that she would have to stay in Texas. Cordell's version of events may very well be true and, in that case, the evidence would show that Argel had not established grounds for revisiting custody. The trial court, however, could not merely accept Cordell's unsworn testimony or otherwise decide the issue on the pleadings. See *Schlender*, 235 Mich App at 233. Rather, because there was a dispute about the facts that clearly implicated whether Argel had met his burden or persuasion for revisiting custody, the trial court had to hold an evidentiary hearing to resolve the dispute. See *Vodvarka*, 259 Mich App at 512-513.

III. CONCLUSION

The trial court erred when it determined that Argel's motion for a change in custody did not on its face meet the threshold requirement of proper cause or change of circumstance. There was a factual dispute that had to be resolved before the trial court could determine whether Argel established proper cause or a change of circumstances sufficient to warrant revisiting the current child custody arrangement. Consequently, we reverse and vacate the trial court's orders dismissing Argel's motion for a change in custody and remand for an evidentiary hearing to determine whether Argel established proper cause or a change of circumstances that would warrant a custody hearing. Given our resolution of this issue, we decline to address the alternate bases for relief that Argel argued on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We further order that no party may tax his or her costs. See MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto