

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN PAUL DENNIS,

Plaintiff-Appellant,

v

MINDY LEA GOYER, f/k/a MINDY LEA
DENNIS,

Defendant-Appellee.

UNPUBLISHED

July 1, 2014

No. 318613

Kalamazoo Circuit Court

LC No. 2009-006069-DM

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying his motion for change of custody with respect to the parties' minor child. We affirm.

In February 2010, the trial court issued a ruling from the bench following the parties' divorce trial. The court awarded the parties joint legal and physical custody of their child. A judgment of divorce incorporating the trial court's ruling was not entered until October 2010. In June 2010, in between the divorce trial and entry of the divorce judgment, defendant was seriously injured in a motor vehicle accident. As a result of the accident and associated injuries, defendant needed the assistance of caregivers, her mobility was substantially limited, she was prescribed numerous drugs, and defendant had a variety of deficits. Nearly three years after the accident, in May 2013, plaintiff filed a motion to change custody, requesting sole physical custody of the child. He claimed a change of circumstances, arguing that defendant's physical and mental health had deteriorated, that defendant's home environment was chaotic and potentially dangerous, and that plaintiff now had more time to spend with the child. The trial court conducted an evidentiary hearing on the threshold issue of whether there had been a change of circumstances or proper cause justifying modification of the custody award. The court ruled that plaintiff failed to establish a change of circumstances or proper cause, and it therefore denied plaintiff's motion, leaving intact the award of joint physical custody.

On appeal, plaintiff argues that the trial court's determination that there was not a change of circumstances or proper cause was against the great weight of the evidence, given the car accident, defendant's resulting disability, her treatment for prescription pain medication addiction, defendant's dependence on numerous prescription drugs, the deterioration of defendant's mental and physical capabilities, the deterioration of defendant's relationship with

the child, the child's anxiety and stress in living with defendant, the child's parental preference, defendant's inability to keep up with the demands of an 11-year-old child, defendant's unsuitable home life, and the improvement in plaintiff's work and home situation. Plaintiff further maintains that the trial court abused its discretion by refusing to hear evidence related to proper cause and a change of circumstances on the basis that said evidence also related to the child's best interests.

With respect to child custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. MCL 722.27 provides in relevant part:

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

...

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances[.]

The seminal case on the threshold inquiry of whether there existed proper cause or a change of circumstances for purposes of modifying a custody order is *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). In construing MCL 722.27(1)(c), the *Vodvarka* panel stated that the party seeking a change in custody must establish, by a preponderance of the evidence, either proper cause or a change of circumstances, and if the movant fails to so establish, "the court is precluded from holding a child custody hearing." *Vodvarka*, 259 Mich App at 508-509; see also *In re Anjoski*, 283 Mich App 41, 53; 770 NW2d 1 (2009).¹ Absent satisfaction of the burden to show proper cause or a change of circumstances, a trial court is not authorized under the statute to revisit a valid prior custody decision and to engage in reconsideration of the statutory best-interest factors. *Vodvarka*, 259 Mich App at 508-509. The purpose of requiring proper cause or a change of circumstances, as well as requiring clear and convincing evidence to alter an established custodial environment, is to erect a barrier against removing a child from an established custodial environment except in compelling cases. *Id.* at 509; *Anjoski*, 283 Mich App at 53.

In *Vodvarka*, this Court explained the nature of evidence that would support a finding of "proper cause" or "change of circumstances," stating:

¹ The *Vodvarka* panel subsequently reiterated that "[t]he 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 (thus establishing the burden of proof) and conduct a review of the best interest factors." *Vodvarka*, 259 Mich App at 509.

In summary, to 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.

...

[W]e hold that in 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. [*Vodvarka*, 259 Mich App at 512-514.]

We initially address plaintiff's misguided argument under MCR 3.210(C)(8) that the trial court was required to find a change of circumstances or proper cause on the basis of the allegations in plaintiff's motion to change custody and two sets of requests for admissions, all of which plaintiff characterizes as an “offer of proof.” Therefore, according to plaintiff, the trial court should have proceeded to conduct an evidentiary hearing on the statutory best-interest factors, MCL 722.23. MCR 3.210(C)(8) provides:

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.

The plain and unambiguous language of the court rule clearly applies to the initial decision by a court regarding whether to conduct an evidentiary hearing in the first place when faced with a motion to change custody. There is no indication in the language of MCR 3.210(C)(8) that the offer of proof can satisfy the requirement of establishing a change of circumstances or proper cause or otherwise serve as substantive evidence for a decision on the merits. Evidently, plaintiff construes MCR 3.210(C)(8)'s reference to an “evidentiary hearing” as alluding to an evidentiary hearing on the best-interest factors and not on the threshold issue, with the offer of proof being utilized to establish the threshold, but nothing in the plain language of the court rule limits its application to a best-interest hearing as opposed to an evidentiary hearing on proper cause or a change of circumstances. And *Vodvarka* makes clear that an evidentiary hearing regarding a change of circumstances or proper cause, while not always necessary, may be appropriate in some instances. *Vodvarka*, 259 Mich App at 512. Again, the

offer of proof is merely employed to decide whether or not to conduct an evidentiary hearing, and the court here conducted an evidentiary hearing.

We also note that allegations in a motion do not constitute an offer of proof.² We do recognize that requests for admissions are a different matter and that they are controlled by MCR 2.312. A change of circumstances or proper cause could be established by way of a request for admissions, given that an admitted matter, which can arise from a failure to timely respond, MCR 2.312(B)(1), “is conclusively established unless the court on motion permits withdrawal or amendment of [the] admission[.]” MCR 2.312(D)(1). “For good cause the court may allow a party to amend or withdraw an admission.” MCR 2.312(D)(1). Plaintiff acknowledges that the first set of requests for admissions were indeed answered, but he then broadly asserts that the answers supported a conclusion that a change of circumstances or proper cause had been established. However, plaintiff fails to provide any explanation or insight with respect to which answers to the 77 individual requests support establishment of the threshold. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (an appellant cannot simply announce a position or assert error and then leave it up to this Court to rationalize and discover the basis for the claim or to unravel and elaborate the argument). In regard to the second set of requests for admissions, there were only four total individual requests, which did go unanswered, but none of them dictated a ruling that the threshold was established even if deemed admitted for failure to respond.

With respect to plaintiff’s argument that the evidence presented at the hearing showed a change of circumstances or proper cause for the litany of reasons set forth by plaintiff, it is abundantly clear from the record, as recognized by the trial court, that defendant was in extremely poor condition following the accident in June 2010, but that she had rebounded considerably by the time plaintiff’s motion to change custody was filed nearly three years later. Although defendant clearly continues to struggle with some physical and mental deficits and limitations and must still take numerous prescribed medications, we are not prepared to rule that the trial court erred in concluding that defendant’s problems did not reach the magnitude of having a *significant* effect on the child’s well-being. There was sufficient evidence to support the trial court’s determination that, by the time of plaintiff’s motion, defendant was physically able to participate in the child’s activities and that the prescription drugs did not render her incapable of caring for the child. Further, with respect to the issues concerning the child’s education, his baseball games, and certain other activities and appointments and defendant’s associated level of participation and attendance, matters were improving in those areas, the record was not sufficiently developed as to place direct blame on defendant,³ the problems were

² An “offer of proof” consists of the evidence itself, such as tangible evidence or testimony, an explanation of its relevance, and an argument supporting admissibility. Black’s Law Dictionary (7th ed).

³ For example, plaintiff notes that the child was absent from school more often when in the care and custody of defendant as compared to the times when plaintiff had custody. There is nothing in the record to support a conclusion of wrongdoing on defendant’s part in regard to the absences; perhaps the child was simply ill more often when in defendant’s care.

not that significant in the grand scheme of the child's life and environment, and/or they were normal life changes in the life of a child. The trial court's factual findings were not against the great weight of the evidence. Additionally, defendant's receipt of SSI benefits on the basis of her accident-related disability did not mean that her health-related issues are having or could have a significant effect on the child's well-being.

In regard to the alleged deterioration of the child's relationship with defendant, the trial court attributed this to the counseling sessions in which plaintiff and the child would solely meet with the therapist to the exclusion of defendant. There was evidence to support the trial court's conclusion that plaintiff did not tell defendant about the counseling when it began. The court found that the counseling sessions reflected a purposeful effort by plaintiff to alienate the child from defendant and to pressure the child into favoring plaintiff over defendant. The record makes clear that the trial judge, who handled the divorce trial, the motion to change custody, and other related matters, found plaintiff to be somewhat manipulative and that the court questioned his sincerity and credibility. On such matters, we defer to the trial court's assessments. *Kessler v Kessler*, 295 Mich App 54, 64; 811 NW2d 39 (2011).

We have examined and evaluated all the reasons and evidence set forth by plaintiff in attempting to establish a change of circumstances or proper cause, and we hold that he has failed to show that the trial court's findings were against the great weight of the evidence or that the court otherwise erred in its ruling. The record simply does not indicate that the grounds relied on by plaintiff have had or could have a significant impact on the child's well being.

Finally, plaintiff maintains that the trial court abused its discretion by refusing to hear evidence related to proper cause and a change of circumstances on the basis that said evidence also related to the child's best interests. Plaintiff focuses, once again, on MCR 3.210(C)(8), and we have already rejected his construction and application of this provision. Further, as stated earlier in this opinion, absent satisfaction of the burden to show proper cause or a change of circumstances, a trial court is not authorized under the statute to revisit a valid prior custody decision and to engage in reconsideration of the statutory best-interest factors. *Vodvarka*, 259 Mich App at 508-509.⁴ Accordingly, we do not find error in the trial court's decision to generally exclude evidence concerning the best-interest factors. To the extent that the trial court's ruling effectively excluded evidence that may have been relevant to the threshold issue,

⁴ We do note that, while not required, it would not constitute error to conduct a single evidentiary hearing that encompasses: whether there exists proper cause or a change of circumstances as needed to modify custody; a determination of the child's established custodial environment, bearing on the burden of proof; an examination of the statutory best-interest factors; and a ruling on the custody motion. *Mitchell v Mitchell*, 296 Mich App 513, 517-518; 823 NW2d 153 (2012). *Mitchell* does indicate, however, that the issue concerning proper cause or a change of circumstances must be the first issue reviewed and resolved by the trial court. *Id.*

plaintiff fails to identify the nature of this evidence and the argument is thus waived. *Mudge*, 458 Mich at 105.

Affirmed.

/s/ William B. Murphy

/s/ Douglas B. Shapiro

/s/ Michael J. Riordan