

STATE OF MICHIGAN
COURT OF APPEALS

NATHAN M. BROWN,

Plaintiff-Appellant,

v

LYNETTE ANN BROWN,

Defendant-Appellee.

UNPUBLISHED

January 3, 2013

No. 309890

Clinton Circuit Court

LC No. 09-021478-DM

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

In this custody dispute, the parties entered a consent judgment of divorce on June 30, 2010, wherein both parties were awarded joint legal custody of their three minor children, defendant was awarded primary physical custody, and plaintiff was awarded significant parenting time. On April 11, 2012, the trial court entered an order wherein it limited plaintiff to four hours of supervised parenting time per week and held that defendant had shown proper cause or changed circumstances existed to warrant an evidentiary hearing on whether to terminate joint legal custody in accord with the Child Custody Act (CCA), MCL 722.21 *et seq.* Plaintiff appeals the April 11, 2012, order as of right. For the reasons set forth in this opinion, we vacate the trial court's order and remand for further proceedings.

I. BACKGROUND

On July 28, 2009, plaintiff filed a complaint for divorce and a consent judgment of divorce (JOD) was entered on June 30, 2010. The JOD provided that the parties would share joint legal custody of their three minor children, PB, DB, and MB, and that defendant would have primary physical custody of the children. The JOD provided that plaintiff would have a significant amount of parenting time with the children. Specifically, during the school year, plaintiff had parenting time with PB and DB on alternate weekends, and on Tuesday evenings and alternate Thursday evenings. Plaintiff's parenting time with MB, who was nine months old at the time of the divorce, was to increase gradually. Plaintiff was also awarded parenting time on alternate spring breaks and alternate birthdays and holidays. During the summer, the parties were to alternate weeks with the children.

On April 25, 2011, plaintiff moved to change custody and requested that he be awarded full legal and physical custody of the children. Defendant responded by filing a motion to change custody wherein she requested that the trial court award her full legal custody and

requested that plaintiff's parenting time be supervised. Defendant alleged that she should be awarded full legal custody because the parties could not agree on essential decisions regarding the minor children. With respect to parenting time, defendant alleged, in part, that supervised parenting time was appropriate because plaintiff's behavior "has been rash and irresponsible."

The trial court referred the case to a hearing referee. The referee denied plaintiff's motion to change custody on grounds that plaintiff had failed to show changed circumstances or proper cause. With respect to defendant's motion to terminate joint-legal custody, defendant argued that the parties' inability to agree on essential decisions amounted to changed circumstances or proper cause warranting an evidentiary hearing. Defendant argued that plaintiff disagreed with her decision to send the children to a catholic school; however, defendant agreed that she could file a motion with the court to resolve the school issue in lieu of changing custody. Defendant also argued that plaintiff insisted on taking the children to a dentist in Eaton Rapids as opposed to taking them to a dentist closer to where defendant lived. However, defendant agreed that a prior court order allowed plaintiff to take the children to a dentist of his choice if he were willing to pay for the dental care. Defendant also argued that she and plaintiff had a disagreement about a medical care provider on one occasion. In addition, defendant argued that plaintiff brought the children to psychological counseling without first consulting with her and she indicated that, in her opinion, the children did not need psychological counseling. Defendant also argued that plaintiff allowed a friend who had been accused of felony embezzlement to attend one of the children's field-trips in plaintiff's stead. Defendant argued that the friend had not been convicted of anything and was not accused of assaultive or criminal sexual conduct. Finally, defendant argued that plaintiff did not bring the children to church on the weekends that he had parenting time with the children.

Plaintiff responded, arguing that he cooperated with the catholic school where PB attended and did not object to enrolling DB at the same school. With respect to the children's dental provider, plaintiff argued that the disagreement arose when there was a lapse in insurance and he stated that he did not oppose bringing the children to a dentist near where defendant lived. Plaintiff also stated that with respect to medical care, he brought DB to an urgent care center during his parenting time because he thought DB needed treatment for his eye. Plaintiff offered proof that defendant told him to seek emergency care for the child if plaintiff thought it was necessary. With respect to counseling, plaintiff argued that he brought the children to counseling on the recommendation of PB's teacher. Plaintiff also stated that he did not interfere with defendant bringing the children to church.

After hearing the parties' arguments and offers of proof, the referee denied defendant's motion to terminate joint-legal custody after finding that defendant had failed to show changed circumstances or proper cause warranting an evidentiary hearing on the issue. The referee reasoned that plaintiff participated with the children's catholic school and had agreed that both PB and DB could attend the same school. The referee found that plaintiff had not interfered with the children attending church and that plaintiff was not obligated to take the children to church during his parenting time. The referee reasoned that dental and medical care were non-issues where there was a prior court order regarding dental care and where the dispute regarding treatment for DB's eye was not significant. The referee concluded that the issue over the field trip was not significant where plaintiff's friend had not been convicted of any crime and where the friend was not accused of assaultive or criminal sexual conduct. Finally, with respect to

counseling, the referee agreed that plaintiff's unilateral decision to seek counseling was a violation of joint-legal custody. However, the referee concluded that a change in custody was not the appropriate remedy and noted that defendant could file a motion to show cause. The referee ordered independent psychological evaluation of the children and ordered both parties to participate in co-parenting counseling.

The referee proceeded to address defendant's motion for supervised parenting time. Defendant argued that, since the entry of the JOD, plaintiff had acted in an increasingly "erratic" and "unpredictable" manner. Defendant offered copies of text messages sent to her from Melissa Clewley, plaintiff's girlfriend at the time. Specifically, in the text messages, Clewley informed defendant that plaintiff was "circling the drain mentally," was "poison to the kids," and was having an "extremely hard time keeping [his] lies together." Clewley informed defendant that plaintiff showed signs of drug use, and she was suspicious that plaintiff was using cocaine. Clewley also informed defendant that plaintiff cheated on Clewley with two other women, stole her gun, and had \$14,000 cash at his home. Clewley also stated that plaintiff acted erratically, did not do anything for his children, and had Clewley watch the children during his parenting time. Clewley stated that she hoped plaintiff never obtained joint custody because the children would suffer. Defendant also offered a letter that Clewley wrote to plaintiff informing him not to trespass onto her property. Defendant argued that supervised parenting time was appropriate because plaintiff refused to deal with her as an adult, made wild statements, and instigated a physical altercation at one of DB's tee-ball games.

After hearing defendant's offer of proof, the referee found that defendant had shown changed circumstances or proper cause that warranted an evidentiary hearing regarding plaintiff's parenting time. The referee proceeded to hold an evidentiary hearing that spanned four days. At the hearing, Clewley testified and essentially recanted everything she stated to defendant regarding plaintiff. Clewley testified that, at the time, she was separated from plaintiff and had agreed to give defendant "dirt" on plaintiff so that she could continue to see defendant's children. The referee also heard testimony from the parties and family members, and Kathy Coscarelli, the therapist to whom plaintiff had brought the children.

On October 14, 2011, the fourth and final day of the hearing, the referee denied defendant's motion for supervised parenting time. However, court staff failed to properly record or transcribe the fourth and final day of the proceeding. As a result, part of plaintiff's testimony and all of the referee's findings of fact and reasoning underlying his recommendation is missing from the record. The referee entered a written recommendation on October 19, 2011.

On November 4, 2011, defendant objected to the referee's recommendation and requested de novo review in the trial court. The trial court held a hearing on February 17, 2012, where the court allowed defendant to re-examine plaintiff in an effort to duplicate plaintiff's testimony that was missing from the lost transcript. The parties did not introduce any other new evidence and the court heard arguments and took the matter under advisement.

On February 27, 2012, before the court issued its decision on defendant's objections, defendant filed an emergency motion to suspend parenting time, wherein defendant indicated that she had obtained a personal protection order (PPO) on plaintiff. Defendant indicated that she obtained the PPO after learning new information from Clewley, who was then married to

plaintiff. In particular, defendant alleged that Clewley had informed defendant that plaintiff had “made very specific, violent, and articulated threats against [defendant] and her children” and had “threatened to kill or seriously [injure] the Defendant and/or the minor children, and that she was extremely concerned for the Defendant and the minor children’s safety.” In addition, defendant alleged that Clewley communicated to her “many alarming and disconcerting matters regarding [plaintiff], his obsession with the Defendant, and his actions, and the Plaintiff appears to be angry, obsessive, and bent on destroying the Defendant literally and/or figuratively.” Defendant stated that, following the February 17, 2012 hearing, she refused to allow plaintiff to have parenting time with the children. Defendant requested that the trial court suspend parenting time and order plaintiff to attend counseling.

On March 8, 2012, the trial court held a hearing in the PPO proceeding. The record of that hearing is not part of the record. On March 20, 2012, the trial court held another hearing wherein the trial court addressed defendant’s objections to the referee’s recommendations. The court held that, following the de novo review hearing on February 17, 2012, it had initially been inclined to defer to the referee’s recommendation. However, the court explained that, after hearing testimony at the March 8, 2012 PPO hearing, it had decided to grant defendant’s objections to the referee’s recommendations. The court explained that at the PPO hearing, both plaintiff and his friend Dustin Twitchell testified and admitted to engaging in what the court termed, “stalking behavior.” The court reasoned that this new evidence amounted to changed circumstances or proper cause that warranted an evidentiary hearing with a referee to determine whether to terminate joint legal custody. In addition, the court reasoned that the evidence warranted limiting plaintiff to four hours per week of supervised parenting time. In an April 11, 2012 written order, the trial court articulated its reasoning as follows,

the Court has made findings that the Plaintiff stalked the Defendant on at least three occasions, once with counsel, once on his own, and once using his friend, Mr. Twitchell and that this additional behavior, which was admitted by the Plaintiff and by Mr. Twitchell, is very troubling to the Court and does directly affect the children due to the effect on the Defendant, the undermining of the Defendant, and the stalking of the Defendant.

[T]he court has found that at least several of the factors in the Michigan Child Custody Act would be affected by the actions of the [plaintiff], including the love, affection, and other emotional ties existing between the parties involved in the child and the capacity and disposition of the parties involved to give the child love, affection, and guidance. The Court also finds that the Plaintiff’s actions show the Plaintiff’s unwillingness and inability to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent and that the Plaintiff’s actions in taking the child to a non-main stream therapist and doing so without the approval of the Defendant served to undermine the Defendant.

The court held that it may review the parenting time after plaintiff underwent a psychological evaluation and began participation in co-parenting counseling with defendant. The court also ordered plaintiff to complete an anger-management course. This appeal ensued.¹

II. APPLICABLE LAW

In this case, both parties sought to modify an existing custody order. The CCA governs the modification of a custody order, and it mandates that a party seeking modification must “first establish proper cause or a change of circumstances.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003), citing MCL 722.27(1)(c). “To establish proper cause, the moving party must establish by a preponderance of the evidence an appropriate ground that would justify the trial court’s taking action.” *Mitchell v Mitchell*, 296 Mich App 513, ___; ___ NW2d ___ (2012) (slip op. at 2). “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.” *Vodvarka*, 259 Mich App at 512 (emphasis added). To establish a change of circumstances, the moving party must show that “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. “These must be more than normal life changes, ‘and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child.’” *Shann v Shann*, 293 Mich App 302, 306; 809 NW2d 435 (2011), quoting *Vodvarka*, 259 Mich App at 513-514.

“Upon finding proper cause or a change in circumstances sufficient to revisit an existing custody order, the circuit court’s threshold determination is whether an established custodial environment exists.” *Pierron v Pierron*, 282 Mich App 222, 244; 765 NW2d 345 (2009). “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.’” *Id.*, quoting MCL 722.27(1)(c). If the trial court finds that an established custodial environment exists with one or both parents, then the court “*shall not* modify or amend its previous judgments or orders or *issue a new order so as to change the established custodial environment* of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.” MCL 722.27(1)(c) (emphasis added). Thus, where an established custodial environment exists, the party seeking to modify a prior custody order has the burden to prove by clear and convincing evidence that the modification is in the best interests of the child. *Mitchell*, 296 Mich App at ___ (slip op. at 3). “In determining whether the moving party has satisfied this burden, the trial court must consider all of the statutory best-interest factors set out in MCL 722.23.” *Id.*

III. STANDARDS OF REVIEW

¹ After plaintiff filed a claim of appeal, the trial court entered another order clarifying that its April 11, 2012, order was not a final order regarding joint legal custody. Instead, the court clarified that it had referred the case to a referee for an evidentiary hearing and application of the statutory best interest factors.

“We employ three different standards when reviewing a trial court’s decision in a child-custody dispute.” *Frowner v Smith*, 296 Mich App 374, 380-381; 820 NW2d 235 (2012). “We review the trial court’s findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error.” *Id.* “A clear legal error occurs when the trial court incorrectly chooses, interprets, or applies the law....” *Id.* (quotation omitted). To the extent we are required to interpret and apply relevant statutory provisions, such issues involve questions of law that we review de novo. *Kessler v Kessler*, 295 Mich App 54, 59; 811 NW2d 39 (2011).

IV. ANALYSIS

In this case, there are two critical aspects to the trial court’s order: first, the court held that defendant had shown proper cause or changed circumstances sufficient to warrant a custody hearing to address joint-legal custody; second, the court significantly altered plaintiff’s parenting time. We proceed by addressing each of these holdings separately.

i. Joint Legal Custody

Plaintiff contends that the trial court erred when it referenced evidence introduced at the PPO hearing “without warning or an opportunity to respond.”

In this case, with respect to joint legal custody, the trial court found that proper cause or changed circumstances existed sufficient to warrant a custody hearing on whether to terminate joint legal custody. A determination whether proper cause or changed circumstances exists involves a factual inquiry. See *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). In making this inquiry, a trial court need not hold an evidentiary hearing on the topic. *Id.* However, a trial court’s findings of fact must be sufficient to allow this Court to determine whether the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009).

Here, irrespective of plaintiff’s arguments regarding “warning” and an “opportunity to respond,” the trial court failed to make sufficient findings of fact to allow review of whether there was proper cause or changed circumstances that warranted a hearing on whether to terminate joint legal custody. *Id.* Defendant’s motion to terminate joint legal custody was premised on the parties’ alleged inability to make decisions regarding the welfare of their children. However, the trial court failed to make sufficient findings of fact based on the record evidence to show how the alleged inability to make decisions amounted to proper cause or changed circumstances. Instead, the trial court referenced evidence from a hearing that is not part of the proceeding. That evidence was not made part of the record; hence, the trial court’s findings were insufficient to allow appellate review and remand is therefore appropriate.

ii. Supervised Parenting Time

Next, plaintiff contends that the trial court abused its discretion when it found that plaintiff’s conduct justified supervised parenting time.

Before a trial court can substantially modify parenting time such that it impacts an established custodial environment, the trial court must first find proper cause or changed

circumstances under the *Vodvarka* framework discussed above. *Shade v Wright*, 291 Mich App 17, 27; 805 NW2d 1 (2010). If proper cause or changed circumstances exist, the trial court must then proceed to determine if modification of parenting time would alter an established custodial environment. *Id.* As noted, “[a]n 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.’” *Pierron*, 282 Mich App at 244; quoting MCL 722.27(1)(c). And, the mere fact that one parent has primary physical custody is not dispositive of whether a custodial environment exists with *both* parents. See *id.* (a custodial environment can exist with both parents). Finally, if the trial court finds that an established custodial environment exists, the court cannot modify parenting time in a manner that would alter that environment absent clear and convincing evidence that modification is in the best interests of the children. *Shade*, 291 Mich App at 27; *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008), quoting *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004) (“if a requested modification in parenting time amounts to a change in the established custodial environment, it should not be granted unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child”). In order to determine whether clear and convincing evidence warrants modification of an established custodial environment, a trial court must hold an evidentiary hearing and conduct an “analysis under the best interest factor framework.” *Powery*, 278 Mich App at 528; see also *Mitchell*, 296 Mich App at ___ (slip op at 3) (in determining whether there is clear and convincing evidence to alter an established custodial environment, the trial court must consider “all of the statutory best-interest factors set out in MCL 722.23”).

In this case, plaintiff’s parenting time was governed by a prior custody order, i.e. the JOD, where plaintiff enjoyed significant parenting time with his children. Thus, before the trial court could substantially alter plaintiff’s parenting time, the court needed to first determine whether there was proper cause or changed circumstances under *Vodvarka*, 259 Mich App at 508. *Shade*, 291 Mich App at 27. Here, the trial court failed to do so. Instead, the trial court simply concluded that evidence adduced at the PPO hearing was sufficient to “impede upon the children’s right of parenting time with [plaintiff], to limit it substantially, and the Court is going to do that.” This amounted to clear legal error.

Moreover, even if the trial court found proper cause or changed circumstances, before modifying plaintiff’s parenting time in a significant way, the court needed to determine if the modification would alter an established custodial environment between plaintiff and the minor children. *Id.* Here, the trial court failed to make such finding. The mere fact that defendant had primary physical custody of the children was not dispositive as to whether a custodial environment existed with plaintiff where a custodial environment can exist with both parents. Under the terms of the JOD, plaintiff had substantial parenting time with the children. In addition to some holidays and birthdays, during the school year, the children spent every other weekend and two evenings a week with plaintiff. During the summer, the children spent every other week with plaintiff. Furthermore, plaintiff participated in the children’s schooling, provided child support, and participated in other decisions affecting the children’s upbringing. The trial court failed to determine whether this and other record evidence showed an established custodial environment existed between plaintiff and the children. Therefore, the court erred when it significantly altered plaintiff’s parenting time without first having made such finding. Accordingly, reversal and remand for further proceedings is appropriate. We note that, if on

remand the trial court finds a custodial environment existed between plaintiff and the children, the court cannot significantly alter plaintiff's parenting time without first holding a hearing to apply the statutory best interest factors and determine whether such modification is in the children's best interests. See *Powery*, 278 Mich App at 528.

iii. Judicial Disqualification

Plaintiff contends that on remand, the trial court judge should be disqualified and this case should be referred to a different judge. Plaintiff failed to preserve this issue for review by failing to file a motion disqualify within 14 days of discovering the alleged basis for disqualification. *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). Nevertheless, we will proceed to address plaintiff's argument.

Every party is entitled to have a neutral and detached decision-maker hear and decide a case. See *Olson v Olson*, 256 Mich App 619, 642; 671 NW2d 64 (2003). If a party is seeking judicial disqualification, the party carries a heavy burden of overcoming the presumption that the judge was unbiased. *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009).

In this case, plaintiff contends that the trial judge should be disqualified because she made several erroneous rulings and committed legal errors. However, a judge's erroneous rulings are not a basis for disqualification even if "vigorously and consistently expressed." *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995) (internal quotation marks and citations omitted). Plaintiff also contends that the trial judge's use of words such as "creepy," "bizarre," and "dysfunctional" demonstrate bias toward plaintiff. However, "while personal animus toward a party requires disqualification," a judge's hostile or critical comments against a party are not grounds for recusal. *In re MKK*, 286 Mich App at 566. Here, plaintiff has failed to show that the judge's choice of words amounted to anything more than critical comments. In sum, plaintiff's arguments that the trial judge should be disqualified lack all merit.

Vacated and remanded for further proceedings consistent with this opinion. Neither party having prevailed in full, neither may tax costs. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra