

STATE OF MICHIGAN
COURT OF APPEALS

JAY ROBERT JOHNSTON,

Plaintiff/Counter-Defendant-
Appellant,

v

AUTUMN NICOLE JOHNSTON,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
August 21, 2012

No. 308247
Lapeer Circuit Court
LC No. 09-041666-DM

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I agree with the majority in all respects except that, in my view, remand for further factual findings is unnecessary. In order to hold a hearing to modify an existing custody order, the movant must establish a proper cause or a change of circumstances as a threshold for holding a child custody hearing in the first instance. The majority concludes that remand is necessary to establish whether the “little issues” to which the trial court referred satisfy that threshold requirement, and does not believe that a sufficient record yet exists to make that determination. I disagree. I ultimately conclude that a child custody hearing should never have been held; however, because a custody hearing *was* held and a record developed, we may review that record. My review of that record leads me to conclude that the threshold requirement of either a proper cause or change of circumstances was not met. Accordingly, I would vacate the trial court’s order modifying custody and reinstate the original custody arrangement from the September 3, 2010 judgment of divorce.

As an initial matter, I note that the trial court erred when it described the original custody agreement in the judgment of divorce as “a conditional custody order and the condition was that it would be sole physical custody to Dad unless Mom was able to relocate in the same school district . . . “ Under MCL 722.27(1)(a), a trial court is empowered to award custody to “one or more of the parties involved or to others” “If the language of a statute is plain and

unambiguous, its provisions will be applied as written.”¹ Here, the plain language of the statute is unambiguous, and it does not empower the court to award custody subject to the fulfillment of a condition precedent. Accordingly, although I agree with the majority that this is a child custody matter and should be analyzed as such, I would go further and note that the trial court’s treatment of the custody arrangement in the judgment of divorce as a “conditional custody order” is not authorized by the statute.

Turning now to the central issue, as this Court has noted, “[t]he goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances.”² Accordingly, under the statute, a trial court may only properly modify a custody award if the movant establishes, as a threshold matter, proper cause or a change of circumstances.³ Indeed, if the movant fails to establish proper cause or a change of circumstance “the trial court may not hold a child custody hearing”⁴ at all.

In *Vodvarka v Grasmeyer*, this Court for the first time shed light on what constitutes “proper cause” and “change of circumstance” for purposes of MCL 722.27(1)(c). With respect to “proper cause,” the *Vodvarka* Court explained:

[T]o establish “proper cause” necessary to revisit a custody order, a movant must prove . . . 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.^[5]

With respect to “change of circumstances,” the *Vodvarka* Court explained:

[I]n 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

¹ *St Joseph’s Twp v Michigan State Boundary Comm*, 101 Mich App 407, 414; 300 NW2d 578 (1980).

² *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009).

³ MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003).

⁴ *Corporan* 282 Mich App at 603-604.

⁵ *Vodvarka* 259 Mich App at 512 (emphasis added).

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.*^[6]

I agree with the majority that neither defendant's change of residency nor her change of employment, either alone or combined, amount to a change of circumstances or proper purpose under the standards articulated in *Vodvarka*. Accordingly, on those bases the trial court should never have proceeded to a hearing on custody.

However, the trial court also referred to "a lot of little issues regarding the children. . . [that] add up to a lot" which "would justify meeting the threshold on a hearing for change of custody." The majority holds that because the trial court made "insufficient factual finding[s]" regarding the "little issues," remand for further findings with regard to the "little issues" is appropriate. I disagree. In the final analysis, I conclude that the trial court should never have held a child custody hearing. However, the trial court did hold a child custody hearing, albeit erroneously, at which it applied the best interest factors—the same best interest factors *Vodvarka* instructs should guide a court's analysis regarding whether to hold a custody hearing in the first instance.⁷ Accordingly, we need only look to the record developed during the court's application of the best interest factors during the custody hearing to determine whether there existed in this case proper cause or a change of circumstances. In this respect, the trial court has provided us with a record "sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction,"⁸ and we can determine from that record whether the "little issues" amount to proper cause or change of circumstances. I conclude that they do not.

At the custody hearing, when conducting its best interest analysis, the trial court noted that, with respect to the children, under the existing custody order:

[T]here's been a lot of back and forth over the decisions about [sic] children's schooling and their community record but I think that those things are – are *not significant* in this case. It sounds like your daughter is doing fine in her school and community. Your son has his ups and downs but it sounds like he's growing out of that, [sic] too and he'll be doing fine as well And I think if there are some problems with [your son], I don't really fault either parent for that. It may be something he's struggling with. A lot of kids struggle when their parents go through a divorce and it's nobody's fault I suspect that this is true of [your son] and hopefully that's behind you.^[9]

⁶ *Id.* at 513-514 (emphasis added).

⁷ *Id.* at 512-514.

⁸ *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009).

⁹ Emphasis added.

Similarly, the trial court found that the “capacity and disposition of the parties to give the children love, affection, [and] guidance . . . [has] continued to be strong even though [the] parenting arrangement has been different” since the time of the original custody order. In short, after reviewing the record, I do not find grounds “of such magnitude to have a significant effect on the child’s well-being,”¹⁰ nor do I find that “the conditions surrounding custody of the child, which have or could have a *significant* effect on the child’s well-being, have materially changed.”¹¹

Moreover, the trial court concluded, with respect to each best interest factor, either that there had been “no[] change[]” from the time of the original custody order, or that the factors “weigh[ed] equally” as between plaintiff and defendant. If there has been no change from the time of the original custody order, there is no change in circumstances; similarly, that some factors now weigh equally, even if they did not before, is not in itself “an appropriate ground for legal action to be taken by the trial court,”¹² in light of the strong presumption against disturbing custody determinations “except under the most compelling circumstances.”¹³

In sum, the trial court should never have held a custody hearing in the first instance, because the “little issues” to which the trial court referred did not satisfy the threshold requirement of either proper cause or a change of circumstances. Accordingly, I would vacate the trial court’s order and reinstate the original custody arrangement.

/s/ Kathleen Jansen

¹⁰ *Vodvarka* 259 Mich App at 512.

¹¹ *Id.* at 513.

¹² *Id.* at 512.

¹³ *Corporan*, 282 Mich App at 603.