

STATE OF MICHIGAN
COURT OF APPEALS

CRUZ AINSWORTH,

Plaintiff-Appellee,

v

CHEYENNE DUNKEL,

Defendant-Appellant.

UNPUBLISHED
December 11, 2018

No. 344311
Ingham Circuit Court
Family Division
LC No. 14-002766-DC

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her motion to modify a prior child custody order involving the parties' daughter. For reasons stated within, we reverse and remand for further proceedings.

I. FACTS

The parties became romantically involved when plaintiff was 16 years old and defendant was 13 years old. Defendant gave birth to LDD in 2011 when she was 15 years old. Defendant represents that from 2011 to 2014, she cared for and lived with LDD.

A Child Protective Services (CPS) complaint was filed against defendant in June 2014 for failing to protect her children from her then-boyfriend, James Lyon. After the incident in which defendant's other daughter, LDD's half-sister, was hospitalized due to Lyon forcing his fingers down her throat, the Department of Health and Human Services (DHHS) took jurisdiction over defendant's children, placed LDD's half-sister in a foster home, and placed LDD with plaintiff.

In August 2014, plaintiff filed a custody complaint requesting physical custody of LDD and reasonable parenting time. In October 2014, Conciliator Janice M. Dooley submitted her recommendations as to plaintiff's requests. Dooley noted that LDD benefitted from residing with plaintiff's parents, in addition to the support she received from them:

[I]t seems that [p]laintiff's residing at the home of his parents is a positive aspect to [LDD's] placement with him. Both [plaintiff and defendant] are young. Neither party has a GED or high school diploma. Plaintiff has home based [sic] with his parents when he had had the minor child, and in the past he has stayed

with friends as well when he didn't have the child . . . It appears that both parties, while considered adults at this time, continue to benefit from assistance from their friends and family . . . At this time, having support from capable family members is important. After consideration of available resources, [DHHS], CPS, and Child and Family Charities feel that [p]laintiff and his family are the best choices for placement of [LDD].

Dooley recommended that plaintiff be awarded sole legal custody of LDD and that defendant be awarded parenting time.

In December 2016, the court terminated its jurisdiction over LDD. In April 2017, defendant filed a motion for a change of custody, arguing that because her legal issues with CPS and DHHS were resolved, a change of circumstances occurred. The court denied defendant's motion for change in custody, but granted her request to change her parenting-time schedule.

The trial court heard defendant's motion for change of physical custody in June 2017. It ruled that defendant's change in behavior and parenting skills did not justify a change in the custodial environment of LDD, because the appropriate legal analysis focused on a change of circumstances or proper cause in the child's life, not the parent's life. At this hearing, defendant stated that she had a new boyfriend, Bruce Collard, who would not have any contact with LDD if defendant were granted overnight visitation rights. The court subsequently denied defendant's motion for a change in custody but granted her request to modify the parenting time schedule to allow overnight visits after a transition period of four weeks. In addition, the court ordered the prohibition of introducing LDD to Collard.

In February 2018, defendant complained that plaintiff had continually failed to be accommodating in altering scheduled visitations. Plaintiff explained to investigator Matthew Moreau that, while he recognized the need for LDD to have contact with her mother, he was concerned about defendant's inconsistent visits and frequent alterations to the schedule. Plaintiff also opined that LDD did not know her mother. After concerns arose that defendant was not able to attend regularly scheduled visits without Collard being present, Moreau conducted a criminal background check, which revealed that Collard had an extensive criminal record involving driving-related offenses, property damage, and assault and battery.

During the meeting with Moreau, plaintiff explained that his parents aided him in caring for LDD, notably by driving her to school and to parent-time exchanges. Additionally, plaintiff stated that, now that he had saved up enough money, he intended to move out of his parents' home and into a new home with his girlfriend. Subsequently, a background check on the girlfriend was completed and came up negative for any criminal history. Moreau then recommended alterations to the parenting time schedule and further suggested that the no-contact order with Collard be continued.

On April 6, 2018, defendant filed a motion to terminate the no-contact order, to modify parenting time, and to authorize a change in physical custody. In doing so, defendant highlighted the fact that she was no longer under investigation by CPS and that the conditions that led to the initial investigations by CPS and DHHS had been rectified. In the motion to authorize a change in custody, defendant alleged that plaintiff had abandoned LDD, asserting that a private

investigator had observed that plaintiff's parents cared for LDD frequently and dropped her off at school. Defendant alleged that after reviewing the private investigation reports, it was apparent that plaintiff had moved out of his parents' home and was living with his girlfriend. Defendant additionally alleged that plaintiff would often leave LDD in the care of his family. Furthermore, defendant maintained that plaintiff refused numerous requests for scheduled parenting time. The court entered an order granting defendant additional parenting time; however, the court indicated that it would hear defendant's motion for a change of custody at a later date.

At the April 16, 2018 hearing, defendant urged the court to lift the no-contact order with Collard because it created impediments to her ability to fully exercise parenting time with LDD. Despite plaintiff's contestation over the no-contact order, the court ordered the removal of the no-contact order and allowed defendant to amend parenting time.

In May 2018, the court denied plaintiff's motion for reconsideration. That same day, defendant filed a motion to hold plaintiff in contempt of court because, she alleged, plaintiff was refusing her parenting time. Consequently, defendant requested she be able to make up weekends that she missed with LDD. The court held an additional hearing on defendant's motion to modify the custody order. With regard to her motion to modify the custody order, defendant argued:

So around the time that [defendant] filed her parenting time complaints . . . [defendant] had suspected that [plaintiff] was essentially, maybe even – not even living with [LDD]. She had in 2017 asked the Court for physical custody and at that time the Court said no, just because [defendant is] in a good place does not mean, you know, a change in circumstance involving the child. And so in order to try to see what was really going on she did hire a private investigator to inconspicuously look at dad and look at, you know, what's going on with the child.

In case the [c]ourt needs it, I do have the private investigator here to testify but I can tell you what she will say. Is that they did a significant amount of surveillance between January and March of dad. And what they found was, dad was essentially having his parents raise this child. There was a period of time when dad did live with the child, but he was essentially never home and then after that there was a period of time that dad moved out of the house and left the child with his parents. And so our argument is, you know, even during that time [defendant] was being denied parenting time. So if there ever was a change in circumstance or proper cause, that's the situation, father's not even living with the child.

After reviewing the report from the private investigator, the court denied defendant's motion for a change of custody, stating:

The mere fact that you were able to document that the grandparents take the child to and from school is insufficient for the Court to conclude that there's a proper cause or change in circumstance that would justify a re-evaluation of the best interest factors.

II. ANALYSIS

The court abused its discretion in denying defendant's motion for a modification of custody insofar as the change in circumstances demonstrated by the evidentiary record warranted a best interests hearing.

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28. Under the great weight standard, the trial court's determination should be affirmed unless the evidence clearly preponderates in the other direction. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). The great weight of the evidence standard applies to all findings of fact. *Fletcher v Fletcher*, 447 Mich 871, 879, 900; 526 NW2d 889 (1994). This standard therefore applies to findings concerning the existence of an established custodial environment, *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), and the existence of cause to modify custody and findings regarding each custody factor, *Corporan v Henton*, 282 Mich App 599, 603-605; 766 NW2d 903 (2009). The abuse of discretion standard applies to the trial court's discretionary rulings, including to whom custody is granted. *Fletcher*, 447 Mich at 879-880. An abuse of discretion exists when the result 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. *Id.*

"The requirement [under MCL 722.27(1)(c)] that a party seeking a change in custody first establish proper cause or a change of circumstances emanates from the Child Custody Act . . ." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847, 852 (2003). "The Child Custody Act (CCA) . . . governs child custody disputes between parents, agencies or third parties." *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). The purpose of the CCA is to promote the best interest and welfare of children, and it is to be liberally construed. MCL 722.25(1); MCL 722.26(1). This standard cannot be abrogated, even in fairness to the parties. *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996). The movant for a modification of custody must establish by a preponderance of the evidence that proper cause or a change in circumstances exists. *Vodvarka*, 259 Mich App at 509.

We conclude that defendant did establish that a change in circumstances existed. In *Vodvarka*, this Court defined what a "change of circumstances" means, and explained what evidence is appropriate for a trial court to consider in making its determination:

[I]n order to establish a "change in circumstances," a movant must prove that, since the entry of the last 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 . . . [T]he 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 . . .

* * *

Because a “change of circumstances” requires a “change,” the circumstances must be compared to some other set of circumstances. And since the movant is seeking to modify or amend the prior custody order, it is evident that the circumstances must have changed since the custody order at issue was entered. Of course, evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred after entry of the last custody order. As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a “change” of circumstances. [*Vodvarka*, 259 Mich App at 513-514.]

The court’s order of October 2, 2017, was the last order regarding the custody of LDD, thereby making it the “the custody order at issue” for the purposes of determining whether a change of circumstances existed. *Vodvarka*, 259 Mich App at 514. “[T]he change of circumstances must have occurred after entry of the last custody order.” *Id.* Defendant did demonstrate that the circumstances surrounding the custody of LDD materially changed since the entry of the October 2, 2017 custody order.

Defendant argued that the changed circumstances that warranted a custody change were that plaintiff’s parents were caring for LDD regularly, that plaintiff did not appear to be living with LDD, that plaintiff had moved in with his girlfriend, and that plaintiff’s parents often cared for LDD overnight. All of these “circumstances” had changed after the entry of the October 2, 2017 amended custody order. Although the court was made aware as early as August 22, 2014, that plaintiff had relied on his parents to help provide care for LDD, the record indicates a significant material change in circumstances due to plaintiff no longer residing under the same roof as LDD. The allegations outlined in the private investigator’s report about the significant care and support plaintiff’s parents provided LDD is sufficient to establish a change in circumstances under *Vodvarka*.

Defendant also argues that plaintiff’s parents’ care for LDD and his move to a new home qualify as proper cause for modification. In *Vodvarka*, this Court defined what “proper cause” means, and explained what evidence is appropriate for a court to consider in making its determination:

[T]o 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 . . .

* * *

[P]roper cause is geared more toward the significance of the facts or events or . . . the appropriateness of the grounds offered. [*Vodvarka*, 259 Mich App at 512-515.]

Defendant asserts that both LDD's grandparents' extensive care for her and plaintiff's move away from his parents' home qualify as "proper cause". We agree. As defendant indicates, plaintiff's abstention from parenting meets the threshold in *Vodvarka* to establish proper cause. Residing in a different home than LDD and absenting himself from primary caretaker duties does not indicate the presence of a strong affection or emotional tie with LDD, nor a serious disposition to provide love, affection, guidance or a stable home environment to the child. See MCL 722.23(a)-(b), (d). While the grandparents' provision of care for LDD might be beneficial, that is not the critical inquiry for establishing proper cause. What is in question is whether plaintiff's lack of care is of such a magnitude to have a significant negative effect on LDD's well-being. For the reasons stated above, it is the opinion of this Court that plaintiff's retreat from parenting poses significant impacts on the child's well-being.

Finally, defendant claims that an evidentiary hearing was required under MCR 3.210(C)(8), which 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.

In light of our analysis above, this issue is moot. We find that the evidence clearly establishes proper cause or change in circumstances, and therefore no further evidentiary hearing is required. Rather, the trial court must proceed to analyze the best interest factors.

Reversed and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

Defendant, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Michael J. Riordan

/s/ Amy Ronayne Krause

Court of Appeals, State of Michigan

ORDER

Cruz Ainsworth v Cheyenne Dunkel

Docket No. 344311

LC No. 14-002766-DC

Michael J. Riordan
Presiding Judge

Amy Ronayne Krause

Brock A. Swartzle
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 14 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 14 days after completion of the proceedings.

/s/ Michael J. Riordan



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

December 11, 2018
Date


Chief Clerk