

STATE OF MICHIGAN
COURT OF APPEALS

JUSTIN PITT,

Plaintiff-Appellant,

v

KARA PASCHKE,

Defendant-Appellee.

UNPUBLISHED

April 22, 2021

No. 354206

Lapeer Circuit Court

LC No. 14-048189-DP

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

In this child custody dispute, plaintiff appeals as of right from the trial court’s order denying plaintiff’s motion to modify parenting time. On appeal, plaintiff argues the trial court applied the wrong legal standard to his motion. For the reasons set forth in this opinion, we vacate the trial court’s order and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The custody and visitation of the minor child born to plaintiff and defendant has been an ongoing source of friction and numerous legal proceedings initiated by both parties. Briefly, plaintiff and defendant are the biological parents of a minor child born in 2013. The issue which is the subject of this appeal arose when plaintiff moved to modify his parenting time, seeking to increase the minor child’s overnight stays by six nights per month for a total of 10 nights per month. Following a hearing on the motion to increase parenting time, the trial court denied plaintiff’s motion, finding his request “amounts, in the Court’s opinion[,] to shared custody.” The trial court further explained:

There’s nothing to support any violation of a right of first refusal, because the Court didn’t order that. And there’s something about vulgar language in the presence of the child, it turns out it was a couple years ago, and then some dental care that both parties were involved in. Otherwise, I can’t find a change of circumstances that meets the requirements.

Ultimately, the trial court concluded the events described in plaintiff's motion were "normal life changes," and the trial court did not "find there's grounds for change of circumstances under the law." Shortly thereafter, plaintiff moved for clarification of the trial court's denial of his motion to modify parenting time, arguing that the trial court should have employed the standard set forth in *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010), and not the more stringent standard in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). The trial court denied plaintiff's motion on the record, and thereafter entered a written order denying plaintiff's motion to modify parenting time "for the reasons stated on the record" This appeal ensued.

II. ANALYSIS

This Court applies three standards of review in child custody cases:

The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Vodvarka*, 259 Mich App at 507-50. (quotation marks and citations omitted).]

This Court will find a court abused its discretion when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994) (quotation marks and citation omitted). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Seifeddine v Jaber*, 327 Mich App 514, 516; 934 NW2d 64 (2019) (citation omitted).

As he did in the trial court, in his appeal, plaintiff argues the trial court erred when it applied the standard applicable to requests for change of custody and not the standard applicable to requests for modification to parenting time.

Under MCL 722.71(1)(c), if a dispute over child custody arises out of another action, the trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances" The party seeking to modify or amend the order must "establish proper cause or change in circumstances, [otherwise] the court is precluded from holding a child custody hearing" *Vodvarka*, 259 Mich App at 508. "The 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." *Id.* at 509.

With respect to parties seeking to modify or amend a custody provision, this Court has defined the term "proper cause" to mean "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.” *Vodvarka*, 259 Mich App at 511. “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.” *Id.* at 512.

Likewise, this Court has explained the term “change of circumstances” in child custody disputes means 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.” *Id.* at 513. “[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.” *Id.* at 513-514. “[E]vidence 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.” *Id.* at 514.

This Court has articulated, however, that when the movant seeks to modify parenting time, and not modify physical custody, the terms “proper cause” and “change of circumstances” have a relaxed meaning. See, e.g., *Kaeb v Kaeb*, 309 Mich App 556, 570-571; 873 NW2d 319 (2015) (“Because the imposition, revocation, or modification of a condition on the exercise of parenting time will generally not affect an established custodial environment or alter the frequency or duration of parenting time, we are persuaded that a lesser, more flexible, understanding of ‘proper cause’ or ‘change in circumstances’ should apply to a request to modify or amend a condition on parenting time.”); *Shade v Wright*, 291 Mich App at 25. (“[T]he definitions of ‘proper cause’ and ‘change of circumstances’ from *Vodvarka* do not control the facts of this case because this case involves a modification of parenting time rather than a change in custody.”).

Where the request to modify parenting time would not change the established custodial environment, a party can demonstrate “proper cause” or “change of circumstances,” for example, where “a child has begun high school and seeks to become more involved in social and extracurricular activities.” *Shade*, 291 Mich App at 31. Thus, “a party requesting a change to an existing condition on the exercise of parenting time must demonstrate proper cause or a change in circumstances that would justify a trial court’s determination that the condition in its current form no longer serves the child’s best interests.” *Kaeb*, 309 Mich App at 571-572.

Plaintiff argues that the trial court applied the more stringent definition of “change of circumstances” from *Vodvarka*, which was improper because that standard only applies to requests for changes in custody, and not requests to modify parenting time. While the trial court did not explicitly refer to the *Vodvarka* standard or the *Shade* standard, it did remark to plaintiff: “And you are asking for a change of custody. You’re asking for shared custody.” It is, therefore, reasonable for us to assume the trial court applied the *Vodvarka* standard to plaintiff’s motion because the trial court considered plaintiff’s request the equivalent of a motion to change custody.

However, the trial court erred when it concluded plaintiff’s motion was, in effect, a motion to change custody. In his motion, plaintiff sought to increase his parenting time with AP from four nights per month to 10 nights per month. While the trial court is entitled to look past the label plaintiff attached to his motion and instead examine the gravamen of his request, *Lieberman v Orr*, 319 Mich App 68, 77 n 4; 900 NW2d 130 (2017), we do not discern from plaintiff’s motion a request that would affect a change in custody.

Here, plaintiff presented evidence bearing on multiple issues, principally related to defendant's alleged inability or unwillingness to attend to the minor child's health and defendant's use of profanity and derogatory statements toward plaintiff in the minor child's presence. The trial court largely rejected the significance of the evidence, concluding it was "a couple years ago" and did not amount to "a change of circumstances that meets the requirements."

To the extent the trial court relied on the fact that some of the events in plaintiff's motion occurred between two and four years before the hearing to deny plaintiff's motion, such reliance constituted legal error. The trial court was *required* to analyze the change of circumstances that occurred after it entered the custody order in 2015. *Vodvarka*, 259 Mich App at 514 ("[T]he change of circumstances must have occurred after entry of the last custody order."). Thus, the only information it could consider to determine whether a change of circumstances occurred was information between entry of the Custody Order in 2015, and when the motion was filed. While the circumstances surrounding the particular event or piece of evidence may have some bearing on whether it impacts the analysis of whether the change is in the child's best interest, see MCL 722.27a(7), the fact that the events occurred in the four-year time span between the entry of the Custody Order and the filing of the motion was not reason alone to deny plaintiff's motion.

In *Shade*, this Court concluded a child's transition into high school and desire to participate in extracurricular activities justified a finding of a change of circumstances in the context of a request to modify parenting time. *Shade*, 291 Mich App at 30-31. We explained that while such factors would not show a change of circumstances for purposes of a dispute over physical custody, "the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time." *Shade*, 291 Mich App at 30.

Thus, under the standard this Court set forth in *Shade*, the trial court should analyze a movant's motion to determine whether the movant "demonstrate[d] proper cause or a change in circumstances that would justify a trial court's determination that the condition in its current form no longer serves the child's best interests." *Kaeb*, 309 Mich App at 571-572. However, the movant must show proper cause or change of circumstances before the trial court can assess whether the condition is in the best interest of the child. *Lieberman*, 319 Mich App at 83.

Here, plaintiff argued that as the minor child was growing older, she had a desire to spend more time with him. While the trial court disregarded it as a future occurrence, plaintiff also argued he was engaged to be married and, to that end, was in the process of purchasing a new house. While these were normal life changes that did not necessarily justify granting plaintiff's motion, under *Shade*, these facts established by a preponderance that there was a change of circumstances that warranted analysis of whether a modification to parenting time was in the minor child's best interest.

" '[P]roper cause' should be construed according to its ordinary understanding when applied to a request to change a condition on parenting time; that is, a party establishes proper cause to revisit the condition if he or she demonstrates that there is an appropriate ground for taking legal action." *Kaeb*, 309 Mich App at 571. Courts are instructed to look to "the twelve factors developed by the Legislature for determining what is in the child's best interests" when assessing

whether there is an appropriate ground for taking legal action. *Vodvarka*, 259 Mich App at 511, citing MCL 722.23(a) through(l). Those factors are:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23(a) through (l).]

Here, plaintiff presented evidence to the trial court that established he had “appropriate ground[s] for taking legal action.” See *Kaeb*, 309 Mich App at 571. For example, plaintiff presented evidence that the minor child had severe tooth decay that needed immediate attention. Plaintiff also presented evidence that demonstrated defendant was not taking the issue seriously. Such facts, if true, would give plaintiff appropriate grounds for taking legal action concerning “[t]he capacity and disposition of the parties involved to provide the child with food, clothing,

medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.” See MCL 722.23(c).

As previously noted, plaintiff also presented evidence that defendant used vulgar language and disparaged plaintiff in the minor child’s presence. Such facts, if true, would give plaintiff appropriate grounds for taking legal action concerning “[t]he moral fitness of the parties involved” and “[t]he mental and physical health of the parties involved.” See MCL 722.23(f), (g).

Reviewing the evidence presented by plaintiff as a whole, we conclude that plaintiff presented sufficient evidence to require the trial court to assess whether a modification to parenting time was in the minor child’s best interest. It was error for the trial court to deny plaintiff’s motion on the basis he failed to establish proper cause or change of circumstances, and we remand to allow the trial court to determine, in the first instance, whether a modification to parenting time is in the minor child’s best interest.¹

Plaintiff also asks this Court to remand the matter to a different judge. Plaintiff construes certain rulings against him as evidence the trial court would never grant him more parenting time, regardless of the evidence presented. Plaintiff cites to no legal authority that would justify this Court assigning the case to a different judge on remand. See *Johnson v Johnson*, 329 Mich App 110, 126; 940 NW2d 807 (2019) (“A party may not leave it to this Court to search for authority to sustain or reject its position.”) (quotation marks and citation omitted). Moreover, even on the substance of plaintiff’s argument, the record does not justify remanding the case to a different judge. “Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying.” *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). “Rather, plaintiff must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views.” *Id.* Our review of the record indicates that the trial judge has been very patient with the parties, has ruled in favor of both parties at various times and we discern no prejudice or bias from or by the trial judge on behalf of, or against, either of the parties. Simply stated, there is no evidence in this record that would lead to the conclusion

¹ Plaintiff asks us to simply remand with instructions to the trial court to grant plaintiff’s motion. Such an act would circumvent the determination whether a modification to parenting time is in the minor child’s best interest. When a movant seeks to modify a parenting time provision of a custody order, the movant is required to demonstrate proper cause or a change in circumstances before the trial court assesses whether the modification is in the child’s best interest. *Lieberman*, 319 Mich App at 83; *Vodvarka*, 259 Mich App at 509. In other words, determination of proper cause or change of circumstances is not the end of the analysis; the movant still must show a modification is in the child’s best interest. The factors the trial court considers under a best-interest analysis include “the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a([7])” *Shade*, 291 Mich App at 31.

postured by plaintiff that the trial judge would not be able to rule fairly on remand. We therefore deny plaintiff's request for reassignment to a different judge.

We vacate the order entered by the trial court and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded. MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Brock A. Swartzle