

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELAINA MARTINEZ,

Plaintiff-Appellee,

v

KEITH CARLEY,

Defendant-Appellant.

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UNPUBLISHED

May 27, 2021

No. 355092

Gratiot Circuit Court

Family Division

LC No. 13-002324-DP

Before: JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right the order of the trial court dismissing his motion for joint legal custody of the parties' minor child. We vacate the order of the trial court and remand for further proceedings consistent with this opinion.

I. FACTS

Plaintiff's and defendant's child was born in 2013; thereafter, plaintiff initiated a paternity action against defendant, seeking an order of child support. The parties agreed to a resolution of the action, and on January 24, 2014, the trial court entered a stipulated order addressing paternity, custody, parenting time, and child support. The trial court found defendant to be the child's father, awarded plaintiff sole legal and physical custody of the child, ordered defendant to pay plaintiff child support, and awarded defendant parenting time. The trial court entered an order dated April 23, 2014, adopting the stipulated order as the final order.

On February 18, 2016, plaintiff moved to modify defendant's parenting time, asserting that defendant recently had sought to exercise his parenting time after failing to visit the child from April 2013 to December 2015. Plaintiff contended that it was not in the child's best interests to have unsupervised parenting time with defendant because the child did not have a relationship with him. Plaintiff requested that defendant's visits with the child be supervised initially, and thereafter gradually increase to unsupervised visits and overnight visits. The trial court ordered the parties to participate in a conciliation conference with the Friend of the Court (FOC), following

which the FOC recommended that defendant receive parenting time on an increasing basis, gradually increasing to unsupervised and overnight visits. The trial court adopted the FOC's recommendation by order dated March 14, 2016.

In 2017, plaintiff requested that the trial court review the order of child support. By order dated December 5, 2017, the trial court adopted the recommendation of the FOC and modified the order of child support, significantly increasing defendant's child support obligation. Thereafter, throughout 2018 and early 2019, the trial court issued a series of support enforcement orders indicating that defendant was delinquent in paying the ordered child support.

On February 4, 2019, defendant filed a motion seeking joint legal custody of the child and also seeking to modify the parenting time schedule. Defendant asserted that over the previous 14 months plaintiff had refused to abide by the parenting time order and had moved without notifying him.<sup>1</sup> Defendant argued that these facts constituted a change of circumstances sufficient to warrant a change in legal custody. Defendant also requested that his parenting time be modified to address a change in his work schedule.

By order dated February 25, 2019, the trial court dismissed defendant's motion for joint legal custody on the basis that defendant had failed to demonstrate a change of circumstances or proper cause to justify a change in the existing custody order, but ordered that a referee hearing be held on the issue of parenting time. Following a hearing, the referee recommended a parenting time schedule, which the trial court adopted by interim order dated April 8, 2019.

In June 2020, defendant again moved for joint legal custody of the child. Defendant contended that the circumstances had changed significantly since the original order granting plaintiff sole legal custody was entered in January 2014 when the child was an infant. Defendant asserted that joint legal custody was in the child's best interests because, since the January 2014 original custody order was entered, he and the child had developed a close bond, the child was bonded with defendant's family, the child looked to him for guidance, and he had demonstrated the capacity to be involved in making important decisions regarding the child.

Plaintiff opposed the motion, contending that the trial court was obligated to consider whether there had been a change in circumstances since the most recent custody order was entered, rather than considering the time period since entry of the initial custody order in January 2014. Plaintiff argued that considering the period of time since the most recent order, defendant had not demonstrated a change in circumstances sufficient to support a change of custody. By order dated July 9, 2020, the trial court dismissed defendant's motion for joint legal custody on the basis that defendant had failed to demonstrate a change of circumstances or proper cause to justify a change in the child's legal custody.

Defendant filed a written objection to the trial court's order, which the trial court treated as a motion for reconsideration. Defendant argued that he stipulated to the initial custody order in

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<sup>1</sup> Certain restrictions regarding a parent's change of a child's legal residence do not apply if the parent has sole legal custody of the child. See MCL 722.31; *Brausch v Brausch*, 283 Mich App 339, 349; 770 NW2d 77 (2009).

2014 without legal counsel and at that time believed that he was stipulating to a temporary order. Defendant argued that since the initial order was entered, he had developed a close relationship with the child that constituted proper cause for a change of legal custody. After a hearing, the trial court denied defendant's motion for reconsideration, explaining that the trial court was limited to considering changes in the circumstances that had occurred since the February 25, 2019 order denying defendant's previous motion to modify legal custody. Defendant now appeals.

## II. ANALYSIS

### A. STANDARD OF REVIEW

Section 8 of the Child Custody Act of 1970, MCL 722.28, provides that "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." The trial court's determination regarding whether a party demonstrated proper cause or a change of circumstances is reviewed under the great-weight-of-the-evidence standard. *Pennington v Pennington*, 329 Mich App 562, 570; 944 NW2d 131 (2019). "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.* To whom custody is awarded is a discretionary ruling, *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994), reviewed for an abuse of discretion. *Pennington*, 329 Mich App at 570. A trial court clearly errs on a legal issue when it incorrectly applies the law. *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014).

### B. MOTION TO MODIFY LEGAL CUSTODY

Defendant contends that the trial court erred when it denied his motion to modify the order granting plaintiff legal custody of the child because the trial court incorrectly limited its consideration to whether there had been a change in circumstances since its February 25, 2019 order denying defendant's earlier motion to modify legal custody. We agree.

The purpose of the Child Custody Act, MCL 722.21 *et seq.*, is to promote the best interests of the child and to provide a stable environment for the child free from unwarranted custody changes. *Pennington*, 329 Mich App at 570-571. The trial court serves as the gatekeeper to ensure the stability of the child. *Id.* at 571. Under MCL 722.27(1)(c), a trial court may "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age," if doing so is in the child's best interests.

The Child Custody Act distinguishes between physical custody and legal custody. *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 263 (2013). Physical custody refers to where the child physically resides, while legal custody refers to the authority to make important decisions regarding the child's welfare. *Id.* But although the act distinguishes between physical and legal custody, this Court applies the same requisite standard for changing physical custody and changing legal custody. *Merecki v Merecki*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2021) (Docket No. 353609), slip op at 3, citing *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003).

Before modifying or amending a child custody order, the trial court must determine whether the moving party has demonstrated by a preponderance of the evidence either proper cause

or a change of circumstances warranting reconsideration of the custody decision. MCL 722.27(1)(c); *Vodvarka*, 259 Mich App at 508. To establish proper cause, the moving party must demonstrate the existence of an appropriate ground for legal action to be taken by the trial court relevant to at least one of the statutory best interest factors, *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011), and generally limited to consideration of events occurring after entry of the most recent custody order. *Vodvarka*, 259 Mich App at 501. To establish a change of circumstances, the moving party must demonstrate 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.

In this case, defendant contends that the trial court erred by denying his June 2020 motion to modify the child’s legal custody. In that motion, defendant contended that the circumstances had changed significantly since the original order granting plaintiff sole legal custody was entered in January 2014. The trial court denied the motion on the basis that defendant did not demonstrate that a change of circumstances had occurred since its February 25, 2019 order, by which the trial court denied defendant’s previous February 2019 motion to modify legal custody asserting the same basis as the June 2020 motion.

Defendant filed an objection<sup>2</sup> to the order, which the trial court treated as a motion for reconsideration. At the hearing on the motion, the trial court explained that it had already ruled on the same motion in February 2019, in which defendant argued the same basis—that there had been a change of circumstances from the initial order in January 2014 to the time of that motion. The trial court stated, in relevant part:

I am not agreeing necessarily with [the plaintiff’s position]. Rather, what I’m indicating is that at that point in time either [a motion] for reconsideration or appellate review should have been undertaken[;] when the Court declined to review legal custody, nothing was done to – to challenge that beyond the Court’s determination and therefore that – you know – becomes the law of the case. . . . So *Vodvarka* in the instant analysis really applies from the entry of the last order a year ago to today, and an articulation, that there is proper cause or [a] change [of] circumstances under *Vodvarka*. [Hearing Tr, 09/22/2020, p 19.]

On appeal, defendant contends that the trial court erred by limiting its consideration to whether there had been a change in circumstances since its February 25, 2019 order denying defendant’s earlier motion to modify legal custody. In *Vodvarka*, this Court addressed what evidence may be considered by the trial court in determining whether a significant change of circumstances has been demonstrated, and explained:

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

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<sup>2</sup> Defendant asserted the basis of the objection as being that he had demonstrated proper cause. At the hearing on the objection held before the trial court, however, defendant once again argued that he had demonstrated a change of circumstances in the conditions surrounding the custody of the child.

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 514 (footnote omitted).]

In this case, the custody order that defendant sought to modify with his June 2020 motion was the trial court’s January 24, 2014 order granting plaintiff sole legal custody of the child. Applying the analysis of *Vodvarka*, because defendant sought to modify legal custody established by the January 24, 2014 order, defendant was required to demonstrate that the circumstances had changed since that custody order was entered. See *id.*

However, in this case, defendant brought the same motion previously in February 2019, arguing the same basis for the motion, being that the circumstances had changed significantly since the original order granting plaintiff sole legal custody was entered in January 2014. The trial court denied the February 2019 motion, determining that defendant had failed to demonstrate that the circumstances had sufficiently changed from January 2014 until February 2019 to warrant a change of custody. The trial court therefore determined that defendant’s renewal of the same motion in June 2020 should be considered only to the extent that it demonstrated a significant change of circumstances since the trial court ruled on the issue previously in February 2019, when it denied the previous motion to modify legal custody.

Again, to establish a change of circumstances, the moving party must demonstrate 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.” *Vodvarka*, 259 Mich App at 513. We acknowledge that this Court sometimes has described an order denying a petition for change of custody as “an order affecting custody.” See *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012), citing *Rivette v Rose-Molina*, 278 Mich App 327, 333; 750 NW2d 603 (2008). However, in *Vodvarka*, we also explained that to determine whether there has been a change of circumstances, there must be a set of circumstances against which to compare the existing circumstances. *Vodvarka*, 259 Mich App at 514. In this case, legal custody was established with plaintiff in January 2014 based on the circumstances that existed at that time. The custody arrangement has not changed since that initial order. To determine whether there has been a significant change in circumstances sufficient to warrant a change in legal custody, it is necessary for the trial court to compare the circumstances as they existed in January 2014 with the current circumstances.

In his June 2020 motion, defendant again moved to modify legal custody on the basis that the circumstances had changed significantly, this time from January 2014 to June 2020. In doing so, defendant did not seek to modify or amend the court’s 2019 order dismissing his motion for joint legal custody. Instead, defendant sought to “modify or amend” the court’s initial custody order from 2014, which had since gone undisturbed. Thus, in arguing there had been a change of circumstances, defendant was permitted to rely on events that occurred any time after the initial custody order. We acknowledge that in ruling on defendant’s previous motion to modify legal

custody asserting that the circumstances had changed significantly from January 2014 to February 2019, the trial court determined that defendant had not established that the circumstances had changed significantly in that time. Presumably, if defendant presents no more evidence than he presented in January 2019, the trial court will conclude that defendant again has failed to establish a significant change in circumstances since the January 2014 custody order that established the child's current legal custody. Nonetheless, the trial court is required to consider the circumstances from the January 2014 custody order that established the current custody of the child, consistent with *Vodvarka*, 259 Mich App at 508-515.<sup>3</sup> Furthermore, "on remand, the court should consider up-to-date information." *Fletcher*, 447 Mich at 889.

The order dismissing defendant's motion for joint legal custody is vacated. We remand this case to the trial court for consideration of defendant's motion to modify legal custody asserting that the circumstances have significantly changed since entry of the trial court's January 24, 2014 order. We retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Amy Ronayne Krause  
/s/ Michael F. Gadola

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<sup>3</sup> To hold otherwise would put non-custodial parents in the unenviable position of having to wait years before renewing a motion for change of custody, on the theory that "not enough" has changed since a previous unsuccessful motion for change of custody, even though circumstances may have incrementally changed sufficiently since the initial custody order to warrant a change.

**Court of Appeals, State of Michigan**

**ORDER**

Elaina Martinez v Keith Carley

Docket No. 355092

LC No. 13-002324-DP

Kathleen Jansen  
Presiding Judge

Amy Ronayne Krause

Michael F. Gadola  
Judges

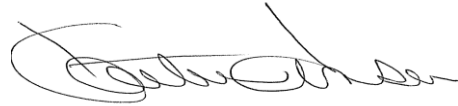
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Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 35 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court shall consider defendant's motion to modify legal custody asserting that the circumstances have significantly changed since entry of the trial court's January 24, 2014 order. The trial court shall file its order addressing defendant's motion to modify legal custody with this Court within 42 days of the Clerk's certification of this order. The proceedings on remand are limited to this issue.

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 21 days after completion of the proceedings.



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Presiding Judge



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

May 27, 2021  
Date

  
Chief Clerk