STATE OF MICHIGAN

COURT OF APPEALS

ANNE MARIE LECH,

Plaintiff-Appellee,

v

DANIEL ROBERT LECH,

Defendant-Appellant.

UNPUBLISHED
June 10, 2021

No. 355632
Clinton Circuit Court
Family Division
LC No. 19-028688-DM

Before: GADOLA, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

Defendant, Daniel Robert Lech, appeals as of right the judgment of divorce dissolving his marriage with plaintiff, Anne Marie Lech, and granting plaintiff sole physical custody of the parties' minor child, EL. We affirm.

I. BACKGROUND

After 25 years of marriage, plaintiff filed for divorce in 2019. In May 2019, the trial court entered an ex parte order awarding plaintiff sole legal and physical custody of EL. The trial court ordered that defendant have parenting time with EL every Wednesday from 5:00 p.m. to 8:00 p.m. and alternate weekends on Saturday and Sunday from 11:00 a.m. to 7:00 p.m. After six months of parenting time, defendant could make a written request to the Friend of the Court to reevaluate whether his parenting time should be expanded.

Defendant timely filed an objection to the order. Defendant requested that the trial court rescind the ex parte order and award the parties joint legal and physical custody of EL. Defendant also requested a "2-2-3" parenting-time schedule in which plaintiff would have two weekdays, defendant would have two weekdays, and the parties would alternate Friday, Saturday, and Sunday overnights. Following a hearing on defendant's objection, in June 2019, the trial court entered a stipulated order awarding the parties joint legal custody and awarding plaintiff sole physical custody of EL. The trial court awarded defendant parenting time every Wednesday from 5:00 p.m. to 8:00 p.m. and alternate weekends from Friday at 5:00 p.m. to Sunday at 5:00 p.m. The trial court encouraged, but did not order, that the parties work with a family counselor to move toward a 50/50 parenting-time schedule. Following a two-day bench trial in January and May 2020, the

trial court issued an opinion and order concluding that defendant failed to establish that there was proper cause or change of circumstances to modify the June 2019 order regarding physical custody. The judgment of divorce awarded the parties joint legal custody of EL. The provisions regarding physical custody and parenting time remained unchanged. This appeal followed.

II. ANALYSIS

Defendant argues that because the June 2019 order was a "temporary" order, the trial court committed legal error by requiring him to establish proper cause or change of circumstances to modify custody. Alternatively, defendant argues that the trial court made various errors in its factual findings. We disagree.

"[A]ll 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." MCL 722.28. "[U]pon a finding of error, appellate courts should remand to the trial court unless the error was harmless." *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994).

MCL 722.27(1) provides, in relevant part, as follows:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> (a) Award the custody of the child to 1 or more of the parties involved . . . .
>
> * * *
>
> (c) Subject to subsection (3), modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . . 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. . . .

Under MCL 722.27(1)(c), the party seeking to modify a child custody order must first establish proper cause or change of circumstances. *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). Temporary custody orders are an exception to this rule. *Thompson v Thompson*, 261 Mich App 353, 357; 683 NW2d 250 (2004).

If the party seeking to change custody establishes proper cause or a change of circumstances, the trial court must determine that the change would be in the best interests of the

child by analyzing the statutory best-interest factors.[1] *Lieberman*, 319 Mich App at 83. If the modification would modify the child's established custodial environment, the movant must prove by clear and convincing evidence that the change would be in the best interests of the child. *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010). If the modification would not modify the

[1] The best-interest factors are as follows:

> (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.
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> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
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> (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.
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> (h) The home, school, and community record of the child.
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> (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.
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> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
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> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

child's established custodial environment, the movant must prove by a preponderance of the evidence that the change would be in the best interests of the child. *Id.*

In this case, defendant argues that the trial court committed legal error by requiring him to establish proper cause or change of circumstances on the basis that the prior June 2019 order was a "temporary" order. We disagree.

In *Thompson*, the parties stipulated that the plaintiff would have temporary physical custody of the children, and the trial court entered an order to that effect. The defendant filed a motion challenging the temporary custody order, which the trial court denied. See *Thompson*, 261 Mich App at 354-355. At trial, after determining that the children had an established custodial environment with the plaintiff and that there was clear and convincing evidence that a change in custody would be in the children's best interests, the trial court awarded the defendant physical custody during the school year and the plaintiff physical custody during the summer. *Id*. at 355.

On appeal, the plaintiff argued, in relevant part, that the trial court erred by changing custody without requiring the defendant to show proper cause or change of circumstances. *Id*. at 357. This Court disagreed, explaining that "the trial court was not required to determine whether [the] defendant demonstrated proper cause or change in circumstances because the proceeding in question was not held to amend or modify a custody order." *Id*. at 358. This Court continued:

> The trial court signed the parties' stipulation for "temporary custody." There was no evidentiary hearing regarding the best interests factors. Defendant had no attorney and claims that when she entered into the stipulation, plaintiff had represented to her that once she got established, plaintiff would allow her to have custody. After consulting an attorney, defendant moved to set aside the temporary custody stipulation, but the trial court denied the motion without holding an evidentiary hearing and without making specific findings regarding the best interests of the children. The trial provided defendant with her first opportunity for an evidentiary hearing. [*Id*. at 358-359 (footnote omitted).]

The June 2019 order in this case is distinguishable from the temporary order in *Thompson*. Here, the trial court clearly informed the parties that if it held an evidentiary hearing, the parties would be bound by the order and that proper cause or change of circumstances would be necessary to support a change in custody. At the beginning of the hearing on defendant's objection to the ex parte order, the trial court told the parties, "[I]f we have a hearing where I'm making findings of fact and conclusions of the law today, those will be binding for you when your trial date comes, and unless there's a change in circumstances or proper cause, decisions that I'm making in terms of established custodial environment and best interest factors, those are pretty well solidified." Defendant nevertheless decided to proceed with an evidentiary hearing. Further, he was represented by counsel at the time. In contrast to *Thompson*, 261 Mich App at 358, in which the trial court signed the parties' stipulation for " 'temporary custody' " without holding an evidentiary hearing on the best-interest factors, the trial court held an evidentiary hearing and discussed each best-interest factor on the record. For these reasons, the June 2019 order was not the type of "temporary" order governed by *Thompson*, and defendant was required to establish proper or change of circumstances to modify the order.

Defendant next argues that the trial court erred by finding that he failed to establish proper or change of circumstances to modify the order. We disagree.

Vodvarka v Grasmeyer, 259 Mich App 499; 675 NW2d 847 (2003), provides the standards regarding proper cause or a change of circumstances with respect to requests to modify custody. "[P]roper cause means 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." *Id.* at 511. It requires "the existence of an appropriate ground for legal action to be taken by the trial court." *Id*. at 512. The ground or grounds for legal action "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*. A "change of circumstances" 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 (emphasis in original). "[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.

In this case, in concluding that defendant failed to establish proper cause or change of circumstances, the trial court stated as follows:

> The parties had been living under the initial custody order for six months prior to the start of the divorce trial. As of that time, [plaintiff] reported that she had been seeing a therapist, but not with [defendant]. [Plaintiff] testified that [defendant] exercised parenting time with [EL]. She believed that even though [EL] had her own bed, that [EL] reported co-sleeping with [defendant]. [Plaintiff] also testified that when [EL] was returned to her, the child would be extremely dirty. [Plaintiff] would pick her up and have to give [EL] a bath. [Plaintiff] spoke with her therapist about how to resolve these and other parenting time conflicts with [defendant].
>
> [Defendant] testified that he believed [plaintiff] was more dependent on [EL] than [EL] is on [plaintiff]. [Defendant] testified it had been a while since he attended [EL's] doctor appointments. When he exercises parenting time, [EL] hugs him, he hugs her back. They get something to eat, and they play together. [Defendant] acknowledged that [plaintiff] and the parties' daughter, [JL], are [EL's] primary caretakers. While [defendant] wants to share custody, he had not looked into any child care facilities, nor had he explored local schools, though he was adamant he did not want [EL] home schooled, as the parties had done with all their other children. [Defendant] testified he suffered from depression, that he is currently taking medications. *Despite [defendant's] heartfelt desire to share physical custody of [EL], as of the time of trial he offered no evidence of steps that he had taken to become more actively involved in the raising of [EL]*. [Defendant] admitted to forgetting about the family counseling previously ordered by the Court, which was required to work up to joint physical custody. The Court does not necessarily view this as disinterest; rather, *it seems as though [defendant] needs to*

continue focusing on his own well-being in order to be a more engaged parent. [Emphasis added.]

Although the trial court emphasized that defendant failed to establish proper cause or change of circumstances to modify the June 2019 order regarding physical custody on the basis that he failed to demonstrate that he was more involved in EL's life, defendant does not challenge this finding. Rather, defendant raises various challenges that are either without merit or do not speak to the heart of the issue as to whether there was proper cause or change of circumstances to modify the June 2019 order.

None of defendant's challenges to the trial court's statements regarding (1) doctor appointments, (2) EL's primary caregivers, (3) whether defendant investigated daycare facilities, or (4) whether defendant investigated local schools warrant reversal. With regard to the first statement, although defendant argues that he was unable to attend EL's doctor appointments because plaintiff notified him of the appointments at the last minute, there was no evidence that, for example, plaintiff was not taking EL to her appointments. With regard to the second statement, although defendant did not acknowledge at the bench trial that plaintiff and JL were EL's primary caretakers, he did so at the hearing on his objection to the ex parte order, and given that there was no evidence that anyone else was caring for EL, the trial court was likely noting that it did not appear that any circumstances had changed since the previous hearing. With regard to the third statement, although the trial court perhaps erred by finding that defendant had not investigated any child care facilities because he had at least investigated prices since the previous hearing, the evidence established that while plaintiff would be able to care for EL without having to put her in daycare, defendant would have to place EL in daycare. Therefore, if anything, the daycare issue was a reason supporting the decision to *not* modify the custody order. Finally, with regard to the fourth statement, at the time of the bench trial, plaintiff was living in Saint Johns and defendant was living in DeWitt. Although defendant testified that he did not want EL to go to school in Saint Johns on the basis that "it just made more sense for her to go to DeWitt" because plaintiff had to drive past DeWitt to go to work, there was no evidence that defendant investigated any particular schools. Therefore, the trial court did not err by finding that defendant had not explored any local schools.

Defendant argues that although the trial court accurately noted that he had depression, was taking medication, and was in therapy, the trial court should have mentioned that plaintiff had anxiety and depression. We disagree.

At the June 2019 hearing on defendant's objection to the ex parte order, defendant testified that he was diagnosed with depression approximately three years ago and that although he was prescribed medication, he did not experience a noticeable improvement until approximately six months prior when his psychiatrist increased his dosage and he began seeing a psychiatrist who gave him tools to help deal with his depression. Defendant testified that he still occasionally felt "down." At the bench trial, defendant testified that his psychiatrist agreed to reduce his dosage because he was "feeling really good lately" and that he was still seeing a therapist. Also at the bench trial, plaintiff testified that she was taking "Lexapro for anxiety, Xanax for panic attacks, and Wellbutrin for going through divorce depression."

Although the trial court did not mention that plaintiff had anxiety and depression in its analysis of proper cause or change of circumstances, the trial court was not required to extensively recite all evidence in its findings and conclusions. See MCR 2.517(A)(2) ("Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts."). Because there was no evidence that plaintiff's depression or anxiety impacted her ability to care for EL, her depression and anxiety would not be grounds to constitute proper cause or change of circumstances.

Finally, defendant argues that the trial court "wildly over exaggerated" his testimony about family counseling and that the trial court should have considered plaintiff's "lack of a good faith effort" in working with a family therapist to accomplish the 50/50 parenting-time goal. We disagree.

At the bench trial, plaintiff testified that she went to family counseling separately and that she and the therapist did not discuss defendant. Defendant testified that the counselor would not see him and plaintiff together because plaintiff refused to speak at the first meeting. Defendant testified that because plaintiff often refused to give EL to him so he and EL could go see the therapist, he had to cancel multiple meetings. Defendant testified that after the "last court appearance," he "forgot" about the meetings. Defendant testified that the meetings helped him "achieve[] what I was looking to get out of it," i.e., "living for that moment" and "being father and daughter."

Given that defendant had the burden of establishing proper cause or change of circumstances, the trial court did not err by focusing on the portion of defendant's testimony about how he forgot to keep attending the meetings with the family counselor. Further, it is unclear why plaintiff did not speak at the meeting. Although it arguably would have been more beneficial if the parties had been able to attend the meetings together, this did not negate the importance for defendant to continue seeing the counselor. Again, the trial court was not required to extensively recite all evidence in its findings and conclusions. See MCR 2.517(A)(2). Defendant has failed to establish that the trial court erred by concluding that he failed to meet his burden of establishing proper cause or change of circumstances.

III. CONCLUSION

In sum, because the June 2019 order was not a "temporary" order, defendant was required to establish that there was proper cause or change of circumstances to modify the custody order. The trial court did not err by finding that defendant failed to meet this burden. Accordingly, we affirm.

/s/ Michael F. Gadola
/s/ David H. Sawyer
/s/ Michael J. Riordan