STATE OF MICHIGAN

COURT OF APPEALS

TANYA MONIQUE MILLER, formerly known as TANYA MONIQUE JOHNSON, Plaintiff-Appellee, v STEPHEN JOHNSON, Defendant-Appellant.	UNPUBLISHED August 8, 2017 Nos. 336083; 337055 Livingston Circuit Court Family Division LC No. 12-046694-DM

Before: CAVANAGH, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated cases, defendant, Stephen Johnson, appeals as of right from the circuit court's orders granting plaintiff, Tanya Miller, sole legal custody of the parties' child, denying Johnson's motion for primary physical custody of the child, reducing Johnson's parenting time, and modifying Johnson's child-support obligation. We affirm the court's denial of Johnson's motion for sole physical custody and the court's reduction of Johnson's parenting time, but we reverse the court's decision to grant Miller sole legal custody and remand for further proceedings with respect to that decision. Further, for the reasons stated in this opinion, we do not address the court's decision to modify Johnson's child-support obligation.

I. BASIC FACTS

The parties divorced in 2013. The consent judgment of divorce provided that they each had joint physical and joint legal custody of their daughter. In 2015, Miller filed a motion requesting, sole legal custody, modification of parenting time, and modification of child support. Johnson then filed a motion requesting primary physical custody. A hearing referee heard several days of testimony from the parties, medical personnel, and therapists. Following the evidentiary hearing, the referee found that the child had an established custodial environment with Miller, recommended that Miller be awarded sole legal custody, recommended that Johnson's parenting time be reduced by one weekend per month, and recommended that Johnson's child-support obligation be modified to reflect the new arrangement. Johnson

objected to the recommendations. After review of the record, the trial court, however, adopted the referee's recommendations.[1] This appeal follows.

II. CHILD CUSTODY

A. STANDARD OF REVIEW

Johnson argues that the trial court made several errors when determining the child custody issues in this case. There are three standards of review in a child custody case:

> 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 v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (citations and quotation marks omitted).]

B. ANALYSIS

When reviewing a motion to change custody, the threshold question is whether the moving party can establish proper cause or a change of circumstances as required by the Child Custody Act, MCL 722.21 *et seq*. *Vodvarka*, 259 Mich App at 508; see also *Lieberman v Orr*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 333816); slip op at 7 ("As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change in circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests."). In *Vodvarka*, this Court considered what constitutes proper cause and change in circumstances "sufficient to reopen a custody issue." *Vodvarka*, 259 Mich App at 509. The *Vodvarka* Court held that:

> to 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. [*Id*. at 512.]

And, with regard to change of circumstances, this Court held that

[1] Because the trial court adopted the referee's findings and recommendation, for ease of reference we will refer to the referee's statements of law and fact as if they were made by the trial court.

> in order to established 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 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. [*Id.* at 513-514.]

Because the trial court considered two motions to change custody—Johnson's motion to change physical custody and Miller's motion to change legal custody—it was required to determine separately whether each party could establish proper cause or change of circumstances sufficient to reopen the custody issues. In doing so, however, the trial applied the *Vodvarka* standard for proper cause or change of circumstances only to Johnson's motion for proper cause or change of circumstances. When evaluating Miller's motion, the court instead applied the standard for proper cause or change of circumstances articulated by this Court in *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010). The trial court applied the more expansive definition in *Shade* because the request "to change legal custody would not affect the minor child's established custodial environment." However, *Shade* does not stand for the proposition stated by the trial court.

Shade involved a request to modify parenting time, not a motion to modify custody. *Id.* at 25. This Court discerned "nothing in the *Vodvarka* opinion that require[d] the standards used to determine the existence of proper cause or change of circumstances for custody determinations to apply to determinations regarding parenting time, absent a conclusion that a change in parenting time will result in a change in an established custodial environment." *Id.* at 26-27. Rather, this Court held that "a more expansive definition of 'proper cause' or 'change of circumstances' is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment." *Id.* at 28.

In support of its holding, the *Shade* Court reasoned that *Vodvarka* applied to a custody determination and the definitions of "proper cause" and "change of circumstances" related to a child's custodial situation. *Id.* at 25-26. In particular, the application of the *Vodvarka* standard was guided by the best interest factors in MCL 722.23(a), which are to be applied to determine whether a change of custody is in a child's best interests. *Id.* at 26. The *Vodvarka* standard did not require any consideration of the parenting time factors set forth in MCL 722.27a(6). *Id.* In addition, the *Shade* Court recognized that, "in a custody dispute, the purpose of the proper cause or change of circumstances requirement is 'to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.' " *Id.* at 28, quoting *Vodvarka*, 259 Mich App at 509 (citation and quotation marks omitted). Those considerations do not exist when considering a modification of parenting time that does not affect the child's established custodial environment, however, because "the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Shade*, 291 Mich App at 28-29. Finally, the *Shade* Court also based its holding on the

fact that the parenting time guidelines direct a reviewing court to take into account "the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment . . . ." *Id*. at 30. In sum, it is plain that the *Shade* Court found that modifications to parenting time that did not affect a child's established custodial environment presented different considerations than a decision modifying custody and so, based on those differences, held that a more expansive definition of proper cause or change of circumstances was appropriate. It did not, however, state or imply at any point that it applied to *custody* decisions so long as those decisions did not change the child's established custodial environment.

We conclude that the trial court erred by applying the more expansive definition of proper cause or change of circumstances to Miller's motion for a change of legal custody. First, as noted above, the reasoning in *Shade* expressly differentiated between custody decisions and parenting time decisions. Thus, *Shade* is wholly inapplicable to custody decisions. Next, the *Vodvarka* Court made no distinction between a change in physical custody and a change in legal custody. See generally *Vodvarka*, 259 Mich App at 509-514.[2] And, in fact, the *Vodvarka* standard has been applied without such a distinction in numerous cases. See e.g. *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 658; 808 NW2d 811 (2011); *Corporan v Henton*, 282 Mich App 599, 604; 766 NW2d 903 (2009). Similarly, the *Vodvarka* standard has also been applied in cases explicitly dealing with changes in legal custody. See *Brauschv Brausch*, 283 Mich App 339, 346, 358; 770 NW2d 77 (2009).

Therefore, because the trial court applied the wrong standard, we reverse the court's decision awarding Miller sole legal custody. Further, given that the court already evaluated the presented evidence and determined that, under *Vodvarka*, there was insufficient evidence of proper cause or change of circumstances to reopen the issue of physical custody, we need not remand for the trial court to apply the proper standard with regard to the issue of legal custody.[3]

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[2] The *Vodvarka* Court never referred to "legal custody" or "physical custody." Instead, it exclusively referred to the issue as involving "custody." The Child Custody Act distinguishes between legal custody and physical custody, thus demonstrating that they are separate concepts under the broader umbrella of "custody." See *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013); see also MCL 722.26a(7)(a) and (b). Therefore, the *Vodvarka* Court's use of the term "custody" evidences an intent to apply the standard to all custody decisions, not just to decisions involving physical custody or legal custody.

[3] Miller argues on appeal that the trial court actually applied the *Vodvarka* standard to her motion for a change of legal custody. We disagree. The trial court adopted the following findings by the referee:

> The parents have significant and deep seeded communication problems. In fact, each parent acknowledged they could not communicate effectively. The parents have not conversed orally regarding their daughter for several years and only communicate through text messaging or email. The testimony suggested that the parents' communication diminished after the Judgment. Mother stopped relaying even the simplest of information regarding the minor child because father either questioned everything or became confused by the information she provided.

Rather, on remand, the trial court shall enter an order denying Miller's motion for a change of legal custody.[4]

III. CHILD SUPPORT

Johnson next argues that the trial court erred in adopting the referee's recommendations concerning his child-support obligations, on the ground that the referee failed to take into account his allotment of summer overnights. However, under MCR 7.202(6)(a)(*iii*) a final order appealable by right includes "a postjudgment order affecting the custody of a minor," but under MCR 7.203(A)(1) an appeal from such an order "is limited to the portion of the order with respect to which there is an appeal of right." And "[w]hen an order does not change the amount of time either parent spends with the child, it simply cannot be said to have affected custody." *Ozimek v Rodgers*, 317 Mich App 69, 77; 893 NW2d 125 (2016). Here, because the challenged

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> Father openly challenged whatever mother reported and at times sent cryptic messages that concerned mother and made her wonder about her safety. Moreover, the evidence showed the resentment between the parents increased to the extent they could not amicably exchange the minor child without issues. That resentment was on display during this lengthy hearing. Each parent accused the other of harassing that parent when attempting to communicate. Clearly, the distance between the parents did not help. The evidence suggested communication failures and an inability to communicate effectively. Most importantly, more than one expert opined that the argumentative relationship the parents had during the marriage likely was a causation factor of the minor child's PTSD. Even with that knowledge, these parents could not change their communication.
>
> Taken together the above were grounds relevant to one or more of the best interest factors and of such a magnitude to have an effect on the minor child's well-being. Additionally, the above established a change in circumstances that supported a review of joint legal custody as it reflected a change in conditions that affected the minor child's well-being.

Thus, contrary to Miller's argument, it is clear that the court did not apply *Vodvarka*. That is, the court did not determine that there was a material change of conditions that would have a *significant effect* on the child's well-being, beyond normal life changes, since the entry of the last custody order. *Vodvarka*, 259 Mich App at 513-514. Rather, the court's findings make it clear that the parties' communication problems began before the parties divorced and continued thereafter. As such, the findings are insufficient to support a finding of change of circumstances under *Vodvarka*.

[4] Given our resolution, we need not address Johnson's arguments that the trial court erred by not considering all the best interest factors in MCL 722.23, nor his contention that the trial court erred in its application of the best interest factors that it found relevant. Further, we need not consider Johnson's argument that the trial court erred in finding that the child's established custodial environment existed solely with Miller.

child-support provisions have no such affect, Johnson's objections to them are not properly included with this claim of appeal by right.

IV. PARENTING-TIME FACTORS

Johnson also argues that the trial court failed adequately to apply MCL 722.27a(7), which sets forth the factors a court "may consider . . . when determining the frequency, duration, and type of parenting time to be granted[.]" However, the referee set forth those factors, stated generally that those criteria had been considered, and it provided substantial discussion concerning Johnson's failures to document completion of the "parenting sessions" and therapy to which he had agreed. The referee also considered the parties' difficulties with the existing parenting-time schedule. Further, the Legislature set forth certain parenting-time factors as matters a court "may consider," suggesting that their use is permissive. See *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) (stating that "may" indicates a permissive action). Additionally, Johnson cites no authority for the proposition that a court is obliged to provide specific findings with regard to any of them. And, although Johnson identifies specific parenting-time factors on appeal for purposes of arguing how they should have been decided, he offered no such argument in connection with his objections to the referee's recommendations in the first instance. For these reasons, we conclude that Johnson has failed to show that the referee or trial court failed to properly consider the statutory parenting-time factors.

V. DE NOVO HEARING

Finally, Johnson contends that the trial court erred by failing to hold a de novo hearing on his objections to the referee's recommendations. MCR 3.215(E)(4) provides that "a party may obtain a judicial hearing on any matter that has been the subject of a referee hearing" by filing "a written objection . . . within 21 days after the referee's recommendation for an order is served on the attorneys for the parties . . . ." MCR 3.215(F)(2) adds that "the court must allow the parties to present live evidence at the judicial hearing." Johnson complains that the trial court in this case afforded him no opportunity to bring live witnesses or other evidence. However, the record reflects that Johnson made no such request to the trial court. Further, MCR 3.215(F)(2)(a) allows a court discretion to disallow evidence "on findings of fact to which no objection was filed," and MCR 3.215(F)(2)(c) allows a court discretion to disallow "new evidence or . . . new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing." Johnson not only admits that the record does not indicate what additional evidence he might have wished to bring, but his brief on appeal is likewise silent in this regard. We conclude that these failures of preservation and presentation are fatal to this claim of error.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because neither party prevailed in full, we award no taxable costs under MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter
/s/ Michael J. Kelly