

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TH,		: No. 15-21,205
	Plaintiff,	:
		:
vs.		: CIVIL ACTION - CUSTODY
		:
MM,		: <i>Preliminary Objections/Motion to Dismiss</i>
	Defendant.	: <i>Petition for Modification of a Custody Order</i>

OPINION AND ORDER

AND NOW, following argument and review of MM’s Preliminary Objections/Motion to Dismiss TH’s Petition for Modification of a Custody Order, the Court hereby issues the following ORDER.

Background

Following a custody trial, on October 3, 2018, this Court issued a Custody Order granting TH (“Plaintiff”) and MM (“Defendant”) shared (50/50) legal and physical custody of their two minor children. On March 6, 2019, Defendant filed a Petition for Modification of a Custody Order, requesting that the Court grant her primary physical custody of the children. Following trial on August 8, 2019, before Senior Judge Dudley N. Anderson, the Court orally ruled in favor of Defendant, granting her primary physical custody. After weighing the 16 factors provided under 23 Pa.C.S.A. § 5328 for determining the best interests of the child, the Court found factors (1), (3), and (13) in favor of Defendant.¹ The Court’s determination under factor (13) that Plaintiff had failed to cooperate with Defendant was based in part on Defendant’s exhibits consisting of screen shots of text messages sent by Defendant to which Plaintiff never responded.^{2, 3} The Court

¹ 23 Pa.C.S.A. § 5328 (“In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following: (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party . . . (3) The parental duties performed by each party on behalf of the child . . . (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.”).

² See *Holmes v. Martin*, FC-2015-21,205, Excerpt of Transcript from Proceedings 6-7 (Sept. 17, 2019).

subsequently issued a written Custody Order on September 3, 2019 (“September 3 Custody Order”), laying out the terms of the new custody arrangement.

On August 13, 2019, Plaintiff filed a Motion for New Trial. In this Motion, Plaintiff asserted that, following trial, he had reviewed his own cell phone records and discovered that Defendant had modified several of the text conversations she had offered as exhibits to remove Plaintiff’s responses. On August 29, 2019, the Court issued an Order denying Plaintiff’s Motion for New Trial, instructing Plaintiff that he instead needed to file a Petition for Modification of a Custody Order.⁴ Thereafter, on September 11, 2019, Plaintiff filed a Petition for Modification of a Custody Order, which included identical averments to those in Plaintiff’s Motion for New Trial. Defendant filed “Preliminary Objections/Motion to Dismiss” on September 30, 2019, asserting that the Court should dismiss Plaintiff’s Petition on the basis that Plaintiff had failed to demonstrate substantially changed circumstances that would alter the best interest of the child analysis and thereby justify modification. The Court held argument on the Preliminary Objections/Motion to Dismiss on October 31, 2019.

Analysis

The Court first notes that, pursuant to the Pennsylvania Supreme Court’s decision in *Karis v. Karis*, a party may file a Petition for Modification of a Custody Order absent a showing of a substantial change in circumstances.⁵ Petitions for Modification may be filed at any time, so long as the petitioner can demonstrate that alteration of the existing custody order would be in the best interests of the child.⁶ When the best interests of the

³ Other factors supporting Court’s ruling included the Court’s finding under factor (1) that Plaintiff was likely to discourage the children’s frequent and continued contact with Defendant and the Court’s finding under factor (3) that Defendant performed a greater share of parental duties.

⁴ See Pa.R.C.P. 1915.10(d) (“No motion for post-trial relief may be filed to an order of legal or physical custody.”); see also *Choplosky v. Choplosky*, 584 A.2d 340, 341 (Pa. Super. 1990) (“[T]he appropriate manner to bring about a change in a custody/visitation Order is by petition for modification[.]”) (internal citations omitted).

⁵ *R.M.G., Jr. v. F.M.G.*, 986 A.2d 1234, 1239 (Pa. Super. 2009) (“[T]here has been no ‘substantial change’ required in Pennsylvania since 1988 when our Supreme Court specifically pronounced that no substantial changed circumstance was required to modify a custody order under the statutory provisions of the Custody and Grandparents’ Visitation Act, 23 Pa.C.S.A. § 5301 *et seq.* See *Karis v. Karis*, 518 Pa. 601, 607–08, 544 A.2d 1328, 1332 (1988)[.]”).

⁶ *Choplosky v. Choplosky*, 584 A.2d 340, 342 (Pa. Super. 1990) (“[T]o promote the best interests of the child efforts seeking to modify custody orders may be entertained at any time[.]”); see also *Jordan v. Jackson*, 876 A.2d 443, 453 (Pa. Super. 2005) (“Case law makes excruciatingly clear that of paramount

child are implicated, all other considerations become subsidiary.⁷ However, absent a demonstration of some change of circumstances following the court's issuance of its prior custody order, the court will presume that what was in the child's best interest continues.⁸ If the court determines that the petition for modification fails to allege new facts that could alter the best interest of the child analysis, then the court may dismiss that petition absent a hearing.⁹

In the instant matter, Plaintiff's Petition to Modify alleges newly discovered evidence, but fails to provide new factual averments that would justify modification of the Custody Order currently in effect. Plaintiff broadly asserts without specificity that Defendant altered "some" of the text messages that she offered as exhibits so as to remove his responses to those text messages. But Plaintiff fails to state which exhibits, or how many exhibits Defendant altered, and Plaintiff fails to provide the substance of his claimed responses. Consequently, Plaintiff's summary allegation that Defendant modified certain exhibits is insufficient, standing alone, to demonstrate that such modification had a material effect on the Court's analysis of the Plaintiff's cooperation with Defendant under 23 Pa.C.S.A. § 5328(a)(13). While the Court placed emphasis on factor (13) when awarding custody to Defendant, factor (13) was only one of three factors supporting the Court's custody award. It is impossible to know what weight the Court gave each factor, or how this "new" evidence would impact the Court's custody determination, if at all. Further, and perhaps most importantly, Plaintiff's Petition to Modify fails to address the Court's other findings, and does not otherwise provide evidence demonstrating *why* modification of the September 3 Custody Order would be in

importance in child custody cases is the best interest of the child. Certainly, courts of this Commonwealth must not decline to enter a custody Order which would serve the best interests of a child simply because the moving party did not sufficiently prove a change in circumstances.").

⁷ *Clapper v. Harvey*, 716 A.2d 1271, 1273 (Pa. Super. 1998) ("Whenever a court is called upon to address the best interests of a child, traditional burdens or presumptions such as substantial change in circumstances, the fitness of one parent over another, or the tender years doctrine must all give way to the paramount concern; the best interests of the child. In determining best interests of the child, a court must consider all factors that legitimately affect the child's physical, intellectual, moral and spiritual well-being.") (internal citations omitted).

⁸ *R.M.G., Jr. v. F.M.G.*, 986 A.2d at 1239 (quoting *Hutchinson v. Hutchinson*, 549 A.2d 999, 1001 (Pa. Super. 1988)) ("Best interest cannot be considered in a vacuum and were the circumstances unchanged from those that resulted in the initial custody arrangement, it must be presumed that what was in the child's best interest continues.").

the best interest of the two minor children.¹⁰ Plaintiff's Petition to Modify fails to allege new facts that could alter the best interest of the child analysis.

Additionally, Plaintiff fails to provide adequate explanation for why he only discovered the text messages' alteration post-trial. Each party provided the other ten (10) days' notice of the exhibits intended to be introduced at trial, which included numerous text messages. As Plaintiff had adequate notice of Defendant's intended use of text messages, the Court cannot find that Plaintiff has provided evidence of newly discovered factual circumstances different from those that resulted in the custody arrangement just ordered. Therefore, it must be presumed that what was in the children's best interest continues. Plaintiff had a full and fair opportunity at trial to present evidence, cross-examine Defendant's testimony and evidence, and raise objections to Defendant's exhibits. Allowing Plaintiff to now belatedly and immediately re-litigate factual evidence post-trial is contrary to the Court's interest in promoting judicial efficiency, imposes unnecessary financial burden on Defendant, and threatens to create a disruptive and destabilizing environment for the parties' two minor children.^{11 12}

Conclusion

Based on the foregoing, Defendant's Motion to Dismiss is GRANTED and Plaintiff's Petition for Modification of a Custody Order is DISMISSED without prejudice. Plaintiff may file a Petition for Modification of a Custody Order in the future should he be able to allege circumstances supporting such a change, such as increased cooperation with Defendant. Plaintiff may supplement such an allegation with evidence that the Court's September 3 Custody Order is based, in part, on falsified exhibits. However, any

⁹ See e.g., J.P.W., Jr. v. A.N.H., No. 191 WDA 2016, 2016 WL 5869530 (Pa. Super. Aug. 24, 2016) (affirming the trial court's dismissal of mother's modification petition absent hearing when petition failed to raise any issues that the trial court had not already considered during the prior custody proceedings).

¹⁰ Paragraph 12 of Plaintiff's Petition to Modify only provided the conclusory statement that, "Father believes a week on week off schedule is in the best interest of the children."

¹¹ Cf. *Agati v. Agati*, 492 A.2d 427, 429 (Pa. Super. 1985) (emphasizing the potentially destabilizing impact on the parties' minor child should the court entertain frequent petitions for modification of a custody order).

¹² This custody matter has faced extensive litigation. Since the filing of the custody complaint in 2015, a petition to modify has been filed almost annually, with intervening petitions for contempt and special relief.

future Petition for Modification of a Custody Order must demonstrate why modification would be in the best interest of the parties' two minor children.

The Court declines to find that Plaintiff's filing of this Petition to Modify constituted obdurate, vexatious, or bad faith conduct. Therefore, Defendant's request for attorney's fees is DENIED.

IT IS SO ORDERED this 5th day of December 2019.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

cc: Andrea Pulizzi, Esquire
Jason Lepley, Esquire
Family Court
Jerri Rook
Gary Weber, Lycoming Reporter