



FUNDAMENTALLY SPEAKING

## WHEN CIRCUMSTANCES CHANGE

BY DANIEL FINDLING

The purpose of this column is to survey the seminal cases on major areas of divorce and family law. This column is inspired by the late John F. Mills, former Chair of the Family Law Section of the State Bar of Michigan, who was a mentor and role model of mine.

As Chair of the Family Law Section, John published a Quick Reference Guide for Family Law Lawyers, which remained in my briefcase for many years to quickly reference important family law topics. It is my hope that this column will further John's goal of encouraging the growth and development of the family bar.

One of the most common questions asked to practitioners in family law cases involves modification of custody, child support, spousal support or parenting time in circumstances when the client perceives the result as unfair.

In addressing the question, the keen attorney tries to formulate a basis for modification and the basis typically involves an analysis of proper cause or change of circumstances.

### Custody

MCL 722.27(c) is the statutory authority for a court to modify a custody determination providing that a court may modify or amend its previous judgments or orders for proper cause or change of circumstances.

The seminal Michigan case on proper cause and change of circumstances is *Vodvarka v. Grassmeyer*, 259 Mich. App. 499 (2003), which provides a definition for both "proper cause" and "change of circumstances" in child custody cases.

*Vodvarka* defined "proper cause" as follows: "In summary, 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. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors."

*Vodvarka* defined "change of circumstances" as follows: "[W]e hold that in order to establish 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."

While "proper cause" or a "change of circumstances" is clearly defined in seeking modification of a child custody determination, the definition is not necessarily adaptable in cases involving spousal support, child support or parenting time.

### Spousal Support

The statutory right to modify spousal support is set forth in MCL 552.28, but the statute does not address proper cause or change of circumstances. The requirement for a change of circumstance to modify spousal support is found in case law. Obtaining new (or better) employment, collecting social security or otherwise improving his/her financial condition has been held to be a sufficiently changed circumstance to modify spousal support.

*Schaeffer v. Schaeffer*, 106 Mich. App. 452, 460 (1981): A modification of an award of alimony under this section [552.28] may rest only upon new facts or changed circumstances arising since the judgment, which justify revision.

*Graybiel v. Graybiel*, 99 Mich. App. 30, 37 (1980): The party moving for modification of spousal support has the burden of showing sufficiently changed circumstances to warrant modification.

*Crouse v. Crouse*, 140 Mich. App. 234, 238 (1985): a former spouse's continued cohabitation (e.g. with a boyfriend/girlfriend) is not a sufficiently changed circumstance to warrant modification of spousal support.

*Gates v. Gates*, 256 Mich. App. 420, 434 (2003): The burden is on the moving party to show a change of circumstances using the facts and circumstances existing at the time of the request. A presumptive alimony term does not shift the burden of proving change circumstances to the non-moving party.

*Ackerman v. Ackerman* 197 Mich. App. 300, 303 (1992): The receipt of disability benefits under an insurance policy was a sufficiently changed circumstance to warrant modification of spousal support.

*Oknaian v. Oknaian* 90 Mich. App. 28, 37 (1979); *Hall v. Hall*, 157 Mich. App. 239, 243 (1987): Alimony in gross (a lump sum or periodic payment that does not terminate

upon a contingency) is generally non-modifiable regardless of changed circumstances.

*Staple v. Staple*, 241 Mich. App. 562, 581 (2000): Parties may agree to waive the statutory right to petition the court for modification of alimony notwithstanding a change of circumstances. The parties must clearly and unambiguously set forth that the parties (1) forgo their statutory right to petition the court for modification and (2) agree that the alimony provision is final, binding and non-modifiable.

## Child Support

The statutory basis for modifiability of child support is set forth in MCL 552.17. The statute provides that child support is modifiable: “. . . as the circumstances of the parents and the benefit of the children require.” (See: MCL 552.17(1)) Once again, case law provides guidance as to a sufficient change of circumstances to support a modification of child support.

*Good v. Armstrong*, 218 Mich. App. 1, 7 (1996): A personal injury settlement in the amount of \$40,000.00 was a sufficient change of circumstances to modify child support considering the notion that the proceeds were spent on non-indispensable items.

*Aussie v. Aussie*, 100 182 Mich. App. 454, 462 (1990): Increased costs associated with rearing a child with a brain injury was a sufficiently changed circumstance to warrant an upward modification of a child support obligation.

*Edwards v. Edwards*, 192 Mich. App. 559, 564 (1992): The increased cost of school and extra-curricular activities were a sufficient change of circumstance to modify child support. The court emphasizing that the needs of the children and the disparity of the parties’ incomes should be considered in determining a sufficient change of circumstance to modify child support.

## Parenting Time

The statutory basis to modify parenting time is the same as custody, MCL 722.27(c), as the parenting time statute, MCL 722.27a, does not address modification. However, case law provides an important distinction between parenting time modifications that rise to a change in the established custodial environment and parenting time that does not change the established custodial environment.

*Rains v. Rains*, 301 Mich. App. 313, 340 (2013): Modifications of parenting time are not necessarily changes in custody. Changes in parenting time are distinct from changes in custody, and only if a change in parenting time would amount to a change of the established custodial environment should the requirements to modify custody apply.

*Shade v. Wright*, 291 Mich. App. 17, 29 (2010): Normal life changes (e.g., child now in high school and changes in extra-curricular activity schedule were a sufficient change of

circumstances to modify parenting time, even if insufficient to warrant modification under the definitions of *Vodvarka*. When modification of a parenting time order does not alter the child’s established custodial environment, the “change in circumstances” requirement is less stringent because the concern of “providing a stable environment for children that is free of unwarranted custody changes” is not implicated. *Shade*, 291 Mich. App. at 28–29. (Citation omitted).

*Kaeb v. Kaeb*, 309 Mich. App. 556, 571 (2015): 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. “Proper 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. The lesser, more flexible, understanding of “proper cause” or “change in circumstances” as set forth in *Shade v. Wright* should apply to a request to modify or amend a condition on parenting time.

This column is not a treatise on proper cause and change of circumstances. Rather, it is my hope that the statutes and case law presented here will point you in the right direction and help you effectively argue your position as the facts require.

If one day, you happen to reach into your briefcase, and reference this article to support your client’s position, I would be grateful. It would be good Karma, as I am as grateful for being able to use the Quick Reference Guide for Family Law Lawyers previously published under John’s leadership, as I am for his mentorship.

## About the Author

*Daniel Findling is a divorce and family law attorney in practice for over 20 years and managing director of Findling Law, PLC, a divorce law firm with attorneys who share the core value of practicing law to help people navigate change in their life without compromising principles. Daniel is a proud father of three, private pilot, prolific blogger and lecturer. A 1971 graduate of Shaarey Zedek Beth Hayeld very good student award, a 1993 graduate of Wayne State University Bachelor of Public Affairs, magna cum laude and a 1997 graduate of Wayne State University Juris Doctor, cum laude. A member of Pi Sigma Alpha – National Political Science Honors Society, recipient of the Bronze Key Certificate – Wayne State University Law School, a DBusiness Top Lawyer, Super Lawyer, Crains Detroit Business Top Lawyer, Hour Detroit Top Lawyer and Avvo Top Divorce Attorney.*