

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

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JACIE JANINE FILSINGER,

Plaintiff-Appellee,

v

KENT DUANE FILSINGER,

Defendant-Appellant.

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UNPUBLISHED

July 27, 2010

No. 295643

Ionia Circuit Court

LC No. 2007-025702-DM

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order dismissing his motion for change in custody. Because we conclude that the trial court did not err in declining to hold a child custody hearing, we affirm.

The parties' marriage, which lasted from August 2001 to July 2008, produced two boys. By consent judgment of divorce, the parties were granted joint legal custody of the boys, and plaintiff was awarded sole physical custody.

In June 2009, defendant filed a motion for change in custody, alleging that certain behavior and statements of the children indicated that plaintiff's fiancé had sexually abused them. At the referee hearing, defendant testified that the older child told him that the fiancé slept in the younger child's bed. He also testified that the younger child told him that the fiancé had put his finger in the boy's "bottom." Defendant contacted Children's Protective Services (CPS), who opened an investigation. CPS told defendant to keep the boys pending the investigation. CPS interviewed the boys, who did not disclose any abuse. CPS then closed the investigation and told defendant to return the boys to plaintiff's custody. Defendant was not satisfied with this result, and asked CPS what else he could do. CPS recommended a doctor for defendant to contact. This doctor interviewed the boys and recommended that they be seen by Sharon Hobbs, Ph. D.

At the time of the hearing, a personal protective order (PPO) was in place, prohibiting contact between the fiancé and the boys. Hobbs, who testified at the referee hearing, said that she believed that the fiancé had sexually abused the children, although she admitted that she did not know exactly what had happened. Plaintiff said that it was her belief that there was no "evidence indicating that something happened." When asked about Hobbs's belief regarding the validity of the abuse allegations, she stated that she "believe[d] that there are other explanations

for why they may have made statements to that effect.” She further testified that she “would never do anything to put [the] children at risk,” and that she would agree to counseling for the boys in order to facilitate the “healing process” if that is what was recommended. She testified that she felt that when the PPO expired, she would seek to gradually reintroduce the children’s time with her fiancé, but that she “would be there at all times.”

The hearing referee found that proper cause and a change in circumstances existed to justify revisiting the custody order. Before the trial court, plaintiff changed her position with respect to contact between the fiancé and the boys. She said that she was no longer planning to reintroduce contact, and had called off the engagement. She agreed that her fiancé would have no contact with the boys “in perpetuity.” The trial court made no finding with respect to whether there had been abuse, but found that, even assuming the fiancé had abused the boys, there was no proper cause or change in circumstances for holding a custody hearing, in light of the fact that the fiancé was out of the boys’ life.

Defendant argues that the evidence established that there was abuse and that plaintiff failed to protect the boys from it, and that the trial court erred in finding that the problem had been fixed by plaintiff’s cutting off contact between the fiancé and the boys. We review a trial court’s determination of whether a moving party has demonstrated proper cause or a change in circumstances under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Under this standard, we defer to the trial court’s findings unless they “clearly preponderate in the opposite direction.” *Id.* (quotation omitted).

In a child custody dispute, the trial court may change a previous child custody order “for proper cause shown or because of change of circumstances.” MCL 722.27(1)(c). The court may not change the custody order—or even hold a child custody hearing—unless the moving party establishes proper cause or change in circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). In deciding whether to hold an evidentiary hearing, the court must first determine “whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.” MCR 3.210(C)(8); see also *Vodvarka*, 259 Mich App at 512. Here, there was a contested factual issue, i.e., whether the evidence demonstrated that the fiancé had abused the children. The trial court determined that the resolution of that issue was not necessary to decide the motion, because the fiancé was out of the children’s lives.

Defendant cites two termination of parental rights cases, *In re Rinesmith*, 144 Mich App 475, 483-484; 376 NW2d 139 (1985), abrogated on other grounds as recognized in *People v LaLone*, 432 Mich 103, 116 n 11; 437 NW2d 611 (1989), and *In re Brown*, 149 Mich App 529, 544; 386 NW2d 577 (1986), in support. In *Rinesmith*, this Court found that there was “overwhelming evidence” that the mother was incapable of protecting her children from harm, because, among other things, she knew that the children had been abused by their father and yet she continued to live with the father. *Rinesmith*, 144 Mich App at 483. In *Brown*, this Court also found “overwhelming” evidence of neglect by the mother, evidenced in part by her statements that she could not prevent her daughter from visiting the man who was known to be abusing her and that she had “no control over strange men inhabiting her home.” *Brown*, 149 Mich App at 544.

The situation in the present case is significantly different from either *Rinesmith* or *Brown*. Once the abuse allegations were raised, plaintiff participated and allowed the children to participate in several investigations into the matter and then complied with the pronouncements resulting therefrom. Although plaintiff indicated a lack of belief in the validity of the allegations raised, she cut off contact between her former fiancé and her boys and has agreed to maintain that situation.

In the child custody context, “proper 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.” *Vodvarka*, 259 Mich App at 511. This formulation of the “proper cause” query carefully balances the importance of assuring a safe and nurturing custodial environment with the goal of protecting children from “unwarranted custody changes (and hearings).” *Id.* Thus, in considering the impact of the cited grounds on a child’s well-being, a court should be mindful of whether the impact is “to the extent that revisiting the custody order would be proper.” *Id.* at 512.

“[I]n order to establish a ‘change of circumstances,’ a movant must prove that, since the entry of the last custody order, the conditions surrounding custody . . . , which have or could have a *significant* effect on the child’s well-being, have materially changed.” *Vodvarka*, 259 Mich App at 513 (emphasis in original). As with proper cause, the “change of circumstances” is considered in context of the desire to “avoid repeated custody evaluations.” *Id.*

In light of the particular facts of the case at hand, the court’s decision to not reopen the custody issue was proper. Defendant asserted in his motion that the facts and circumstances showed “that the children are in grave danger in their mother’s care.” The basis for this concern was the alleged sexual abuse. The existence of an abusive custodial environment would undoubtedly have a “significant effect” on the children’s life and well-being. Here, however, the potentially abusive environment has been altered by plaintiff’s agreement to assure that her former fiancé will not be around the children “in perpetuity.” Given plaintiff’s past adherence to requirements placed upon her and requests made of her regarding the situation, there is no reason at this time to doubt the sincerity of that representation. In any event, the court indicated that it would be ready to consider any changed circumstances in the future. Accordingly, although an “appropriate ground for legal action” *Vodvarka*, 259 Mich App at 512, may have existed at the time defendant’s motion was brought, and at the time the referee ruled, the circumstances had evolved as of the hearing in the trial court that “the extent” of effect necessary to breach the statutory barrier against revisiting custody orders was not established. As for the question of a “change of circumstances,” “the existing conditions or state of affairs” had also been transformed. *Id.* at 513 (quoting dictionary definition of “circumstances”).

In sum, because the evidence supported a finding that there is no continuing condition that could have a significant effect on the children’s lives, the trial court did not err in declining to hold a child custody hearing.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Jane M. Beckering