

STATE OF MICHIGAN
COURT OF APPEALS

SHELLEY ROZMIAREK,

Plaintiff/Counter-Defendant-
Appellee,

v

JOSEPH ROZMIAREK,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
July 26, 2016

No. 330980
Monroe Circuit Court
Family Division
LC No. 13-036428-DM

Before: JANSEN, P.J., and FORT HOOD and BOONSTRA, JJ.

JANSEN, P.J. (*dissenting*).

I respectfully dissent. I believe that the trial court’s conclusion that there was no proper cause or change of circumstances warranting modification of the custody order was against the great weight of the evidence. Therefore, I would reverse the trial court’s order denying defendant’s motion to modify custody of the minor child and remand for further proceedings.

I believe that the criminal charges and no contest plea arising from plaintiff’s abuse of her 17-year-old daughter established proper cause and a change of circumstances warranting modification of the October 8, 2014 custody order with regard to the child at issue in this case, GR. As discussed in the majority opinion, the trial court may modify a custody order only if it first determines that the movant establishes proper cause or a change of circumstances. MCL 722.27(1)(c); *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). As outlined in the majority opinion:

[T]o 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.

* * *

[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 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 604-605 (citation and quotation marks omitted).]

A change of circumstances must occur after the prior custody order was entered. *Vodvarka v Grasmeyer*, 259 Mich App 499, 514; 675 NW2d 847 (2003). “Of course, evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order.” *Id.* However, this is not the case with proper cause, which does not involve the same type of change in events. *Id.* at 515. “[A] party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order.” *Id.* Nevertheless, these situations may occur. *Id.*

I disagree with the majority because I believe that the criminal charges and no contest plea stemming from plaintiff’s assault of her 17-year-old daughter constituted proper cause and a change of circumstances warranting a modification of the child custody order. The majority concludes that because defendant did not appeal from the August 3, 2015 order denying his motion to change custody, the issue on appeal is limited to the changed circumstance of the criminal proceedings against plaintiff. Even accepting this as true, the criminal charge and no contest plea establish that the conditions surrounding custody of GR, which could have a significant effect on her well-being, have materially changed. The third-degree child abuse charge and attempted third-degree child abuse conviction stemmed from plaintiff’s assault of her 17-year-old daughter. Plaintiff’s conduct leading to the criminal proceedings makes it more likely that plaintiff will commit a similar act against GR in the future. Plaintiff’s conduct therefore affects the safety of GR, which in turn significantly affects her well-being. It is my belief that the conditions surrounding custody of GR materially changed when plaintiff was charged with third-degree child abuse and convicted by no contest plea of attempted third-degree child abuse.

The majority concludes that defendant was unable to raise the issue because he had sufficient knowledge of the incident and investigation before the October 8, 2014 order was entered. However, I believe that the charge and no contest plea constituted an escalation of the issue that existed when the court entered the last custody order because the claims against plaintiff went from speculative to concrete once the charges were filed, and plaintiff did not contest the charges. See *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011) (noting that the parties’ disagreements regarding the child had escalated and expanded since the

trial court entered the last custody order). Plaintiff went from a parent who had allegations pending to a defendant convicted of a crime against a child.

Similarly, I also disagree with the majority's conclusion that the fact that defendant knew about the altercation and the ongoing Child Protective Services (CPS) investigation before entry of the last custody order is outcome determinative. At the time that the last custody order was entered, defendant knew that an incident occurred. However, defendant did not know what occurred during the incident. The father of the child involved in the incident told defendant that there had been a physical altercation between plaintiff and the child. Plaintiff informed defendant that she was in an altercation and that her daughter was the aggressor. Thus, defendant did not know that plaintiff initiated the incident. Furthermore, defendant did not know what the CPS investigation entailed. Defendant testified that CPS informed him of the investigation into the incident. However, a Department of Health and Human Services (DHHS) employee testified that she did not inform defendant of the allegations against plaintiff. Accordingly, there is no indication that defendant knew what occurred during the incident. Thus, although defendant had heard about the incident and knew that there was an ongoing CPS investigation, I do not believe that he had sufficient information regarding the underlying events and investigation at the time of the last custody order to establish proper cause or a change of circumstances. Instead, defendant learned what occurred during the incident after the last custody order was entered, and the claims against plaintiff went from speculative to concrete after formal charges were brought against her and she was convicted. Accordingly, I believe that the trial court's conclusion that defendant had sufficient knowledge of the incident to raise the issue at the hearing corresponding with the October 8, 2014 order was against the great weight of the evidence.

The trial court also concluded that defendant failed to show a change in circumstances because the terms of plaintiff's probation would permit her to continue to parent the child. However, I believe that the trial court's conclusion misses the point. The changed circumstance is not that plaintiff would no longer be able to parent or watch over the child. Rather, the incident of child abuse indicates that plaintiff has exhibited violence toward a child, which increases the risk that GR will be subjected to abuse. I believe that the trial court improperly refused to consider the nature of the child abuse charge and attempted child abuse no-contest plea. Accordingly, I conclude that the trial court's decision that the criminal proceedings against plaintiff did not constitute a change in circumstances was against the great weight of the evidence. See *Corporan*, 282 Mich App at 605.

I similarly conclude that defendant established proper cause to modify the custody order. Defendant established the existence of an appropriate ground for the court to take action relevant to several statutory best-interest factors, including "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," "[t]he mental and physical health of the parties involved," and "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(d), (g), and (l). Furthermore, the child abuse charge and attempted child abuse no contest plea were of such a magnitude that they have a significant effect on GR's well-being. Here, the fact that plaintiff abused her other child significantly affected GR's well-being as it indicated a heightened chance that GR would also be abused. Accordingly, I believe that defendant established proper cause for a modification of the custody order. See *Dailey*, 291 Mich App at 665.

I believe that the trial court's conclusion that there was no proper cause or change of circumstances warranting modification of the custody order was against the great weight of the evidence. I would reverse the order denying defendant's motion to modify custody of the minor child and remand for further proceedings.

/s/ Kathleen Jansen