STATE OF MICHIGAN

COURT OF APPEALS

DENNIS GUSMANO,

Plaintiff-Appellee,

v

KATHLEEN GUSMANO,

Defendant-Appellant.

UNPUBLISHED
December 13, 2012

No. 307807
Wayne Circuit Court
LC No. 08-123682-DM

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right an order awarding sole legal and physical custody of the parties' minor child to plaintiff. We reverse and remand.

I. CHANGE OF CIRCUMSTANCES

Defendant contends that the trial court's finding of a change of circumstances was against the great weight of the evidence. We agree.

> This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard. Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings "clearly preponderate in the opposite direction." [*Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (citations omitted).]

A custody award may only be modified upon the showing of a proper cause or a change in circumstances that establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). The party seeking the change in custody "has the burden of proving by a preponderance of the evidence that either a proper cause or a change in circumstances exists." *Id.* at 509. Because the trial court modified custody based on it finding that a change of circumstances existed, and not a proper cause, we will focus on this change-of-circumstances aspect only.

> [T]o 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. [*Id.* at 513-514 (emphasis in original).]

"[E]vidence 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.* at 514 (emphasis in original).

The trial court found that plaintiff established a change of circumstances based on defendant causing the child to miss several days of school in September 2010.[1] However, this finding is against the great weight of evidence.

The issue of the child missing school was not a "change" that occurred after the entry of the last custody order. The prior custody order, entered on February 4, 2010, indicates that the child missing school was an already-existing issue. The February 4 order specifically provided, in pertinent part:

> The minor child has missed several days of school. Based on the testimony[,] Plaintiff indicates that Defendant tends to over exaggerate [the child's] medical issues resulting in excessive absences, while Defendant insists that the child has only been out when medically necessary.

This situation is precisely the same situation that plaintiff and the trial court relied upon later to modify custody. Even plaintiff conceded in his motion for a change of custody that "[t]his behavior continue[d] from the inception of this action in 2008." Obviously, the specifics of the incidents (absences occurring in September 2010 as opposed to absences occurring before February 2010) are different events, but the underlying "cause" or "reason" remains the same (defendant allegedly has kept the child out of school when not medically necessary). As a result, the trial court's finding that this constituted a *change* in circumstances is against the great weight of evidence.

We note that just because some characteristic or circumstance may have been present in some form before the entry of a previous custody order does not necessarily bar the later

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[1] In its opinion and order, while addressing whether plaintiff established a change in circumstances, the trial court first implied that defendant was responsible for the child's absences from school when it stated that "the minor child missed several days of school . . . which were [sic] almost all occurred during Defendant-Mother's parenting time." Lest there be any confusion about the trial court's true finding, it later stated, while evaluating the best-interest factors, that defendant has "allowed the child to regularly miss school, and takes the child to the doctor excessively." We have no issue with this particular finding, but rather we simply hold that this finding is insufficient to constitute a change of circumstances under *Vodvarka*.

presence of that same characteristic or circumstance from ever being considered a "change in circumstances." In *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011), this Court held that the "escalat[ion] and expan[sion]" of an already-existing bad circumstance can be sufficient to constitute a "change in circumstance." But here, the trial court did not make a finding that the absences were an *escalation* of the condition that existed at the time of the previous custody order. Instead, the trial court merely relied on the fact that there were several absences that it attributed to defendant.

II. LIMITATION OF EVIDENCE AND BEST-INTEREST FACTORS

Because plaintiff failed to establish a change in circumstances, the trial court was prohibited from conducting any child-custody hearing. *Corporan*, 282 Mich App at 603. As a result, we need not address defendant's arguments that the trial court improperly excluded evidence at that hearing or that the trial court's best-interest findings from that hearing were against the great weight of evidence.

III. GUARDIAN AD LITEM FEES

Finally, defendant contends that the trial court erred in requiring her to be solely responsible for the guardian ad litem's (GAL) fees and requiring those fees to be paid directly from her spousal support award. We disagree.

Defendant argues that the trial court should have considered the income discrepancies between the parties and that the GAL benefited both parties. However, defendant specifically requested the GAL be appointed and the record indicates that she was aware that the appointment was made with the understanding that she would pay for it. First, shortly after initially requesting the GAL at the April 16, 2010, hearing, opposing counsel stated to the trial court, "[Y]ou can order a GAL be appointed, as mom's paying for it . . . ." Notably, defendant did not correct this position. Further, toward the end of the hearing, when the issue of the GAL had not yet been addressed by the trial court, the following exchange occurred:

> *THE COURT*: I've ruled.
>
> *[Defendant]*: And what are you going to do about the guardian ad litem?
>
> *COURT OFFICER*: We're done. We're done. We're done.
>
> *THE COURT*: Can you afford to pay for one? Can you afford to pay for one?
>
> *[Defendant]*: Yes.
>
> *THE COURT*: Okay, great. Barb Watry, guardian ad litem. You pay for it, she'll go out.

Again, defendant did not voice any objection to this arrangement. Instead, she willingly went along with the arrangement to pay for the GAL. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to

that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (citation and internal quotation marks omitted). Therefore, defendant is now precluded from challenging the trial court's decision.

Defendant also argues that the trial court erred in requiring her to pay the GAL fees out of her spousal support. Defendant argues that just as a party should not be required to pay attorney fees out of spousal support, the GAL fees should not be taken from spousal support. Defendant's reliance on *Gates v Gates*, 256 Mich App 420; 664 NW2d 231 (2003), and *Myland v Myland*, 290 Mich App 691; 804 NW2d 124 (2010), is misplaced. In the context of awarding attorney fees, the *Gates* Court stated that "a party should not be required to invade assets to satisfy attorney fees *when the party is relying* on the same assets for support." *Gates*, 256 Mich App at 438 (emphasis added). Similarly, the *Myland* Court stated that when deciding on whether to award attorney fees, a trial court should consider whether that party "would have to invade the same spousal support assets *she is relying on to live* in order to pay her attorney fees." *Myland*, 290 Mich App at 703 (emphasis added). Both of these cases stand for the position that a person should not have to pay attorney fees when doing so will interfere with her ability to support herself. However, this concern is not present in the instant case because defendant admitted to the trial court that she *could* afford to pay the GAL fees.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra