

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH YOUNT,

Plaintiff-Appellant,

v

DIANA YOUNT,

Defendant-Appellee.

UNPUBLISHED

December 11, 2007

No. 278890

Ingham Circuit Court

LC No. 07-000663-DC

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

In this child custody dispute involving a natural parent, plaintiff Joseph Yount, and a third person, plaintiff's sister – defendant Diana Yount, plaintiff appeals as of right the trial court's order dismissing his complaint to modify a prior out-of-state custody order relative to plaintiff's two minor daughters, with the court finding a failure to show proper cause or a change of circumstances. Because of the trial court's finding, no evidentiary hearing on the children's best interests was conducted. We reverse, concluding that a change of circumstances was established, and we remand for an evidentiary hearing on the children's best interests.

Pursuant to a March 2001 order entered by a Minnesota family court, the court found that the minor children were in need of protection or services, that the children had been in the legal custody of the county since November 9, 2000, that plaintiff requested that defendant take custody of the children, and that plaintiff would not be able to care for the children in the foreseeable future because of chemical dependency issues.¹ The order gave legal and physical custody of the children to defendant, who was residing in Michigan, and it provided plaintiff with the right of reasonable visitation under supervised conditions as approved by defendant. The order further stated that custody would not be returned to plaintiff except by court order.

Plaintiff subsequently relocated to Michigan to be closer to the children and to exercise visitation. In July 2002, the Minnesota order was registered in Michigan as a recognizable and enforceable foreign order pursuant to an action filed by plaintiff, who claimed that he was drug

¹ Plaintiff's wife, and the mother of the children, previously committed suicide, and plaintiff had been the sole custodian of the children.

and alcohol free since his release from a chemical dependency program. In February 2006, plaintiff filed a petition to change custody in the Michigan trial court, claiming, among other matters, that he had been clean and sober for five years. The action was referred to the friend of the court for conciliation, but defendant first filed a motion to dismiss, and the trial court granted the motion, indicating its belief that while it could enforce the Minnesota order, it lacked jurisdiction to modify the Minnesota order. Plaintiff then obtained an amended order from Minnesota that reiterated much of the content from the 2001 order, adding that plaintiff's parental rights had never been terminated, that plaintiff had the right and standing to petition a court for legal and physical custody, that Minnesota was terminating its jurisdiction, and that the Michigan court could exercise jurisdiction. Plaintiff subsequently filed a motion for change of custody in Michigan,² and the case was again referred to the friend of the court. After proceedings were conducted, the friend of the court conciliator recommended and ordered that plaintiff have sole legal and physical custody;³ however, defendant objected and the matter was once again placed before the trial court. The court found that the case was not properly positioned as a custody action, given the prior dismissal, although it remained open for purposes of enforcing the Minnesota order. The motion to change custody was thus dismissed.

In March 2007, plaintiff filed a new complaint for custody, and defendant moved to dismiss the action, arguing that plaintiff had not shown a change of circumstances or proper cause. The trial court agreed, issuing an order that there "is no material change in circumstance nor proper cause to establish a reason to have an evidentiary hearing to decide the best interests factors after six (6) years of custody as a result of plaintiff's abandonment of the children to defendant." The court also ruled that the parental presumption under MCL 722.25(1) did not apply and was not implicated, given that plaintiff failed to show proper cause or a change of circumstances. At the hearing on the motion to dismiss the action, the court essentially accepted that plaintiff was now clean and sober and had recovered from his dependency problems that had led to intervention by the Minnesota court system.⁴ However, the court, rejecting that a change of circumstances had occurred, maintained that the recovery happened years earlier and that plaintiff had not been a fit and proper parent when defendant was given custody. The trial court did award plaintiff unsupervised parenting time, commenting that "nobody appears to have any problems with his ability to provide visitation or care overnight." The court further noted that no one was claiming that plaintiff posed a risk of harm to the children. The court opined that plaintiff deserved at least minimum parenting time like any other parent entitled to visitation.

² The 2002 action to register the Minnesota order and the February 2006 petition to change custody, which was dismissed, had the same lower court docket number, and plaintiff's subsequent motion to change custody was filed under that identical docket number.

³ The conciliator found, in part, that plaintiff has stable employment, earns a high income, and lives in a nice home with his new wife. The conciliator concluded that plaintiff truthfully asserted that he had been clean and sober for over five years, and the conciliator noted that defendant admitted that she knew of no events subsequent to 2002 that would support her continuing concern about chemical dependency.

⁴ Plaintiff testified that he got his life back together by 2002.

Findings of fact in custody cases are reviewed under the great weight of the evidence standard, discretionary decisions such as custody dispositions are reviewed for an abuse of discretion, and questions of law are reviewed for clear legal error. MCL 722.28; *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

MCL 722.27 provides in pertinent part as follows:

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

* * *

(c) *Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances* The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. [Emphasis added.]

A change of circumstances is established by proving 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.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003) (emphasis in original). Something more than normal life changes that occur during a child’s life must be shown. *Id.* Proper cause is shown by proving by a preponderance of the evidence that an appropriate ground for legal action to be taken by the trial court exists. *Id.* at 512. “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.” *Id.* If proper cause or a change of circumstances is not established, the court is precluded from holding a child custody hearing to determine the child’s best interests. *Id.* at 508.

We decline plaintiff’s invitation to find that the parental presumption in MCL 722.25(1)⁵ negates plaintiff’s need to show proper cause or a change of circumstances under MCL 722.27(1)(c). Rather, we take no position on the argument because it is unnecessary to reach the issue where plaintiff has indeed established a change of circumstances. Plaintiff contended that he overcame his chemical dependency problems, and the court apparently accepted that

⁵ MCL 722.25(1) provides, in relevant part, that “[i]f the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.”

contention.⁶ The main reason for the proceedings in Minnesota and plaintiff's request that defendant take custody of the children related to his chemical dependency. Thus, plaintiff's actions, efforts, and success in overcoming the dependency and becoming clean and sober certainly constitute a significant change of circumstances, satisfying the threshold under MCL 722.27(1)(c). Plaintiff's sobriety, under the circumstances of this case, is relevant to the children's best interests. The fact that plaintiff waited a few years after his recovery before filing an action is, contrary to the trial court's assertion, irrelevant, where the question is whether there has been a change since entry of the last custody order, which was back in 2001.⁷ Plaintiff's fitness at the time of the last order in 2001 is also irrelevant to whether he has now established proper cause or a change of circumstances. To rule otherwise would permanently close the door to custody relative to parents who have earnestly straightened out their lives after earlier parental failures. Accordingly, plaintiff is entitled to an evidentiary hearing on the best interests of the children.

With respect to the evidentiary hearing, the burden of proof, and the balancing of the parental presumption, MCL 722.25(1), against the principles regarding the established custodial environment, MCL 722.27(1)(c), the trial court is directed to follow and apply *Heltzel v Heltzel*, 248 Mich App 1; 638 NW2d 123 (2001). We find *Mason v Simmons*, 267 Mich App 188; 704 NW2d 104 (2005),⁸ factually distinguishable, where here the record indicates that plaintiff has

⁶ The trial court commented that plaintiff "was better back in 2002, and there really hasn't been a material change in circumstance for four years." This language suggests a recognition by the court that a change of circumstances had occurred after the 2001 Minnesota order was issued. The court also stated, "While he's okay now, he was not a fit and proper parent at the time [the 2001 Minnesota order] was entered." As indicated in *Vodvarka, supra* at 512, an evidentiary hearing on the threshold question is not always necessary, such as where the court "accept[s] as true the facts allegedly comprising proper cause or a change of circumstances, and then decide[s] if they are legally sufficient to satisfy the standard."

⁷ Plaintiff testified that he delayed seeking custody because he first spent time trying to work with defendant in increasing his visitation.

⁸ In *Mason, supra* at 206-207, the Court concluded:

The comprehensive scheme set forth in the Child Custody Act permits consideration of both the natural parent's fundamental liberty right to raise a child and a child's need for stability in determining the ultimate issue of the child's best interests. When the statutory presumption in favor of parental custody and the presumption in favor of the established custodial environment conflict, due process requires that the presumption remain in favor of custody with the parent in the absence of a showing of parental unfitness. *Heltzel, supra* at 23-24, 27-28. The best interests of the child are presumed to be served by granting custody to the parent, and that presumption must be weighed heavily in favor of the parent. To rebut the presumption, the third party must show by clear and convincing evidence that the best interests of the child require maintaining the established custodial environment. *Id.*

(continued...)

been honestly and actively involved in the lives of his children over the last several years, or at least as much as possible under the custody and visitation arrangements, regardless of the low period and his prior unfitness years earlier.

Finally, on review of the entire record and contemplation of plaintiff's argument concerning reassignment, we deem it appropriate to reassign the case to a different judge on remand for purposes of the evidentiary hearing, not because of any improprieties, but in order to preserve the appearance of justice. *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). Under the circumstances, we believe that it would be difficult for the trial judge to set aside previously expressed views and findings regarding plaintiff's case. *Id.* Moreover, reassignment would not entail duplication and waste. *Id.* Our decision is not to be viewed as reflecting personal criticism of the trial judge; rather, our chief concern is with the appearance of justice.

We reverse and remand for an evidentiary hearing on the children's best interests before a different judge. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto

(...continued)

However, when a parent's conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child, the reasoning and holding of *Heltzel* do not govern. In this custody dispute, given defendant's failure to acknowledge paternity during the first six years of the child's life and his total neglect of his child over a three-year period after the mother's death, we find no clear legal error in the placement of the burden of persuasion on defendant, to show by a preponderance of the evidence, that a change in the established custodial environment with the guardian was in the child's best interests.