STATE OF MICHIGAN

COURT OF APPEALS

LORETTA WOSZCZYNA and DALE WOSZCZYNA, Plaintiffs-Appellants, v CHRISTINA SHOUSE and ROBERT SMITH, Defendants-Appellees.	UNPUBLISHED August 10, 2010 No. 296462 Lapeer Circuit Court LC No. 05-035921-DC

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

In this child custody dispute, plaintiffs appeal the trial court's order that awarded sole physical custody of the minor child to defendant Robert Smith.[1] For the reasons set forth below, we affirm.

Plaintiff Loretta Woszczyna is the maternal grandmother of the child and is married to plaintiff Dale Woszczyna. Plaintiffs contend that the trial court should not have granted custody to defendant, who is the child's father. In response, defendant asserts that plaintiffs lack standing to litigate this issue. Defendant is correct that plaintiffs were *limited* guardians when they filed the custody petition. The Child Custody Act (CCA) provides that limited guardians have no standing to bring a custody action unless the child's parents have failed to substantially comply with the guardianship placement plan. MCL 722.26b(2). At the time of their petition for custody, the child's mother, defendant Christina Shouse, had not complied with the guardianship placement plan and Smith had not yet established paternity. Accordingly, plaintiffs met the standing requirements for limited guardians under the statute. We decline to otherwise revisit the validity of plaintiffs' 2005 guardianship. *Unthank v Wolfe*, 483 Mich 964; 763 NW2d 924 (2009).

Plaintiffs contend that the trial court erred when it changed custody because all of the best interest factors in MCL 722.23 favored them. They further argue that the court imposed an

[1] Defendant Christina Shouse did not file a brief on appeal, so our use of "defendant" refers to Robert Smith.

unduly heavy burden on them to establish their entitlement to custody. Contrary to plaintiffs' assertions, they could not defeat defendant's motion to change custody by simply presenting evidence that the statutory best interest factors favored them. Rather, plaintiffs had the burden to establish by clear and convincing evidence that custody with defendant was not in the child's best interest. *Hunter v Hunter*, 484 Mich 247, 279-280; 771 NW2d 694 (2009). Indeed, MCL 722.25(1) provides, "If 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."[2] This key statutory mandate protects, promotes, and reflects the important and fundamental parent-child relationship. The referee cited the correct legal standard.

With regard to the evidence presented, this Court defers to the trial court's factual findings in custody matters unless the findings are against the great weight of the evidence. *Pierron v Pierron*, 282 Mich App 222, 242; 750 NW2d 603 (2009). Further, this Court must affirm the trial court's ultimate decision on a custody matter unless the court made a clear legal error or its decision is a palpable abuse of discretion. *Id*.; see also MCL 722.28. "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Rittershaus v Rittershaus*, 273 Mich App 462, 465; 730 NW2d 262 (2007) (internal quotation marks and citations omitted). Clear legal error occurs "[w]hen a court incorrectly chooses, interprets, or applies the law." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

Plaintiffs presented its most persuasive evidence pursuant to best interest factor (d), the length of time the child had lived in a stable, satisfactory environment and the desirability of maintaining that environment, MCL 722.23(d), including the opinion of psychologist, Dr. Milton Grosenbach. However, the parental presumption, as well as the remainder of the evidence, supports the trial court's ruling. Plaintiffs presented some evidence on some of the other best interest factors, but presented no evidence that sufficiently challenged factors (a) (defendant's love and affection for the child), (e) (the permanence, as a family unit, of defendant's home), (g) (defendant's mental or physical health), (h) (the child's home, community and school record), or (k) (domestic violence). MCL 722.23(a), (e), (g), (h), (k). Plaintiffs could not fulfill their burden of proof merely by demonstrating that they had greater wealth, longer home ownership,

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[2] We also reject plaintiffs' claim that defendant was attempting to sidestep a prior custody determination. In *Hunter*, the majority and dissent recognized that parents could not use the parental presumption to circumvent termination of parental rights proceedings by seeking custody under the CCA. *Hunter*, 484 Mich at 286-288, citing MCL 712a.19a (Corrigan, J., dissenting). The majority and dissent also recognized that collateral estoppel would bar relitigation of a custody decision rendered under the Juvenile Code, MCL 712a.19a. *Id.* at 276 (Kelly, C.J.), 289 (Corrigan, J., dissenting). Here, the 2008 custody order did not involve a Juvenile Code determination. Moreover, defendant's motion for a change in custody did not involve relitigation of a prior determination; the motion involved modification of a prior child custody order under the CCA. Thus, defendant's motion was within the scope of custody decisions contemplated in *Hunter*.

or more experience in child rearing than defendant. Again, the parental presumption required plaintiffs to demonstrate that, considering *all relevant factors*, defendant should not have custody of the child. *Hunter*, 484 Mich at 279. The trial court correctly found that plaintiffs had not met their burden, and properly awarded sole custody to the father.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto