

STATE OF MICHIGAN
COURT OF APPEALS

LEWIS WILLIAMS,

Plaintiff-Appellee,

v

APRIL RUFFIN,

Defendant-Appellant.

UNPUBLISHED

July 5, 1996

No. 184496

LC No. 91-108181 DC

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo,* JJ.

PER CURIAM.

In this child custody matter, defendant April Ruffin appeals of right the order awarding permanent legal and physical custody of the parties' child to plaintiff's sister, with reasonable visitation to defendant and her family. We affirm.

In 1988, Mistiana Williams (hereinafter the child) was born to unmarried parents defendant and plaintiff Lewis Williams, who ended their relationship after the child was born. The child lived with defendant for her first three years. In early 1991, plaintiff petitioned the circuit court for custody of the child because defendant was addicted to crack cocaine¹ and had neglected the child. In July, 1991, the circuit court awarded legal and physical custody to plaintiff; defendant did not contest the decision. In November, 1991, after contracting cancer, plaintiff placed the child with his parents. At that time, the paternal grandparents did not seek custody or guardianship.

While the child lived with her paternal grandparents, defendant frequently visited the child, and the child visited defendant's family every weekend. Several of plaintiff's relatives, including plaintiff's sister Mary Ann Scott, lived with or nearby the paternal grandparents and helped take care of the child. Before his death, plaintiff told Scott that he wanted her to care for the child after he passed away. Plaintiff died on March 10, 1994. Defendant immediately took physical custody of the child. Eight days later, Scott petitioned for guardianship of the child in the probate court. During that proceeding,

* Circuit judge, sitting on the Court of Appeals by assignment.

Scott and defendant agreed that defendant would retain custody of the child, and that Scott would be conservator of the child's estate.

In May, 1994, along with the child's maternal grandmother, defendant refused to return the child to the paternal grandparents. The next month, Scott, as personal representative of plaintiff's estate, filed a motion in circuit court for a show cause hearing to determine whether the child should remain with her maternal grandmother. In July, 1994, Scott moved for defendant to return the child to her paternal grandparents' home. At a hearing later that month, the Friend of the Court referee advised that the court award custody to the paternal grandparents. On August 1, 1994, the circuit court ordered that defendant return the child to the paternal grandparents. Defendant initially refused to return the child; however, she later returned the child after the judge threatened her with contempt of court. Thereafter, defendant, Scott, and the paternal grandparents sought custody of the child in circuit court. After three evidentiary hearings, the circuit court granted Scott permanent legal and physical custody of the child in November 1994, and granted reasonable visitation to defendant and her family. Defendant appeals the order of custody.²

Defendant first challenges the constitutionality of MCL 722.26c; MSA 25.312(6c) on equal protection grounds. Defendant did not raise this issue below. Generally, this Court does not review constitutional issues raised for the first time on appeal. *Booth Newspapers, Inc v U of M Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Additionally, our Supreme Court has refused to reach constitutional claims that are unnecessary to the resolution of a case. *Id.* We decline to review this unpreserved issue, and we will not reach the constitutional issue because it is unnecessary in deciding this matter.

Next, defendant argues that her procedural due process rights were violated. Defendant's claim that Scott did not comply with procedural requirements will be addressed below. Defendant did not raise her remaining due process claims before the circuit court, and the court did not address them. To be preserved for appeal, issues generally must be raised before the trial court and addressed by that court. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 368; 533 NW2d 373 (1995). Defendant therefore did not preserve the due process issues for review.

Additionally, defendant argues that Scott, as the child's paternal aunt, did not have standing to pursue custody under MCL 722.26c; MSA 25.312(6c) when the probate court previously had granted defendant custody. First, the probate court's order did not grant custody of the child to defendant; the probate court had no power to do so, as indicated below. Second, although traditionally third parties had no standing to bring custody actions, see *Bowie v Arder*, 441 Mich 23, 48-49; 490 NW2d 568 (1992), a recent amendment to the Child Custody Act of 1970, MCL 722.21 *et seq.*, MSA 25.312(1) *et seq.*, provides for third party standing in custody actions as follows:

- (1) A third person may bring an action for custody of a child if the court finds . . . the following:

* * *

(b) All of the following:

- (i) The child's biological parents have never been married to one another.
- (ii) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.
- (iii) The third person is related to the child within the fifth degree by marriage, blood, or adoption. [MCL 722.26c(1)(b)(i-iii); MSA 25.312(6c)(1)(b)(i-111).]

Scott meets the above criteria under the statute. Plaintiff and defendant were never married to each other. Plaintiff, who had custody of the child since 1991, died in 1994. The circuit court did not grant defendant custody under court order. Scott is related to the child within the fifth degree by blood. (Compare *Porter v Overton*, 214 Mich App 95; 542 NW2d 288 (1995), where this Court ruled that the plaintiff did not have standing because she was not related to the children within the fifth degree by marriage, blood or adoption.)

Evidence under the statutory best interest factors also supports this result. The circuit court found that the child's established custodial environment was with her paternal relatives, not with defendant. The court found that Scott and the paternal grandparents were "much more able to provide the child with the guidance, education and self discipline that she needs." Scott is a full-time IRS employee; defendant is an unemployed high school drop out who collects public assistance. There is some question whether defendant remains a drug user. Defendant gave birth to another child in 1994. The court was concerned about the type of moral environment defendant would provide the child. When defendant took the child in May, 1994, she did not take the child to school. Also, defendant failed to attend a hearing in this case. For these reasons, the evidence supports that Scott retain custody of the child.

Defendant also argues that Scott did not comply with the statutory requirement that she include, with her action, the following:

- (a) An affidavit setting forth facts relative to the existence of the prerequisites required by subsection (1)(a) or (b).
- (b) Notice that a defense or objection to a third person's right to bring an action for custody may be raised as an affirmative defense or by a motion for summary disposition based on lack of standing provided in the Michigan court rules. [MCL 722.26c(2); MSA 25.316(6c)(2).]

In this case, defendant was not prejudiced by Scott's failure to set forth facts relative to subsection (1)(b) because defendant was aware that she never had been married to plaintiff, that plaintiff

held legal custody of the child, that plaintiff had died, and that Scott was related to the child within the fifth degree. Additionally, defendant did not have an affirmative defense under subsection (2)(b) because Scott had standing under the statute. Defendant had notice of the proceedings and the opportunity to be heard before an impartial decision maker. *Deal v Deal*, 197 Mich App 739, 743; 496 NW2d 403 (1993). Defendant was not denied due process.

Defendant next argues that the circuit court did not have jurisdiction in this matter because the probate court had proper jurisdiction over the legality of defendant's custody of the child. Defendant contends that the probate court gained jurisdiction in this matter when it heard Scott's petition for guardianship of the child. Whether a court has subject matter jurisdiction is a question of law that we review de novo. *WA Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

The probate court does not have jurisdiction to hear custody matters. *University Center, Inc v Ann Arbor Public Schools*, 386 Mich 210, 219; 191 NW2d 302 (1971). The probate court has no power to act outside its statutorily defined jurisdictional boundaries. *Id.* Under statute, the probate court has jurisdiction over protective proceedings and guardianship proceedings. MCL 700.401(1); MSA 27.5401(1). Contrary to defendant's argument, the order regarding guardianship did not amount to an award of legal custody to defendant because the probate court had no authority to issue such an order.

Although the probate court ruled on the guardianship issue, this case in its current posture involves a custody dispute. The circuit court has general jurisdiction over custody disputes. *Bowie v Arder, supra* at 39. Moreover, the circuit court had jurisdiction under statute to determine custody in this action. See MCL 722.26c(1)(b); MSA 25.312(6c)(1)(b). Also, the circuit court had continuing jurisdiction in this matter. The circuit court became involved in this case in 1991, when it ordered that plaintiff gain custody of the child. Once a circuit court has properly exercised its jurisdiction under the act, it has the continuing authority to modify or amend its prior judgments or orders until the child reaches eighteen years of age. MCL 722.27(1)(c); MSA 25.312(7).

Affirmed.

/s/ Maura D. Corrigan

/s/ Barbara B. MacKenzie

/s/ Paul J. Clulo

¹ Defendant underwent treatment for her drug problem and alcohol addiction from December, 1992, through June, 1993.

² Defendant also moved for a new trial, challenging Scott's standing to petition for custody; the circuit court denied that motion. Defendant did not appeal that decision.