STATE OF MICHIGAN

COURT OF APPEALS

JODI LOVELESS,

Plaintiff-Appellee,

and

RICHARD LOVELESS and PATRICIA LOVELESS,

Appellees,

v

ROBERT THOMAS TREFIL,

Defendant-Appellant.

UNPUBLISHED
October 3, 1997

No. 199331
Montcalm Circuit Court
LC No. 91-000N31-DP

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right an order denying his petition for a change of custody of his son, Joseph Hammond Loveless, and awarding continuing custody to appellees, Richard Loveless and Patricia Loveless, the child's maternal grandparents. We affirm.

Defendant first argues that the lower court was without jurisdiction to hear the present matter since appellees were not legal guardians of his son. Defendant maintains that *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992), mandates reversal since the lower court had no authority to enter the initial ex parte order awarding custody to appellees. We disagree. *Bowie, supra*, and its companion case, *Duong v Hong*, are distinguishable. In this matter, unlike *Bowie* or *Duong, supra*, this custody dispute was born out of a paternity action filed by plaintiff Jodi Loveless in January 1991. Under MCL 722.720(1); MSA 25.500(1), the lower court was not without jurisdiction in this matter, but rather the court had continuing jurisdiction "to provide for, change, and enforce provisions for the order relating to custody or support of or parenting time with the child." *Id.* See also MCL 722.26b(3); MSA 25.312(6b)(3). The original order in this case was an order of filiation entered on April 19, 1991 after

Jodi Loveless brought a paternity action against defendant. Under § 722.720(1), the court had jurisdiction to modify the order of filiation on December 23, 1992 when it issued the ex parte order to appellees, and to decline to modify the custody award as requested in defendant's petition. Accordingly, the trial court did not err in exercising jurisdiction in this matter.

Next, defendant argues that the lower court erred in finding that appellees had standing to oppose his petition for a change of custody. He cites MCL 722.26c; MSA 25.312(6c), which governs actions for custody by a party other than the parent, maintaining that appellees do not qualify for standing under the statute. However, the third-party statute is not relevant to the current discussion in that the statute identifies which persons have standing to bring *original actions* seeking custody. This was not an original action, but a hearing on a petition by defendant to modify an existing order. Accordingly, there was no error in finding that appellees had standing to contest defendant's petition.

Defendant next argues that the trial court erred in applying the wrong standard of proof. Specifically, he maintains that the trial court failed to recognize that when a parent challenges an order awarding custody to a third person, the parent is required to prove only by a preponderance of the evidence that a modification would be in the child's best interests. *Rummelt v Anderson*, 196 Mich App 491, 494-495; 493 NW2d 434 (1992). We agree with defendant that appellees' counsel mischaracterized the burden of proof during closing arguments by asserting that the standard of proof was clear and convincing evidence, and acknowledge that defense counsel failed to object. It is possible that the trial court applied this higher standard, but the record does not indicate which burden of proof the trial court applied. Because any conclusions in this regard would amount to speculation, we decline to review this issue. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

Finally, defendant argues that the lower court erred in adopting the findings of the Friend of the Court ("FOC") investigator regarding the child's best interests without making an independent determination as required by MCL 722.23; MSA 25.312(3). Here, the trial court indicated that after reviewing its notes of the testimony taken before it, the statutes involved, and the caselaw cited to it, it adopted the findings contained in the Friend of the Court report, which covered all the factors at issue in detail, as its own. Relying on *Constantini v Constantini*, 171 Mich App 466; 430 NW2d 748 (1988), defendant argues that this was improper because here the report upon which the trial court relied was not admitted into evidence. We disagree. Because the report was admitted without objection at the referee hearing which preceded the circuit court hearing, it was a part of the record before the circuit court. See MCR 2.315. We find no basis in the court rules or elsewhere to conclude that the report, once admitted at the referee hearing, could not be used by the circuit court. Furthermore, we do not agree with defendant that the trial court's findings of fact relative to custody in this case went against the great weight of the evidence or evidenced clear legal error.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra