STATE OF MICHIGAN

COURT OF APPEALS

GARY HESSBROOK,

Plaintiff-Appellee,

v

SUE ANN (HESSBROOK) NAZARIO,

Defendant,

and

MARK NAZARIO,

Intervening Defendant-Appellant.

UNPUBLISHED
July 10, 1998

No. 207350
Gratiot Circuit Court
LC No. 90-000862 DM

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Appellant Mark Nazario appeals as of right from the trial court order denying his motion to intervene and to set aside an ex parte order awarding custody of his two minor stepchildren to appellee Gary Hessbrook, the children's natural father. The trial court determined that appellant did not have standing to intervene. We affirm.

During their marriage, appellee and Sue Ann Hessbrook (later Nazario) had two children, Nicole and Derek. After the appellee and Sue Ann divorced in 1990, they shared legal custody of the children, and Sue Ann received physical custody. Sue Ann married appellant in 1992. The children resided with appellant and Sue Ann until the latter's death in 1997. Appellee filed a petition for custody of the children and obtained an ex parte custody order allowing him to remove the children from appellant's residence. Appellant and Nicole Hessbrook, then fifteen years old, filed an emergency motion to set aside the ex parte order. The trial court found that neither appellant nor Nicole had standing to intervene in this action.

I

Appellant first argues that the trial court erred in refusing to convene a hearing to determine Nicole's best interests. Whether a best interest determination was required in this case is a question of law. In child custody cases, questions of law are reviewed for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

The trial court refused to hold a hearing to determine Nicole's best interests because it found that appellant did not have standing to seek custody of Nicole. Appellant maintains, however, that circuit courts have jurisdiction to enter orders regarding a child's care, custody, and maintenance once a divorce judgment has been entered and to grant custody to third parties, regardless of their standing to file for relief. In addition, appellant points out that during the pendency of divorce proceedings, the trial court may modify custody orders. See MCL 552.17(1); MSA 25.97(1).

We do not find appellant's argument persuasive. While it is true that the trial court has jurisdiction to enter orders regarding the minor's care, custody and maintenance once a divorce judgment has been entered, *Bowie v Arder*, 441 Mich 23, 38-39; 490 NW2d 568 (1992), appellant fails to distinguish between subject matter jurisdiction and standing. The trial court cannot exercise its jurisdiction until a person with standing initiates proceedings. *Id*. at 42-43.

A third party does not have standing to initiate a custody dispute unless the third party is a guardian of the child or has a substantive right of entitlement to custody of the child, which occurs in narrowly defined instances not applicable in this case.[1] A third party cannot create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party would be in the best interests of the child. *Id*. at 48-49. A circuit court may award custody to a third party based on a determination of the child's best interests in an appropriate divorce case filed by a party with standing. Such appropriate proceedings include (1) the initial divorce proceeding during which custody is at issue, and (2) a proceeding initiated by a parent's petition for a change of custody. *Sirovey v Campbell*, 223 Mich App 59, 81-82; 565 NW2d 857 (1997).

Appellant argues that appellee's 1990 divorce was still legally pending until the youngest child reached the age of majority, thereby entitling him to intervene. Although the trial court continued to have jurisdiction over the children until the children reached the age of majority, the initial divorce proceeding concluded with the entry of the judgment of divorce. The initial divorce proceeding did not create an ongoing custody dispute in which a third party could intervene at any time until the youngest child reached the age of majority.[2]

Appellant next asserts that the filing of the petition for an ex parte custody order by appellee constituted the initiation of an "appropriate" action in which he should have been permitted to intervene and seek custody of Nicole on the basis of her best interests. We disagree. Although appellee petitioned the court for an ex parte custody order, the petition did not create a divorce action nor seek a change of custody. Because appellee was awarded joint legal custody in the original divorce action, he received full custody upon the mother's death. Consequently, the petition did not create an appropriate proceeding during which the trial court could enter an order regarding Nicole's custody pursuant to MCL 552.15(1); MSA 25.95(1) or MCL 552.17(1); MSA 25.97(1).[3]

II

Appellant argues that the trial court erred when it refused to conduct a "best interests" hearing before it ordered that Nicole be removed from an established custodial environment. We disagree. Appellant cites no authority for the proposition that a best interests hearing must be held when no party with standing has requested it, despite the existence of an established custodial relationship. Third parties do not attain a legal right to custody on the basis that a child has lived with them.[4] *Bowie, supra* at 45.

Appellant also argues that he is entitled to relief under the equitable parent doctrine. The equitable parent doctrine allows a husband who is not the biological father of a child conceived during the marriage to be considered the natural father if there is a mutually acknowledged father-child relationship over time, the husband desires equitable parenthood, and he is willing to pay child support. *York v Morofsky*, 225 Mich App 333, 336; 571 NW2d 524 (1997). Appellant did not raise this issue in the trial court, and it is therefore not preserved for appellate review. See *Brown v Michigan Bell Telephone, Inc*, 225 Mich App 617, 626; 572 NW2d 33 (1997). In any case, the doctrine is inapplicable because the Hessbrook children were neither born nor conceived during appellant's marriage to Sue Ann.

III

Finally, appellant argues that this Court should broaden its interpretation of the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq*., to allow a minor child of a sufficient age to express a reasonable preference regarding her custody to obtain a best interests hearing. Appellant contends that because of Nicole's age of fifteen years and her obvious personal stake in the outcome of the proceedings, she should be granted standing to file a petition to obtain such a hearing.

However, the Supreme Court has already rejected the argument that a minor child has the right to bring a Child Custody Act action and obtain a best interests of the child hearing regarding her custody. The Court stated:

> We do not believe that the Child Custody Act can be read as authorizing such an action. The act's consistent distinction between the "parties" and the "child" makes clear that the act is intended to resolve disputes among adults seeking custody of the child.
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> * * *
>
> The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness. As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child. [*In re Clausen*, 442 Mich 648, 686-687; 502 NW2d 649 (1993) (footnotes omitted).]

We note that, as a general rule, making social policy is a job for the Legislature, not the Courts. The responsibility for drawing lines in a society as complex as ours–of identifying priorities, weighing the relevant considerations, and choosing between competing alternatives–is the Legislature's, not the judiciary's. *Van v Zahorik*, 227 Mich App 90, 95; 575 NW2d 566 (1997). Plaintiff's argument that minor children of sufficient age should have the right to obtain a best interests hearing regarding their custody is therefore more appropriately addressed to the Legislature.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] See MCL 722.26b; MSA 25.312(6b), MCL 722.26c; MSA 25.312(6c).

[2] Rather, any subsequent custody dispute would commence with one of the parents filing a petition for a change of custody.

[3] Absent a finding of parental unfitness, a parent has the right to the custody of his or her children. *In re Clausen*, 442 Mich 648, 687; 502 NW2d 649 (1993). Because appellee's parental rights were neither voluntarily surrendered nor legally terminated, after Sue Ann's death sole legal and physical custody vested in him because he was the only remaining person with parental rights. See, e.g., *Weinberger v Wiesenfeld*, 420 US 636; 95 S Ct 1225; 43 L Ed 2d 514, 527 (1975).

[4] Appellant relies on *Henrikson v Gable*, 162 Mich App 248; 412 NW2d 702 (1987), and *Rummelt v Anderson*, 196 Mich App 491; 493 NW2d 434 (1992). However, we find these cases distinguishable because although appellant lived with the children for some years, he never had custody of them; Sue Ann had physical custody, and after her death appellee promptly asserted his parental rights. Appellant also relies on *Stevenson v Stevenson*, 74 Mich App 656, 659; 254 NW2d 337 (1977), where the defendant father was required to establish by clear and convincing evidence that a proposed change in the child's established custodial environment would be in the child's best interests. However, the issue in *Stevenson* was not custody but rather visitation rights. More importantly, neither the Child Custody Act nor any other authority grants standing to create a custody dispute to a third party who does not possess a substantive right to custody. *Sirovey*, *supra* at 863.