STATE OF MICHIGAN

COURT OF APPEALS

NICHOLAS KONTOR,

Plaintiff-Appellee,

v

PATRICIA DUNN,

Defendant-Appellant,

and

LOIS KONTOR

Third-Party Plaintiff.

.

UNPUBLISHED
November 9, 2001

No. 231172
Wayne Circuit Court
LC No. 97-730248-DC

NICHOLAS KONTOR,

Plaintiff-Appellee,

v

PATRICIA DUNN,

Defendant-Appellant,

and

LOIS KONTOR,

Third-Party Plaintiff-Appellee.

No. 231288
Wayne Circuit Court
LC No. 97-730248-DC

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

In these consolidated appeals, defendant Patricia Dunn appeals from a November 10, 2000, order of the circuit court that denied her request to acquire custody of her and plaintiff's child, denied her motion to void the court's 1998 custody determination placing the child with plaintiff's mother, third-party plaintiff Lois Kontor, and required her to pay half of third-party plaintiff's attorney fees, an amount totaling $3,500.[1] We affirm.

This case arises from the custody dispute over NKD (dob 06/19/97), the son of plaintiff Nicholas Kontor and defendant Patricia Dunn, who were never married. The parties and their parents have been fighting about custody issues since NKD was born. In June of 1998, the circuit court held an extensive evidentiary hearing where a dozen witnesses testified, including the parties, their parents, social workers and doctors. Unusually, both parents were deemed unable to independently care for NKD.[2] This finding formed the basis for the circuit court's even more unusual decision.

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[1] Raising essentially identical claims, defendant both initiated an appeal of right and applied for leave to appeal. The reason for this unusual procedural posture concerned the application of MCR 7.203(A)(3), as it was then in effect. Because at that time the court rule restricted the right to appeal custody issues to those arising from "divorce or paternity" actions, this Court directed the parties to brief the question of the constitutionality of the court rule provision. The concern was that litigants such as the instant parties, who present custody issues but whose litigation does not fit within the categories of "divorce or paternity" actions, were forced to apply for leave to appeal. We need not address the question in this opinion, however, because the issue is now moot. In an order entered on September 11, 2001, to be effective immediately, our Supreme Court adopted an amendment to MCR 7.203 that resolves the question. In pertinent part, the court rule now reads:

> (A) **Appeal of Right.** The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
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> * * *
>
> (3) In a *domestic relations* action, a postjudgment order affecting the custody of a minor;
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> * * *
>
> [MCR 7.203 (emphasis added).]

[2] Testimony revealed that plaintiff and defendant met at a day recreation center at Heritage Hospital in 1991 and that both plaintiff and defendant had previously undergone inpatient treatment for mental illness. Defendant suffered from depression and a history of suicidal tendencies, while plaintiff was diagnosed a paranoid schizophrenic, although he disputed that diagnosis. A psychiatrist who conducted clinical interviews with the parties at the request of the trial court opined that plaintiff and defendant were incapable of independently caring for Nicholas. She further noted that because the relationships between the parties and their families were so strained, she recommended strict visitation guidelines.

Accepting the parties' stipulation, the judgment granted joint legal custody to plaintiff, defendant, plaintiff's mother, third-party plaintiff Lois Kontor, and defendant's mother, Betty Dunn. The court then awarded physical custody to Lois Kontor, noting that testimony evidenced that she fostered the relationship between NKD and defendant and her family, while defendant's family constantly imposed barriers and sought to exclude plaintiff and his family from any contact with NKD. Since June 1998, therefore, third-party plaintiff has had physical custody of NKD, while defendant has shared joint legal custody and exercised her awarded parenting time.

During the next year and a half, the disputes between the families continued, and in June 2000, defendant filed motions to void the court's September 1998 judgment and to change custody. After a hearing, the court ruled that it had been statutorily permitted, pursuant to MCL 722.27(1)(a), to award physical custody to third-party plaintiff. The court accordingly denied the motion to void its original judgment. The court also ruled that defendant had failed to present sufficient changed circumstances or other proper cause supporting the motion to change custody. Accordingly, the court denied the motion to change custody without holding a new evidentiary hearing regarding the best interest factors. Finally, the court additionally ruled on a motion filed by Lois Kontor, granting her permissive third-party plaintiff status, *nunc pro tunc* to June 1998, and ordering defendant to pay half her attorney fees on a finding that a large portion of defendant's motions were based on frivolous grounds. It is from the November 10, 2000, order effectuating these various judgments that defendant now appeals.

Defendant raises related issues with respect to the court's denial of her motion to void the 1998 order that determined custody. She first challenges the court's consideration of third-party plaintiff as a candidate for custody during the 1998 proceedings. Defendant contends that because third-party plaintiff did not have standing to bring a custody case at that time, she should not have been considered an eligible candidate for physical custody.

During the 1998 proceedings, defendant stipulated to both grandmothers joining both natural parents for a total of four legal custodians of the child. The trial court accepted this stipulation. Arguably, therefore, defendant waived objections to third-party plaintiff's participation in this case as one with whom plaintiff would be sharing any custodial rights. However, to the extent defendant's challenge is specifically focused on third-party plaintiff's legal capacity to be awarded physical custody where both natural parents retain parental rights, we shall briefly address the validity of the trial court's action.

Statutory construction presents a question of law that we review de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995). At issue here is MCL 722.27(1)(a), which in pertinent part provides:

> (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:
>
> (a) Award the custody of the child to 1 or more of the parties involved *or to others* and provide for payment of support for the child, until the child reaches 18 years of age. [Emphasis added.]

Defendant argues that because third-party plaintiff did not have standing to bring suit for custody under MCL 722.26c, she should not have been considered an *other* to whom custody could be awarded. However, the clear language of the statute does not lend itself to such a restrictive interpretation and prior case law supports a broader reading. "[Custody] may be awarded to grandparents or other third parties according to the best interests of the child in an appropriate case." *Ruppel v Lesner*, 421 Mich 559, 565; 364 NW2d 665 (1984). "[S]uch an award of custody is based not on the third party's legal right to custody of the child, but on the court's determination of the child's best interests." *Bowie v Arder*, 441 Mich 23, 49 n 22; 490 NW2d 568 (1992). Here, third-party plaintiff neither created the dispute nor asserted rights in the matter as if on par with either parent. Rather, third-party plaintiff offered testimony in support of plaintiff's petition for custody, agreed to share legal custody with plaintiff, and ultimately accepted physical custody tacitly on behalf of plaintiff. A plain reading of MCL 722.27(1)(a) suggests that given such circumstances, the award of physical custody to third-party plaintiff was authorized.

The related remaining question concerns whether the record supports the court's determination that this resolution was in the child's best interests. MCL 722.25(1) states that in custody disputes between parents and third parties, "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." This falls short of calling for a specific finding of parental unfitness before awarding custody to a third party. Nevertheless, the court all but made such a determination, finding that neither parent was independent from their respective families and that neither was capable of raising the child alone. With respect to defendant's specific challenge to the trial court's application of the best interest factors during the 1998 proceedings, which application led to a conclusion that third-party plaintiff was the most appropriate candidate for the responsibility of being physical custodian, this issue is collateral to the November 2000 order presently appealed, and is accordingly time barred. See MCR 7.203(B)(1); MCR 7.205(A); MCR 7.205(F)(3).[3] Suffice it to say for present purposes that in an effort to keep all interested parties, the parents and their families, involved in NKD's life, the trial court appropriately and thoroughly considered the child's best interests and awarded physical custody to the best available candidate under MCL 722.27(1)(a). We find no error in this portion of the court's decision denying defendant's motions by refusing to void the 1998 custody judgment.[4]

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[3] Also time barred is defendant's challenge to the court's finding, or lack thereof, with respect to the child's established custodial environment in 1998.

[4] Briefly addressing yet another related sub-issue raised by defendant, we find that Lois Kontor had standing to participate in the 2000 proceedings and defend defendant's motions. See *Bowie, supra* at 49 (an exception to the restrictive standing limits of the statutory scheme exists where "the third party . . . has a substantive right to entitlement to custody of the child"). Though without standing in 1998, Lois Kontor's two years as physical custodian pursuant to the court's order effectively provided her a "substantive right to entitlement to custody." Accordingly, the trial court appropriately granted Lois Kontor third-party plaintiff status in 2000. That the court ordered this status to be effective *nunc pro tunc* to June 1998—i.e., relating back to the beginning of this litigation—was likely error, because arguably Lois Kontor did not then have a substantive right to entitlement to custody. Nevertheless, this designation had no effect on

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Defendant next contests the fact that the trial court placed on her a burden to demonstrate the existence of changed circumstances before it considered her motion to change custody. Defendant argues that such a showing is unnecessary where a natural parent with a fundamental liberty interest in the parent-child relationship challenges the right to custody of any third party. We disagree.

A trial court's factual findings are reviewed clear error, while its application of the law to the facts is reviewed de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). MCL 722.27(1)(c) authorizes a trial court to "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." This provision clearly indicates that a party moving for a postjudgment order to change custody has no basis for proceeding except insofar as that party demonstrates that "proper cause" or a "change of circumstances" warrants revisiting the custody determination. See *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Defendant is essentially contending that there exists a bright-line rule that a natural parent who has not been formally declared unfit has a right to custody of the child that no third party can oppose. Defendant suggests that this constitutes "proper cause," thus obviating the need to show changed circumstances.

We agree that parents have a fundamental liberty interest in the "companionship, care, custody, and management of their children." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). On review of the case law, however, we can discern no bright-line rule establishing that a natural parent's right to custody will, in the absence of a declaration of unfitness, always be deemed superior to the interests of the child or a third party. Compare *In re Clausen*, 442 Mich 648, 687; 502 NW2d 649 (1993) ("[t]he mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness . . . the natural parent's right to custody is not to be disturbed absent such a showing . . . .") with *Bahr v Bahr*, 60 Mich App 354, 360; 230 NW2d 430 (1975) ("[r]ebuttal of the presumption in favor of parental custody no longer requires proof of parental unfitness, neglect or abandonment.") While a fit natural parent's fundamental interest in the parent-child relationship may, therefore, have presented proper cause requiring the court to consider modification of the 1998 judgment, here the trial court had effectively made a finding of unfitness. The court credited expert testimony to the effect that "neither parent is capable of handling the child alone," and thus was correct to hold defendant to a showing of changed circumstances before it considered in greater detail her petition to change custody.[5]

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defendant's or third-party plaintiff's present or future rights in the matter, and to the extent it may have been error, we consider it harmless.

[5] This case is distinguishable from the recent decision of *Heltzel v Heltzel*, ___ Mich App ___; ___ NW2d ___ (Docket No. 232736, issued October 23, 2001), slip op. at 11-14. In that case a panel of this Court remanded the matter for a more thorough consideration of the custody dispute that afforded appropriate weight to the fundamental constitutional interest of the natural parent (the interest reflected in MCL 722.25(1)). Here, in contrast, we are not dealing with a "fit" natural parent. The trial court in the instant matter, having determined that defendant was incapable of raising the child alone, was not required to afford defendant the strong presumption acknowledged in *Heltzel*.

Alternatively, defendant contends that she presented sufficient factual questions and evidence of changed circumstances to warrant an evidentiary hearing. Again, we disagree.

Defendant's amended motion for a change of custody is premised solely on the argument that the court erred in awarding physical custody to third-party plaintiff in the first instance because such award was against the child's best interests. "Unless otherwise indicated, an amended pleading supersedes the former pleading." MCR 2.118(A)(4). See also *Grzesick v Cepela*, 237 Mich App 554, 561-562; 603 NW2d 809 (1999). Because defendant's amended motion makes no reference to the original motion, which itself contained only a few brief statements regarding alleged changed circumstances, defendant wholly failed to make out a prima facie case of changed circumstances sufficient to warrant a change of custody. The court did not modify the 1998 custodial judgment and an evidentiary hearing was unnecessary.

Finally, we find no abuse of discretion in that portion of the trial court's order that required defendant to pay half of third-party plaintiff's attorney fees. See *In re Condemnation of Private Property for Highway Purposes (Dep't of Transportation v Curis)*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997).

MCR 2.114(F) authorizes a court to award costs in the face of a frivolous claim. At a September 2000 motion hearing, the court ruled that several of the grounds upon which defendant requested a change of custody were time barred and thus not properly raised before the court. The court specifically ruled, however, that not warranting sanctions was defendant's legal argument in support of her contention that the 1998 judgment was void. The court accordingly decided to award half of third-party plaintiff's requested $7,000 attorney fees in sanctions.[6]

MCR 2.612(C)(1) sets forth the basis upon which a party may seek relief from judgment and MCR 2.612(C)(2) states that any such motion must be made in a reasonable time, providing further that arguments based on mistake, new evidence, or misrepresentation must be brought within a year after the judgment in question. Offering no more than a cursory argument that relief from judgment was appropriate pursuant to MCR 2.612(C)(1)(f) (any reason other than those particularly set forth "justifying relief from the operation of the judgment"), defendant has insufficiently challenged the trial court's conclusions that the majority of defendant's bases for her motion were time barred and not properly before the court. The court did not abuse its discretion in concluding that defendant's motion had "an aspect of vexatiousness and was not grounded on fact or law."

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen

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[6] Having previously observed that third-party plaintiff, the actual physical custodian, could least afford the costs of litigation, at the November 2000 motion hearing, the trial court ruled that each parent should pay half of third-party plaintiff's attorney's fees. This characterization still left defendant obligated in the amount of $3,500.