

STATE OF MICHIGAN
COURT OF APPEALS

DEAN EDWARD ALBRIGHT, II,
Plaintiff-Appellant,

UNPUBLISHED
December 11, 2012

v

KELLY SUE MACDONALD,
Defendant-Appellee.

No. 308432
Wexford Circuit Court
LC No. 2010-022606-DC

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this custody action, plaintiff appeals by right the trial court's order granting the primary physical custody of the parties' minor son to defendant and denying plaintiff's motion for reconsideration. We reverse and remand for further proceedings consistent with this opinion.

The parties were married in 2003. After returning from active duty in the Army, plaintiff found work in Utah. Defendant remained in Michigan with the parties' son. Plaintiff filed for divorce in Utah, and a judgment was entered in that state on December 19, 2006. The parties exercised parenting time pursuant to the Utah order until 2010, when plaintiff moved to change custody. Defendant filed a response questioning the Utah court's jurisdiction over the child. The Utah court entered an order that the Utah custody order was void ab initio because Utah was not the child's home state. Thereafter, plaintiff filed this original custody action in Michigan.

Evidentiary hearings were held before a friend of the court referee on September 27, 28, and December 8 and 9, 2010. At the close of the hearings, the referee determined that there existed no valid custody order and that there was an established custodial environment with defendant. The referee issued a report and recommendation on March 10, 2011, finding that the parties had agreed on the record that an established custodial environment existed with defendant and further finding that plaintiff had shown by clear and convincing evidence that the child's best interests would be served by awarding primary physical custody to plaintiff.

On June 17, 2011, the trial court heard additional testimony from plaintiff and defendant regarding factual developments that had occurred after the referee hearings were concluded. At the close of testimony, the trial court found that there was an established custodial environment, with defendant's having primary care and custody of the child while he was in school and plaintiff's having custody during portions of the summer. The trial court found that clear and convincing evidence did not exist to disrupt this established custodial environment and discussed

at length the various child custody factors. Thus, the court's order provided plaintiff with parenting time every other weekend during the school year and for six weeks during the summer.

Plaintiff moved the trial court for a new trial, reconsideration, or other relief from the court's order. The court heard the parties' arguments on September 16, 2011. The trial court denied plaintiff's motion for reconsideration, finding that no palpable error occurred. But the court granted plaintiff's motion for a new trial in part, ordering that de novo review should continue and "that Plaintiff may present evidence regarding Defendant's abuse of drugs or alcohol, and Defendant's continued association with Phillip Grames, and Defendant may present any rebuttal evidence . . .," limited to events occurring after the date of the last referee hearing.

On October 28, 2011 and December 9, 2011, the trial court heard additional testimony. Ultimately, the court found that an established custodial environment existed with defendant and found that there was no basis to reconsider its custody order entered after the initial de novo hearing. It entered its order on January 17, 2012, affirming its prior order granting primary physical custody to defendant.

Plaintiff first argues that the trial court erred in applying the legal standard for a motion to change custody rather than the standard applicable to an initial custody determination. The determination of the appropriate burden of proof in a child custody case presents a question of law this Court reviews de novo. *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009). We hold that the trial court erred by applying the "proper cause" or "change of circumstances" standard to plaintiff's custody action where no valid prior custody order existed.

The proper cause or change of circumstances requirement is applicable when the moving party seeks to amend or modify an existing custody order. *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). Pursuant to MCL 722.27(1)(c), the trial court may:

Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. . . .

But when a trial court makes an initial custody determination, there is no requirement that proper cause or a change of circumstances be shown:

The first sentence of MCL 722.27(1)(c) only refers to when a party is attempting to "[m]odify or amend," while the second sentence mandates that the trial court not "modify or amend its previous judgments or orders *or issue a new order* so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." (Emphasis added.) In light of the clear intention of the Legislature, the first sentence of the MCL 722.27(1)(c) does not apply [to] the trial court's initial or "new" custody order in this matter. The trial court's award of custody was not a modification or amendment; it was a new order that is only subject to the

limitation provided in the second sentence of MCL 722.27(1)(c). [*Thompson v Thompson*, 261 Mich App 353, 361-362; 683 NW2d 250 (2004).]

In this case, the trial court ruled that plaintiff was required to demonstrate proper cause or change of circumstances and distinguished *Thompson* on the basis that it involved a situation where an individual obtained a temporary custody order and had attempted to use that to impose the higher burden on the other party of showing both proper cause or change of circumstances and clear and convincing evidence regarding in the best interests of the child. The trial court went on to find that plaintiff had failed to show proper cause or change of circumstances necessary to change the established custodial environment.

It is undisputed that as part of the 2006 judgment of divorce, a Utah court issued an order of custody and parenting regarding the child that the parties complied with for approximately three years, i.e., until plaintiff moved for its modification in the Utah court. But the Utah court determined that it lacked jurisdiction over the child custody proceeding because Michigan was the child's home state pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, MCL 722.1101 *et seq.* See, e.g., *Nash v Salter*, 280 Mich App 104, 109-111; 760 NW2d 612 (2008) (holding Michigan lacked subject matter jurisdiction in a custody action because Michigan was not the child's home state on the date of the commencement of the Michigan proceeding, nor had Michigan been the child's home state within six months before the commencement of the proceeding). Thus, the determination as to which burden of proof to apply rests on whether the Utah order has any effect.

“When there is a want of jurisdiction over the parties or the subject matter, no matter what formalities may have been taken by the trial court, the action is void because of its want of jurisdiction.” *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992). Here, the Utah court ruled its order regarding the minor child was void ab initio because it lacked subject matter jurisdiction over the minor child; the custody and parenting time provisions of the Utah judgment were null and void from the first moment of its entry. As a result, when plaintiff filed the instant custody action in Michigan no “previous judgment[] or order[]” regarding the minor child existed that would require plaintiff to show “proper cause” or “change of circumstances” under MCL 722.22(1)(c). Because plaintiff sought an initial or new custody order, the trial court erred by requiring plaintiff to show “proper cause” or “change of circumstances” in addition to clear and convincing evidence that changing the established custodial environment would be in the minor child's best interest. *Id.*; *Thompson*, 261 Mich App at 361-362.

We reverse and remand for further proceedings consistent with this opinion. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause