STATE OF MICHIGAN

COURT OF APPEALS

REBEKA SUE KILLINGBECK,

Plaintiff-Appellee,

and

TONY ROSEBRUGH,

Plaintiff-Appellant,

v

DENNIS DEAN KILLINGBECK,

Defendant-Appellee.

FOR PUBLICATION
December 6, 2005
9:00 a.m.

No. 258358
Arenac Circuit Court
LC No. 03-008651-DP

REBEKA SUE KILLINGBECK,

Plaintiff/Counterdefendant-Appellant,

and

TONY ROSEBRUGH,

Intervening Party,

v

DENNIS DEAN KILLINGBECK,

Defendant/Counterplaintiff-Appellee.

No. 261404
Arenac Circuit Court
LC No. 02-008187-DM

REBEKA SUE KILLINGBECK,

Plaintiff/Counterdefendant,

and

TONY ROSEBRUGH,

Intervening Party-Appellant,

v

DENNIS DEAN KILLINGBECK,

Defendant/Counterplaintiff-Appellee.

No. 261405
Arenac Circuit Court
LC No. 02-008187-DM

Official Reported Version

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

BANDSTRA, J.

These consolidated appeals involve custody, parenting time, and child support rights and obligations concerning Devon Dennis Rosebrugh, who is now seven years old. His biological parents are Tony Rosebrugh and plaintiff Rebeka Sue Killingbeck (hereinafter "plaintiff"). Defendant Dennis Dean Killingbeck (hereinafter "Killingbeck") signed an acknowledgement of parentage following Devon's birth and acted as Devon's father for the first four years of his life until DNA (deoxyribonucleic acid) testing revealed Rosebrugh's parentage and these actions ensued. The primary issue raised on appeal is the trial court's order granting parenting time to Killingbeck, coupled with an order revoking the acknowledgement of parentage. We reverse the order granting Killingbeck parenting time, vacate the order revoking the acknowledgement of parentage, and remand.

I. Background Facts and Proceedings Below

Plaintiff testified that she lived with Killingbeck for a five-year period in the early 1990s; that she lived with Rosebrugh for approximately three months beginning in August 1997; and that, near the time of Devon's conception, she had engaged in intercourse with both Killingbeck, whom she saw approximately every other week, and Rosebrugh, whom she saw about once a week. Sometime in December 1997, plaintiff moved in with Killingbeck because she began to feel more attached to him. Rosebrugh testified that, before Devon's birth in July 1998, plaintiff assured him that they "would do blood work when the child was born," but that after Devon's birth, Killingbeck prohibited contact between plaintiff and Rosebrugh. Further, in August 1998, plaintiff and Killingbeck prepared and signed an acknowledgement of parentage stating that they were Devon's natural parents. See MCL 722.1001 *et seq*. Plaintiff testified that she had signed the acknowledgement of parentage stating that Killingbeck had fathered Devon because "[a]t the time . . . [she] believed [Killingbeck] was the father." However, she also stated that she did not feel certain that Rosebrugh had not fathered Devon and that she discussed her concerns with Killingbeck.

Plaintiff and Killingbeck continued living together through the time of their marriage in March 2002. In September 2002, plaintiff filed for divorce from Killingbeck. After doing so, plaintiff contacted Rosebrugh, and they arranged for genetic testing in October 2002 to determine whether Rosebrugh was Devon's father. The test results confirmed Rosebrugh's paternity of Devon. About a year later, on October 7, 2003, plaintiff and Rosebrugh filed a paternity petition to revoke the acknowledgement of parentage that plaintiff had cosigned with Killingbeck. Plaintiff and Rosebrugh requested that the trial court enter an order declaring Rosebrugh's paternity of Devon. However, in the divorce case, the amended judgment that ended the marriage between plaintiff and Killingbeck, entered in May 2003, had listed Devon as one of the parties' children.

Regarding the paternal relationships with Devon, Rosebrugh testified that he visited Devon regularly since the child turned four years old, that he and Devon had a good relationship, that he provided financial support for Devon on many occasions, and that he intended to continue acting as Devon's father. Killingbeck testified that he had helped take care of Devon and supported him financially for the years that Devon lived with him, that he regularly contacted and had a close relationship with Devon until plaintiff moved out of the marital home, that he currently paid child support for Devon, that he still wanted to act as Devon's father, and that he had not yet participated in any paternity blood testing.

On March 17, 2004, the trial court entered two orders that tracked the terms of an agreement that Rosebrugh, plaintiff, and Killingbeck had reached in January 2004: (1) an order in the paternity case revoking the acknowledgement of parentage because Killingbeck had not fathered Devon, and amending Devon's birth certificate to reflect that Rosebrugh was Devon's biological father, and (2) an order in the divorce case providing that Killingbeck "shall continue to have the rights of a *de facto* father," that "any request regarding parenting time, support and custody . . . by . . . Tony Michael Rosebrugh shall not diminish the rights of" defendant, and that the order "shall not be amended absent clear and convincing evidence that it is in the best interest of" Devon.

On May 4, 2004, Rosebrugh moved to intervene in the divorce case "with respect to custody issues of . . . Devon," pursuant to MCR 2.209. At a May 13, 2004, hearing in the divorce case, the trial court entertained Rosebrugh's motion to intervene. The trial court explained that it would "at least temporarily" grant Rosebrugh's motion to intervene "in this DM case for purposes of addressing issues regarding physical parenting time regarding . . . Devon . . . ." The court entered an order for limited intervention in June 2004 "for the limited purpose of all matters relating to custody, parenting time, and support of . . . Devon . . . , until further order of the Court." The order also provided "that the parties have not waived any rights or defenses relating to this matter by reason of stipulation or entry of this [o]rder."

During this time, plaintiff and Rosebrugh reconsidered the January 2004 agreement they had reached with Killingbeck, and the court orders implementing that agreement. On June 17, 2004, Rosebrugh moved to set aside the March 17, 2004, order regarding custody and awarding parenting time to Killingbeck, and moved to amend the judgment of divorce, to "dissolv[e] any legal rights or responsibilities . . . Killingbeck has to . . . Devon." At the June 25, 2004, hearing on Rosebrugh's motion, Rosebrugh requested "that the Court enter another order in the divorce action indicating that there has been a paternity order that's in effect that states [Killingbeck] is

not the biological father of Devon . . . ." The parties argued whether, in light of the established fact that Rosebrugh was Devon's biological father, they could by consent create or give to Killingbeck de facto or equitable parental rights with respect to Devon. The trial court indicated on the record that it would deny Rosebrugh's motions.

On August 27, 2004, the trial court held a combined hearing in the divorce and paternity cases to address Rosebrugh's motion "to remove [Killingbeck] as a party and terminate his parental rights," and his motion for custody, parenting time, and support. Rosebrugh and plaintiff reiterated their position that no legal basis existed for Killingbeck to assert parental rights to Devon. On the same date, the trial court entered an order denying Rosebrugh's motions, as well as an order denying a motion filed by plaintiff to modify the judgment of divorce to clarify the legal issue of the marriage between plaintiff and Killingbeck. After further discussions with the parties concerning appropriate parenting time for Rosebrugh and Killingbeck, the trial court also entered an interim order awarding Killingbeck specific parenting time with Devon.

On September 21, 2004, the trial court entered an order in the paternity case denying Rosebrugh's motion to remove Killingbeck as a party and to terminate his parental rights. The court also ordered that Rosebrugh and plaintiff share joint legal custody of Devon, that plaintiff maintain sole physical custody, that Rosebrugh and Killingbeck have specific, separate parenting time with Devon, and that Rosebrugh pay child support in the amount of $570 a month.

II. Analysis of Issues Raised on Appeal

A

Rosebrugh and plaintiff first argue on appeal that the trial court erred by failing to order Rosebrugh's joinder as a necessary party to plaintiff's and Killingbeck's divorce action.[1] This contention can be easily resolved because it has no basis in fact.

. The record reflects that the trial court entertained Rosebrugh's motion to intervene in the divorce action, permitted Rosebrugh to argue at length concerning the merits of his motion to intervene and the various bases for his assertion that Killingbeck had no parental rights regarding

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[1] The records in the two actions being reviewed here suggest a number of procedural irregularities. However, Rosebrugh's and plaintiff's contention regarding Rosebrugh's joinder as a necessary party in the divorce action is the only argument raised on appeal; other procedural questions are not preserved for review. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Rentz v Gen Motors Corp, Fisher Body Div, Fleetwood Plant*, 70 Mich App 249, 251; 245 NW2d 705 (1976). Nonetheless, we note that the trial court erred in granting Rosebrugh's intervention, however limited, in the divorce action. Domestic relations actions are strictly statutory. The only parties to a divorce action are the two people seeking dissolution of their marriage. Third-party intervention in divorce actions is permitted in extremely limited circumstances not present here. Rosebrugh's sole recourse on any issue involving his son was in the paternity action, not in the divorce action.

Devon, and addressed all the positions Rosebrugh raised. Further, on June 24, 2004, the trial court entered an "[o]rder for [l]imited [i]ntervention" making "Tony Rosebrugh . . . an intervener in this cause for the . . . purpose of all matters relating to custody, parenting time, and support of the minor child . . . ." Because the trial court permitted Rosebrugh to intervene in the divorce action and Rosebrugh does not argue that the court limited his desired participation in the action, Rosebrugh's and plaintiff 's assertion of error lacks merit.

B

Rosebrugh and plaintiff next argue that the trial court erred by awarding Killingbeck parental rights concerning Devon on the basis of the equitable parent or equitable estoppel doctrine. Whether the undisputed facts of this case afford Killingbeck a basis to assert parental rights concerning Devon, either as an equitable parent or through equitable estoppel, constitutes a legal question, which this Court considers de novo. See *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215 n 5; 600 NW2d 630 (1999); *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 1 (1991); *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); MCR 7.203.

Our Supreme Court in *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999), foreclosed reliance on the equitable parent and equitable estoppel doctrines under the circumstances of this case. In *Van*, the parties never married, but they resided together for six years and had two children together, one while they cohabited and another after the period of cohabitation had ended. *Id*. at 323. The plaintiff alleged that he supported the children, even after his relationship with the defendant terminated, until the defendant denied him access to the children because he had begun seeing another woman. *Id*. The plaintiff filed a petition to establish his paternity of the children. *Id*. at 324. Although the plaintiff "conceded that blood testing showed that he was not the biological father," he "argued that he was an 'equitable parent' and that [the defendant] was equitably estopped from denying that he [wa]s the father." *Id*. The trial court granted the defendant's motion for summary disposition of the paternity action pursuant to MCR 2.116(C)(8), and this Court affirmed, *Van v Zahorik*, 227 Mich App 90; 575 NW2d 566 (1997); see *Van*, 460 Mich 324-326.

Our Supreme Court also affirmed. *Id*. at 323, 337-338. Regarding the equitable parent doctrine, the Court observed that "[b]y its terms, this doctrine applies, upon divorce, with respect to a child *born or conceived during the marriage*." *Id*. at 330 (emphasis added). The Court reasoned that, because "the children at issue were not born or conceived during marriage[,] . . . the doctrine of equitable parenthood would not apply to [that] case." *Id*. at 330-331. The Court rejected the plaintiff 's invitation "to extend the doctrine outside the context of marriage," leaving that decision to the Legislature. *Id*. at 331. Concerning equitable estoppel, the Court recognized that several cases had "applied this doctrine to estop a husband from denying paternity of a child born during marriage, but of whom he is not the biological father." *Id*. at 335. But the Court similarly refused to extend this doctrine beyond the context of marriage, primarily because "the Child Custody Act, which comprehensively governs child custody matters, does not recognize it." *Id*. at 336.

In this case, the parties agree that Devon was not conceived or born within the marital relationship between plaintiff and Killingbeck. The parties testified that plaintiff had intimate

relationships with both Rosebrugh and Killingbeck around the time of Devon's conception and that plaintiff did not enter into her marital relationship with Killingbeck until March 2002, well over three years after Devon's birth. Accordingly, applying *Van*, we conclude that Killingbeck has no parental rights to Devon under the doctrines of equitable parenthood or equitable estoppel.

Although the record is not totally clear, it appears that the trial court's order granting Killingbeck parenting time as Devon's "de facto father" was based, at least in part, on the equitable parenthood and equitable estoppel doctrines.[2] As noted, the parties argued about the applicability of those doctrines below, just as they do here. To the extent the trial court relied on equitable parenthood or equitable estoppel, the order granting Killingbeck parenting time was entered in error.

Had the trial court not revoked the acknowledgement of parentage, an order granting parenting time to Killingbeck would have been authorized. Such an acknowledgement "establishes paternity," meaning that "the man signing as the father" has the "same relationship" with the child as he would have had if the child were "born or conceived during a marriage." MCL 722.1004. The acknowledgment "may be the basis for court ordered . . . parenting time," *id*., and "[e]ither parent may assert a claim . . . for parenting time . . . ." MCL 722.1007(d).

Thus, the acknowledgement of parentage gave Killingbeck status as a parent, eligible to pursue parenting time under the Child Custody Act, MCL 722.21 *et seq*. In *Van*, the Supreme Court denied parental status under that act to a man who was not a biological father because he "ha[d] not pursued other means to become a legal parent, e.g., adoption." *Van*, *supra* at 328. Killingbeck did not seek adoption of Devon here for the obvious reason that he thought Devon was his biological son. Nonetheless, recognizing that Devon's being born out of wedlock might present problems, Killingbeck did follow another legislatively established procedure "to become a legal parent," by joining with plaintiff in an acknowledgement of parentage. Pursuant to the acknowledgement of parentage statute, Killingbeck thus became a "legal parent" for purposes of the Child Custody Act under the *Van* analysis.

The record strongly suggests that the trial court's two decisions—to revoke the acknowledgement of parentage while, at the same time, granting Killingbeck parenting time rights as a "de facto father"—were interrelated and interdependent. In other words, it seems clear that the trial court revoked the acknowledgement only because it thought that, nonetheless, Killingbeck could be granted parenting time. As discussed above, the trial court thus acted on a mistaken understanding of the law.

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[2] Initially, the court order to this effect seems largely to have been based on the parties' agreement. However, an order in contravention of the law cannot be justified by such an agreement. See *Kokx v Bylenga*, 241 Mich App 655, 661; 617 NW2d 368 (2000) (observing that parties cannot enter a binding stipulation regarding the law applicable to their claims); *In re Ford Estate*, 206 Mich App 705, 708; 522 NW2d 729 (1994) (explaining that parties cannot by mere agreement supersede procedures and conditions set forth in statutes or court rules).

Here, the trial court "apparently misunderstood the legal basis for" revoking the acknowledgement of parentage while also granting Killingbeck parenting time as a de facto father, "resulting in an incorrect conclusion that was violative of logic . . . ." *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 779; 404 NW2d 665 (1987). "Where the trial court misapprehends the law to be applied, an abuse of discretion occurs" and reversal is warranted. *Byrum v The ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

Vacation of the order revoking the acknowledgement of parentage on the basis of this principle is especially appropriate here.[3] Revocation of an acknowledgement of parentage, even in cases where there is "clear and convincing evidence . . . that the man is not the father," must be warranted by the "equities of the case." MCL 722.1011(3). The record here evidences the trial court's conclusion that, notwithstanding the repeated protestations of plaintiff and Rosebrugh, the equities of this case justified Killingbeck's continuing right to parenting time. At the very least, the trial court might well have weighed the equities of this case differently in determining the motion to revoke Killingbeck's acknowledgement of parentage had it realized that Killingbeck's right to seek parenting time was at issue.

Accordingly, while we reverse the order granting Killingbeck parenting time as a "de facto father," we also vacate the order revoking the acknowledgement of parentage as it may have been based on a mistake of law. On remand, the trial court shall reconsider the motion to revoke the acknowledgement in light of this opinion.

C

Rosebrugh also asserts that the trial court improperly considered his motion for custody and parenting time without conducting a full evidentiary hearing regarding Devon's best interests.[4] We disagree.

Before an evidentiary hearing is held, a movant must first establish a change in circumstances. In order to establish a change of circumstances, a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed. MCL 722.27(1)(c).[5] As we stated in *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003):

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[3] We recognize that the propriety of that order was not directly raised on appeal. Nonetheless, we may "enter any judgment or order or grant further or different relief as the case may require . . . ." MCR 7.216(A)(7).

[4] In light of our resolution of the issues above, it is unnecessary to consider this issue. Nonetheless, we do so briefly to provide direction should the issue arise in this or another case.

[5] Not just any change will suffice; the evidence must demonstrate something more than the normal life changes (both good or bad) that occur during the life of a child, and there must be at

(continued…)

> The requirement that a party seeking a change in custody first establish proper cause or a change of circumstances emanates from the Child Custody Act, MCL 722.21 *et seq*. Specifically, MCL 722.27(1)(c) provides that if a child custody dispute has arisen from another action in the circuit court, the court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." On the basis of this language, this Court held in *Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996), quoting *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994), that if the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing:
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> "The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. *It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.*" [Emphasis added.]
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> These initial steps to changing custody—finding a "change of circumstance or proper cause" and not changing an "established custodial environment" without clear and convincing evidence—are intended to "erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid v AAASulewski (After Remand),* 209 Mich App 587, 593; 532 NW2d 205 (1995). See also *Foskett v Foskett,* 247 Mich App 1, 6; 634 NW2d 363 (2001) (recognizing the Legislature's intent in enacting the Child Custody Act was to prevent the removal of children from established custodial environments "'except in the most compelling cases,'" quoting *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 [1981]). The movant, of course, has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors. *Dehring, supra*.

Here, there was no change of circumstances, either alleged or established. The original custody order in the divorce case awarded plaintiff sole physical custody. Although not an intervening party at that time, Rosebrugh, later, at the January 29, 2004, hearing, stipulated

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(…continued)

least some evidence that the material changes have had or will almost certainly have an effect on the child. *Vodvarka v Grasmeyer,* 259 Mich App 499, 513; 675 NW2d 847 (2003).

parenting rights for both himself and Killingbeck without challenging plaintiff's custody.[6] The sole physical custody originally awarded to plaintiff was left unchanged in the resulting March 17, 2004, order. Less than five months later, on August 10, 2004, Rosebrugh moved for a "determination of custody" in the paternity case. It was undisputed that plaintiff had sole physical custody of Devon and had acted as Devon's primary caregiver for all his life. It was also undisputed that Rosebrugh visited his son regularly since Devon turned four years old and that he intended to continue acting as Devon's father. His primary complaint and focus in the hearing on the motion was the denial of parenting time for the time between Devon's birth and the age of four. There was no hint of any change of circumstances during the five-month period between March 17, 2004, and August 10, 2004.

Although the trial court did not address or acknowledge the best interest factors, it was not required to do so unless a change of circumstance was first established. *Vodvarka, supra.* Because Rosebrugh failed to establish this crucial first step, the trial court did not err in refusing to hold an evidentiary hearing on the best interest factors.

D

Rosebrugh lastly contends that a conflict of interest existed during the trial court proceedings because he and plaintiff were represented by the same counsel. Again, we disagree.

"It is a well-established ethical principle that 'an attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute.'" *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 197; 650 NW2d 364 (2002), quoting *Barkley v Detroit*, 204 Mich App 194, 203; 514 NW2d 242 (1994). The Michigan Rules of Professional Conduct (MRPC) generally prohibit an attorney from representing multiple clients when the representation of one client is directly adverse to, or may materially limit, the attorney's representation of another client. MRPC 1.7. A party seeking the disqualification of counsel '"bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.'" *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004) (citations omitted). "The conclusion that a conflict of interest exists is a question of fact and is reviewed under the clearly erroneous standard." *Camden v Kaufman*, 240 Mich App 389, 399; 613 NW2d 335 (2000).

Rosebrugh apparently asserts a conflict of interest arose from the fact that, at the January 2004 trial concerning the petition to revoke the acknowledgement of parentage signed by plaintiff and Killingbeck, attorney Gregory M. Simon represented both Rosebrugh and plaintiff. Plaintiff and Rosebrugh had both signed the petition to revoke the acknowledgement, indicating that, at the time of the dual representation by Simon, plaintiff and Rosebrugh shared the same goal. During the subsequent custody, parenting time, and support phase of the proceedings, which for the first time potentially placed plaintiff and Rosebrugh on opposite sides of the issues,

[6] Both Rosebrugh and plaintiff were represented by the same attorney.

Simon had discontinued his representation of either plaintiff or Rosebrugh, each of whom was represented by separate counsel.[7]

Because the only instance of dual representation occurred during the period in which plaintiff and Rosebrugh shared the same interests, and because Rosebrugh failed to set forth with specificity the manner in which Simon's dual representation during the initial phase of the proceedings prejudiced Rosebrugh during the later custody, parenting time, and support proceedings, we conclude that no conflict of interest occurred. *Rymal*, *supra* at 319.

E

We find the dissenting opinion's concern about how our decision today affects Rosebrugh to be misplaced. In this appeal, no one is challenging either his right to parenting time or his responsibility for child support under the orders entered by the trial court and, accordingly, these issues are not properly before this Court. Our opinion today does not address the lower court orders in these regards, and any comment on the issues raised, sua sponte, by the dissent is mere obiter dictum. We express no such comment, other than to note that the trial court's actions on remand, as a result of our decision, may have some effect on Rosebrugh. If so, and if another appeal with respect to that effect should arise in the future, appellate review would be appropriate.

Conclusion

We reverse the order granting Killingbeck parenting time as a "de facto father." We also vacate the trial court's order revoking the acknowledgement of parentage and remand for reconsideration of that issue in light of that result. We do not retain jurisdiction.

Kelly, J., concurred.

/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

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[7] Simon acted as plaintiff's successor counsel in the divorce action from late October 2003 until May 3, 2004, the date when Nichol J. Palumbo filed her appearance as plaintiff's counsel, and Stephen W. Tyler filed his appearance for Rosebrugh. Tyler filed Rosebrugh's motion to intervene in the divorce action on May 5, 2004, after Simon discontinued his representation of plaintiff.