

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA BARGERSTOCK, a/k/a BARBARA
HARRIGAN,

Plaintiff-Appellant,

v

DOUGLAS BARGERSTOCK,

Defendant-Appellee.

UNPUBLISHED
April 25, 2006

No. 263740
Wayne Circuit Court
Family Division
LC No. 94-409397-DM

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order transferring full legal and physical custody of the parties' minor children to defendant. We reverse and remand.

Plaintiff asserts that the trial court violated her right to due process in appointing her a guardian ad litem and essentially deeming her incompetent without first conducting a separate competency hearing. Plaintiff did not raise a due process issue below and, therefore, has not preserved this issue for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Accordingly, to be entitled to relief, plaintiff must demonstrate a plain error that affected her substantial rights. *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824 (1999); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Plaintiff argues that the trial court wrongfully appointed a guardian ad litem for her without first properly adjudicating her status as an "incompetent person." See MCR 2.201(E). Plaintiff also asserts that the trial court was not authorized to determine her competency because such an adjudication must, in accordance with *Redding v Redding*, 214 Mich App 639, 643-644; 543 NW2d 75 (1995), be deferred to the jurisdiction of the probate court.

An initial concern for this Court regarding reliance on *Redding* is the fact that much of the statutory basis for the Court's ruling in *Redding* has subsequently been replaced by the enactment of the Estates and Protected Individuals Code, MCL 700.1101 *et seq.* Moreover, while this Court concurs with the ruling in *Redding* that, in general, "[t]he proper remedy where a question of mental competency arises is a petition in the probate court for a finding of incapacity and appointment of a guardian," *Redding, supra*, p 645, the analysis does not end there.

As noted in MCL 600.605, “Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.” MCL 700.1302(c) affords probate courts exclusive subject matter jurisdiction over “a proceeding that concerns a guardianship, conservatorship, or protective proceeding,” except as provided in MCL 600.1021. MCL 600.1021(2) provides the family division of a circuit court with “ancillary jurisdiction pertaining to “(a) [c]ases involving guardians and conservators as provided in article 5 of the estates and protected individuals code, 1998 PA 386, MCL 700.5101 to 700.5520” and “(b) [c]ases involving treatment of, or guardianship of, mentally ill or developmentally disabled persons under the mental health code, 1974 PA 258, MCL 330.1101 to 330.2106.” This Court has indicated that

[a]ncillary jurisdiction should attach where: (1) the ancillary matter arises from the same transaction that was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated. [*WPW Acquisition Company v City of Troy*, 254 Mich App 6, 9; 656 NW2d 881 (2003) (internal citation and quotation marks omitted).]

Plaintiff’s mental status was integrally related to a determination of custody and ancillary jurisdiction therefore was appropriate.

Even if jurisdiction in the circuit court was appropriate, however, plaintiff alleges that the court nonetheless erred in appointing a guardian ad litem without first properly adjudicating that plaintiff was, indeed, incompetent and could not continue to participate in the proceedings. The trial court indicated that it had sufficient medical testimony and other relevant documentation – such as the psychological evaluator’s report and recommendations of the guardians ad litem and medical treatment professionals – to substantiate its determination that plaintiff was not competent. However, we note that the mere procurement of a psychiatric diagnosis is not the equivalent of a determination of incompetence. Specifically, MCL 330.1489 states, in relevant part:

(1) No determination that a person requires treatment, no order of court authorizing hospitalization or alternative treatment, nor any form of admission to a hospital shall give rise to a presumption of, constitute a finding of, or operate as an adjudication of legal incompetence.

Moreover, a court may not appoint a guardian ad litem or next friend¹ under MCR 2.201(E) until there has been a hearing and a determination regarding competency. See *Redding*,

¹ Because plaintiff is not the defendant in this matter, it appears that, if she is properly deemed
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supra at 643-645. MCL 700.5303(1) provides for an individual on their own, or any person concerned with the individual’s welfare, to “petition for a finding of incapacity and appointment of a guardian.” The filing of such petition requires the scheduling of a hearing in accordance with MCL 700.5303(3). An alternative or abbreviated procedure exists in emergency situations. Specifically, MCL 700.5312(1) provides:

If an individual does not have a guardian, an emergency exists, and no other person appears to have authority to act in the circumstances, the court shall provide notice to the individual alleged to be incapacitated and shall hold a hearing. Upon a showing that the individual is an incapacitated individual, the court may exercise the power of a guardian, or appoint a temporary guardian with only the powers and for the period of time as ordered by the court. A hearing with notice as provided in section 5311 shall be held within 28 days after the court has acted under this subsection.

The available lower court record does not substantiate that the trial court acted in accordance with this statutory provision and properly deemed plaintiff an “incompetent person” before appointing a guardian ad litem or a next friend under MCR 2.201(E).²

While the concern of the trial court for the well-being of plaintiff, in addition to the best interests of the minor children, should be applauded and recognized, the record fails to support the trial court’s independent determination of plaintiff’s competency. Although persuasive evidence was presented regarding plaintiff’s clinical condition and diagnosis, this was not sufficient for a determination of competency. Both the court and plaintiff’s guardian ad litem failed to invoke appropriate procedural mechanisms to determine plaintiff’s competency to be a litigant. We must remand this case so that proper procedural steps can be taken with regard to the custody matter and plaintiff’s ability to participate in the proceedings.

Plaintiff next asserts that the trial court erred when it transferred custody without making an independent determination with regard to the existence of an established custodial environment and without having conducted an evidentiary hearing. Because we are reversing and remanding as stated above, and because the trial court stated that it would revisit the custody issue six months after the entry of its order, we decline to address the merits of this issue. Nevertheless, we make the following observations to guide the trial court when it reevaluates the custody issue on remand.

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incompetent, a “next friend,” as opposed to a “guardian ad litem,” should be appointed for her. See MCR 2.201(E)(1)(b).

² We note that MCL 700.5303(3) directs the court to appoint a guardian ad litem for the person whose competency is being questioned, “[u]nless the allegedly incapacitated individual has legal counsel of his or her own choice” We do not view this statutorily mandated guardian ad litem, which is for the limited purpose of representing a person during a competency hearing, as being equivalent to a guardian ad litem or next friend contemplated by MCR 2.201(E). Indeed, the appointment of a guardian ad litem or next friend under MCR 2.201(E) requires a hearing and a determination regarding competency. See *Redding, supra* at 643-645.

An award of child custody can be modified, under MCL 722.27(1)(c), for “proper cause shown” or “[a] change of circumstances” establishing the modification to be in the child’s best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Before custody can be changed, an evidentiary hearing must be conducted. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). The individual seeking the change in custody must first establish proper cause or a change in circumstances before both the existence of an established custodial environment and the best interests factors may be considered. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The burden of proof is always on the party seeking the modification. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991). When an established custodial environment is determined to exist, a trial court shall not amend or modify its previous custody orders and change the established custodial environment of a child unless there is clear and convincing evidence presented that a change of custody is in the minor child’s best interests. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 24-25; 614 NW2d 183 (2000).

A change of circumstances or proper cause warranting a possible custody change exists if there has been a change in conditions since the entry of the last custody order that has had or could have a significant impact on a child’s well-being. *Vodvarka, supra*, p 513. The determination of a change of circumstances or proper cause is based on the statutory best interests factors, on a case-by-case basis. *Id.* at 514. In this instance, defendant alleged that a change in circumstances had occurred based on the deterioration in plaintiff’s mental status and functioning and its negative impact on the minor children when in her custody.

While defendant has demonstrated sufficient proper cause or a change of circumstances to warrant an evaluation of the current custodial order, the trial court on remand must initially make a determination regarding the existence of an established custodial environment. Whether an established custodial environment exists comprises a question of fact that must be addressed by a trial court before it makes any determination regarding what is in a child’s best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). The trial court must independently address the existence of an established custodial environment and not merely adopt the findings of the guardian ad litem for the minor children and the psychological evaluator.

In addition, a trial court must consider all of the factors contained in MCL 722.23, applying the correct burden of proof, in order to determine the best interests of a child in a child custody dispute. “A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors.” *Foskett, supra*, p 9.

While the trial court is not required to comment on every matter in evidence or declare its acceptance or rejection of every proposition asserted, it must still “evaluate each of the factors contained in the Child Custody Act, MCL 722.23 . . . and state a conclusion on each, thereby determining the best interests of the child.” See *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004) (internal citation and quotation marks omitted). Failure to do so constitutes clear legal error.

Acknowledging the trial court’s authority, pursuant to MCL 722.27(1)(e), to “take any other action considered to be necessary in a particular child custody dispute,” even if the court determines that an emergency situation exists necessitating a change of custody, “[s]uch a

determination . . . can only be made after the court has considered facts established by admissible evidence – whether by affidavits, live testimony, documents, or otherwise.” *Mann, supra*, p 533. While it is not improper for the court to consider the reports of a guardian ad litem or psychological evaluator, its ultimate findings must be based on competent evidence adduced at a hearing. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). We direct that the trial court, on remand, conduct an evidentiary hearing in order to determine whether a change of custody is appropriate.

Plaintiff next asserts that the trial court erred in granting personal protection orders to her minor children that precluded her from contacting the children. The grant of injunctive relief is deemed to be within the sound discretion of a trial court. *Kernan v Homestead Development Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). As such, a trial court’s decision regarding the imposition of a personal protection order is reviewed for an abuse of discretion. *Id.* Plaintiff contends that the trial court erred in interpreting and applying MCL 600.2950(1). Questions of statutory interpretation are questions of law, which are reviewed de novo on appeal. *In re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

Plaintiff asserts that the trial court committed a procedural error by issuing personal protection orders precluding plaintiff access or communication with her minor children. Plaintiff cites MCL 600.2950(27), which provides, in relevant part:

A court shall not issue a personal protection order that restrains or enjoins conduct described in subsection (1) if any of the following apply:

* * *

(b) The petitioner is the unemancipated minor child of the respondent.

It is well recognized that legislative intent is determined by first looking at the language of the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Unless defined within the statute, every non-technical word or phrase of a statute should be read in accordance with its plain and ordinary meaning. MCL 8.3a. In other words, “a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *DLF Trucking, Inc v Bach*, 268 Mich App 306, 310-311; 707 NW2d 606 (2005) (internal citation and quotation marks omitted). As noted by plaintiff, the clear and unambiguous language of the statute indicates the Legislature’s intent that personal protection orders provided in accordance with MCL 600.2950 should not be issued between petitioners and respondents who retain the specified familial relationship of parent and minor child. Hence, the trial court’s provision of personal protection orders to the minor children against plaintiff was in error, and the orders must be vacated.³

³ We do not hold that the trial court cannot prohibit certain types of contact with the minor children through a personal protection order on behalf of defendant or through issuance of a separate “no contact” provision in a custody order.

Plaintiff lastly argues that it is necessary to reassign this matter to an different judge based on the original judge's bias and prejudice. Reassignment to a different judge is typically required only if the original judge has demonstrated favoritism or antagonism toward a litigant that would preclude the ability to render a fair judgment. *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996). A case should be assigned to an alternative judge if it would be unreasonable to expect the original judge, based on his familiarity with and handling of the matter, to set aside previously expressed findings without substantial difficulty. *Ireland v Smith*, 214 Mich App 235, 251; 542 NW2d 344 (1995), aff'd as mod on other grnds 451 Mich 457 (1996). Plaintiff has failed to demonstrate that the trial judge had actual prejudice or bias, as opposed to a concern with the well-being of the minor children involved and a desire to secure a custody decision reflecting the best interests of the children. While there were procedural defects necessitating a remand, the mere fact that a judge rules against a litigant, even if the rulings are determined to be erroneous, is not sufficient to require disqualification or reassignment. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Hence, there exists no reason to assign a different judge to conduct future hearings in this matter.

Reversed and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Patrick M. Meter