

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARTHA J. FUHST, f/k/a MARTHA J. CAIN,

Plaintiff-Appellee,

v

DANIEL E. CAIN,

Defendant-Appellant.

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UNPUBLISHED

June 27, 2000

No. 218446

Kent Circuit Court

LC No. 87-062176-DM

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

PER CURIAM.

This case is on remand from the Supreme Court for consideration as on leave granted. *Fuhst v Cain*, 459 Mich 960 (1999). The Supreme Court included the following instructions in its remand order:

On remand, the Court of Appeals is to instruct the parties to include among the questions to be briefed whether the trial court had the authority to order the defendant to pay parochial school expenses and to what extent, if any, such expenses were already factored into the child support payments which were required of defendant.

This appeal arises out of plaintiff's July 18, 1994 motion for child support increase. The parties were divorced on September 9, 1988, and had three children together. The judgment of divorce provided that plaintiff would have physical custody of the three children and that defendant was to pay \$161 a week "for the support and maintenance of the minor children." As stated, plaintiff moved for an increase in child support of \$80 a week "towards school tuition relating to the three minor children, which represents less than one-half of the amount required each week for the payment of tuition and school expenses." The trial court, in an order dated August 22, 1994, increased child support to \$218 a week "for the support maintenance" of the three minor children. The trial court additionally ordered that the Friend of the Court "shall investigate and make a recommendation concerning partial reimbursement for school tuition at the parochial schools, which is attended by the minor children and any recommendation shall be retroactive to the beginning of the 1994 School Year."

On December 11, 1995, the trial court signed a stipulation and order to alter child support. This order provides that child support was modified to \$208 a week and retroactive to August 1, 1994. Additionally, the order provides that the parties were to submit briefs on the issue of private school tuition and that this issue “may be decided by the [trial court] after review of the [b]riefs without further oral argument, unless deemed necessary by the court to resolve factual disputes.” In early January 1996, both parties submitted their briefs in support of their respective positions. Nearly one year later, on December 3, 1996, the trial court sent a letter to the parties’ attorneys. The trial court stated that the issue involved plaintiff’s request for reimbursement of parochial tuition for the parties’ children. The trial court noted that the judgment of divorce provided that plaintiff would have the care, custody, control, and education of the children. Because no hearing was held on this matter, and because the trial court made no other factual findings, we set out the pertinent passages from the trial court’s letter:

From [the] language [of the judgment of divorce,] I would presume that the decision of school placement was and is solely that of the plaintiff, absent a contrary result placed on the record or contained in a writing signed by the parties.

While there is very little law on this point, some reliance may be had upon Stern v Stern, 327 Mich 567, 568 (1950) which indicates that the “expense education” is a factor which may be considered in assessing the appropriate amount of support. A benefit of a public school education may be said to be the elimination of tuition. Conversely, these payments are inherent in any private school system.

I recognize that there is no published law which assists in addressing parochial school expenses. Nonetheless, denominational preference and religious observances is recognized as being in the “best interest” of a child when considering the “guidance and continuation of the educating and raising of the child in its religion or creed, if any”. MCL 722.23(b); MSA 25.312(3)(b).

I therefore conclude that the decision of where the children should attend school is exclusively for the plaintiff-mother. Parochial school tuition which is a consequence of that choice is a circumstance to be considered in assessing the proper amount of support to be paid.

There are only assumptions which can be drawn from a silent record. The first is that the amount of tuition here is not a function of factoring each parent’s income. The second is that these children have actually attended parochial school.

Thus, to provide guidance to counsel I direct that [plaintiff’s counsel] furnish to [defendant’s counsel] proof of parochial school attendance for any or all of the children during all periods up to the present. These records will also reflect the tuition amounts for the relevant periods and will be furnished within fourteen (14) days from the date of this letter.

Thereafter, each parent will bear that portion of parochial school tuition in a percentage equal to each parties’ respective income.

Defendant subsequently filed a brief in opposition to payment of private school tuition, which was filed on February 24, 1997. A hearing was held on February 28, 1997<sup>1</sup>, and the trial court indicated that any untimeliness issues would be waived, but that it was not going to change its ruling indicated in the December 3, 1996 letter. On June 20, 1997, the trial court signed an order for reimbursement and payment of parochial school costs. The order specifically provides that defendant shall reimburse plaintiff for an “appropriate portion” of parochial school tuition for the children for the years 1994 to 1996. Defendant was also ordered to continue to assist with the costs of parochial school tuition for the children as long as they attended parochial school. The matter was also referred to the Friend of the Court to determine the parties’ incomes, to apportion the parties’ obligations for parochial school tuition, to determine the amount of parochial school tuition to be divided among the parties, and to determine a schedule for payment of arrears for past school expenses for defendant.

On July 7, 1997, defendant moved for reconsideration of this order; however, the trial court denied the motion in an order dated July 15, 1997. On August 1, 1997, defendant purported to file a claim of appeal in this Court; however, on November 20, 1997, defendant’s appeal was dismissed for lack of jurisdiction because the order appealed from was a post-judgment order that is appealable only by leave.

In the meantime, the Friend of the Court issued its report and recommendation regarding child support in October 1997. Plaintiff’s net weekly wages were determined to be \$391.93 and defendant’s net weekly wages were determined to be \$653.29. The recommendation was that child support increase to \$185 a week for two children and \$120 a week for one child. It was further recommended that plaintiff pay thirty-eight percent and defendant pay sixty-two percent of the parochial school tuition based on the parties’ incomes after taking into account the multiple child discount. On March 24, 1998, plaintiff moved to implement the Friend of the Court recommendation. Defendant’s later application for leave to appeal was denied by this Court in an unpublished order dated June 5, 1998. Defendant then sought leave to appeal in the Supreme Court, and the Court has remanded the case for consideration as on leave granted.

Defendant frames the issues on appeal as directed by the Supreme Court.<sup>2</sup> Defendant argues that the trial court abused its discretion in modifying his child support obligation to include reimbursement and payment of parochial school costs. He contends that the trial court erred in failing to comply with the applicable statute relating to exceeding a Friend of the Court recommendation for child support, that the trial court erred in failing to hold an evidentiary hearing to determine whether plaintiff showed a change in circumstances necessitating a change in child support, and that the trial court erred in utilizing the best interest standard under the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.* We agree with defendant and reverse.

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<sup>1</sup> We note that at this hearing, the trial court did indicate that it had read the parties’ briefs.

<sup>2</sup> We note that defendant has never argued below, and does not argue on appeal, that an award of parochial school tuition is per se unenforceable. Defendant does not argue that the children should not be placed in parochial schools, rather, his contention is that he is financially unable to meet such costs and therefore should not be obligated to do so.

Many of the key facts underlying this case are in dispute and, in the absence of any evidentiary hearing or fact finding by the trial court, we can only set forth the parties' positions. Defendant states that he is Protestant while plaintiff is Catholic. Defendant maintains that two of the children actually attended parochial school during their marriage. However, because of financial restraints and differences in religion, both parties agreed that the children would attend public schools. At the time of the judgment of divorce, defendant states that the children were not in parochial schools and that plaintiff placed two of the children back into parochial schools, but over defendant's objection because he was financially unable to afford such tuition.

Plaintiff, on the other hand, maintains that all three children were attending a Catholic school at the time that the judgment of divorce was entered. Plaintiff also claims that the parties did not agree to a public school education. Rather, plaintiff states that they were married in a Catholic Church, that the children were baptized in a Catholic Church, and that they agreed to educate the children through the Catholic Church.

Regardless of these factual disputes, the judgment of divorce only provides that defendant was to pay \$161 a week for the support and maintenance of the children. Consequently, plaintiff's request for child support increase in July 1994 is a request for a modification of the initial child support order contained in the judgment of divorce. Moreover, although the parties ultimately stipulated to an increase in child support to \$208 a week in December 1995, the issue of payment of parochial school expenses was specifically reserved for the trial court to decide. Thus, the modification request is governed by MCL 552.17; MSA 25.97. Pursuant to this provision, the trial court has the power to modify a support order upon a showing by the petitioning party of a change in circumstances which justifies modification. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

The trial court must hold an evidentiary hearing if the parties fail to consent to the modification and there exists a factual dispute concerning the circumstances relating to the petition for modification. *Varga v Varga*, 173 Mich App 411, 415-416; 434 NW2d 152 (1988), citing *Petoskey v Kotas*, 147 Mich App 487, 490; 382 NW2d 804 (1985). Here, the parties were in clear disagreement regarding defendant's obligation to pay for parochial school expenses and there are factual disputes that must be resolved by the trial court. We reject plaintiff's contention that no evidentiary hearing was necessary in determining whether defendant should pay for parochial school expenses. Absent a showing by plaintiff, and a finding by the trial court, of a change in circumstances justifying modification, any such modification of defendant's obligation to pay child support is not authorized. The December 11, 1995, order stipulates that the parties would submit briefs (which they did) and that the trial court could decide the issue of "private school tuition" after review of the briefs without further oral argument unless deemed necessary by the court to resolve factual disputes. In this case, there are clearly factual disputes, and the trial court simply made certain assumptions in its letter, rather than resolve those disputes following an evidentiary hearing. This was error on the part of the trial court.

Further, plaintiff's contention that educational expenses are "additional support," as opposed to "ordinary support" which is determined by the child support formula, and that the trial court need not make specific findings when ordering additional support is wrong. MCL 552.17(5); MSA 25.97(5) clearly states that support may include payment of the expenses of medical, dental, other health care,

child care expenses, and educational expenses. Under a plain reading of the statute, educational expenses may be included in child support payments; consequently, a request for an increase in child support to include parochial school expenses is governed by this statute.

Although § 17(5) clearly authorizes a court to include payment of educational expenses<sup>3</sup> when modifying child support, there must be an initial showing and finding that there was a change in circumstances justifying modification of child support. Because there were factual issues to be resolved, including whether there was a change in circumstances necessitating a change in child support payments, the trial court erred in failing to hold an evidentiary hearing on the matter and erred in failing to make factual findings in light of that evidentiary hearing on the record. Therefore, the matter must be remanded for an evidentiary hearing and for the trial court to make findings on the record. *Varga, supra*, p 416.

We further agree with defendant that should the trial court decide to deviate from the Friend of the Court's recommendation, then it must adhere to the dictates of MCL 552.17(2); MSA 25.97(2). This requires the court to set forth in writing or on the record why application of the child support formula would be unjust or inappropriate should the court deviate from the child support formula.

With respect to defendant's argument that the trial court erred in utilizing the best interest factors of the Child Custody Act, MCL 722.23; MSA 25.312(3), we simply note that the issue of modifying child support is governed by MCL 552.17; MSA 25.97, but not by the Child Custody Act.

The trial court's order of June 20, 1997 for reimbursement and payment of parochial school costs is reversed and we remand this matter to the trial court for an evidentiary hearing to determine whether plaintiff's request for an increase in child support to pay for parochial school expenses is justified by plaintiff's burden of showing a change in circumstances. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra  
/s/ Jeffrey G. Collins

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<sup>3</sup> Further, this Court has at least impliedly approved the inclusion of private school expenses when considering the amount of child support. See *Edwards v Edwards*, 192 Mich App 559; 481 NW2d769 (1992); *Arndt v Kasem*, 135 Mich App 252; 353 NW2d 497 (1984).