STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM HILL and EVELYN HILL,

Plaintiff-Appellants,

v

DENNIS GORDON MINIX,

Defendant-Appellee.

UNPUBLISHED
July 19, 2005

No. 261131
Berrien Circuit Court
LC No. 2003-001649-DC

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition to defendant. Plaintiffs are the limited guardians and grandparents of defendant's eleven-year-old son and filed the present action seeking custody of the minor child. The trial court granted defendant's motion for summary disposition after finding that he had substantially complied with the limited guardianship placement plan such that plaintiffs did not have standing to file suit for custody. We reverse and remand.

Plaintiffs became temporary guardians of the minor child after the death of their daughter, defendant's ex-spouse and the child's mother. At a November 6, 2002, hearing concerning the minor child, the parties realized that plaintiffs' temporary guardianship had terminated by operation of law; therefore, the parties entered into a limited guardianship that was to continue "until further order of the Court, with the goal being termination of the limited guardianship at the start of the 2003-2004 school year, following a transitional period from the guardians' to the father's home." A limited guardianship placement plan, which identified specific requirements of defendant, was subsequently filed with the trial court.

On September 10, 2003, plaintiffs filed a complaint against defendant seeking custody of the minor child; however, pursuant to MCL 722.26b, limited guardians do not have standing to seek custody if a child's parent has substantially complied with the limited guardianship placement plan. The trial court conducted two evidentiary hearings regarding defendant's compliance with the placement plan and found that, although defendant had admitted to smoking marijuana during four months of the ten-month period between the beginning of the limited guardianship and the filing of plaintiffs' complaint, defendant had complied with other aspects of the plan directly related to parenting and interaction with his son and, so, had substantially complied with the placement plan as a whole. Accordingly, the trial court granted defendant's

motion for summary disposition pursuant to MCR 2.116(C)(5) because plaintiffs lacked the legal capacity to sue, or in other words, they lacked standing to file the complaint.

On appeal, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition because defendant's admitted drug use prevented completion of the placement plan and frustrated the plan's purpose, which was to reintegrate defendant into the minor child's life, such that he did not substantially comply with the placement plan.

We first note the following standards of review and the contexts in which they are typically applicable. Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). This Court reviews de novo a trial court's ruling on a motion for summary disposition, including one brought pursuant to MCR 2.116(C)(5). *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003). Questions regarding statutory interpretation are also reviewed de novo. *Lee v Robinson*, 261 Mich App 406, 408; 681 NW2d 676 (2004). The unusual posture of this case, i.e., the blending of the guardianship proceedings with the standing issue in the custody case pursuant to stipulation, resulted in the standing issue being decided, not solely on documentary evidence and argument typical of a motion for summary disposition, but rather on the basis of testimony at the evidentiary hearing on guardianship along with documentary evidence. Generally, a trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Gumma v D&T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). However, we note that in child custody disputes, "*all* orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28 (emphasis added). We find it unnecessary to explore and determine the precise nature of the appropriate standard of review under the circumstances presented because reversal is warranted even if we accept defendant's argument that MCL 722.28 guides our review.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(5), which allows for summary disposition to be granted where "[t]he party asserting the claim lacks the legal capacity to sue."

As noted above, the trial court found that, because defendant had substantially complied with the limited guardianship placement plan, plaintiffs lacked legal standing to file the present action pursuant to MCL 722.26b, which provides in relevant part as follows:

> (1) Except as otherwise provided in subsection (2), a guardian or limited guardian of a child has standing to bring an action for custody of the child as provided in this act.
>
> (2). A *limited guardian* of a child *does not have standing* to bring an action for custody of the child *if the parent or parents of the child have substantially complied with a limited guardianship placement plan* regarding the child …. [Emphasis added.]

The statute does not define "substantially complied." Therefore, it is appropriate to consider "dictionary definitions to aid in the general goal of construing the term in accordance with its ordinary meaning and generally accepted use." *Lee, supra* at 409-410. According to *Random House Webster's College Dictionary* (2001), "substantial" means, in relevant part, "of ample or considerable amount, quantity[;]" "of real worth, value, or effect[;]" "pertaining to the substance, matter, or material of a thing[;]" and "pertaining to the essence of a thing[,]" and "compliance" means "the act of conforming, acquiescing, or yielding[;]" "conformity [or] accordance[;]" and "cooperation or obedience[.]" Therefore, the level of defendant's compliance or actions in conformance with the plan's terms must have been considerable or of real worth, but need not have constituted strict compliance.

Furthermore, the parties agreed with the trial court's use of the definition of "substantial compliance" as articulated by a panel of this Court in an unpublished custody case, *Avery v Ptak*, unpublished opinion per curiam of the Court of Appeals, decided November 5, 1996 (Docket No. 185505), in which the panel, relying on a dictionary definition of the substantial-compliance rule from Black's Law Dictionary (5th ed, 1999), concluded that "substantial compliance" means compliance with the essential requirements of a statute or contract, and it further concluded that "[s]ubstantial compliance is something less than strict compliance with the terms of a plan. This definition indicates that compliance relates to performance rather than intent. Whether there has been substantial compliance with a plan must be determined on a case by case basis." While this unpublished case has no precedential value, MCR 7.215(C)(1), we find that *Avery* comports with the dictionary definitions noted *supra*.

The parties generally agreed in their testimony that defendant complied with the terms requiring him to exercise his supervised parenting time and to later share transportation responsibilities when his parenting time increased to unsupervised visitations. Furthermore, defendant paid for and took part in the minor child's counseling as required by the placement plan. Defendant testified that all parties allowed reasonable telephone contact with the minor child as required by the plan. While plaintiff Evelyn disagreed that defendant complied with this term, the trial court noted that none of the parties had complained to the trial court about any noncompliance. Furthermore, while plaintiff Evelyn argued that defendant had not complied with the plan's term requiring cooperation among the parties because she felt defendant's silence around and refusal to acknowledge her husband's presence showed his dislike of her husband, her husband testified that he did not know of any times that defendant talked negatively about plaintiffs in front of the child. Given this evidence, the trial court did not err in finding compliance with these terms while noting perhaps minor non-compliance with the term concerning the allowance of reasonable telephone contact.

Plaintiffs do not argue on appeal that the trial court erred in making these specific findings but, rather, plaintiffs argue that defendant's failure to substantially comply with the drug testing requirement of the placement plan and his admitted marijuana use resulted in his failure to substantially comply with the placement plan overall by frustrating "the ultimate purpose of the plan" of reintegrating defendant into the minor child's life. We agree with this assessment. As indicated by the trial court itself, defendant's extensive history of illicit drug use, which included three terms of imprisonment for drug possession, made the drug testing aspects of the placement plan very important to the overall plan, as well it should be when considering the well-being of a minor, and this aspect was of the greatest concern to plaintiffs. The plan was

designed to provide for a period of transition from plaintiffs' home to defendant's home, "with the goal being termination of the limited guardianship at the start of the 2003-2004 school year." This goal was not met because of defendant's drug use, which he tried to hide through lies and trickery. The trial court found that there was only a forty (40%) percent failure to comply on the drug-marijuana issue. During the trial court's ruling, plaintiffs' counsel argued that there was no evidence to show compliance with the drug testing provision of the plan for the period between roughly May and September 2003. The trial court stated that there was no evidence that defendant used drugs during this period of time; the court evidently believed defendant's testimony that he did not use drugs during that time. Defendant testified that he took one drug test in June that was "dirty," supposedly based on May drug use to which defendant conceded at the hearing in May, and then underwent one more test in August that was "clean." First, the record indicates that these test results were not provided to plaintiffs as required by the placement plan. Second, and more importantly, the placement plan provides that defendant "shall submit to weekly drug testing for the presence of any controlled substance, at [defendant's] expense and under the supervision of the counselor." Defendant, as indicated in his own testimony, did not do so between May and September 2003, except for the two occasions mentioned above, assuming that such testing occurred as claimed by defendant. Therefore, not only were there failed drug tests and evidence of drug use prior to and including May 2003, there was evidence that defendant failed to undergo the testing thereafter in accordance with the placement plan through September 2003.

While the drug testing provision of the plan was but one of many requirements, it was an extremely important aspect of the plan and, contrary to the court's findings, there was virtually no compliance whatsoever, where compliance not only related to providing negative or clean screens but also to the simple act of submitting to the drug testing in and of itself on a weekly basis. Moreover, defendant's actions in using drugs set the entire plan off its schedule. Substantial compliance was lacking. On this record, and even giving the trial court deference with respect to its ruling under MCL 722.28, the court erred in finding substantial compliance with the limited guardianship placement plan for purposes of standing in the custody case. Accordingly, plaintiffs have standing to pursue custody under MCL 722.26b.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio