

STATE OF MICHIGAN
COURT OF APPEALS

ANISEH ELJAHMI, Deceased,
Plaintiff,

UNPUBLISHED
November 30, 2006

v

No. 270848
Wayne Circuit Court
LC No. 01-108659-DM

HANNIE ELGARMİ,

Defendant-Appellant,

v

ABDU ELJAHMI and LOWZA ELJAHMI,

Intervening Plaintiffs-Appellees.

Before: Davis, P.J., and Murphy and Schuette, JJ.

DAVIS, J. (*concurring*).

I fully concur in the majority’s opinion in this matter. However, I do not believe the majority fully addresses the issues before this Court.

The majority correctly concludes that the trial court had subject matter jurisdiction. The majority also correctly concludes that grandparents generally cannot *initiate* a child custody dispute, although the trial court may determine that placing a child with grandparents is in the child’s best interests. However, the majority does not address how grandparents, if they cannot *bring* a child custody claim, can nevertheless become involved in the proceedings and participate in it as parties. The fact that the circuit court has jurisdiction does not establish “whether a particular plaintiff has a cause of action.” *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992).

Plaintiff was the only individual ever granted legal and physical custody of the child. Defendant had been given parenting time, but no more. Therefore, plaintiff’s death caused the child to be *entirely without a legal custodian*. Because defendant never received legal custody under any prior court order, the child’s custody did not automatically devolve on him. See *Deschaine v St Germain*, 256 Mich App 665, 671 n 9; 671 NW2d 79 (2003). Therefore, a “situation involving the placement of a child,” *Sirovey v Campbell*, 223 Mich App 59, 68; 565 NW2d 857 (1997), quoting *Frame v Nehls*, 452 Mich 171, 179; 550 NW2d 739 (1996), already existed when intervening plaintiffs sought to become involved in it. Indeed, it existed before

defendant filed his petition in this matter. Significantly, *any* resolution of the child's custody thereafter would *by definition* require the trial court "to modify or amend its previous [custody order] or issue a new order so as to change the established custodial environment of a child," which the trial court could not legally do without first properly determining that the change was in the child's best interests. MCL 722.27(1)(c).

In other words, because defendant was not a parent who had any legal or physical custody, he could not legally *obtain* full or partial custody without a modification or amendment to the prior custody order. As the majority explains, the trial court could not modify the prior custody order without conducting an evidentiary hearing. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). Even in an emergency situation regarding a change of custody, as would be suggested by an *ex parte* proceeding, "[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 v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991). Therefore, by virtue of her status as the only custodial parent, plaintiff's death automatically mandated a best interests hearing.

Under ordinary circumstances, changing a child's custody from an established custodial environment requires the trial court to consider the twelve "best interest factors" under MCL 722.23 and find "clear and convincing evidence that [changing custody] is in the best interest of the child." *Foskett v Foskett*, 247 Mich App 1, 5, 9; 634 NW2d 363 (2001). If the dispute is between a natural parent and a third party, as is the case here, the child's best interests remain paramount, but a "strong presumption exists . . . that parental custody serves the child's best interests." *Heltzel v Heltzel*, 248 Mich App 1, 27; 638 NW2d 123 (2001). Therefore, although a third party may be awarded custody, the third party must establish by clear and convincing evidence that "all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns . . . demonstrate that the child's best interests require placement with the third person." *Id.*¹ The trial court is obligated to "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." *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004) (citations omitted); see also *Foskett*, *supra* at 9. Neither Judge Halloran nor Judge Brown conducted *any* best interests analysis that I can discover in the record.

It appears that the Child Custody Act simply does not anticipate a situation similar to the one before us: where a parent with sole custody dies, leaving behind another parent who has never been given any custody, and a child living in the care and custody of third parties pursuant to the deceased custodial parent's wishes. The deceased parent's actions during her lifetime have, as a functional matter, already made the grandparents *de facto* parties to the ongoing child

¹ However, the third party need not shoulder such a heavy burden if the natural parent is deemed unfit. Therefore, "if a parent's conduct is inconsistent with a parent's protected interest in a child," the parent forfeits his or her entitlement to "the constitutional deference to which a natural parent is generally entitled." *Mason v Simmons*, 267 Mich App 188, 190, 196-200; 704 NW2d 104 (2005).

custody action. *Terry v Affum*, 237 Mich App 522, 534; 603 NW2d 788 (1999). Indeed, even without a *right* to custody, it is entirely proper that the third parties may suggest to the trial court that “the child’s best interests would be served by continuing to reside in the established custodial environment” with them. See *Heltzel, supra* at 31. I therefore find that intervening plaintiffs here are proper parties to this action, and the trial court did not err in treating them as such. The only error below was failing to hold the required evidentiary hearing, thereby depriving this Court of the ability to know whether the facts of the case are sufficient to overcome the presumption in defendant’s favor.

Underlying the Child Custody Act is a strong Legislative mandate to avoid unnecessary disruptions in a child’s life. *Foskett, supra* at 6. As discussed, unless he is determined to be an unfit parent, defendant is entitled to a strong constitutional presumption that custody with him is in the child’s best interests. Nevertheless, the child’s present situation should not be disturbed until the trial court has properly heard and evaluated the evidence regarding the child’s best interests. Both post-mortem custody orders should be vacated and on remand the trial court should hold a full evidentiary hearing.

/s/ Alton T. Davis