* child custody

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

ROBERT PORTER AND
JUDITH PORTER,

Plaintiffs-Appellants

DOCKET NO. Publ opn 6-11-13
COA DOCKET NO. 306562
LC NO. 11-012799-DZ

Saginaw
J. Borchard

V

CHRISTINA MARIE HILL f/k/a
CHRISTINA MARIE PORTER,

Defendant-Appellee

DILL LAW PLLC
BY: COLIN M. DILL (P70861)
ATTORNEY FOR PLAINTIFFS-APPELLANTS
4855 STATE ST., SUITE 4
SAGINAW, MI 48603
989.792.3434

SUSAN J. TARRANT (P39937)
ATTORNEY FOR DEFENDANT-APPELLEE
6420 NORMANDY DR.
SAGINAW, MI 48638
989.249.9102

147333
APPL
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B41784

PLAINTIFFS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

PREPARED BY:
DILL LAW PLLC
BY: COLIN M. DILL (P70861)
ATTORNEY FOR PLAINTIFF
4855 STATE ST., SUITE 4
SAGINAW, MI 48603
989.792.3434

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

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Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

JUDGMENT OR ORDER APPEALED FROM

The Order from which leave to appeal is sought is from the grandparenting time complaint which was summarily dismissed by the trial court. The Order granting Defendant's motion for summary disposition was entered by the trial court on September 26, 2011. The Court of Appeals rendered a decision through a published Opinion dated June 11, 2013.

Jurisdiction for this application is found in MCL 7.302(C)(1).

The Plaintiffs-Appellants are requesting that this court reverse the decisions of both the Court of Appeals and the trial court and specifically find that the Plaintiffs-Appellants have legal standing to request grandparenting time.

The issue raised in this appeal involves legal principles and will have a significant impact to the State of Michigan's jurisprudence inasmuch as this published Opinion will give an entirely new interpretation and definition to the term "grandparent" and "natural parent" as set forth in MCL 722.22(h). This new interpretation will significantly reduce the number of claimant grandparents who wish to petition the court for grandparenting time.

The trial court recognized the significance of this legal issue and stated as much in its opinion, "[i]'m going to make it real simple. This matter is going to go up on appeal no matter who wins or loses. I am going to keep it simple for appeal, because it's something that the appellate courts should decide. (emphasis added).

It's the Court's - - and I am not making any determination on these grandparents. They appear to be fine people. But I am going to have to rule that under the Child Custody Act your rights come through those of your child. And I'm ruling that the Child

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

Custody Act does not allow, when somebody's parental rights are terminated, for the grandparents to seek visitation.

As I said, I hope the Court of Appeals reverses me on this issue. And I have kept it real simple so it can be taken up on appeal. But I think it's something that the Court of Appeals needs to decide, and it hasn't yet." (emphasis added) (Hearing, Tr. Sept. 6, pg. 11)

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

STATEMENT OF QUESTIONS INVOLVED

1. Do grandparents have legal standing to seek a grandparenting time order if their child has his parental rights involuntarily terminated?

   The trial court answered no.

   The Court of Appeals answered no.

   Plaintiffs-Appellants answer yes.

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

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Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Judith and Robert Porter, Appellants, filed a complaint for Grandparenting Time on May 17, 2011 pursuant to MCL 722.27b. The Appellants are the paternal grandparents for Robert Timothy Porter, born April 5, 2008 and Addison Elizabeth Porter, born June 14, 2009. The Appellants had a son, Russell J. Porter. Russell J. Porter was the biological father of Robert T. Porter and Addison E. Porter. Russell J. Porter was married to Christina Porter, n/k/a Christina Hill, Appellee, the biological mother to Robert T. and Addison E. Porter.

That Russell J. Porter had his parental rights involuntarily terminated on February 4, 2010. Russell J. Porter and Christina Hill were divorced by Judgment on January 25, 2011. That Russell J. Porter died on April 6, 2011.

The Appellee, filed a Motion for Summary Disposition, asserting that the trial judge lacked jurisdiction to rule on the Appellants complaint for the reason that the Appellants did not have legal standing to file suit for Grandparenting Time because their son the biological father had his parental rights terminated.

Both the Appellant and Appellee filed legal briefs and the trial court heard oral argument on said motion on August 29, 2011 and September 6, 2011.

The trial court ruled in favor of the Appellee and found that the Appellants did not have legal standing to file for Grandparenting Time as their rights were derived from their son, Russell Porter, who had his parental rights terminated.

That counsel for the Plaintiffs-Appellants and counsel for the Defendant-Appellee agreed with the Statement of Facts as set forth.

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

That oral argument was heard in the Court of Appeals on Tuesday, October 9, 2012. The Court of Appeals rendered its published Opinion on June 11, 2013.

TRIAL COURT'S OPINION

"I'm going to make it real simple. This matter is going to go up on appeal no matter who wins or loses. I am going to keep it simple for appeal, because it's something that the appellate courts should decide. (emphasis added)

It's the Court's - - and I am not making any determination on these grandparents. They appear to be fine people. But I am going to have to rule that under the Child Custody Act your rights come through those of your child. And I'm ruling that the Child Custody Act does not allow, when somebody's parental rights are terminated, for the grandparents to seek visitation.

As I said, I hope the Court of Appeals reverses me on this issue. And I have kept it real simple so it can be taken up on appeal. But I think it's something that the Court of Appeals needs to decide, and it hasn't yet." (emphasis added) (Hearing, Tr. Sept. 6, pg. 11)

ARGUMENT

I. Do Grandparents have legal standing to seek a grandparenting time order if their child had his parental rights involuntarily terminated?

Standard of Review

Appeals from orders regarding motions for summary disposition, are reviewed de novo. *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 123 (2005). The

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

interpretation and application of court rules and statutes present a question of law that is reviewed de novo. *Id.* at 124.

Basis of Argument

MCL722.22 Definitions

(e) "Grandparent" means a natural or adoptive parent of a child's natural or adoptive parent.

(h) "Parent" means the natural or adoptive parent of a child.

That it appears the word 'natural' in the above written context could be a substitute for the word biological. The parties here before this court are both the biological grandparents as well as the deceased's biological parents. The Court of Appeals on March 4, 2010 stated that the legal obligation to support a child remains with the natural parent regardless if their parental rights were terminated. "Absent adoption, the legal obligation to support a child remains with his natural parents." *Department of Human Services v Lawrence Michael Beck*, 287 Mich App 400, 403(2010). Russell J. Porter, is the biological and natural parent to Robert and Addison Porter pursuant to the definitions set forth in MCL 722.22, and continued to pay child support to the Appellee after his parental rights were terminated.

Random House Webster's College Dictionary (1991) defines natural, in relevant part, as being "related by blood rather than by adoption." Similarly, Black's Law Dictionary (9th ED) defines natural, in part, as "(O)f or relating to birth," as in a "natural child as distinguished from (an) adopted child."

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

Inasmuch as Russell J. Porter is the natural and biological father to Robert and Addison Porter, then the Appellants satisfy the definition as Grandparent as set forth in MCL 722.22.

The minor children, Robert and Addison Porter have not been adopted by another individual.

That as the trial court stated in their opinion there is not a statute or case law that directly states that grandparents can't seek a grandparenting time order if their child had his or her parental rights terminated. Furthermore, grandparenting time is a wholly different claim with different litigants as such should be interpreted and dealt with separately from the claims of a biological parent.

The Appellee only argues that since the biological father's parental rights were terminated the grandparent's rights are terminated as well. The Appellee did not cite any legal authority to support said claim, including but not limited to statutes and case law.

The majority opinion was written by the Honorable Judge Meter and they have relied on the legal authority that was set forth in *People v Wambar*, COA No. 304116, (2013), another published Opinion written by the Honorable Judge Meter. See Appendix 2. The Honorable Justice Boonstra rendered a dissenting Opinion in this matter and strongly disagreed with the majority's reliance on the *People v Wambar* Opinion. See Appendix 3. The dissenting Opinion states that *People v Wambar* dealt with the child taking statute as set forth in MCL 750.350 as well as the parental kidnapping statute of MCL 750.350a and analogized it against the facts as set forth here in a child custody dispute. In *Wambar*, the majority Opinion said that a parent whose rights were involuntarily terminated could only be charged under the general child taking statute and

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

not the parental kidnapping statute. *Id.* at 5. That since the majority in *Wambar* ruled in a parental kidnapping statute case that a parent whose parental rights were terminated and therefore could only be charged under the child taking statute they were going to rule in a similar fashion in a grandparent visitation claim.

Justice Boonstra states the following, "With due respect to the majority, I do not believe that its conclusion follows. The considerations that were present in *Wambar* simply are not present here. Since Russell is deceased, there is no potential here for him to receive a benefit or any "protection" from interpreting the term "natural parent" according to its plain and ordinary meaning. Nor would an interpretation of the term "natural parent" according to its plain and ordinary meaning in any way "revive" Russell's parental rights, as the majority suggests.

What I find "anomalous," in fact, is that the majority declines to equate "natural parent" with "biological parent" in this context, yet equates "natural parent" with "legal parent" as its basis for affirming. I find the former equation of terms much more compelling and supportable than the latter, particularly given the plain and ordinary meaning of the terms. In fact, in using the phrase "natural or adoptive parent" to define the terms, Parent" and "grandparent," the Child Custody Act specifically juxtaposes the adjective "natural" with the complementary adjective "adoptive." MCL 722.22. An "adoptive parent" is a form of "legal parent." . . .

"My conclusion also finds support in the language of our Supreme Court. In *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009), the Court found that "a parent whose rights have been terminated . . . cannot initiate an action for custody under the [Child Custody Act] because it would amount to a collateral attack on the earlier

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

proceedings," *Id.* at 277. In so finding, the Court observed that a "termination order, by its nature, finds that custody with the *natural parent* is not in the child's best interests. A *parent's* only recourse in such cases is to appeal the order." *Id.* (emphasis added). In other words, a person whose parental rights have been terminated, and who has therefore lost his or her rights as a "legal parent," remains a "natural parent" and, therefore, a "parent," under the definition of the Child Custody Act." *Porter v Hill*, Dissenting Opinion, pg. 5-6, COA 306562, (2013)

The Grandparenting Time statute, MCL. 722.27b, does not directly or indirectly state that a grandparent can not seek an order for grandparenting time if their child had his or her parental rights terminated.

MCL 722.27(b)

> **(1) A child's grandparent may seek a grandparenting time order under 1 or more of the following circumstances:**
>
> **(b) The child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled; or**
>
> **(c) The child's parent who is a child of the grandparents is deceased.**

The parties were divorced by a Judgment of Divorce on January 25, 2011, File No. 09-006100-DM-4. That said Judgment of Divorce dealt with custody as the Plaintiff-mother was awarded sole legal and physical custody of the minor children. That the Defendant-father in said action was ordered to pay $440.00 a month for the two minor children. That Russell J. Porter died on April 6, 2011.

MCL 722.27b

> **(5) If 2 fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3). This subsection does not**

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated. (emphasis added)

MCL 722.27b(5) as stated above further supports the position that the Appellants have legal standing to seek a grandparenting time order. The above listed provision in MCL 722.27b(5) states that a natural parent's opposition to a request for grandparenting time is not sufficient to dismiss a complaint or motion if the grandparents are the natural parents of the child who is deceased or whose parental rights have been terminated. The Appellants would clearly meet both standards as Russell J. Porter is deceased and his parental rights were terminated. Furthermore, MCL 722.27(b)(5) is evidence that the legislature contemplated that grandparents of children whose parental rights were terminated should have legal standing to seek a grandparenting time order.

That in his dissenting Opinion, Justice Boonstra stated the following regarding MCL 722.27b, "[w]hile, as the majority notes, the circumstances of a stepparent adoption are not present here, this statute nonetheless undercuts the majority's preferred statutory interpretation. By its very terms, the statutory provision recognizes the Legislature's intent that a "grandparent" seeking grandparenting time may be a "natural or adoptive parent" of a "parent . . . whose parental rights have been terminated." (emphasis added). In other words, even though a person's parental rights have been terminated, he or she may still be a "parent" for purposes of enabling a grandparent to seek grandparenting time."

"The majority therefore implores the Legislature to amend the statute, based on the majority's belief as to what the Legislature "likely" intended. In my view, the

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

majority thereby impermissibly "legislates" its own policy preference, notwithstanding the clear and unmistakable meaning of the actual words that the Legislature chose to employ. MCL 8.3a; *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002)." Porter v Hill, Dissenting Opinion, pg. 6-7, COA 306562, (2013)

Other Jurisdictions Recognize Grandparents' Standing After a Termination of Parental Rights.

In his dissenting Opinion, found on page 7 under footnote 5, Justice Boonstra states that a number of other states allow for grandparent visitation when there has been an involuntary termination of parental rights. Justice Boonstra cites that the states of Pennsylvania, New Mexico, Indiana and Colorado allow for grandparent visitation when there has been an involuntary termination.

There are numerous other examples in Michigan law as well as Federal law that support the premise that Russell J. Porter remained the natural parent to the minor children, Robert and Addison Porter.

MCL 722.3

Obligation of Parents; Exceptions; Enforcement of Duty to Support; Child Support Formula as Guidelines; Enforcement of Judgment.

"(1) The parents are jointly and severally obligated to support a minor as prescribed in section 5 of this support and parenting time enforcement act, unless a court of competent jurisdiction modifies or terminates the obligation of the minor as emancipated by operation of law, except as otherwise ordered by a court of competent jurisdiction. Subject to section 5b of the support and parenting time enforcement act, a

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

court of competent jurisdiction may order support as provided in this section for a child after he or she reaches 18 years of age."

That the 10th Circuit Court as well as the Saginaw Friend of the Court considered Russell Porter the legal father of the minor children for purposes of collecting child support; he was paying $440.00 a month.

MCL 700.2114 Parent and child relationship.

"Sec. 2114. *(1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:*

(3) The permanent termination of parental rights of a minor child by an order of a court of competent jurisdiction; . . ."

That the estates and protected individuals code clearly allows for the children of a deceased individual whose parental rights were terminated to inherit from his estate. That EPIC clearly contemplates a deceased individual whose rights were terminated as the legal father and recognizes said relationship.

The Appellee, filed an appearance of parent on behalf of the minor children in probate court to claim benefits from the Estate of Russell J. Porter, Deceased. The minor children were found to be Heirs of Russell J. Porter.

Social Security Benefits for Children

That the Social Security Administration website (SSA.gov) states that for children to receive benefits, a child must show "a parent who is disabled or retired and entitled to social security benefits; or a parent who died after having worked long enough

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

on a job where he or she paid social security taxes. The Social Security Administration website goes on to state that the documentation needed for the child to receive benefits is the following: "When you apply for benefits for your child, you will need the child's birth certificate and the parent's and child's social security numbers. Depending on the type of benefit involved, other documents may be required. For example, if you are applying for survivor's benefits for the child, you will need to furnish proof of the parent's death. If you are applying for benefits for a disabled child, you will need to furnish medical evidence to prove the disability. The Social Security representative who sees you will tell you what other documents you will need." *ssa.gov*. (emphasis added)

That the Appellee in this case, Christina Hill, the children's mother, acted as if Russell Porter was the children's parent as she claimed the children as dependents of Russell J. Porter at the Social Security Administration office so that the children could receive their father's social security benefits. That clearly the federal government considers Russell Porter to be the children's parent as it has allowed the children to receive his social security benefits.

Conclusion

For the reasons stated above, Russell J. Porter is the natural parent of Robert and Addison Porter. Inasmuch as Russell J. Porter is the natural parent, then Robert and Judith Porter are grandparents as defined in MCL 722.22 and would then have legal standing to seek a grandparenting time order pursuant to MCL 722.27b.

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656

RELIEF

The Appellants respectfully request this honorable court reverse the trial court and the Court of Appeals and find that the Appellants have legal standing to seek a grandparenting time order pursuant to MCL 722.27b.

Dated: June 28, 2013

COLIN M. DILL (P70861)
Attorney for Plaintiff-Appellants

Dill Law PLLC
Attorneys at Law
4855 State Street
Suite 4
Saginaw, Michigan
48603-3891

(989) 792-3434
Fax (989) 792-5656