STATE OF MICHIGAN

COURT OF APPEALS

TODD DAVID ERWIN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2014
v	No. 317823 Livingston Circuit Court
CHRISTIE HOPE CLANCY, f/k/a CHRISTIE HOPE ERWIN, Defendant-Appellant.	LC No. 09-042206-DM

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right the post-judgment order awarding plaintiff legal and physical custody of the parties' minor children. We affirm.

I

Plaintiff and defendant entered into a consent judgment of divorce on July 13, 2010. The parties were awarded joint legal custody of the children, and defendant was awarded physical custody of the children. The judgment contained a detailed provision regarding parenting time. Specifically, the judgment provided in relevant part that plaintiff's parenting time would be supervised by the plaintiff's mother or father, or any other individual upon which the parties could mutually agree, until further ordered by the court. The judgment also provided that

> c. Plaintiff Father will complete a Domestic Violence program similar to that offered at The Haven and approved by the Livingston County Friend of the Court; however, Plaintiff's agreement to complete said program was made to resolve this matter without trial and is intended to comply with the Court's prior Orders/Recommendations. Upon proof of completion of the Domestic Violence program, Plaintiff may petition the Court for modification of his parenting time schedule. Said modification may include unsupervised visits, overnights, extended parenting time, holiday parenting, and parenting time in the Plaintiff's home state. *The parties stipulate and agree that completion of the domestic violence program is a sufficient change of circumstances to consider the Plaintiff's request to modify parenting time.* [Emphasis added.]

The judgment also contained the following directive:

> Neither party shall encourage, or call another individual to encourage the children to refer to any third party as "mommy/mom" or "daddy/dad."

On February 22, 2011, plaintiff moved to modify parenting time pursuant to the consent judgment of divorce. At that time, he was living in Texarkana, Arkansas. Plaintiff attached to his motion a February 17, 2011, "Letter of Program Completion" for the "Battering Intervention & Prevention Program" offered by Domestic Violence Prevention, Inc., in Texarkana, Arkansas.[1] Plaintiff sought unsupervised and extended parenting time pursuant to the stipulation in the consent judgment of divorce that *completion of the domestic violence program is a sufficient change of circumstances to consider the Plaintiff's request to modify parenting time*. After a referee hearing and a subsequent hearing before the trial court on defendant's objections to the referee report and recommendations, the trial court entered an order adopting the referee's report as modified by the order and modifying parenting time in pertinent part as follows:

> IT IS FURTHER ORDERED that Plaintiff Father shall have seven days for parenting time each month in Michigan. . . .
>
> IT IS FURTHER ORDERED that if Plaintiff Father's drug test is negative then his parenting time will not be supervised beginning in May, 2011.
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> IT IS FURTHER ORDERED that the children shall be with Plaintiff Father from 9:00 a.m. until 7:00 p.m. . . .
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> IT IS FURTHER ORDERED that Plaintiff father may have one overnight with the children in June, 2011, if the parenting time includes a Saturday, the overnight shall be Saturday night. Overnight parenting time will be from 9:00 a.m. until 7:00 p.m. the following day. . . .
>
> Beginning in July, 2011, Plaintiff Father shall have two overnights with the children during each parenting time period. The overnights would be Friday and Saturday night if the parenting time includes a weekend.
>
> However, the referee recommendation is modified in that should Plaintiff Father elect to exercise parenting time in August, 2011 and not June, 2011, the overnight parenting time shall begin in the later month of the following visit.

On February 15, 2012, plaintiff filed a "Motion to Modify Custody, Parenting Time, Award Sanctions and Attorney Fees and Other Relief" with supporting documentation. On February 17, 2012, defendant filed an answer to the motion and denied that there was any basis to modify custody.

[1] The court approved this program.

The parties appeared for a referee hearing on the motion on February 22, 2012.[2] The referee apparently set the matter for an evidentiary hearing. The hearing commenced on May 29, 2012, and the referee continued the hearing and took testimony on June 5, 2012, July 31, 2012, January 24, 2013, March 14, 2013, March 22, 2013, March 28, 2013, April 8, 2013, April 9, 2013, April 18, 2013, and April 26, 2013. The referee issued two reports and recommendations. Initially, on August 7, 2012, the referee issued a report and recommendation regarding her conclusions with regard to whether plaintiff had met his burden of establishing proper cause and/or changed circumstances sufficient to revisit custody. The referee found that plaintiff had met his burden of proof in this regard. She found that defendant had demonstrated that she was unable to facilitate and encourage a close and continuous parent-child relationship between plaintiff and the children and that her failure in this regard had the potential to cause a significant impact on each child's life and well-being. Defendant initially objected to this recommendation, but on September 28, 2012, she withdrew her objections to the report and recommendation.

On May 29, 2013, the referee issued her report and recommendation on the entirety of plaintiff's motion. The referee found that defendant "was suspicious of law enforcement and encouraged anxiety in the children. She concluded that factor (b), the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care" favored plaintiff. Additionally, because the children had lived in six different homes with defendant since the judgment of divorce was entered, factor (d), the length of time the child has lived in a stable, satisfactory environment, favored father plaintiff.

The referee also found that factor (e), the permanence, as a family unit of the existing or proposed custodial home, also favored plaintiff. With regard to factor (f), the moral fitness of the parties involved, the referee found that this factor favored plaintiff. In support of this conclusion the referee noted how defendant referred to her new husband as the children's father, and that defendant "hid a recording device in the children's teddy bear" in an effort to record what transpired during plaintiff's parenting time. The referee also found that defendant denied plaintiff parenting time several times and otherwise failed to follow the order of the court.

The referee made substantial findings regarding factor (g), the mental and physical health of the parties involved. The referee detailed how Isaiah was "worried about his mother going to jail." She noted that there were significant concerns about his anxiety, which was perpetuated by defendant's inability to "prioritize the children's needs" above her own needs. She further noted that time and therapy had not abated the intense anger that defendant had for plaintiff, and that Dr. Kushler had recommended Dialectal Behavior Therapy for defendant because her current therapy was not helping her. The referee found that factor (g) favored plaintiff.

The referee also found that factor (j), the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent relationship between the child and the other parent, to favor plaintiff. The referee noted that defendant's "phone encouragement is non-existent. She yells at the children . . . . She has threatened the children with her going to jail. It is as if the children talking to their father is a direct affront to her authority or autonomy as a

[2] A copy of the transcript of the hearing is not included in the lower court record.

parent." The referee also noted that defendant fails to consult with plaintiff regarding any important matters regarding the children, and that she had been found in contempt for failing to follow court orders regarding parenting time.

The referee also outlined her findings with regard to factor (l), any other factor considered by the court to be relevant to a particular child custody dispute. The referee made findings regarding defendant's unreliable veracity, her refusal to follow court orders about notifying plaintiff of the children's location, defendant's unsubstantiated allegations of sexual abuse by plaintiff, and the profound negative effect such allegations have on children.

After discussing the findings, the referee recommended that plaintiff be awarded sole legal and physical custody of the children. The referee concluded that the children "being exposed to [Mother] on a daily basis with her frequent changes of mind and unpredictability is a serious concern. She is unable to separate her needs from that of the children. . . . Their emotional needs are not being met." The referee recommended that defendant be granted parenting time the fourth weekend of each month, with her parenting time taking place in Arkansas.

On June 19, 2013, defendant filed objections to the referee report and recommendation, and on June 24, 2013, she filed amended objections. In her objections, defendant presented affidavits of witnesses who had testified during the evidentiary hearing before the referee. The original motion hearing on the objections was adjourned to allow time for preparation of the numerous transcripts involved in this case. A hearing was later held on August 15, 2013. Defendant's counsel was present at the hearing, but defendant was not. Plaintiff urged the court not to consider the affidavits because those witnesses had already testified. The court indicated that the testimony of the witnesses at the hearing would speak for itself and that the affidavits would be considered only if they constituted newly discovered evidence. According to defendant's counsel, the affidavits were offered to "contradict the assertions of the referee" and not as newly discovered evidence. Because defendant admitted that the authors of the affidavits had testified at the hearing, the court indicated that it was going to rely on testimony of the witnesses from the transcript. The court further stated:

> It's, it's a de novo review. So I don't know if there's a way to expedite this a little bit. If the parties would be willing to – [defense counsel] if you are able to cite to specific provisions or transcript pages that support – are supportive of your objections that may be . . . a way to . . . expedite it. . . . what my thinking was to do is to ask for you to supplement your briefs with specific pinpoint cites to transcript pages, areas of testimony, that you would highlight in support of your objections. And that way then the Court can go right – focuses and concentrate on those areas first.

Plaintiff's counsel requested that the court adopt the referee's recommendation regarding custody as an interim order pending a hearing on the objections. He pointed out that the recommendation was for the children to attend school in Arkansas with plaintiff, and that school was to commence in less than a week. Plaintiff's counsel also alluded to additional CPS involvement and police involvement in the recent weeks as a basis for adopting the recommendations on an interim basis.

The court questioned plaintiff about the children's interactions with him in Arkansas during their two week visit. Plaintiff explained that the visit went well and that he had videos and pictures of the children having a good time. The court subsequently stated:

> I was inclined to adopt the recommendations on an interim basis until I can review – finish the review and place my findings on the record of the best interest factors at a full de novo review on another day when the Court has time to put all those – make a full analysis of all the best interest factors and place that on the record based on the objections.

Defendant's counsel objected to the entry of an interim order transferring custody, indicating that the children needed a transitional period. Plaintiff objected to a transitional period because school was about to begin, and noted that the children had not experienced transition problems during their two week visit in Arkansas over the summer. He explained that the only time that the children exhibited any trauma was when defendant told them that plaintiff was "trying to keep you there and never let you see us again."

The court was sympathetic to defendant's counsel's inability to present evidence on behalf of defendant with regard to the new allegations involving CPS and the police. The court indicated that it would continue the hearing on the objections and allow defense counsel the opportunity to present and cross-examine regarding the new evidence. Specifically, the court stated:

> I've heard all of this information from one side. [Defense counsel has no opportunity to controvert it, cross-examine it, and even have a conversation with his client about it I'm sure. So I think the Court's in the position now where I have to continue the evidentiary hearing and permit the parties to present this evidence and cross-examine regarding this evidence. And I'll place on the record that it was – the Court had intended to adopt the referee's recommendation in the interim anyway before I even heard this information. But I want to give ample opportunity and fair opportunity to [defense counsel] so that's why I'm now considering scheduling this for hearing so that I can hear – so both parties can have an opportunity to present evidence regarding this, this new information as part of the Court's consideration in the de novo view. I mean the Court is permitted to – to the extent allowed by law the Court may conduct the judicial hearing by review of the record of the referee hearing, but the Court must allow the parties to present live evidence at the judicial hearing.. . .

The court adopted the referee's recommendation as an interim temporary order pending a full hearing and the opportunity to present evidence.[3] The court instructed defendant's counsel to supplement his objections with specific citations to the transcript, and counsel agreed to file a

[3] MCL 552.507(7) provides that "Pending a de novo hearing, the referee's recommended order may be presented to the court for entry as an interim order as provided by the Michigan Court Rules."

supplemental brief by September 16, 2013. The court set the matter for a continued hearing on the objections on October 2, 2013.

As part of the interim order, the court ordered defendant to return the children to plaintiff on Saturday, August 17, 2013, so that he could drive them to Arkansas and have them ready to begin school on August 19, 2013. The court ordered that the exchange occur at the Big Boy at Haggerty and Eight Mile Road at noon on August 17, 2013.

On August 19, 2013, plaintiff filed an emergency motion to show cause why defendant should not be held in contempt of court for failing to turn over the children to plaintiff on August 17, 2013, as ordered by the court. Defendant again failed to appear at the hearing, but her counsel appeared. He explained his unsuccessful attempts to contact defendant by phone, mail, and e-mail, and indicated that he had had no contact with her and did not know her whereabouts. The court expressed concern for the welfare of the children and questioned whether defendant's actions constituted "parental kidnapping."

Plaintiff's father testified about his attempt to pick up the children on August 17, 2013, at noon. He arrived at the Big Boy at 11:45 a.m. At approximately 12:10 p.m., defendant's father arrived and stated that he did not know where defendant was and that she would not be coming.[4] Plaintiff's father left the Big Boy at 12:30 p.m. without the children. As of the date of the hearing, he did not have the children and did not know where they were. The court ordered that defendant appear in court on August 22, 2013, with the children and show cause why she should not be held in contempt of court. Plaintiff's counsel indicated that he would personally hand deliver the orders to defendant's suspected residences.

On August 22, 2013, the court continued the show cause hearing, and defendant again failed to appear for the hearing. Defendant's counsel indicated that he had received correspondence authored by defendant that was directed to the trial court. The letter stated in relevant part that "I now realize that having a fair trial in your court is impossible. For that reason, I regret not being able to come today . . . ."

The court again expressed concern for the safety and well-being of the children and, given defendant's failure to appear for the hearing after receiving notice, the court issued a bench warrant for her arrest. The court indicated that it would be filing a complaint with the Department of Human Services due to the court's concerns for the safety and well-being of the children.[5]

With regard to defendant's objections and her request for a de novo hearing, defendant's counsel requested that the court delay the hearing indefinitely until such time that defendant

[4] Defendant's father's decision to go to the Big Boy and alert plaintiff that defendant would not be coming with the children was prompted by a telephone call from defendant's counsel.

[5] According to defendant's brief on appeal, defendant was subsequently discovered with the children in the state of New York, and the children are currently residing with plaintiff.

could participate in the process. Defendant's counsel stated that he "would prefer to have a client available" to proceed with the hearing. Plaintiff's counsel requested that the interim order be entered as a final order of the court. He pointed out that defendant had willfully failed to appear at the last three court hearings. Plaintiff argued that defendant's actions in this regard constituted a withdrawal of her objections. The court stated:

> Well, she's not only not participating in the process she's in contempt of the process. She didn't appear on Thursday for the ruling which is kind of a big deal. I suppose she didn't have to be if that was a discussion her and lawyer had that's fine. But then she didn't come Monday and she didn't come today. I mean it's obvious what's going on. And this was, this was a concern that was shared and discussed some time ago. After the first, after the first hearing this was a concern. And it's come true so it's not even shocking really that this happened. It's unfortunate but it's not shocking. You know that's all I can really say about it. I just don't know what point it is in arguing over something if she's just – she's not going to abide by it. It doesn't matter what it is unless it's fully favored for her then she'll happily prance in and take her favorable ruling. But I don't know. She's not participating. She's filed her objections timely so they are preserved. The court is going to dismiss her objections without prejudice and she can renew them once she comes in compliance with this Court's orders and purges contempt. So they're dismissed.

The court entered an order on that same date that stated:

> 1. A bench warrant without bond shall issue for the arrest of Christie Hope Clancy;
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> 2. The Interim Order awarding Todd Erwin custody (sole legal and physical) shall be entered as a final order;
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> 3. The Defendant's Objections to the Referee's Recommendation are dismissed without prejudice and may be refiled after the Defendant has purged her contempt;
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> 4. The Defendant's parenting time is suspended until further Order of this Court;
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> 5. The October 2nd, 2013, evidentiary hearing is adjourned until further Order;
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> 6. The Plaintiff's request for attorney fees and costs are preserved.

Defendant now appeals that order.

II

In a rather cursory and confusing argument, defendant contends that the trial court "erred when it denied defendant-mother's objections to the referee's report and recommendation, dated May 29, 2013." In support of this contention, defendant states that "the Referee's Recommendations as adopted by the Trial Court, failed to properly reflect the testimony of those

experts whose opinions relied upon in finding the basis to change legal and physical custody and parenting time." She then cites legal authority for the proposition that a party has the right to an evidentiary hearing before a modification of custody if the factual issues are contested. She then states, without any analysis or explanation, that the trial court relied solely upon the referee's report and recommendation, and asserts that the trial court should have "discounted and removed the recommendation from its decision, as the May 29, 2013 report and recommendation was flawed, inaccurate, and reached a conclusion contrary to the opinions of experts for which the referee relied upon."

MCL 552.507(4)-(6) governs judicial review of a referee's recommendation and provides:

> (4) The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.
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> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:
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> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
>
> (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.
>
> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
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> (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.
>
> (b) A new decision based only on evidence presented at the time of the de novo hearing.
>
> (c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

MCR 3.215(F) also governs a judicial hearing to review a referee's findings and provides, in pertinent part:

> (2) To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:

> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
>
> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
>
> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

The de novo hearing on plaintiff's motion to change custody was requested by defendant herself when she objected to the referee's recommendation and requested a "redetermination." Defendant did not request to present live evidence or to present any new evidence.

Defendant failed to appear at an August 15, 2013, motion hearing on her objections to the referee's recommendation. The trial court adjourned the hearing to October 2, 2013, but entered the referee's recommended order, with slight modifications, as an interim order. Defendant then failed to appear for an August 19, 2013, show cause hearing regarding her failure to comply with the court's August 15 order, and again failed to appear for the August 22, 2013, show cause hearing. The trial court dismissed defendant's objections *without prejudice* due to defendant's failure to appear at three hearings.[6] Defendant's assertion that the trial court "denied her objections," presumably without a de novo hearing, is a mischaracterization of the proceedings below. The court attempted to conduct a de novo hearing but defendant refused to appear and her counsel indicated that he could not defend the objections without her participation. Under these circumstances, where the court needed to make a decision regarding the custody of the children, where defendant failed to appear at a hearing on her objections and her counsel did not want to proceed without her attendance, and where defendant failed to appear for two show cause hearings and was in contempt of court, the trial court did not abuse its discretion by dismissing defendant's objections *without prejudice*, adopting the interim order as a final order,[7] and allowing defendant to again raise her objections once she purged herself of contempt.

Defendant also announces, without argument or citation to the record, that plaintiff failed to present clear and convincing evidence that modification of custody was in the best interests of the children. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his

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[6] During that same time period, defendant refused to abide by the court's orders and was held in contempt of court with a bench warrant issued for her.

[7] Indeed, if the recommendation is approved by the court and no written objection is filed with the court within 21 days after service, the recommended order will become a final order. MCR 3.215(E)(1)(c).

claims, or unravel and elaborate for him his arguments . . ." *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009).

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey