STATE OF MICHIGAN

COURT OF APPEALS

SANDRA J. PIEPER, also known as SANDRA JORDAN Plaintiff-Appellant, v MARK OTTO PIEPER, Defendant-Appellee.	UNPUBLISHED June 19, 2018 No. 338206 Lapeer Circuit Court LC No. 14-047936

Before: SWARTZLE, P.J., and SHAPIRO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order adopting a Friend of the Court (FOC) recommendation and continuing a temporary child support order entered after an FOC hearing. We affirm in part, vacate in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties were married in 2001, and have two minor children. Plaintiff filed for divorce in 2014. A Consent Judgment of Divorce was entered in 2015. The divorce judgment granted the parties joint legal custody and granted plaintiff sole physical custody of the children. The joint legal custody provision required that the parties "shall share in the decision-making authority as to the important decisions affecting the health, education, and welfare of the children." The divorce judgment also provided that

> the parents may not change their legal residences [sic] with the children to a location more than 100 miles from the parents' residences as determined at the time the Complaint was filed (August 25, 2014), unless the other parent consents to the change, or the Court orders the change, or if the change results in the parents' homes being closer to each other than before the change.

The Uniform Child Support Order that accompanied the divorce judgment listed defendant's source of income as "David Michael Plumbing, Inc." and plaintiff's source of income as "Social

Security Disability (Unemployed)."[1] The annual gross incomes for the parties were calculated at $8,722 for plaintiff and $38,896 for defendant. The child support order required defendant to pay plaintiff $940 per month in child support for the children.

In September 2016, plaintiff, acting in pro per, filed with the trial court a Motion Regarding Support, arguing that defendant had failed to disclose his true income and requesting that defendant's support obligation be reevaluated based on his actual income of $52,000 per year. The issue was referred to the FOC and scheduled to be heard on November 18, 2016. At the hearing, plaintiff appeared with retained counsel, but defendant appeared without his attorney and requested an adjournment, to which plaintiff agreed; the FOC referee later filed a recommendation and proposed temporary order adjourning the case, which the trial court entered. The hearing was set for February 2017.

In November 2016, plaintiff moved with the minor children to a new residence in Ogemaw County and unilaterally enrolled the children in the Ogemaw school district. In response, defendant filed an ex parte motion asserting that plaintiff had violated the divorce judgment by moving more than 100 miles away and by unilaterally removing the children from their Lapeer County school (and indicating that he was unaware of whether the children were attending school in their new location). The motion sought immediate custody of the children and their immediate return to their previous school. The trial court entered an ex parte order on November 15, 2016, ordering that the children be returned to their previous school in Lapeer County and granting temporary physical custody to defendant; the order also stated that the issue of child support would be referred to the FOC.

As stated, the scheduled November 18, 2016 hearing on plaintiff's motion was adjourned after defendant represented that his attorney was unavailable. On November 21, 2016, defendant filed an emergency motion seeking to have plaintiff held in contempt for failing to abide by the trial court's ex parte order and for plaintiff to turn the children over to defendant and to return them to their previous school in Lapeer County. The trial court issued an order requiring that plaintiff show cause why she should not be held in contempt for violating the court's earlier ex parte order, and scheduling a show cause hearing for November 23, 2016. This order was never personally served upon plaintiff.[2] On November 23, 2016, the parties had an in-chambers conference with the trial court; according to defendant's counsel at a later motion hearing, the parties reached a "temporary agreement" not to move the children from Ogemaw County pending ultimate resolution of the issue of plaintiff's move. The trial court entered an order

[1] As discussed later in the opinion, plaintiff actually was receiving Supplemental Security Income (SSI), not Social Security Disability Insurance (SSD). The Uniform Spousal Support Order that also accompanied the divorce judgment listed plaintiff's source of income as "Disabled (Receiving SSI)."

[2]Plaintiff returned the children to defendant on November 21, 2016, and they remained with defendant through the Thanksgiving holiday; defendant voluntarily returned them to plaintiff on November 27th.

referring the issues of support modification, custody, parenting time, and attorney fees for plaintiff's alleged violation of the "100-mile provision" to the FOC for a hearing.

On December 29, 2016, after the parties had conducted discovery, plaintiff filed a motion to amend the divorce judgment to provide that the children could stay in the Ogemaw school district or, alternatively, to have the trial court determine, after a hearing, which school it was in the best interest of the children to attend. On December 31, 2016, plaintiff filed a motion requesting that the trial court deem defendant to have made admissions based on allegedly non-responsive answers to her requests for admissions, and seeking attorney fees and costs as a sanction for filing frivolous motions related to plaintiff's alleged violation of the "100-mile provision" of the divorce judgment.

In January 2017, the parties stipulated to adjourn the FOC hearing on the issues of support modification, custody, parenting time, and attorney fees for plaintiff's alleged violation of the divorce judgment to February 24, 2017. On February 13, 2017, a hearing was held on plaintiff's discovery motion and motion for sanctions. The trial court required defendant to answer the question of whether plaintiff had moved the children's residence more than 100 radial miles.[3] On February 16, 2017, after having calculated the change of radial miles to have been 97 miles, defendant's counsel agreed, via letter to plaintiff's counsel, to withdraw "only the issue of the 100 Mile Rule Violation with regard to the evidentiary hearing scheduled for February 24, 2017."

The FOC hearing was held on February 24, 2017. During the hearing, the parties placed on the record a settlement agreement regarding the choice of school, custody, and parenting time issues, which resulted in the children remaining in the custody of plaintiff and enrolled in the Ogemaw school district, with increased parenting time for defendant. The referee then took testimony regarding the issue of child support. Plaintiff testified that she received SSI because she was disabled from a 2008 car accident and could not work. Plaintiff testified that she possessed evidence from a physician of her disability and inability to work, but that she did not have the documents with her that day. Defendant agreed that plaintiff was disabled and received SSI. Defendant testified regarding his income from his job as a plumber, and that his gross income was $56,615.76 in 2016; defendant did not provide any documentary evidence of this income.

The referee then moved on to the issue of attorney fees for plaintiff's alleged violation of the divorce judgment. Defendant's counsel testified that her rate was $250 per hour and that she had expended 12 hours on the ex parte motion for return of the children.

Following the hearing, the referee issued a recommendation to the trial court and an accompanying proposed child support order. The recommendation stated that plaintiff was

> unemployed, but capable of earning gross income in the amount of $1,548.60, based on her physical appearance at the hearing which demonstrates she is

[3] I.e., "as the crow flies."

> capable of working 40 hours per week at a sedentary job earning the State Minimum Wage of $8.90 per hour. In addition, the Plaintiff failed to introduce any evidence from a physician or other expert to show she is physically incapable of obtaining employment.

The recommendation further stated that plaintiff had violated the divorce judgment by unilaterally changing the children's school district despite sharing legal custody with defendant. The recommendation noted that defendant had incurred approximately $3,000 in attorney fees related to obtaining the ex parte order for return of the children, and recommended that the trial court award defendant $2,600 in attorney fees (after deducting attorney fees that defendant's counsel had billed for travelling to and from the courthouse to file the motion). The referee declined to recommend an award of attorney fees to defendant related to obtaining the order to show cause because plaintiff was never personally served with the order, the issue of the return of the children to their school district was ultimately resolved by agreement of the parties, and plaintiff had never been found in contempt. The accompanying temporary child support order awarded plaintiff $1,016 per month in child support for the children, based on an imputed net monthly income to plaintiff of $1,351.81 and defendant's calculated net monthly income of $3,559.23.

Plaintiff objected to the FOC recommendation. On April 6, 2017, the trial court issued a de novo review opinion and order upholding the FOC recommendation. The trial court found that "the Referee's award of attorney fees is supported by the record and law." The trial court also found that the referee's imputation of income to plaintiff based on "plaintiff's physical appearance and abilities in court" was appropriate, and that plaintiff "did not come prepared or prove her case."

This appeal followed.

II. MODIFICATION OF CHILD SUPPORT

Plaintiff argues that the trial court erred by adopting the FOC recommendation for modification of child support because (1) the referee improperly considered the issue of support, (2) there was no change of circumstances warranting a modification of support, (3) the referee failed to set forth findings as required by the Michigan Child Support Formula (MCSF) and improperly imputed income to plaintiff, and (4) defendant never challenged plaintiff's disabled status or income. We disagree that the referee improperly considered the issue of support; however, we agree that the referee failed to find that a change of circumstances had occurred that warranted a modification of support and failed to set forth findings as required by the MCSF; further, we agree that the referee and trial court improperly placed a post hoc burden on plaintiff to prove her disability when it was not made an issue by either party.

Plaintiff argues that the only issues before the referee related to plaintiff's motion to change the children's school district and defendant's motion regarding plaintiff's violation of the divorce judgment, and that the referee therefore erred by even addressing the child support issue. The record shows, however, that virtually all of the orders leading up to the February 24 hearing indicated that the issue of child support modification (which was initially raised by plaintiff's motion) was to be resolved at that hearing; further, at the hearing, counsel for both parties and

the referee clearly expected that the issue of child support would be resolved. In fact, it was plaintiff's counsel who initially began questioning defendant regarding his income and, when asked the relevance of her questions by the referee, stated that defendant's income was "relevant to the support that he's paying." Plaintiff's counsel did not object when the referee, after the settlement agreement was placed on the record, moved to the taking of testimony regarding child support. We find no basis on which to conclude that the referee improperly considered the issue of child support.

We review for an abuse of discretion a trial court's child support orders and orders modifying support. *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007). Whether a trial court properly applied the child support guidelines is a question of law that we review de novo. *Id*. We review a trial court's findings of fact for clear error. *Good v Armstrong*, 218 Mich App 1, 4; 554 NW2d 14 (1996).

A trial court has the authority to modify the child support provisions of a judgment of divorce if a change of circumstances has occurred that warrants such a modification. See MCL 552.17; *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). A trial court may consider not only a parent's actual income but a parent's "unexercised ability to earn" in determining an appropriate child support award. *Good*, 218 Mich App at 5. However, in ordering or modifying child support, the trial court must either "order support in accordance with the child support formula" or set forth in writing or on the record how the order deviates from the MCSF and the reasons why it finds that application of the MCSF would be unjust or inappropriate. *Kosch*, 233 Mich App 346; see also MCL 552.605(2). The "criteria for deviating from the formula are mandatory." See *Burba v Burba*, 461 Mich 637, 644; 610 NW2d 873 (2000). The trial court, when it deviates from the MCSF, must first state the level of support it would have ordered had it followed the formula. *Id*. at 645. The trial court must then explain how the amount of support it is entering deviates from the formula amount. *Id*. Finally, it must explain how the application of the MCSF would be unjust or inappropriate. *Id*.

If the trial court wishes to impute income to a parent based on what it believes is an unexercised ability to pay, it must make specific findings of fact on a number of factors. *Ghidotti v Barber*, 459 Mich 189, 198-199; 586 NW2d 883 (1998). These factors are found in the MCSF Manual. *Id*. at 189. In *Ghidotti*, our Supreme Court specifically overturned this Court's affirmance of the trial court's decision to impute income to the defendant, who received means-tested benefits, "based on the finding of the Calhoun Friend of the Court's investigation that she 'suffered from no condition or restriction that would preclude her from obtaining gainful employment.' " *Id*. at 197-198 (quotation marks and citation omitted). The *Ghidotti* Court held that the trial court's imputation of income to a parent who receives means-tested income was a deviation from the MCSF and that the trial court had failed to follow the statutory procedures for making such a deviation. *Id*. at 204.

A similar result is mandated here. Neither the FOC recommendation nor the trial court's de novo opinion addressed whether a change of circumstances existed that warranted a modification of support. *Kosch*, 233 Mich App at 350. Further, while imputation of income to a

person receiving means-tested benefits is a deviation from the MCSF,[4] neither the recommendation nor the de novo opinion made any of the specific findings necessary for a deviation from the MCSF; rather, the referee apparently based his decision on his observations of plaintiff in a courtroom for several hours; during which time plaintiff testified that she received SSI benefits, had been deemed unable to work by a physician, and was then "in a lot of pain." In adopting the FOC recommendation, the trial court failed to follow the necessary procedures it was required to follow when imputing income to plaintiff, and failed to explain the resulting deviation from the MCSF in any way. *Ghidotti*, 459 Mich at 199.

We also do not agree with the trial court that plaintiff essentially waived or forfeited her right to challenge the imputed income by not bringing documentary evidence of her disability to the FOC hearing. In the first instance, her disability had never before been placed at issue—the initial support orders were (perhaps wrongly, in light of Section 2.04(A) of the 2013 MCSF Manual) based on her income from SSI (although erroneously labelled as SSD in the original child support order). Defendant never challenged her income or moved to have the trial court impute income to her; in fact, defendant testified at the FOC hearing that plaintiff was disabled following a car accident and was rendered unable to work. The referee never stated his intent to consider imputing income to plaintiff by analyzing the relevant factors under the MCSF. Finally, the referee did not require documentation from defendant concerning his actual income, at one point explicitly telling him to answer questions about his income "just to the best of [his] memory." Plaintiff and her counsel had no reason to suspect that, post hoc, the referee and trial court would declare that plaintiff had failed to meet her burden of proving a disability that had never been an issue in the case. Waiver is intentional relinquishment of a known right, whereas forfeiture is a failure to make the timely assertion of a right. See *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). Neither is implicated here.

Second, and more simply, nothing in our caselaw concerning the trial court's duty to explain deviations from the MCSF supports the conclusion that a parent can waive or forfeit the right to have the trial court follow the statutory procedures for deviation. Ultimately, a support obligation is for the benefit of the children, and the guiding concern is "the welfare of children and their right to support by their parents." *Fisher*, 276 Mich App at 429. Thus, even assuming for the sake of argument that plaintiff failed to assert her right to have the requisite factors considered by the trial court when she failed to produce medical records upon the demand of the referee, such a failure would not relieve the trial court of its duty to justify deviations from the MCSF.

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[4] The MCSF Manual in use at the time the modification of child support occurred precludes the inclusion of means-tested income from SSI when determining income. See MCSF Manual, § 2.04(A) (2013). It also provides a specific list of factors to be considered when imputing income to a parent; none of which were referenced by the referee or trial court. See *id*. at § 2.01(G). These factors include any physical or mental disabilities of the parent. *Id*. The evaluation of factors such as these is essential to ensuring that "any imputation of income is based on an actual ability and likelihood of earning the imputed income," rather than "pure speculation." *Ghidotti*, 459 Mich at 199.

We reverse the trial court's adoption of the child support aspect of the FOC recommendation and the continuation of the temporary support order, and remand for further proceedings on the issue of child support.

III. ATTORNEY FEES

Plaintiff also argues that the trial court erred by accepting the FOC recommendation regarding attorney fees, because the divorce judgment did not specifically prohibit plaintiff from changing the children's school district, plaintiff was never found in contempt, and defendant's attorney fees were caused by defendant's refusal to concede that plaintiff had moved less than 100 miles away. We hold that the referee did not err by determining that plaintiff violated the divorce judgment or by awarding attorney fees despite the lack of a finding of contempt, but we remand for determination of the appropriate amount of attorney fees.

We review for an abuse of discretion a trial court's grant or denial of attorney fees. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). A trial court's factual findings underlying an award are reviewed for clear error. *Id*. We review de novo questions of law, such as the interpretation of the divorce judgment. *Id*.

MCR 3.206(C)(1) permits a party to a domestic relations proceeding to request attorney fees related to a specific proceeding. In order to obtain such fees, the party must show that "the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." MCR 3.206(C)(2).

Here, the referee determined that plaintiff violated the joint legal custody provision of the divorce judgment, which provides that "the parties shall share in the decision-making authority as to the important decisions affecting the health, education, and welfare of the children" when she unilaterally changed the children's school district. We agree. Plaintiff argues that, because the divorce judgment permits her to move less than 100 miles without seeking defendant's consent or court approval, the judgment is at least ambiguous concerning whether a change in school districts resulting from such a move violates the joint legal custody provision. We find this argument unavailing. An unambiguous contractual provision must be enforced according to its terms. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). We discern nothing ambiguous in the divorce judgment's provision that the parties will share in the decision-making authority regarding important decisions affecting the children's education. Plaintiff does not argue that the change of school districts was not an important educational decision. See *Pierron v Pierron*, 486 Mich 81, 90; 782 NW2d 480 (2010) (referring to a change in schools as an "important decision" affecting the welfare of the child). The mere fact that a change in school districts might be required by a move does not render the joint legal custody provision ambiguous. Nor do the two provisions irreconcilably conflict; while plaintiff is free to move without defendant's approval within 100 miles, she must share the decision-making authority when it comes to changing the children's schools. See *id*. at 84; 782 NW2d 480 (2010) (analyzing a proposed change in schools occasioned by the defendant's move approximately 60 miles away from the plaintiff when the parties shared joint legal custody).

Therefore, we agree with the referee and trial court that plaintiff "refused to comply with a previous court order, despite having the ability to comply." MCR 3.206(C)(1). And we agree

that defendant incurred attorney fees in filing a motion seeking to have the children returned to their previous school district. Although the issue was ultimately resolved in a way that kept the children in their new school district, it was plaintiff's unilateral removal of the children from the Lapeer County school that occasioned defendant's original ex parte motion, for which the referee awarded attorney fees. Although plaintiff argues that the issue was resolved by informal agreement and that she was never held in contempt, the FOC recommendation makes clear that the award was not premised on the later show cause proceedings or a finding of contempt, but rather on the necessity of filing the original ex parte motion and defense counsel's efforts to secure the entry of the order.

However, we conclude that remand is required concerning the amount of attorney fees. Generally speaking, the referee and the trial court did not analyze the relevant factors for determining the reasonableness of an attorney fee award as set forth in *Smith v Khouri*, 481 Mich 519, 529-530; 751 NW2d 472 (2008), despite plaintiff's challenge to the reasonableness of both the rate charged and the number of hours billed. More specifically, the record reveals that a portion of defendant's ex parte motion concerned defendant's allegation that plaintiff had violated the "100-mile provision" of the divorce judgment. Presumably, a portion of the in-chambers conference held on November 23, 2016 also concerned that allegation, considering that the order referring issues to the FOC issued by the trial court that day contained reference to attorney fees for the asserted violation of that provision. Because defendant eventually withdrew that portion of his motion as lacking factual support, we conclude that the referee erred to the extent that he concluded that defendant had incurred compensable attorney fees relating to plaintiff's alleged refusal to comply with the divorce judgment's 100-mile provision. MCR 3.206(C)(2). We therefore vacate the award of attorney fees and remand for the trial court to consider the relevant *Smith* factors and to determine the appropriate award for the portion of defendant's ex parte motion and attendant proceedings that related to plaintiff's unilateral change of schools, without making an award for time spent on the portion related to the alleged violation of the 100-mile provision.

Affirmed with regard to the trial court's adoption of the referee's finding that plaintiff violated the divorce judgment, vacated with regard to the amount of attorney fees awarded, reversed with regard to the trial court's adoption of the FOC-recommended child support order and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Douglas B. Shapiro
/s/ Mark T. Boonstra