

STATE OF MICHIGAN
COURT OF APPEALS

CAROL SLOCUM and DAVID EARL SLOCUM
II,

UNPUBLISHED
June 19, 2018

Plaintiffs-Appellees,

v

Nos. 338782; 340242
Eaton Circuit Court
LC No. 16-000992-DC

AMBER FLOYD,

Defendant-Appellant.

Before CAMERON, P.J., and METER and BORRELLO, JJ.

PER CURIAM.

In Docket No. 338782, defendant appeals as of right the circuit court's May 30, 2017, order granting plaintiffs grandparenting time in this dispute involving the minor children of defendant and plaintiffs' deceased son. In Docket No. 340302, defendant appeals as of right the circuit court's September 13, 2017, order denying defendant's motion for relief from an underlying probate court order appointing plaintiffs as the children's temporary guardians, which served as the basis for plaintiffs' standing to bring the circuit court action.¹ We reverse the trial court's award of grandparenting time to plaintiffs and remand for further proceedings.

In a prior related appeal, defendant challenged a circuit court order denying as moot her request for the circuit court to exercise superintending control to compel the probate court to dismiss a petition by plaintiffs for temporary guardianship over the children. *In re Floyd*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 2017 (Docket No. 335840). This Court's prior opinion provides the following relevant factual background:

Plaintiff [defendant in the instant case] and her ex-husband had two minor children. After the divorce, the father had primary physical custody, and the parents shared legal custody. Further, the father remarried.

¹ Defendant had argued that the probate court order was improper and that, therefore, plaintiffs had no standing to pursue custody or grandparenting time by way of the circuit court action.

The father later died following a motorcycle accident. On the day of his death, plaintiff allowed the children to spend the night at their father's home with their [stepmother]. A few days later, plaintiff allowed the children to attend their father's funeral. Plaintiff also attended the funeral. Afterward, she attempted to take the children with her, but the children's [stepmother] and paternal grandparents denied plaintiff access to the children.

The grandparents [plaintiffs in the instant case] then filed emergency petitions in the probate court seeking a temporary guardianship over the children. The probate court held a hearing on the petitions, and plaintiff attended without counsel. The probate court granted the petitions, appointing the grandparents as temporary guardians[,] and scheduled a full guardianship hearing on the date that the temporary guardianships were set to expire.

Plaintiff then obtained counsel and filed a motion to dismiss the petition, arguing that the grandparents lacked standing because she never gave permission for the children to reside with them. See MCL 700.5204(2)(b). The probate court canceled the full guardianship hearing so that the grandparents could respond to plaintiff's motion.

On the day that the temporary guardianships were set to expire, the grandparents filed a third-party custody action in the circuit court,^[2] relying on their status as guardians to give them standing to do so. See MCL 722.26b(1). Filing the third-party custody action stayed the probate court action pursuant to MCL 722.26b(4).

Plaintiff then requested an order of superintending control from the circuit court to compel the probate judge to decide in favor of her motion to dismiss. She alleged that the probate court failed to proceed according to law when it granted the grandparents temporary guardianships without deciding plaintiff's motion to dismiss. The circuit court denied plaintiff's request, finding the matter moot because the temporary guardianships had expired and the probate court proceedings had given way to the third-party custody case. [*In re Floyd*, unpub op at 1-2.]

This Court affirmed, on alternative grounds, the circuit court's denial of defendant's motion for superintending control, *id.*, unpub op at 3-4, and the circuit court issued an ex parte interim order in the instant custody case on October 30, 2016, awarding defendant sole legal and physical custody of the minor children and awarding grandparenting time to plaintiffs. The order provided, in relevant part:

² The third-party custody action is at issue in this appeal.

ENTRY OF ORDER

This amended Ex Parte Order will remain in effect and must be obeyed unless changed by a later Court Order. Either party may move to modify or rescind this Order by filing an objection within twenty-one (21) days after the date on the Certificate of Mailing in the Circuit Court Clerk's Office. If neither party files an objection, this Order automatically becomes a Temporary Order and remains in effect until modified by a later Court Order.

None of the parties challenged the award of custody to defendant, but both plaintiffs and defendant challenged the portion of the order concerning the award of grandparenting time. Following additional proceedings, the circuit court entered an order on May 30, 2017, deciding the outstanding grandparenting-time issues. The order also stated that "all other orders not inconsistent with this Order shall remain in full force and effect." Defendant appeals that order as of right in Docket No. 338782.

On September 1, 2017, defendant moved for relief from judgment under MCR 2.612(C)(1)(d) or (f) in the circuit court, seeking relief from the probate court's August 12, 2016, order for temporary guardianship. The circuit court denied that motion on September 13, 2017, and defendant appeals that order as of right in Docket No. 340242.

I. JURISDICTION

Preliminarily, plaintiffs argue that the circuit court's May 30, 2017, and September 13, 2017, orders are not final orders, and therefore, this Court is without jurisdiction to consider defendant's claims of appeal.³ We disagree.

MCR 7.203(A)(1) provides that this Court "has jurisdiction of an appeal of right" from a final judgment or order as defined in MCR 7.202(6), which provides that a "final order" includes, in pertinent part:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . .

* * *

(iii) in a domestic relations action, a postjudgment order affecting the custody of a minor[.]

³ This Court previously denied plaintiffs' motion to dismiss for lack of jurisdiction, but "without prejudice to the ability of the case call panel to fully consider the jurisdictional issues raised in appellees' briefs on appeal as to these appeals as of right." *Slocum v Floyd*, unpublished order of the Court of Appeals, entered February 28, 2018 (Docket Nos. 338782 & 340242).

Although we acknowledge that the May 30, 2017, order is not a model of clarity, we are persuaded that it indicated with finality that plaintiffs do not have a right to custody of the children, but were entitled to grandparenting time as set forth in the order, making it a final order under MCR 7.202(6)(a)(i). This conclusion is supported by the facts that this order: (1) included a provision for prior orders not inconsistent with it to remain in effect and thus incorporated the order awarding defendant custody;⁴ (2) imposed conditions on defendant's custody of the children such as court-ordered counseling; (3) did not set another review hearing for nearly a year; and (4) significantly, gave the parties the ability to cancel that hearing if no issues arose. Accordingly, we find that that order qualifies as a final order under MCR 7.202(6)(a)(i). It follows that the September 13, 2017, order qualifies as a post-judgment order affecting the custody of a minor,⁵ making it a final order appealable as of right under MCR 7.202(6)(a)(iii). It is undisputed that defendant timely filed a claim of appeal from the May 30 and September 13 orders. Accordingly, this Court has jurisdiction over both of defendant's appeals.

II. GRANDPARENTING TIME

Defendant argues that the circuit court erred when, after awarding her sole physical and legal custody of the children, it awarded plaintiffs grandparenting time without following the procedures set out in MCL 722.27b to determine whether plaintiffs are entitled to grandparenting time. We agree.

This case is substantially similar to *Falconer v Stamps*, 313 Mich App 598; 886 NW2d 23 (2015), which involved a three-way custody battle among the plaintiff-mother, the defendant-father, and the child's paternal grandmother, who was an intervener in the proceedings. See *id.* at 601. Similar to the instant case, the grandmother filed a petition in probate court for appointment of a full guardianship of the child under MCL 700.5204(2), stating that the child and both parents had lived with the grandmother until both parents moved to Arizona, leaving the child in the grandmother's custody. *Falconer*, 313 Mich App at 601-602. The grandmother was granted a full guardianship. *Id.* at 602. After the parents returned to Michigan, the plaintiff moved to terminate the guardianship. *Id.* Competing complaints for temporary custody were later filed by both the plaintiff and the defendant. *Id.* at 607. Following a custody hearing, the trial court, recognizing that there is a presumption that placement with the natural parent is in the child's best interests absent clear and convincing evidence otherwise, evaluated the best-interests factors in MCL 722.23 and awarded the plaintiff sole physical and legal custody of the child. *Falconer*, 313 Mich App at 633-637, 639. The grandmother was awarded standard parenting time for a noncustodial parent after the court addressed the factors in MCL 722.27b(6)(a) through (j). *Falconer*, 313 Mich App at 637-639. The plaintiff appealed the decision to award the grandmother grandparenting time. *Id.* at 601. After this Court noted that the case involved a

⁴ The conduct of the parties and the trial court at the September 12, 2017, hearing on defendant's motion to vacate the earlier temporary guardianship order indicated that they all understood that the custody matter had been resolved in defendant's favor.

⁵ The September 13, 2017, order affected the custody of the children based on its continuation of the effect of the May 30, 2017, order.

custody dispute between the grandmother and the plaintiff-parent, it vacated “that portion of the circuit court’s order that granted Intervener grandparenting time given that the issue of grandparent visitation was not properly before the circuit court.” *Id.* at 601, 668. This Court stated:

Here, the circuit court conflated what should have been two separate and distinct actions—the custody determination and the grandparenting-time determination. It first concluded that plaintiff was entitled to custody of the child based on Intervener’s failure to show by clear and convincing evidence that the child’s best interests were not served by placing the child with plaintiff. However, the circuit court *sua sponte* continued that “there are other issues the Court has to decide. Those other issues concern grandparent visitation.” It then plowed ahead and addressed the factors in MCL 722.27b(6) . . .” [*Falconer*, 313 Mich App at 645].

In a lengthy analysis, this Court discussed the history of the grandparenting-time statute, MCL 722.27b, and the interplay and differences between a custody decision and a grandparenting-time decision, particularly with respect to the presumption of fitness of the parent. *Falconer*, 313 Mich App at 640-648. This Court noted:

An action for grandparenting time, unlike custody, is simply a different cause of action altogether. Here, in granting plaintiff full physical and legal custody, the circuit court methodically considered the child’s best interests under MCL 722.23 and concluded that Intervener failed to meet her burden of showing by clear and convincing evidence that the child’s best interests would have been served by placing the child in Intervener’s care. Necessarily included in that decision was the circuit court’s tacit finding that plaintiff was a fit parent. Whereas a custody case involves an inquiry as to parental fitness, a proceeding under the grandparent visitation statute *presumes* parental fitness. Absent a challenge to the circuit court’s custody decision, it is presumed that plaintiff is a fit parent and there is a presumption that fit parents act in the best interests of their children. [*Falconer*, 313 Mich App at 642 (quotation marks and citation omitted).]

This Court concluded that the trial court should not have decided the grandparenting-time issue at the same time as the custody issue, noting that the “plaintiff received custody of the child just moments before the circuit court’s decision on grandparenting time and, therefore, plaintiff had not denied Intervener grandparenting time.” *Id.* at 646. Reasoning that “a request for grandparenting time is not automatically included in a third-party request for custody,” this Court vacated the portion of the trial court’s order awarding grandparenting time and found that the trial court could not consider such a request until the intervener-grandmother brought a separate motion under MCL 722.27b(3). *Falconer*, 313 Mich App at 648, 668.

We thus conclude that the circuit court in this case erred when it awarded plaintiffs grandparenting time after determining that defendant should receive full custody, without plaintiffs having first moved for grandparenting time under MCL 722.27b and meeting the requirements of that statute. Like the circuit court in *Falconer*, the circuit court in the instant

case conflated what should have been two separate and distinct actions. Therefore, we reverse the trial court's award of grandparenting time to plaintiffs and remand for further proceedings.

We note that defendant raises several other related issues, including that plaintiffs failed to present evidence that the denial of grandparenting time presented a substantial risk of harm to the children's mental, physical, or emotional health under MCL 722.27b(4)(b), or that grandparenting time should be awarded pursuant to the factors in MCL 722.27b(6). However, the trial court did not decide these issues. Ordinarily, we do not address issues that were not decided by the trial court. *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004). Although this Court has discretion to review an issue not decided by the trial court if the issue is one of law and all the necessary facts have been presented, *Koster v June's Trucking, Inc.*, 244 Mich App 162, 168; 625 NW2d 82 (2000), the issues raised by defendant are fact-driven and require findings of fact by the circuit court. Unlike in *Falconer*, 313 Mich App at 637-639, wherein the trial court addressed the factors in MCL 722.27b(6)(a) through (j), the circuit court did not do so in this case. It would be inappropriate for us to address these factors initially on appeal. Therefore, remand for further proceedings is required. Should plaintiffs move for grandparenting time on remand, the trial court must "balance the parent's fundamental constitutional right to manage . . . her child[ren] against the goal of eliminating the risk of harm to the child[ren]" when determining the amount of any grandparenting time to award to plaintiffs and in imposing other conditions relevant to the children's well-being. *Falconer*, 313 Mich App at 657 (quotation marks omitted).

III. MOTION FOR RELIEF FROM JUDGMENT

Defendant argues that the circuit court erred when it denied her motion for relief from the probate court's August 12, 2016, order for temporary guardianship. Defendant sought relief from the probate court's order under MCR 2.612(C)(1)(d) (order is void) or (f) (any other reason justifying relief from an order). We agree with defendant's basic argument that the probate court's temporary order was erroneously entered because at the time the guardianship issue arose, plaintiffs' son could not give the children permission to reside with plaintiffs due to his death and, regardless of the children's actual presence with plaintiffs, there was no evidence that defendant had given permission for the children to reside with plaintiffs. Thus, plaintiffs could not meet the requirements set out in MCL 700.5204(2)(b). *Deschaine v St Germain*, 256 Mich App 665, 668-670; 671 NW2d 79 (2003). However, plaintiffs raise an arguably meritorious claim that defendant's motion was not filed within a reasonable time under MCR 2.612(C)(2) because she waited more than a year after the temporary order was entered to bring her motion, after continuing to participate in the custody proceedings and not availing herself of other remedies as set forth in this Court's earlier opinion in *In re Floyd*, unpub op at 4. However, given our decision concerning the trial court's error regarding its award of grandparenting time, we find it unnecessary to resolve this issue. Because the circuit court awarded plaintiff physical and legal custody of the children and that decision has not been challenged, and because we are reversing the circuit court's order awarding grandparenting time to plaintiffs and remanding for further proceedings on that issue, any error in denying defendant's motion for postjudgment relief is essentially harmless. MCR 2.613(A).

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

/s/ Thomas C. Cameron

/s/ Patrick M. Meter

/s/ Stephen L. Borrello