STATE OF MICHIGAN

COURT OF APPEALS

TABETHA REA GABLE,

Plaintiff-Appellant,

v

JERMIE ROBERT MERRILL,

Defendant-Appellee.

UNPUBLISHED
September 19, 2019

No. 347814
Osceola Circuit Court
LC No. 12-013239-DC

Before: GADOLA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Tabetha Rea Gable, appeals as of right the trial court's order granting defendant, Jermie Robert Merrill, physical custody of the parties' minor children. We remand to the trial court for further proceedings.

I. FACTS

This case arises from defendant's motion to change custody of the parties' two minor children. Until November 2018, the parties lived in Osceola County; plaintiff and the children lived in one community where the children attended school, while defendant lived in a nearby community. A custody order entered November 19, 2015 awarded plaintiff primary physical custody of the minor children, and awarded defendant parenting time every other weekend and every Wednesday after school during the school year, and alternating weeks during the summer. The parties shared legal custody.

In November 2018, plaintiff and the children moved to a community near Grand Rapids, Michigan, about 80 miles from their previous residence, with the objective of enrolling the children in a purportedly better school district. When defendant learned of the move, he filed a motion in the trial court seeking to change the children's primary physical custody from plaintiff to himself. Defendant alleged that plaintiff was using illegal drugs and was in an abusive relationship, and that plaintiff and the children were staying in various unsafe places as a result of plaintiff's chaotic personal life.

A hearing on the motion was held before the trial court's referee on December 6, 2018, and was scheduled to begin at 10:00 a.m. When the referee began the hearing at 10:12 a.m., plaintiff was not present. The referee took testimony from defendant, and at the conclusion of defendant's testimony the referee began to state his findings on the record. At 10:40 a.m., one minute after defendant was excused as a witness and the referee had begun to state his findings, plaintiff arrived at the hearing. In response to her request to testify, the referee advised plaintiff that she had missed the opportunity to testify, but would have an opportunity to object to the referee's recommendations.

The referee found that the children did not have an established custodial environment with either party, and that defendant's burden of proof regarding the best interests of the children therefore was a preponderance of the evidence. The referee then reviewed the statutory best-interest factors and concluded that four of the factors weighed in defendant's favor, while the parties were equal on the other factors. The referee recommended that defendant be awarded primary physical custody of the children, that plaintiff be awarded parenting time, and that the parties share legal custody. The trial court thereafter entered an order changing the custody of the children based upon the recommendation of the referee.

Plaintiff objected to the referee's recommendation and sought de novo review in the trial court, contending that the referee had deprived her of the opportunity to present evidence. Plaintiff also challenged the referee's finding of proper cause or change of circumstances, the finding that no established custodial environment existed, and the referee's findings on the best-interest factors.

At the de novo hearing, the trial court determined that the referee properly precluded plaintiff from testifying because plaintiff was tardy to the referee hearing. The trial court also concluded that plaintiff did not have the right to present evidence at the de novo hearing. The trial court then found that defendant had established proper cause or a change of circumstances as a result of plaintiff moving the children geographically. The trial court found, however, that the referee had incorrectly determined that there was no established custodial environment, and found instead that the children had an established custodial environment with both parents, and that the applicable burden of proof for defendant to prove the best interests of the children was clear and convincing evidence. The trial court then reviewed the statutory best-interest factors, and found that clear and convincing evidence demonstrated that the proposed custody change was in the children's best interests. The trial court thereafter entered an order denying plaintiff's objections to the recommendation of the referee. Plaintiff now appeals to this Court.

II. DISCUSSION

A. STANDARD OF REVIEW

In a child custody dispute, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). In addition, "[a] trial court's findings regarding the existence of an established custodial

environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citation omitted). In a child custody determination, an abuse of discretion occurs when "the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014). We review questions of law for clear legal error, which occurs when the trial court incorrectly chooses, interprets, or applies the law. *McIntosh*, 282 Mich App at 474.

B. DE NOVO HEARING

Plaintiff first contends that the trial court erred in refusing to allow her to present evidence at the de novo hearing, contrary to MCL 552.507(5) and (6). We agree.

Section 7 of the Friend of the Court Act, MCL 552.507, provides that the trial court may designate a referee to hear motions in a domestic relations matter, and to submit a recommended order to the trial court. MCL 552.507(1), (2). MCL 552.507 further provides for a de novo hearing on any matter that was the subject of a referee hearing, and states, in relevant part:

> (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.
>
> (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:
>
> (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:
>
> (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 that 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.

Thus, a party is entitled to a de novo hearing before the trial court of any matter that was subject to the decision of the referee. But although MCL 552.507(5) provides that the hearing before the trial court is considered de novo even though the trial court imposes "reasonable restrictions and conditions to conserve the resources of the parties and the court," this is only true if "[t]he parties have been given a full opportunity to present and preserve important evidence at the referee hearing." MCL 552.507(5).

In addition, when a party objects to a referee's findings and recommendation, the trial court reviews the referee's recommended order under MCR 3.215(F)(2), which provides:

> (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.

Thus, MCR 3.215(F)(2) clearly requires a trial court to permit the parties to present live testimony at the de novo hearing. Although that court rule permits the trial court discretion to limit the testimony in certain respects, that discretion is limited by MCL 552.507(5), which requires that the parties have been given a full opportunity to present and preserve important evidence at the referee hearing and, with respect to findings to which the parties have objected, that the parties have a new opportunity to offer the same evidence to the trial court, as well as offering supplemental evidence. Thus, a trial court must afford the parties the opportunity to present evidence at a judicial hearing and not simply base its ruling on a review of the record of the referee hearing.

In sum, a party is entitled to object to a referee's findings and recommendations, and upon doing so is entitled to a de novo hearing by the trial court. In conducting a de novo hearing, a trial court may consider a referee's report and recommendation but must also allow the parties to present live evidence. *Dumm v Brodbeck*, 276 Mich App 460, 465; 740 NW2d 751 (2007). The de novo hearing's purpose "is for the trial court to render its own decision based on the evidence, independent of any prior . . . ruling." *Sturgis v Sturgis*, 302 Mich App 706, 708; 840 NW2d 408 (2013) (quotation marks and citation omitted). In addition, the trial court's ability to impose reasonable restrictions and conditions on the introduction of evidence is conditioned upon the parties having been given a "full opportunity to present and preserve important evidence at the referee hearing." MCL 552.507(5).

In this case, the referee precluded plaintiff from testifying or otherwise offering evidence because plaintiff was tardy; she had arrived just after the close of proofs while the referee was stating his findings. As a result, defendant was the only party who offered evidence. At the de novo hearing, the trial court refused to accept evidence from either party, despite plaintiff's counsel's entreaties that plaintiff be permitted to offer evidence. Therefore, the trial court based its decision entirely on the record from the referee hearing. Although MCL 552.507(6) allows a trial court to base its decision entirely on the record of the referee hearing, this subsection is expressly made subject to MCL 552.507(5), which requires that the parties be given a full opportunity to present and preserve evidence at the referee hearing and, if the parties objected to the referee's findings of fact, that they be given a new opportunity to offer the same evidence that was presented to the referee. These two conditions were not met because plaintiff did not have the full opportunity to present and preserve evidence at the referee hearing and because she was not afforded the opportunity to present evidence at the de novo hearing, notwithstanding her objections.

One of the purposes of the Friend of the Court Act is "to ensure that procedures adopted by the friend of the court will protect the best interests of children in domestic relations matters." MCL 552.501(2). The purposes of the Child Custody Act "are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Lieberman v Orr*, 319 Mich App 68, 78; 900 NW2d 130 (2017) (quotation marks and citation omitted). Here, it appears that the trial court's decision to not allow plaintiff to introduce evidence was at least partially for the purpose of punishing plaintiff's tardiness. The trial court stated:

> We don't allow a parent to get a new hearing because they didn't appear, so as unfortunate as that may be for Mom, I'm not going to entertain any additional testimony today from Mom or her attorney, because Mom didn't appear appropriately on time, and that's that, I guess.

The trial court undoubtedly possessed authority to sanction plaintiff for her tardiness, but to change the children's physical custody without allowing plaintiff to offer evidence at the de novo hearing does not conform to the purpose of either Act, which is to promote and protect the children's best interests. Here, the children's best interests necessitated the trial court hearing *both* sides in determining whether to change a custody arrangement in which the children had spent a large portion of their lives. We conclude that, in prohibiting plaintiff from offering any evidence at the de novo hearing, the trial court incorrectly applied the law, constituting clear legal error. See *McIntosh*, 282 Mich App at 474.

We remand to the trial court for a de novo hearing in which plaintiff will be permitted to offer evidence. We further direct the trial court to permit plaintiff to file a motion requesting to change the children's school district if she wishes to file such a motion. We retain jurisdiction.

/s/ Michael F. Gadola
/s/ Jane E. Markey
/s/ Amy Ronayne Krause

Court of Appeals, State of Michigan

ORDER

Tabetha Rea Gable v Jermie Robert Merrill

Docket No. 347814

LC No. 12-013239-DC

Michael F. Gadola
Presiding Judge

Jane E. Markey

Amy Ronayne Krause
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The trial court shall send a copy of all opinions and/or orders entered on remand to the Clerk's Office of this Court. Further, appellant shall order a transcript of any hearing on remand to be filed with this Court within 21 days after completion of the proceedings.

/s/ Michael F. Gadola

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

September 19, 2019
Date

Chief Clerk