STATE OF MICHIGAN

COURT OF APPEALS

ZACHARY A. JACOBS,

Plaintiff-Appellant,

v

KATIE TERESE RIZZO,

Defendant-Appellee.

UNPUBLISHED
January 28, 2020

No. 350428
Tuscola Circuit Court
Family Division
LC No. 19-030637-DC

Before: METER, P.J., and FORT HOOD and REDFORD, JJ.

PER CURIAM.

In this custody dispute, plaintiff appeals as of right the trial court's order granting plaintiff primary physical custody. We affirm.

I. BACKGROUND

MGJ was born on September 21, 2012. The parties to this case have never been married, but have lived together at various times in MGJ's life. The instant dispute arose after defendant moved into a new home, which was not in MGJ's school district. After defendant moved to her new home, she enrolled MGJ in a new school district in early 2019.

Plaintiff responded by filing a complaint in the trial court, seeking joint legal custody and sole physical custody of MGJ. The matter was submitted for a referee hearing, which resulted in the referee recommending that the parties share joint legal custody and that defendant be awarded primary physical custody. Plaintiff filed a written objection to this recommendation with the trial court and requested a de novo hearing. At the outset of the de novo hearing, the trial court noted, "This is your opportunity [to] either place arguments on the record as to how the Referee errored, and/or to present additional testimony that was not available at the time of the Referee hearing." After the parties offered their arguments regarding plaintiff's objections, the hearing proceeded to factfinding.

As his first witness, plaintiff offered the testimony of a school employee whom he claimed would rebut the referee's conclusion that plaintiff failed to attend numerous parent-teacher conferences. The trial court precluded plaintiff from calling the witness, stating, "The

only thing that this Court allows are new proofs that were not available on the [date of the referee hearing.] . . . So if the individual is going to be called, she can only testify as to what has occurred from [the date of the referee hearing] forward as with any witnesses that you call." Plaintiff did not call the witness. Instead, both parties testified on their own behalf. The trial court limited both parties' testimony to information that was not available before the referee hearing.

Following the hearing, the trial court awarded the parties joint legal custody of MGJ and awarded plaintiff primary physical custody of the child, which was consistent with the referee's recommendation. This appeal followed.

II. ANALYSIS

A. DE NOVO HEARING

On appeal, plaintiff first argues that the trial court erred by limiting the parties' presentation of live evidence at the de novo hearing. According to plaintiff, the trial court improperly precluded him from submitting the proposed school witness's testimony and improperly limited the parties' testimony to events occurring after the referee hearing. We review this legal issue for clear legal error, which is committed when the trial court incorrectly chooses, interprets, or applies the law. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

Under the Friend of the Court Act, MCL 552.501 *et seq.*, the trial court may designate a referee to hear motions on domestic relations matters and to submit a recommended order to the trial court. MCL 552.507(1), (2)(a). Parties may challenge the referee's recommendation by filing written objections with the trial court. MCL 552.507(4). Upon the filing of a written objection, the trial court "shall hold a de novo hearing on any matter that has been the subject of a referee hearing." MCL 552.507(4). MCL 552.507(5) and (6) set the factfinding requirements for a de novo hearing, providing:

> (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 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.

Similarly, MCR 3.215(E)(4) provides that "[a] party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection and notice of hearing." MCR 3.215(F)(2) provides:

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.

Unpacking these authorities, we start with the principle that a de novo hearing focuses on only the contested factual issues; for uncontested issues, the trial court may rely on the referee's recommendation and/or the transcript from the referee hearing. On contested factual issues, the trial court must allow the parties an opportunity to present testimony on issues arising since the referee hearing. To ensure that the parties do not use the de novo process as a circuit-court appellate parachute, however, MCR 3.215(F)(2) allows the trial court to prohibit the parties from introducing evidence at the de novo hearing that was available to the parties at the time of the referee hearing, but was not previously offered by the parties.

As noted previously, the trial court in this case directed the parties at the outset of the de novo hearing to place their arguments on the record regarding how the referee erred and to limit their presentation of evidence to that which had developed since the referee hearing. The parties placed their arguments on the record and plaintiff attempted to offer the testimony of a witness from MGJ's school who would testify that plaintiff attended MGJ's parent-teacher conferences, which occurred before the referee hearing. Because plaintiff did not show that the school witness's testimony was not available before the referee hearing, the trial court properly precluded this witness from testifying. MCR 3.215(F)(2)(c).

The parties then offered their own testimony. Consistent with MCR 3.215(F)(2)(C) and MCL 552.507(5)(b), the trial court allowed the parties to testify regarding events that occurred

between the referee hearing and the de novo hearing; in other words, the trial court allowed the parties to make a record of the evidence pertinent to the contested issues which was not available at the time of the referee hearing. The trial court, however, prohibited the parties from testifying regarding events that occurred before the referee hearing. Indeed, when the parties attempted to offer testimony which was already offered at the referee hearing, the trial court precluded the parties from doing so, indicating that it had read the transcripts from the referee hearing and that these transcripts were sufficient for it to make its determination.

Plaintiff argues that the trial court erred by preventing him from offering testimony at the de novo hearing that he had previously offered at the referee hearing. We disagree. MCR 3.215(F)(2) grants the trial court the discretion to impose reasonable restrictions on the de novo hearing to preserve the limited resources of the court—perhaps, the most important of which is time before the factfinder. To further this end, MCR 3.215(F)(2) allows the trial court to conduct the de novo hearing by reviewing the record from the referee hearing, which the trial court did in this case. Still, plaintiff argues that MCR 3.215(F)(2) should be read consistently with MCL 552.507(5) and, because MCL 552.507(5)(b) requires the trial court to afford the parties a new opportunity to offer the *same evidence* to the court on contested issues as they offered to the referee, the trial court was required to allow the parties to replicate the live testimony from the referee hearing at the de novo hearing. We disagree for two reasons.

First, where a statute and court rule conflict on procedural matters, the court rule governs. *Stenzel v Best Buy Co, Inc*, 320 Mich App 262, 279; 906 NW2d 801 (2017). Again, our court rules specifically allow the trial court to conduct a de novo hearing in part by review of the referee record and to impose reasonable restrictions on the presentation of evidence. Second, MCR 3.215(F)(2) does not appear to conflict with the state. While MCL 552.507(5)(b) requires the circuit court to afford the parties an opportunity to offer the "same" evidence offered at the referee hearing on contested issues, this subsection does not speak to the form of the submission. MCL 552.507(6), however, provides that de novo hearings include decisions made entirely or in part on the record developed at the previous hearing. Consistent with our court rule, MCL 552.507(5)(a) provides that a hearing is de novo despite the circuit's imposition of reasonable evidentiary decisions if the "parties have been given a full opportunity to present and preserve important evidence at the referee hearing." Considered as a whole, these sections make clear that the trial court must *consider* the same evidence offered at the referee hearing, but not necessarily in the same form. If the parties have been given an adequate opportunity to develop the record before the referee, the trial court may reasonably limit the parties' submission of this evidence to the submission of the record of the earlier proceeding. In this manner, the Friend of the Court Act recognizes that the parties' right to a de novo hearing is the right to independent factual findings by the circuit court, not the right to wash away the previous record. If the previous record, supplemented by newly available evidence, is sufficient for the trial court to render independent factual findings, then the trial court need not allow further testimony. The parties' right to present live testimony is limited to newly available evidence and testimony that the trial court finds helpful to its factual determinations.

Accordingly, because the parties have not argued that they did not have an opportunity to fully develop the record at the referee hearing, we conclude that the trial court did not err by restricting the parties' testimony to evidence not available at the time of the referee hearing.

B. MGJ'S BEST INTERESTS

Where, as here, a current order governs the custody of a minor child, the party moving to modify that order must prove "either proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision." *Gerstenschalger v Gerstenschalger*, 292 Mich App 654, 657; 808 NW2d 811 (2011). If the movant establishes a proper cause or change in circumstances, the trial court may modify an established custody order if the trial court determines that the modification is in the child's best interests. MCL 722.27(c); *Dailey v Kloenhamer*, 291 Mich App 660, 666-667; 811 NW2d 501 (2011). When the trial court determines that the modification would modify the child's established custodial environment, the trial court may not modify the current custodial order unless the movant proves by clear and convincing evidence that the modification is in the child's best interests. MCL 722.27(c); *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010). Where the trial court determines that there is no established custodial environment, the movant must prove by a preponderance of the evidence that modification is in the best interests of the child. *Shade*, 291 Mich App at 23.

Here, plaintiff does not challenge the trial court's conclusion that an established custodial environment existed with both parents and that, therefore, for the trial court to modify the custodial environment, it must find by clear and convincing evidence that the change was in the child's best interests. Plaintiff, rather, challenges the trial court's finding that altering MGJ's established custodial environment by awarding defendant primary physical custody was in MGJ's best interests. Plaintiff also argues that the trial court committed error requiring reversal when, after reviewing each best-interest factor, the trial court used the phrase "the referee did not err." We decline to address this latter argument, however, because plaintiff did not present this issue in the statement of questions presented.[1] *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001); MCR 7.212(C)(5).

A reviewing court may not disturb a trial court's decision on a motion to modify custody unless the trial court " '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.' " *Dailey*, 291 Mich App at 664, quoting MCL 722.28. To determine whether a change in custody would be in the child's best interests, the trial court looks to the best-interest factors set forth in MCL 772.23. *Riemer v Johnson*, 311 Mich App 632, 641; 876 NW2d 279 (2015). These factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

[1] We note that, having reviewed the trial court's opinion, we doubt that this argument would have merit if properly presented. Rather, the trial court's use of the phrase "did not err" appears to be a shorthand indication that its independent factual findings were consistent with the referee's findings, not an indication that it was reviewing the referee's decision instead of making de novo findings. Indeed, immediately before using the challenged phrase, the trial court noted as much, stating whether it was weighing the factor in favor of either party and noting how its finding compared to the referee's finding.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

In this case, plaintiff challenges only the trial court's findings under factors (a), (b), (c), (j), and (*l*).

With respect to factor (a), plaintiff argues that he has a close relationship with MGJ because he took MGJ to school and picked her up, and because MGJ confides in him. The trial court acknowledged that both parties had "some type of bond" with MGJ. Defendant, however, testified that she thought she had a greater emotional bond with MGJ than plaintiff because MGJ confides in her and because she was MGJ's "best friend." MGJ's brother echoed this latter assertion, indicating the various activities MGJ and defendant would undertake together. Similar proofs were not made with respect to plaintiff. Accordingly, the trial court's finding that MGJ

had a stronger bond with defendant was not against the great weight of the evidence, and the trial court did not err by concluding that factor (a) weighed "slightly" in favor of defendant.

With respect to factor (b), plaintiff argues that he was involved in MGJ's education. The trial court acknowledged that both parties helped with MGJ's homework, talked to her teachers about her progress in school, and attended parent/teacher conferences. Contrary to plaintiff's assertion that he always ensured that MGJ's homework was completed, however, defendant testified that plaintiff would regularly fail to ensure that MGJ completed her homework while in his care, despite the fact that MGJ was struggling in school. Therefore, the trial court's finding that defendant was "more involved" in MGJ's education than plaintiff was not against the great weight of the evidence.

Plaintiff also argues that he always ensured that MGJ was properly dressed and bathed in his care. Defendant, however, testified that, when she picked up MGJ, the child's hair would not be brushed, and she would be dirty, sometimes wearing the same clothes as she was dropped off in. Moreover, plaintiff did not ensure that MGJ consistently wore clean underwear; indeed, MGJ was sent to school without any underwear on the day of the referee hearing after being in defendant's care. The trial court also noted several instances when plaintiff failed to ensure that MGJ was "presentable" for special occasions when she was picked up by defendant, including a school picture day and attending church. Because "the overall record reflects that [defendant] is the primary parent with the disposition to provide [MGJ] with guidance and continue her education," the trial court did not err by concluding that factor (b) weighed in favor of defendant.

With respect to factor (c), the trial court found that, although both parties had the capacity to provide MGJ with food, clothing, medical care, and other remedial care, defendant had "a slightly greater capacity" because her annual income was $32,320, while plaintiff's annual income was $12,000. Plaintiff argues that he has contributed to MGJ's expenses since birth and has provided utilities and housing for the child while she was in his care. The trial court, however, noted that defendant provided for MGJ's medical insurance, scheduled the child's medical appointments, coordinated the child's daycare, and generally took care of MGJ's health. Although plaintiff provided some level of financial support for MGJ, the record makes clear that coordination of MGJ's care was primarily accomplished by defendant. Because defendant had "a slightly greater capacity to provide for [MGJ]" and "an even larger disposition to do so," the trial court did not err by weighing factor (c) in favor of defendant.

With respect to factor (j), plaintiff argues that, despite defendant's unilateral decision to change the child's school district without notifying him, he has consistently cooperated with defendant to ensure her contact with MGJ. In a different section of the opinion, the trial court recognized the seriousness of plaintiff's decision to change MGJ's school, however, noting that plaintiff conduct was "**not** viewed well by the Court." The trial court noted with respect to this factor that, for the majority of the time since the parties split, defendant had taken "it upon herself" to develop a parenting schedule which ensured that the child would have a routine in which she saw both parents. The trial court noted that, although plaintiff had been accommodating at times, at other times, he had threatened defendant over parenting time. On this record, the trial court did not clearly err by concluding that "the total record reflects a mother who desires father to be involved in [MGJ's] life" and that, therefore, this factor weighed in defendant's favor.

With respect to factor (*l*), the trial court stated:

> With the filing of the Complaint in this matter, [plaintiff] led the Court to believe that he had the child on a full-time basis. He led the Court to believe that he was paying for 50% of the child's support. He led the Court to believe that he was the primary caregiver since the birth of the child. With that belief, the Court issued an Ex Parte Order. Now, after presentation of **all** of the proofs, the Court declares that it was misled by father. The above statements are far from the truth.

Plaintiff argues that this factor should have weighed equally or not been relevant because at the time of filing the complaint, he believed he was the primary caregiver of MGJ because she lived with him. During the referee hearing, however, plaintiff admitted that stating he was the primary caregiver was "misleading." Regardless of whether or not plaintiff intended to mislead the trial court, this factor addresses "[a]ny other factor considered by the court to be relevant to a particular child custody dispute. MCL 722.23(*l*). Certainly, plaintiff's misleading the trial court is relevant to this custody dispute, because the overall goal is to determine what is in the best interests of the child, which must be determined on a case-by-case basis on the facts. Further, the trial court acknowledged, albeit with respect to a different factor, that plaintiff provided inconsistent testimony. To the extent that plaintiff's actions hampered the trial court's factfinding, whether intentional or not, the trial court did not err by concluding that factor (*l*) weighed in favor of defendant.

Because plaintiff has not shown that any of the contested factors should have preponderated in his direction, we affirm the trial court's conclusion that granting primary physical custody to defendant was in MGJ's best interests.

Affirmed.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood
/s/ James Robert Redford