STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE MARIE STAWSKI,

Plaintiff-Appellee,

v

STEVEN KARL STAWSKI,

Defendant-Appellant.

UNPUBLISHED
January 21, 2021

No. 353277
Grand Traverse Circuit Court
LC No. 17-013393-DM

Before: REDFORD, P.J., and MARKEY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right the trial court's March 5, 2020 order denying defendant's motion for a writ of mandamus and upholding, on an interim basis, a referee's recommended order granting plaintiff's motion for a change of custody with respect to one of the parties' three children. We affirm.

The parties were married on September 23, 2000. In February 2017, plaintiff filed a complaint for divorce. The parties have three minor children. The instant appeal involves custody and parenting-time issues concerning their middle child, RJS. During the divorce proceedings, the trial court entered a temporary custody and parenting-time order that awarded the parties joint legal and physical custody of all of the children and gave them, in general, biweekly equal parenting time. This arrangement was later incorporated into the parties' divorce judgment. Repeated attempts to transfer RJS to defendant's care pursuant to the judgment were unsuccessful because the child was unwilling to stay with defendant. After plaintiff moved to modify parenting time and defendant filed a show cause motion and petitions with the Friend of the Court (FOC) regarding missed parenting visits with RJS, the parties entered into an agreement on June 20, 2018. The agreement was designed to foster reunification between RJS and defendant. The parties chose a reunification therapist with the aim of restoring defendant's parenting and custodial time with RJS as soon as possible. By agreement, all pending motions and filings were dismissed with prejudice. There was a target date of August 31, 2018, for full restoration of defendant's rights. Unfortunately, the reunification efforts did not go as planned. RJS continued to be frightened of defendant and resisted visiting him. Various witnesses attributed some of the difficulties to defendant's conduct directed toward RJS's treatment providers. Throughout the remainder of

2018, during all of 2019, and into 2020, there were myriad FOC, referee, and court filings and proceedings connected to custody and parenting time issues in relation to RJS. They were primarily initiated by defendant and are dizzying in number and effect.

Subsequently, the assigned referee held hearings to resolve defendant's continuing objections to the lack of parenting time in contravention of the divorce judgment and to provide a recommendation regarding a change-of-custody motion plaintiff filed in which she sought sole custody of RJS because of the continued hostility between RJS and defendant. After several hearing dates, the referee evaluated the statutory best-interest factors, MCL 722.23, and recommended that plaintiff be awarded sole legal and primary physical custody of RJS. The referee also recommended that defendant's parenting time be suspended until further order of the court, while providing for regular reviews by the referee to determine when and whether parenting time should resume and under what circumstances. The referee further recommended that the trial court dismiss any pending FOC complaints about missed parenting time and other matters. The referee executed the recommended order on February 4, 2020, and the trial court later signed the recommended order on February 12, 2020. The recommended order indicated that it would take immediate effect on an interim basis pending any de novo judicial hearing relative to objections. Defendant filed a motion for writ of mandamus and an objection to the referee's recommended order. On March 5, 2020, the trial court entered an order denying defendant's motion for a writ of mandamus. The court also affirmed the interim effect of the referee's recommended order on custody and parenting time. Defendant then filed this appeal.

Before addressing defendant's appellate arguments, we take a moment to review events that occurred in the trial court after the appeal was filed and that are part of the lower court record in our possession. On March 6, 2020, the trial court issued an order in which it provided that it would schedule a de novo judicial hearing concerning the referee's recommended order, but only after defendant ordered, paid for, and filed transcripts of the referee hearings on July 22, July 23, October 30, and October 31, 2019. In response, on April 3, 2020, defendant indicated that there had been no referee hearing on October 31, 2019, and that transcripts for the three other hearing dates had already been filed with the trial court by Curtiss Reporting. At a hearing on June 2, 2020, the trial court discussed defendant's argument that the court could not give interim effect to the referee's recommended order changing custody. The trial court disagreed with defendant's argument and continued, on an interim basis, the recommended order granting custody of RJS to plaintiff. On June 4, 2020, the trial court entered an order denying a judicial hearing on and de novo review of the referee's recommended order because "[i]t appear[s] from the Court file in the above-entitled cause that [defendant] has failed to comply with this Court's order dated March 6, 2020."[1] On June 29, 2020, the trial court denied defendant's motion for reconsideration of the order denying defendant a judicial hearing on his objection to the recommended order.

[1] It appears from the record that *full* transcripts of all the pertinent hearings were not ordered or part of the record.

On appeal, defendant first argues that, for a variety of reasons, the trial court was under a clear legal duty to refrain from giving interim effect to the referee's recommended order because it entailed a change of custody regarding RJS.

The primary purpose of a writ of mandamus is to enforce duties created by law. S*tate Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 667; 425 NW2d 80 (1988). A writ of mandamus is an extraordinary remedy to which a plaintiff has the burden of showing entitlement. *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999). "To obtain a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *Id*. at 223-224.

At first glance, the issue concerning whether there existed authority to give interim effect to the referee's recommended order to change custody would appear to be moot. "An issue is moot when a subsequent event makes it impossible for this Court to grant relief." *Gleason v Kincaid*, 323 Mich App 308, 314; 917 NW2d 685 (2018); see also *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014) ("We generally do not address moot questions or declare legal principles that have no practical effect in a case."). But we can reach moot questions and declare principles or rules of law that have no practical legal effect in the case before us if the issue is one of public significance that is likely to recur yet evade judicial review. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 50; 748 NW2d 221 (2008). We believe that the issue presented by defendant is one of public significance that is likely to recur and yet, given its very nature, evade judicial review. Consequently, we shall address defendant's argument.

We disagree with defendant's position that MCR 3.215(G)(3) prohibits a trial court from giving interim effect to a referee's recommended order that changes an established custodial arrangement pending a judicial hearing on an objection to the recommendation. Defendant's argument relies on an administrative order, family court plan, and appointment language concerning the involved referee, but ultimately it is anchored by and premised on the construction of MCR 3.215(G)(3). Accordingly, we shall simply go straight to addressing the interpretation of MCR 3.215(G)(3). "When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation." *Haliw v Sterling Hts*, 471 Mich 700, 704-705; 691 NW2d 753 (2005); see also *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). "Court rules should be interpreted to effect the intent of the drafter, the Michigan Supreme Court." *Fleet Business*, 274 Mich App at 591. Clear and unambiguous language contained in a court rule must be given its plain meaning and is enforced as written. *Id*.

MCR 3.215(G) provides, in relevant part, as follows:

> (G) Interim Effect for Referee's Recommendation for an Order.
>
> (1) Except as limited by subrules (G)(2) and (G)(3), the court may, *by an administrative order or by an order in the case*, provide that the referee's recommended order will take effect on an interim basis pending a judicial hearing. The court must provide notice that the referee's recommended order will be an

interim order by including that notice under a separate heading in the referee's recommended order, or by an order adopting the referee's recommended order as an interim order.

(2) The court may not give interim effect to a referee's recommendation for any of the following orders:

(a) An order for incarceration;

(b) An order for forfeiture of any property;

(c) An order imposing costs, fines, or other sanctions.

(3) The court may not, *by administrative order*, give interim effect to a referee's recommendation for the following types of orders:

(a) An order under subrule (G)(2);

(b) *An order that changes a child's custody*;

(c) An order that changes a child's domicile;

(d) An order that would render subsequent judicial consideration of the matter moot. (Emphasis added).

The plain language of the court rule does not support defendant's argument that MCR 3.215(G)(3) precludes giving interim effect to a referee's recommended order that changes the custody of a child. Although the court rule does not permit giving interim effect to a referee's recommendation with respect to a change in custody through *an administrative order*, there exists no prohibition against "an order in the case" being issued by the court for such a purpose. MCR 3.215(G) clearly contemplates two mechanisms for giving interim effect to a referee's recommended order—an administrative order or a standard court order. MCR 3.215(G)(2) prevents, either by administrative order or court order, giving interim effect to a referee's recommended order for incarceration, property forfeiture, or sanctions. Had a change-of-custody provision been inserted in Subrule (G)(2) of the court rule, defendant's argument would be sound. Our Supreme Court, however, did not do so, allowing for a judge to give interim effect to a referee's recommended order to change the custody of a child by way of a court order. To be clear, MCR 3.215(G)(3) authorizes a *court* to give interim effect to a recommended order changing custody, *not a referee*. In this case, the trial court, by executing the referee's recommended order to change custody on February 12, 2020, properly exercised its authority under MCR 3.215(G)(3) to give the recommended order interim effect. Therefore, the trial court did not have a clear legal duty to refrain from giving interim effect to the referee's recommended order changing custody, and thus defendant was not entitled to the requested writ of mandamus.

Defendant next argues that the trial court had a clear legal duty to comply with MCR 3.215(F)(1), which provides that a "judicial hearing must be held within 21 days after [a] written objection [to a referee's recommendation] is filed, unless the time is extended by the court for good cause." Defendant indicates that he filed a written objection on March 4, 2020, to the

referee's recommended order changing custody of RJS; therefore, the trial court was required to hold a judicial hearing no later than March 25, 2020, yet no judicial hearing was ever held. As mentioned earlier, on March 6, 2020, the trial court issued an order in which it provided that it would schedule a de novo judicial hearing concerning the referee's recommended order, but only after defendant ordered, paid for, and filed transcripts of the relevant referee hearings, which the court later concluded had not been done. The March 6, 2020 order further provided:

> Upon receipt of the transcript, the Court will promptly set a de novo review hearing. New evidence will NOT be allowed which could have been introduced at the Referee hearing with the exercise of reasonable diligence. The failure to comply with this Order will cause the Court to consider the matter abandoned and will dismiss the petition with prejudice.

There is nothing in the order or record suggesting that the trial court would not have held the hearing on or before March 25, 2020, had defendant complied with the court's directive.

Defendant argues that the trial court did not have the authority to require him to provide hearing transcripts in order to proceed with a judicial hearing to review de novo the referee's recommended order. Defendant cites MCR 3.215(D)(4)(d) in support of this argument. MCR 3.215(D)(4)(d) provides:

> If the court on its own motion uses the record of the referee hearing to limit the judicial hearing under subrule (F), the court must make the record available to the parties and must allow the parties to file supplemental objections within 7 days of the date the record is provided to the parties. Following the judicial hearing, the court may assess the costs of preparing a transcript of the referee hearing to one or more of the parties. *This subrule does not apply when a party requests the court to limit the judicial hearing under subrule (F)* or when the court orders a transcript to resolve a dispute concerning what occurred at the referee hearing. [Emphasis added.]

Subrule (F) of MCR 3.215 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:
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> (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.

Defendant claims that the trial court could not order him to procure and pay for the transcripts in order to obtain a judicial hearing in light of MCR 3.215(D)(4)(d). At a hearing on June 2, 2020, however, the trial court found that there was a party request to limit the judicial hearing pursuant to MCR 3.215(F) (judicial hearing on review of record of referee hearing). Therefore, considering the language in the final sentence of MCR 3.215(D)(4)(d), the court determined that MCR 3.215(D)(4)(d) did not apply, and we have no basis to rule or find otherwise. Furthermore, MCR 3.215(D)(4)(b) provides:

> If ordered by the court, or if stipulated by the parties, the referee must provide a transcript, verified by oath, of each hearing held. The cost of preparing a transcript must be apportioned equally between the parties, unless otherwise ordered by the court.

And MCR 3.215(D)(4)(c) provides, in part, that "[i]f a stenographic transcript is necessary, except as provided in subrule (4)(b), the party offering the evidence must pay for the transcript." One or both of these provisions appear to support the action taken by the trial court. Moreover, the 21-day provision for conducting a judicial hearing, MCR 3.215(F)(1), does not contain any language precluding a court from issuing an order like the one the trial court issued in this case so long as the hearing is held within the 21-day period or a longer period if good cause exists.

Regardless, we find it unnecessary to determine whether the trial court had the authority to direct defendant to order, pay for, and file the hearing transcripts as a prerequisite to holding a judicial hearing on the objection to the referee's recommended order. The court issued the order requiring compliance with the transcript prerequisite, and defendant could not unilaterally decide that the court lacked the authority to do so and ignore the order. A party cannot simply defy a court order that the party deems unlawful. Rather, defendant was obligated to abide by the trial court's March 6, 2020 order if he wanted a judicial hearing on his objection to the recommended order. Defendant's recourse would then be to challenge the order on appeal.

Defendant next contends that the trial court had a clear legal duty to enforce his constitutional right to parent all three children, not just the youngest and oldest. Defendant contends that his parenting-time rights were effectively rendered meaningless because the trial court failed to enforce the parenting-time schedule through the use of its contempt powers. Defendant further maintains that he had a constitutional right to parent RJS, that he had a statutory right to the enforcement of the custody and parenting-time provisions in the divorce judgment, and that the FOC had a duty to initiate timely enforcement of complaints regarding missed parenting time.

We initially note that in June 2018, defendant agreed to the suspension of his rights as a parent under the divorce judgment in order to allow a reunification therapist to work with RJS and defendant. This agreement did not have a definitive end date, and it also resulted in the dismissal with prejudice of defendant's show cause motion and FOC petitions regarding alleged parenting-time violations. Furthermore, defendant cannot complain about alleged violations of his rights as a parent to custody and parenting time where defendant did not avail himself of a judicial hearing

on the referee's recommended order. In addition to recommending a change of custody, the recommended order called for suspension of defendant's parenting time as to RJS and dismissal of any ongoing FOC complaints regarding missed parenting time and other pending matters. As reflected in the trial court's order of March 6, 2020, the court would deem "matter[s] abandoned" if defendant failed to procure all of the pertinent transcripts for purposes of pursuing his objections to the referee's recommended order. Given the abandonment below, we decline to discuss any further defendant's assertion that his constitutional rights as a parent were violated.[2]

We affirm. Having fully prevailed on appeal, plaintiff may tax costs under MCR 7.219.

/s/ James Robert Redford
/s/ Jane E. Markey
/s/ Mark T. Boonstra

[2] We also note that delays in the process of a parent attempting to secure or vindicate his or her rights as a parent are part of any litigation concerning custody and parenting time. But here, it was defendant's litigiousness that created a mountain of filings and proceedings that led to confusion and delays.