STATE OF MICHIGAN

COURT OF APPEALS

BRENDA ADAMS,

Plaintiff-Appellant,

v

DAVID FOGLESONG, II,

Defendant-Appellee.

UNPUBLISHED
August 20, 1996

No. 185024
LC No. 91 20470 DS

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

In this dispute over a modification of child custody, plaintiff Brenda Adams appeals by right the order denying her motion for relief from the default judgment and the change in custody order. The critical issue presented is whether a court in a child custody action must hold an evidentiary hearing on the best interests of the child before entering a change in custody order when the parent contesting the motion to change custody does not appear and is defaulted. We hold that under such circumstances, a court may hold an evidentiary hearing without the presence of the parent who contests custody. We reverse and remand for proceedings consistent with this opinion.

David Foglesong, III (hereinafter the child), was born on April 3, 1991; he is the child of plaintiff and defendant David Foglesong, II. Both parties are now married to other individuals. The record does not indicate that the parties were ever married to each other.[1] Plaintiff eventually sued defendant for child support. In March, 1992, the court ordered that defendant receive weekly visitation. In July, 1993, plaintiff petitioned the court to permit her to move with the child to Texas because of her husband's employment. In August, 1993, the court allowed plaintiff to move the child to Texas dependent upon certain contingencies, including that plaintiff notify the Sanilac County Friend of the Court of her Texas address and that defendant receive four months of visitation. The court held in abeyance its decision on plaintiff's petition to change the child's domicile.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In February, 1994, the court permitted plaintiff's attorney, David Hearsch, to withdraw as plaintiff's counsel. Hearsch stated that plaintiff had failed to respond to his correspondence regarding her compliance with the court-ordered contingencies. In May, 1994, the Sanilac County Friend of the Court informed the court that plaintiff had not given it or defendant her Texas address or telephone number. Plaintiff later telephoned and complained that defendant was not paying child support. Plaintiff refused to provide her telephone number and said that she would not allow defendant to see the child again. The Friend of the Court then recommended that the circuit court deny plaintiff's motion to change the child's domicile.

On May 24, 1994, defendant moved to compel plaintiff to return the child to Michigan. The court set a hearing for June 6, 1994. That same day, Richard Riordan became plaintiff's attorney of record. Four days later, the court entered a consent order, signed by Riordan, that required plaintiff to permit defendant to have visitation in July, 1994. When defendant arrived to pick up the child for visitation, however, plaintiff refused to let the child leave with him, in part because the child became hysterical.

On July 25, 1994, the court ordered plaintiff to return the child to Michigan within fourteen days. The court threatened immediately to enter an order denying plaintiff's request to change the child's domicile should plaintiff fail to comply. Two weeks later, when plaintiff had not complied, defendant filed for a change of custody. On August 10, 1994, the court denied plaintiff's motion to change the child's domicile and ordered plaintiff to return the child to Michigan immediately. The following day, Riordan filed an answer to defendant's motion to change custody.

In early August, 1994, at a hearing that plaintiff failed to attend after notice, Riordan and defendant stipulated that a Friend of the Court hearing would occur on August 31, 1994. On August 30, 1994, the court ordered that if plaintiff failed to appear for the hearing or failed to return the child to Michigan, the court would grant custody of the child to defendant. Plaintiff did not attend the hearing.[2] The Friend of the Court referee advised the court that plaintiff had discharged Riordan, and had requested a seven-day adjournment to retain new counsel. On August 31, 1994, the court entered a default judgment against plaintiff, awarded full custody to defendant, ordered plaintiff to return the child to Michigan immediately, and issued a bench warrant for plaintiff due to her failure to appear and comply with the court's earlier orders.

In late 1994, the parties agreed to allow defendant a four-month visitation in Michigan.[3] In February, 1995, plaintiff returned to Michigan to pick up the child, but defendant refused to release him. In March, 1995, plaintiff moved for relief from the order granting custody to defendant, which the court denied. Plaintiff appeals.

Plaintiff first argues that she is entitled to relief from judgment under MCR 2.612(C)(1)(a) because of neglect by her previous counsel. The Michigan Court Rules provide for relief from judgment as follows:

(C) Grounds for Relief From Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect. [MCR 2.612(C)(1)(a).]

This Court reviews a trial court's decision on a motion under MCR 2.612(C)(1) for an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 382; 533 NW2d 373 (1995). Plaintiff asserts that her first counsel should have reduced to an order the original recommendation from the Friend of the Court to change the child's domicile to Texas. Plaintiff's argument assumes that the court would have granted such an order, but the record shows otherwise. Indeed, the court permitted plaintiff to move with the child to Texas, requiring only a few contingencies, which plaintiff flouted. Thus, plaintiff cannot support her assumption that the court would have granted the order without such contingencies had counsel submitted it. Further, an attorney's negligence is generally attributable to the client and does not constitute grounds to set aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299; 530 NW2d 781 (1995).

Moreover, plaintiff suggests that had her counsel submitted such an order, the court could not have denied the order absent a proper hearing. Plaintiff's assertion is particularly interesting because she failed to appear for several key hearings in this case. We will not endorse plaintiff's attempt to fashion an appellate parachute for her own failure to attend hearings. See *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 542; 529 NW2d 318 (1995) (Jansen, J, dissenting).

Plaintiff also contends that her second counsel did not obtain her approval before consenting to the entry of an order that "unconditionally and without limit provided for the return of the child to the exclusive possession of [defendant]." Plaintiff did not provide an affidavit supporting her allegations. Plaintiff also did not specify the order to which she objects on appeal; this Court assumes she is referring to the consent order, signed by Riordan, that required plaintiff to permit defendant visitation in July, 1994. Considering that plaintiff had not complied with the court order to provide her Texas address to the Friend of the Court, and considering that plaintiff told defendant that she would refuse to permit visitation with the child, she has no grounds to assert that Riordan's actions in this matter comprise neglect warranting relief from judgment. See *McNeil v Caro Community Hospital*, 167 Mich App 492, 497-498; 423 NW2d 241 (1988). Further, the consent order merely provided for visitation, not "exclusive possession" by defendant as plaintiff claims. Defendant had not yet filed for a change in custody when Riordan signed the consent order. Presumably, had plaintiff complied with the visitation order, defendant may never have filed for a change in custody.

Plaintiff next argues that the trial court abused its discretion in failing to conduct an evidentiary hearing because defendant committed a fraud upon the court. MCR 2.612(C)(1)(c) provides that a court may relieve a party from a final judgment due to fraud, misrepresentation or misconduct by an

adverse party. When a party alleges fraud upon the court, the court should typically conduct an evidentiary hearing on that allegation. *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995).

Plaintiff alleges that defendant misrepresented that he did not agree to custody arrangements other than those contained in court orders. Plaintiff maintains that defendant's statement was fraudulent because he had agreed not to exercise his visitation rights in Texas in July, 1994, after the child became hysterical. Plaintiff did not submit an affidavit supporting this allegation in the circuit court, and does not support this allegation on appeal. Although she has provided this Court with no factual grounds to support fraud, plaintiff asks this Court to relieve her from the judgment based on a finding of fraud. We decline plaintiff's request.

Moreover, although generally courts should hold evidentiary hearings regarding fraud, the court's failure to do so was not erroneous. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). Plaintiff has not demonstrated that the court based its order on defendant's statement about custody agreements. Rather, the court stated on the record that plaintiff's noncompliance and nonappearance formed the basis for its order granting a change in custody.

Additionally, plaintiff claims that she is entitled to relief from the change in custody order because the judgment was void under MCR 2.612(C)(1)(d). Plaintiff's argument that the court did not have personal jurisdiction over her when it issued the default judgment and order of change in custody is without merit. The record reflects that plaintiff had notice of the August 31, 1994, hearing. First, the parties stipulated to the hearing. Second, the file contains a notice of the August 31 hearing and certificate of mailing dated August 15, 1994. Third, a notice of presentment of order, which had a proof of service stamp on it and referenced the change in custody if plaintiff did not appear at the August 31 hearing, was filed on August 18, 1994. Further, plaintiff submitted to the court's jurisdiction by her initial petition to the court for child support. *Ewing v Bolden*, 194 Mich App 95, 101; 486 NW2d 96 (1992).

Plaintiff does not support her next argument that the circuit court should have permitted her telephonic testimony. In her motion for relief from judgment, plaintiff did not provide the circuit court with evidence on this point. This Court's review is limited to the record developed by the trial court. *Harkins v Dept of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994). Therefore, we will not review this issue.

Plaintiff next asserts that this Court should grant her relief from judgment under MCR 2.612(C)(1)(e) because, after the change in custody order, she has appeared for every hearing and abided by every court order. MCR 2.612(C)(1)(e) states that a party may be relieved from judgment when "it is no longer equitable that the judgment should have prospective application." Plaintiff's reliance on MCR 2.612(C)(1)(e) is inappropriate in the context of this custody dispute, where continued supervision is necessary:

> Of course, it is not necessary to resort to this provision to get modification of a judgment in equitable actions when it is a matter for continued supervision and the court has reserved jurisdiction to change or modify its judgment. Similarly applications for changing or modifying the orders or judgments of the court in domestic relations matters, such as alimony, custody and support payments, where continued supervision is assumed, are more liberally governed by quite separate considerations. [Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), MCR 2.612(C)(1)(e), author's comment, p 542.]

Further, the authority cited by plaintiff, *Stahl v Dyer*, 244 Mich 521; 221 NW2d 442 (1928), neither supports her argument nor applies to this case.

Plaintiff next contends that she is entitled to relief from judgment under MCR 2.612(C)(1)(f), which provides that a party may receive relief for "[a]ny other reason justifying relief from the operation of the judgment." To obtain relief, subsection (f) requires: (1) that the reason for setting aside the judgment does not fall within subrules (1) through (5); (2) that the opposing party's substantial rights must not be detrimentally affected if the court sets aside the judgment; and (3) that extraordinary circumstances must exist that mandate setting aside the judgment to achieve justice. *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992). Relief is typically granted under the above subsection only when the party in whose favor the judgment was obtained acted improperly. *Id.*

In this case, defendant did not act improperly in obtaining the default judgment. Plaintiff's own nonappearances and disregard of court orders served as the basis for the judgment. This Court has previously refused to set a standard that would force trial courts to "engage in frustrating semantic exercises" to bring a case within MCR 2.612(C)(1)(f). *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 199; 446 NW2d 648 (1989).

Plaintiff states that the circuit court's denial of her motion for relief was "without explanation and without any substantive discussion." Plaintiff offers this Court no substantive discussion of the alleged extraordinary circumstances that led her to ignore the circuit court's repeated orders for her appearance and for the return of the child to Michigan. Plaintiff 's history of noncompliance makes us reluctant to reward her behavior with relief in this case. Indeed, had the court considered the best interests of the child, we would not grant plaintiff relief. Because the court did not, however, we remand this case for the court to do so, as indicated below.

Plaintiff finally argues that the circuit court erred in ordering a change in custody without holding an evidentiary hearing on the best interests of the child. Courts determine the best interests of the child by considering the factors set forth in MCL 722.23; MSA 25.312(3). Additionally, MCL 722.27(c); MSA 25.312(7)(c) provides in part: "The court shall not modify or amend its previous judgments or orders or *issue a new order so as to change the established custodial environment of a child* unless there is presented clear and convincing evidence that it is in the best interest of the child." Whether a court must hold a hearing under the circumstances of this case is a question of law. This

Court reviews questions of law in custody disputes for clear legal error. *Wiechmann v Wiechmann*, 212 Mich App 436, 439; 538 NW2d 57 (1995).

The circuit court did not attempt to conduct a hearing in plaintiff's absence on the child's best interest. The record is devoid of evidence as to the requisite considerations in a child custody dispute. Plaintiff failed to provide the circuit court with evidence to support her objection to the change in custody order. Plaintiff did not provide facts on the relevant factors to support her retention of custody. Conducting an evidentiary hearing without such evidence would seem to be an exercise in futility. Indeed, the circuit court itself referenced the fruitlessness of such a hearing:

> [T]here is some case law . . . [in] which some Appellate Judges who've never been in a Trial Court thought that every time there is a change in custody whether by default or whether by agreement, in fact, the Court has to make findings on all eleven or twelve elements, which, of course, they seem to ignore the fact that that would be impossible if there's no evidence presented to make those findings. . . . It simply defies logic to require a Trial Court to make findings of fact when there's been no evidence presented.

Nonetheless, this Court must rely on the findings of fact by a trial judge to rule effectively on custody decisions. "The trauma suffered by all concerned parties in a custody dispute increases when a speedy resolution of the matter is frustrated by a trial judge's failure to make the findings of fact required by statute." *Wolfe v Howatt*, 119 Mich App 109, 112; 326 NW2d 442 (1982).

The change in custody order is a harsh remedy in this case. Plaintiff, however, actively obstructed defendant from visiting the child, and deliberately delayed court proceedings by substituting counsel on the very dates set for critical hearings. Moreover, plaintiff's nonappearance at the critical custody hearing speaks for itself. Nonetheless, to change custody without conducting a hearing on the relevant factors ignores the best interests of the child, and ignores the statute mandating the court to conduct a hearing on those interests.

This Court previously has ruled that the trial court should hold a hearing even in the absence of the parent who contests custody. In *Currey v Currey*, 109 Mich App 111; 310 NW2d 913 (1981), the plaintiff-mother had custody of the child; the divorce judgment provided that she could not change the child's domicile without the court's prior written consent. The defendant-husband later filed for a change in custody order because the plaintiff intended to move with the child to Louisiana without obtaining permission from the court. The plaintiff subsequently removed the child from school and left the state with the child. Approximately one month later, the court held a hearing on the defendant's motion to change custody. The plaintiff did not appear at the hearing, and refused to answer the change in custody petition, asserting that no basis existed for such a change. *Id.* at 112-115. The trial court granted custody of the child to the defendant, who testified on his own behalf, and found by clear and convincing evidence that the change was in the child's best interest. *Id.* at 117. This Court noted that the plaintiff had chosen to remove herself and the child from the trial court's jurisdiction, and stated that because of the plaintiff's actions, the trial court was forced to decide the motion to change custody

solely on evidence produced by the defendant. *Id.* at 199. This Court determined that the trial court made specific findings regarding the requisite factors and did not abuse its discretion in changing custody. *Id.*

Defendant erroneously argues that *Rossow v Aranda*, 206 Mich App 456; 522 NW2d 874 (1994) supports his argument that a hearing was unnecessary. The Court in *Rossow* held that the circuit court did not need to consider and make findings on the best interest factors. The Court stated that a trial court may amend or modify its previous custody judgment only for proper cause or because of a change in circumstances. The Court stated that:

> [W]here the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors. *Id*. at 458.

Defendant in this case overlooks that he was the party seeking to change custody, not plaintiff. Therefore, *Rossow* describes defendant's burden, not plaintiff's. Defendant did not demonstrate a change in circumstances, other than plaintiff's noncompliance. Moreover, the circuit court had not previously considered the best interest factors. An evidentiary hearing thus would not be a reconsideration or revisitation of those factors. *Rossow* is therefore not analogous to this case.

In contrast, a case on point is *Adams v Adams*, 100 Mich App 1; 298 NW2d 871 (1980). When the parties in *Adams* divorced, the plaintiff-mother obtained custody of their child. The plaintiff later moved with the child to Wisconsin, with the court's permission. The plaintiff subsequently petitioned for permission to move the child to Oregon, which the court granted contingent upon a modified visitation schedule. The defendant-father then filed for a change in custody. The plaintiff violated the court's order by failing to insure that the child spent a holiday with the defendant. The plaintiff did not appear for the show cause hearing, where the court found her in contempt for not obeying the visitation schedule. The court later held a custody hearing, at which neither the plaintiff nor the child appeared. The defendant presented witnesses on his behalf. *Id.* at 6-8. The trial court discussed each of the child custody factors in its ruling. The judge considered the plaintiff's moves to Wisconsin and Oregon, and noted that she violated the visitation schedule. He mentioned that the plaintiff failed to appear before the court and that her current counsel was the third involved in the case. The trial court found clear and convincing evidence to merit a change in custody. *Id.* at 9-11.

This Court found that the *Adams* defendant had not established, by clear and convincing evidence, that a change in custody was warranted. The Court noted with disapproval the trial judge's undue emphasis on the plaintiff's violation of the visitation schedule, and on her failure to attend the show cause hearing. The Court stated: "Disputes regarding visitation and contempt are not a proper basis for changing custody." *Id*. at 13. The Court said that the majority of the lower court's findings were speculative or conclusory and based on improper considerations of the visitation problem. The Court ordered that the trial court hold a new hearing and returned custody to the plaintiff. *Id*. at 14-15.

Even in *Adams*, upon which plaintiff relies, the Court ordered an additional evidentiary hearing. We reverse and remand for the circuit court to hold an evidentiary hearing as soon as possible. On remand, the court should consider up-to-date information on the pertinent factors. *Fletcher*, *supra*, at 889. Regarding the custodial environment of the child, the circuit court should not give undue weight to the fact that the child has spent the last year with defendant, and should consider that the child spent the first four years of his life with plaintiff. Thus, that defendant has had custody of the child for the past year does not alter his burden of proof in establishing a custodial environment. *Id.* at n 10. To avoid unnecessary disruption in the child's life, we refrain from ordering that the child be returned to plaintiff's custody in the interim.

Finally, defendant argues that this appeal is moot because plaintiff consented to defendant's custody of the child in a June order. That order does not evince an agreement to grant custody to defendant; rather, its purpose was to grant visitation rights to plaintiff. Defendant's argument on this point thus fails.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan

[1] The child was legitimized as defendant's under MCL 700.111; MSA 27.5110.

[2] In her brief, plaintiff claims that she attempted to make an appearance by telephone, but that defendant's counsel objected. The lower court record does not contain verification of plaintiff's assertions on this point.

[3] Defendant had attempted to enforce the court's order in Texas, but when the parties agreed to the four-month visitation, they abated the Texas proceedings.