STATE OF MICHIGAN

COURT OF APPEALS

LAUREL KATHERINE EPPSTEIN,

Plaintiff-Appellee,

v

BRUCE WALTER SODERSTROM,

Defendant-Appellant.

UNPUBLISHED
January 20, 1998

No. 202560
Kalamazoo Circuit Court
LC No. 96-1415 DM

Before: Fitzgerald, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from a March 25, 1997 judgment of divorce awarding sole physical and legal custody of the parties' minor children to plaintiff. We reverse and remand.

The dispositive issue in the present case is the trial court's failure to provide defendant with a de novo hearing following a referee's decision that plaintiff receive custody of the parties' minor children.

On August 27, 1996, the trial court entered a stipulation and order referring the issues of temporary custody, support and visitation to a friend of the court referee for resolution. A hearing was held on October 15, 1996; both parties and their counsel appeared at the hearing. Following plaintiff's testimony, defense counsel reported that she would not be calling any witnesses, and that defendant was ready for a decision as soon as the referee spoke to the children.

Before rendering his decision, the referee noted that he found it unfortunate that defense counsel only briefly cross-examined plaintiff and chose not to present any witnesses. The referee also indicated that he considered counsel's actions to be a "direct affront" to the referee process, and recommended that should defense counsel later request a de novo hearing before the circuit court regarding his ruling, defendant should not be given the opportunity to call any witnesses. The referee then went on to find that an established custodial environment existed in both parties, and that plaintiff had proven by clear and convincing evidence that the statutory custody factors favored granting her physical and legal custody of the children and awarding defendant only liberal visitation right.

On November 5, 1996, plaintiff filed a seven-day notice of presentment of the referee's recommended order for entry.[1] On November 12, 1996, defendant filed an "Objection to Presentment and Entry of Referee's Recommended Order." Defendant's objection did not expressly request a de novo hearing. However, defendant did state the following:

> Defendant further preserves the right to request a de novo hearing, but respectfully asks this Honorable Court to consider the de novo hearing incorporated within the scheduled trial in this matter . . . .

A hearing was held on December 2, 1996 to resolve defendant's objections. By order dated December 10, 1996, the trial court granted defendant a de novo hearing. The court stated:

> The court rule is clear that following the presentation of the referee's recommended order, a party is entitled to a judicial hearing upon the filing of an objection along with notice of hearing. The court concludes that defendant has substantially complied with this requirement by filing his objection.

The court then scheduled the hearing for December 19, 1996.

At the December 19 hearing, the trial court questioned defense counsel about her failure to present testimony or evidence before the referee. The court noted that defendant apparently viewed the referee process as "a bite at the apple which can be repeated at will." The court then held that the law only required an independent review of the testimonial record taken at the referee hearing, along with the friend of the court report and recommendation, and an independent opinion. Defendant was not allowed to present any further proofs. On December 23, 1996, the trial court issued an opinion on temporary custody from the bench. The opinion essentially affirmed the referee's findings and awarded physical and legal custody of the parties' children to plaintiff. In January 1997, at trial, the court refused to reconsider its earlier custody decision. The court prohibited defendant from presenting any proofs prior to December 23, 1996, finding that there had been no change in circumstances or proper cause shown. See MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

On appeal, defendant argues that he was entitled to a de novo judicial hearing before the circuit court, rather than a mere de novo review of the referee hearing transcript. We agree.

Regardless of the actions of defense counsel at the October 15 referee hearing, defendant was entitled to a de novo hearing in accordance with MCL 552.507(5); MSA 25.176(7)(5), which provides:

> The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon 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 under subsection (4), except that a request for a de novo hearing concerning an order of income withholding shall be made within 14 days after the recommendation of the referee is made available to the party under subsection (4).

According to the terms of the statute, a trial court is required to conduct a de novo hearing, not de novo review, on any matter that was the subject of a referee hearing upon proper request of a party. This distinction has meaning and has been extensively discussed by this Court. See *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 101 (1986). The trial court may not simply adopt the findings of the friend of the court or the hearing referee, but must proceed as if no prior determination has been made and arrive at an independent decision. See *Marshall, supra.* Accordingly, it was error for the trial court to limit the taking of further testimony and to rely on the testimony and evidence from the referee's hearing and the friend of the court report. *Crampton v Crampton,*178 Mich App 362, 363; 443 NW2d 419 (1989); *Truitt v Truitt*, 172 Mich App 38, 42-44; 431 NW2d 454 (1988).

Plaintiff argues that defendant can not validly claim the right to a de novo hearing under this statute because he failed to request a hearing "within 21 days after the recommendation of the referee [was] made available." However, we agree with the trial court that defendant's November 12, 1996 objections were in substantial compliance with this requirement. Defendant essentially requested that a de novo hearing on the custody issue be held in conjunction with trial. What is troubling in this case is that the Court agreed to hold a "de novo hearing," but actually conducted a "de novo review" of the existing records. This is clear legal error requiring reversal.

The primary responsibility of the trial court in a custody dispute is to determine the best interests of the children at the time the determination is being made. *Johns v Johns*, 178 Mich App 101, 106; 443 NW2d 446 (1989). This important determination cannot be properly made if the court refuses to consider admissible evidence (live testimony, affidavits, documents, or other admissible evidence). *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991). Nor can the court properly make the findings of fact necessary to support the court's action under § 7(1) of the Child Custody Act, MCL 722.21 *et seq*.; MSA 25.312(1) *et seq*., if the relevant evidence is not admitted. Under the circumstances, we feel compelled to reverse. See MCL 722.28; MSA 25.312(8); *Crampton, supra.* Given this determination, we see no need to address defendant's other claims of error. On remand, the trial court is directed to conduct a full de novo hearing and to make an independent determination regarding custody of the parties' children.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] The proposed order is dated November 5, 1996, indicating that the referee's recommendation and order was first made available to the parties on that date.