# STATE OF MICHIGAN

# COURT OF APPEALS

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PETROS IOANNATOS,

Plaintiff-Appellant,

v

AMY POWERS,

Defendant-Appellee.

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UNPUBLISHED
March 20, 1998

No. 201866
Oakland Circuit Court
LC No. 94-481961-DP

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Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order awarding defendant physical custody of the parties' minor child. We reverse and remand.

A lengthy evidentiary hearing on the issue of custody was conducted before a friend of the court referee. Following the hearing, the referee recommended that defendant retain legal and physical custody and that plaintiff receive generous visitation rights. Plaintiff objected to entry of the referee's recommended order and timely requested a de novo hearing on the issue of custody before the trial court.

At a hearing on February 10, 1997, the trial court refused to conduct an entirely new custody hearing as requested by plaintiff, but, as a compromise, agreed to the following procedure:

> I [will] listen to oral argument on the briefs and I [will] listen to any citations they have to the Friend of the Court record. If there is evidence by way of testimony or exhibits that they feel is pertinent that is not contained in the record, they may present this to this court as a supplement to the Friend of the Court record. [Plaintiff's counsel] objects to that and wants to be able to present all the witnesses that were presented before to the Friend of the Court to this Court.

The trial court gave each party one-half hour to present any additional evidence the party wished to present.

On February 14, 1997, the trial court issued an order largely paralleling the friend of the court recommendation, but awarded the parties joint legal custody of the child and revised the visitation schedule, giving plaintiff significantly less visitation than the referee had recommended.

On appeal, plaintiff 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 briefly supplemented by evidence not presented to the referee. We agree.

Regardless of the amount of evidence presented at the 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 plain 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. See also MCR 3.215(3). 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 had been made and arrive at an independent decision. See *Marshall*, *supra*. Accordingly, it was clear legal error requiring reversal 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 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). Thus, we remand this matter to the trial court. The trial court is directed to conduct a full de novo hearing and to make an independent determination regarding custody, visitation, and support.

Given this determination, we need only address one of plaintiff's remaining issues. Plaintiff challenges the trial court's order requiring him to pay defendant $7,500 in attorney fees. Defendant was awarded attorney fees under MCR 3.206(C), which provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay.

This rule applies to custody disputes. See *Featherston v Steinhoff*, ___ Mich App ___; ___ NW2d ___ (Docket No. 199221, issued 11/25/97), slip op p 5.

Under MCR 3.206(C)(2), defendant may recover reasonable attorney fees and expenses if she is unable to bear the expense of the action and plaintiff is able to pay. Unfortunately, the trial court did not make any findings of fact with regard to defendant's ability to bear the expense of the action or plaintiff's ability to pay, despite the fact that these were contested issues. Thus, on remand the trial court must make a determination regarding defendant's ability to bear the expense of the action and plaintiff's ability to pay.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer