

STATE OF MICHIGAN
COURT OF APPEALS

STANLEY J. HELZER, JR.,

Plaintiff/Counter Defendant-
Appellant,

v

ANNA MARIE HELZER,

Defendant/Counter Plaintiff-
Appellee.

UNPUBLISHED
February 21, 2013

No. 312830
St. Clair Circuit Court
LC No. 11-002994-DM

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce. We remand for clarification of the custody and parenting time provisions of the judgment, and affirm all other aspects of the judgment.

I. FACTS

Plaintiff filed for divorce in 2011. Initially the trial court entered a temporary order regarding custody and parenting time, under which the parties had joint legal custody but defendant was awarded physical custody, with limited parenting time awarded to plaintiff. Following a one-day bench trial on property issues only, the trial court granted the divorce in July 2012. However, the trial court did not make any determinations regarding custody or parenting time for the parties' minor child. Instead, the trial court decided to forego those issues until it received a recommendation and report from the Friend of Court. In August 2012, the FOC report recommended that the parties share joint legal custody, with defendant having full physical custody.¹ In essence, the FOC recommended that the provisions of the temporary order become a permanent part of the judgment of divorce. Although plaintiff objected to this recommendation and asserted that he should have full physical custody, after a hearing, the trial court adopted the FOC recommendation. The trial court entered an amended judgment of

¹ The FOC report did not contain an evaluation of the statutory best interest factors.

divorce in October 2012, which recognizes the temporary order, and then sets forth the substantive provisions of the order.

II. ANALYSIS

Initially, we note that plaintiff's brief fails to present any legal authority, analysis, or factual support for any of his issues on appeal. Thus, we may decline to address the issues raised in plaintiff's appeal because "[a] party cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position," *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (quotation marks and citation omitted), and "[t]he failure to cite sufficient authority results in the abandonment of an issue on appeal," *Hughes v Almena Twp*, 284 Mich App 50, 72; 771 NW2d 453 (2009).

Nonetheless, we will address plaintiff's argument that the trial court erred in failing to consider any of his evidence relating to custody at the September 20, 2012, hearing because plaintiff objected to the FOC's custody recommendation within 21 days, thus preserving the issue for review. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). In a child custody dispute, a trial court's findings of fact are reviewed against the great weight of the evidence, a trial court's discretionary decisions are reviewed for an abuse of discretion, and questions of law are reviewed for clear error. *Frowner v Smith*, 296 Mich App 374, 380-381; 820 NW2d 235 (2012).

MCL 552.507(4) and (5) permit judicial review of FOC recommendations:

(4) The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the 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.

(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.

Likewise, MCR 3.215(F)(1) and (2) provide guidance regarding the trial court's discretion at the judicial hearing:

(1) The judicial hearing must be held within 21 days after the written objection is filed, unless the time is extended by the court for good cause.

(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:

(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.

In this case, after the FOC report was issued, plaintiff filed two separate motions challenging the report and on September 20, 2012, the trial court held a hearing on plaintiff's motions. At the September 20, 2012, custody hearing, plaintiff reiterated his belief (expressed at the trial on property issues) that defendant committed perjury, and thus the trial court decided to limit plaintiff's live evidence presentation. While the trial court limited plaintiff's evidence presentation, the record reveals that the trial court listened to and addressed plaintiff's argument. Consequently, the trial court did not abuse its discretion because plaintiff was afforded the opportunity to present live evidence, and the court merely imposed reasonable restrictions on plaintiff. See MCL 552.507(5)(b) and MCR 3.215(F)(2)(d).

Additionally, while earlier versions of MCL 552.507 and MCR 3.215 permitted the trial court

to base its review solely on the FOC record only if the parties consented . . . amendments of the statute and court rule have lifted this restriction, and the trial court is no longer prevented from considering an FOC report or recommendation if it also allows the parties to present live evidence. [*Dumm v Brodbeck*, 276 Mich App 460, 465; 740 NW2d 751 (2007).]

Here, the trial court held a hearing and plaintiff was given the opportunity to present evidence to the trial court. Therefore, the trial court properly considered the FOC custody recommendation.

However, while a trial court may consider a report from the friend of the court in making its determinations, the court must reach its own independent conclusions on the evidence received. *Truitt v Truitt*, 172 Mich App 38, 42-43; 431 NW2d 454 (1988). A custody decision must be based on a court's own hearing and cannot be based on hearings or conclusions reached by the friend of the court. *Id.* at 43. In other words, "[t]he Child Custody Act *required* the circuit court to determine the best interests of the children before entering an order resolving the custody dispute." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). (Emphasis in the original.) This includes an evaluation of the statutory best interest factors, as well as

preliminarily a determination whether there is an established custodial environment with one or both parents before making *any* custody determination. MCL 722.27(1)(c); *Thompson v Thompson*, 261 Mich App 353, 361 n 2; 683 NW2d 250 (2004); *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991).

From our review of the record neither the FOC nor, more importantly, the circuit court, ever made findings regarding an established custodial environment or on the best interest factors. However, we are unclear whether this was a deliberate forbearance, or simply an error on the part of the court. As to the former, the trial court stated at the September 20th hearing that “as far as custody we are in the midst of an ongoing procedure to try and resolve the custody issues,” thus suggesting that what the court ordered on September 20, 2012, (and incorporated into the amended judgment) was only temporary. And, as we noted, the amended judgment makes note that there was a temporary order of custody. On the other hand, the amended judgment’s actual language regarding custody reads as though the provisions are final, to the extent these matters are ever final. Accordingly, we remand to the trial court to indicate on the record or in writing whether the custody and parenting time provisions are final judgments of the court. If they are, those portions of the amended judgment are vacated as the trial court did not articulate any findings as required by the Child Custody Act, and the trial court should then proceed to do so. If the provisions are meant to be temporary, we encourage the trial court to determine the issues promptly under the standards noted above.²

Affirmed in part and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

² Because the trial court is more familiar with this case and the parties than is this Court, rather than simply vacate we have given the trial court the opportunity to make clear what its intentions were in these provisions of the amended judgment.