

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT EIFLER,

Plaintiff-Appellee,

v

SUSAN EIFLER,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 267395

Calhoun Circuit Court

LC No. 96-000344 DM

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant, Susan Eifler, appeals as of right a trial court order regarding physical and legal custody, parenting time, and child support of the parties' minor child. Because the trial court failed to conduct a proper evidentiary hearing required by MCR 3.215(F)(2), we vacate the trial court's order granting custody to plaintiff and remand for the appropriate evidentiary hearing.

Defendant gave birth to Tyler Duane Eifler on June 12, 1995. The parties separated soon after Tyler's birth and divorced in February 1997. The divorce judgment awarded sole physical custody of Tyler to defendant, and ordered both parties to share joint legal custody. The court awarded plaintiff, Robert Eifler, liberal parenting time. In July 1998, plaintiff moved to obtain physical custody of Tyler. The court dismissed the motion with prejudice and the custody orders from the divorce judgment remained in effect. In May 2004, plaintiff again moved for a change of custody and both parties stipulated to a Friend of the Court (FOC) investigation regarding custody and parenting time. After the FOC filed its report and recommendation, a referee held a three-day hearing over a period of five months. The referee determined that a change in physical and legal custody was in Tyler's best interest. The trial court entered an order changing custody in favor of plaintiff. Defendant then moved to set aside the referee's recommendation. After a brief hearing, the trial court entered a final order affirming the custody recommendation. This appeal followed.

On appeal, defendant asserts that the trial court erred by not granting an appropriate de novo hearing following her objection to the referee's proposed order. Defendant contends that the trial court did not conduct a proper hearing after she moved to set aside the referee's recommendation. She asserts that instead, the trial court simply used the referee's notes and written opinion when it reviewed the referee's decision. It is her position that because the trial court did not review the transcripts from the three referee hearings, or allow for the presentation

of live evidence, the trial court denied her the de novo hearing to which she is entitled. Plaintiff responds arguing that the trial court was not required to hold a de novo hearing because defendant's objection to the entry of the referee's recommendation was both withdrawn and untimely, and also because defendant did not properly object to the referee's findings of fact.

Indeed, if either party objects to a referee's report, the trial court must hold a de novo hearing. *Cochrane v Brown*, 234 Mich App 129, 131-134; 592 NW2d 123 (1999). The trial court may not base its decision on its review of the file and transcripts of the FOC hearing without conducting its own de novo hearing. *Id.* However, if both parties consent, the judicial hearing may be based solely on the record of the referee hearing. *Id.* at 133-134. MCR 3.215 provides instructions pertaining to referees in domestic relations cases and deals in relevant part with judicial hearings following the issuance of a referee's opinion. MCR 3.215(E)(4) permits a party to obtain a judicial hearing "on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection and notice of hearing within 21 days after the referee's recommendation for an order is served on the attorneys for the parties." The court rule further provides:

The objection must include a clear and concise statement of the specific findings or application of law to which objection is made. Objections regarding the accuracy or completeness of the recommendations must state with specificity the inaccuracy or omission.

And, MCR 3.215(F)(2) provides:

(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.

Further, MCL 552.507, which designates the powers and duties of referees, states in relevant part:

(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.

We are called on to review the procedural posture of this case in order to determine whether the trial court was required to hold a de novo hearing and allow defendant to present evidence to the trial court. The record reveals the following timeline:

1. The referee filed its Opinion and Recommendation with the trial court on October 20, 2005. Adhering to the recommendation, the court entered the Order Regarding Custody, Parenting Time, and Child Support the same day.
2. On November 7, 2005, defendant files a Motion to Set Aside Referee's Recommendation as well as a notice of hearing. The motion was brief and did not specifically object to particular findings of fact.
3. Plaintiff filed his Answer to Motion to Set Aside Referee's Recommendation on November 15, 2005.
4. Defendant filed her Amended Motion to Set Aside the Referee's Recommendation on November 28, 2005. Defendant objected to the referee's recommendation on the grounds that the referee improperly applied the law and relied too heavily on the outdated friend of the court investigation. More specifically, defendant disputed many of the findings regarding the child custody factors, including factors a, b, c, e, and h, MCL 722.23, and claimed that an established custodial environment did exist.
5. The trial court held it's a hearing on the motion on December 5, 2005.
6. Also on December 5, 2005, after the hearing concerning setting aside the referees decision, the court entered a final order entitled Order Regarding Custody, Parenting Time, and Child Support affirming the referee's recommendations.

The timeline and content of the pleadings filed by defendant in this matter belie plaintiff's assertions that the trial court was not required to hold a de novo hearing due to defendant's alleged procedural errors. The record displays that defendant partially satisfied MCR 3.215(E)(4) when she filed a timely written objection and notice of hearing within 21 days after the referee's recommendation. And by operation of the amended and supplemental pleadings rules, MCR 2.118(A)(1), together with the rule allowing the relation back of amendments, MCR 2.118(D), plaintiff's timely filing of her amended motion brought her into full compliance with the specificity requirements of MCR 3.215(E)(4).

Thus, having satisfied the procedural requirements for obtaining a judicial hearing on the matter, the trial court was required to grant defendant the opportunity to present live evidence. MCR 3.215(F)(2). During the hearing on December, 5, 2005, defendant's counsel even verbally requested the court to entertain the presentation of evidence when it stated: "my hope would be actually to conduct a new hearing, that the Court hear the evidence for itself, and see whether or not it felt it was clear and convincing." Clearly, defendant sought the opportunity to present evidence to the trial court. But at no point during the December 5, 2005 hearing did defendant have the opportunity to present new evidence or live evidence to the trial court on facts or conclusions to which she objected. Instead, the court stated in part as follows:

In preparing for today's case, I wanted to say that the Referee did a thorough job by hearing the case on at least three different dates that I'm aware of. Both parties were represented by counsel at that hearing that was conducted over a three-day period. The court believes that that opportunity was a fair opportunity for each party to be heard. The case was carefully and fully presented by the parties at those three sessions. We have a very experienced Referee with the court, who made extensive notes, which I have reviewed in anticipation of today's motion. I also have reviewed all of the exhibits and documents that were presented at the three day Referee hearing, including the Friend of the Court investigation - the report of that investigation that was admitted at the Referee's hearing Having reviewed the Referee's notes, having looked at each of the exhibits, I - there is no other conclusion that I would have come to that differs from the Referee's conclusion in this matter.

We are certainly mindful of the broad powers of the court to limit the evidence provided and even prohibit the presentation of certain non-objected to evidence, but when the procedural requirements are satisfied, the court may not deprive defendant of her opportunity to offer the same evidence, as well as supplemental evidence, regarding the facts to which she objected. MCR 3.215(F)(2). The trial court never heard the evidence for itself with respect to the disputed factors, a, b, c, e, and h, MCL 722.23, or the issue of an established custodial environment. It also failed to review the transcripts, and it merely relied on the partial notes of the referee. The trial court did not meet the requirements in MCL 552.507(5), which provide that a hearing is de novo if the parties had a full opportunity to present and preserve evidence at the referee hearing and, for findings to which the parties objected, the parties are afforded the opportunity to offer the same evidence previously offered to the referee and to supplement that evidence with evidence that could not have been offered to the referee.

Vacated and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio