STATE OF MICHIGAN

COURT OF APPEALS

ROBERT WAYNE BARNETT,

Plaintiff-Appellant,

v

AMY LYNN CLEMMER,

Defendant-Appellee.

UNPUBLISHED
July 17, 2008

No. 283322
Genesee Circuit Court
Family Division
LC No. 06-268806-DP

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order making a referee recommendation a permanent order, and thereby granting the parties joint legal and physical custody of their minor child. He contends that he was entitled to a de novo hearing, that joint custody is not appropriate because the parties are unable to agree on important decisions regarding the child's education, and that the trial court erred in failing to consider the factors set forth in MCL 722.31. We affirm.

Plaintiff and defendant are both involved with their partners in long-term same-sex relationships. Defendant and her partner approached plaintiff in approximately 2003 about becoming the father of her child, and plaintiff eventually agreed after discussing the situation with his partner.[1] The child was born on November 28, 2004.[2] Since that time, the parties have shared approximately equal parenting time.

Plaintiff filed a complaint for custody on June 22, 2006, alleging, among other things, that defendant had threatened to leave the state with the child and that defendant had eight dogs living in her home which plaintiff believed may have caused the scratch marks he had observed on the child. The trial court entered an ex parte order prohibiting the parties from removing the child from Genesee County. After a hearing spanning several months, the friend of the court

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[1] Defendant became pregnant through a procedure similar to in vitro fertilization.

[2] There is no dispute that plaintiff is the child's father

referee issued a report and recommendation. After a hearing on the parties' objections, the trial court adopted the referee's recommendation and issued an order granting the parties joint legal and physical custody of the child.

Plaintiff first asserts that he was entitled to a de novo hearing after filing objections to the referee's recommendations. We conclude that the trial court's hearing on the parties' objections satisfied the requirement of a de novo hearing.

The Child Custody Act, MCL 722.21 *et seq*., "applies to all child custody disputes and vests the circuit court with continuing jurisdiction." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004); MCL 722.26. Under the Friend of the Court Act, MCL 552.501 *et seq*., the parties to a custody dispute may choose to present their dispute to a referee, but the circuit court retains the duty to independently determine what custody arrangement is in the best interest of the child. *Harvey*, *supra* at 187, 190-192.

Under the Michigan Court Rules, "A party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that has 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 order is served" on the parties' attorneys. MCR 3.215(E)(4). Under MCR 3.215(F)(2), "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." At its discretion, the court may "prohibit a party from presenting evidence on findings of fact to which no objection was filed," or "introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing." MCR 3.215(F)(2)(a), (c).

In addition, MCL 522.507 provides, 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 the motion of the court. The request of a party shall be made in writing within 21 days after the recommendation of the referee is made available to that party.
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> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and of the court if the following conditions are met:
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> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
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> (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.
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> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:

(a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.

(b) A new decision based only on evidence presented at the time of the de novo hearing.

(c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

In *Dumm v Brodbeck*, 276 Mich App 460; 740 NW2d 751 (2007), the trial court conducted a hearing on the defendant's objections to the referee's recommendations on the same day as the referee hearing pursuant to MCR 3.215(E)(7). On appeal, the defendant challenged the trial court's decision to adopt the friend of the court recommendations over his objections and without conducting an evidentiary hearing. *Id*. at 463-464. However, this Court found that the judicial hearing held the same day as the referee hearing satisfied the requirement of a de novo hearing, MCL 552.507(4), because the trial court heard argument from both parties and the referee, there was no evidence to support the defendant's allegation that he was prevented from presenting evidence before the referee, and "neither asked to present live evidence before the trial court nor presented any documentation or affidavits to support his allegations." *Id*. at 464-466.

In this case, the referee issued her report and recommendations on September 17, 2007. On October 5, 2007, plaintiff filed, and served on defendant, written objections to the referee's recommendations and a request for a de novo hearing. Plaintiff was therefore entitled, under MCL 552.507(4) and MCR 3.215(E)(4), to a de novo hearing before the circuit court. However, the court was permitted to base its decision entirely on the record of the referee hearing, as long as it gave the parties the opportunity to present live evidence. *Harvey*, *supra* at 464; MCR 3.215(F)(2); MCL 552.507(5)(b), (6). Plaintiff took steps at the close of the referee hearing to preserve his ability, in the event of a subsequent hearing, to call Dr. Daniel Deciechi, defendant's former employer, to rebut testimony that defendant was fired as a result of discrimination. However, at the hearing on the parties' objections to the referee report, plaintiff's only objection regarding Dr. Deciechi was that the referee had failed to address employment records subpoenaed from Dr. Deciechi and admitted at the hearing; plaintiff did not ask to call Dr. Deciechi as a witness. In his written objections, plaintiff also claimed that defendant had quit her job in Indiana subsequent to the hearing and moved to Michigan, but planned to move to Indiana again. However, he did not repeat this allegation at the hearing and "neither asked to present live evidence before the trial court nor presented any documentation or affidavits to support his allegations." *Dumm*, *supra* at 464-466. Thus, as in *Dumm*, the trial court properly reviewed the record of the referee hearing and properly relied on the referee's recommendations in issuing its order. *Id*. at 466.

Plaintiff next argues that the referee and the trial court abused their discretion in granting the parties joint custody of the child because the parties are unable to agree on important educational decisions. We disagree.

In order to be preserved for appellate review, an issue must generally have been raised before and addressed by the trial court. *Brown*, *supra* at 599. Because plaintiff did not argue before the trial court that joint custody was inappropriate because of the parties' inability to

agree on decisions concerning the child's education, and the trial court did not address the issue, it is unpreserved. Therefore, our review is for plain error. *Rivette v Rose-Molina*, 278 Mich App 327; ____ NW2d ____ (Docket No. 280922, issued March 27, 2008), slip op, p 1.

MCL 722.26a provides, in part:

> (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
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> (a) The factors enumerated in section 3.[3]
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> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. [Footnote added.]

In this case, the trial court adopted the referee's report and recommendations, and the referee did at least consider the parties' general ability to cooperate. In its findings on best interest factor (j) (willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent), the referee noted:

> The parties cooperated regarding issues pertaining to [the child] before the plaintiff filed his petition in June of 2006. The [sic] considered themselves to be a single family unit, although they maintained separate houses. They held extensive family meetings regarding important matters regarding [the child] and the plaintiff even assisted the defendant financially when she needed it.

In addition, plaintiff testified at the referee hearing that, during the first several months of the child's life, when she required a lot of specific care and close attention, the parties and their partners cooperated and were always flexible if one needed to switch days. He testified that the parties always tried to do what was best for the child. Thus, while there was testimony that indicated communication and cooperation problems between the parties, especially regarding defendant's move to Indiana and her dogs, the record demonstrates the historical ability of the parties to cooperate in the best interests of the child. See *Shulick v Richards*, 273 Mich App 320, 326-327; 729 NW2d 533 (2006) (concluding that the trial court's finding that the parties could cooperate on important decisions concerning the welfare of the children was not against the great weight of the evidence where the testimony showed that, despite periodic problems and some personal animosity, the parties were generally able to cooperate for the best interests of the children, and had recently displayed a willingness to communicate).

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[3] MCL 722.23

Perhaps more importantly, there is little evidence that the parties' disagreements pertain to important child-rearing issues. Plaintiff's only claimed disagreement involves defendant's opposition to plaintiff's plan to enroll the child in an early childhood development program at the University of Michigan-Flint. However, defendant did not oppose enrolling the child in the program because of a dispute about the proper way to educate the child. Rather, she seems to have opposed it primarily because it would interfere with her parenting time.[4] In fact, she looked into another early childhood development program in Indianapolis that would accommodate a 9 to 12 day rotating parenting time schedule. Thus, while the record suggests that the parties have had some problems, it does not reveal a fundamental disagreement on important child-rearing decisions. Under the circumstances, it was not plain error for the court to grant the parties joint custody. See *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987) (holding that the trial court properly denied the defendant's petition for sole custody, in part because the parties' inability to cooperate centered on disputes regarding custody times and personal animosity, rather than "basic child-rearing issues.")

Plaintiff further argues that the trial court erred in failing to consider the factors set forth in MCL 722.31(4), and in failing to indicate in its order the legal residence of the child. We disagree.

Under MCL 722.31(1), where a child's custody is governed by court order, the court must consider the factors set forth in MCL 722.31(4) before permitting a parent to change the legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the custody order was issued. In this case, however, the child's custody was not governed by court order. Rather, the parties had followed an informal parenting time arrangement since the child's birth. In response to plaintiff's request for ex parte relief, the court's June 22, 2006, order prohibited the parties from removing the child from the state and "ordered that the parties['] current schedule of contact with the child shall continue." The order did not purport to make a custody determination or even use the word "custody." Therefore, the trial court did not clearly err in failing to address the factors set forth in MCL 722.31(4).

Plaintiff next argues that remand is required because the order of the trial court from which plaintiff appeals does not fulfill the requirement of MCL 722.31(5) that all custody orders establish the child's legal residence. MCL 722.31(5) provides:

> (5) Each order determining or modifying custody or parenting time of a child shall include a provision stating the parent's agreement as to how a change in either of the child's legal residences will be handled. If such a provision is included in the order and a child's legal residence change is done in compliance with that provision, this section does not apply. If the parents do not agree on such a provision, the court shall include in the order the following provision: "A parent whose custody or parenting time of a child is governed by this order shall

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[4] Defendant testified that enrolling the child in the program would take half of defendant's parenting time.

> not change the legal residence of the child except in compliance with section 11 of the "Child Custody Act of 1970," 1970 PA 91, MCL 722.31."

The trial court's order adopting the recommendations of the referee and granting the parties joint custody provides, in relevant part:

> IT IS FURTHER ORDER AND ADJUDGED that a parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act of 1970.

Contrary to plaintiff's argument on appeal, nothing in MCL 722.31(5) requires a custody order to contain a provision specifically establishing the legal residence of the child. In addition, MCL 722.31(1) provides that "A child whose parental custody is governed by court order has, for purposes of this section, a legal residence with each parent." Therefore, because the child's custody is now governed by court order, she has a legal residence with each parent. Moreover, in the absence of an agreement between the parties regarding how a change in either of the child's legal residences will be handled, the above-quoted provision of the order satisfies the requirement of MCL 722.31(5) that each custody order include a provision regarding a change of the child's legal residence. Therefore, the order complies with the requirements of MCL 722.31(5).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio