

STATE OF MICHIGAN
COURT OF APPEALS

BRAD LEE WERNETTE,

Plaintiff-Appellant,

and

MILDRED FINCH,

Intervening Plaintiff/Appellee,

v

JESSICA MARIE WERNETTE,

Defendant-Appellee.

UNPUBLISHED

January 4, 2011

No. 293309

Ionia Circuit Court

LC No. 08-011153-DZ

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order upholding the recommendation of a Friend of the Court referee to deny plaintiff's motion for grandparenting time. We affirm.

Tragically, plaintiff's son, the father of the children involved, committed suicide. Initially, defendant, the mother of the children, allowed plaintiff to see the children following their father's death, but after some conflict between plaintiff and defendant, that visitation was discontinued at defendant's direction. Plaintiff sought a court order awarding him continued grandparenting time with the children, and a hearing was held before a referee. Based on the referee's recommendation, the circuit court entered an order denying plaintiff's motion. Plaintiff subsequently objected, and a hearing was held in the circuit court. Plaintiff's request for ordered grandparenting time was again denied, and plaintiff appealed to this Court.

Plaintiff argues that the decision to deny him grandparenting time was against the great weight of the evidence. "Orders concerning [grand]parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Keenan v Dawson*, 275 Mich App 671, 679; 739NW2d 681 (2007), quoting *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005) (alteration by *Keenan* Court). "A trial court's findings of fact are not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction." *Keenan*, 275 Mich App at 679-680.

Plaintiff asserts that common sense should have led the court to see that it would be damaging to the children to cut off his relationship with the children, already emotionally impacted by their father's death. This argument is unpersuasive. First, MCL 722.27b(4)(b) places the onus on plaintiff to offer proof that denial of grandparenting time would "create[] a substantial risk of harm to the child[ren's] mental, physical, or emotional health." A mere appeal to common sense does not satisfy this burden. Indeed, § 7b(4)(b) creates a presumption that denial of grandparenting time does *not* create such a risk, implying that the common sense of the matter, in general, is contrary to the position advanced by plaintiff.¹ Even when the presumption is overcome, visitation is only ordered in those situations where the court decides it is in the best interests of the children. MCL 722.27b(6).

Also, we note that the denial of court-ordered grandparenting time is not equivalent to the complete denial of the right to see the children. It is true that the circumstances seem to indicate that at this time defendant is unlikely to allow visitation. However, circumstances can change. It is not that the court is preventing visitation—the court is simply not ordering that it occur.

As for the evidence adduced, plaintiff offered only lay witnesses and did not offer any testimony from school personnel or others trained in children's behavior or mental health to show that the children had suffered or would suffer as a result of his absence from their lives. Plaintiff attempts to advance his argument by characterizing defendant's and intervening plaintiff's testimony as "self-serving" and deceptive. However, credibility is a matter for the referee and trial court to consider, not this Court on appeal. See *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). Also, while plaintiff's connection to the children's father is undeniable, the assertion that he is the only link to keeping alive the father's memory is conjectural and self-serving in itself. Clearly, the other parties to this appeal and family members not part of the litigation can foster the memory of the children's father.

Plaintiff argues that the referee erred in allowing admission of evidence of specific events surrounding his criminal record and past violent behavior. Plaintiff contends that the contested evidence was not relevant and that its admission had a prejudicial effect on the decisions of both the referee and the trial court. We find that the referee did not abuse his discretion in allowing the challenged testimony. The decision whether to admit evidence is within a trial court's discretion and will not be reversed unless there has been an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion occurs if the trial court chooses an outcome falling outside a range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

¹ MCL 722.27b(4)(b) states, "In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. . . ." Plaintiff stipulated that defendant was a fit parent.

One of the past incidents involved plaintiff's son. Plaintiff acknowledged that when his son was 16 years old, plaintiff had placed him in a headlock during an argument, and as a result his son suffered a bloody nose. This evidence is relevant to best interests factor (j) (“[a]ny other factor relevant to the physical and psychological well-being of the child,” see MCL 722.27b(6)(j)) in that it shows that plaintiff is not averse to using physical violence in a dispute with a minor living in his home who, according to plaintiff, “wouldn’t live by my rules.” It is also relevant to plaintiff’s moral fitness. See MCL 722.27b(6)(c). With respect to *custodial* best interests factor (f), MCL 722.23(f) (“[t]he moral fitness of the parties involved”), the Michigan Supreme Court has stated the following:

Thus, the question under factor f is not “who is the morally superior adult;” the question concerns the parties’ relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function as a parent. [*Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (emphasis omitted).]

Fletcher provided a nonexhaustive list of “the type of morally questionable conduct relevant to one’s moral fitness as a parent. It includes: verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors.” *Id.* at 887 n 6.

Applying this reasoning to MCL 722.27b(6)(c), the question is whether plaintiff’s conduct “necessarily has a significant influence on how [he] will function as a” grandparent. See *Fletcher*, 447 Mich at 887. Resolving disputes over a failure to follow house rules by placing a minor in a headlock is relevant concerning how plaintiff will function as a grandparent when visiting with his grandchildren, particularly when they are in his home. The same can be said with respect to evidence of the other incidents of violence and plaintiff’s driving record. How plaintiff chooses to resolve disputes and the significant level of violence used, and his past choice to operate a vehicle while impaired, is relevant to how he will function as a grandparent responsible for safeguarding his grandchildren while in his care.

We reject plaintiff’s assertion that the court erred in limiting the extent and duration of live testimony at the hearing held as a result of his filing objections to the decision of the referee. Following the referee’s decision denying plaintiff’s motion for grandparenting time, the circuit court issued an order stating that, pursuant to MCR 3.215, the *de novo* hearing would be “conducted by a review of the transcript of the Referee hearing No additional testimony may be offered by either party unless a proper motion is filed requesting permission.” In response, plaintiff requested that he be permitted to present the same witnesses he had presented before the referee and to cross-examine defendant.

MCR 3.215(F)(2) states:

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.

Defendant argues that the trial court was not required to hear all plaintiff's witnesses, because MCL 552.507 allows the court to impose certain "reasonable restrictions" upon the parties in order to conserve resources. This statute 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 motion of the court. . . .

(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.

(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. [MCL 552.507.]

Under both the court rule and the statute, the opportunity to present live testimony at the de novo hearing is subject to the discretion of the court. The court rule does provide that the

reviewing court must allow the parties to present live witnesses at the judicial hearing, but it also indicates that the court has discretion to prevent the taking of evidence “on findings of fact to which no objection was filed.” MCR 3.215(F)(2)(a). This limitation based on the raising of an objection is mirrored in MCL 522.507(5)(b), which provides that the hearing is de novo provided, in part, that “[f]or 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.” The condition that a party be allowed to supplement evidence regarding a matter objected to is in accord with the court rule’s grant of authority to “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.” MCR 3.215(F)(2)(c). Moreover, the complement to the authority to prohibit the presentation of evidence on a matter not objected to is that the court must allow evidence on a matter objected to, limited by the requirement that an adequate showing be given on why new evidence was not presented at the referee hearing.

We find that, given the objections raised, the court’s response was proper. Plaintiff asserted, as he does on appeal, that the referee’s recommendation was against the great weight of the evidence. He argues that the evidence was clear that (a) there was a strong bond between him and the children, (b) there was no evidence that the children were not properly cared for while with him, and (c) the oldest child was upset when told he could no longer see plaintiff. He also argued that the court’s findings with respect to many of the best-interests factors was erroneous. However, the referee and the court based their decisions on the failure to overcome the presumption that no substantial risk of harm would occur if an order was not issued. Accordingly, although mention of the best-interests factors was made, those findings were not central to the decisions rendered.

The factual findings challenged by plaintiff were either made consistently with his position, or were not actually made and relied on by the referee or the court. The referee concluded that he believed plaintiff loved his grandchildren and had the best interests of the children in mind. Although not a direct statement concerning the existing bond, it supports, not contradicts, plaintiff’s position. Further, the referee stated that best-interests factor (a) favored plaintiff because the children and plaintiff “do have love and affection and emotional ties.” See MCL 722.27b(6)(a). The referee did not conclude that the children were not properly cared for when with plaintiff, nor did he find that the oldest child was not upset because of the lack of contact with plaintiff. Plaintiff may believe that the referee should have given greater attention to these matters, but that is not the standard to be met in order to have live testimony presented. We conclude that there were insufficient objections to specific and pertinent factual findings such that the trial court was obligated to allow the requested live testimony.

Moreover, we note that plaintiff does not explain how being afforded an opportunity to present the same witnesses he presented before the referee would help him meet his burden of proof. Instead, plaintiff asserts that if the trial court had been able to see his witnesses testify in person, it would have decided any questions of credibility in his favor regarding “his close emotional bond” with his grandchildren. As previously stated, however, plaintiff’s burden was to show that the children would suffer a substantial risk of harm to their physical, emotional, or mental health if his requested order was denied, not merely that he had a bond with the children. This was not an issue of credibility, but rather of the quantity and quality of evidence offered by

plaintiff. As the referee noted, plaintiff did not offer an expert witness that could have substantiated his argument that the children would suffer a substantial risk of harm to their emotional or mental health if they were cut off from plaintiff. Plaintiff's witnesses did not address this point, and presumably would not have done so before the circuit court.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher