

STATE OF MICHIGAN
COURT OF APPEALS

CAJ,

Petitioner-Appellee,

v

KDT,

Respondent-Appellant.

FOR PUBLICATION

December 9, 2021

9:00 a.m.

No. 355433

Kent Circuit Court

LC No. 20-005220-PH

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

In this nondomestic ex parte personal protection order (PPO) case, respondent, KDT, appeals as of right the trial court order denying his motion to terminate the PPO granted to petitioner, CAJ, and his request for a review of the referee’s decisions regarding the PPO. We vacate the trial court’s orders granting an ex parte PPO and denying respondent’s motion to terminate the PPO, and we instruct the trial court to amend its procedures regarding nondomestic PPOs consistent with MCR 3.700 and other governing rules consistent with this opinion.

I. BACKGROUND

Petitioner and respondent are neighbors with an exceptionally contentious relationship. On August 3, 2020, petitioner sought an ex parte nondomestic PPO against respondent for what she deemed harassing and intimidating behavior by respondent under MCL 600.2950a(1).

On August 3, 2020, the trial court reviewed and granted petitioner’s request for an ex parte PPO. The order did not include specific findings or reasoning as to why the ex parte PPO was issued by the court, even though judicial findings are statutorily required pursuant to MCL 600.2950a, as well as mandated by MCR 3.705(a)(2).

A. MOTION TO TERMINATE THE PPO

On August 17, 2020, respondent moved to terminate the PPO. Respondent asserted that petitioner's allegations were false. A proceeding on respondent's motion to terminate was held on September 2, 2020, with a family court referee, not a trial court judge.

The referee presided over a hearing that was more akin to a family court mediation or alternative dispute resolution, as opposed to a formal court hearing. Other than evaluating credibility, the referee made no other factual findings on the record. At the conclusion of the hearing, the referee denied respondent's motion to terminate to the PPO.

On September 9, 2020, the trial court entered an order adopting the referee's denial to terminate the PPO. The order stated, in pertinent part, "It is ordered that the Respondent's Motion to Object or Modify Ex-Parte Personal Protection Order entered by this Court on August 3, 2020, is denied, and the Personal Protection Order shall stay in place for reasons stated on the record." The order stated that it was based on the referee's findings and recommendations. The order authorized respondent to request a hearing challenging the trial court's order within 21 days by filing a motion with the circuit court clerk and friend of the court's office. While the friend of the court (FOC) plays many important roles in helping families in crisis, it is unclear from the record why a party in a nondomestic matter would be required to serve the FOC with a motion to terminate a PPO.

On October 2, 2020, respondent appealed the denial of his motion to terminate the PPO by the referee to the circuit court and requested a de novo hearing.

On October 23, 2020, the trial court denied respondent's motion and affirmed the referee's denial of the termination motion without holding a de novo hearing. The order stated, "This matter having come before the Court pursuant to Respondent's request of a De Novo Hearing pursuant to MCR 3.215(E) regarding Referee Kmetz, on 9/2/2020 ruling regarding a PPO. After review of the transcript, the motion is denied."

B. SHOW CAUSE AND REVIEW HEARING

On August 18, 2020, petitioner filed a motion to show cause for alleged violations of the PPO. A show cause hearing for the alleged PPO violation was held on October 30, 2020. The trial court found, by clear and convincing evidence, that respondent was guilty of civil contempt. After respondent was held in contempt, the trial court held an impromptu "de novo review hearing" on October 30, 2020, despite its earlier "de novo" order denying respondent relief. Neither party had prior notice of the de novo hearing, and consequently, neither had witnesses available to testify. Nevertheless, the trial court held a hearing and again denied respondent's motion to terminate the PPO, essentially affirming its initial ruling. This appeal followed.

On appeal, respondent argues that the trial court failed to comply with the procedures set forth under MCR 3.700 and that the trial court abused its discretion by granting the PPO and denying his motion to terminate the PPO. Respondent also argues that he was not afforded his

procedural due-process rights as a result of the defective procedure utilized by the trial court. We agree.

II. PRESERVATION AND STANDARD OF REVIEW

An issue is preserved if it is raised in the trial court and pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Respondent did not argue that the trial court failed to follow the appropriate procedure in granting or reviewing the PPO below or that the referee lacked the authority to hear PPO proceedings. Therefore, this issue is unpreserved.

“A PPO constitutes injunctive relief.” *Brown v Rudy*, 324 Mich App 277, 288; 922 NW2d 915 (2018). This Court reviews a trial court’s decision to grant or deny a PPO, including a respondent’s motion to terminate a PPO, for an abuse of discretion. *Id.* “An abuse of discretion occurs when the court’s decision falls outside the range of principled outcomes.” *Id.* “A court necessarily abuses its discretion when it makes an error of law.” *TM v MZ (On Remand)*, 326 Mich App 227, 235-236; 926 NW2d 900 (2018) (cleaned up). A trial court’s findings of fact underlying a PPO ruling are reviewed for clear error. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). “The clear-error standard requires us to give deference to the lower court and find clear error only if we are nevertheless left with the definite and firm conviction that a mistake has been made.” *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 386–387; 853 NW2d 421 (2014) (cleaned up). “The interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation.” *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012). “Whether due process has been afforded is a constitutional issue that is reviewed de novo.” *Elba Twp v Gratiot Co Drain Comm’r*, 493 Mich 265, 277; 831 NW2d 204 (2013). Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). “Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings.” *Id.* at 9.

III. PROCEDURE FOR NONDOMESTIC PPO PROCEEDINGS

Respondent first argues that the trial court utilized improper procedure and did not comply with MCR 3.705 and MCR 3.707, and further challenges the authority of the referee to hear nondomestic PPO proceedings. Respondent also asserts that the procedural error violated his due-process rights and created an error requiring reversal. We agree.

The trial court failed to comply with the proper procedure for nondomestic PPO proceedings as required under subchapter 3.700 of the Michigan Court Rules. Subchapter 3.700 of the Michigan Court Rules governs the procedures of personal protective orders. MCR 3.705(A) provides:

- (1) The court must rule on a request for an ex parte order within one business day of the filing date of the petition.
- (2) If it clearly appears from specific facts shown by verified complaint, written petition, or affidavit that the petitioner is entitled to the relief sought, an ex

parte order shall be granted if immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued. In a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order. A permanent record or memorandum must be made of any nonwritten evidence, argument or other representations made in support of issuance of an ex parte order.

MCR 3.707(A)(2) provides, in relevant part, “The court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion”

The PPO in this instance was issued ex parte. Accordingly, respondent was entitled to request a hearing challenging the merits of the PPO. A family court referee presided over respondent’s first motion to terminate the PPO, which the referee denied. The referee made no findings of fact. The trial court then entered an order based on the referee’s non-existent findings of fact and conclusions and continued the PPO “for reasons stated on the record.” Subsequently, respondent appealed the denial of his motion to terminate the PPO to the circuit court and requested a hearing. The trial court denied respondent’s motion and request for a de novo hearing and affirmed the referee’s denial of the termination motion without holding a hearing.

Respondent argues that the referee did not have the authority to hear a challenge to the PPO and that the trial court failed to follow the proper procedures for PPO proceedings. Respondent also argues that the trial court abused its discretion by denying his request for a de novo hearing under MCR 3.707(a)(2). Although the trial court subsequently held an impromptu hearing after denying respondent’s request to terminate the PPO, respondent argues that the court failed to apply de novo review. Additionally, respondent asserts that he was not provided notice of the de novo hearing and, as a result, was denied the opportunity to present witnesses. We agree with respondent and further note that the petitioner was also denied an opportunity to present any witnesses as well.

The trial court’s October 23, 2020 order suggests that the referee acted under the authority of MCR 3.215(E). Subchapter 3.200 of the Michigan Court Rules governs domestic relations actions and applies to:

(1) actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, support under MCL 552.451 *et seq.*, or MCL 722.1 *et seq.*, the custody of minors or parenting time under MCL 722.21 *et seq.* or MCL 722.1101 *et seq.*

(2) an expedited proceeding to determine paternity or child support under MCL 722.1491 *et seq.*, or to register a foreign judgment or order under MCL 552.2101 *et seq.* or MCL 722.1101 *et seq.*, and to

(3) proceedings that are ancillary or subsequent to the actions listed in subrules (A)(1) and (A)(2) and that relate to

- (a) the custody of minors,
- (b) parenting time with minors, or
- (c) the support of minors and spouses or former spouses. [MCR 3.201(A).]

MCR 3.215(B) generally provides that domestic relations motions can be initially heard by a referee.¹

MCR 3.705(A) requires that “[t]he court . . . rule on a request for an ex parte order” MCR 3.707(A)(2) also requires the court to “hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion” This Court gives the language of court rules their “plain and ordinary meaning.” *Lamkin*, 295 Mich App at 709 (cleaned up). “If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written.” *Id.* (cleaned up).

This case involved a nondomestic dispute between neighbors. The record does not reflect there was a domestic relations action or issue. Therefore, the trial court plainly erred by allowing the referee to initially hear the PPO proceedings, including respondent’s motion to terminate the PPO, under MCR 3.215. The trial court also erred by denying respondent’s request for a hearing. There is no provision in the court rules or statute that permitted this outcome. There was no basis of authority for the referee to review or provide recommendations on respondent’s motion to terminate the PPO. MCR 3.707(a)(2) clearly states, in relevant part, “the court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion” Therefore, the trial court was required to hold a hearing regarding the termination of the PPO. The trial court denied respondent’s request for a hearing. It subsequently held a “de novo hearing” during the PPO violation hearing. However, the notice provided to respondent regarding the hearing was in relation to the show cause violation hearing, not for a reexamination of the PPO. Therefore, respondent never received the proper notice about the “de novo hearing” on his motion to terminate. As our Supreme Court recognized:

[A]t a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard. To comport with these procedural safeguards, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. [*Bonner v Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014) (cleaned up).]

¹ Under the Michigan Court Rules, referees have authority to hear matters in two areas. Under MCR 3.207, a court may issue “protective orders against domestic violence” as provided under MCR 3.700. MCR 3.207(A). A trial court may refer such matters to a referee under MCR 3.215(B). The rules also provide that, in the family division of the circuit court in cases filed under the Juvenile Code, MCR 3.901(A)(1), “the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than those specified in MCR 3.912(A) and to make recommended findings and conclusions,” MCR 3.913(A)(1).

In addition to failing to follow the proper procedure under MCR 3.700 and because neither party received notice of the “de novo hearing” regarding respondent’s motion to terminate the PPO, the trial court failed to afford respondent and petitioner their procedural due-process rights under the law. In other words, because the process lacked a meaningful time and manner in which to be heard, respondent was deprived of his right to procedural due process.

Respondent has established plain error affecting his substantial rights because the error affected the outcome of the proceedings. *In re Utrera*, 281 Mich App at 8-9. The trial court, not the family court referee, was required to rule on the ex parte PPO petition, MCR 3.705(A), and hold the requested termination hearing, MCR 3.707(A)(2). Therefore, the court erred by allowing the referee to do so and by denying respondent’s request for a hearing regarding his motion to terminate. Additionally, we note that although the trial court signed the ex parte PPO order, it failed to comply with MCR 3.705(A)(2), which requires the court to “state in writing the specific reasons for issuance of the order.” The order contains no such reasoning. Further, respondent was entitled to notice of the trial court’s de novo review of the PPO at the show cause hearing. See *Bonner*, 495 Mich at 235.

MCR 2.613(A) provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Because respondent was not properly afforded the opportunity to be heard by the trial court for his motion to terminate as required by the court rules, the trial court should have, as an initial matter, heard respondent’s motion to terminate the PPO. Further, because the trial court also failed to comply with MCR 3.705(A)(2), we vacate the PPO for the court’s error in failing to comply with the procedures set forth under MCR 3.700.

Because we find that the process described above was defective and violative of the governing statutory provisions and court rules, we need not address the remaining issues raised by respondent.

We appreciate the challenges trial courts face with respect to time guidelines, as well as the unique and sometimes frightening facts that petitioners may present when they request PPOs. We do not take those circumstances lightly. There are instances where ex parte relief is necessary. There are also instances when a respondent must and should be held accountable when they have violated the trial court’s order. However, we feel compelled to express concern about a process that fails to comport to the legal requirements of the law.

In conclusion, the trial court abused its discretion by failing to follow the required procedures under MCR 3.700 and other governing rules and statutes as indicated above. The trial court also failed to afford respondent (as well as petitioner) his procedural due process rights because neither party had notice of the de novo review hearing. Therefore, we vacate the trial court’s order denying respondent’s motion to terminate and instruct the trial court to enter an order

terminating the PPO forthwith and to amend its procedures to comply with MCR 3.700 and other governing rules consistent with this opinion.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Thomas C. Cameron

/s/ Michelle M. Rick