

STATE OF MICHIGAN
COURT OF APPEALS

SAFIYA A. KHALID, a/k/a TOLANDA BURTON
CABELL,

UNPUBLISHED
August 13, 1999

Plaintiff-Appellant,

v

No. 203958
Washtenaw Circuit Court
LC No. 89-037232 DP

SALEEM KHALID, a/k/a GREGORY ROLAND
LEE,

Defendant-Appellee.

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff, proceeding in propria persona, appeals of right from the May 28, 1997 circuit court order granting defendant temporary physical custody of the parties' minor child on an emergency basis and denying plaintiff visitation until further order of the court, pending completion of an evidentiary hearing and referral to the friend of the court. We affirm in part and reverse in part.

I

In accordance with § 8 of the Child Custody Act, MCL 722.28; MSA 25.312(8), we review a trial court's findings of fact under the "great weight of the evidence" standard, and must affirm the court's findings unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). We review discretionary rulings under a "palpable abuse of discretion" standard, and questions of law for clear legal error. *Id.* at 879, 881.

Some of plaintiff's challenges seem to be predicated on the incorrect premise that the challenged circuit court order constituted a final judgment changing custody from plaintiff to defendant. The record is clear, however, that the circuit court's order temporarily placed Hasan, who at the time of the hearing had been in a juvenile home for over a week as the result of alleged neglect,¹ with defendant "on an emergency basis" pending referral to the friend of the court and an evidentiary hearing on custody. Plaintiff's arguments that an established custodial environment existed with her and that there was not a change of circumstances to warrant a change in custody are appropriately addressed at the scheduled

evidentiary hearing.² Procedurally, the circuit court had the authority to issue the order, notwithstanding the earlier child protective proceeding in the Wayne County Probate Court, see MCR 3.205(A), which, in any event, was dismissed for reasons including lack of jurisdiction. See n 1, *supra*. Substantively, the circuit court had authority to issue the order under MCL 722.27(1)(f); MSA 25.312(7)(1)(f), which provides in pertinent part:

(1) If a child custody dispute has . . . arisen incidentally from another action in the circuit court or an order of judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

* * *

(f) Take any other action considered to be necessary in a particular child custody dispute.

The events immediately preceding issuance of the circuit court's order began with Hasan's disappearance while in plaintiff's custody. The child apparently left the building at which plaintiff was conducting business and walked several blocks to his father's office. His father was not there and Hasan became locked in the office, apparently inadvertently, overnight. His father retrieved him and the parties had a physical altercation that resulted in police intervention.

The police report of that altercation led to the filing of a neglect petition on May 18 or 19, 1997. The report stated in pertinent part that the police received information from defendant and Hasan "that the mother may harm the child as reprisal of wanting [sic] to be with the father. Both the father and the son mentioned of [sic] previous harm inflicted by the mother after an altercation with the father." At a May 19, 1997 hearing, the probate court authorized the neglect petition, both parties denied neglect, plaintiff opposed placing Hasan with defendant, neither party opposed placing Hasan with a suitable relative or in a suitable facility but neither suggested such a relative, and Hasan was placed in foster care, at a juvenile facility. A pretrial hearing was set for June 17, 1997. The parties and Hasan each were represented by appointed counsel in the probate court. Defendant's probate court counsel was not the same attorney as represented defendant in the circuit court, and plaintiff represented herself in circuit court.

On Hasan's counsel's petition, the probate court dismissed the underlying neglect petition on May 23 or 24, 1997, see n 1, *supra*, following a hearing at which (appointed) counsel for plaintiff and Hasan, but not defendant, were present. It is unclear from the record why Hasan remained in foster care following dismissal of the neglect petition.

The May 27, 1997 circuit court hearing on defendant's motion for custody/parenting time was short. Defense counsel presented her argument and documentary evidence, and plaintiff, who appeared in propria persona, responded. Defense counsel argued:

The Court issued a custody visitation order in 1993 Plaintiff mother was awarded primary possession and the Defendant Father ordered specific visitation schedule [sic].

We believe that the child has not been attending school and has no residential address and that it would be in his best interest to live with his father at this time.

In addition, there's every indication the child has a strong preference at this time to live with his father. We subpoenaed records from the Ann Arbor Public Schools to confirm our suspicions that the Plaintiff had either failed to enroll or retain the minor child in school and I received today from the public school, school court liaison officer that the child has been enrolled but he had not attended school since October 16, 1996. I have a copy of this letter for Ms. Khalid or Ms. Cabell and for the Court.

* * *

The letter³ not only indicates the child has not attended school since October 16, 1996 but they [sic] have no way of really locating the mother because of her failure to provide them with a residential address. They don't know where she lives, we don't know where the child has been living for quite some time and we think that it's detrimental to his best interests to be allowed to – for her to have custody.

Now, during the week of May 16, just a week or so ago, apparently the child ran away from the Plaintiff to the father's office in Detroit when the mother and child were in Detroit. And she filed a missing persons [sic] report in response to this. When my client, Mr. Khalid called his office on or about May 17th to retrieve messages from it, his son answered the phone and the father picked him up, took him to the police station because he was aware that there was a missing persons [sic] report filed. The police retained the child, he was taken to Juvenile Court, I believe last Monday and was put in an emergency shelter, the Don Bosco Home for Boys, based on the mother's alleged neglect.

The child has repeatedly said since then that he wishes to live with the father, he has said it before, he has said it since, consistently. As far as I know the child is still detained in an emergency shelter. He's been there for eight days now. We're asking that he be released from the shelter as this Court has continued the jurisdiction over this child because of this case. And we would like an order, number one, that schedules an evidentiary hearing in this matter but first I think we need a referee hearing on a rather expedited basis so we'd like a Friend of the Court referral and an evidentiary hearing scheduled.

We would like pending completion of the evidentiary hearing that the Defendant father have temporary possession of the child and that the mother not have parenting time based on what we've stated to the Court.

If the mother regains possession of the child from the home in which he has been sheltered on an emergency basis, we would like an order that she has to immediately turn the child over to the father. If the child continues to be at the Don Bosco Home for

Boys then we would like the order to provide that it shall release the child to the father and thereby modifying any Wayne County Probate Court orders accordingly.

We also would like this matter, the juvenile matter transferred to the probate court in Washtenaw County because clearly mother lives in Washtenaw County, this is a Washtenaw County matter, I think it would be appropriate for this Court to exercise its jurisdiction over this matter so that there's one court that is dealing with this child.

Plaintiff responded that the City of Detroit was investigating her son's disappearance and that if the circuit court was going to consider that matter in ruling on the custody issue, "then at least there should be testimony given by the City of Detroit" to the effect that defendant did not have proper custody of Hasan when he retrieved him from his office. Plaintiff argued that the record showed that defendant had not exercised his regular visitation under the 1993 order, had neglected Hasan, owed \$11,000 in child support, and was a "deadbeat dad." She argued that defendant had physically attacked her after retrieving Hasan from his office, that she had obtained a personal protection order because of defendant's violence, and that she had been represented by Neighborhood Legal Services because she could not afford an attorney. Plaintiff disputed that defendant was married, arguing that he had represented to the court in 1993 that he was divorced. Plaintiff argued that the court should not overturn previous rulings, and that if the court was going to

make an interim order of anything your Honor, I would ask that you adjourn this particular motion until the evidence can be reviewed in its total entirety. . . . And if you allow me to subpoena some of these people up here so they can give you testimony as to whether or not, quote, unquote the emergency began with me or whether it began with Saleem Khalid then I think that that would be in the best interests of the child. . . .

. . . . But before anything else, it has to go before the Friend of the Court for consideration on anything else. . . .

In response to defendant's claim that Hasan had not been attending school, plaintiff stated:

. . . . She [defense counsel] doesn't know that he was in the City of Detroit Public Schools or any other private schools and Ann Arbor Public Schools, as high and mighty as they think they are, are not the only school systems in the whole entire state of Michigan.

So, maybe they did not be over [sic] there because he was not over there because they did not provide Eric Gibbons who I think you know, against the public trial that was on that issue, since I do not have a right to go before Clague Middle School and I think any other private school and other etcetera schools that Hassan [sic] may still have been attending should be considered in reference to an evidentiary hearing.

And that all that evidence be presented before the Court. I will ask that any biases that you may have in reference to me not be set aside in anything else, the \$300, all that

other stuff that you put out before that in reference to me disqualifying you as a judge, those reasons are . . . still standing. And still factual. . . . right now they have no concrete evidence, no testimony, no affidavits, nothing to present before this Court than [sic] any emergency hearing, anything else in reference to my child's endangerment is a factor based on me. And I will ask that you consider all this information and at least review it. . . .

Plaintiff did not address defendant's argument that she not be allowed visitation in the interim and apparently was not aware of the neglect petition's dismissal, as she did not raise it at the circuit court hearing.

The following colloquy ensued:

THE COURT: Where is your minor son at this point?

MS. KHALID: My son is currently in the foster care home in Wayne County based on the order of the court in probate in Wayne County.

THE COURT: Thank you. This issue did come up last week when Ms. Fink was here and alerted me that there was a juvenile court proceeding. Since then I have consulted with Judge Francis, Judge Francis and I are both very concerned of the welfare of the minor child and that's our immediate overriding concern over the concerns of any of the adults.

We are in agreement that this court does have jurisdiction, meaning the Washtenaw Count [sic] court, that the juvenile court proceeding in Wayne County should be transferred here. Judge Francis and I will consult and one of us will handle both these matters so we don't have conflicting orders. . . . One of us will hear these issues.

In the interim, I am extremely concerned for the welfare of the child. Being in the Don Bosco Home for Boys in Wayne County cannot be in his best interest. And I am therefore in the interim, because these are truly emergency circumstances, we have this child in foster care setting, I'm going to grant temporary, it's not binding, temporary custody to the father. We will set this up for a Friend of the Court hearing. Ms. Khalid, I'm asking that you go downstairs and get your hearing date. If you refuse to do it we'll have to proceed without you. And then we'll set it up for an evidentiary hearing.

II

A hearing is required before custody can be changed on even a temporary basis, *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991);⁴ MCR 3.210(c), although the parameters of such a hearing apparently have not been set. See *Schlender v Schlender*, __ Mich App __; __ NW2d __ (Docket No. 208285, issued April 9, 1999) (Kelly, J., concurring).

This is a difficult case. Although a hearing was held on defendant's motion for custody/parenting time, it was abbreviated. However, plaintiff had opportunity to respond to defendant's allegations and, even taking into account that plaintiff was representing herself, we conclude that she did not adequately refute defendant's documentary evidence supporting: that Hasan had not attended the Ann Arbor public school in which he was enrolled since October 16, 1996, and had attended a Detroit school for only a short time before being dropped for non-attendance, that plaintiff had not responded to two letters from the Ann Arbor public schools court liaison requesting meetings to discuss Hasan's attendance, and that Hasan had no fixed residential address. While plaintiff asserts in this Court that she was home-schooling Hasan, she made no such claim in the trial court. Further, while the reason Hasan went to his father's office while in his mother's care is unclear, the fact remains that he did disappear while in her care. Under these circumstances, and given that Hasan had been in foster care for over a week at the time of the circuit court hearing, and that the circuit court, and the parties, from all indications were unaware that the neglect petition had been dismissed several days earlier, we find no error in the circuit court's decision, following a hearing, to temporarily place Hasan with defendant, on an emergency basis, pending the outcome of a full evidentiary hearing. The hearing should have been expedited, however.⁵

Plaintiff also argues that the circuit court abused its discretion when it denied her visitation until further order of the court. We agree, and reverse that part of the circuit court's order to the extent that the issue is not now moot. In the event plaintiff is not currently enjoying visitation, appropriate visitation shall be implemented immediately.⁶

Plaintiff's remaining challenges are not properly before us. Plaintiff's arguments concerning her rights to protect herself, keep her address confidential, and provide home schooling, were not raised before or decided by the circuit court. *Federated Publications, Inc v Board of Trustees of Michigan State Univ*, 221 Mich App 103, 119; 561 NW2d 433 (1997); *Ali v Detroit*, 218 Mich App 581, 587; 554 NW2d 384 (1996). Plaintiff's claim requesting appointment of a guardian ad litem is not properly before us because it was first properly raised after the instant claim of appeal was filed. However, the circuit court should address this request anew on remand as it seems that such an appointment would be useful in this case.

Affirmed in part and reversed in part. No costs to either party. All pending matters below should be expedited. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Martin M. Doctoroff

/s/ Helene N. White

¹ The Wayne County Family Independence Agency's neglect petition dated May 18, 1997 stated that on that day Hasan was in a home or environment unfit to live in because of harm or potential harm by the parent. At a preliminary hearing in the Juvenile Division of Wayne County Probate Court held on May 19, 1997, the referee stated that the matter was before the court "to see if a petition should be

filed or authorized and to see if the child should be further detained outside, in this case, the mother's home." The parties and Hasan were each represented by appointed counsel. Counsel from the Attorney General's office stated that the agency did not want a petition authorized and that it wanted Hasan released to plaintiff. However, counsel representing Hasan objected, stating that the police report contained serious allegations against plaintiff, that he wanted a petition authorized, and that he opposed Hasan's release to plaintiff.

On or about May 22, 1997, counsel for Hasan filed a petition in the Probate Court seeking dismissal of the prior petition, on the basis that after further investigation he had reason to believe that the allegations contained in the police report were not true. The probate court granted the request and dismissed the petition on May 23 or 24, 1997, after a hearing at which Hasan's counsel stated that the petition should also be dismissed on jurisdictional grounds.

In the interim, on May 19, 1997 (although the proof of service is dated May 15, 1997), defendant filed a motion for custody/parenting time, and for psychological evaluation in Washtenaw Circuit Court, which in October 1993 had awarded custody of Hasan to plaintiff and reasonable visitation to defendant. Defendant's motion alleged that plaintiff had failed to comply with the visitation order, failed to enroll or retain Hasan in school, that Hasan was not in school at the present time, that defendant believed plaintiff did not have a stable residence and had been staying in others' homes for a considerable time, that defendant did not know where Hasan resided or whether he had a regular residence, and that defendant was married with children and had a stable residence and employment.

On May 20, 1997, at a circuit court hearing scheduled on unrelated matters plaintiff had filed on May 13, 1997--to disqualify the judge and to increase child support -- plaintiff did not appear nor did counsel for plaintiff. Defense counsel appeared and asked that plaintiff's praecipes be dismissed and that plaintiff be assessed \$300 in costs. Defense counsel also stated that an emergency matter had come up the previous weekend, that Hasan had been in the Don Bosco Home for Boys since the previous weekend, and that she had noticed a hearing for the following Tuesday on defendant's motion for custody, at which time this emergency matter would be raised. Defense counsel asked the circuit court to contact the probate court in the meantime so that Hasan could leave the Bosco Home as soon as possible.

The circuit court stated that it would contact the probate court, and dismissed plaintiff's praecipes for disqualification and child support, noting that it had not received briefs on those matters, and that plaintiff could refile them if she paid defense counsel \$300.

² Defendant states that the evidentiary hearing was ongoing as of the date he filed his appellate brief. Neither party has provided further information.

³ The letter was addressed to defense counsel from the Ann Arbor Public Schools Court Liaison, on Ann Arbor Public Schools letterhead, and stated:

Dear Ms. Fink,

Enclosed is the information you have requested. As evident in the attendance record, Hasan has not attended the Ann Arbor Public Schools since 10-16-96. However, Ms. Khalid has not formally withdrawn Hasan from Clague School.

In attempting to locate Hasan, I obtained information that he may possibly be enrolled in the Detroit Public Schools. I contacted Detroit Public Schools and according to Barbara Strong, student information administrator, (494-1225), Hasan did enroll for a brief period in the Malcolm X Academy. However, he had been dropped for non-attendance.

I attempted to contact Ms. Khalid by mail on 11-18-96 and 4-24-97 requesting a meeting to discuss Hasan's attendance. Ms. Kahalid [sic] did not respond to these requests. The last known mailing address for Ms. Khalid we have is []. I hope this information is helpful. . . .

⁴ In *Mann, supra*, the parties' divorce judgment granted sole physical custody to the defendant and the parties had joint legal custody. Approximately 1 ½ years after entry of the divorce judgment, on the plaintiff's motion to change custody, and based solely on the friend of the court's recommendation, the circuit court entered an "interim" order changing physical custody to the plaintiff, pending a hearing de novo. 190 Mich App at 528. The plaintiff's motion to change custody had alleged that the defendant was living with a man by whom she was pregnant, without being married, that there were "illegal activities" occurring before the children, and that the children's school performance had deteriorated since being in the defendant's custody.

The defendant objected to the friend of the court recommendation to award the plaintiff custody and requested a hearing de novo. The friend of the court recommendation had considered evidence taken at an evidentiary hearing and psychological evaluations of the parties, their mates, and the children. At a subsequent hearing, the circuit court explained that the defendant was entitled to a hearing de novo. The court adopted the friend of the court recommendation and changed physical custody temporarily, noting that it was its practice under these circumstances to adopt and implement the friend of the court's recommendation pending a hearing de novo. Approximately five months later a de novo hearing was held on the plaintiff's motion to change custody, after which the court granted the plaintiff sole legal and physical custody and granted the defendant supervised visitation only.

The defendant argued on appeal that the circuit court's temporary change of custody was improper because an evidentiary hearing was not held and because the court did not make a finding that a compelling circumstance necessitated the change. This Court noted:

Where a party objects to a Friend of the Court recommendation regarding a change in custody, a court cannot permanently change custody without first holding a hearing de novo. Nor can a court permanently change custody on the basis of a Friend of the Court report unless the parties agree that the court can consider the report as evidence. Therefore, the question is whether the trial court may do by a postjudgment interim

order temporarily changing custody that which it cannot do by a final order changing custody. We hold that it cannot.

* * *

A trial court's characterization of its change in physical custody or possession as temporary or interim, pending a final judgment, does not change the fact that the court is changing physical custody of the child. . . .

* * *

. . . in determining whether a temporary change is appropriate or necessary, a hearing must be conducted. Without considering admissible evidence—live testimony, affidavits, documents, or other admissible evidence—a court cannot properly make the determination or make the findings of fact necessary to support its action under § 7(1) of the Child Custody Act. . . .

* * *

We recognize that situations might arise in which an immediate change of custody is necessary or compelled for the best interests of the child pending a hearing with regard to a motion for a permanent change of custody. Such a determination, however, can only be made after the court has considered facts established by admissible evidence—whether by affidavits, live testimony, documents, or otherwise. . . . [190 Mich App at 529-530, 531, 532, 533.]

⁵ Events have transpired in the trial court since the ruling that is the subject of this appeal. It is unclear when plaintiff learned that the probate court matter had been dismissed, and whether she sought to have the instant order vacated or reconsidered on that basis. We review only the order that is the subject of this appeal and we do so based on the record presented at the May 27 hearing.

⁶ The court shall assess the present situation and devise an appropriate visitation arrangement.