STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA LEE, f/k/a VICTORIA POLITO,

Plaintiff-Appellant,

v

JOSEPH POLITO,

Defendant-Appellee.

UNPUBLISHED
November 3, 2000

No. 227786
St. Clair Circuit Court
Family Division
LC No. 95-000109-DM

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting temporary physical custody of the parties' minor children to defendant. We vacate the trial court's order and remand for an evidentiary hearing before the same judge.

Plaintiff argues that the trial court erred in granting temporary physical custody to defendant without first holding an evidentiary hearing de novo. We review this issue for clear legal error. See *Mann v Mann*, 190 Mich App 526, 529-533; 476 NW2d 439 (1991).

If a party timely objects in writing to a referee's recommendations regarding a change in custody and requests a hearing, then the court must conduct an evidentiary hearing de novo and determine the best interests of the children before changing custody, even on a temporary basis. *Id*. at 529-532; *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); *Cochrane v Brown*, 234 Mich App 129, 132-134; 592 NW2d 123 (1999); MCL 552.507(5); MSA 25.176(7)(5); MCR 3.215(E)(3)(b). Here, plaintiff timely filed written objections to the referee's recommendation that custody be changed to defendant and requested a hearing. Subsequently, without holding an evidentiary hearing de novo, the trial court relied on the referee's recommendation and awarded temporary physical custody to defendant. This constituted clear legal error under the above-cited authorities. We therefore

vacate the trial court's change of custody order, as well as the parenting time order associated with the change of custody order, and remand this case for an evidentiary hearing de novo.[1]

Plaintiff contends that this matter should be heard by a different judge on remand because the current judge participated in numerous prior proceedings during the case, spoke with the referee, and failed to follow the law with regard to changing custody and parenting time. Because a motion for disqualification was not raised before the trial court, this issue is not preserved for appeal. *In re Jackson,* 199 Mich App 22, 29; 501 NW2d 182 (1993). In any event, the fact that the trial court conducted prior proceedings involving the same parties is not sufficient grounds for disqualification. *In re Schmeltzer,* 175 Mich App 666, 673; 438 NW2d 866 (1989). Moreover, even if the trial court's prior rulings against plaintiff were erroneous, this alone is insufficient to rebut the presumption of judicial impartiality and does not require disqualification. *Ireland v Smith,* 214 Mich App 235, 249; 542 NW2d 344 (1995), aff'd 451 Mich 457 (1996); *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995). Finally, plaintiff's bald statement that "the judge has spoken to the referee," without more, provides no grounds for disqualification. Unlike the situation in *Crampton v Crampton,* 178 Mich App 362, 363; 443 NW2d 419 (1989), there is no indication in this case that the trial court had a notable "attitude" that would make him unable to render a decision based on the best interests of the children once a proper evidentiary hearing is held. We decline to order that this matter be assigned to a new judge.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter

[1] Because we are vacating the judge's orders, we need not address plaintiff's argument that the court issued a modified parenting time order without giving plaintiff sufficient notice of the proposed modification.