STATE OF MICHIGAN

COURT OF APPEALS

SUSAN MARIE TERRELL, Plaintiff-Appellee,	UNPUBLISHED April 1, 2008
v	No. 281329 Kent Circuit Court
STEVEN PAUL HOLT, Defendant-Appellant.	LC No. 05-008081-DM

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

In this custody dispute, Steven Holt appeals as of right the trial court's order denying his motion for a review of the order governing custody of his three children with Susan Terrell and imposing sanctions for making a frivolous request for review of the referee's findings and recommendation. Because we conclude that the referee made insufficient findings of fact for our review and may have misapplied the law, we conclude that it was error for the trial court to adopt the findings and recommendation of the referee. Likewise, because there is no record evidence that Steven's request for a review of the referee's decision was done for the purpose of delay and the request was not frivolous within the meaning of MCR 3.215(F)(3), we conclude that the trial court erred when it sanctioned Steven for requesting a review of the referee's findings and recommendation. For these reasons, we reverse the decision of the trial court, vacate it's order of September 28, 2007, and remand for an evidentiary hearing to determine whether there has been a sufficient change in circumstances to warrant a review of the current custody order.

I. Facts and Procedural History

Susan and Steven were married in 1997 and divorced in 2006. The judgment of divorce provided for joint legal custody of the parties' three children, but awarded primary physical custody to Susan.

In 2007, Steven moved for review of the custody arrangements on the basis of changed circumstances. Steven noted that, since entry of the judgment of divorce, Susan had entered a medical residency program that required her to work 60 to 80 hours per week exclusive of driving time and recovery periods. Steven further stated that Susan would not permit him to assume some of the responsibility for caring for the children during her residency even though his schedule had become considerably more flexible. Instead, Susan's new husband quit his job and assumed the role of the children's primary caregiver. Steven expressed concern that Susan's

new husband has used inappropriate corporal punishment and language with the children. Steven also explained that, since the judgment of divorce, the parties' son Ryan has been diagnosed with signs of depression, ADHD and dyslexia. Finally, Steven claimed that Susan is deliberately refusing to facilitate his relationship with the children.

Steven's motion was assigned to a referee to determine whether Steven had established a sufficient change in the circumstances surrounding the children's custody to warrant review. See MCL 552.507 and MCR 3.215. The referee concluded that Steven had not met that burden. Steven then exercised his right to object to the referee's recommendation and have the trial court hold a de novo hearing on the matter. See MCL 552.507(4) and MCR 3.215(E)(4). At the de novo hearing, the trial court adopted the referee's findings and recommendation.[1] In addition, the trial court sanctioned Steven for exercising his right to object on the ground that the objection was frivolous or done for delay. See MCR 3.215(F)(3).

This appeal followed.

II. Change in Circumstances

Steven first argues that the trial court erred when it adopted the referee's findings and concluded that Steven had not shown by a preponderance of the evidence that there had been a sufficient change in the circumstances to warrant a review of the current custody order. We agree.

A. Standards of Review

This Court reviews a trial court's factual findings in a custody matter under the great weight of the evidence standard and will affirm the factual findings "unless the evidence clearly preponderates in the opposite direction." *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). This Court reviews a trial court's exercise of discretion for palpable abuse and reviews questions of law for clear error. *Id.* at 507-508; MCL 722.28. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

B. Establishing Changed Circumstances

A trial court may not modify an existing custody order unless "it first finds that the moving party has demonstrated proper cause or a change in circumstances." *Spires v Bergman*, 276 Mich App 432, 444-445 n 4; 741 NW2d 523 (2007), citing MCL 722.27(1)(c). The moving party bears the burden to prove, by a preponderance of the evidence, that either proper cause or a

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[1] In its order of September 28, 2007, the trial court stated that it "affirmed" the opinion and order of the referee. Although the trial court was required to hold a de novo hearing, see MCL 552.507(4), it may rely solely on the record of the referee's hearing and may adopt the referee's recommendations. See MCL 552.507(6). It is clear from the record that the trial court agreed with and adopted the findings and recommended order of the referee.

change in circumstances exists before the trial court will reconsider the existing custody order. *Vodvarka, supra* at 509. The purpose of this rule is to "'erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.'" *Id.*, quoting *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995).

A "change in circumstances" occurs when "the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed" since the entry of the last custody order. *Id.* at 513.

> [N]ot just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate that something more than normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id.* at 513-514.]

At the September 28, 2007 hearing, the trial court summarily adopted the referee's findings and conclusions regarding whether Steven had established a sufficient change in circumstances. Because the trial court did not take new evidence and did not offer an independent analysis of the record evidence, we shall limit our analysis to an examination of the referee's factual findings and conclusions of law.

At the hearing before the referee, Steven noted a series of changes in the lives of the children since the divorce that he believed warranted a review of the custody order. Steven testified that Susan had been the children's primary care giver, but that she had since entered into a demanding medical residency program that took up most of her time. Steven stated that, although he had had a cooperative agreement with Susan where he would often take the children during his free time, after Susan remarried, she insisted on rigid adherence to the custody order. Indeed, instead of permitting Steven to care for the children while she was in the residency program, Susan turned over primary care of the children to her new husband. Steven also testified that he could no longer communicate directly with Susan about the children. Instead, he had to direct his concerns to Susan through her new husband.

Steven also testified that Susan's new husband used inappropriate disciplinary techniques with the children such as spanking, slapping one child's face, and locking one of the children in a car. He also stated that the children began to use inappropriate language and, when confronted about their language, the children indicated that Susan's new husband spoke in that way.

Steven further presented testimony and evidence that his oldest son, Fischer, had been diagnosed before the divorce with transient tick disorder, nonverbal learning disorder and ADHD. He also presented evidence that, since the divorce, his other son Ryan has also been diagnosed with depression, ADD and dyslexia.

After the close of the hearing, the referee determined that Steven had not established changed circumstances that warranted a review of the custody order. Although the referee readily came to this conclusion, she did not make any specific factual findings regarding the majority of the issues and did not explain how those findings affected her determination. There

were no findings addressing how, if at all, Susan's entry into the residency program had affected her ability to parent and interact with the children. Likewise, there were no factual findings addressing whether Susan's new husband used inappropriate language or discipline with the children or how Susan's new husband's interaction with the children might be affecting their development and special needs. Further, the referee failed to address Steven's claim that Susan was deliberately attempting to undermine his efforts to maintain a close and continuing relationship with his children. Because of the paucity of findings, this Court cannot properly review whether the findings were against the great weight of the evidence. See MCR 2.517(A).

However, the referee did make one clear factual finding: she found that Susan and Steven were either aware or could have been aware of Ryan's disorders before the entry of the judgment of divorce. Based on this, the referee concluded that, as a matter of law, Ryan's diagnoses could not be a basis for a change in circumstances. We conclude that, even if Steven and Susan had some awareness of Ryan's special needs, that understanding did not render Ryan's special needs a preexisting circumstance that was incapable of supporting a claim of changed circumstances.

The moving party "cannot rely on facts that existed before entry of the custody order to establish a 'change' of circumstances." *Vodvarka*, *supra* at 514. This rule of law is premised on the notion that the parties "had an opportunity before the order was entered to raise or discover issues that warranted consideration" by the court in resolving the custody dispute. *Id.* at 514 n 12. However, if the parties were not aware of the existence of a fact or had an incomplete understanding of the fact, they would not be able to properly raise it for consideration by the court. For that reason, we cannot agree that every fact that existed before entry of a custody order constitutes a preexisting fact that cannot support a claim of changed circumstances. Rather, in order to constitute such a preexisting fact, the fact must not only have existed before the current custody order, but the parties must also have had sufficient knowledge of the fact that they could have properly raised it for consideration by the trial court.

In this case, even if Steven and Susan had an inclination that Ryan had some type of special needs before the entry of the current custody order, there is no evidence that the parties had a full understanding of the nature and extent of those needs. Hence, to the extent that Ryan's special needs have become better understood, the change in understanding constitutes a change in circumstances that the referee should have considered.

After determining that Ryan's special needs constituted a preexisting fact, the referee addressed Susan's remarriage, change in employment, and move. The referee concluded that, under *Vodvarka*, *supra*, these changes were not sufficient to warrant a review of the current custody order. She explained that *Vodvarka*, *supra*,

> goes onto also address alleged circumstances, including marriage, employment and home ownership; all three of which appear here today. These are nothing more than normal life changes. There has been a marriage, there has been change in employment, there has been change in ownership of home, all of which was brought out today in the evidence present. All of which Vodvarka finds that they are merely normal life changes.

Based on this paragraph, it appears that the referee concluded that changes of this nature are normal life changes as a matter of law. That is, because the typical remarriage, change in employment, and move are normal life changes, Susan's remarriage, change in employment and move must also be normal life changes that were incapable of supporting Steven's motion. But a parent's remarriage, move or change in employment can, under some circumstances, constitute a sufficient change in the "conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being," to warrant a review of the custody arrangements. *Vodvarka*, *supra*, at 513. Because there is no categorical rule against considering these life events, each marriage, change in employment, and move must be examined on a case-by-case basis to determine whether the change has had or could have a significant effect on the child's wellbeing.

This is a case in point; it does not involve the typical changes associated with a change in employment or a remarriage. Susan not only remarried, but she entered onto a career path that significantly altered her ability to be a caregiver for her children. As a result, Susan's new husband assumed much of the role previously assigned to Susan under the current custody order. And Steven has raised serious concerns about Susan's new husband's ability to appropriately parent the children. This is especially alarming given that Susan and Steven have children with special behavioral needs. Therefore, the referee clearly erred when she concluded that these changes could not, as a matter of law, support a finding of changed circumstances. See MCL 722.28.

C. Conclusion

Based on these errors by the referee, we conclude that the trial court erred when it adopted the referee's factual findings and conclusions of law. Further, because the referee failed to address the most significant factual disputes, it will be necessary to remand this case to the trial court for a new evidentiary hearing to determine whether there is a factual basis for reviewing the current custody order.

III. Sanctions for Frivolous Review of the Referee's Decision

Steven next argues that the trial court erred when it sanctioned him for requesting a de novo hearing on the issue of whether there were changed circumstances warranting a review of the current custody order. We agree.

A. Standard of Review

A trial court has the discretion to assess reasonable costs and attorney fees against a party that raises a frivolous objection to the decision of a referee. MCR 3.215(F)(3). This Court reviews a trial court's exercise of discretion for abuse. *Fletcher*, *supra* at 880-881. A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). This Court reviews the factual findings underlying an exercise of discretion for clear error. *Id.* A finding is clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000).

This issue also involves the interpretation of the court rules. The proper interpretation of the court rules is a matter of law that this Court reviews de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412-413; 633 NW2d 371 (2001).

B. Sanctions Under MCR 3.125(F)(3)

Referees are authorized by statute to hear motions in domestic relations matters. MCL 552.507(2); see also MCR 3.215. Although referee's may make findings of fact and issue recommended orders, see MCL 552.507(2)(c) and MCR 3.215(E)(1), the parties to the domestic relations matter have the right to request a de novo hearing "on any matter that has been the subject of a referee hearing," upon written request within 21 days after the referee's recommendation. MCL 552.507(4); see also MCR 3.215(E)(4). However, if the trial court determines that the objection to the referee's findings of fact and recommended order is "frivolous or has been interposed for the purpose of delay, the court may assess reasonable costs and attorney fees." MCR 3.215(F)(3). Hence, under MCR 3.215(F)(3), before determining whether to exercise its discretion to award attorney fees and costs, a trial court must first find that the objection was frivolous or made for purposes of delay.

In the present case, Steven filed a written objection to the referee's findings and recommended order. At the de novo hearing, Steven did not present new evidence. Rather, his counsel argued that the referee applied an incorrect standard and simply erred when she concluded that Steven had not met his burden. For that reason, Steven's counsel asked the trial court to take a "fresh view" of the evidence. However, the trial court declined to make an independent review of the evidence. Instead, the court stated that it agreed with the referee's opinion because it was an "absolutely dead-on, accurate opinion." Further, because the referee's opinion was so accurate, the court concluded that Steven's "appeal" of the referee's opinion was frivolous. For that reason, the trial court awarded $2,000 in attorney fees to Susan.

Because the trial court's award of attorney fees was based on MCR 3.215(F)(3), whether Steven's objection was frivolous must be determined in light of the requirements of MCL 552.507 and MCR 3.215. As already noted, Steven had the right to request a de novo hearing of the referee's findings and recommended order. MCL 552.507(4). Once Steven made that request, the trial court had an obligation to hold a de novo hearing on the matter at issue. *Id.* At a de novo hearing, the court may render an entirely new decision based on new evidence, based on the record of the hearing conducted by the referee, or based in part on new evidence and the record of the referee's hearing. MCL 552.507(6). Further, although nothing precludes the trial court from adopting the referee's findings of fact, credibility assessments, and conclusions of law, because the hearing is de novo, the trial court is not obligated to defer to the findings, assessments, or conclusions.

In the present case, we have determined that the referee erred in rendering its decision and concluded that the error warrants relief. However, because an objecting party is entitled to a de novo hearing, that party need not demonstrate that the referee made factual or legal errors in order to warrant the court's review. Indeed, given the court's broad discretion to decide the matter anew, a party might reasonably request a review on the basis that—viewing the evidence with fresh eyes—the court might simply reach a different result. For that reason, where reasonable minds might make different factual findings and come to different legal conclusions based on the same evidence, a party's exercise of the right to object under MCL 552.507(4) is

not frivolous as a matter of law. Thus, even if we had not determined that the referee erred, Steven's decision to object could not be characterized as frivolous. Steven presented sufficient evidence that, if believed, would meet his burden of proof for establishing a change in circumstances. Hence, on de novo review, the trial court could have disregarded the referee's findings and conclusions of law and ruled in favor of Steven based on its own view of the law and evidence. Furthermore, there is no record evidence that Steven's objections were "interposed for the purpose of delay." MCR 3.215(F)(3). Consequently, the trial court clearly erred when it found that Steven's objection was frivolous or made for purpose of delay. *Moore*, *supra* at 654-655.

C. Conclusion

Because the trial court clearly erred when it found that Steven's motion was frivolous or made for purposes of delay, it did not have discretion to award costs or attorney fees under MCR 3.215(F)(3). Therefore, it erred when it awarded $2,000 in attorney fees to Susan.

IV. General Conclusion

The trial court erred when it adopted the findings and recommendations of the referee where those findings were insufficient for our review and were tainted by a misapplication of the relevant law. Likewise, because Steven's objection was not frivolous within the meaning of MCR 3.215(F)(3) and there was no record evidence that the objection was done for purposes of delay, the trial court abused its discretion when it elected to award Susan attorney fees under MCR 3.215(F)(3). For these reasons, we reverse the decision of the trial court, vacate its order of September 28, 2007, and remand the case to the trial court for an evidentiary hearing to determine whether Steven has established that a review of the current custody order is warranted.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering