STATE OF MICHIGAN

COURT OF APPEALS

MIRANDA PETERSON, f/k/a MIRANDA ORBAN,

Plaintiff-Appellee,

v

ALLEN ORBAN,

Defendant-Appellant.

UNPUBLISHED
December 9, 2008

No. 286081
Ionia Circuit Court
LC No. 01-021712-DM

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order dismissing his objections to the referee's recommendation and order and requesting a de novo hearing. Defendant further challenges the trial court's order adopting the referee's recommendation and order and granting plaintiff sole legal and sole physical custody of the parties' minor child. Because the trial court abused its discretion when it imposed the ultimate sanction of dismissal on defendant under the circumstances of this case, we vacate and remand.

The parties were divorced in January 2003 and were awarded joint legal and joint physical custody of their minor child, Kaitlyn Rose. Since the divorce, the parties had each sought a change in custody, plaintiff in 2004 and defendant in 2005, but each of those motions was resolved by stipulation of the parties. Plaintiff's most recent motion for sole physical custody was brought in late 2006 after a series of events in which defendant made a number of choices related to Kaitlyn's heath care and religious training without consulting plaintiff as well as defendant's occasional difficulties with interpersonal conflict. A referee conducted a three-day hearing on plaintiff's motion, which took place over a period of several months. Testimony was given by the parties, the Friend of the Court evaluator, and friends and relatives of the parties. Throughout the testimony, several major issues of contention between the parties were identified. At the conclusion of the hearing, the referee made a recommendation to award sole physical custody and sole legal custody to plaintiff, with visitation to defendant. The referee's recommendation and order considered each of the statutory best interest factors set out in MCL 722.23 and found that four factors favored the parties equally, that four factors favored plaintiff and that one factor favored defendant.

Defendant filed an objection to the referee's recommendation and order within 21 days, and the matter was originally scheduled to be heard by the trial court on October 26, 2007.

However, on October 23, 2007, the judge assigned to the matter voluntarily recused himself because his wife was a friend of defendant's wife, and the case was transferred to another judge. Defendant's counsel filed a notice of hearing on December 27, 2007, indicating that the matter would be heard on February 22, 2008. This hearing apparently did not go forward because the case number listed on the notice did not follow the local practice of including the judge's initial in the case number event. Defendant filed another notice of hearing, this time setting the motion to be heard on April 2, 2008. Plaintiff filed a motion requesting the trial court dismiss defendant's objections to the referee's recommendation and order, alleging defendant was not entitled to de novo review since the matter had not been timely set for hearing. On April 2, 2008, when defendant's objections and plaintiff's motion to dismiss defendant's objections were both set for hearing, defendant's counsel failed to appear at the commencement of the hearing. The trial court refused to allow defendant's counsel to participate telephonically or briefly delay the hearing until defense counsel could arrive at the court. In defense counsel's absence, the trial court granted plaintiff's motion to dismiss defendant's objections to the referee's recommendation and order based in part on the lapse of time between the referee hearing and the de novo hearing and in part on defendant having scheduled the hearing and then failing to appear. Defendant now appeals.

Defendant argues that the trial court erred in dismissing his objections to the referee's recommendation and order, thereby refusing to grant de novo review. There are three standards of review in child custody appeals. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). First, this Court reviews a trial court's findings of fact to determine whether they are against the great weight of the evidence. *Id*. Whether an established custodial environment exists is a question of fact. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). Second, this Court reviews the trial court's discretionary rulings for an abuse of discretion. *Vodvarka, supra* at 507-508. An abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Third, this Court reviews questions of law for clear legal error. *Vodvarka, supra* at 508. "'A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.'" *Id*. (citation omitted).

The record reflects that neither defendant nor defendant's counsel were present at the commencement of the relevant April 2, 2008 at 10:00 a.m. hearing that was to include consideration of defendant's request for a de novo review of the referee's child custody decision at issue. At approximately 10:05 a.m., defendant's counsel received a telephone call from the trial court's judicial aide, Charlene Maynard. Maynard informed defense counsel that the de novo hearing had been scheduled to convene at 10:00 a.m. and inquired at the trial court's request regarding counsel's whereabouts. Defendant's counsel informed Maynard that he was in his office in Grand Rapids and that his "appointments book showed the hearing for April 4 rather than April 2, and that [he] had apparently misrecorded it through inadvertence." Defendant's counsel requested to participate in the hearing telephonically, but Maynard informed counsel that the trial court would not allow the accommodation. Defendant's counsel then requested to speak personally with the trial court but Maynard informed him that the trial court refused to speak with him for the reason that the communication would be ex parte. Defendant's counsel informed Maynard that he was immediately proceeding to Ionia Circuit Court and that he would arrive prior to 11:00 a.m. so that he could participate in the hearing in person. Maynard informed him that the trial court had no other matters pending at that time and planned to

proceed in defense counsel's absence. The trial court continued with the hearing and decided that "based on the fact that the long delay that's taken place in this case and based on the fact that defendant scheduled this hearing and did not appear, I'm going to grant [plaintiff's] motion to dismiss the request for a de novo hearing." After defense counsel arrived within the hour, the trial court returned to open court at defense counsel's request, but the trial court refused to hear any comments from defense counsel and would not state the substance of its earlier ruling on the record. The matter was closed at 11:09 a.m.

MCL 552.507(4) states that:

> 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. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.

Here, the record displays that the trial court initially intended to comply with the requirement of MCL 552.507(4) to hold a de novo hearing in this case at the scheduled date and time, but did not proceed with the hearing due to the failure of defendant or his counsel to appear at the commencement of the hearing. The trial court then exercised its discretion and decided to discontinue the hearing and dismiss the request for de novo review, in part, as a result of the failure of defendant or his counsel to be present at the commencement of the hearing.

Our review of the circumstances in this case reveals that defense counsel failed to appear at the hearing due to a simple clerical error. When contacted by court staff, defense counsel volunteered to participate in the hearing telephonically and also requested to speak with the trial court. The trial court refused both requests. And despite knowledge that defendant's counsel was on his way and would arrive shortly, the trial court refused to delay the hearing for any length of time. After defendant's counsel hurried from his office in Grand Rapids to the court in Ionia and managed to arrive at the court within an hour, the hearing had already concluded. Failure to appear for a scheduled de novo hearing may necessitate dismissal of the request for de novo review in certain situations, but that is certainly not the case here.

We undoubtedly acknowledge that "'a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney.'" *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 424; 668 NW2d 199 (2003), quoting *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (1999). But, we conclude that complete dismissal of a request for de novo review is not a reasoned and principled outcome under the circumstances in this case when defense counsel failed to attend the hearing due to a simple clerical mistake, and when made aware of his error, counsel immediately attempted to make alternative arrangements to participate via teleconference and then ultimately arrived at the court only an hour late for the hearing. *Maldonado, supra* at 388. For these reasons, we conclude that on this record, the trial court abused its discretion when it imposed the ultimate sanction of dismissal on defendant and deprived him of his clear statutory right to argue against the referee's recommendation that his rights–both legal and custodial–to his daughter be terminated. *Id.*

The trial court also granted plaintiff's motion to dismiss defendant's objections to the referee's recommendation and order based in part on the lapse of time between the referee hearing and the de novo hearing. But our review of the record reveals that previous

adjournments of review hearings were at least as much the fault of the trial court as they were defendant's fault. Therefore, we cannot rely on this alternative basis for dismissal. Thus, the trial court's order must be vacated and the matter remanded for a de novo hearing as requested by defendant. MCL 552.507(4).

Because of our conclusion in the foregoing issue, we decline to address defendant's argument that evidence presented at the referee hearing did not support a grant of sole custody to plaintiff.

Vacated and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio