# STATE OF MICHIGAN

# COURT OF APPEALS

MARK J. PFAENDTNER,

Plaintiff-Appellant,

v

MIEKE V. PFAENDTNER, a/k/a MIEKE V WEISSERT,

Defendant-Appellee.

UNPUBLISHED
December 15, 2009

Nos. 288810, 291722
Ingham Circuit Court
LC No. 03-001702-DM

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals by right from two orders that changed parenting time of the parties' minor child. We decline to address one of the orders because it was an interim order that is now moot, and we affirm the other.

The parties were married in 1997 and had one child together, Michael Joseph Pfaendtner, born January 2, 2001. Plaintiff filed for divorce in 2003. Plaintiff alleged that defendant had suffered some kind of emotional breakdown, while defendant accused plaintiff of emotional abuse, anger management problems, and, later, harassment and other interference in her affairs. While the parties agreed that there had been an irreparable breakdown of the marital relationship, divorce proceedings ground down for several years largely over disputes as to Michael's custody. The parties agreed to a joint custody agreement with parenting time alternating between the parties on a weekly basis. Defendant moved to Pennsylvania in December of 2003, citing plaintiff's ongoing harassment, and also to address her own problems; she was apparently diagnosed with bipolar disorder at some point. The trial court entered an order maintaining the weekly alternating parenting time schedule and ordering the parties to make the exchange at a parking lot off the Ohio Turnpike.

When the parties' judgment of divorce was finally entered on August 4, 2006, it contained an explicit agreement to comply with "co-parenting provisions" included in a Settlement Agreement attached thereto. The Settlement Agreement provided, among other things, that Matthew would primarily live with plaintiff and attend school in Lansing during the school year, Matthew would primarily live with defendant during the summer, and some miscellaneous time would be spent with the "off" parent. The Settlement Agreement further provided as follows:

> 30. In the event that on or before December 31, 2007, Mieke [defendant] establishes a residence within 10 miles of the school which Matthew is attending ("Greater Lansing Area"), one month after Mieke has to [sic] moved to Michigan, the parenting time schedule will change to one week with Mieke and one week with Mark [plaintiff] with an exchange time taking place at 6:00 p.m. on Fridays. The parent starting his/her parenting time shall pick up Matthew at the other parent's home. Matthew will have Tuesday parenting time with the off-week parent from a time beginning at 5:30 p.m. or after and ending one hour prior to Matt's [sic] bedtime.
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> 31. In the event of such move, Plaintiff reserves the right to argue that that move constitutes a change in circumstances mandating a [sic] evidentiary hearing on the agreed upon parenting time schedule. In the event Defendant moves to Michigan, regardless of when the move occurs, either before or after December 31, 2007, Defendant reserves the right to argue that it is not a change in circumstances and the agreed upon parenting time should occur without requiring an evidentiary hearing.

Defendant did, in fact, return to Michigan, within ten miles of Matthew's school, and advised plaintiff of her move, well before the deadline. She asserted that she therefore had the right to automatically return to an alternating-weekly parenting time schedule. Plaintiff contended that doing so would constitute a modification to a prior custody order, and therefore defendant would be obligated to prove proper cause or a change in circumstances.

The trial court concluded that the Settlement Agreement reflected "an agreement to disagree" and that while a change in the custodial arrangement was made available, it was not made automatic. Defendant then moved to change parenting time, and the matter was referred to the friend of the court, which held a referee hearing. The friend of the court referee recommended that defendant's return to Michigan constitute a "change of circumstances" entitling her to "equal time custody" pursuant to the terms of the judgment of divorce, or at least a review of the parenting time schedule. The friend of the court also analyzed the statutory "best interest factors" under MCL 722.23; it found most of them did not apply or were weighted equally between the parties, but factor (d)[1] slightly favored plaintiff and factor (j)[2] favored defendant. Finally, the friend of the court recommended that the parties continue to share joint legal and physical custody of Matthew, but that parenting time change to an alternating-weekly arrangement with a more complex holiday schedule. The friend of the court observed that the "parties' agreement indicates the [parenting time] arrangement [while defendant was in Pennsylvania] was intended to be temporary; the agreement recites that the Defendant would be

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[1] "The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity."

[2] "The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents."

entitled to resume equal time care of the child if she should be able to move back to the state by December 31, 2007."

The trial court entered an order making the referee's recommendations the order of the court, subject to a de novo hearing, "if any." Plaintiff appeals from that interim order in Docket No. 288810. The trial court then held a de novo hearing. It limited evidence to only what could not have been provided to the friend of the court referee, stating that it would review the transcripts from the Friend of the Court and that it did not intend "to redo the referee hearing." The de novo hearing took ten days, and at the conclusion thereof, the trial court entered a thorough order discussing the best interest factors and, ultimately, concluding that it was in Matthew's best interests to have the alternating-weekly parenting time arrangement. The trial court's final order thus reached the same result as the interim order, although its reasoning differed in some aspects. Plaintiff appeals from that order in Docket No. 291722.

In custody cases, a trial court's findings of fact, including its findings regarding the best interest factors or the existence of a custodial environment, are reviewed deferentially and will be affirmed unless the evidence clearly preponderates to the contrary. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). The trial court's discretionary rulings, including any final decisions regarding custody, are reviewed for an abuse of discretion. *Id*. This Court's review is less deferential where it appears that the trial court's decisions or findings were based on an erroneous view of the law or erroneous application of the law to the facts. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). Questions of law, including statutory interpretation, are reviewed de novo. *Thompson*, *supra* at 358. This Court reviews de novo whether a court has subject matter jurisdiction. *Steiner School v Ann Arbor Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999).

This Court also reviews de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Contract law does not govern matters of child custody, but the courts must nevertheless enforce parties' written agreements unless doing so would violate the law or public policy of Michigan. *Brausch v Brausch*, 283 Mich App 339, 350; 770 NW2d 77 (2009).

Initially, however, we must consider whether we have jurisdiction. Both orders appealed must be "final judgment[s] or final order[s] . . . as defined in MCR 7.202(6)." MCR 7.203(A)(1). In a domestic relations action, the relevant definition is "a post-judgment order affecting the custody of a minor." MCR 7.202(6)(a)(iii). Plaintiff contends that the orders are illegal modifications to Matthew's custody, whereas defendant contends that they did not actually affect custody at all, but rather only returned parenting time to the parties' own default agreement. While the orders do not specifically say that they change custody, no talismanic incantation is necessary if the substance of an order actually does so. See *Thurston v Escamilla*, 469 Mich 1009; 677 NW2d 28 (2004).

The cases on point all feature much more dramatic changes in parenting time than exist here. For example, a change in parenting time that would result in a parent with equal involvement in a child's life being "relegated to the role of a 'weekend' parent" would affect the child's custodial environment. *Powery v Wells*, 278 Mich App 526, 527-528; 752 NW2d 47 (2008). Likewise, removing a child from the state would affect the child's custodial

environment; although, critically, a mere domicile change, even of more than a hundred miles, does not *necessarily* change an established custodial environment. *Brown v Loveman*, 260 Mich App 576, 590-591; 680 NW2d 432 (2004). Furthermore, "a change in domicile will almost always alter the parties' parenting time schedule to some extent" so "the [new] parenting time schedule need not be equal to the prior parenting time schedule in all respects." *Id*. at 595. Plaintiff is not being relegated to a "weekend parent," nor is Matthew being removed from the state. Quite the opposite: instead of transporting Matthew out of state, Matthew now needs only to travel across town. Furthermore, the return to the parties' original parenting time arrangement was after a temporary change apparently agreed to so that defendant could resolve her own problems – in which case "sound policy is to provide such encouragement [to temporarily give up custody] by returning custody to [him or] her once [he or] she is able to care for them." *Dowd v Dowd*, 97 Mich App 276, 279-280; 293 NW2d 797 (1980).[3]

We note that contract law is not controlling in custody matters, but the courts enforce contracts unless they violate the law or other public policy. *Brausch*, *supra* at 350. Public policy is to return custody that has been voluntarily given up on a temporary basis where a parent is unable to provide the requisite care. And notwithstanding plaintiff's insistence that the parties had no agreement, the trial court never found the provisions of the Settlement Agreement to be a nullity, and any such finding would be erroneous. Contracts must, if possible, be read as a whole with every word given effect and harmonized. *Roberts v Titan Insurance Co* (*On Reconsideration*), 282 Mich App 339, 357-358; 764 NW2d 304 (2009). The agreement states that "one month after Mieke has to moved to Michigan, the parenting time schedule *will* change to one week with Mieke and one week with Mark" (emphasis added). The word "will," in this context, is if anything less ambiguous than the word "shall," which (in the absence of other indications to the contrary) has a mandatory connotation. See, e.g., *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612 and n 7; 321 NW2d 668 (1982). The following paragraph only provides that neither party gives up the right to assert that defendant's return to Michigan constitutes a "change of circumstances," it does not in any way negate their contractual agreement to return to an alternating-weekly parenting time arrangement.

Nevertheless, we are persuaded that plaintiff's parenting time has been reduced from roughly 70% of the time to roughly 50% of the time, which we simply cannot find to be trivial, particularly where the contiguity of each party's parenting time has also been affected significantly. While nowhere close to the level of disruption discussed in the cases plaintiff cites, we find that the circuit court's orders did "affect Matthew's custody" within the meaning of MCR 7.202(6)(a)(iii). Therefore, we have jurisdiction to consider plaintiff's substantive arguments.

As an additional initial matter, however, we decline to consider plaintiff's arguments pertaining to the court's interim order adopting the friend of the court recommendations. The

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[3] We do not consider *Dowd* otherwise significant because it predated the existence of MCR 7.202, which had no direct predecessor, and furthermore it treated "parenting time" and "custody" as synonymous given that the defendant therein had temporarily agreed to *completely* give up *all* time with the child.

trial court subsequently entered an order of the court re-adopting the result in the friend of the court's recommendations after a de novo hearing. The interim order no longer has any effect. Even if it had been erroneously adopted, no order of this Court could correct the error: the parenting time arrangement between October 22, 2008, and April 6, 2009, cannot be "undone." An issue is moot and will generally not be considered if this Court could no longer fashion a remedy for the alleged error. *Attorney General v MPSC*, 269 Mich App 473, 485; 713 NW2d 290 (2006). This is functionally identical to seeking review of a preliminary injunction after entry of a permanent injunction. See *Alliance for Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1998).

Plaintiff's first substantive argument is that the trial court used the wrong evidentiary standard when it changed parenting time. We disagree.

Because the change in parenting time affected Matthew's established custodial environment, the trial court must analyze the best interest factors in MCL 722.23 to determine whether the relocating parent can prove by clear and convincing evidence that the change is in the child's best interest. *Brown*, *supra* at 583-591; *Powery*, *supra* at 527-528. The trial court's order states that it "ha[d] applied the preponderance of the evidence standard, but finds the factors as weighted above to show by clear and convincing evidence that the following is in the best interests of Matthew: [followed by the complained-of change in parenting time]." This order clearly shows that the trial court found *the propriety of the change* to be proven by clear and convincing evidence, which is precisely what the trial court was required to do. In relevant part, MCL 722.27(1)(c) provides that the court may not change a child's established custodial environment "unless there is presented clear and convincing evidence that it [i.e., the change] is in the best interest of the child." See also, *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001).

Plaintiff next argues that the trial court reversed itself after finding the parties' agreement to return to an alternating-weekly parenting time schedule to be a "nullity." As discussed *supra*, we disagree. Plaintiff simply makes an unwarranted and incorrect extrapolation from the trial court's observation of the obvious. The trial court found that paragraph 31, in which plaintiff reserved the right to contend that defendant's move back to Michigan was a change of circumstances, and defendant reserved the right to contend that it was not, constituted an "agreement to disagree," thus, as the trial court found, the parties reserved the right to dispute whether defendant's return to Michigan would constitute a "change of circumstances." The trial court also found that "[n]o change is automatic regarding child custody," which is true because no agreement by the parties can contravene the law – relevant to this case, the trial court alone can change a custody order, irrespective of any agreement by the parties. *Brausch*, *supra* at 350-351. The trial court never found paragraph 30 to be a nullity, nor could it: the plain, unambiguous language of paragraph 30 is that the parties *did* have an agreement pertaining to parenting time, which as discussed does not necessarily constitute an automatic upset of custody.

Plaintiff states that neither the Judgment of Divorce nor the settlement agreement mentions "that the defendant mother left the state of Michigan to reside in Pennsylvania in order to resolve health care issues or that she had any health care issues at the time either temporary or permanent." Plaintiff appears to argue that the lack of any statement thereof belies the trial court's finding that defendant had temporarily given up equal parenting time out of concern for Matthew's best interests while she resolved her own problems. Consequently, plaintiff argues

that the trial court erred in relying on *Dowd* and *Theroux v Doerr*, 137 Mich App 147; 357 NW2d 327 (1984). These cases both state that public policy favors parents temporarily and voluntarily giving up custody of a child out of concern for the child's best interests, and the courts encourage this by returning that custody. *Dowd*, *supra* at 279-280; *Theroux*, *supra* at 149-150; see also, *Loyd v Loyd*, 182 Mich App 769, 780-781; 452 NW2d 910 (1990). However, plaintiff himself repeatedly pointed out that defendant had moved to Pennsylvania due to mental health problems. And paragraph 30 unambiguously reflects the parties' belief that the parenting time arrangement would probably be temporary. Public policy therefore supports the trial court's order returning parenting time to equality, and the trial court's reliance on *Dowd* and *Theroux* was proper.

Plaintiff next argues that the trial court erred in finding best interest factor J, the willingness of the parties to facilitate a parent-child relationship between the child and the other parent, favored defendant. He argues that the trial court essentially penalized plaintiff for exercising a legal right that the trial court itself had determined plaintiff reserved; and further that defendant frequently refused to afford plaintiff his parenting time, while he frequently permitted defendant to have extended parenting time. We find no error.[4]

The trial court's findings under Factor J stated, in salient part, that "[t]he question is not whether each parent had a right to assert what he or she was legally entitled to assert[, but] whether either parent acted with an intent to thwart the other parent's close and continuing parent-child development." The trial court found that the parties had different, and essentially incompatible, views of what they were generally entitled to do under the terms of the settlement agreement, and moreover, the settlement agreement supported both positions. Thus, it found "both parties are correct." The trial court did *not* penalize plaintiff for insisting on his right to a full custody hearing. On the contrary, the trial court recognized that plaintiff had the right to do so. Indeed, the trial court's stated reasoning slightly implies that the trial court found the friend of the court's analysis under factor J (which did imply that plaintiff should be penalized for exercising his rights) flawed, even though the trial court continued to find that the factor weighed in favor of defendant. A pattern of parenting time violations obviously has some potential relevance to whether a party was trying to undermine the other party's relationship with a child. See *Shulick v Richards*, 273 Mich App 320, 332; 729 NW2d 533 (2006).

Rather, as the trial court explained, such violations are not *per se* relevant to Factor J unless probative of a parent's willingness and ability to foster the other parent's relationship with the child, as opposed to each other. The trial court clearly based its findings under Factor J on the far more relevant facts that plaintiff attributed Matthew's increased crying episodes to not wanting to see defendant, when in fact the evidence showed no such thing and instead showed that other life changes were probably responsible; and that plaintiff was attempting to use defendant's mental health diagnosis as a "sword" against her, despite having no information to suggest that she posed any danger to Matthew. The trial court found that there was no evidence

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[4] To reiterate: we are only considering the trial court's analysis after its de novo review, not its adoption of the friend of the court recommendations.

of similar conduct by defendant. The trial court found that, while plaintiff was a loving and considerate parent, his attribution of Matthew's crying to defendant and attempts to use defendant's mental health diagnosis against her without any sound basis showed that he was attempting to undermine defendant's relationship with Matthew. We find that the evidence does not clearly preponderate against the trial court's findings.

Plaintiff next argues that he was not properly afforded a true de novo hearing because the trial court erroneously limited what evidence the parties could present. The trial court ordered that "as to findings of fact to which the parties have objected, the parties shall not be afforded a new opportunity to offer the same evidence to the Court as was presented to the referee," and any evidence not presented to the referee would be admitted only if it could not have been provided to the referee because the facts or evidence did not exist at or prior to the Friend of the Court hearing. It further stated that it would review the transcripts from the Friend of the Court and that it did not intend "to redo the referee hearing." Plaintiff contends that this violated the pertinent court rule. We disagree.

MCR 3.215(F)(2) states:

> To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:
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> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
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> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
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> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

It is undisputed that the trial court permitted extensive live evidence to be presented, the order did not prohibit any evidence that could not have been made available to the referee, and at issue is restrictions placed on findings to which plaintiff *did* object. Finally, plaintiff does not contend that the parties were denied a full opportunity to present and preserve evidence at the referee hearing.

The critical fact is that plaintiff filed extensive objections to some of the Friend of the Court's findings of fact. Plaintiff argues that the first phrase of MCR 3.215(F)(2), "To the extent allowed by law..." means that the provisions of MCL 522.507 must be read into the court rule. We agree. MCR 522.507 provides in relevant part:

> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:

(a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.

(b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.

(6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:

(a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.

(b) A new decision based only on evidence presented at the time of the de novo hearing.

(c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

Plaintiff particularly relies on MCL 553.507(5)(b), which explicitly permits parties " to offer the same evidence to the court as was presented to the referee," as to findings of fact to which a party has objected. However, MCL 552.507(5)(b) does *not* specify that the parties must be afforded a new opportunity to present *live* evidence, only the *same* evidence. In other words, this statutory provision does not guarantee parties the right to present "the same evidence" in any particular form or format. This does not, therefore, preclude "the same evidence" from *literally* being "the same evidence" in the form of the record from the referee hearing, as the trial court reviewed here.

In context, MCL 552.507(5) as a whole appears intended to ensure that no matter what restrictions the trial court places on evidence at the de novo hearing, it cannot make itself ignorant of evidence provided to the referee. The trial court may consider the "FOC report or recommendation if it also allows the parties to present live evidence." *Dumm v Brodbeck*, 276 Mich App 460, 465; 740 NW2d 751 (2007). In *Dumm*, the complaining party never asked to present live evidence, but in this case, the parties actually *did* present live evidence. Again, there is no statute or court rule guaranteeing parties the opportunity to present the *same* evidence *as* live evidence; only that they be permitted to offer the same evidence (which happened through the trial court's examination of the Friend of the Court's record and the transcript of the referee hearing) and to offer live evidence (which happened over the course of the ten-day de novo hearing).

Furthermore, plaintiff fails to articulate how he was prejudiced by the trial court's order limiting evidence. An appealing party has the burden of proving that reversal is warranted. *In re 1987-88 Medical Doctor Provider Class Plan*, 203 Mich App 707, 726; 514 NW2d 471 (1994), lv den 448 Mich 869 (1995). An appellant "has the burden in the appellate court of showing (1) that the ruling was erroneous, (2) that he opposed the ruling and contended for a proper ruling, and (3) that the erroneous ruling was prejudicial." *Henson v Veteran's Cab Co of Flint*, 384 Mich 486, 494; 185 NW2d 383 (1971). Even if the trial court's ruling was erroneous, plaintiff must show that he was prejudiced thereby. However, plaintiff merely makes the bare assertion

that error occurred and that this Court must therefore reverse. This argument is insufficiently briefed to merit consideration.

Finally, plaintiff asserts that the trial judge violated Judicial Code of Conduct Cannon 3(C) by failing to disclose "that it had past relations with" defendant. Aside from various inadequately briefed or argued assertions of general favoritism or incompetence that we decline to consider,[5] plaintiff strongly implies that the trial judge had an extrajudicial relationship with defendant of the sort that should have warranted judicial disqualification, and that the trial judge failed to disclose this relationship. We disagree.

On the seventh day of the de novo hearing, it was disclosed during cross-examination of defendant that she had once applied for a job with the trial judge prior to the judge's election to the bench, when the judge was employed at the prosecuting attorney's office. The trial court confirmed that "[defendant] interviewed for a job with me when I worked at the Prosecutor's office." No further questioning on the topic took place, and as far as can be determined from the record, including the lower court register of actions, no motion to disqualify the trial judge was ever filed. Plaintiff asserts that judges must advise the parties whenever they have "cause to believe that grounds for disqualification may exist under MCR 2.003(B)." See Judicial Code of Conduct Cannon 3(C). While this is an accurate statement of the law, we find nothing in MCR 2.003(B) that would warrant disqualification here. There is simply no evidence or indication that the trial judge had any special knowledge of or interest in the matter simply because defendant once interviewed with the judge for a job in a prior role. Plaintiff's assertion of improper "past relations" is grossly exaggerated.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis

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[5] This Court generally does not address issues not set forth in the statement of questions presented. *Michigan Ed Assn v Sec of State*, 280 Mich App 477, 478-488; 761 NW2d 234 (2008)