STATE OF MICHIGAN

COURT OF APPEALS

ANDREW MICHAEL FOY, Plaintiff-Appellant,	UNPUBLISHED December 9, 2014
v	Nos. 322015 and 322018 Mecosta Circuit Court Family Division
ALICE DEANN DAVIS, Defendant-Appellee.	LC No. 13-021988-DP

Before: MARKEY, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

In this custody and parenting time dispute, plaintiff appeals the trial court's orders denying his objections to the Friend of the Court (FOC) recommendations. We reverse and remand for further proceedings consistent with this opinion.

The parties, who have never married, executed an affidavit of parentage for the child in issue. Following a hearing to determine custody and parenting time, the FOC hearing referee in an interim order granted the parties joint legal custody and plaintiff primary physical custody. Parenting time was to be as agreed on between the parties. Plaintiff filed objections to the interim order. Defendant thereafter petitioned for a specific parenting-time schedule after plaintiff refused to allow defendant any parenting. After another hearing, the referee granted defendant two eight-hour visitations per week, which was the parenting-time schedule that had previously been in effect during a child protective proceeding. Plaintiff also filed objections to the interim parenting time order. In subsequent hearings on plaintiff's objections in the circuit court, the trial court did not allow any testimony, evidence, or argument, and rendered its ruling solely on a review of the FOC hearing record. Plaintiff's objections were denied.

Plaintiff first argues that defendant is collaterally estopped from requesting joint legal custody after her unfitness as a parent was already established at a prior proceeding. We disagree.

The basic and precious right of parents to raise their children is not easily relinquished on the basis they have not been model parents. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). But parents may not invoke the parental presumption of the Child Custody Act (CCA), MCL 722.21 *et seq.* stated in MCL 722.25(1) ("that the best interests of the child are served by awarding custody to the parent or parents") to attack a prior custody order because the

principles of collateral estoppel will generally prevent a party from relitigating an issue already established in the first proceeding. *Hunter*, 484 Mich at 276.

In this case, defendant entered a plea in May 2013 admitting that there were statutory grounds for the circuit court to exercise jurisdiction over the child pursuant to MCL 712A.2(b), including: "failure to provide, when able to do so, support, education, medical, surgical, or other necessary care for health or morals"; "substantial risk of harm to mental well-being"; "lack of proper custody or guardianship"; and "an unfit home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian." The court's order of adjudication also indicated that defendant "has demonstrated instability in housing, employment, and personal relationships," "has not benefitted from services that have been provided as a result of another child that is in care," and "is not prepared or capable of taking care of a medically fragile infant at this time." Nonetheless, the child protective proceedings were dismissed in a February 18, 2014 order, and defendant was granted joint legal custody and parenting time in the proceedings at issue in this case.

Our Supreme Court has rejected the idea that "a parent who . . . admits being unfit at any time is never entitled to benefit from the parental presumption in MCL 722.25(1)." *Hunter*, 484 Mich at 277, n 61. In this case, defendant did not attempt by "to circumvent valid court orders affecting custody." *Id*. at 277. Instead, she merely requested that the circuit court in these proceedings enforce the same parenting-time schedule that had previously existed. Therefore, collateral estoppel did not preclude the trial court from awarding joint legal custody.

Next, plaintiff argues that MCL 722.27a(3) violates the Michigan and United States Constitutions because it does not provide adequate deference to "fit" parents in requiring them to prove by clear and convincing evidence that parenting time with the other parent will cause physical, mental, or emotional harm to the child. "It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1). In order to rebut this presumption, it must be "shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a(3).

Plaintiff contends that "[t]he clear and convincing burden of proof does not provide sufficient deference to a fit natural parent's fundamental right to the care, custody, and management of his or her children." This argument is premised on plaintiff's assertion that he is the fit parent, while defendant is "per se unfit" under MCL 712A.19b(3). Specifically, plaintiff relies on MCL 712a.19b(3)(m)(*iii*) and (*v*):

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
>
> (m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state and the proceeding involved abuse that included 1 or more of the following:

* * *

(*iii*) Battering, torture, or other severe physical abuse.

* * *

(*v*) Life-threatening injury.

Because defendant testified an older child of hers suffered a life-threatening injury resulting in her voluntarily surrendering her parental rights, plaintiff asserts that she is unfit per se.

MCL 712A.19b lays out a comprehensive scheme for terminating a person's parental rights, and, although terminating one's parental rights most certainly involves evaluating his or her fitness to be a parent, nowhere in the statute does it indicate that termination of one's parental rights renders that parent permanently unfit. In fact, the word "unfit" is not included in the statutory language at all. Further, "[n]othing in the statute or the CCA generally suggests that parental fitness is a prerequisite to entitlement to the parental presumption in MCL 722.25(1)." *Hunter*, 484 Mich at 275. Further, the mere fact that a child is under the court's jurisdiction due to a termination of parental rights to another child on the basis of failure to protect is alone insufficient to terminate a parent's rights where the conditions at the time of the first proceeding no longer exist. *In re Sours*, 459 Mich 624, 636-637; 593 NW2d 520 (1999).

Third, plaintiff argues that MCL 722.1006 violates the Michigan and United States Constitutions' Equal Protection Clauses because it grants initial custody to the mother in all situations without considering the child's best interests. MCL 722.1006 states as follows:

> After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.

MCL 722.1006 obviously creates a classification based on gender: mothers are awarded initial custody; fathers are not. "Gender-based classification schemes are subject to heightened scrutiny review." *Rose v Stokely*, 258 Mich App 283, 302; 673 NW2d 413 (2003. Under this intermediate level of scrutiny, gender "classifications will be upheld only if they 'serve important governmental objectives and [are] substantially related to achievement of those objectives.' " *Id*. at 321 (GRIFFIN, J., *dissenting*), quoting *Orr v Orr*, 440 US 268, 279-283; 99 S Ct 1102; 59 L Ed 2d 306 (1979).

Defendant, however, argues that strict scrutiny should be applied because MCL 722.1006 impinges the fundamental liberty interest of a natural parent in the care, custody, and management of his child. See *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). When legislation creates a classification that impinges on the exercise of a fundamental right, strict scrutiny is applied. *Doe v Dep't of Human Servs*, 439 Mich 650, 662; 487 NW2d 166 (1992). "A statute reviewed under this strict standard will be upheld only if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling government interest." *Id*.

The Acknowledgement of Parentage Act, MCL 722.1001 *et seq.*, only establishes paternity, the rights of the child, and permits a court to order child support, custody, or parenting time without further adjudication of the child's paternity. *Aichele v Hodge*, 259 Mich App 146, 153; 673 NW2d 452 (2003). Further, as stated in the plain language of MCL 722.1006, its grant of initial custody of the child to his mother is "without prejudice to the determination of either parent's custodial rights," and does not "affect the rights of either parent in a proceeding to seek a court order for custody or parenting time." Thus, contrary to plaintiff's argument, the statute does not impinge his right to seek a judicial determination regarding custody or parenting time. See *Foster v Wolkowitz*, 486 Mich 356, 366; 785 NW2d 59 (2010) (holding the statute "creates no impediment should either parent wish to seek a judicial determination of custodial rights"). In other words, MCL 722.1006's initial grant of custody to the mother merely provides the framework for plaintiff to seek the very right he claims it impinges—his right to provide care for and have custody of his child. *Aichele*, 259 Mich App at 153. The statute does not impinge on parents' fundamental rights in the care, custody, and management of their children.[1]

Lastly, plaintiff argues that the trial court clearly erred in relying solely on the referee's findings of fact and not allowing plaintiff to present testimony at the de novo review hearing. Custody and parenting time orders "must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005); MCL 722.28. Under the great weight of the evidence standard, this Court should not substitute its judgment on a finding of fact unless the evidence clearly preponderates in the opposite direction. *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). "In child custody cases, an abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* (citation and internal quotation marks omitted). A court commits clear legal error when it errs in its choice, interpretation, or application of the existing law. *Id.* This Court reviews questions of statutory interpretation de novo. *Hunter*, 484 Mich at 257.

MCL 552.507(2)(a) grants a FOC referee the power to "[h]ear all motions in a domestic relations matter, except motions pertaining to an increase or decrease in spouse support, referred to the referee by the court." But "[t]he court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon written request of either party or upon motion of the court." MCL 552.507(4). Further, MCL 552.507(5) provides:

[1] This Court has already determined that a father who acknowledges paternity does not have the same legal rights as a father whose child is born in wedlock. *Eldred v Ziny*, 246 Mich App 142, 149; 631 NW2d 748 (2001) ("Although MCL 722.1004 affords the *child* the full rights of a child born in wedlock, the statute does not grant a putative father who acknowledges paternity the same legal rights as a father whose child is born in wedlock.").

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

Moreover, MCR 3.215(F), which governs judicial hearings on review of objections to a referee's findings and recommendations, supports plaintiff's contention that the circuit court erred by not permitting plaintiff to present testimony at the de novo review hearing. The trial court's policy was not to permit the presentation of evidence at the de novo hearing unless it concerned matters that occurred since the referee hearing or for some reason the party did not have the opportunity to present the evidence at the referee hearing. But MCR 3.215(F)(2) provides (emphasis added): "*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*." MCL 552.507(4)(b) plainly requires with respect to referee "findings of fact to which the parties have objected," that the parties be "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." (Emphasis added). At the de novo hearing, the court may prohibit evidence on findings for which no objection was filed, MCR 3.215(F)(2)(a), or prohibit a "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." MCR 3.215(F)(2)(c) (emphasis added). The statute and court rule combine to require that the circuit court permit the presentation of the same evidence that was presented to the referee, provided the evidence is relevant to findings of the referee to which timely objection was made. This ensures that the trial court's decision is independent of any prior ruling. See *Sturgis v Sturgis*, 302 Mich App 706, 707; 840 NW2d 408 (2013).

In this case, plaintiff disputed the referee's factual findings that the parties could cooperate and generally agree and that defendant was capable of making important decisions regarding the child in his objection. Further, plaintiff "object[ed] to the Referee's findings that the Parties are in equal standing regarding the best interest factors: (a), (c), (d), (g), (h), and (j)" and "the Referee's failure to score factor (k)." Both parties should have been allowed to present their case again before the circuit court for de novo review.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Donald S. Owens