# STATE OF MICHIGAN

# COURT OF APPEALS

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| MAYA EIBSCHITZ-TSIMHONI,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>April 14, 2016 |
| v | No. 329406<br>Oakland Circuit Court<br>Family Division |
| OMER G. TSIMHONI,<br><br>Defendant-Appellee. | LC No. 2009-766749-DM |

Before: O'CONNELL, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Maya Eibschitz-Tsimhoni, appeals as of right the trial court's September 3, 2015, ex parte order precluding Maya from contacting the children for a 90-day period and the trial court's August 12, 2015 order placing the children with defendant, Omer G. Tsimhoni "until further order of the court." We reverse and remand.

## I. BACKGROUND

This matter involves long-standing litigation and animosity surrounding the custody and parenting time of the parties' three minor children. Between November 2011 and July 2015, the trial court entered over 30 orders regarding issues of parenting time and other disputes in the parties' relationship. In an attempt to resolve these issues, the trial court placed the children in Omer's care and precluded Maya from contacting them. But because the trial court did so without first holding a hearing to determine the children's best interests, this attempt was procedurally flawed.

## II. STANDARD OF REVIEW

Generally, this Court must affirm the trial court's findings of fact related to matters of child custody unless they are against the great weight of the evidence. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009); MCL 722.28. This Court reviews for a "palpable abuse of discretion" the trial court's discretionary decisions, including custody award. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We review de novo whether the trial court properly interpreted and applied the relevant statutes and court rules. *Kaeb v Kaeb*, 309 Mich App 556, 564; 873 NW2d 319 (2015). The same standards apply to orders concerning parenting time. See *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010).

## III. ANALYSIS

Maya contends that the trial court erred by effectively changing the children's custody, even on a temporary basis, without first determining whether that change would alter the children's established custodial environment. We agree.

As an initial matter, Omer contends that Maya has waived our review of these issues by stipulating to participating in the program that the trial court implemented. A waiver is an intentional abandonment or relinquishment of a known right. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 379; 666 NW2d 251 (2003). A waiver operates to extinguish any error and forfeit an appellant's claimed deprivation of a right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Contrary to Omer's assertion on appeal, Maya did not agree to participate in this program. The record indicates that Maya agreed to participate in two programs that the trial court determined were not suitable. Maya objected to the specific program the children were placed in. Accordingly, we conclude that Maya has not waived these issues.

Michigan strongly focuses on the best interests of the children involved in custody disputes. See MCL 722.21 *et seq*. To minimize unwarranted and disruptive changes in children's custody, a trial court may only modify children's custody if the moving party first establishes a proper cause or a change of circumstances. *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). The purpose of this requirement 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." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003).

Accordingly, the trial court *must* conduct an evidentiary hearing before modifying a child's custody—even on a temporary basis. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005). The only exception is when an emergency mandates an immediate change of custody:

> Pending the entry of a temporary order, the court may enter an ex parte order if the court is satisfied by specific facts set forth in an affidavit or verified pleading that *irreparable injury, loss, or damage will result from the delay* required to effect notice, or that notice itself will precipitate adverse action before an order can be issued. [MCR 3.207(B)(1 (emphasis added).]

The trial court may not "circumvent and frustrate the purpose of the law by issuing an ex parte order changing custody without any notice to the custodial parent or a hearing on the issue whether clear and convincing evidence was presented that a change of custody was in the child's best interest." *Pluta v Pluta*, 165 Mich App 55, 60; 418 NW2d 400 (1987).

In this case, the record lacks any indication of facts to indicate that delay would cause the children to suffer irreparable loss or damage. The affidavit contained only Omer's speculation, stated as an "apprehension," that Maya would disregard future no-contact provisions and disrupt the children's progress in therapy. The record, however, reflects that conditions at the time of the order were similar to conditions existing the previous year. There is no indication that the

children would suffer from the type of *immediate* harm that could not be prevented in the absence of an ex parte order. We conclude that the trial court improperly issued the September 3, 2015, ex parte order under these circumstances.

We also conclude that the trial court improperly issued the August 12, 2015 order effectively changing custody from Maya to Omer without a hearing. Regardless of the temporary nature of an order, the trial court may not change children's custody without holding a hearing *before* issuing an order.[1]

Maya also contends that the trial court should not be allowed to consider evidence regarding parental alienation syndrome at any future evidentiary hearing. We decline to address this issue because our review would be premature. The trial court is the gatekeeper to determine whether expert testimony is sufficiently reliable. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). Because the trial judge has not yet made a decision regarding which evidence it will allow at a future evidentiary hearing, we have no decision to review.

We also decline to address Maya's contention that this custody order was the prejudicial product of judicial bias. Because the trial judge who issued the orders has recused herself from the case, this issue is moot. See *Gen Motors Corp v Dep't of Treas*, 290 Mich App 355, 386; 803 NW2d 698 (2010) (stating that an issue is moot if this Court's ruling can have no practical effect on the controversy).

Finally, Maya contends that this Court should not remand for an evidentiary hearing but should instead immediately return the children to her custody. Ignoring the realities of the children's situation and imposing on them yet *another* abrupt change without first holding a hearing would in no way, shape, or form advance the Legislature's goal of minimizing unwarranted and disruptive changes in the children's custody. See *Corporan*, 282 Mich App at 603. It would only exacerbate their already unfortunate circumstances.

While we reverse the trial court's procedurally defective orders, we note that nothing that this Court can do will change the reality of the children's situation. On remand, the trial court shall conduct an evidentiary hearing on the children's custody as soon as possible to determine whether, considering the myriad disruptions in this case, the children have an established custodial environment.[2] The trial court shall then use the appropriate standard to determine what custody arrangement is in the children's best interests.

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[1] While we agree that the trial court's procedure was flawed, we do not agree with Maya's assertions that the trial court deprived her of due process by failing to hold a hearing after the ex parte order. Maya filed motions adjourning a scheduled evidentiary hearing and requested a stay of proceedings, and the trial court granted both motions. It is axiomatic that a party may not appeal an error that the party created. *Clohset v No Name Corp*, 302 Mich App 550, 555; 840 NW2d 375 (2013). Any failure to hold a hearing was directly attributable to Maya's actions.

[2] The existence of an established custodial environment does not depend on how the environment was created. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). On remand, the

We reverse and remand for further proceedings. We do not retain jurisdiction, and we do not award costs.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Colleen A. O'Brien

trial court must consider the children's present situation when determining whether an established custodial environment exists. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).