

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS DWAYNE JACKSON,
Plaintiff-Appellant,

UNPUBLISHED
June 21, 2012

v

No. 306692
Oakland Circuit Court
Family Division
LC No. 2004-702201-DM

CHERIE LYNETTE JACKSON,
Defendant-Appellee.

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying his motion for custody and suspending his parenting time. We reverse in part and remand for further proceedings regarding whether an established custodial environment exists, and if so, whether denying plaintiff custody and suspending his parenting time were in the best interest of the children under the factors articulated in MCL 722.23.

I. THE REFEREE’S ALLEGED ERRORS

Plaintiff first argues that the Friend of the Court (FOC) referee (a) did not follow the Michigan Court Rules and relevant statutes, (b) was biased, (c) erred in refusing to hear testimony from plaintiff’s witnesses, and (d) improperly made findings of fact based on defendant’s unproven allegations. We disagree.

In order to preserve an issue for appellate review, it must be raised before, addressed, and decided by the lower court.¹ Plaintiff made no timely mention that the referee was not following the applicable Michigan statutes and court rules or that the referee was biased. Thus, these two issues are not preserved for appellate review. Plaintiff, did, however, object to the referee’s refusal to allow plaintiff to call witnesses, and the trial court conducted a de novo hearing to allow plaintiff to call these witnesses. Thus, this issue is preserved for review. Plaintiff also timely objected to the referee’s findings of fact based on defendant’s unproven allegations, and

¹ *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005).

the trial court denied plaintiff's objections. Thus, this issue is also preserved for appellate review.

This Court reviews unpreserved claims for plain error affecting substantial rights.² An error affects substantial rights when it is outcome determinative.³ Whether the trial court conducted a proper de novo hearing when plaintiff objected to the referee's recommendation is a question of law, reviewed de novo.⁴ This Court will affirm factual findings in child custody matters "unless the evidence clearly preponderates in the opposite direction."⁵

As a threshold matter, we emphasize that the ultimate determination of custody fell to the trial court, not the referee. A referee may "investigate all relevant facts, and . . . make a written report and recommendation to the parties and to the court, regarding child custody or parenting time, or both, if ordered to do so by the court."⁶ However, upon completion of the referee's recommendation "[t]he 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."⁷ It is the trial court, not the referee, that renders the final decision regarding custody. Thus, any alleged errors in the referee proceedings do not necessarily render the trial court's determination erroneous.

Moreover, plaintiff's specific objections to the referee's recommendation and behavior are without merit. Plaintiff argues that the referee failed to follow the Michigan Court Rules and Michigan statutes, but plaintiff fails to specify what rules and statutes were violated or what behavior at the hearing was objectionable. It is not enough for a party to "simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."⁸ Moreover, our review of the referee hearing does not reveal any apparent errors.

Plaintiff also argues that the referee was biased and formed an opinion before the conclusion of the hearing, rendering the hearing transcript inadmissible. However, we note that plaintiff specifically consented to the trial court's use of the referee hearing transcript as evidence, and "[a] party may not take a position in the trial court and subsequently seek redress

² *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

³ *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

⁴ *Cochrane v Brown*, 234 Mich App 129, 131; 592 NW2d 123 (1999).

⁵ *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (citations omitted).

⁶ MCL 552.505(1)(g).

⁷ MCL 552.507(4).

⁸ *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (citations omitted).

in an appellate court that is based on a position contrary to that taken in the trial court.”⁹ Furthermore, although plaintiff provides page numbers of the transcript where the referee’s bias is supposedly demonstrated, plaintiff fails to specify what particular statements were indicative of bias. A review of those transcript pages reveals nothing amounting to improper comments or comments indicating that the referee formed an opinion before the conclusion of the hearing.

Next, plaintiff argues that the referee impermissibly barred testimony from plaintiff’s witnesses. The referee did imply that unless plaintiff’s witnesses could testify about the living situation in defendant’s home, their testimony would not be allowed. However, plaintiff objected about this to the trial court, and the trial court agreed to hear testimony from plaintiff’s additional witnesses. Thus, even assuming that the referee improperly barred testimony from plaintiff’s additional witnesses, there was ultimately no error because the trial court held a hearing to specifically allow plaintiff to call his additional witnesses before making a decision about custody and parenting time issues.

Lastly, plaintiff argues that the referee erred when making findings of fact based solely on defendant’s unproven allegations and not on plaintiff’s allegations. Even if the referee made findings of fact that the trial court relied on and that were based on defendant’s unproven allegations, this is not necessarily improper. Though defendant’s allegations may have conflicted with plaintiff’s allegations, a trial court is allowed to make credibility decisions when assessing the validity of the evidence presented by the parties, and “[t]his Court will defer to the trial court’s credibility determinations.”¹⁰

II. EVIDENTIARY HEARING

Plaintiff’s next claim on appeal is that the trial court erred in adopting the referee recommendation on an interim basis without first conducting a full de novo hearing. We disagree.

Whether the trial court conducted a proper de novo hearing in response to a party’s objection to a referee recommendation is a question of law, reviewed de novo.¹¹

The trial court must hold a de novo hearing when either party objects to a referee recommendation in a custody matter.¹² However, MCR 3.215(G)(1) specifically states that a trial court “may, by an administrative order or by an order in the case, provide that the referee’s recommended order will take effect on an interim basis pending a judicial hearing” Moreover, MCL 552.507(7) states that “[p]ending a de novo hearing, the referee’s recommended order may be presented to the court for entry as an interim order as provided by the Michigan

⁹ *Blazer Foods, Inc v Restaurant Prop, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (citations omitted).

¹⁰ *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

¹¹ *Cochrane*, 234 Mich App at 131.

¹² *Cochrane*, 234 Mich App at 131-134.

court rules.” Thus, Michigan law and the Michigan Court Rules do not support plaintiff’s position that the trial court automatically erred by adopting the referee’s recommendation on an interim basis.

Further, even if there was some type of error in the trial court’s interim order, the issue is moot at this point. “An issue is moot if an event has occurred that renders it impossible for the court to grant relief.”¹³ This Court will only review a moot issue “if it is publicly significant and is likely to recur, yet is likely to evade judicial review.”¹⁴ Here, the interim order, which limited plaintiff’s parenting time to alternate weekends and one day every week, was entered on February 10, 2010. On March 24, 2010, the trial court entered an order suspending all of plaintiff’s parenting time. Hence, the interim order was in effect for a little over a month and was rendered obsolete when the trial court suspended all of plaintiff’s parenting time. There is no relief that this Court could grant, because nothing can change the parenting time that occurred between February 10, 2010, and March 24, 2010.¹⁵

III. SUSPENSION OF PARENTING TIME AND DENIAL OF CUSTODY

Plaintiff next argues that the trial court erred in suspending plaintiff’s parenting time, the trial judge was biased, the trial judge failed to follow the Michigan Court Rules, and that the trial court erred in limiting the de novo hearing. We agree, in part.

As discussed above, in order to preserve an issue for appellate review, it must be raised, addressed, and decided in the lower court.¹⁶ Plaintiff requested that the trial court not alter his parenting time, and the trial court declined to grant this request and instead suspended all of plaintiff’s parenting time. Thus, this issue is preserved for appellate review. Plaintiff never mentioned in the lower court that the trial judge was biased or that the judge was not following the Michigan Court Rules. Thus, these two claims are not preserved for appellate review.¹⁷ However, plaintiff agreed with the trial court’s decision to limit the de novo hearing. Thus, this issue is preserved for appellate review.

¹³ *Attorney General v Pub Service Comm*, 269 Mich App 473, 486; 713 NW2d 290 (2005) (citations omitted).

¹⁴ *Id.*

¹⁵ Plaintiff’s argument is also somewhat disingenuous, as he failed to exercise any parenting time between February 10, 2010, and March 24, 2010, even though the interim order allowed for parenting time every other weekend and one evening every week.

¹⁶ *Detroit Leasing Co*, 269 Mich App at 237.

¹⁷ “Where a [party] knows of alleged bias” of the trial judge prior to the proceedings and “fails to move for disqualification, the issues is not preserved for appeal.” *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 491; 369 NW2d 487 (1985); see also MCR 2.003(c)(1), stating that a party must file the motion to disqualify within 14 days after the party discovers the grounds for disqualification and include an affidavit regarding the known grounds for disqualification.

A trial court's adherence to the proper legal framework in custody cases is reviewed for clear legal error and a "trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law."¹⁸ This Court reviews unpreserved claims for plain error affecting substantial rights.¹⁹ Whether the trial court conducted a proper hearing in response to a party's objection to a referee's recommendation is a question of law, reviewed de novo.²⁰

As this Court explained in *Vodvarka*,²¹ the threshold showing for a modification of custody is that "a party seeking a change in custody first establish proper cause or a change of circumstances" Proper cause "means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken."²² As for a change of circumstances, the "movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed."²³

After this initial burden has been met, the trial court then must determine whether an established custodial environment exists, looking "over an appreciable time" to see whether "the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort."²⁴ If an established custodial environment does exist, "then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child."²⁵ Yet, "if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests."²⁶ MCL 722.23 explains that the "best interests of the child means the sum total of the following factors to be considered, evaluated, and determined by the court:"

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

¹⁸ *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

¹⁹ *Kloian*, 272 Mich App at 242.

²⁰ *Cochrane*, 234 Mich App at 131.

²¹ 259 Mich App at 508, quoting MCL 722.27(1)(c).

²² *Id.* at 511.

²³ *Id.* at 513 (emphasis in original).

²⁴ MCL 722.27(1)(c).

²⁵ *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001).

²⁶ *Id.* at 6-7.

- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) 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.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The *Vodvarka* framework only applies to changes in parenting time “[i]f a change in parenting time results in a change in the established custodial environment”²⁷ The physical environment of the child is an enumerated consideration when determining an established custodial environment, and in this case, the children lived with plaintiff every other week and every other weekend before the suspension of plaintiff’s parenting time. Moreover, even the referee recognized that “clearly there is an established custodial environment in this matter with each of the parties, having equally divided the year with the children on a weekly basis since 2005.” Thus, it appears that the suspension of plaintiff’s parenting time did amount to a change of the custodial environment, which triggered the *Vodvarka* analysis.

However, the trial court failed to follow the *Vodvarka* framework. The trial court failed to make any findings regarding the existence of an established custodial environment. This is contrary to established case law which instructs that “[t]he first step in considering a change of custody petition is to determine whether an established custodial environment exists. It is only then that the court can determine what burden of proof must be applied.”²⁸ Likewise, the trial court made no mention of the statutory best interest factors, and “[i]n deciding a child custody matter, the trial court must evaluate each of the statutory factors pertaining to the best interest of the child and must explicitly state its findings and conclusions regarding each factor.”²⁹

²⁷ *Shade v Wright*, 291 Mich App 17, 27; 805 NW2d 1 (2010).

²⁸ *Wealton v Wealton*, 120 Mich App 406, 410; 327 NW2d 493 (1982).

²⁹ *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008).

Accordingly, the trial court's modification of custody without following the *Vodvarka* framework was clearly erroneous.

Moreover, the trial court's decision to completely suspend plaintiff's parenting time seemed to be a reaction to the revelation that plaintiff went to the children's school to tell them that he would no longer see them. Although plaintiff's behavior may have been inappropriate, we are not convinced that the complete removal of plaintiff from the children's life was the proper remedy, particularly since this Court has recognized that the procedural safeguards in change of custody motions "are intended to . . . minimize unwarranted and disruptive changes of custody orders."³⁰ Furthermore, although the trial judge exhibited frustration with plaintiff's behavior in court and threatened to hold plaintiff in contempt of court, changing custody is not a proper method of forcing compliance with court orders.³¹

Plaintiff next argues that the trial judge was biased, failed to follow the Michigan Court Rules, and erred in only holding a limited hearing. Plaintiff does not mention any of these claims in his issues presented section of his appellate brief and an issue is "not preserved for appeal [when] it was not set forth in [plaintiff's] statement of the questions involved."³²

Moreover, plaintiff's claims are meritless. Plaintiff provides no examples of the trial judge's bias, and offers no reference to any transcript pages to illustrate this alleged bias. As this Court has stated, a party may not simply announce his position on appeal and then expect this Court to unravel his argument and search for authority to support his claims.³³ Although the trial court judge expressed strong disapproval of plaintiff's behavior in disrupting the children at school, a trial judge's opinions, even if indicative of an "unfavorable predisposition that springs from facts or events occurring in the current proceeding" do not amount to bias "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."³⁴ Furthermore, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge" unless such remarks "reveal an opinion that derives from an extrajudicial source" or "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."³⁵

³⁰ *Vodvarka*, 259 Mich App at 509.

³¹ *Adams v Adams*, 100 Mich App 1, 13-14; 298 NW2d 871 (1980).

³² *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); See also MCR 7.212(C)(5) (an appellate brief must include "[a] statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately . . .").

³³ *Wilson*, 457 Mich at 243.

³⁴ *Cain v Mich Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996) (citations omitted).

³⁵ *Liteky v US*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

None of the trial judge's remarks appear to be from extrajudicial sources or rise to the level of a high degree of favoritism or antagonism.

Next, plaintiff contends that the trial judge failed to follow the Michigan Court Rules. Plaintiff again fails to explain his claim and provides no factual or legal support to sustain his argument. A party may not merely assert an error and expect this Court to understand the arguments and search for authority to either sustain or reject the claims.³⁶ Because plaintiff has failed to specify what errors he has apparently detected, an analysis of his claim is virtually impossible.

Lastly, plaintiff contends that the trial court erred in holding a limited hearing instead of a de novo hearing. According to MCR 3.215(F)(2):

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:

- (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
- (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
- (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.

Also, MCL 552.507(6)(c) specifically states that a de novo hearing includes "a new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing." Thus, even though the trial court limited its hearing to evidence relating to plaintiff's objections to the referee recommendation, this is still considered a de novo hearing. Furthermore, plaintiff actually agreed to limit the hearing in this respect, and, thus, cannot now claim that a limited hearing was improper, as "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court."³⁷

IV. THE FAMILY COUNSELOR'S RECOMMENDATION

Plaintiff's last claim on appeal is that the family counselor's recommendation did not comply with MCL 552.515. We disagree.

³⁶ *Wilson*, 457 Mich at 243.

³⁷ *Blazer Foods, Inc*, 259 Mich App at 252.

In order to preserve an issue for appellate review, it has to be raised before, addressed, and decided by the lower court.³⁸ In this case, while plaintiff objected to the family counselor's recommendation because it had been taken out of context, he made no argument relating to MCL 552.515. Thus, this issue is not preserved for appellate review. This Court reviews unpreserved claims for plain error affecting substantial rights.³⁹

MCL 552.515 states that:

An employee of the office who provides alternative dispute resolution in a friend of the court case involving a particular party shall not perform referee functions, investigation and recommendation functions, or enforcement functions as to any domestic relations matter involving that party.

Plaintiff failed to articulate any argument in support of his claim that the family counselor's recommendation somehow violated MCL 552.515. Moreover, nothing in the record indicates that the family counselor was involved in alternative dispute resolution. While the family counselor met with both plaintiff and defendant, the purpose of this meeting appeared to be for the family counselor to discover and detail for the court the progress that the parties had made, not to actually mediate the custody dispute between plaintiff and defendant. Thus, there was no plain error affecting plaintiff's substantial rights.

Reversed in part and remanded for further proceedings regarding whether an established custodial environment exists, and if so, whether denying plaintiff custody and suspending his parenting time were in the best interest of the children under the factors articulated in MCL 722.23. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher

³⁸ *Detroit Leasing Co*, 269 Mich App at 237.

³⁹ *Kloian*, 272 Mich App at 242.