STATE OF MICHIGAN

COURT OF APPEALS

JAYNE MARIE MOORE,

Plaintiff-Appellant,

v

MORRIS THOMPSON,

Defendant-Appellee.

UNPUBLISHED
August 15, 1997

No. 192064
Eaton Circuit Court
LC No. 93-000625-DS

Before: Cavanagh, P.J., and Holbrook, Jr. and Jansen, JJ.

PER CURIAM.

Plaintiff and defendant are the natural parents of five year old Tauheed Thompson. Plaintiff appeals as of right from a custody order by which defendant was awarded sole physical custody of Tauheed. We affirm.

I

Plaintiff's first argument consists of two separate challenges to the trial court's decision to proceed with the custody hearing on March 17, 1995, even though she was not represented by counsel on that day. Plaintiff argues that that decision violated her constitutionally protected right to due process. She also argues that the court's action evidences a palpable abuse of discretion. Although plaintiff did not raise the due process issue below, this Court will review unpreserved constitutional error raised "for the first time on appeal when the alleged error could have been decisive of the outcome." *People v Grant*, 455 Mich 535, 547; 520 NW2d 123 (1994). "This Court reviews questions of law regarding constitutional issues de novo." *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996). The abuse of discretion issue was raised below, and is therefore preserved for appeal. In a child custody case, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; MSA 25.312(8).

A. Due Process

The federal constitutional guarantee of due process is embodied in the Fourteenth Amendment: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." US Const, Am XIV. In *Lassiter v Dep't of Social Services*, 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the Court observed that "'due process' has never been, and perhaps can never be, precisely defined. . . . Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests at stake." *Id*. at 24-25. The *Lassiter* Court noted that there are three factors that need to be examined when determining what due process is required under the federal constitution in a given proceeding: "the private interests at stake, the government's interest, and the risk that the procedures will lead to erroneous decisions. We must balance these elements against each other." *Id*. at 27, citing *Mathews v Eldridge* 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d (1976).

Michigan's constitutional guarantee of due process is found in Const 1963, art 1, § 17: "No person shall be . . . deprived of life, liberty or property without due process of law." The Michigan Supreme Court has written that three factors should be considered when determining the due process requirements in a given situation:

> "First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and finally the Governments interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Eldridge*, *supra* at 335.]

Thus, both the federal and state guarantees of due process are analyzed under the *Eldridge* balancing test.

"It is plain that the interests of a parent in the companionship, care, custody, and management of his or her children" are significant. *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Accordingly, a parent has a concurrently important interest in a just and correct resolution to a custody proceeding. *Lassiter, supra* at 27. The state also has an important interest in the just and correct resolution of a child custody proceeding. As our Supreme Court observed in *Baker v Baker*, 411 Mich 567, 576; 309 NW2d 532 (1981), the Child Custody Act of 1970, MCL 22.212 *et seq.*; MSA 25.312(1) *et seq.*, was enacted by the Legislature to, "among other things, . . . standardize the criteria for resolving child custody cases by declaring that the ultimate standard for the award of custody -- the best interests of the child -- is to be determined by the evaluation and consideration of . . . specifically identified factors."

With regard to the complexity of the legal situation faced by plaintiff, there is no indication in the record that the March 17, 1995 hearing was so complicated that both plaintiff's and the state's interest in a just resolution to this custody dispute was undermined by having plaintiff proceed on that day without an attorney. Plaintiff was not required to present any proofs or engage in any cross-examination of defense witnesses. Although she did undergo a lengthy cross-examination by defense counsel, the

trial court specifically and repeatedly advised her of her right to raise an objection at any time during the course of the hearing.

Finally, the *Lassiter* Court observed that "a court deciding whether due process requires the appointment of counsel need not ignore a parents' plain demonstration that she is not interested in attending a hearing." *Lassiter*, *supra* at 33. Similarly, we need not ignore plaintiff's pattern of behavior surrounding the March 17 hearing. The record indicates that plaintiff waited until approximately two weeks before the scheduled hearing to contact an attorney to represent her, even though she had fired her previous attorney on February 9, 1995. When told by her new attorney that he was scheduled to sit as a mediator for the United States District Court on March 17, plaintiff hired him anyway. Additionally, at a hearing held on March 16, 1995, the trial court told plaintiff's attorney that it would adjourn the proceedings if plaintiff satisfied several conditions. Plaintiff failed to fulfill those conditions. When asked by the trial court whether she had satisfied the conditions, plaintiff indicated that she could not, and that she did not, want the hearing to be postponed. In view of all of these circumstances, we conclude that plaintiff's due process rights were not violated at the March 17, 1995 custody hearing. The risk that an error would result as a consequence of plaintiff being without counsel for that one day was minimal. We also note that plaintiff was represented by her counsel of choice at all previous and subsequent proceedings.

B. Abuse of discretion

"The adjournment of a case is always a matter of discretion on the part of the trial judge." *Bauman v Grand Truck Western R Co*, 363 Mich 604, 609; 110 NW2d 628 (1961). Initially, we note that the custody proceedings had been postponed from February 17, 1995, to March 17, 1995, after plaintiff failed to appear at the February hearing. As noted above, plaintiff waited until approximately three weeks after she had fired her previous attorney and approximately two weeks before the March 17, 1995 hearing, before she contacted an attorney regarding representation. Plaintiff was not dissuaded from hiring her new attorney even though he informed her he could not attend the March 17 hearing. Finally, plaintiff failed to meet the trial court's conditions for an adjournment. Considering all of these circumstances, we conclude that the trial court did not abuse its discretion when deciding to proceed with the March 17, 1995 hearing.

II

Second, plaintiff argues that the trial court committed a clear legal error when it based part of its findings upon her decision not to have Tauheed immunized. Plaintiff asserts that she has a statutorily mandated right to elect not to have her children immunized. MCL 333.9215; MSA 14.15(9215) indicates that a child is exempt from the immunization requirements of Michigan's Public Health Code under the following specific circumstances:

> (1) A child is exempt from the requirements of this part as to a specific immunization for any period of time as to which a physician certifies that a specific immunization is or may be detrimental to the child's health or is not appropriate.

> (2) A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement to the administrator of the child's school operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or other objections to immunizations. [MCL 33.9215(1) and (2); MSA 14.15(9215)(1) and (2).]

At the March 17, 1995 hearing, plaintiff indicated that she was not going to keep Tauheed's immunizations current because she had chosen not "to put diseases in [his] . . . system." This appears to be a medical justification, but it does not appear to be grounded on any scientifically recognized concern with immunizations. Instead, plaintiff asserted what appears to be a personal rejection of the concept of immunization in general. Plaintiff did not indicate that she was acting pursuant to medical advice or that any documentation supported her concerns. There is also no indication that plaintiff's decision was based on any deeply held religious convictions.

The trial court cited plaintiff's actions concerning Tauheed's immunizations as a reason in support of finding that factors MCL 722.23(a) and (c); MSA 25.312(3)(a) and (c), weighed in favor of defendant. Theses conclusions are not contrary to the directives of either MCL 333.9215; MSA 14.15(9215) or MCL 722.23; MSA 25.312(3). Plaintiff failed to meet the requirements of the medical exemptions to immunization, and she did not argue that her decision was based on religious convictions. MCL 333.9215(2); MSA 14.15(9215)(2) does say that a child is exempt if "a written statement" outlining "other objections" to immunization is presented to the proper authorities. However, there is no evidence that plaintiff had ever written her objections and presented them to anyone. Without such documentation, there is no way to fully examine whether plaintiff's reasons fall under the "other objection[s]" exemption, or whether the custody proceeding was the first that she had ever raised the issue.

Finally, we note that the trial court scored the factors included in MCL 722.23; MSA 25.312(3) in the following fashion: (a), (c), (d), (e), and (j) in favor of defendant; (b), (f), (g), (h) and (k) equal; and no score for (i). Therefore, even if the two factors in which Tauheed's lack of immunization played a part were reevaluated as weighing in favor of plaintiff, the combined weight of the other factors would still indicate that the best interests of the child will be promoted by the custody arrangement as it now exists.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen