STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL D. PHIPPS,

Plaintiff-Appellee,

v

WENDY M. FADER,

Defendant-Appellant.

UNPUBLISHED
November 18, 2003

No. 249380
Tuscola Circuit Court
LC No. 01-020410-DZ

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a trial court order granting the parties joint legal and physical custody of their minor children. We reverse and remand.

Plaintiff and defendant were never married, but had three children during their approximately twelve-year relationship. The parties separated on February 21, 2001, and the parties thereafter alternated custody of the minor children on a weekly basis. Plaintiff filed the instant matter seeking sole physical custody of the minor children. In the alternative, plaintiff sought an order continuing the then-existing custodial arrangement. Plaintiff further sought an equitable division of the parties' assets and liabilities. Defendant filed an answer requesting that it be deemed a counterclaim seeking sole physical custody.

A referee hearing was held on January 8, 2002, April 16, 2002, April 17, 2002, and July 16, 2002. On August 2, 2002, the hearing referee issued written findings recommending that the parties be awarded joint physical custody of the minor children (continuing the alternating weekly arrangement). Attached to the hearing referee's findings of fact was a proposed order implementing the recommendations. The hearing referee's findings also contained the following notice:

NOTICE OF RIGHT TO DE NOVO HEARING

> The parties are hereby notified that they may request a de novo hearing before the Family Division Judge by filing a written objection. The written objection shall set forth specifically the portion(s) of the recommendation objected to and the basis of the objection (i.e. errors in findings of fact or law). **The objection must be filed with the Tuscola County Clerk, with copies served upon the Friend of the Court and the opposing party or counsel for the opposing party.** Said

> written objection must be filed within twenty-one (21) days after the Recommendation is mailed pursuant to Michigan Court Rule 3.215. **PLEASE NOTE: FACSIMILE OBJECTIONS WILL NOT BE ACCEPTED.** The de novo hearing will be conducted by a review of the transcript of the referee hearing. After reviewing the transcript, the Court may, in its discretion, schedule a further hearing for presentation of additional testimony or proof. It is the responsibility of the party requesting a de novo hearing to obtain a transcript of the referee proceeding at his/her expense. The transcript must be ordered and arrangements made for payment, within the twenty-one (21) day period referred to above. If no request for a de novo hearing is received within said period, or if the transcript is not properly ordered within said period, the Recommendation shall become the Order of the Court, to be entered, without further notice to either party.

On August 6, 2002, defendant filed a written objection to the hearing referee's findings of fact and recommendations, and she specifically requested a de novo hearing. However, on August 30, 2002, the trial court, despite not having held a de novo hearing, entered the order prepared by the hearing referee.

Defendant moved to set aside the order and extend the time limit for payment of the referee hearing transcript fees. She noted that she had not been able to acquire the approximately $1,800 required for the transcripts. The trial court denied the motion, ruling that it was untimely because defendant did not raise the issue during the twenty-one day period.

On appeal, defendant contends that the trial court improperly denied her a de novo hearing pursuant to MCL 552.507 and MCR 3.215. MCL 552.507(5) provides as follows:

> The 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. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party under subsection (4), except that a request for a de novo hearing concerning an order of income withholding shall be made within 14 days after the recommendation of the referee is made available to the party under subsection (4).

MCR 3.215(E)(3)(b) also states that a party may obtain a judicial hearing on any matter that has been the subject of a referee hearing by filing a written objection and notice of hearing within twenty-one days.

In *Cochrane v Brown*, 234 Mich App 129, 134; 592 NW2d 123 (1999), we recognized that "the timely filing of written objections and request that the court entertain additional evidence triggers the requirement under these authorities for a full hearing de novo." Here, the hearing referee issued her findings of fact and recommendations on August 2, 2002. On August 6, 2002, defendant filed a written objection to the hearing referee's findings of fact and recommendations, and specifically requested a de novo hearing. Because defendant's request was both timely and in writing she was, therefore, plainly entitled to a de novo hearing. Consequently, the trial court erred in denying her request for a de novo hearing.

We further note that the aforementioned notice provision in the hearing referee's findings of fact stated that the "de novo hearing will be conducted by a review of a transcript of the referee hearing. After reviewing the transcript, the Court may, in its discretion, schedule a further hearing for presentation of additional testimony or proof." In *Cochrane*, we ruled that "the plain wording of MCR 3.215(F)(2) indicates that a hearing based exclusively on review of the record is appropriate only if the parties consent to that arrangement." *Cochrane*, *supra* at 133. Here, the record does not indicate that defendant consented to a hearing based solely on a review of the transcript. Accordingly, contrary to the notice provision, the trial court may not merely rely on the transcript of the referee hearing, but must, instead, conduct a de novo hearing.

We also note that the hearing referee's notice provision indicates that the party requesting a de novo hearing must arrange for the transcript of the referee hearing at his or her expense. In contrast, MCL 552.507(3) provides as follows: "If ordered by the court, or if stipulated by the parties, a referee shall make a transcript, verified by oath, of each hearing held. The cost of preparing a transcript shall be apportioned equally between the parties, unless otherwise ordered by the court." Here, the record does not whether the referee hearing was ordered by the court or stipulated to by the parties. Nor does the record indicate that the trial court ordered only one of the parties to pay for the cost of the transcript. Accordingly, there does not appear to be any factual basis for the hearing referee's notice provision requiring defendant to pay for the entire cost of the transcript. And, to the extent that this language was "boilerplate," it is contrary to MCL 552.507(3), which sets forth the general rule that, absent a trial court order to the contrary, the parties share the cost of preparing the transcript. Regardless, having properly requested a de novo hearing, defendant's right to that hearing is mandatory and may not be rendered conditional on the trial court obtaining a copy of the referee hearing transcript.

In conclusion, we vacate the order of the trial court and remand for a de novo hearing. In light of our ruling, we need not address defendant's remaining contentions of error.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad