STATE OF MICHIGAN

COURT OF APPEALS

ANDREW J. PERUN, JR.,

Plaintiff-Appellant,

v

CYNTHIA J. PATTERSON, a/k/a CYNTHIA J. PERUN, a/k/a CYNTHIA J. ZITO,

Defendant-Appellee.

UNPUBLISHED
November 20, 2008

No. 284497
Oakland Circuit Court
LC No. 2000-637587-TM

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Plaintiff, proceeding in propria persona, appeals by delayed leave granted a March 13, 2008, order denying his motion for a hearing on custody, parenting time, and child support, which plaintiff filed after the trial court issued an order, dated February 13, 2008, that restricted plaintiff's parenting time. We affirm.

I. Facts

The parties were divorced in 1998, pursuant to a consent judgment of divorce that awarded the parties joint legal and physical custody of their children, with defendant having primary physical custody. Plaintiff was awarded parenting time on alternating weekends, as well as one weekly overnight visit. Following an incident in 2001, defendant was awarded sole legal and physical custody of the children and plaintiff's parenting time was limited to supervised parenting time. In 2005, unsupervised parenting time was reinstated. On May 17, 2007, the trial court entered a new parenting time order that expanded plaintiff's parenting time, including one monthly overnight visit. The May 17, 2007, order also directed the parties to submit any parenting time disputes to an appointed parenting time mediator, and to conduct a follow-up evaluation in September 2007 with Dr. Larry Friedberg, who had previously evaluated the parties in these proceedings.

Several parenting time disputes arose after entry of the May 17, 2007, order. Plaintiff frequently advised defendant and her attorney to file motions with the court if they disagreed with his interpretation of the order. Plaintiff also repeatedly advised defendant that Dr. Friedberg and the appointed parenting time mediator were not involved in the case and that he could not pay for their services. He refused to pay his portion of Dr. Friedberg's fee and failed to cooperate with the September follow-up visit.

In January 2008, defendant filed a motion for plaintiff to show cause why he should not be held in contempt for violating the May 17, 2007, order by refusing to mediate disputes with the parenting time mediator and by refusing to schedule a follow-up evaluation with Dr. Friedberg. The trial court determined that plaintiff had failed to comply with its orders but, in lieu of holding him in contempt, rescinded the appointments of Dr. Friedberg and the parenting time mediator, and reduced plaintiff's visitation to weekly supervised visits at the Haven.

II. Reduction of Parenting Time

Plaintiff argues that the trial court erred by reducing his parenting time without holding an evidentiary hearing. We disagree.

We review parenting time orders de novo, but will affirm the trial court's order unless its findings of fact 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. MCL 722.28; *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008).

The trial court did not err when it reduced plaintiff's parenting time without first holding an evidentiary hearing.

Plaintiff correctly asserts that a trial court may not modify a child's established custodial environment unless it first finds proper cause or changed circumstances, and also finds by clear and convincing evidence that the modification is in the child's best interests. MCL 722.27(1)(c). However, a modification of parenting time is not subject to these prerequisites unless the modification amounts to a change in the child's established custodial environment. See *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008).

Here, the trial court did not change the children's established custodial environment. A custodial environment is established when, over an appreciable time period, the child naturally looks to the custodial parent for guidance, discipline, the necessities of life, and parental comfort. 722.27(1)(a); *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). Defendant had sole legal and physical custody of the children since 2001. Since May 2007, the children had only one overnight visit with plaintiff monthly, and periodic daytime and evening visits. Because plaintiff's contacts with the children were limited to set time periods each month, there is no basis for finding that a custodial environment existed with plaintiff. Because the trial court's modification of parenting time did not change the children's establish custodial environment, no evidentiary hearing was required. *Powery*, *supra* at 528.

Plaintiff also argues that the trial court erred by failing to "reschedule" an evidentiary hearing that was originally scheduled for April 5, 2005, but was adjourned based on the parties' stipulation to submit the matter to nonbinding mediation. Plaintiff filed a motion to reschedule that hearing in January 2006, which the trial court resolved in an order dated February 8, 2006. Plaintiff did not seek either an appeal of that order within 21 days as required by MCR 7.205(A), or apply for delayed leave to appeal pursuant to MCR 7.205(F)(1), and "[e]xcept as provided in [MCR 7.205](F)(4) [applicable to criminal defendants], leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after" entry of the order that could have been the subject of an appeal. Thus, to the extent that plaintiff challenges the trial court's

denial of his earlier motion for an evidentiary hearing, pursuant to the February 8, 2006, order, this Court lacks jurisdiction to consider that issue.

III. Oral Request for Parenting Time

Plaintiff also argues that the trial court erred when it responded to his oral request for specific parenting time by advising him that he was required to raise the issue in an appropriate motion. MCL 722.27a(7) provides that "[p]arenting time shall be granted in specific terms if requested by either party at any time." In *Pickering v Pickering*, 268 Mich App 1, 6-7; 706 NW2d 835 (2005), this Court held that because "the plain language of MCL 722.27a(7) provides that a request for specific terms regarding parenting time can be made 'at any time' . . . requests for specific parenting time terms must be considered by the court regardless of the timing of the request." Accordingly, the Court concluded that where the defendant orally moved for specific parenting time, "the trial court erred, as a matter of law, in refusing to consider specific terms for parenting time 'in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time,' subject to the mandates of MCL 722.27a." *Id.*

In this case, at the hearing for entry of an order on defendant's motion to modify parenting time, plaintiff clearly requested a specific parenting time order. Thus, the trial court was obligated to consider the request, and the court erred in replying that plaintiff was instead required to file a motion. The error was harmless, however, because the trial court did in fact enter a parenting time order that was specific as to frequency, duration, and type. MCL 722.27a(1). The trial court ordered one hour of supervised visitation a week at the Haven. Because plaintiff's request for a specific order was satisfied, his substantial rights were not affected. See MCR 2.613(A) (an error in the trial court proceedings does not require reversal unless a party's substantial right was affected).

IV. Limitation of Parenting Time

Plaintiff next argues that the trial court abused its discretion by limiting his parenting time to one hour of supervised visitation a week. We disagree.

MCL 722.27a provides, in pertinent part:

> (1) Parenting time shall be granted in accordance with the best interests of 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. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.
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> (3) A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.

* * *

(6) The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:

* * *

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

* * *

(i) Any other relevant factors.

The trial court explained that it was limiting plaintiff's parenting time to one hour of supervised visitation a week because he had failed to comply with previous orders to cooperate with a follow-up evaluation by Dr. Friedberg and to submit parenting time disputes to a parenting time mediator. These were proper considerations pursuant to MCL 722.27a(6)(f) and (i). Plaintiff's past history served as a sound basis for the trial court's requirement of a follow-up evaluation with Dr. Friedberg to monitor the success of overnight visitation under the May 17, 2007, order. Although plaintiff asserts that the order is unjust because he was not able to financially afford the mediation and evaluation services, he never sought relief from these requirements. Further, defendant submitted letters written by plaintiff, which showed that plaintiff's unwillingness to cooperate with Dr. Friedberg was not based solely on financial concerns. Plaintiff's history of non-cooperation, his confrontational approach to dealing with disputed matters, and his unwillingness to use the mediator's services reflected his unwillingness to work in good faith at implementing a harmonious parenting time arrangement that would serve the children's best interests. Furthermore, the possibility of expanded visitation in the future was not foreclosed. Under the circumstances, the trial court's order is not "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." *Berger*, *supra* at 716.

V. Evidentiary Hearing

Plaintiff argues that he had a constitutional due process right to an evidentiary hearing before losing unsupervised visitation rights. No person may be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Tolksdorf v Griffith*, 464 Mich 1, 7; 626 NW2d 163 (2001). A parent's custodial rights warrant due process protection because it is an important interest. *Aichele v Hodge*, 259 Mich App 146, 164; 673 NW2d 452 (2003). Procedural due process is designed to limit government action and requires the application of safeguards in proceedings that affect the rights protected by due process, including life, liberty, and property. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Due process is a flexible concept applied to the adjudication of important rights. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). The individual situation determines what procedural protections are required to protect fundamental fairness. *Id.*

Fundamental fairness includes: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the interest of the state or government, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). Due process minimally must include notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker. Although the opportunity to be heard does not require a full trial-like proceeding, it does require a hearing where the parties are apprised of the nature of the proceedings and the relevant evidence to which a response is necessary. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

Here, the interest at stake was not plaintiff's custody of his children, which he did not have, but the frequency and duration of his parenting time rights. Plaintiff was given notice that defendant had sought further restrictions of his parenting time because of his failure to comply with the May 17, 2007, order by failing to mediate parenting time disputes and failing to cooperate with Dr. Friedberg's follow-up evaluation. Plaintiff had the opportunity to respond to defendant's motion. Plaintiff also has the opportunity to move for reinstatement of unsupervised parenting time in the future. Under these circumstances, plaintiff was afforded sufficient due process.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens