STATE OF MICHIGAN

COURT OF APPEALS

DEAN ALLEN DILTS,

Plaintiff/Counter-Defendant/Appellant,

v

ANDREA SUE DILTS also known as ANDREA SUE CALLISON,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED
September 22, 2016

No. 332230
Muskegon Circuit Court
LC No. 12-254682-DM

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Plaintiff father, Dean Allen Dilts, appeals as of right the trial court's January 8, 2016 order denying his motion for change of custody that would give him primary physical custody of his two minor children. We affirm.

I. STATEMENT OF FACTS

The trial court awarded the parties joint legal and physical custody of their two minor children and equal parenting time in a July 29, 2013 judgment of divorce. On March 31, 2015, father filed a motion to change custody, alleging that mother's permanent relocation to Indiana met the threshold requirement of proper cause or a change in circumstance. Father's motion came before a hearing referee on April 29, 2015, from which mother was absent. Based on father's factual representations, the hearing referee issued a recommendation finding that mother had moved to Indiana and that a change in circumstance existed. Subsequently, a prehearing conference was held in July of 2015, after which the trial court issued an order instructing the parties, among other things, to submit custody briefs "covering all issues to be decided including the established custodial environment and the 'Best Interest Factors'."

In his custody brief, father stressed that mother had lived in Indiana with her parents during the summer of 2014 until October of 2014, and again from Christmas of 2014 until she received his motion to change custody. During this time, she exercised weekend parenting time two to three weekends per month. Father said that he did not object to "the parenting time being currently exercised" nor to mother's remaining in Indiana, and submitted "that there has been ample changes in circumstances and that proper cause exists for filing this motion." Father

devoted the remainder of his brief to discussing how the best-interest factors weighed in favor of the trial court granting him primary physical custody of the children.

In her custody brief, mother disputed that she had relocated permanently to Indiana. She said that she spent time in Indiana during the summer of 2014, but continued to exercise and provide transportation for alternate-week parenting time. She further stated that she had moved temporarily to Indiana in December of 2014 to assist her ailing mother, but said that she returned permanently to Michigan on March 22, 2015. Mother explained that she was absent from the April 29, 2015 hearing on father's change of custody motion because she did not receive timely notice of the hearing. She alleged that father knew at the time of the April hearing that she had returned to Michigan because she had already contacted him to resume week-on/week off parenting.

The trial court began the November 17, 2015 custody hearing by noting that it was "stuck on one thing," namely, its "understanding that the referee was given false information or at least misleading information." The trial court said it wanted to "start the whole hearing based on that information." Father's counsel disagreed with the trial court's characterization of the situation and asserted that he had been unaware at the time of the hearing whether mother had moved back to Michigan. In the colloquy between the trial court and father's counsel that followed, the trial court insisted that father's counsel had an obligation at the April hearing to correct the "blatantly false" information that mother had moved to Indiana. In response, father's counsel insisted that it was mother's responsibility to do that, that his information at the time of the motion hearing was that she had moved to Indiana, and that, contrary to her assertions, alternate-week parenting time had not resumed until after the April hearing.

Mother acknowledged that, during the time she was in Indiana, she mentioned to father that she was thinking of relocating to be near her parents, but said that she later decided against it and returned to live in Michigan on March 22, 2015. She contended that she and father resumed alternate-week parenting approximately one week after her return, and testified that, during the months that she was transporting the children back and forth for weekend parenting time, father never mentioned anything to her about filing a motion to change custody. Mother admitted that she had moved seven or eight times since the divorce and currently lived with father's mother, but stated that she had applied for housing in a duplex. Father's counsel sought to elicit testimony regarding mother's relocations since her return to Michigan, arguing in response to mother's objection that the information went to a change in circumstances. Rejecting father's argument, the trial court ruled that the focus of the hearing was not mother's housing history, but the referee's finding that mother's out-of-state move created a change in circumstance that supported reconsideration of the current custody order. As the trial court put it, "[t]he ticket that got us into this hearing is the ticket that says the mother has moved to Indiana."

Father asserted that the parties did not resume alternate-week parenting until after the April motion hearing, and that he first learned that mother was coming back to Michigan a "day or so" before the hearing. He also explained that he had not discussed his custody motion with mother during parenting-time exchanges because he did not want to get into an argument.

Each party presented a witness that supported their conflicting testimony about when alternate-week parenting began. Mother's long-time friend testified that after mother returned

from Indiana at the end of March, 2015, mother moved in with her and began exercising alternate-week parenting. Father's girlfriend testified that alternate-week parenting resumed in late May, 2015, after the school year ended for the oldest child.

The trial court denied father's motion for a change in custody in a written order issued January 8, 2016, stating:

> The Court finds, based on testimony presented and a review of the documents submitted to the case file that [father] did not make a proper showing of a change in circumstances. The basis of the referee's finding of a change in circumstances rested upon the fact that [mother] had "moved" to Indiana. The Court finds that [mother] was residing in Michigan at the time of the referee hearing, it also follows that the Court finds that there has not been a change in circumstances requiring an inquiry into the change of custody.

Father filed a motion for reconsideration on January 29, 2016, requesting, among other things, that the trial judge reverse her ruling, or alternatively, disqualify herself and reschedule the matter with another judge. Noting that father's motion for disqualification was untimely, and finding in father's other assertions of error no reason to reconsider its prior ruling, the trial court denied the motion. The instant appeal followed.[1]

II. ANALYSIS

Father first argues that the trial court judge's conduct during the November 2015 custody hearing pierced the veil of impartiality and violated his due-process right to a fair trial. We find father's argument without merit.

Due process "requires an unbiased and impartial decision maker," *Olson v Olson*, 256 Mich App 619, 642; 671 NW2d 64 (2003). "A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). "Opinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester Elks Lodge*, 228 Mich App 20, 39; 577 NW2d 163 (1998).[2] Moreover,

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[1] Father also filed a motion to disqualify the trial court judge with the Chief Judge of Muskegon Circuit Court pursuant to MCR 2.003(D)(3)(a)(i). After the Chief Judge disqualified himself on the grounds that he had been consulted about the matter in controversy and had knowledge of the evidentiary facts, the motion was transferred to Kent County Circuit Judge Donald A. Johnston. According to mother's brief to this Court, father's motion was denied at a hearing held on May 13, 2016. The record before us contains no independent verification of this disposition.

[2] In addition to actual bias, "there may be situations in which the appearance of impropriety on the part of a judge . . . is so strong as to rise to the level of a due process violation." *Armstrong v*

> "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. . . . [Further], [n]ot establishing bias or partiality . . . are, expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display." [*Cain v Michigan Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996), quoting *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147, 1157; 127 L Ed 2d 474 (1994) (alterations in *Cain*).]

Father first contends that the trial court revealed its bias and partiality in comments at the start of the custody hearing implying that father misrepresented the existence of a change in circumstance to the referee.[3] We disagree.

The existence of a proper cause or change in circumstances is a threshold matter that the movant has the burden of proving by a preponderance of the evidence before a trial court may consider whether there is an established custodial environment and whether modification of an existing custody order is in the best interests of the child. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003).

In the instant case, the proper cause or change in circumstances on which father predicated his motion for a change in custody was mother's presumed relocation to Indiana. However, according to mother's trial brief, when father filed his change in custody motion on March 31, 2015, mother had already returned to Michigan and contacted father for resumption of alternate-week parenting. In addition, father's own trial brief indicated that mother had not relocated permanently to Indiana, only that she had "lived exclusively in Indiana" from shortly before Christmas of 2014 "until [she] received the current parenting time motion." Thus, the trial court's opinion that father had provided "false," "misleading," or at least, "inaccurate" information was well grounded in a reading of the parties' briefs and the record of prior proceedings in this case. Although the trial court's initial comments may have put father on the defensive and set an unnecessarily adversarial tone for the rest of the hearing, we cannot conclude that they show bias or partiality on the part of the trial court judge, or that they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg*, 228 Mich App at 39.

Father contends in addition that the trial court showed favoritism toward mother by limiting the scope of the change-in-circumstances inquiry solely to the question of whether mother had moved out of state. Again, we disagree.

Ypsilanti Charter Twp, 248 Mich App 573, 599; 640 NW2d 321 (2001) (quotation marks and citation omitted). However, father does not allege any of these situations.

[3] We note father's heavy reliance on *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015). However, the *Stevens* decision focuses on how a judge's improper conduct during trial can influence a jury "by creating the appearance of advocacy or partiality against a party." *Id*. at 171. As the instant case did not involve a jury, *Stevens* has limited applicability, making father's reliance on the case unpersuasive.

Because the parties disputed whether mother had moved out of state, and because father's custody motion advanced on the referee's recommendation that mother's relocation had created a change in circumstance, the trial court conducted a de novo hearing on the referee's finding to resolve this dispute. "[T]o conserve the resources of the parties," MCL 552.507(5) allows a trial court to impose reasonable restrictions and conditions on a de novo hearing as long as two conditions are met:

> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
>
> (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.

Our review of the record leads us to conclude that the trial court's decision to restrict the hearing to the issue of whether an out-of-state move created a proper cause or change in circumstance was reasonable. Although father had a full opportunity to present and preserve evidence of mother's housing transience at the referee hearing, and such evidence was available at the time of the hearing, he focused his argument on mother's presumed relocation to Indiana. The only finding of fact made by the referee was that mother had moved to Indiana, and this finding then served as the basis for the referee's decision to proceed to a pretrial conference and custody hearing. Thus, given the parameters of father's argument and the specifics of the referee's finding and recommendation, we conclude that it was reasonable for the court to limit the scope of the hearing to the issue of whether mother's move created a change in circumstance.

Father also claims that the trial court revealed its bias and partiality by recalling and questioning a witness favorable to mother's position. We disagree. A trial court may, "on its own motion or at the suggestion of a party, call witnesses" and "may interrogate witnesses, whether called by itself or by a party." MRE 614(a) and (b). Moreover, "a trial judge has more discretion to question witnesses during a bench trial than during a jury trial." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992). The record makes clear that the trial court's questioning demonstrated a desire to ascertain the truth regarding whether mother moved to Indiana. See *id*. (stating that "a review of the trial judge's questioning of witnesses leads us to believe that the judge was merely attempting to clarify testimony and elicit additional helpful information to aid in his role as factfinder").

Finally, father calls attention to a number of comments by the trial court and contends that the very nature of the words used by the trial court judge "exhibited hostility, bias and incredulity." Transcripts inadequately convey those variations in a trial court's tone and demeanor that bear heavily on litigants' experience of a proceeding; even so, the transcript of the custody hearing at issue clearly shows the trial court and father's attorney reacting in mutual frustration. Nevertheless, we do not find that the trial court's comments support a bias or partiality charge when viewed in the context of the proceedings. See *Cain*, 451 Mich at 497 n 30. Bias and partiality cannot be predicated upon comments made during the course of a trial or hearing that may be critical, disapproving, or even hostile, nor on "expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and

women . . . sometimes display." *Id*. The record reveals no "deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg*, 228 Mich App at 39. Nor does it reveal anything other than that the trial court based its ultimate decision on the "testimony presented and a review of documents submitted to the case file" and because "the referee's finding of a change of circumstances rested upon the fact that [mother] had 'moved' to Indiana." Accordingly, we conclude that father has not overcome the presumption of fairness and impartiality. *In re Susser Estate*, 254 Mich App at 237.

Father next argues that the trial court committed clear legal error by reopening the proper cause or change in circumstance issue when mother had not timely objected to the referee's finding of fact that a change in circumstance exists. We disagree.

MCL 552.507(4) requires a trial court to "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 parties have 21 days after a referee's recommendation to file their objections, MCL 552.507(4), and, as father correctly notes, mother did not file a timely objection to the referee's finding that a change in circumstance existed because she had relocated permanently to Indiana. However, the statute does not place a time limit on the trial court's authority to hold a hearing on a disputed matter. Further, in order to "minimize unwarranted and disruptive changes of custody orders[,]" the trial court must ensure that the threshold matter of proper cause or change in circumstance has been met before further considering whether modification of an existing custody order is warranted. *Vodvarka*, 259 Mich App at 508-509. Thus, given the trial court's authority to conduct a de novo hearing regarding the referee's findings upon its own motion, MCL 552.507(4), and its obligation to ensure that the movant has made the threshold showing of proper cause or a change in circumstances, *Vodvarka*, 259 Mich App at 508-509, we conclude that the trial court did not clearly err by revisiting the issue.

Finally, father argues that the trial court failed to recalculate child support based on mother's employment status. Father having first raised this issue in a motion for reconsideration, it is not properly preserved. *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009). We review a trial court's decision regarding modification of a child support order for an abuse of discretion. *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012). The party appealing the support order has the burden of showing an abuse of discretion. *Thompson v Merrit (Amended Opinion)*, 192 Mich App 412, 416; 481 NW2d 735 (1991). An abuse of discretion occurs when the outcome is not within the range of reasonable and principled outcomes. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

Father predicated his initial request for recalculation of child support on his motion to change custody. The trial court having denied father's custody motion, there was no warrant to recalculate child support based on a change in custody. In his motion for reconsideration, father asked the trial court to recalculate child support, based solely on mother's testimony at the custody hearing that she currently was employed. "Sole reliance on an increase in one party's income without consideration of other relevant factors is inadequate to establish that a change in circumstances has occurred." *Pellar v Pellar*, 178 Mich App 29, 32; 443 NW2d 427 (1989). Assuming that mother's employment constitutes an increase in her income, father's request took into account no other relevant factor, such as the needs of the children or the parties' ability to pay, consideration of which is necessary to establish a change in circumstances for recalculating

child support. *Id*. Consequently, we conclude that the trial court's denial of father's request to recalculate child support was not an abuse of discretion.[4]

In sum, we conclude that the trial court's conduct did not constitute bias or prejudice such as to violate father's right to due process, nor did the trial court err in reconsidering whether a change in circumstances exits or by limiting the inquiry to the accuracy of the referee's finding that mother had moved to Indiana. Nor did the trial court abuse its discretion by denying father's request to recalculate child support based on mother's employment.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering

[4] We further note that father's right to seek modification of child support is not dependent on this appeal; rather, he may seek recalculation independent of this appeal under MCR 3.204.