STATE OF MICHIGAN

COURT OF APPEALS

RALUCA LOWE,

Plaintiff-Appellee,

v

STEVEN RUSSELL LOWE,

Defendant,

and

STEVE LOWE and GAIL LOWE,

Third-Party Defendants-Appellants.

UNPUBLISHED
February 20, 2018

No. 340128
Oakland Circuit Court
Family Division
LC No. 2008-745497-DM

Before: SAWYER, P.J., and MURRAY and STEPHENS, JJ.

PER CURIAM.

Third-party defendants appeal as of right an order denying their motion for grandparenting time with their grandson (the minor child), the son of Raluca Lowe (plaintiff) and their son, Steven Russell Lowe (Lowe).[1] On appeal, third-party defendants argue that they met their burden pursuant to MCL 722.27b(4)(b), and rebutted the presumption that plaintiff's decision to deny grandparenting time did not create a substantial risk of harm to the minor child's mental, physical, or emotional health, particularly because the parties previously agreed to grandparenting time. We affirm.

Plaintiff and Lowe got married in 2004, and the minor child was born in 2006. Following tumultuous proceedings, the parties divorced in September 2009. Plaintiff was awarded sole legal and physical custody of the minor child.[2] During the divorce proceedings, Lowe had

---

[1] Lowe is not a party to this appeal.

[2] Both plaintiff and Lowe appealed this order, which was affirmed by this Court. *Lowe v Lowe*, unpublished per curiam opinion of the Court of Appeals, issued December 14, 2010 (Docket No. 298052).

visitation with the minor child supervised by third-party defendants. The opinion and order of divorce noted the involvement of third-party defendants in the divorce proceedings, and the tension between third-party defendants and plaintiff. The order of divorce awarded Lowe weekly unsupervised parenting time. However, in 2015, Lowe's parenting time was suspended pending completion of a psychological evaluation, and Lowe was prohibited from contacting the minor child. Third-party defendants did not seek grandparenting time until 2017.

On appeal, third-party defendants argue that the trial court committed clear error when it denied them grandparenting time because they rebutted the presumption in MCL 722.27b(4)(b), in particular, because the parties agreed to grandparenting time. We disagree.

As an initial matter, plaintiff argues on appeal that this Court lacks jurisdiction because the order appealed from is not a final order as it does not affect the custody of a minor. Plaintiff cites the dissenting opinion of *Lieberman v Orr*, 319 Mich App 68, 100; 900 NW2d 130 (2017) to support this argument, as well as a case that has been overruled since plaintiff filed her brief, *Ozimek v Rodgers*, 317 Mich App 69; 893 NW2d 125 (2016), overruled by *Marik v Marik*, ___ Mich ___; 903 NW2d 194 (Docket No. 333687, entered November 16, 2017).

Third-party defendants assert that they filed a timely appeal as of right pursuant to MCR 7.203(A)(1). Under MCR 7.203(A)(1), an appeal as of right may be taken from a final judgment or order, as defined in MCR 7.202(6). In domestic matters, a "final judgment" or "final order" is defined as "a postjudgment order affecting the custody of a minor." MCR 7.202(6)(a)(*iii*). This Court specifically addressed "whether an order regarding grandparenting time is a postjudgment order affecting the custody of a minor under MCR 7.202(6)(a)(*iii*)" in *Varran v Granneman*, 312 Mich App 591, 602; 880 NW2d 242 (2015). The *Varran* Court relied on *Wardell v Hincka*, 297 Mich App 127; 822 NW2d 278 (2012), for the proposition that MCR 7.202(6)(a)(*iii*) "includ[es] orders wherein a motion to change custody has been denied." *Varran*, 312 Mich App at 603, quoting *Wardell*, 297 Mich App at 132-133. The Court determined:

> Because a grandparenting-time order overrides a parent's legal decision to deny grandparenting time, a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child. Thus, when a parent has legal custody of the child, an order regarding grandparenting time is a postjudgment order affecting the custody of a minor. MCR 7.202(6)(a)([*iii*]). Because Father had legal custody of A, we hold that the May 30, 2014 order was a "final judgment" or "final order" under MCR 7.202(6)(a)([*iii*]) and, therefore, appealable by right, MCR 7.203(A)(1). [*Id.* at 605-606.]

The decision notes the dissenting point that the award or denial of grandparenting time does not change a custody arrangement, but the language only requires that the order "affect" custody, "which is materially different." *Id.* at 606. The *Varran* decision remains good law. Thus, this Court has jurisdiction over third-party defendants' appeal as of right because the order denying grandparenting time is a final judgment or order pursuant to MCR 7.202(6)(a)(*iii*) because it affects the custody of a minor.

This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Luckow v Luckow*, 291 Mich App 417, 423; 805 NW2d 453 (2011). "A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes." *Id.* " 'Orders concerning [grand]parenting time must be affirmed on appeal unless the trial court's findings 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.' " *Varran*, 312 Mich App at 617, quoting *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007) (citation omitted; alteration in original). The trial court's findings of fact should be affirmed unless the evidence clearly preponderates in the opposite direction. *Zawilanski v Marshall*, 317 Mich App 43, 48; 894 NW2d 141 (2016). An abuse of discretion occurs regarding a grandparenting time decision when it " 'is 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.' " *Id.*, quoting *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Clear error occurs when the trial court " 'incorrectly chooses, interprets, or applies the law.' " *Zawilanski*, 317 Mich App at 48, quoting *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009).

Parents have a constitutional right to determine the care, custody, and management of their children. *Zawilanski*, 317 Mich App at 49. However, this right is not absolute because " 'the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor . . . .' " *Id.* (quotations omitted). In addition, the United States Constitution provides a presumption that fit parents act in their children's best interests, and " 'there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of [fit parents] to make the best decisions concerning the rearing of [their] children.' " *Id.* (quotations omitted).

MCL 722.27b specifically allows grandparents to seek grandparenting time in certain situations. However, MCL 722.27b(4)(b) protects a parent's constitutional right to determine the care, custody, and management of their children by including a rebuttable presumption "that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health." For a grandparent to rebut this presumption, he or she must demonstrate by a preponderance of the evidence that the parent's denial of grandparenting time "creates a substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.27b(4)(b). The trial court must dismiss the grandparent's request for visitation if he or she fails to rebut this presumption. *Id.* If a grandparent successfully rebuts the presumption,

> the court shall consider whether it is in the best interests of the child to enter an order for grandparenting time. If the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. [MCL 722.27b(6).]

In this matter, third-party defendants did not allege that plaintiff was an unfit parent. Thus, the issue before the trial court was whether third-party defendants rebutted the presumption that plaintiff's decision to deny them grandparenting time did not create a

substantial risk of harm to the minor child's mental, physical, or emotional health. MCL 722.27b(4)(b). The crux of third-party defendants' argument in support of their contention that they rebutted this presumption is the memorandum of understanding drafted by Keela Johnson (Johnson), acting as a mediator rather than a GAL, which provided that the parties "attended mediation . . . and agreed that it is in the best interests of [the minor child] that they work together to rebuild a relationship to allow [the minor child] to resume a healthy relationship with his paternal grandparents." However, for the reasons stated herein, third-party defendants did not successfully rebut the presumption.

In *Zawilanski*, the plaintiff mother appealed an order awarding grandparenting time. *Zawilanski*, 317 Mich App at 44. In finding that the grandmother rebutted the presumption, the lower court relied upon a Friend of the Court (FOC) report which "recommended grandparenting time because the parties agreed in principle on the desirability of grandparenting time and had asked the FOC to recommend a grandparenting-time schedule." *Id.* at 50. This Court determined that the lower court erred in relying on this report to come to its conclusion: "It seems illogical to interpret the fact that the report did what it was supposed to do – recommend a grandparenting-time schedule at the request of both parties – as evidence that petitioner rebutted the fit-parent presumption." *Id.* The grandmother did not present any evidence regarding how the plaintiff mother's denial of some, but not all, grandparenting time created a substantial risk of harm to the child. *Id.* at 50-51. Thus, this Court vacated the trial court order for grandparenting time and remanded the matter because the trial court committed clear error by not requiring the grandmother to rebut the presumption that the mother's reduced grandparenting time schedule did not create a substantial risk of harm to the child. *Id.* at 51.

Third-party defendants' second motion for grandparenting time indicated that the parties were scheduled to meet at Johnson's office "to attempt resolution," and the memorandum of understanding was drafted by Johnson as a result of that meeting. Plaintiff indicated in her response to third-party defendants' third motion for grandparenting time and on appeal that the purpose of the meeting with Johnson was to facilitate the one grandparenting time that took place on June 17, 2017. Similar to *Zawilanski*, it appears that the parties "agreed in principle on the desirability of grandparenting time," and sought Johnson's help to facilitate it. *Id.* at 50. However, it also seems "illogical" to rely on the memorandum, which did what it was supposed to do – facilitate grandparenting time at the request of both parties – as evidence that third-party defendants rebutted the presumption. *Id.* at 50. Thus, third-party defendants did not rebut the presumption on the basis that the memorandum provided that the parties agreed to grandparent visitation at that time.

Because third-party defendants allege that the civil litigation mediation, domestic relations mediation, and arbitration court rules do not apply to the memorandum, and the trial court agreed, they need not be discussed. Rather, third-party defendants assert on appeal that the memorandum of understanding is a binding agreement pursuant to MCR 2.507(G), which provides:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

The memorandum was not made in open court. Third-party defendants argue that the word "subscribed" does not require a signature, and that Johnson attested to the parties' consent to the desirability of grandparenting time. Third-party defendants rely on *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 459; 733 NW2d 766 (2006), to make this argument; however, third-party defendants' reliance on specific language from the opinion does not support their argument when read in context of the opinion.

In *Kloian*, the plaintiff challenged on appeal a settlement agreement that was created through e-mail correspondence by the parties' attorneys. *Kloian*, 273 Mich App at 456. The plaintiff argued that the trial court erred in enforcing the settlement agreement because it was not in writing or signed by the plaintiff or his attorney, as required by MCR 2.507(G).[3] *Id.* This Court provided that "subscribed" was not defined in the court rule, and relied on the dictionary definition: " 'to append, as one's signature, *at the bottom of a document* or the like; sign.' " *Id.* at 459, quoting *Random House Webster's College Dictionary* (2001) (emphasis added). The Court noted that an electronic signature satisfies the signature requirement of the Uniform Electronic Transactions Act, MCL 450.837(4), and pursuant to that act, an electronic signature includes electronic sounds, symbols, or processes attached or logically associated with a record that are executed or adopted by a person intending to sign. *Id.*

> However, MCR 2.507(H) does not require a "signature"; it requires a "writing, *subscribed*" by the party against whom enforcement is sought. MCR 2.507(H) (emphasis added). "Subscribed" is a different word from "signed." Since some statutes of frauds require an agreement "in writing and signed," MCL 566.108 and 566.132, and others require a "writing, subscribed," MCR 2.507(H) and MCL 566.106, we must treat "in writing and signed" differently from "a writing, subscribed." [*Id.*]

Thus, the Court determined that the original e-mail containing the settlement offer satisfied MCR 2.507(H) because it was subscribed by the plaintiff's attorney "because he typed, or appended, his name at the end of the e-mail message," and the defendant's attorney sent an e-mail accepting the offer which was subscribed with his name at the end of the message. *Id.*

Third-party defendants' reliance on *Kloian* is misplaced as the facts of this matter are distinguishable from the facts of *Kloian*. In *Kloian*, the signatures of the attorneys for both parties at the end of the e-mails met the definition of subscription. *Id.* In this matter, the only subscription at the end of the memorandum was by Johnson, who was acting as a mediator at that time. Neither third-party defendants nor plaintiff, or either of their attorneys, subscribed at the end of the document. Thus, the document does not meet the subscription requirement of MCR 2.507(G), and therefore, it is not a binding agreement between the parties.

Furthermore, third-party defendants did not meet their burden of rebutting the presumption that plaintiff's denial of grandparenting time did not create a substantial risk of

---

[3] At the time of the *Kloian* decision, this provision of the court rule was at MCR 2.507(H) rather than MCR 2.507(G). *Kloian*, 273 Mich App at 456 n 2.

harm to the minor child's mental, physical, or emotional health. MCL 722.27b(4)(b). They simply asserted in their motions that it was a "good thing" for them to want contact with the minor child, and that a denial of grandparenting time "would pose a substantial risk of harm to [the minor child's] mental[,] physical[,] but perhaps especially[,] emotional wellbeing." Third-party defendants did not explain in any of their filings in the lower court or on appeal how a lack of grandparenting time would actually harm the minor child. Rather, third-party defendants use the same language in their brief on appeal as they did in their motion for reconsideration to argue that they met their burden:

> [Third-party defendants] respectfully contend that their original motion as stated still supplied ample evidence for at least the granting of an evidentiary hearing, inter alia:
>
> a) It correctly asserted that grandparenting had commenced in the form of a single visit which [occurred] on June 17, 2017;
>
> b) It correctly asserted that the agreement and conduct of the parties met the petitioner [sic] burden as established under MCL 722.27b;
>
> c) It correctly reminded the court that [] Johnson, who had previously been appointed GAL on this file, supported [third-party defendants'] request for grandparenting time;
>
> d) It [correctly] referenced this court to the fact that [d]efendant father in this case was not exercising his parenting time and that absent contact with [third-party defendants,] contact between the minor and an entire half of his family – his heritage – would be lost.

Third-party defendants' assertion that the minor child would lose contact with his father's side of the family and "lose his heritage" is the only way in which defendants claim that the minor child would face a substantial risk of harm to his mental, physical, or emotional health. This does not suffice to rebut the presumption by a preponderance of the evidence. MCL 722.27b(4)(b). "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Thus, the trial court did not err when it denied defendants grandparenting time or when it denied defendants' motion for reconsideration.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens