

STATE OF MICHIGAN
COURT OF APPEALS

JALAL A. SAEAD,

Plaintiff-Appellee,

v

PAMELA M. SAEAD,

Defendant-Appellant.

UNPUBLISHED

March 29, 2012

Nos. 301778; 304661

Midland Circuit Court

LC No. 05-008517-DM

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Defendant Pamela M. Saead has filed two appeals that have been consolidated for appellate review. In Docket Number 301778, defendant appeals by leave granted an order entered in December 2010, which granted in part and denied in part defendant's motion to disqualify the trial judge. In Docket Number 304661, defendant appeals by leave granted an order entered in June 2011, which modified the parties' custody arrangements to allow plaintiff Jalal A. Saead to take the parties' minor children to Saudi Arabia for the summer of 2011. Because the time period covered by the trial court's order temporarily altering custody has expired, we conclude that defendant's claim of error with regard to that order is moot. And, because there were no errors warranting relief, we affirm the circuit court's decision to deny defendant's motion for disqualification.

I. BASIC FACTS

Plaintiff and defendant have three minor children together. Plaintiff was born in Jordan, and two of the children were born in Yemen. In August 2006, the trial court entered a judgment of divorce and establishing parenting time.

In July 2010, plaintiff moved to modify parenting time and to require defendant to cooperate in getting passports for the children. Plaintiff stated that he had lost his job in Midland and, after eight months of searching, was able to obtain employment with an accounting firm in Saudi Arabia. Therefore, he requested that instead of the current parenting schedule involving alternating weeks, he would like to have parenting time in Saudi Arabia during the children's summer vacations, with defendant receiving parenting time with the children for most of the remaining year. For this to occur, plaintiff also needed defendant's cooperation to obtain passports for the children.

At the hearing on plaintiff's motion, defendant expressed serious concerns about the children living in Saudi Arabia for the summer. She stated that defendant had agreed to raise the children in the Christian faith, not Muslim faith, even though two of the children were born in the Middle East. But because plaintiff was born Muslim, the extended Muslim community considers the children their responsibility. She also stated that when her eldest son was visiting family in the Middle East with plaintiff, plaintiff's brother "forced [him] to go to the mosque and pray as the Muslims do", which made the child very upset. For these reasons, defendant was concerned that the government of Saudi Arabia and plaintiff's family might take control over the children. She also expressed concern about "cultural and social and religious issues that the children will have difficulty navigating." Defendant was not concerned, however, that plaintiff would take the children to the Middle East and not return them.

Despite defendant's misgivings, the trial court granted plaintiff's motion "from top to bottom" and issued a temporary order. The trial court explained that defendant was unable "to articulate any specific rational concern that she has for the safety of the children or any reason at all to conclude that Mr. Saeed would in any way prevent the children from returning to the United States." It also felt that defendant's cultural concerns could be a "potential positive" in that it could "broaden their cultural and social awareness." Finally, the trial court noted that it was defendant's decision to marry a man from Jordan and have children with him, so it is inevitable that these cultural issues would arise.

Defendant objected to the order and the trial court held a hearing. At the hearing, plaintiff argued that defendant did not cooperate with his efforts to get passports for the children; he stated that she told passport officials she was signing the documents under duress—that is, because of the court's order. The trial court expressed its frustrations on the record and made several remarks to the effect that it would throw defendant in jail for what it perceived to be contemptuous conduct.

Defendant then moved to have the trial judge disqualified from the case on the ground that he had prejudged the outcome. Defendant argued that she had no authority to issue the passports and that the trial judge deprived her of due process by advocating for plaintiff. The trial judge denied the motion, and the State Court Administrative Office referred the matter to Midland Circuit Judge Kenneth Schmidt. Judge Schmidt found that the trial judge's statements on the record amounted to poor word choices that could "perhaps" be interpreted as prejudging the outcome. He disqualified the trial judge from hearing the contempt issue, but refused to disqualify the trial judge from hearing the parties' remaining issues.

In the meantime, defendant had submitted a motion for reconsideration of the change in parenting time permitting plaintiff to exercise his time in Saudi Arabia. In granting the motion in part, the trial court acknowledged that it "did not specifically articulate its findings of fact and conclusions of law with specific reference to each of the statutory factors before approving the proposed change" as required under *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010). Therefore, the trial court set an evidentiary hearing and ordered that the parties file briefs addressing the effect of *Pierron* and discussing whether an established custodial environment existed and if so, whether plaintiff's move to Saudi Arabia will change it.

II. ANALYSIS

First, defendant argues that the trial court erred by denying her motion to disqualify the trial judge from all future litigation between the parties. We review “a trial court’s factual findings regarding a motion for disqualification for an abuse of discretion and its application of the facts to the law de novo.” *In re MKK*, 286 Mich App 546, 564; 781 NW2d 132 (2009). The abuse of discretion standard recognizes that there is more than one principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). “An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes.” *Id.*

Defendant moved for disqualification of the trial judge under MCR 2.003(C)(1). A judge may be disqualified under that rule where the “judge is biased or prejudiced for or against a party or attorney” and where the judge, “based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party . . . or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.” *Id.*

Due process requires that all parties have an unbiased and impartial decision maker. *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). “A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption.” *In re MKK*, 286 Mich App at 566. Repeated rulings against defendant will not establish bias, even if they are found to be erroneous. *Id.* In addition, “a trial judge’s remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias.” *Id.* at 567.

However, the United States Supreme Court has stated that there are situations “‘in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’” *Caperton v Massey*, 556 US 868; 129 S Ct 2252, 2257; 173 L Ed 2d 1208 (2009), quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456, 43 L Ed 2d 712 (1975). When these situations are present, due process requires disqualification. *In re MKK*, 286 Mich App at 567. The *Caperton* Court also stated judicial disqualification is an objective inquiry and courts should not ask “whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Id.* at 2262 (internal quotation marks omitted). But, as our Supreme Court has observed, disqualification based on due process is only required “in the most extreme cases. *Cain*, 451 Mich at 498.

Although the trial judge clearly made intemperate remarks, defendant has not overcome the heavy burden of proving that he was biased. Rulings against defendant are not evidence of bias. The fact that the trial judge threatened defendant with contempt and issued temporary parenting orders against her do not, by itself, establish bias. Further, this Court has noted that a trial judge’s remarks which are hostile to parties do not necessarily establish bias. Judge Schmidt noted that the trial judge did not use the best wording and conceded that his remarks could be interpreted as bias, but he also stated that the statements appeared to be made out of frustration.

Defendant also has not shown that due process requires disqualification. As stated, disqualification based on due process is reserved for the “most extreme cases.” Some examples include: (1) where the trial judge has a pecuniary interest in the outcome, (2) where the trial judge was a target of personal abuse from the party, and (3) where, the trial judge has “prejudged the case because of prior participation as an accuser, investigator, or fact finder.” *Cain*, 451 Mich at 498. Defendant has not alleged that any of these examples have occurred in this case. The statements seem to be nothing more than expressions of frustration. While the courtroom may not have been the proper venue for them, the statements made do not create a probability of actual bias that is too high to be constitutionally tolerable.

Next, defendant argues that the trial court abused its discretion by issuing a temporary order changing plaintiff’s parenting time from Michigan to Saudi Arabia for the summer of 2011. The trial court may very well have erred by granting a temporary change of custody without conducting a hearing and making the necessary findings. See *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005). In addition, we are troubled by the trial court’s earlier—somewhat cavalier—dismissal of defendant’s concerns about the problems that the children might face in Saudi Arabia. The trial court should have thoughtfully considered those issues before agreeing to send the children overseas. Nevertheless, defendant has only requested reversal of that order. And, because the children went to Saudi Arabia during the summer and have since returned, the issue is moot. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995). The trial court should decide any future parenting time modifications as outlined in *Pierron*.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro