STATE OF MICHIGAN

COURT OF APPEALS

KELLIE ULLOA f/k/a KELLIE LAFAVE, Plaintiff-Appellee,	UNPUBLISHED February 23, 2012
v	No. 301955 Livingston Circuit Court
DANIEL THOMAS LAFAVE, Defendant-Appellant.	LC No. 04-035084-DM

KELLIE ULLOA f/k/a KELLIE LAFAVE, Plaintiff-Appellee,	
v	No. 302207 Livingston Circuit Court
DANIEL THOMAS LAFAVE, Defendant-Appellant.	LC No. 04-035084-DM

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

These consolidated appeals arise from the trial court's December 2, 2010 order. In Docket No. 301955, defendant appeals by leave granted the part of the order that denied his motion for increased parenting time. In Docket No. 302207, defendant appeals by right the part of the order that required him to pay $2,500 in attorney fees to plaintiff. We affirm in Docket No. 301955, and vacate and remand for further proceedings in Docket No. 302207.

Plaintiff and defendant are the divorced parents of three minor children. Pursuant to the latest custody orders, defendant has parenting time with the children for five consecutive days every two weeks. After the friend of the court recommended an increase in defendant's child support obligation, defendant moved for a change of custody. He requested equal overnights. The trial court determined that defendant's motion was a motion for increased parenting time, and ordered him to file a new motion. Defendant then filed a motion to increase his parenting time from five to seven consecutive days every two weeks.

After a two-day hearing, a referee recommended that defendant's motion be denied. The referee concluded that defendant had not demonstrated either proper cause or change of circumstances, and that the current parenting time schedule was sufficient to maintain defendant's bond with the children. According to the referee, an increase in defendant's parenting time could actually harm the children's mental and emotional well-being due to defendant's negative attitude and behavior toward plaintiff. The referee also found that defendant's motions were frivolous, and recommended that defendant be required to pay plaintiff $2,500 in attorney fees. Defendant objected to the referee's recommended order and requested a de novo hearing. After hearing defendant's objections, and without giving defendant the opportunity to present live testimony, the trial court adopted the referee's recommendation. An order was entered denying defendant's motion for increased parenting time and awarding plaintiff $2,500 in attorney fees.

I. DOCKET NO. 301955

On appeal, defendant argues that the trial court incorrectly applied MCR 3.215(F)(2) when it limited the hearing on his objections to the referee's report and recommendation to legal argument, offers of proof, and a review of the referee's record and recommendation. We disagree.

We must affirm an order concerning parenting time unless the trial court's findings were against the great weight of the evidence, the trial court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id*. We review de novo the interpretation and application of statutes and court rules. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

A motion in a domestic relations matter, except one pertaining to an increase or decrease in spousal support, may be submitted to a referee for hearing. MCL 552.507(2)(a). Following a hearing, the referee must make a recommendation for an order. MCR 3.215(E)(1). A party may obtain a "de novo hearing," otherwise known as a "judicial hearing," on any matter that was the subject of a referee hearing by filing a written objection within 21 days after receiving the recommended order. MCL 552.507(4); MCR 3.215(E)(4).

MCR 3.215(F)(2) provides:

> To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:
>
> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
>
> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;

> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

The corresponding statute, MCL 552.507, provides, in pertinent part:

> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following 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.
>
> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
>
> (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.
>
> (b) A new decision based only on evidence presented at the time of the de novo hearing.
>
> (c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

Defendant relies on *Cochrane v Brown*, 234 Mich App 129, 134; 592 NW2d 123 (1999), wherein the Court stated that the defendant's timely filing of written objections and request to present additional testimony triggered the requirement for "a full hearing de novo." According to the *Cochrane* Court, the defendant was entitled to "a 'hearing' de novo, not merely review de novo." *Id*. at 132. However, defendant fails to recognize that since *Cochrane* was decided both MCL 552.507 and MCR 3.215(F)(2) have been amended. Sections (5) and (6) were added to MCL 552.507 in 2004. See 2004 PA 210. Almost all of section (F)(2) was added to MCR 3.215 in 2005. See 472 Mich lxxxvii (2005).

Defendant also relies on the inclusion of the word "must" in MCR 3.215(F)(2). While a trial court may conduct the judicial hearing by review of the record of the referee hearing, it "must allow the parties to present live evidence at the judicial hearing." MCR 3.215(F)(2). "The term 'must' indicates that something is mandatory." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009). Nonetheless, the court rule also grants the trial court discretion to limit the live evidence the parties may present. See MCR 3.215(F)(2)(a)-(d). Here, the trial

court did not provide defendant with the opportunity to present live evidence. However, defendant admits the trial court reviewed the record of the referee hearing. The trial court also heard defendant's offer of proof regarding a witness who had not testified at the referee hearing. Defendant makes no claim that, under these circumstances, the trial court's refusal to allow him to present live evidence was not an exercise of discretion permitted by MCR 3.215(F)(2), and specifically, MCR 3.215(F)(2)(d). Because defendant fails to make such a claim, and because of defendant's reliance on *Cochrane*, a case that does not interpret the current language of MCR 3.215(F)(2) and MCL 552.507, defendant has not established that the trial court committed clear legal error when it denied him the opportunity to present live evidence.

Defendant also argues that the trial court erred in requiring him to establish proper cause or change of circumstances before it could modify the parenting time schedule. We disagree.

Under the Child Custody Act, MCL 722.21 *et seq.*, a trial court may modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances. MCL 722.27(1)(c); *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010). A party seeking modification of a parenting time order is required to establish proper cause or change of circumstances. *Id*. at 22-23; *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999). Accordingly, defendant's argument that he did not have to establish proper cause or change of circumstances before the trial court could modify the parenting time schedule is without merit.

In the alternative, defendant argues that the children's ages and their preference to live equally with him and plaintiff were normal life changes sufficient to modify the parenting time schedule. We disagree.

In *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), this Court articulated the proper cause or change of circumstances necessary to revisit a custody order. See *Shade*, 291 Mich App at 23. Specifically, the Court held that normal life changes that occur during the life of a child are not a sufficient change of circumstances to modify a custody order. *Vodvarka*, 259 Mich App at 513-514. However, the standards of proper cause and change of circumstances articulated by the *Vodvarka* Court do not apply to a request for modification of a parenting time order, where the modification would not alter the child's established custodial environment. *Shade*, 291 Mich App at 25, 27-28. In *Shade*, the Court held that the normal life changes experienced by the minor child—now being a high school student with changing school and extracurricular activities—were sufficient to establish proper cause or change of circumstances necessary to modify the parenting time schedule where the current schedule and the distance between the parents' homes prohibited the child from engaging in certain activities. *Id*. at 29-31.

We reject the proposition that a child's age, by itself, is a normal life change sufficient to modify a parenting time order. Such a proposition would render the terms "proper cause" and "change of circumstances" in MCL 722.27(1)(c) meaningless in cases involving requests to modify parenting time orders. Because every child grows older, there would be proper cause or change of circumstances in every case. Moreover, we conclude from *Shade* that a normal life change is sufficient proper cause or change of circumstances to modify a parenting time order if the child's needs, as a result of the child growing up, cannot be met by the current order. Here,

defendant presented no evidence that the three children had experienced any changes in their needs as a result of growing older that were negatively affected or could not be met by the current parenting time order. There were no "practical implications" of the children growing up that required an increase in defendant's parenting time. See *Shade*, 291 Mich App at 30. Because defendant failed to establish proper cause or change of circumstances, even under the "more expansive definition[s]" of those terms, *id.* at 28, the trial court was without authority to increase defendant's parenting time. See MCL 722.27(1)(c); see, also, *Vodvarka*, 259 Mich App at 508-509 (stating that if the moving party fails to establish proper cause or change of circumstances, the trial court is precluded from holding a child custody hearing and reviewing the statutory best interest factors, MCL 722.23). Accordingly, we affirm the trial court's order denying defendant's motion for increased parenting time.[1]

II. DOCKET NO. 302207

Defendant argues that the trial court erred in concluding that he filed a frivolous motion and awarding plaintiff $2,500 in attorney fees. He also argues that, even if the trial court correctly determined that his motion was frivolous, the trial court erred in not determining the reasonableness of the award.

We review for an abuse of discretion a trial court's decision to award attorney fees and its determination of the reasonableness of the fee. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). However, we review for clear error a trial court's determination to impose sanctions for the filing of a frivolous document. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id.*

Under the "American rule," which Michigan courts follow, attorney fees are not recoverable as an element of damages or costs unless expressly authorized by statute or court rule. *Haliw v Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). As authorized by statute and court rule, attorney fees shall be awarded if, upon motion of a party, the trial court finds that an action or defense was frivolous. MCL 600.2519(1) and (2); MCR 2.625(A)(2). MCL 600.2519(3) defines "frivolous":

> "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

[1] In light of our conclusion, we need not address defendant's claims that the trial court failed to interview the minor children and that the court's holding was against the great weight of the evidence.

(iii) The party's legal position was devoid of arguable legal merit.

Here, although the referee found that defendant's motions were frivolous, the referee provided no explanation for its finding. In addition, we do not understand the trial court's rationale for affirming the referee's finding. Accordingly, we remand for an articulate explanation of why defendant's motions were frivolous.

We also vacate the award. On remand, the trial court shall impose an award of reasonable attorney fees using the analysis set forth in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). If a trial court finds that an action or defense was frivolous, it shall award to the prevailing party the amount of costs and fees actually incurred, which includes "reasonable attorney fees." MCL 600.2591(1) and (2); *In re Attorney Fees & Costs*, 233 Mich App 694, 705; 593 NW2d 589 (1999). In *Smith*, the Supreme Court clarified how a trial court is to determine a reasonable attorney fee. In general terms, a trial court is to determine a reasonable hourly or daily rate, multiply the rate by the reasonable number of hours expended, and then make up or down adjustments in light of the other factors listed in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982), and MRPC 1.5(a). *Smith*, 481 Mich at 522, 530-531 (opinion by TAYLOR, C.J.), 538 (concurring opinion by CORRIGAN, J.). Because there was no analysis by the trial court to determine whether $2,500 was a reasonable attorney fee, the trial court abused its discretion in ordering the award.

In Docket No. 301955, we affirm. In Docket No. 302207, we vacate and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello