STATE OF MICHIGAN

COURT OF APPEALS

JOYA STARR SMITH-McCORMICK, Plaintiff-Appellee,	UNPUBLISHED June 30, 2011
v	No. 302019 Genesee Circuit Court Family Division
MATTHEW THOMAS PAYNE, Defendant-Appellant.	LC No. 02-237115-DS

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right the December 17, 2010, order of the circuit court that denied his motion to change the custody of the child he and plaintiff had together. We vacate the order and remand.

Defendant raises two issues on appeal. The first issue deals with a circuit court order that permitted plaintiff to relocate the child to Texas. This order was entered in August 2009, but defendant never appealed this order. Because defendant never filed any appeal within 21 days of this postjudgment order, this Court lacks jurisdiction to hear this issue. MCR 7.202(6)(a)(iii); MCR 7.203(A); MCR 7.204(A). As a result, it will not be considered.

However, defendant does properly invoke the jurisdiction of this Court for the second issue. Defendant argues that the trial court failed to conduct a de novo review of the referee's findings because of an incorrect view of the law. We agree. This issue involves the proper interpretation of statutes and court rules, which are questions of law that are reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

After the trial court entered the August 2009 order, which allowed plaintiff and the child to relocate to Texas, defendant filed a motion to change custody.[1] After a series of referee hearings, the referee issued her findings and recommended that custody not change. Defendant timely objected to certain findings and sought review in the circuit court.

[1] Sole legal and physical custody had been vested with plaintiff as a result of a 2002 order.

MCR 3.215(E)(4) allows for a judicial review of a referee hearing and provides the following:

> A party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection and notice of hearing within 21 days after the referee's recommendation for an order is served on the attorneys for the parties, or the parties if they are not represented by counsel. The objection must include a clear and concise statement of the specific findings or application of law to which an objection is made.

MCR 3.215(F)(2), in turn, provides how such a judicial hearing is to be conducted:

> 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.

Similarly, MCL 552.507 also permits review of referee recommendations following the objection of a party and provides, in part:

> (4) The court shall 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 request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.
>
> (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.

In the present case, defendant filed a written objection to the referee's findings related to the best-interest factors (d), (e), (f), and (j)[2]. The trial court acknowledged that defendant met the timeliness and specificity requirements of MCR 3.215(E)(4). However, the trial court failed to conduct a de novo hearing. Instead, the trial court denied the objection because it thought that the referee's findings were binding unless new evidence was presented. The court's belief is evident from its repeated statements during the hearing:

[*THE COURT*]: [M]y biggest concern when I read [your objection] is you basically are telling me you don't like the [referee's] decision and you want a do over. That's my concern.

* * *

[*THE COURT*]: So the way I read [MCR 3.215(F)] is if there was something that for whatever reason testimony could not be presented. But I don't see in your objection that it w– that you're saying that testimony – you weren't – there wasn't evidence available, you just don't like the way she decided. That's my concern. . . .

* * *

[*THE COURT*]: I think this is the reason for the court rule. It's one thing if you say, "The testimony was presented and we didn't like the conclusion." It's a different thing if the testimony wasn't available so that's why it wasn't taken into account; [t]here was something important that she didn't have to consider. . . .

* * *

[2] These best-interest factors are found in MCL 722.23.

> [*THE COURT*]: So you disagree with the finding of – the finding of that which is the point of having a factual hearing.
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> * * *
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> [*THE COURT*]: And so I'm going to deny your objection on . . . the factual basis because I believe all of that testimony was heard. And pursuant to the court rule cited, um – there's no – there wasn't any testimony that you didn't have an opportunity to present or that wasn't available. Um – you just didn't like the decision and that's the finder – that's the finder of fact[']s job is to make a decision. Unfortunately, . . . she had to agree with someone and not agree with someone and so one side doesn't like the decision and in this case it's [defendant].

The trial court's belief is contrary to the law. If a party properly objects to a referee's report, the trial court *must hold a de novo hearing*. MCL 552.507(4); MCR 3.215(E)(4); *Cochrane v Brown*, 234 Mich App 129, 131-134; 592 NW2d 123 (1999). And the conduct of that judicial hearing is governed by MCR 3.215(F)(2). *Dumm v Brodbeck*, 276 Mich App 460, 463; 740 NW2d 751 (2007). While the trial court must allow for the presentation of live evidence, the court has some discretion in limiting this evidence. MCR 3.215(F)(2)(c); MCL 552.507(5). But this does not stand for the proposition that review can only occur if new evidence is presented. The taking of evidence and the conducting of the review are two distinct matters. In fact, MCL 552.507(6)(a) clearly contemplates that de novo hearings are to include "[a] new decision based entirely on the record of a previous hearing." Additionally, the de novo review requires the trial court to reach an independent conclusion. *Truitt v Truitt*, 172 Mich App 38, 43; 431 NW2d 454 (1988). Thus, the failure of the trial court to conduct a de novo review of the particular contested findings is erroneous. We vacate the order and remand so that the trial court can conduct the appropriate de novo review.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering