

STATE OF MICHIGAN
COURT OF APPEALS

KATRINA STRECH,

Plaintiff,

v

NATHAN BUSH,

Defendant-Appellant,

and

JENNIFER A. FROST,

Appellee.

UNPUBLISHED

September 10, 2020

No. 351196

Lenawee Circuit Court

LC No. 16-043381-DP

Before: LETICA, P.J., and FORT HOOD and GLEICHER, JJ.

PER CURIAM.

The trial court appointed a guardian ad litem (GAL)—Jennifer Frost—during a parenting-time dispute between Nathan Bush and Katrina Strech. During a hearing, however, the court determined that Frost was a lawyer/guardian ad litem (LGAL), rather than a GAL. The court therefore denied the parties the right to question Frost as a GAL regarding her report.

Bush challenges the trial court’s order requiring the parties to reimburse Frost for her services. We affirm the payment portion of the court’s order. However, we vacate the court’s order permitting Frost to withdraw and remand for a continuation of the evidentiary hearing at which the parties may question Frost regarding her report.

I. BACKGROUND

Nathan Bush and Katrina Strech were never married, but share a young son, NB, who was born in 2016. The parties have battled over custody, child support, and other parenting issues ever since. In the spring of 2019, the parties filed competing motions to modify the parenting-time schedule and custody arrangement, and Bush requested a court order for Strech to submit to a psychological evaluation. Bush further contended that Strech’s boyfriend, William (or Willem) Boer, had assaulted him while Bush was holding NB.

A hearing was conducted on May 13, 2019, and the parties' competing motions were given preliminary consideration. That hearing was not transcribed. On May 21, 2019, the trial court issued an order modifying the parenting-time schedule and setting rules for parenting-time exchanges. Relevant to this appeal, the order provided:

It is further ordered that Attorney Jennifer Frost is hereby appointed as *Guardian Ad Litem (G.A.L.)* for minor child [NB] and she shall conduct an investigation and issue a report with recommendations on the remaining issues before the Court, namely: the request of Defendant/father for Plaintiff/mother to submit to a psychological evaluation, the request of Defendant/father that William Boer not have contact with the minor child, and the issue of parenting time transportation and exchange location. [Emphasis added.]

The court included the following handwritten order as well: "And the request of the plaintiff that the defendant submit to a psychological evaluation." The court ordered that the parties would be "equally responsible for the fees and costs of the G.A.L." Bush lodged no objection to the order at the time it was entered.

Following a three-week investigation, Frost submitted the "Report and Recommendation of Guardian ad Litem." Frost recited that the court had authority to appoint a GAL under MCL 722.24 and that the GAL's powers and duties were described by MCL 712A.17d. Frost indicated that she had reviewed the court file and interviewed both parents, as well as reviewing "other custody matters involving the parties, police reports, videos, text messages, emails from the parties, the parties prior custody/parenting time evaluation performed by Sally Shanks, and information provided by Dr. Cunningham (father's counselor)."

In making her recommendation, Frost noted that Bush already had sole physical custody of NB with Strech having parenting time. While the court had previously increased Strech's parenting time in September 2018, the court had since vacated that order and returned to the prior order. Although Frost did not detail the specifics of that arrangement, Strech has parenting time every other weekend. And Frost recommended leaving that arrangement in place.

On June 13, 2019, the judge met with the parties and Frost in chambers. The court then took to the record to conclude that an evidentiary hearing was required because the parties could not agree on various issues, including whether psychological evaluations were required. On the record, Frost identified herself as the guardian ad litem.

Frost appeared at the August 8, 2019 custody hearing and again identified herself as the child's "Guardian ad Litem." Strech testified that she had spoken on the phone with Frost, and that her last psychological evaluation was in 2012. Bush's therapist, Dr. Kenneth Cunningham, asserted that he spoke to Frost ahead of the hearing and provided his opinions regarding Bush's mental health. Dr. Cunningham also reviewed Frost's report and expressed:

I saw in her descriptions that Mr. Bush came forth as credible and capable and I didn't see much evaluation to the contrary but then I saw several paragraphs in which things were mentioned about the mother in a rather negative way and yet the outcome had balance for both parents.

At the close of the hearing, the court recommended reconvening one week later. Frost indicated that she was not available that day. The following colloquy ensued:

Ms. Frost. Your Honor, I don't know if the court would like further recommendation from me but I can tell the court at this time that my recommendation will not change from what I have reported to the court and presented to the parties at this point. So perhaps they may continue with their hearing on Friday unless my assistance is required.

[Strech's Counsel]. I wasn't planning on calling her as a witness. I don't know if [Bush's counsel] was.

The Court. I think it would also require the stipulation of her report to be received into evidence as well because for purposes of the settlement conference that is available to all attorneys, but if we want it to become part of the record itself it has to be done by stipulation of the attorneys.

[Strech's Counsel]. I am not prepared to do that at this point, your Honor.

The Court. Of course if not then her fees continue to accumulate which I understand they are being equally shared by the parties at this juncture.

After further discussion, the court scheduled the next hearing for September 20. Bush's counsel asserted that the only other witness he intended to call was Frost. Frost stated her belief that counsel could not call her as a witness. Frost agreed with counsel that she was a GAL, not an LGAL, but still contended that the statutes prohibited her testimony. The following discussion occurred:

The Court. The [LGAL] represents the child, okay, so according to MCL [712A.17d]

Ms. Frost. [17d].

The Court. She is appointed as the [LGAL] to represent the child and has powers and duties in relation to that representation.

[Bush's counsel]. Is she the [LGAL]? I thought she was a GAL.

The Court. I believe she was - - well, she is the [GAL] but she is also the - - I believe she was appointed the [LGAL] and performed your duties under the statute; did you not, Ms. Frost?

Ms. Frost. Yes, I believe so, your Honor and I can look at the particular order appointing me.

The Court. Under the same statute MCL 722.24[(3)], she is tasked with writing a report and recommendation. The court may read the report and recommendations, shall not, however, admit the report and recommendation into

evidence unless all parties stipulate to the admission. The parties may make use of the report and recommendation for purposes of a settlement conference, as I referenced earlier. The remaining section refers to the determination of fees, which has also already been previously decided. The [LGAL's] powers and duties are set forth further in . . . MCL 712A.17(d). So, I believe she is correct. As the [LGAL] as her duties have been described for purposes of this case she is not a witness. She is, in fact, the representative making a recommendation on behalf of the children.

[Bush's counsel]. And, I understand that. I wasn't hearing you indicating in the statute that is precluding her from being called as a witness.

The Court. She is the attorney for the children.

[Bush's counsel]. She is the attorney - - I thought she was the GAL, again, there is a difference, right, between an [LGAL] and [a GAL].

The Court. Ms. Frost?

Ms. Frost. The order appointing me does not [GAL]. The word "Lawyer" is not in front of it. However, it is my understanding that because I am a lawyer, this is my position, and so the [GAL] statute which under the custody act which provides for a [GAL] it references directly the child protective statute, 712A.17(d), which is the [LGAL] rights and responsibilities which preclude me from being a witness.

* * *

The Court. I mean effectively, [Bush's counsel], you are asking an attorney participating on behalf of the children to be in a dual role of a witness which I do not believe is contemplated by the statute. But, we will be coming back so if you would like to do some research - -

[Bush's counsel]. Ms. Frost says it is in the statute definitely then I will look and that is something that is simple to look at.

Ms. Frost. I am sure it is from my role as in child protective proceedings as the [LGAL]. I'm sure it is specifically written out in the statute and I will find it if need be.

[Bush's counsel]. I mean this isn't a child protective proceeding.

The Court. Right, but she has been appointed [LGAL] as it is allowed under the custody provisions.

In between the evidentiary and follow-up hearings, Frost sought payment for her services as an LGAL. Frost asserted that she had "performed the services requested by the Court" and had submitted her bill to the parties through their attorneys. However, neither party had paid.

Bush objected to Frost's motion to compel payment. Bush argued that Frost was appointed by the court to serve as a GAL, not an LGAL. Without citing authority, Bush contended that "GAL fees are not enforceable by threat of contempt." Moreover, Bush contended, Frost was not entitled to payment because she failed to meet her duties as either a GAL or an LGAL. If Frost served as an LGAL, she was required by MCL 712A.17d(1)(d) to meet her client (the child) before the evidentiary hearing. Frost did not do so. And if Frost was a GAL, she could be compelled to testify about her report and recommendation, but the court precluded her testimony. Bush also inaccurately accused Frost of not attending all hearings of the court.

The court heard Bush's challenge to Frost's request for payment at the September 20, 2019 hearing. Frost stated, "It is true that the order appointing me was for a [GAL] but as we discussed at the last hearing the child custody act does refer you back to the Probate rules which gives the duties of [an LGAL]." Frost further noted that neither party contended that the services listed were not performed.

Bush, acting in pro per, retorted that he did in fact challenge that Frost had not performed certain services. He reiterated that Frost had not met with her client, NB. Given NB's young age, "the only way you can possibly glean" what is in the child's best interests, "is to observe them in their natural state, how they respond to each parent, how they behave, what their particular needs are, where they are at in their stage in development." Bush further noted that Frost had not met with or spoken to Boer despite that "one of the primary subjects of the investigation was Willem Boer." Frost also never met with Strech, speaking to her only by phone. As such, Frost could not take into account Strech's "facial expressions, eye contact, body language and things of that nature." Bush could not "understand how [Frost] can properly make a determination as to Ms. Strech's psychological health without meeting with that person face to face." Finally, Bush accused Frost of favoring Strech to ensure that Strech would pay her share of the bill.

The court responded:

[Frost] has delivered her report and she has delivered her recommendations. If you would like her to do an additional investigation I am prepared to allow you to ask her to do that if you are going to compensate her only out of your funds to go and do the additional meetings that you are asking her to do[.]

The court ultimately ordered the parties to pay their shares of Frost's services to date and permitted Bush to request additional services at his own costs. "She has done what the court asked her which is to give me a report and a recommendation on what she has found as a result of the interviews that she's done and the court is satisfied with that at this point." Bush indicated that he did not want to pay Frost for additional services and the custody hearing continued.

Following the hearing, the court issued an order permitting Frost to withdraw from the case and requiring each party to pay Frost \$1,072.50.

Bush subsequently filed a motion for reconsideration of the order regarding Frost's fees. Bush took issue with "the discrepancy between the language used in the order appointing Ms. Frost" and the court's and Ms. Frost's later referral to her as an LGAL. And Bush took issue with the court ordering payment of Frost's fees when she had not completed services as required for

either an LGAL or a GAL. As a GAL, Frost would have been required to testify at the custody hearing, and as an LGAL, Frost would have been required to meet with NB. Bush further complained that Frost failed to meet with Boer to investigate him as required by the court's order, or to meet with Strech in person.

Frost made no reply to Bush's reconsideration motion. The trial court denied the motion as Bush had raised no new issue for the court's consideration and failed to demonstrate any palpable error.

The court subsequently issued an order resolving the custody and parenting-time issues on December 30, 2019. The court noted that the parties eventually "stipulated to the admission into evidence of the written report of the *G.A.L.*" (Emphasis added.)

II. ANALYSIS

On appeal, Bush contends that the trial court incorrectly treated Frost as an LGAL rather than a GAL. This is true. "[A] court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). The court clearly appointed Frost to serve as GAL, not LGAL, in its May 21, 2019 order. If the court erred and actually intended Frost to serve as LGAL, the court needed to enter a corrected order. The court did not do so and therefore Frost remained a GAL.

But does this error require relief?

In a child custody proceeding, a GAL is "an individual whom the court appoints to assist the court in determining the child's best interests. A [GAL] does not need to be an attorney." MCL 722.22(g). An LGAL is "an attorney appointed under section 4. A [LGAL] represents the child, and has the powers and duties, as set forth in section 4." MCL 722.22(h). Section 4 directs the reader to MCL 712A.17d for the duties of an LGAL. MCL 722.24(2). MCL 722.24(3) provides that the LGAL may file a written recommendation and report for the court's consideration.

In child protective proceedings, the definition of a GAL mirrors the definition of that designation in a child custody case. See MCL 712A.13a(1)(f). An LGAL, like in a custody case, "represents the child, and has the powers and duties, as set forth in" MCL 712A.17d. MCL 712A.17d(1) provides:

A [LGAL's] duty is to the child, and not the court. The [LGAL's] powers and duties include at least all of the following:

- (a) The obligations of the attorney-client privilege.
- (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.
- (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family

members, and others as necessary, and reviewing relevant reports and other information. . . .

(d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case . . .

* * *

(h) To attend all hearings and substitute representation for the child only with court approval.

(i) To make a determination regarding the child's best interests and advocate for those best interests according to the [LGAL's] understanding of those best interests, regardless of whether the [LGAL's] determination reflects the child's wishes. . . .

This Court has held that the duties of a GAL and an LGAL are distinct:

[T]he distinction is significant to the extent that it indicates that there are differences between a GAL and an LGAL. For instance, a GAL need not be an attorney, while an LGAL must be an attorney. MCL 712A.13a(1)(f) and (g). A GAL, after conducting an independent investigation, "shall make a report in open court or file a written report of the investigation and recommendations." MCR 5.121(C). The GAL's report and any subsequent reports "may be received by the court and may be relied on to the extent of their probative value" MCR 5.121(D)(1). And interested parties have a right to "examine and controvert reports received into evidence" and can cross-examine the GAL who made the report. MCR 5.121(D)(2)(a) through (c). An LGAL, like a GAL, must conduct an independent investigation, MCL 712A.17d(1)(b), but, unlike a GAL, "[t]he court or another party to the case shall not call [an LGAL] as a witness to testify regarding matters related to the case," and an LGAL's "file of the case is not discoverable," MCL 712A.17d(3). And while the court must appoint an LGAL in a child protective proceeding, MCL 712A.17c(7), a court is not required to appoint a GAL in such proceedings; MCL 712A.17c(10) provides, "To assist the court in determining a child's best interests, the court *may* appoint a [GAL] for a child involved in a proceeding under this chapter." (Emphasis added.) Perhaps the starkest difference between the two is that, unlike an LGAL, appointment of a GAL "does not create an attorney-client relationship," and "[c]ommunications between that person and the [GAL] are not subject to the attorney-client privilege." MCR 5.121(E)(1). In addition to these differences, an LGAL has the statutory duties outlined earlier, which do not apply to a GAL. [*Farris v McKaig*, 324 Mich App 349, 358; 920 NW2d 377 (2018).]

Contrary to Bush's contention, Frost met the obligations of a GAL. Frost attended every required court hearing. She assisted the court in assessing NB's best interests as required by MCL 722.22(g). Frost authored a report and filed it with the court. *Farris*, 324 Mich App at 358, citing MCR 5.121(C). The court's order did not require Frost to interview Strech face-to-face or to interview Boer. As the parent with sole physical custody of NB, Bush was free to bring NB to his

meeting with Frost, but did not. Ultimately, Frost spoke to both parties and Bush's therapist, reviewed a recent custody evaluation, and considered evidence presented by the parties, such as "videos" presented by the parties. During their testimonies at the hearing, each party testified that they video-recorded parenting-time exchanges, including the incident during which Boer allegedly assaulted Bush while holding NB. Frost thereby assessed the concerns raised in the court's order. And as such, Frost was entitled to payment for the services actually completed as a GAL.

Bush contends that the court could not order the parties to compensate Frost for her GAL services because Frost did not personally visit NB. In this regard, Bush cites MCL 700.5305 of the Estates and Protected Individuals Code. The code, however, is intended to protect "an individual alleged to be incapacitated," MCL 700.5305(1), not children. And in the trial court, Bush contended that a GAL could not seek payment through a contempt motion. Bush cites no relevant statute, court rule, or caselaw supporting that position, either.

Although Frost fulfilled her role, the court interfered with Bush's right to examine her and to thereby controvert her report by denying his request to call Frost to the stand. See *Farris*, 324 Mich App at 358, citing MCL 5.121(D)(2)(a)-(c). While Frost is an attorney by trade, she was not serving as an attorney or an LGAL in this case. Frost created a report to help the court assess NB's best interests and allowing the parties to examine the author on the stand furthers that interest.

Rather than vacating the court's December 30, 2019 order and leaving NB in limbo, we remand to the trial court to continue the evidentiary hearing in this matter. The parties may call Frost to the stand in her capacity as GAL. The parties will be permitted to question Frost as the GAL regarding her report. This opens the parties' competing parenting-time motions for further consideration. Following the hearing, the court may either reaffirm its earlier order regarding parenting time, or it may modify that order. In either event, the parties will be required to share the costs of Frost's continued services.

We affirm that portion of the September 20, 2019 order requiring the parties to compensate Frost for her services to date and vacate that portion permitting Frost to withdraw from the case. We remand to the trial court for a continuation of the evidentiary hearing at which the parties can question Frost regarding her report and after which the court must resolve the parenting-time motions. Following the hearing, the court shall order the parties to share the cost of Frost's additional services. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher