STATE OF MICHIGAN

COURT OF APPEALS

DANE L. SONGER,

Plaintiff/Counter-Defendant-Appellee,

v

CRYSTAL L. SONGER, a/k/a CRYSTAL L. HATFIELD,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
May17, 2007

No. 274124
Shiawassee Circuit Court
Family Division
LC No. 02-008574-DM

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant/counter-plaintiff (defendant) appeals as of right the trial court's order changing custody, child support, and parenting time, which awarded sole physical custody to plaintiff/counter-defendant (plaintiff). We affirm.

Defendant argues that she was deprived of her constitutional right to due process when the trial court changed custody following a hearing of which she did not receive timely notice. We disagree. Constitutional questions are reviewed de novo. *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). However, MCL 722.28 provides that child custody orders and judgments shall be affirmed on appeal unless the trial court made "findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." *Fletcher v Fletcher*, 447 Mich 871, 877-881; 526 NW2d 889 (1994). A finding of fact is against the great weight of the evidence if "the evidence 'clearly preponderates in the opposite direction.' " *Id.* at 879, quoting *Murchie v Std Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). We review the trial court's discretionary rulings, including custody decisions, for an abuse of discretion. *Fletcher*, *supra* at 879-881. We review questions of law for clear legal error, which occurs when a court incorrectly chooses, interprets, or applies the law. *Id.* at 881.

The United States and Michigan Constitutions guarantee that one may not be deprived of life, liberty, or property without the due process of law. US Const, Am V; Const 1963, art 1, § 17.

> "Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." [*Hanlon v Civil Service Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002), quoting *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).]

Notice must be reasonably calculated, under the circumstances, to apprise interested parties "of the pendency of the action and afford them an opportunity to present their objections." *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 574; 692 NW2d 68 (2004).

MCR 2.119(C)(1)(a) provides that, "[u]nless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served . . . at least 9 days before the time set for the hearing, if served by mail." The hearing occurred on July 11, 2006. One proof of service indicates that plaintiff mailed the notice of hearing and his motion to the address defendant had on file with the Friend of the Court on July 6, 2006, which was five days before the hearing. An amended proof of service indicates that plaintiff mailed the notice of hearing and his motion to another address he had for defendant on July 7, 2006, which was four days before the hearing. In his motion to change custody, plaintiff requested an emergency hearing before the Friend of the Court or the trial court to determine the best interests of the children, and the notice of hearing provided that the scheduled hearing was an emergency hearing. The trial court scheduled the hearing on an emergency basis, as is evidenced by the notice of hearing and the trial court's comments at the August 10, 2006, and October 12, 2006, hearings. Defendant's attorney claimed that she did not receive notice until July 12, 2006, one day after the hearing was conducted.

At the August 10, 2006, hearing, the trial court declined to set aside the order changing custody because it had found that there had been just cause for an emergency hearing. Although the trial court did not identify the just or good cause it found, it is noteworthy that the change in circumstances leading the court to consider the best interest factors was twofold. The trial court relied on the location of defendant's residence and the children's health in finding that a change in circumstances had occurred. Given defendant's statement to plaintiff that she was not sure where she would be living, combined with plaintiff's testimony and the doctor's report regarding the lice, bug bites, and filthy condition of the children and plaintiff's imminent deployment, we conclude that there was good cause to employ a different period for providing notice of the hearing pursuant to MCR 2.119(C)(1)(a).

Defendant additionally argues that the order changing custody was not a valid ex parte order under MCR 3.207(B)(1) because plaintiff never requested an ex parte order and there was no finding of a threat of irreparable injury to the children. This argument is misplaced. Defendant is correct that plaintiff never requested an ex parte order and the trial court never found a threat of irreparable injury to the children. As discussed *supra*, however, plaintiff requested an emergency hearing, and the trial court granted one, thus properly shortening the time period of the notice requirement under MCR 2.119(C)(1)(a). Similarly, defendant's reliance on *Pluta v Pluta*, 165 Mich App 55; 418 NW2d 400 (1987), is misplaced because the *Pluta* Court made no finding regarding an emergency or good cause for failing to provide the

required notice. Rather, the *Pluta* Court considered an ex parte order, which was entered without an evidentiary hearing or any opportunity for the plaintiff to present proofs. *Id.* at 59-60.

Plaintiff was unsure of defendant's residence when he prepared the motion to change custody, and he sent the notice of hearing to the address on record with the Friend of the Court as well as another address. Plaintiff was being deployed on July 28, 2006, and he had serious concerns for the health of the children. Under these circumstances, we conclude that notice was reasonably calculated to apprise defendant of the pendency of the hearing on plaintiff's motion to change custody. See *Maxwell*, *supra* at 574. Further, the overriding concern in any custody determination is the best interests of the children. *Hawkins v Murphy*, 222 Mich App 664, 674; 565 NW2d 674 (1997).

Defendant contends that the trial court did not allow her to present any proofs and she was denied the opportunity to be heard. However, the record shows that, at the October 12, 2006, hearing, defendant had failed to subpoena any witnesses, offer any proof, or even testify on her own behalf. At that hearing, defendant indicated that she wished to cross-examine plaintiff, but he was in Kuwait and therefore unavailable. When offered the opportunity to continue the hearing so that defendant could arrange for witnesses to be present, defendant resumed her argument that the notice of hearing was insufficient. The trial court recognized that defendant had a right to present her proofs, but defendant failed to avail herself of the opportunity and the trial court adjourned the hearing. Due process requires an opportunity to be heard in a meaningful time and manner, and the nonmoving party must have the chance to know and respond to the evidence. *Hanlon*, *supra* at 723. We conclude that defendant was provided this opportunity, and her decision not to take advantage of it does not constitute a denial of due process, especially given that the overriding concern is the best interest of the children. *Hawkins*, *supra* at 674. Therefore, reversal is not warranted on this ground.

Defendant argues that the trial court erred in admitting the doctor's report from the urgent care clinic because it was hearsay and did not satisfy the business records hearsay exception. We disagree. Because the trial court did not address this issue, it is unpreserved, *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004), but this Court may review it because it is a question of law and all the facts necessary for its resolution have been presented, *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 555; 672 NW2d 513 (2003). This Court reviews de novo questions of law, including interpretation of a court rule. *Richards v Tibaldi*, 272 Mich App 522, 528; 726 NW2d 770 (2006).

At the July 11, 2006, hearing, plaintiff testified regarding the doctor's opinions. The current version of MRE 803(6) provides a hearsay exception for business records, in pertinent part, as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, *conditions, opinions, or diagnoses*, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of

> information or the method or circumstances of preparation indicate lack of trustworthiness. [Emphasis added.]

Defendant is correct that the former MRE 803(6) did not contain an exception for conditions, opinions, or diagnoses. See Comments to MRE 803, 1978 Note (2). However, in 1990, the Michigan Supreme Court amended MRE 803(6) so that it conformed to its federal counterpart by including an exception for "conditions, opinions, or diagnoses." 437 Mich ccviii-ccix; see also Staff Comment, 437 Mich ccix. Therefore, defendant's entire argument is misplaced.

Defendant also contends that the trial court erred in admitting the doctor's report from the urgent care clinic because it was not properly authenticated and did not meet the foundational requirements. In 2001, the Michigan Supreme Court amended MRE 803(6) such that it "allows properly authenticated records to be introduced into evidence without requiring the records' custodian to appear and testify to their authenticity." Staff Comment, 464 Mich cclxviii. To the extent that defendant argues that the records' custodian was required to appear, her argument is misplaced. Defendant correctly asserts that no employees of the urgent care center testified to the authenticity of the report, and we agree that the trial court erred in permitting plaintiff to testify about the report without presenting any documentation to authenticate it.

However, defendant fails to articulate how substantial justice requires us to vacate the order changing custody. MCR 2.613(A). "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Failure to properly address the merits of this assertion constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).

Defendant asserts that she was deprived of her due process right to confrontation because she did not have an opportunity to cross-examine plaintiff. We disagree. Because the trial court did not address this issue, it has not been properly preserved for appellate review, *Brown*, *supra* at 599, and will be reviewed only for plain error affecting substantial rights, *Kern*, *supra* at 336.

The Confrontation Clauses of the United States and Michigan Constitutions guarantee, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him[.]" US Const, Am VI; Const 1963, art 1, § 20. The instant action is a child custody proceeding, not a criminal prosecution. The purposes of the Child Custody Act are to promote the best interests of the children and to provide a stable environment that is free of unwarranted custody changes. *Thompson*, *supra* at 362 n 2; *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). In contrast, the purpose of a criminal proceeding is to determine the guilt or innocence of the defendant. *People v Gates*, 434 Mich 146, 162; 452 NW2d 627 (1990).

Although defendant correctly asserts that the Confrontation Clause may apply in some civil cases where a party has been denied the opportunity to cross-examine a witness, defendant was never deprived of the opportunity to cross-examine plaintiff. Rather, she declined to continue the hearing until plaintiff could be available and failed to subpoena him. *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). Reversal is not warranted on this ground.

Defendant claims that the trial court violated her constitutional right to privacy in raising her children by determining that she failed to maintain the children's hygiene, which amounted to a finding that her parental methods were inadequate. We disagree. Because defendant failed to raise this issue before the trial court, it has not been properly preserved for appellate review, *Brown*, *supra* at 599, and will be reviewed only for plain error affecting substantial rights, *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

At the outset, we note that defendant correctly points out in her reply brief that plaintiff attempts to expand the record on appeal by attaching a copy of the Michigan Dep't of Community Health & Michigan Dep't of Ed, *Michigan Head Lice Manual* (Lansing, MI: 2004). The trial court record does not contain a copy of this manual, and expansion of the record on appeal is prohibited. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Therefore, we will not consider this manual in analyzing this issue.

Defendant correctly asserts that, as part of the liberty protected by the Due Process Clause of the Fourteenth Amendment, a custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate her children. *Troxel v Granville*, 530 US 57, 95; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *DeRose v DeRose*, 469 Mich 320, 328-329; 666 NW2d 636 (2003). Further, a presumption exists that " 'so long as a parent adequately cares for his or her children (i.e., is fit), 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 that parent to make the best decisions concerning the rearing of that parent's' child." *DeRose*, *supra* at 329, quoting *Troxel*, *supra* at 68-69. However, defendant overlooks the fact that the trial court based its finding of a change in circumstances on its conclusion that there was uncertainty about the location of her residence and the condition of the children's health. Notably, defendant does not challenge the trial court's findings regarding a change of circumstances or the best interest factors. Defendant's argument is misplaced, and she provides no support for the assertion that a trial court's decision to change custody based on a proper finding of a change in circumstances and a consideration of the best interest factors of MCL 722.23 amounts to a denial of her right to raise her children in a manner she sees fit. Therefore, reversal is not warranted on this ground.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra