

STATE OF MICHIGAN
COURT OF APPEALS

ERIC JAMES MALONEY,

Plaintiff/Counter-Defendant-
Appellant,

v

MARIA DAWN MALONEY,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
December 9, 2008

No. 279798
Oakland Circuit Court
LC No. 2005-712997-DM

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm.

Plaintiff first argues that the trial court's decision to award defendant sole legal and physical custody of the child improperly modified an earlier custody order without a showing of proper cause or change of circumstances, contrary to MCL 722.27(1)(c). We disagree.

“This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28.” *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). “Under the ‘great weight of the evidence’ standard, a trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction.” *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). Moreover, to whom custody is granted is a discretionary ruling and thus subject to an abuse-of-discretion standard of review. *Id.* This Court reviews questions of law for clear legal error, which occurs “when a trial court incorrectly chooses, interprets, or applies the law.” *Berger, supra* at 706.

Plaintiff's argument is based on the erroneous assumption that the November 1, 2005, interim order for temporary custody constituted an award of custody that could not be modified or amended under the first sentence of MCL 722.27(1)(c) without proper cause or a change of circumstances. We disagree. The November 1, 2005, order, by its terms, was only for “temporary custody,” and it was entered without an evidentiary hearing regarding the statutory best-interest factors. The trial court's December 12, 2006, custody award following trial was the original custody award. Because that proceeding was not held to amend or modify a previous custody order, the trial court was not required to determine whether defendant demonstrated

proper cause or changed circumstances. *Thompson v Thompson*, 261 Mich App 353, 357-358; 683 NW2d 250 (2004).

Plaintiff also argues that even if proper cause or changed circumstances were not required to be shown, the trial court erred in awarding defendant sole legal and physical custody of the parties' child and in determining plaintiff's parenting-time schedule. We disagree.

Plaintiff does not directly contest the trial court's findings on any of the statutory best-interest factors. He challenges the following findings:

The court finds Plaintiff's demeanor and manner while testifying to be consistent with the findings of the psychologist and family counselor. Plaintiff is critical of authority figures, specifically the Keego Harbor police and the district court, and is demeaning, arrogant, and intimidating in his interaction with others. Plaintiff is manipulative and misrepresents facts to the court. In order to co-parent, the parties must be able to communicate openly and effectively. While Defendant has made efforts to cooperate, Plaintiff has not. Further, subjecting Liam to repetitive examinations for unsubstantiated claims of abuse is a form of abuse in itself. This court is concerned for the well-being of Liam as he grows older and more independent. These parties cannot work effectively together to parent Liam. Therefore, an award of joint custody is not in Liam's best interest.

Considering all child custody factors, this court finds by clear and convincing evidence that it is in Liam's best interest to award sole legal and physical custody to the Defendant. Plaintiff shall be awarded parenting time as discussed below. Further, all parenting time exchanges shall occur in a supervised setting in the presence of police or other professionals who can document Liam's physical condition and report any misbehavior on the part of Plaintiff. The parties shall not communicate with one another except in a writing, to be retained for future litigation if needed.

In deciding whether to award joint custody, a court must consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b). Contrary to plaintiff's argument, there was ample evidence to support the trial court's determination that joint custody was not workable because of plaintiff's unwillingness to cooperate with defendant. Although the Friend of the Court Investigator, Sandra Binder, and the court psychologist, Paul VanHeulen, both recommended joint legal custody, the trial court was not bound to follow those recommendations. The evidence showed that plaintiff was distrustful of defendant, repeatedly questioned and undermined her decisions, and had filed several complaints accusing plaintiff of physically abusing the child, none of which were substantiated or found to have merit. Even VanHeulen acknowledged that because of the parties' problems with communicating and agreeing on issues regarding the child, it would be difficult for joint custody to work. His original recommendation seemed to be premised in part on his recommendation that the parties also both participate in therapy. However, plaintiff had previously refused to attend court-ordered counseling as part of his probation for a conviction involving an offense committed against defendant.

Plaintiff also argues that the trial court erred in disregarding the testimony of his disinterested third-party witnesses, who plaintiff maintains supported his claims that defendant was responsible for physically abusing the child. We disagree. None of the witnesses actually observed defendant abusing the child. Although the witnesses testified that they observed questionable injuries on the child, other evidence was presented that plaintiff's claims of physical abuse were investigated by several different professionals who found no merit to plaintiff's claims of abuse.

The trial court's finding that joint custody was not feasible because of plaintiff's inability to communicate and cooperate with defendant was not against the clear weight of the evidence. Based on the record, we find no error in the trial court's decision to award defendant sole legal and physical custody of the child or in its determination of plaintiff's parenting-time schedule.

Plaintiff also asserts that the trial court erroneously applied a preponderance of the evidence standard, rather than a clear and convincing evidence standard, in determining the issue of custody. Plaintiff does not cite any factual support for this argument. Moreover, the trial court stated in its opinion and order that it was determining "whether to change legal or physical custody based on a clear and convincing evidence standard." Accordingly, we find no merit to this issue.

Plaintiff also contends that this Court should remand for a new custody hearing because a change of circumstances now supports an award of full custody in his favor. This issue is not properly before us. If plaintiff believes that there has been a change of circumstances sufficient to modify the trial court's custody decision, he may file an appropriate motion in the trial court. See MCL 722.27(1)(c).

Plaintiff also argues that the trial court erred by including in the divorce judgment a provision specifying that its awards of \$11,000 for unreturned property and \$7,000 for attorney fees were "in the nature of family support" and could not be discharged in bankruptcy.

Although plaintiff relies on *Kowatch v Kowatch*, 179 Mich App 163, 168-170; 445 NW2d 808 (1989), to argue that only obligations properly characterized as support, rather than part of a property settlement, are dischargeable in bankruptcy, that decision is based on a former version of 11 USC 523(a). Since *Kowatch* was decided, 11 USC 523 has been amended and subsection 15 of that statute now provides that all debts to a spouse or former spouse, "incurred . . . in the course of a divorce or separation" are not dischargeable in bankruptcy. This amended provision was in effect when the divorce judgment was entered and when the bankruptcy petition was filed. Accordingly, regardless of whether the trial court's awards properly can be characterized as support, the court did not err by providing that the debts were not subject to discharge in bankruptcy.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter