STATE OF MICHIGAN

COURT OF APPEALS

ERIC V. LUNDQUIST, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 28, 2007
v	No. 271023 Oakland Circuit Court
CYNTHIA D. LUNDQUIST, Defendant-Appellant/Cross-Appellee.	LC No. 2002-670819-DM

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from an order modifying a joint custody arrangement pursuant to a consent judgment of divorce. The order awards plaintiff sole legal and physical custody of the parties' minor children and requires defendant to pay child support. Plaintiff cross-appeals the trial court's calculation of child support. We affirm.

I. FACTS

The parties were originally awarded joint custody of their children pursuant to a consent judgment of divorce. Plaintiff later petitioned for a change of custody, alleging that the joint custody arrangement was not manageable due to defendant's hostile, uncooperative, and accusatory conduct, which was harmful to the children. Defendant also moved for sole custody of the children, alleging that plaintiff's conduct toward herself and the children amounted to domestic abuse. The trial court referred the matter to a referee. After conducting a lengthy evidentiary hearing, the referee recommended awarding custody of the children to plaintiff. Defendant requested a de novo hearing under MCL 552.507, and plaintiff moved for a de novo hearing on the issue of child support. Following a one-day hearing, the trial court found that there was adequate cause for a change of custody and awarded plaintiff sole custody of the children and ordered defendant to pay child support. In calculating the amount of defendant's child support, the court declined plaintiff's request to impute income to defendant. Both parties now appeal.

II. STANDARD OF REVIEW

"All custody orders must be affirmed on appeal unless the trial court's findings 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." *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999), citing MCL 722.28. The great weight of the evidence standard applies to all findings of fact, and the trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). Discretionary rulings, including the ultimate custody decision, are reviewed for an abuse of discretion, and questions of law are reviewed for clear error. *Id.*

III. CHANGE IN CIRCUMSTANCES

Defendant first challenges the trial court's determination that there were changed circumstances or proper cause for revisiting the issue of custody.

MCL 722.27 provides in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court . . . for the best interests of the child the court may do 1 or more of the following:
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> * * *
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> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age…. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

Before a court considers the best interest factors, the moving party must first establish that the conditions surrounding custody of the child have materially changed. *Killingbeck v Killingbeck*, 269 Mich App 132, 145; 711 NW2d 759 (2005).

Initially, defendant argues that the trial court failed to adequately explain the basis for its finding of changed circumstances or proper cause to warrant a change of custody. The question whether the trial court adequately set forth findings of fact is a question of law that is reviewed de novo on appeal. See *Burba v Burba* (*After Remand*), 461 Mich 637, 647; 610 NW2d 873 (2000). "Brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 2.517(A)(2); see also *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994). In evaluating the adequacy of the trial court's findings, the material question is not whether the court made a "clear decision," but whether it is apparent from the court's findings of fact and conclusions of law that the court was aware of the issues and correctly applied the law. *LaFond v Rumler*, 226 Mich App 447, 458; 574 NW2d 40 (1997).

In the instant case, the trial court found that there was proper cause to consider a change in custody where defendant's actions rendered the joint custody arrangement unmanageable:

> Plaintiff alleges Defendant has refused to cooperate with him concerning the children's activities and needs. Defendant alleges that Plaintiff is a domestic abuser and that the issue of domestic abuse has never been addressed. It was established that there is proper cause to consider a change in custody.

It is apparent from the trial court's statements that it was aware that a change in custody was legally permissible only if a change in circumstances or proper cause was shown and that, factually, defendant's failure to cooperate, to the extent that the joint custody arrangement was not manageable, was proper grounds for considering a change in custody. The trial court's findings on the question whether a change in custody was warranted were sufficient.

Defendant additionally argues, however, that her alleged uncooperativeness and hostility toward plaintiff were conditions that predated the original custody order and, therefore, cannot support a finding of changed circumstances warranting reconsideration of custody. We disagree. In *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003), this Court noted that in some situations, proper cause for a change in custody can be based on events and circumstances that were known before the entry of the original order if they are sufficiently significant to justify revisitation of the order. *Id.* Here, notwithstanding defendant's history of hostility and uncooperativeness before the original custody order was entered, the palpable impact of these problems on a joint custody relationship was not fully realized until after the joint custody arrangement was put in place. However optimistic the parties may have been that a joint custody arrangement could work, plaintiff presented ample evidence that the arrangement did not work out once put in place, and that defendant continually thwarted the children's involvement in extracurricular activities, provoked arguments with plaintiff in the children's presence, and urged the children to perceive plaintiff as an abuser. This evidence principally involved events and circumstances that occurred after the custody order was entered. Although many of defendant's personal issues were known before the custody order was entered, their significance and impact on a joint custody arrangement was not fully apparent until after the arrangement was implemented. The trial court did not err in finding that there was proper cause to consider a change in custody.

IV. DE NOVO HEARING

Defendant next argues that the trial court violated its statutory obligation to conduct a de novo hearing by limiting the hearing to a single day. Defendant failed to preserve this issue with an objection to the trial court's scheduling order of a one-day hearing. Thus, this claim is unpreserved and we review it only to determine if defendant can establish a plain error affecting her substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

If either party objects to a referee's report, the trial court must hold a de novo hearing. MCL 552.507(4); *Cochrane v Brown*, 234 Mich App 129, 131-134; 592 NW2d 123 (1999). MCL 552.507(5) provides that a trial court may impose reasonable restrictions and conditions on the de novo hearing, provided:

> (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.

Here subsection (a) was clearly satisfied by the 13-day hearing held by referee Traci Rink. We also find that subsection (b) was satisfied by the trial court's hearing, despite the fact that the duration of the hearing was limited. The record reflects that the trial court gave defendant a full opportunity to provide evidence on matters to which she objected in the referee's report. In particular, after defendant called her last witness, the trial court asked her if she had another witness. Defendant replied, "No, I do not." The court then asked defendant if she had "anything else to present by way of evidence?" Defendant again replied, "No." There is no indication in the record that the trial court prevented defendant from presenting any evidence, or that defendant lost the opportunity to present evidence that could have affected the outcome of the hearing. Defendant has failed to establish a plain error affecting her substantial rights.

V. RELIANCE ON REFEREE REPORT

Defendant next argues that the hearing was not truly de novo because the trial court relied on the referee's report and erroneously made findings that were not supported by evidence at the de novo hearing. We disagree. The trial judge heard sufficient testimony during the hearing to support its findings.

Plaintiff testified extensively on his own behalf, and Dr. John Ardizzone, the court-appointed therapist for the parties' daughters, testified for plaintiff as well.[1] Defendant called as witnesses a domestic violence expert, a counselor who worked with Nathan for two years, a gastroenterologist who treated Maggie, and four close acquaintances who had witnessed interactions between the parties and their children. The trial court heard and considered the testimony of all of these witnesses; clearly, the trial court did not simply rely on the referee's report and recommendations. And the trial court evaluated and made specific findings as to each of the statutory best interest factors. The court found that the parties were equal on five, that plaintiff prevailed on seven, and that defendant did not prevail on any.[2]

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[1] Relevant to defendant's claims on appeal, Ardizzone testified about his concerns about the negative effects on the children of plaintiff's belief that she was a domestic abuse victim. Ardizzone testified that he believed plaintiff encouraged her children to perceive themselves as victims also, and took them to counseling sessions at Haven. He testified that Maggie told him that she was upset by the therapy sessions because she had to listen to a child describe physical violence between his parents. Maggie told Dr. Ardizzone that she did not understand why defendant took her to the Haven because this sort of violence never happened between plaintiff and defendant. Ardizzone also testified that defendant disregarded his parenting advice. As an example, he explained that he had advised her that she needed to focus on the children instead of her hostility toward plaintiff, and he had warned her that her mother's hostility toward plaintiff had an adverse effect on the children. In response, she merely giggled and said "what can I do."

[2] The court found that the parties were equal with respect to factor (a) (love affection and other emotional ties with the children), factor (e) (permanence as a family unit of the parties' homes), factor (f) (moral fitness), factor (h) (home, school, and community record). With respect to factor (h), the court did note, however, that defendant was "less likely to follow professional advice." The court found that factor (i) (preference of the children) did not favor either party, because the children did not express any preference.

(continued…)

Defendant argues specifically that the trial court erred in its findings regarding defendant's amenability to Carol Keidan's[3] compromise on church attendance, defendant's failure to recover emotionally from the divorce, and defendant's obstinacy regarding Abby's kindergarten readiness. The evidence presented at the de novo hearing was sufficient to support the trial court's findings on each of these matters. Plaintiff testified about defendant's refusal to facilitate the children's church attendance and religious education, although plaintiff was willing to follow Keidan's suggestion to attend a different service than defendant and the children. Plaintiff testified extensively regarding defendant's hostile, accusatory, and obstructionist conduct, which supported the trial court's finding that defendant failed to recover emotionally from the divorce. Further, the testimony of plaintiff and Dr. Ardizzone enabled the trial court to find that defendant's opinion about Abby's kindergarten readiness was not a good-faith

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(…continued)

The court found that factor (b) (capacity to give the children love, affection, and guidance, and to support the children's religious affiliation) favored plaintiff, noting that defendant refused to cooperate with the children's Mass attendance and with their catechism classes.

The court also found that factor (c) (capacity and disposition to provide for the children's material, medical, and other needs) favored plaintiff, noting that plaintiff earned a sufficient income from his business to provide for the children, while defendant's emotional issues and migraines prevented her from adequately providing for the children.

The court found that factor (d) (desirability of maintaining continuity in a stable environment) favored plaintiff, noting that the joint custody arrangement was not in the children's best interests because the parties could not resolve disputes without the assistance of a parent coordinator.

The court found that factor (g) (mental and physical health) favored plaintiff, who was in good physical and mental health, in contrast to defendant, whose migraines prevented her from working full time, and whose emotional health was questionable.

The court found that factor (j) (willingness and ability to encourage a relationship between the children and the other parent) favored plaintiff, because defendant used the unfounded domestic abuse accusations as an excuse to interfere with plaintiff's involvement in school activities.

The trial court found that factor (k) (domestic violence) favored plaintiff, because defendant had failed to present any objective evidence of physical or emotional abuse.

With respect to factor (l) (any other relevant factor), the court stated:

> This factor favors Plaintiff father. The Friend of the Court Family Counselor, Jany Lee, Friend of the Court Referee, Traci Rink, Dr. John Ardizone [sic] and Carol Keidan have all recommended sole legal and physical custody to Plaintiff father. Each of these professionals have interacted with the parties and children on a long term basis. They are fully aware of the family dynamics and each of them is sincerely concerned for the best interests of the children.

[3] Keidan is a court-appointed family therapist; she began working with the parties and their children during the original divorce proceedings.

difference of opinion, but rather an irrational refusal to recognize Abby's obvious need for another year of emotional and speech development.

VI. ALLEGATION OF DOMESTIC ABUSE

Defendant argues that the trial court failed to properly consider her allegations of domestic abuse in its evaluation of the statutory best interest factors. Defendant's evidence of domestic abuse was scant and mostly subjective. Her arguments on appeal are based more on psychological and sociological theory than the law and the evidence. The trial court's failure to give credence to defendant's claims of domestic abuse was not contrary to the great weight of the evidence. *Mixon, supra*.

VII. INCOME CALCULATION

On cross appeal, plaintiff challenges the trial court's refusal to impute income to defendant based on her unrealized earning potential.

When assessing a parent's ability to pay child support, the trial court is not limited to consideration of a parent's actual income. *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005). "Rather, [it] may consider the parent's voluntarily unexercised ability to earn." *Id*. Plaintiff argues that the trial court's finding that defendant did not voluntarily reduce her income below her earning potential was contrary to the great weight of the evidence. We disagree.

Although defendant did not present her own evidence regarding her ability to work in a legal or real estate position, the trial court was not obligated to accept the testimony of plaintiff's vocational rehabilitation counselor, Guy Hostetler, at face value. Rather, it was up to the trial court to weigh the evidence and evaluate the witness's credibility. *Fletcher v Fletcher* (*After Remand*), 229 Mich App 19, 29; 581 NW2d 11 (1998). Although Hostetler assumed that defendant would be able to find and retain a full-time position in law or real estate, it was undisputed that she had never worked full-time in either field. Hostetler also acknowledged that defendant was prone to migraines when stressed, and merely assumed that she could handle the stress of full-time work in law or real estate because she could handle the stress of two part-time retail jobs. Although plaintiff argues that there was no evidence presented at the de novo hearing concerning defendant's emotional and medical disabilities, the trial court could infer from plaintiff's own testimony regarding defendant's often irrational and hostile behavior that defendant was too emotionally unstable to handle a stressful, demanding, full-time legal or real estate position, particularly considering that she had never done so before. The trial court's refusal to impute additional income to defendant is not against the great weight of the evidence.

Affirmed.[4]

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette

[4] Because we are affirming the trial court's decisions, it is unnecessary to consider defendant's argument that this case should be reassigned to a different judge in the event it is remanded. We note, however, that on review of the record we see no evidence that might support defendant's claim of judicial bias.