STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER A. HAVAS,

Plaintiff/Counter-Defendant-Appellee,

v

MARK A. HAVAS,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
July 3, 2007

No. 272302
Oakland Circuit Court
Family Division
LC No. 05-713962-DM

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant/counter-plaintiff ("defendant") appeals as of right the trial court's judgment of divorce awarding plaintiff/counter-defendant ("plaintiff") sole custody. Acting in propria persona, defendant raises twenty-seven issues on appeal, all of which can be reduced to two fundamental questions: Did the trial court abuse its discretion in awarding plaintiff sole custody and did the trial court deprive defendant of his right to due process by preventing him from introducing evidence at trial and refusing to waive the fees for production of transcripts? Because we answer both questions in the negative, we affirm the decision of the trial court for the reasons set forth in this opinion.

At the outset, we note that defendant raises four issues regarding a PPO that was issued against him in LC No 06-715956-PP. However, the order granting the PPO has not been appealed to this Court, and the record has not been provided. The order granting the PPO was issued on January 4, 2006, and defendant did not file an appeal of right within 21 days as required by MCR 7.204 or apply for leave to appeal within 21 days as required by MCR 7.205. Therefore, these issues are not properly before this Court and will not be addressed in this opinion.

Much of what defendant argues on appeal is either unsubstantiated by the record or an effort by defendant to enlarge the record without first bringing a proper motion. However, because we are aware of the need for finality in these types of cases, we shall endeavor to address the main arguments of defendant.

Defendant argues that the trial court abused its discretion in awarding plaintiff sole custody of the minor child. Despite defendant devoting more than seven pages of his brief to arguments concerning the best interest of the child factors, he does not include any mention of them in the "statement of questions involved" section of his brief on appeal as required by MCR 7.212(C)(5). Therefore, to the extent that defendant challenges the trial court's findings regarding the best interest factors, these issues are deemed waived and not subject to appellate review. MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). However, in an effort to put some semblance of finality to this matter, we may consider them because they are issues of law and the record is factually sufficient. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003).

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.

Pursuant to an ex parte order, plaintiff had sole physical custody. Because an established custodial environment existed with plaintiff, defendant had the burden to prove that a change was in the child's best interest. MCL 722.27(1)(c). If a party requests joint custody, the trial court is obligated to consider it. MCL 722.26a(1); *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006). In determining whether joint custody is in the best interest of the child, the trial court must consider the best interest factors of MCL 722.23. MCL 722.26a(1). Defendant challenges the trial court's factual findings regarding factors (d), (e), (f), (g), and (k).

MCL 722.23(d) instructs the trial court to consider the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The trial court found that factor (d) favored plaintiff, noting the existence of the PPO and finding that the child was living in a stable, satisfactory environment now that he and plaintiff had moved out of the marital home. Defendant offers no support for his assertion that the trial court showed plaintiff favoritism because of her gender. Defendant cannot support these assertions, at least in part because plaintiff's main witnesses for custody were defendant's own parents. Further, his repeated protests regarding plaintiff's PPO against him are meritless because he failed to appeal that decision. Trial courts, which are more experienced and better situated to weigh evidence and assess credibility, are in a superior position to make accurate decisions about which custody arrangement will be in the child's best interests. *Fletcher*, *supra* at 889-890. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that this factor favored plaintiff, and this finding was not against the great weight of the evidence.

MCL 722.23(e) focuses on the "permanence, as a family unit, of the existing or proposed custodial home or homes." Factor (e) concerns the permanence of the custodial home, as opposed to its acceptability. *Ireland v Smith*, 451 Mich 457, 464; 547 NW2d 686 (1996); *Fletcher*, *supra* at 884-885. Regarding factor (e), the trial court found that the parties were equal. Defendant asserts that plaintiff has been cohabitating with another woman in a romantic

relationship, and he correctly asserts that live-in romantic companions for the custodial parent may undermine the stability of a home. *Ireland*, *supra* at 465 n 9. However, the trial court record contains no testimony or other evidence that plaintiff had been cohabitating with another person, and he may not expand the record on appeal. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that the parties were equal on this factor, and this finding was not against the great weight of the evidence.

MCL 722.23(f) requires the trial court to consider the "moral fitness of the parties involved." The trial court found the parties equal on this factor. Defendant makes another claim regarding plaintiff's sexual activities and asserts that it affects factor (f). However, the trial court record contains no testimony or other evidence to support this assertion, and defendant may not expand the record on appeal. See MCR 7.210(A)(1); *Sherman*, *supra* at 41, 56. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that the parties were equal on this factor, and this finding was not against the great weight of the evidence.

MCL 722.23(g) focuses on the mental and physical health of the parties. The trial court found the parties equal regarding factor (g) because defendant's disorder would not impair his parenting abilities. Defendant objects to the trial court's finding that defendant was mentally deficient. Defendant admitted that he was under a doctor's care for major depression and anxiety, and another doctor's report indicated that, in addition to major recurrent depression, diagnoses for bipolar disorder and attention deficit disorder were being entertained. There is no evidence that plaintiff had any health issues. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that the parties were equal on this factor, and this finding was not against the great weight of the evidence.

MCL 722.23(k) instructs the trial court to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Regarding factor (k), the trial court found that the child had been exposed to controlling, shouting, or other threatening behavior and noted that plaintiff and Richard Havas had PPOs against defendant. Further, the trial court stated that defendant had violated one PPO. Therefore, the trial court found that factor (k) favored plaintiff. Defendant claims that this finding was in error because no abuse ever occurred in the child's presence. However, defendant overlooks the plain language of the statute, which instructs the trial court to consider domestic violence regardless of whether it was witnessed by the child. MCL 722.23(k). Richard Havas testified that defendant shoved him, and defendant admitted that he had pleaded nolo contendere to a domestic violence charge. Further, plaintiff obtained a PPO against defendant, and defendant was found guilty of violating the PPO in LC No 06-715956-PP. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that this factor favored plaintiff, and this finding was not against the great weight of the evidence.

In determining whether joint custody is in the child's best interest, the trial court must also 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).

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education,

> day to day decision making and discipline—and they must be willing to cooperate with each other in joint decision making. If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. The establishment of the right to custody in one parent does not constitute a determination of the unfitness of the noncustodial parent but is rather the result of the court's considered evaluation of several diverse factors relevant to the best interests of the children. [*Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982) (citations omitted); see also *Lombardo v Lombardo*, 202 Mich App 151, 157-158; 507 NW2d 788 (1993).]

The trial court denied defendant's request for joint legal custody because of plaintiff's PPO against him and determined that joint legal custody was not in the child's best interest because of the parties' inability to communicate with one another. Plaintiff's PPO against defendant prohibits communication between the parties; therefore, it is highly unlikely that the parties would be able to agree on the basic issues of child rearing or cooperate with one another in joint decision making. Because none of the challenged findings regarding the best interest factors or the parties' ability to communicate were against the great weight of the evidence, the trial court did not abuse its discretion in awarding plaintiff sole custody.

Defendant repeatedly asserts that the trial court terminated his parental rights. These arguments are entirely misplaced. The record before us indicates that the trial court did everything possible to accommodate, going so far as to advise defendant that once the PPO expired and was not extended, defendant would have an opportunity to establish a change of circumstances and the trial court would entertain a motion for a modification of custody and parenting time. The judgment of divorce indicates that sole custody remains in effect until the child attains age 18 or until further order of the court, which indicates that the order is not a permanent order. Therefore, it is evident that the trial court did not preclude or intend to preclude the possibility of joint custody in the future. The lower court record contains no indications whatsoever that anyone filed a petition to terminate defendant's parental rights or that termination proceedings were ever initiated. Further, none of the grounds listed in MCL 712A.19b have been alleged or appear to be present in the instant case.

Defendant asserts that he has been denied the following rights: the right to inherit property from the child, the right to consent to elective medical care and treatment for the child, the right to obtain the child's medical records, the right to consent to the marriage of the child, the right to obtain a passport in the child's name, the right to travel in excess of 100 miles with the child, the right to relocate the child's domicile without interference, the right to consent to enlistment in the armed forces of the child, the obligation to pay for any debt incurred by the child, the obligation to provide a legal defense of the child in any legal proceedings, the obligation to be liable for certain damages caused by the child, the obligation to ensure that the child attends school, along with the ability to determine the type of school the child will attend, the ability to review school records, the ability to approve of the curriculum and school related activities, the obligation to provide a safe living environment for the child, the ability to determine the child's religious affiliation and religious education, the ability to manage the child's financial resources, the ability to enroll and encourage the child's extra-curricular

activities, and the ability to contract on the child's behalf. However, defendant merely restates the consequences of the trial court's decision to award plaintiff sole legal custody, which we have determined was proper. See MCL 722.26a(7). "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).

Further, pursuant to MCL 722.30, defendant may not be denied access to records or information, including medical, dental, or school records, concerning the child merely because he is the non-custodial parent. Although defendant is correct that he may not change the child's legal residence to a location that is more than 100 miles away from the child's legal residence, he overlooks the fact that plaintiff is bound by the same restriction pursuant to MCL 722.31(1). The trial court is required by MCL 722.31(5) to include this provision in the judgment of divorce or any order modifying custody or parenting time. We reiterate the trial court's statement that defendant retains the right and responsibility to move to modify custody after the PPO expires, and we find that defendant's arguments with regard to these rights are meritless.

Defendant asserts that he was denied the due process of law because he was denied the opportunity to present evidence at trial. Because defendant raises these arguments for the first time on appeal, they are not preserved, *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004), and will only be reviewed for plain error affecting defendant's substantial rights, *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Due process in civil cases generally requires an opportunity to be heard in a meaningful time and manner. *Hanlon v Civil Service Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002). As is discussed, *supra*, the trial court informed defendant that his request for joint custody would not be a possibility until plaintiff's PPO against him was terminated. The parties resolved the issues regarding assets and placed an agreement regarding assets on the record during the last day of trial. Defendant repeatedly objected to the trial court's rejection of his request for joint custody and attempted to challenge the validity of the PPO, but at no time did he request an opportunity to present additional evidence or witnesses.

The trial transcripts show that Karen Fink and Fidelias Wittbrodt testified on defendant's behalf and defendant conducted a full cross-examination of Richard Havas and Rosemary Havas. Further, plaintiff never testified and defendant never requested the opportunity to question her. Although in his brief on appeal defendant presents a list of witnesses he would like to question, he never requested the opportunity to question them at trial. Defendant attempted to reiterate his arguments about the validity of the PPO, and the trial court informed him that was not before it and would not be considered, but the trial court never denied him the opportunity to present additional evidence. Due process requires an opportunity to be heard in a meaningful time and manner. *Hanlon*, *supra* at 723. Defendant was provided this opportunity, and his failure to take advantage of it does not constitute a denial of due process.

Defendant also repeatedly states that he has a fundamental legal right to be the natural parent to his child. Defendant is correct 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 his 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 65. However, defendant is not a custodial parent, and the trial court properly based its decision regarding sole custody on the best interest factors and the parties' inability to cooperate and communicate, as discussed, *supra*. Therefore, defendant's argument is misplaced and reversal is not warranted on this ground.

Defendant argues that his right to trial transcripts for this appeal was denied and he is poor and indigent. This Court has already ruled on defendant's motion to waive fees for trial transcripts. *Havas v Havas*, unpublished order of the Court of Appeals, entered September 20, 2006 (Docket No. 272302). Further, the relevant transcripts were ordered by defendant and filed with this Court on December 20, 2006, and defendant has offered no support for his assertion that he was entitled to have the fees for production of the transcripts waived. "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*, *supra* at 243, quoting *Mitcham*, *supra* at 203. Failure to properly address the merits of this assertion constitutes abandonment of the issue. *Thompson*, *supra*, 261 Mich App 356.

Affirmed.

/s/ William C. Whitbeck, C.J.
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello