STATE OF MICHIGAN

COURT OF APPEALS

CHANTA STANLEY,

Plaintiff-Appellee,

v

RASHAD THOMPSON,

Defendant-Appellant.

UNPUBLISHED
March 17, 2020

No. 349779
Oakland Circuit Court
Family Division
LC No. 17-856735-DC

Before: TUKEL, P.J., and MARKEY and SWARTZLE, JJ.

PER CURIAM.

In this child-custody action, defendant appeals as of right the trial court's order awarding sole-legal custody of the minor children, RHT and KALT, to plaintiff. On appeal, defendant argues that the trial court erred when it denied defendant's request for equal-parenting time, granted plaintiff sole-legal custody, and ordered defendant to pay attorney and therapy fees. We affirm.

I. BACKGROUND

This case arises from a complaint that plaintiff filed for sole-legal and sole-physical custody of the children, as well as parenting time and child support. Plaintiff and defendant entered into a consent judgment, through which they agreed to have joint-legal and joint-physical custody of the children, with the children's primary-physical residence at plaintiff's home. Under the consent judgment, defendant would exercise parenting time every Thursday for an overnight stay, as well as alternating weekends. In addition, the trial court ordered that plaintiff and defendant participate in therapy sessions with Richard Kleinstiver to improve their coparenting skills.

Subsequently, plaintiff filed a motion to modify the consent judgment, requesting that the trial court award her sole-legal custody. Plaintiff asserted that defendant was consistently late to parenting-time exchanges and that he refused to allow RHT to attend therapy to address RHT's violent behaviors at school. Plaintiff also requested that the trial court award her attorney fees and order defendant to pay his share of the therapy fees for sessions with Kleinstiver that defendant did not attend. Defendant filed a response to plaintiff's motion and requested that the trial court

increase his parenting time to award him equal-parenting time with plaintiff. After an evidentiary hearing held over three days, the trial court determined that it was in the best interests of the children to award plaintiff sole-legal custody, but it was not in the best interests of the children to increase defendant's parenting time. The trial court also awarded plaintiff attorney fees and ordered defendant to pay Kleinstiver for the therapy sessions that defendant missed, as well as half of Kleinstiver's fee to appear for the evidentiary hearing.

This appeal followed.

II. ANALYSIS

On appeal, defendant challenges the trial court's determinations regarding parenting time, legal custody, attorney fees, and Kleinstiver's fees. We conclude that defendant's arguments are without merit.

A. PARENTING TIME

Defendant first argues that the trial court erred when it determined that an increase in his parenting-time schedule was not in the best interests of the children.

In child-custody disputes, all orders and judgments of the circuit court "shall be affirmed on appeal unless the trial judge 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." MCL 722.28. "Thus, a trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion." *Id.* "In child custody cases, an abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010) (cleaned up). Furthermore, the clear-legal-error standard applies when the trial court "errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

Parenting time is governed by MCL 722.27a, which states in part:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. [MCL 722.27a(1).]

If a change in parenting time does not change the established-custodial environment, "the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Shade*, 291 Mich App at 23.

"[C]ustody disputes are to be resolved in the child's best interests," which are measured by the twelve factors outlined in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The trial court must evaluate each of the best-interest factors "and explicitly state its findings and conclusions regarding each factor." *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008). "A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705.

During the evidentiary hearings in this case, the parties agreed that a change in defendant's parenting time would not change the established-custodial environment. The trial court concluded that there was proper cause to revisit the custody determination because the parties had "continuous disagreements regarding issues that affect on [sic] the well-being of the children." On appeal, defendant does not challenge the trial court's finding of proper cause, but challenges only the trial court's factual findings relating to best-interest factors (b), (c), (f), and (*l*).

The trial court determined that factor (b) favored plaintiff because defendant failed to recognize the need for therapy to address RHT's violent behavior, downplayed the seriousness of RHT's violence by calling the incidents "mishaps," and delayed getting RHT into therapy. Defendant argues that the trial court erred because there was conflicting testimony regarding the reasoning supporting the trial court's decision. Specifically, defendant argues that he did not delay getting RHT into therapy because defendant testified that during a therapy session with Kleinstiver and plaintiff, all three agreed that plaintiff would find a therapist for RHT. Defendant asserts that his testimony also refutes Kleinstiver's testimony that defendant refused to allow RHT to attend therapy, as well as Kleinstiver's conclusion that plaintiff and defendant were unable to coparent. Although defendant's testimony contradicted plaintiff's and Kleinstiver's testimony regarding these issues, this Court defers to the trial court's decisions regarding the weight of the evidence and the credibility of witness testimony. *Luna v Regnier*, 326 Mich App 173, 182-183; 930 NW2d 410 (2018).

The trial court determined that factor (c) favored plaintiff because defendant stopped contributing financially and did not use the children's eczema cream during his parenting time. Defendant argues that he was only behind on his child-support payments because he had a recent medical diagnosis that increased his own expenses, plus defendant was unemployed at the time. Regardless of the reason, defendant ultimately stopped paying child support, which favors plaintiff. Defendant also argues that there were no medical records reflecting that the children's eczema flared up while the children were in defendant's care, and that plaintiff did not testify that defendant did not keep a separate supply of eczema cream for the children. Because changing the legal-custody status would not affect the established-custodial environment, plaintiff was required to prove only by a preponderance of the evidence that factor (c) weighed in favor of plaintiff. *Pierron v Pierron*, 486 Mich 81, 89-90; 782 NW2d 480 (2010). Thus, defendant's argument fails.

The trial court determined that factor (f) favored plaintiff because plaintiff "credibly testified that [defendant] has engaged in threatening behavior toward her and has called her derogatory names during certain parenting time exchanges." Defendant argues that plaintiff fabricated the story that was the basis of the trial court's determination. At the evidentiary hearing,

plaintiff testified about a conversation that occurred during the parenting-time exchange, where defendant aggressively pushed to have a conversation with plaintiff. Eventually, RHT got between plaintiff and defendant and said, "Don't do this, guys. Don't do this." Plaintiff also detailed another parenting-time exchange at which defendant yelled and swore at plaintiff, which caused the children to cry. At the beginning of the next evidentiary hearing, defense counsel stated that he had the video-surveillance footage from the last parenting-time exchange, which established that there was no altercation between plaintiff and defendant. Plaintiff acknowledged that there was no incident at the last parenting-time exchange.

Defendant asserts that plaintiff's acknowledgment is proof that plaintiff fabricated the story. Plaintiff's acknowledgment, however, only established that plaintiff was mistaken about when the incident occurred, not whether the incident occurred. Furthermore, because plaintiff testified about three incidents that occurred during parenting-time exchanges, the lack of video evidence pertaining to one of the incidents is not dispositive. Because plaintiff testified about three incidents that occurred during parenting time exchanges, which the trial court found credible, the trial court did not err with respect to factor (f), and defendant's argument fails.

We note that the trial court's opinion, and defendant's argument on appeal, regarding factor (f), overlaps with factors (j) and (k). The best-interest factors "have some natural overlap," and evidence relevant to one factor may also be considered for a different factor. See *Fletcher v Fletcher*, 229 Mich App 19, 25-26; 581 NW2d 11 (1998). The trial court's reasoning for concluding that factor (f) weighed in favor of plaintiff also applies to factors (j) and (k). Just as with factor (f), the trial court used defendant's name-calling and aggressive behavior to support the conclusion that factors (j) and (k) weighed in favor of plaintiff. Although defendant argues that plaintiff fabricated her testimony, the trial court found plaintiff's testimony credible. Additionally, plaintiff testified to other instances of physical and verbal aggression during parenting time exchanges. Therefore, the trial court did not err when it determined that factors (j) and (k) weighed in favor of plaintiff.

For factor (*l*), the trial court considered MCL 722.26a(1)(b): "Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." The trial court determined that plaintiff and defendant were unable to cooperate and generally agree on important life decisions for the children. Defendant argues the trial court erred because the parties eventually came to a decision for every issue, including the flu shots, change of schools, and therapy. While it may be true that the parties were eventually able to come to a decision on some of the issues, the trial court noted many other issues came before the trial court because the parties could not come to a decision: enrolling the children in summer camp, defendant's tardiness to parenting-time exchanges, and obtaining passports for the children. There was sufficient evidence to support the conclusion that the parties were not able to coparent and make important decisions for the welfare of the children.

Considering the above factors, and the factors that defendant does not challenge, the trial court did not abuse its discretion when it determined that an increase in defendant's parenting time was not in the best interests of the children. Although disputed by defendant, there was evidence that defendant failed to recognize the seriousness of RHT's behavioral issues and failed to address those issues in an appropriate amount of time. Additionally, plaintiff testified about three instances of threatening behavior by defendant in the presence of the children. Finally, Kleinstiver

recommended that defendant's parenting time remain the same. For these reasons, the trial court did not err when it declined to increase defendant's parenting time.

B. LEGAL CUSTODY

Defendant next argues that the trial court abused its discretion by awarding plaintiff sole-legal custody of the children because plaintiff failed to meet her burden of establishing by clear and convincing evidence that the change in legal custody was in the best interests of the children.

"Before modifying or amending a custody order, the circuit court must determine whether the moving party has demonstrated either proper cause or a change of circumstances to warrant reconsideration of the custody decision." *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011). Here, the trial court determined that there was a proper cause to reconsider the custody decision because the parties had continuous disagreements over issues relating to the well-being of the children. Defendant does not dispute that there was proper cause to reconsider the custody decision. The trial court determined that there was an established-custodial environment with both parties, and that a change in legal custody would not affect the established-custodial environment. Because changing the legal-custody status would not affect the established-custodial environment, plaintiff was required to prove only by a preponderance of the evidence that the change in legal custody would be in the best interests of the children. *Pierron*, 486 Mich at 89-90.

Defendant argues that the trial court abused its discretion by awarding sole-legal custody to plaintiff. Defendant advances the same arguments as he did regarding parenting time. These arguments have been addressed above and dismissed because this Court defers to the trial court's determinations regarding issues of credibility and the weight of evidence. *Luna*, 326 Mich App at 182-183.

The trial court determined that factors (b), (c), (f), (h), (j), and (k) favored plaintiff, while factors (a), (d), (e), and (*l*) were neutral, and there was no testimony regarding factors (g) and (*i*). Considering the factors that weighed in favor of plaintiff, Kleinstiver's recommendation that plaintiff be awarded sole-legal custody, and the trial court's emphasis that the children needed one decisionmaker because plaintiff and defendant could rarely agree on important matters regarding the children, there was a preponderance of the evidence that plaintiff should be awarded sole-legal custody.

In addition to sole-legal custody being in the best interests of the children, there was also animosity between plaintiff and defendant, manifesting in a struggle to come together to make decisions to foster the children's well-being. Even when the parties did eventually come to an agreement, such as with the flu shots, extracurricular activities, which school the children should attend, or whether to enroll RHT in therapy, the delay in coming to an agreement affected the well-being of the children. The parties were not even able to have civil parenting-time exchanges on their own, which necessitated that the exchanges occur at police stations. "Therefore, joint custody was not an option, because the record reflected that the parties would not be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." *Wright v Wright*, 279 Mich App 291, 299-300; 761 NW2d 443 (2008) (cleaned up). Accordingly, the trial court did not abuse its discretion by awarding plaintiff sole-legal custody of the children.

C. ATTORNEY FEES

Defendant next argues that the trial court erred when it awarded plaintiff attorney fees. We note that defendant only challenges the trial court's decision to award attorney fees, not the reasonableness of the fees awarded.

"A trial court's decision to grant or deny a motion for attorney fees presents a mixed question of fact and law." *Brown v Home-Owners Ins Co*, 298 Mich App 678, 689; 828 NW2d 400 (2012). "The findings of fact underlying an award of attorney fees are reviewed for clear error, while underlying questions of law are reviewed de novo, and the decision whether to award attorney fees and the determination of the reasonableness of the fees . . . [are] reviewed on appeal for an abuse of discretion." *Sulaica v Rometty*, 308 Mich App 568, 586-587; 866 NW2d 838 (2014) (citations omitted). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "The proper interpretation and application of a court rule is a question of law, which this Court reviews de novo." *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

"A court may award costs and attorney fees only when specifically authorized by statute, court rule, or a recognized exception." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 217; 818 NW2d 478 (2012). The court rules allow an award of attorney fees in actions brought under the Child Custody Act, MCL 722.21 *et seq*. *Schoensee v Bennett*, 228 Mich App 305, 313-314; 577 NW2d 915 (1998). Furthermore, under the court rule in effect when the trial court awarded plaintiff attorney fees, a party was permitted to request attorney fees when "the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." MCR 3.206(D)(2)(b).[1] The court rule focused on a party's bad behavior. *Cassidy v Cassidy*, 318 Mich App 463, 481; 899 NW2d 65 (2017).

Defendant argues the trial court erred because the only possible allegation of not complying with a court order was that defendant was not always timely to meet plaintiff for the parenting time exchange. Defendant asserts that the unreasonableness of failing to appear on time does not warrant an award of attorney fees, and cites to the following quotation from *Cassidy* for support:

> The Court finds that where there is a claim of misconduct justifying an award of attorney fees, as there is in this case, the Court must find that the party's conduct was unreasonable, that a causal connection existed between that misconduct and the fees incurred, and the fees incurred were reasonable. Things like providing false interrogatory answers, violation of a court order compelling discovery, signing a document in violation of the court rules, and filing frivolous claims or defenses, all justify the Court exercising its discretion and awarding attorney fees

[1] MCR 3.206(D)(2)(b) was amended, effective January 1, 2020. See 504 Mich lxx-lxxii. The above quoted language is from the version of MCR 3.206 that was in effect when the trial court awarded plaintiff attorney fees. The current version of MCR 3.206(D)(2)(b) allows for the recovery of attorney fees when the opposing party "engaged in discovery practices in violation of these rules."

> if they are "reasonable" or "actual." In an appropriate case, fees due to misconduct can be in the hundreds of thousands of dollars. [*Cassidy*, 318 Mich App at 482.]

Defendant is mistaken that the above quotation has precedential value. The quotation is actually a quote from the trial court's findings of fact, which justified why the trial court awarded attorney fees to the plaintiff. *Id*. at 481-482. Although defendant's conduct in this case was less deceptive than the defendant's bad acts in *Cassidy*, there is no threshold amount of "badness" for purposes of MCR 3.206(D)(2)(b). See *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). Indeed, this Court has upheld an award of attorney fees when a defendant refused to comply with a parenting time order by refusing to return the children to the plaintiff's custody. *Butler v Simmons-Butler*, 308 Mich App 195, 210-211; 863 NW2d 677 (2014).

Here, the trial court awarded plaintiff attorney fees because plaintiff's motion to modify the consent judgment was "based, at least in part, on [defendant's] failure to comply with the Consent Judgment with respect to the parenting time schedule and because [defendant] is at least partially responsible for the need to change legal custody." In other words, plaintiff incurred attorney fees because defendant failed to comply with the consent judgment. Defendant failed to adhere to the time frame of the parenting-time exchanges. Defendant's persistent arguing with plaintiff, and the inability to come to a decision for the welfare of the children, also motivated plaintiff to file the motion to modify the consent judgment. These two reasons justified the award of attorney fees because the consent judgment required defendant to exchange the children at specific times and required the parties to work together to promote the best interests of the children. The trial court was authorized to award attorney fees on the basis of defendant's failures to comply with the consent judgment, with which defendant had the ability to comply.

The trial court did not abuse its discretion when it awarded plaintiff attorney fees based on defendant's failure to comply with the consent judgment pertaining to the timeliness of parenting time exchanges, and working with plaintiff for the welfare of the children. Because the trial court awarded attorney fees under MCR 3.206(D)(2)(b), the trial court was not required to analyze plaintiff's ability to pay her own attorney fees, as such an inquiry is only necessary for an award of attorney fees under MCR 3.206(D)(2)(a). *Safdar v Aziz (After Remand)*, 327 Mich App 252, 270; 933 NW2d 708 (2019).

D. KLEINSTIVER'S FEES

Lastly, defendant argues that the trial court erred when it ordered defendant to pay for half of two therapy sessions with Kleinstiver. Defendant argues that the trial court did not articulate the legal basis for the imposition of the sanction. Defendant further argues that he should not have to pay for the two therapy sessions because defendant never agreed to attend the sessions.

Whether a trial court has the authority to impose a sanction is a question of law that we review de novo. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637; 607 NW2d 100 (1999). The trial court's actual decision regarding what sanction to impose is reviewed for an abuse of discretion. *Id*. at 642.

On June 20, 2018, the trial court entered an order requiring that plaintiff and defendant participate in joint therapy sessions with Kleinstiver to improve their coparenting skills.

Kleinstiver first met with plaintiff on September 17, 2018, defendant on September 18, 2018, and both parties on September 27, 2018. After September 27, 2018, Kleinstiver met with plaintiff and defendant for four therapy sessions. Plaintiff and defendant agreed to each pay half of Kleinstiver's fee. Defendant did not attend a therapy session on December 20, 2018, because of a conflict with a job interview, although defendant does not contest paying his half of the fee for this session, and states that he has already paid the fee. Defendant also failed to attend the therapy sessions on December 27, 2018, and January 2, 2019. Defendant asserted that he should not have to pay for the two therapy sessions because defendant did not schedule the sessions, nor did defendant receive confirmation of the scheduled sessions.

Contrary to defendant's assertion, the trial court had the inherent authority to sanction defendant for failing to attend the therapy sessions. Trial courts have the inherent authority to sanction litigants. *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). "This Court has repeatedly recognized that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney." *Persichini*, 238 Mich App at 639. Additionally, "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." MCL 600.611. Here, the trial court sanctioned defendant by ordering him to pay his portion of Kleinstiver's fees for the therapy sessions that defendant was ordered to attend. Thus, the trial court had the authority to sanction defendant, based on the trial court's inherent authority, as well as defendant's failure to adhere to the terms of the trial court's order.

Defendant further argues that the trial court abused its discretion by imposing the sanctions because defendant was not aware of the therapy sessions. The trial court entered an order requiring the parties to attend therapy sessions with Kleinstiver. A party must obey a trial court's order or risk the possibility of being held in contempt and required to comply with the order at a later date. *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998). Defendant testified that he normally received confirmation regarding scheduled therapy sessions, but he did not receive any confirmation for the sessions on December 27, 2018, and January 2, 2019. Kleinstiver testified, however, that he believed that he called defendant to inform defendant of the sessions. Kleinstiver also testified that a person who does not attend a scheduled session is still responsible for paying the fee. Plaintiff attended the December 27, 2018 and January 2, 2019 sessions, and paid her half of the fee. Because plaintiff was aware of and attended the sessions, and paid her fee, the trial court was justified in finding that the sessions were scheduled. Kleinstiver testified that he contacted defendant to inform him of the sessions, despite defendant's testimony to the contrary. The trial court did not abuse its discretion by imposing the sanction that defendant would pay his portion of the December 27, 2018 and January 2, 2019 therapy sessions.

Affirmed. As the prevailing party, plaintiff may tax costs under MCR 7.219.

/s/ Jonathan Tukel
/s/ Jane E. Markey
/s/ Brock A. Swartzle