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STATE OF MICHIGAN

COURT OF APPEALS

KATE OLIVERI, Plaintiff-Appellant,	UNPUBLISHED June 24, 2021
v GABRIEL VÉLIZ, Defendant-Appellee.	Nos. 354814; 354817 Livingston Circuit Court Family Division LC No. 19-054403-DC

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In Docket No. 354814, plaintiff, Kate Oliveri, appeals by leave granted[1] the circuit court's order denying her motion for make-up parenting time with JV, her child with defendant, Gabriel Véliz. In Docket No. 354817, plaintiff appeals by right the same order denying her motion to change custody. We affirm.

I. FACTUAL BACKGROUND

The parties married in 2013 while in Florida, both of them having moved to Florida from their respective home states for the purpose of attending the Ave Maria School of Law. Plaintiff was originally from Michigan, and defendant was originally from New Jersey. The child, JV, was born in 2014. The parties separated approximately one year later, in early 2015, after defendant had graduated from law school and while plaintiff was still a student. The Florida courts granted the parties' divorce in 2015, in a judgment reflecting a seriously troubled relationship. Plaintiff regarded defendant as having been verbally and emotionally abusive, with one instance of physical violence. The court opined that defendant was to some extent treating JV as property, and plaintiff was being somewhat less obstructive and was more credible. The court emphasized, however, that both parties were fit parents, and defendant was not lacking in concern for JV's well-being. The judgment reflects that the parties had a poor working relationship, but the court noted that "[b]ased

[1] *Oliveri v Véliz*, unpublished order of the Court of Appeals, entered November 19, 2020 (Docket No. 354814).

on the testimony of the parties and their witnesses, the court believes the parties will be able to return to a cooperative relationship once this litigation concludes." Unfortunately, that prediction proved overly optimistic.

The judgment of divorce provided that "[b]oth parties shall share in making major decisions for the minor child with neither party having more of a say in those decisions than the other party." Major decisions were to include decisions involving childcare providers, schools, medical providers, and nonemergency medical treatment. Either party was permitted to make emergency medical decisions, to be followed by notifying the other parent as quickly as practical. The judgment of divorce also included two alternative parenting-time provisions. The first parenting-time provision would operate if the parties lived within 20 miles of each other, in which case each parent would receive two overnights a week and alternating weekends with JV. Alternatively, if the parties did not live within 20 miles of each other, defendant would generally receive two weekends a month with JV. The judgment also divided holidays. The judgment provided that plaintiff could relocate JV to Michigan, and it expressed the belief that defendant would also relocate to Michigan. The latter belief also proved somewhat optimistic.

Plaintiff promptly moved to Michigan with JV to live with her family. The parties continued to engage in mutually antagonistic communications. At some point, defendant purportedly acquired a residence in Michigan. On September 1, 2018, the Florida court entered an order regarding a motion defendant filed to enforce the time-sharing provision. The Florida court noted that both parties had generally accused the other of frustrating their parenting times; it granted defendant's motion to enforce the parenting time schedule, but it denied defendant's request to hold plaintiff in contempt "because he is as much responsible for the parties' lack of communication as is [plaintiff]." The court also observed that defendant "now has a Michigan residence," that the parties had "exchanged physical addresses in open court," and that the parties had agreed to the commencement of the "local timesharing schedule" and a location for exchanging JV. The court further opined that it would not be "a good idea given their communication troubles" for the parties to exchange JV personally. The parties' communications difficulties continued.

Furthermore, defendant actually continued to physically reside in Florida, at least in part, and it is not clear whether his Michigan residence ever even existed. A few months before the September 1, 2018, order, a Michigan court had found that defendant "does not reside in Michigan." Nevertheless, on April 29, 2019, the Florida court considered the Michigan order, but it nevertheless ruled that the Michigan order was "not dispositive as to [defendant's] current legal state of residence." The court also noted that defendant's invocation of the parties' 50/50 parenting time arrangement would be difficult from Collier County, Florida, which was "over 1,000 miles from where [plaintiff] and the child reside." It therefore concluded that defendant "resided" in Michigan. It further found that plaintiff and JV lived in Michigan full-time, JV would soon start school in Michigan, and Michigan was "the more appropriate forum for the parties." It therefore declined to further exercise jurisdiction over the matter.

On August 1, 2019, plaintiff filed a request in the Michigan circuit court to register the Florida judgment of divorce and custody determination, pursuant to MCL 722.1304 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. Defendant initially objected to the registration, but the parties eventually stipulated to registering the Florida

final judgment of divorce along with the Florida court's September 1, 2018, order. On November 8, 2019, the trial court entered an order accordingly.

The parties' mutual antagonism did not abate. In April 2020, following a dispute about parenting time during the COVID-19 pandemic, defendant moved to enforce the parties' custody agreement. In May 2020, plaintiff moved for sole legal custody. In response to a motion for make-up parenting time filed by defendant, plaintiff contended that she was entitled to make-up parenting time, premised mostly on the allegation that defendant fraudulently claimed he resided in Michigan during 2018 and 2019. Plaintiff asserted that the parties' communication difficulties about school, extracurricular activities, and the child's medical care established that they could not communicate or agree about major life decisions affecting the child. Plaintiff attached an enormous tome of printouts from the parties' various email, text, and other electronic communications; which excruciatingly reflects that both parties share severe mutual antagonism, have hopelessly conflicting communications styles, and are both incapable of comprehending each other's perspectives or needs.

In June 2020, following a hearing, a Friend of the Court referee issued a report and proposed order. The referee determined that proper cause did not warrant revisiting the child's custody because, although plaintiff had established that the parties had a history of communication issues, there was no evidence that their disagreements affected the child's well-being. The referee opined that their problems could be resolved by a stable parenting schedule. The referee noted that the existing parenting-time order lacked clarity, and it proposed to modify parenting time to provide more structure. The referee recommended denying plaintiff's request for make-up parenting time on the basis that the Florida court's residence findings were controlling under the doctrine of res judicata.

Plaintiff objected to the proposed order and sought an evidentiary hearing. At the hearing on the motion before the trial court, in addition to her previous arguments, plaintiff asserted that the "within 20 miles" parenting plan in the parties' judgment could disrupt the child's established custodial environment. At the hearing, the parties agreed to a parenting schedule, and the trial court ordered the parties to communicate through Our Family Wizard[2] except in cases of emergency. The court denied plaintiff's request for make-up parenting time and sole legal custody. On appeal, plaintiff argues that, based on defendant's alleged lack of cooperativeness, the trial court erred in failing to grant her sole custody; in the alternative, the trial court erred in failing to hold an evidentiary hearing. Additionally, plaintiff argues that the trial court erred by failing to delete the "within 20 miles" parenting time arrangement from the parties' custody order, and the trial court erred by failing to grant her request for make-up parenting time.

II. STANDARDS OF REVIEW

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

[2] Our Family Wizard, or OurFamilyWizard, is a "co-parenting app" that purportedly allows parents who otherwise face communications difficulties to share information and scheduling in a structured and productive manner. < https://www.ourfamilywizard.com/ >

committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. This includes parenting time orders. *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). Under the great weight of the evidence standard, "a reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (quotation omitted). The trial court's discretionary decisions regarding custody are reviewed for an abuse of that discretion, meaning "the trial court's decision is palpably and grossly violative of fact and logic." *Moote v Moote*, 329 Mich App 474, 477-478; 942 NW2d 660 (2019) (quotation omitted). However, the abuse of discretion standard for all other kinds of discretionary decisions is less deferential, meaning the trial court's decision fell outside the range of reasonable and principled outcomes. *Maier v Maier*, 311 Mich App 218, 221-222; 874 NW2d 725 (2015); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010) (quotation omitted). Because plaintiff is an attorney licensed and in good standing to practice law in Michigan, she is not entitled to any special treatment for appearing in propria persona. Cf. *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976).

III. EVIDENTIARY HEARING

Plaintiff argues that the trial court should have held an evidentiary hearing before deciding her motion to change custody. We conclude that the trial court's decision not to hold an evidentiary hearing did not fall outside the range of reasonable and principled outcomes.

Whether to hold an evidentiary hearing is discretionary. *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995). As a prerequisite to even considering modifying an existing custody order, courts are required to make a case-by case factual determination of whether the moving party has established proper cause or a change of circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). However, an evidentiary hearing may not always be necessary for the trial court to make that determination. *Id.* at 512. Here, as noted, plaintiff attached a vast collection of obviously antagonistic communications between the parties, replete with numerous seemingly-documented accusations or instances of defendant stonewalling her and being uncooperative in various ways. We have not discovered any challenge to the completeness or accuracy of this evidence.

More importantly, plaintiff has not articulated any additional evidence that she would have submitted to the court at a hearing. Rather, she only implies that, because an evidentiary hearing was not held and the motion hearing was "rushed," the trial court did not read or fully consider her lengthy motion and even more-lengthy collection of documentation. We decline to speculate that the trial court failed to meet its duties to read its own record. Indeed, the trial court explicitly assured plaintiff at the motion hearing that it had "read [her] papers." We also find nothing in the hearing transcript to reflect that it was "rushed." The trial court informed plaintiff that she could continue speaking for as long as she liked, but after seventeen minutes, it wanted to hear from defendant, and it clearly believed, reasonably, that plaintiff was beginning to repeat herself. Although defendant's attorney did state that it was getting late and the judge wished to go home, it did so largely in the context of the argument that plaintiff was unnecessarily revisiting issues while the trial court was attempting to negotiate agreements between the parties as to specific

points of disagreement. Furthermore, the hearing continued for at least fifteen more minutes, well after regular business hours, during which the trial court gave every indication that it intended to continue until all of those points of disagreement had been resolved. Indeed, the parties successfully made several stipulations.

We conclude that the trial court did not abuse its discretion by declining to hold an evidentiary hearing under the circumstances.

IV. LEGAL CUSTODY

Plaintiff argues that the trial court's proper-cause finding was against the great weight of the evidence because the parties could not communicate about major decisions affecting the child. We disagree.

In the context of determining whether a court may modify a custody order, "proper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka*, 259 Mich App at 511. Courts may look to the "best interest" factors set forth in MCL 722.23 for guidance. *Id*. However, it is not enough for a fact to be relevant to one of the best interest factors; it must also be of sufficient magnitude to sufficiently affect the child's well-being. *Id*. at 511-512. Whether joint custody is in the best interests of a child depends, in addition, on "[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). Notably, although a history of mutual animosity and communications difficulties is cause for concern, such a history is not dispositive where the parties have also demonstrated a desire to cooperate and ability to make improvements. See *Shulick v Richards*, 273 Mich App 320, 326-327; 729 NW2d 533 (2006).

It is readily apparent from the communications printed out and provided by plaintiff that the parties had a history of concerningly poor communications. Both of them are accusatory towards the other, both of them have a tendency to bring extraneous matters and unnecessary personal commentary into what ought to be simple inquiries or responses, both of them express some degree of fearfulness of the other, both of them distrust the other, and both of them display profound difficulty comprehending the other's concerns and perspectives. Furthermore, they prefer very different communications mediums: plaintiff prefers lengthy emails, whereas defendant prefers short texts. However, it is also readily apparent that, notwithstanding their clashing personalities and communications styles, they were actually making efforts to work out their disagreements regarding decisions affecting JV. Importantly, both of them expressed a desire to become better at communicating and coordinating. They might have been bad at it, but the willingness itself is significant. It is therefore critical that they both agreed to the use of Our Family Wizard, which appears to be intended to facilitate willing parties to coordinate and communicate productively despite similar kinds of animosity and communications problems. At the hearing, albeit with considerable prompting by the trial court, the parties were able to stipulate to many aspects of parenting time.

The record does not support plaintiff's argument that defendant failed to communicate with her about the child's school. "[G]enerally, the appellant bears the burden of furnishing the reviewing court with a record that verifies the basis of any argument on which reversal or other

claim for appellate relief is predicated." *Petraszewsky v Keeth*, 201 Mich App 535, 540; 506 NW2d 890 (1993). The documentary evidence established that the parties had a long and involved discussion about the child's school. Plaintiff asserts that defendant failed to respond about registering the child for school, but the record reflects that defendant actively engaged in conversation about which school was appropriate and whether the school had after-school care available. That plaintiff refused to accept his concerns as legitimate does not mean that defendant failed to communicate. Furthermore, it is clear that plaintiff shares some responsibility for the parties' antagonistic communications, resulting in those communications proving more drawn-out than necessary. Regardless, defendant ultimately did not object to the child's school and stated during the proceedings that he believed the school was "a great fit" for the child. There is no evidence in the record that the parties' communication issues about the school—attributable to both parties—affected the child's well-being. Similarly, there is no evidence that the parties' communication difficulties about the child's extracurricular activities, which occurred before the trial court registered the parties' custody agreement, affected the child's well-being.

The record indicates that the parties have not agreed about whether the child should have therapy. However, again, there is no evidence that their disagreement harmed the child's well-being. Plaintiff wanted to take the child to a therapist, but defendant opined that the child was healthy and asked plaintiff why she wanted to take him to a therapist. Plaintiff believed that the child was struggling with transitions, but she also stated that she refused to discuss these issues with defendant. Defendant again expressed that he did not believe there was a reason for the child to see a therapist. There is no evidence regarding whether this dispute affected the child's well-being, and, again, plaintiff's own refusal to discuss the matter in detail with defendant shows that any communications breakdown was not solely defendant's fault.

Ultimately, we conclude that the evidence did not clearly preponderate against the trial court's finding that a proper cause did not warrant changing the child's legal custody.

V. CLOSE-DISTANCE PARENTING PROVISION

Plaintiff argues that the trial court erred by failing to remove the "within 20 miles" parenting provision in the parties' custody order. We disagree. The evidence indicates that defendant lives in Florida and intends to continue living in Florida. In the seemingly-unlikely event that defendant decides to move not only to Michigan, but to within 20 miles of plaintiff, then nothing precludes plaintiff from revisiting the issue. Indeed, such a move would seem likely to constitute a change of circumstances in any event. We are not persuaded that the trial court erred by leaving this issue for the day, which may never come, that it becomes more than merely a hypothetical possibility.

VI. MAKE-UP PARENTING TIME

Plaintiff argues that the trial court erred when it denied her request for make-up parenting time on the basis that defendant wrongly exercised parenting time by falsely claiming that his residence was in Michigan. We disagree.

"The applicability of res judicata is a legal question that this Court reviews de novo." *Bergeron v Busch*, 228 Mich App 618, 620; 579 NW2d 124 (1998). The doctrine of res judicata

"serves a two-fold purpose: to ensure the finality of judgments and to prevent repetitive litigation." *Id*. at 621. The doctrine serves to bar a subsequent action if "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The doctrine is broadly applied, and it therefore bars "not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id*.

Plaintiff contends that defendant wrongfully held himself out as living in Michigan, when in fact he lived in Florida, from September 2018 through August 2019. There is no dispute that defendant currently lives in Florida, and he seemingly intends to stay there. Notably, irrespective of whether defendant actually did ever reside in Michigan, his claim to do so ultimately benefitted plaintiff by inducing the Florida courts to relinquish jurisdiction. This, in turn, resulted in the parties' custody dispute being heard by Michigan courts—a much more convenient forum for plaintiff, and a much less convenient forum for defendant, if he truly did not reside in Michigan. Furthermore, it is readily apparent from plaintiffs' communications, as well as her demeanor in her briefs and at oral argument, that she seems more interested in scoring points against defendant and continuing her side of the parties' mutual petty and pointless antagonism. Under the circumstances, we find no value in attempting to ascertain whether defendant genuinely lived in Michigan or misrepresented that he lived in Michigan.

In any event, the trial court properly concluded that res judicata barred it from finding that defendant had wrongfully exercised parenting time prior to the registration of the judgment of divorce in Michigan. The Florida court made a final determination that defendant resided in Michigan, following a dispute by the parties. Consequently, that determination was decided on its merits and could not be relitigated. Furthermore, although a parent who has wrongfully been denied parenting time is entitled to make-up parenting time, that make-up time "shall be taken within 1 year after the wrongfully denied parenting time was to have occurred." MCL 552.642(1)(b). The Child Custody Act establishes a public policy of promptness. See MCL 722.26, MCL 722.28. Plaintiff does not even appear to have filed a motion for make-up parenting time; rather, she made her request in response to a motion filed by defendant. Ultimately, the trial court did not err by failing to award plaintiff her requested make-up parenting time.[3] It would be in plaintiff's, and more importantly the child's, best interest if plaintiff could focus on the future instead of continuing her pattern of continuing to fight over the past.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause

[3] Furthermore, plaintiff admitted at oral argument that defendant is entitled to 90 overnights a year with the child, but he actually takes approximately 36 overnights a year. Therefore, the reality is plaintiff has custody 90% of the time instead of 75% of the time, and she has effectively already received the makeup time she feels she is owed.