STATE OF MICHIGAN

COURT OF APPEALS

JULIE KULP, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 292103 Wayne Circuit Court Family Division
JEFFREY SCOTT KULP, Defendant-Appellant.	LC No. 08-104554-DM

Before: M. J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right the judgment in his divorce. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that the trial court erred by not admitting portions of his mental health records and refusing to hear the testimony of his psychiatrist, Dr. Andrea Nowak. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

The parties do not dispute that defendant had a valid privilege with regard to his mental health records. Therefore, defendant could assert that privilege to prevent the discovery of privileged communications or information acquired during his treatment. MCR 2.314(B)(1); *Landelius v Sackellares*, 453 Mich 470, 474-475; 556 NW2d 472 (1996). However, MCR 2.314(B)(2) limits a party's ability to present medical evidence following the party's assertion of the privilege:

> [I]f a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition. [MCR 2.314(B)(2); see also *Hyde v University of Michigan Bd of Regents*, 226 Mich App 511, 523-524; 575 NW2d 36 (1997) (stating that, because the plaintiff asserted his physician-

patient privilege, he could not offer testimony regarding his noneconomic damages, including mental anguish, outrage, embarrassment and humiliation).]

In light of MCR 2.314(B)(2), the trial court correctly concluded that defendant was precluded from introducing any substantive evidence relating to his mental condition. Although defendant now contends that he signed authorizations for the release of all of his medical records, the record reflects that defendant never waived his privilege with regard to his mental health records from his hospitalization at Kingswood Hospital. Thus, defendant asserted his privilege for those records and, under MCR 2.314(B)(2), the trial court properly precluded the introduction of testimony and evidence concerning his mental health records.

Defendant next raises several issues regarding the trial court's division of the parties' marital property. In a divorce action, "the circuit court must make findings of fact and dispositional rulings." *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). This Court will uphold the circuit court's factual findings unless they are clearly erroneous. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the court's findings of fact are not clearly erroneous, we must then determine whether the distribution "was fair and equitable in light of those facts." *Id*. This Court will affirm a dispositional ruling unless it is left with the firm conviction that the ruling was inequitable. *Id*. at 429-430.

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained by the trial court. *Id.*

Defendant argues that the trial court did not properly account for plaintiff's use of a credit card from the Navy Federal Credit Union. Defendant contends that plaintiff should pay half of the balance on the card.

The trial court ordered that defendant was solely responsible for the debt on his credit card from the Navy Federal Credit Union, while plaintiff was solely responsible for the debt on her credit card from Chase, and the parties were jointly responsible for the debt on a third joint credit card. The record supports the trial court's finding that defendant could not prove that plaintiff had ever used the Navy Federal Credit Union credit card. When testifying, defendant could not identify when plaintiff had placed a charge on that card or indeed whether she had ever activated the card. Thus, the trial court's finding is not clearly erroneous, and in light of this finding, the trial court's distribution of credit card debt was fair and equitable.

Defendant also argues that the trial court did not properly account for the money plaintiff withdrew from the parties' joint account and plaintiff's failure to abide by the status quo order.

The record shows that plaintiff withdrew $46,000 from the parties' joint account. The trial court calculated that, based on the money remaining in the parties' joint account and defendant's other account, as well as the martial expenses paid by defendant, plaintiff owed defendant $5,809 from this money. However, the trial court also found that defendant was

responsible for $8,161.10 in child support. The resulting offset left defendant owing plaintiff $2,352.10. The trial court provided detailed findings of fact on this issue during trial and defendant has not demonstrated how the trial court's calculations on this issue might be inaccurate. Consequently, we cannot conclude that the trial court clearly erred in its findings and, on this record, we conclude that the trial court fairly and equitably addressed plaintiff's violation of the status quo order and her withdrawal of money from the parties' joint account.

In addition, defendant argues that the trial court did not properly account for the items that he alleges plaintiff removed from the parties' marital home. We note that defendant did not properly raise this issue before the trial court. In any event, the judgment of divorce shows that the parties stipulated to the division of the property in the marital home. Thus, defendant has failed to establish any error warranting relief.

Defendant also argues that the trial court erred by awarding attorney's fees to plaintiff. Defendant contends that plaintiff should be held responsible for all of the fees and costs associated with this litigation.

This Court reviews a trial court's decision to award attorney fees and its determination of the reasonableness of the fees for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). This Court reviews a trial court's findings of fact underlying the award of attorney fees for clear error and reviews the underlying questions of law de novo. *Id.*

"As a general rule, attorney fees are not recoverable as an element of costs or damages absent an express legal exception." *Fleet Business Credit, LLC v Krapohl Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). In domestic relations cases, attorney fees are authorized under MCL 552.13 and MCR 3.206(C). An award of attorney fees is appropriate when the party requesting the fees was forced to incur them as a result of the other party's unreasonable conduct during the course of the litigation. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007).

The trial court awarded plaintiff $12,525 in attorney's fees and costs because of defendant's unreasonable actions, which forced plaintiff to incur these fees. Defendant repeatedly changed his position concerning whether he would waive his privilege to his mental health records. Multiple motions were heard and orders entered on this issue because of defendant's indecision and delay tactics. Further, these tactics continued even through the last day of trial. A review of the record supports the trial court's findings on this issue and the trial court's decision to order the award was within the range of reasonable outcomes. *Saffian*, 477 Mich at 12.

Lastly, defendant argues the trial court erred in its findings on several of the best interests factors in deciding to award plaintiff sole legal and sole physical custody of the parties' only child.

We must affirm custody orders 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. MCL 722.28; *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007). The clear legal error standard applies where the trial court errs in

its choice, interpretation, or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). In accord with the great weight of the evidence standard, we will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id*. Further, a trial court's determination on the issue of custody is reviewed for an abuse of discretion. *Id*.

If the court finds that an established custodial environment exists, it may not change that environment unless it finds clear and convincing evidence that a change in custody is in the child's best interests. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 527-528; 752 NW2d 47 (2008). In this case, the trial court found that there was an established custodial environment with plaintiff alone. Therefore, defendant was obligated to show, by clear and convincing evidence, that awarding him joint legal and joint physical custody of the parties' child was in the child's best interests. The child's best interests are to be evaluated in light of the statutory best interest factors set forth in MCL 722.23(a)-(l).

The trial court must weigh the statutory best interest factors found in MCL 722.23 and make a factual finding regarding each of the factors. *Grew v Knox*, 265 Mich App 333, 337; 694 NW2d 722 (2005). While the trial court must state its factual findings and conclusions on each best interest factor, the court need not include consideration of every piece of evidence entered and argument raised at trial. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005).

The trial court considered the factors and concluded that seven of the factors favored plaintiff, none of the factors favored defendant, and the remaining five factors were either equal or not relevant to the inquiry. On appeal, defendant does not challenge the trial court's findings with regard to factors (a), (c), (e), or (k).

For factor (b), MCL 722.23(b), "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any," the trial court found that both parties are disposed to give the child love and affection, and that both parties are capable of assisting her with her education. The trial court also found that plaintiff is not involved in any church, while defendant has been involved at North Ridge Church in Plymouth and has taken his daughter there on several occasions, but has not been attending services much lately. In addition, the trial court expressed concern about defendant's ability to foster a healthy emotional bond in the future because testimony showed that he was placing his daughter in the middle of the divorce. Specifically, plaintiff testified that defendant tried to convince their daughter that she heard the voices he was hearing, and if she admitted this, her parents would not split up. Also, Jennifer Price, who supervised visits between defendant and his daughter, testified that defendant told his daughter that the supervised parenting time would not be necessary in the future. Based on these findings, the trial court found that this factor favored plaintiff.

The trial court's findings on this factor are fully supported by the record. Defendant argues that the trial court should have found the factor in his favor because of examples in which plaintiff and her sister, Donna Johnson, placed the parties' child in the middle of the divorce. However, the record does not support defendant's examples and his anecdotal evidence does not outweigh the trial court's concern about defendant's ability to foster a healthy bond in the future with his daughter. The trial court did not err in finding that factor (b) favored plaintiff.

Regarding factor (d), MCL 722.23(d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," the trial court found that the child has lived in Donna and Dale Johnson's home with plaintiff since the parties separated. The trial court also found that it was desirable to maintain continuity and that this living situation is appropriate and stable.

Defendant argues that this factor should be equal because the only reason that the parties' child has spent more time with plaintiff is because of plaintiff's false allegations concerning his mental health. He also notes that their daughter is just as comfortable spending the night with him. However, despite defendant's opinions on the matter, the record amply supports that plaintiff is living with the parties' child in a stable environment and this continuity is desirable. The evidence did not clearly preponderate against the trial court's finding.

Under factor (f), MCL 722.23(f), "[t]he moral fitness of the parties involved," the trial court found that there was substantial evidence to support that defendant had used prostitutes during the marriage based on the testimony from several witnesses. The trial court also noted plaintiff's allegation that defendant had groped himself in front of their child and concluded that this factor favored plaintiff.

Defendant argues that this factor should be equal because the allegations of infidelity are untrue and the moral fitness of plaintiff is also problematic. However, the trial court explicitly stated that it did not find defendant credible on the issue of whether he was with a prostitute. And this Court will defer to the trial court on credibility determinations. MCR 2.613(C); *Sinicropi v Mazurek*, 273 Mich App 149 155, 184; 729 NW2d 256 (2006). The evidence did not clearly preponderate against the trial court's finding.

For factor (g), MCL 722.23(g), "[t]he mental and physical health of the parties involved," the trial court found that an accurate assessment of defendant's mental health could not be made because of defendant's inconsistent and confusing positions concerning the release of his medical records. Defendant did admit to being diagnosed with a probable psychotic illness due to stress and he was prescribed Resperol, which he stopped taking after sixty days. The trial court recited plaintiff's testimony about numerous incidents of defendant hearing voices, which gave rise to defendant's involuntary hospitalizations and the parties' eventual separation. The trial court also noted that defendant denied plaintiff's allegations and claimed that she was exaggerating in an attempt to manipulate the situation in preparing for divorce. The trial court concluded that this factor favored plaintiff.

Defendant argues that three letters from Dr. Nowak clearly establish that he poses no physical or emotional threat to the parties' child in contradiction of plaintiff's allegations. Further, defendant contends that the record is inaccurate if it shows that he admitted to being diagnosed with a probable psychotic illness due to stress. As already discussed, the trial court properly decided not to consider the mental health records submitted by defendant because he refused to waive his privilege to all of his mental health records. Further, we are not persuaded by defendant's argument that the transcript with his admission concerning his psychological diagnosis is inaccurate. Moreover, the trial court did not credit defendant's assertions that plaintiff had fabricated her allegations against defendant. Thus, the evidence did not clearly preponderate against the trial court's finding.

With regard to factor (h), MCL 722.23(h), "[t]he home, school, and community record of the child," the trial court found that the parties' child is in first grade and is making good progress. The trial court also noted that plaintiff takes the parties' child to dance lessons. The trial court stated that defendant testified to involvement in many activities with the parties' child, but concluded that because defendant has not been involved with these school and community activities for over a year, this factor favors plaintiff.

The trial court's findings on this factor are fully supported by the record. Defendant argues that he has been involved regularly with the parties' child's school as a volunteer and had several of her classmates over for play dates. However, the record does not support defendant's factual recitation of his involvement. As of February 2008, defendant was restricted to supervised visits and his testimony did not indicate the level of involvement in school and community activities that he now alleges.

Under factor (i), MCL 722.23(i), "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference," the trial court stated that the parties' child is too young to express a preference and both parties have declined to have her interviewed. Defendant argues that the child's interview with the court's psychologist should help show the great relationship that he has with her. However, the parties stipulated to not having the child interviewed by the trial court. Therefore, the trial court properly decided not conduct an interview.

The trial court found that factor (j), MCL 722.23(j), "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents," favored plaintiff. The trial court noted that plaintiff testified extensively about her efforts to facilitate parenting time between defendant and their daughter, including making accommodations for defendant when he had family members in town. The trial court also noted that defendant testified that plaintiff unreasonably withheld time from him with their daughter and that plaintiff does not encourage telephone contact.

Defendant argues that this factor should favor him because he has shown that plaintiff has manipulated the situation in a systematic plan to question defendant's mental health. The record does not support defendant's position and it is clear from the record that plaintiff is the one willingly facilitating defendant's time with their daughter. The evidence did not clearly preponderate against this finding.

Factor (l), MCL 722.23(l), a catchall, is designed to take into consideration other relevant factors. *Ireland v Smith*, 451 Mich 457, 464 n 7; 547 NW2d 686 (1996). The trial court concluded that it had addressed all relevant issues and did not make any findings under this factor. Defendant argues that the trial court failed to address a multitude of issues regarding plaintiff's behavior and actions. Defendant provides an exhaustive and rambling list of examples that he asserts show plaintiff's true intent in making the allegations about his mental health. Defendant is challenging plaintiff's credibility about these allegations. However, the trial court did not conclude that plaintiff was incredible and defendant's arguments do not overcome the deference due the trial court in making credibility determinations. MCR 2.613(C). The trial court did not err by failing to address additional factors.

Given these findings, we conclude that the trial court did not abuse its discretion by awarding plaintiff sole legal and sole physical custody.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder