STATE OF MICHIGAN

COURT OF APPEALS

JAMIE BLACKBURN f/k/a JAMIE GRENQUIST, Plaintiff-Appellee, v MARK FRANCIS GRENQUIST, Defendant-Appellant.	UNPUBLISHED December 6, 2012 No. 309921 Ingham Circuit Court Family Division LC No. 08-002351-DM

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff sole legal custody of the parties' minor son and awarding plaintiff attorney fees. We affirm.

The parties were divorced on October 27, 2009. The judgment of divorce awarded sole physical custody of the parties' minor child to plaintiff, with the parties sharing joint legal custody. In May 2010, plaintiff filed a motion for sole legal custody, consistent with her preserved objection to the judgment of divorce. On the same day, defendant filed a motion seeking additional parenting time, consistent with his preserved objection to the judgment of divorce. Defendant also requested physical custody of the minor child, an issue not preserved for further review. At the start of the hearing on the motions, the hearing referee determined that defendant had not established the required proper cause or a change of circumstance to justify reviewing the physical custody award. Accordingly, the referee held that the hearing would focus on plaintiff's request for sole legal custody and defendant's request for additional parenting time.

After extensive testimony, the referee determined that "the parties have a contentious, antagonistic and litigious relationship, do not get along, and have difficulty communicating and reaching mutual decisions affecting the welfare of the child." After analysis of the statutory best-interest factors, the referee concluded that plaintiff should be awarded sole legal custody of the minor child and defendant should be awarded additional parenting time. Defendant objected and the circuit court held a de novo hearing. After the hearing, the trial court adopted the referee's findings, with some amendments, and affirmed the referee's disposition of custody and parenting time. Plaintiff was also awarded attorney fees of $5,600. This appeal followed.

Defendant argues that the referee and the trial court erred in limiting and excluding certain witness testimony which was necessary to demonstrate that plaintiff's new husband, Joseph Blackburn, was a danger to the parties' minor child. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses an outcome that is outside the range of principled results. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007).

Defendant first claims that the trial court erred in limiting the scope of the testimony of his expert witness, psychologist Dr. Robert Fabiano, with regard to the issues of alcohol abuse and the characteristics of those who abuse alcohol. The trial court ruled as follows:

> Defendant would like to have Dr. Fabiano testify about alcohol abuse and qualities and characteristics of those individuals who suffer with such an ailment. Specifically, Defendant would like Dr. Fabiano to testify about whether or not Mr. Blackburn could have issues with alcoholism. Dr. Fabiano testified previously at the Referee hearing about interactions Defendant had with his son, and about Defendant personally. Dr. Fabiano testified that he has not interviewed Plaintiff, or her husband, and has conducted no evaluation on Mr. Blackburn or either of the parties.
>
> Dr. Fabiano also testified that his practice consists primarily of doing psychological evaluations. Dr. Fabiano does not focus on substance abuse or alcoholism, and has not done any research in this area. As a result, Dr. Fabiano cannot be qualified as a witness to testify about alcoholism, and certainly he cannot testify about whether or not Mr. Blackburn has issues with alcoholism because he has never interviewed Mr. Blackburn. Therefore, this court finds that Dr. Fabiano's testimony as it relates to alcoholism, and Mr. Blackburn is more prejudicial than probative, and therefore additional testimony of Dr. Fabiano will not be allowed.

To be admissible, proposed expert testimony must meet a three-part test. *In re Wentworth*, 251 Mich App 560, 563; 651 NW2d 773 (2002). "First, the expert must be qualified. Second, the evidence must provide the trier of fact a better understanding of the evidence or assist in determining a fact in issue. Finally, the evidence must be from a recognized discipline." *Id*.; see also MRE 702. Here, Dr. Fabiano testified that his practice does not focus on alcoholism and that he had not done any research in this area. Further, Dr. Fabiano never met with or evaluated either plaintiff or Blackburn. Thus, the trial court did not abuse its discretion when it excluded the proffered testimony related to alcohol abuse and the characteristics of those individuals who abuse alcohol.

Second, defendant claims that testimony from Blackburn's previous wife, Angela LeClear, and Blackburn's daughter was erroneously excluded because it would have demonstrated that Blackburn was a danger to the parties' minor child. We disagree.

The trial court excluded the proffered testimony, holding:

> In this case, evidence of Mr. Blackburn's behavior around his child may be relevant to this court's determination on custody and parenting time. However, this court does not find that a re-trial of the Blackburn's divorce is necessary. Ms. LeClear has already testified as to her observations and opinions of Mr. Blackburn's behavior around her child, and her observations about his parenting skills, in her deposition. Both attorneys had the opportunity to ask her questions regarding the relevant issues at hand. [Blackburn's daughter's] testimony will likely be cumulative of Ms. LeClear's testimony. Further [Blackburn's daughter] has not had contact with her father in two years and has never witnessed him with [the minor child]. Further, the Court agrees with the Plaintiff that this testimony is irrelevant as to the issues before the Court which are joint legal custody and additional parenting time for the Defendant.

The trial court did not abuse its discretion by excluding the testimony. As the trial court noted, LeClear's deposition testimony was admitted into evidence and during the deposition both attorneys had the opportunity to question her. And, as the referee noted, LeClear had not had any contact with Blackburn in two years. Further, defendant has failed to reference any evidence that Blackburn had a chronic alcohol-related disorder for which he sought treatment that LeClear could address. Similarly, Blackburn's daughter had not had contact with Blackburn in two years and had never seen Blackburn interact with the minor at issue. Accordingly, the excluded testimony was cumulative and irrelevant to the issues before the court. See MRE 402, 403.

Next, defendant argues that he should not have had to demonstrate proper cause or a change in circumstances to modify the custody order as required under MCL 722.27(1)(c) because the issue of physical custody was preserved in the judgment of divorce. We disagree.

Generally, a trial court interprets the terms of a divorce judgment in the same way contracts are interpreted. *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008). When reviewing the language of a divorce judgment, or contractual language, terms are to be given their plain and ordinary meanings. *Id*.; see also *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). When the language is unambiguous it will be construed as written. *Id*.

Defendant asserts that the judgment of divorce specifically reserved all issues pertaining to custody with the following clause: "IT IS FURTHER ORDERED AND ADJUDGED the parties' objections to the F of C [Friend of the Court] recommendations, including Defendant's objection regarding no overnight on Thursdays preceding Defendant's weekend and Plaintiff's objection to joint legal custody are preserved . . . ." By its plain language, however, defendant's preserved objection pertained only to the amount of parenting time he received, not the issue of physical custody. And defendant has not directed us to any objection in the record regarding physical custody. Accordingly, it was not erroneous for the referee and trial court to require defendant to satisfy MCL 722.27(1)(c) with regard to the custody issue.

Defendant also argues that the award of sole legal custody to plaintiff was against the great weight of the evidence. We disagree.

All custody orders must be affirmed on appeal unless the trial court committed an abuse of discretion, made findings against the great weight of the evidence, or made a clear legal error. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The trial court's findings of fact are reviewed under the great weight of the evidence standard and discretionary rulings are reviewed for an abuse of discretion. *Id*. Under the great weight of the evidence standard the trial court's determination will be affirmed unless the evidence clearly preponderates in the other direction. *Id*. An abuse of discretion occurs when the result is '"so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

The Child Custody Act, MCL 722.21 *et seq.*, governs custody disputes. *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). In resolving such disputes, the best interests and welfare of the child are paramount and determined by considering the several factors set forth in MCL 722.23:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The 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.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The 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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

When evaluating the best-interest factors, the trial has discretion in determining what weight to give each factor. *Kessler v Kessler*, 295 Mich App 54, 64; 811 NW2d 39 (2011). Credibility determinations are accorded deference on appeal. *Id.*; *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998).

Defendant argues that the award of sole legal custody to plaintiff was erroneous because plaintiff was equally at fault for the parties' inability to cooperate, yet no fault was attributed to her. This assertion is belied by the record. The referee determined that "the parties have a contentious, antagonistic and litigious relationship, do not get along, and have difficulty communicating and reaching mutual decisions affecting the welfare of the child." The referee went into great detail about the impracticality of joint legal custody because of the parties' inability to cooperate. The referee spent time discussing the evidence that defendant was controlling and manipulative, but acknowledged that plaintiff was also at fault and could be histrionic at times. Thus, contrary to defendant's assertion, fault on plaintiff's part was considered.

Defendant also argues that the findings in regard to factors (e), (h), (j), and (*l*) were against the great weight of the evidence.

The referee did not consider factors (e) and (h) because physical custody was not in issue. The court agreed with respect to factor (e), but found that factor (h) weighed against joint legal custody and favored plaintiff. In regard to factors (e) and (h), defendant returns to his argument that the judgment of divorce reserved all custody issues, thus the ruling that physical custody was not an issue was erroneous. As discussed above, however, we agree with the trial court that physical custody was not in issue. Defendant also asserts that "[t]he trial court should have considered [plaintiff's] refusal to recognize her move [from Holt to Howell] as a complicating factor when it determined which party should be favored" under factors (e) and (h).

Regarding factor (h), the trial court stated the following:

> [The minor child] does attend pre-school at St. Joe's in Howell, Michigan. Luke is doing well there. The referee found that [the minor child] does not have an established school record yet. Although this is pre-school, it is important to note that the parties had not had a discussion or an agreement yet regarding kindergarten for [the minor child]. The Court finds that this factor weighs against the award of joint legal custody and favors the mother.

In the absence of any agreement regarding where the minor child would go to school, the court's finding that factor (h) favored plaintiff was not against the great weight of the evidence. "[I]t is certainly in [a child's] best interests to attend school in the community where they live with their primary physical custodian." *Pierron v Pierron*, 282 Mich App 222, 261; 765 NW2d 345

(2009). Further, it is in the child's best interests to maintain his involvement in the academic life of the community to which he was exposed in preschool.

Defendant also claims that the findings for factor (j) were against the great weight of the evidence in light of plaintiff's move and its impact on how far away defendant was from the minor child. The referee found it of much greater concern that defendant felt superior to plaintiff and her family, stating:

> Defendant testified that he believes that it is in the best interest of the parties' minor child for him to have custody . . . , further stating that he is looking into the future and believes it would be better for the child to be with him because he is educated and is a doctor and his fiancé comes from a line of doctors. Defendant testified that he believes in "intelligence by osmosis" . . . . Defendant testified that Plaintiff does not have a college degree and does not understand the system the way he does. . . .

Defendant testified that the minor child would have a better chance of going to college and being successful if he lived with defendant because neither plaintiff nor anyone in her family had a college degree. Defendant also testified that he was concerned with Blackburn's mental capabilities. A psychologist who had become involved in the divorce proceedings testified that she had witnessed defendant talking down to plaintiff, and that defendant talked about plaintiff not being as bright as him. The psychologist noted that those kinds of attitudes would make a co-parenting situation difficult and was a "sort of alienation kind of thing." Further, the psychologist testified about parental alienation by defendant in that the minor child had called Blackburn "ugly Joe" and said that his dad had made such a comment. Because hearing such a comment once would not likely have made the minor child repeat it, the psychologist was concerned that the comment may have been said over and over.

Contrary to defendant's claim, the finding that defendant was less likely to facilitate and encourage a close and continuing parent-child relationship between the child and plaintiff was not against the great weight of the evidence. It is clear from the evidence that defendant's disdain for plaintiff, her husband, and her family would negatively impact defendant's facilitation and encouragement of a close relationship with plaintiff. Although the physical distance between the child and defendant had changed due to plaintiff's move, plaintiff was still facilitating defendant's parenting time.

Defendant also asserts that if factor (*l*) was given equal weight, it was error because plaintiff's "recalcitrance to agree" to the psychologist's recommendations should have weighed against her. The referee explained that the consideration under factor (*l*) was "the ability of the parties to communicate and get along, and also their ability to reach mutual decisions affecting the welfare of the child." The referee then reviewed the evidence in this regard, which clearly showed an inability to get along and agree on decisions impacting the minor child. In particular, the evidence demonstrated that defendant is hostile and resolute in his determination to thwart any possibility of the parties ever getting along. The evidence included that: (a) defendant hired a private investigator after the parties were divorced with regard to the custody matter, (b) defendant called Child Protective Services on plaintiff and asserted unfounded allegations, (c) defendant was terminated from his employment as a physician at Sparrow Hospital because he

"did not act with dignity and respect" and was banned from any Sparrow location, (d) defendant was in a car accident with the minor child and did not inform plaintiff about the accident, (e) defendant took the minor child to a physician for medical treatment on several occasions but refused to tell plaintiff the name of the physician, (f) defendant and/or his girlfriend have videotaped parenting time exchanges, and (g) defendant called the Michigan State Police demanding that Blackburn be subjected to a breathalyzer at the parenting time exchange site but the police refused because no evidence supported the action.

The referee concluded that the factor favored plaintiff because "[t]he root of the conflict appears to start with Defendant's behavior." We agree. The referee also noted that defendant is manipulative and controlling in his interactions with plaintiff. This conclusion is supported by the testimony of the psychologist involved in the divorce proceedings. Further, the referee's discussion of defendant's manipulative behavior with respect to medical decisions was echoed by the trial court. The trial court noted that defendant refused to tell plaintiff the name of the physician who had treated the minor child, refused to advise plaintiff that the child had received medical treatment, and that defendant had himself prescribed medication to the minor child without advising plaintiff. Defendant's decisions, the trial court held, were clearly not in the minor child's best interests. The findings with respect to factor (*l*) were not against the great weight of the evidence.

Finally, defendant argues that the trial court erred in awarding plaintiff an additional $5,600 in attorney fees on May 14, 2012. We disagree.

A trial court's award of attorney fees is reviewed for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). On this matter, an abuse of discretion occurs if the trial court's decision is outside the range of reasonable and principled outcomes. *Id.*

In domestic relations cases attorney fees are provided for both by statute and court rule, but such award is discretionary. MCL 552.13; MCR 3.206(C); *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). The party requesting attorney fees must allege sufficient facts to show that (1) the party cannot bear the expense of the attorney fees, but the other party can, or (2) the attorney fees were caused by the other party's refusal to follow a previous court order. MCR 3.206(C)(2).

Defendant argues that the trial court erred in awarding additional attorney fees after its April 5, 2011 order awarding attorney fees because he did not engage in misconduct. Defendant has failed to provide this Court with a transcript of the proceedings related to the April 5, 2011 order. See MCR 7.210(B)(1)(a). We will not consider an issue for which the appellant failed to produce the transcript. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006). However, we note that a trial court is permitted to award attorney fees based solely on the ability of one party to pay and the other party's inability to pay; a finding of misconduct is not a prerequisite. MCR 3.206(C)(2); see also *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003).

Defendant also argues that the following language from the April 5, 2011 order prohibited the trial court from awarding further fees: "The Plaintiff's request for attorney fees is granted and the Defendant shall pay to [plaintiff's counsel] . . . the sum of $3,000. However, this

is a final order as it relates to attorney fees for the currently pending motions." Again, because defendant has failed to produce the transcript of the proceedings related to the April 5, 2011 order, we need not consider this issue. See MCR 7.210(B)(1)(a); *PT Today, Inc*, 270 Mich App at 151-152. However, we note that the "final order" language is clearly limited "to attorney fees for the currently pending motions." The court was not required to modify that order before awarding additional attorney fees because the scope of that order did not extend to subsequent proceedings. And the trial court had previously determined that plaintiff was entitled to attorney fees pursuant to MCR 3.206(C)(2)(a) because her yearly income of $5,000 was substantially less than defendant's yearly income of $200,000; thus, plaintiff lacked the financial ability to pay her attorney fees. There is no evidence that the relative positions of the parties had changed so as to undermine the accuracy and applicability of the court's prior findings when it entered the subsequent order awarding $5,600 in attorney fees.[1]

Affirmed. Plaintiff is entitled to costs as the prevailing party. MCR 7.219(F).

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro

[1] Defendant's reliance on *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005) is misplaced. In *Reed*, the trial court did not find that the plaintiff had financial need for attorney's fees and instead relied on the American rule that attorney's fees are appropriate when one party's misconduct has resulted in the other party incurring fees. *Id*. at 164-165. Unlike *Reed*, the trial court here found that plaintiff did have financial need and therefore was justified in awarding fees under MCR 3.206(C)(2)(a).