STATE OF MICHIGAN

COURT OF APPEALS

JOHN FRANCIS HALL,

Plaintiff-Appellant/Cross-Appellee,

v

JULIE ANN STEWART,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 10, 1998

No. 195702
Midland Circuit Court
LC No. 91-009199

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiff petitioned to change physical custody of the parties' minor child away from defendant. The petition was denied, and he appeals as of right. Defendant cross-appeals as of right from the trial court's order denying the petition. We affirm.

Plaintiff first argues that the trial court erred by determining that an established custodial environment existed with defendant. We disagree. An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987). MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

In this case, defendant's home was the child's primary residence from the time of her birth. Defendant met the child's day-to-day needs and there was ample testimony of the loving relationship and deep bond between defendant and child. Regardless of the reasons, plaintiff had no contact with the child until she was thirteen months of age, and then his only contact was during visitation. Therefore, we find no error in the trial court's determination that a custodial environment existed in defendant's home.

Next, plaintiff argues that the trial court's ruling that physical custody of the child should remain with defendant was against the great weight of the evidence. We disagree. A court may not change the established custodial environment of a child unless there is clear and convincing evidence that a change in custody would be in the best interest of the child. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993); MSA 722.27(1)(c); MSA 25.312(7)(1)(c). In order to determine what the best interests of the child are, the trial court is required to make determinations with regard to the best interest factors enumerated in MCL 722.23; MSA 25.312(3). Here, the trial court reviewed the evidence, weighed the best interest factors and determined that there was no clear and convincing evidence that would necessitate a change of custody in the best interests of the child. From the record, it is apparent that the court considered all of the testimony, including the conflicting expert testimony, when rendering its conclusions. It delineated its findings and, although it did not comment on additional factors, such as plaintiff's earning potential, it was not required to comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *Fletcher v Fletcher,* 447 Mich 871, 883; 526 NW2d 889 (1994). Moreover, the trial court, as the fact finder, was entitled to decide how much weight to give to the experts' opinions. *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995).

In addition, contrary to plaintiff's argument, it does not appear that the trial court based its decision "almost exclusively" on the basis of the length of time that the child resided with defendant. The trial court found that all of the factors were equal with the exception of factor d, length of time in a stable, satisfactory environment and desirability of maintaining continuity, which favored defendant, and factor j, the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent, which favored plaintiff. Based on the relative equality of the best interest factors, it concluded that there was not clear and convincing evidence that a change of custody was necessary. There was substantial evidence that defendant used extremely poor judgment in refusing to better facilitate contact between the child and plaintiff. The trial court accordingly weighed factor j in favor of plaintiff but held that it was insufficient to justify a change of custody. Based on the record, it is obvious that defendant did indeed use extremely poor judgment on visitation issues. We conclude, however, that the trial court's determination was not against the great weight of evidence.

Plaintiff next argues that the trial court abused its discretion by denying plaintiff reasonable cross-examination of defendant and other defense witnesses. We disagree. The trial court limited the length of time each party had to present his case. This was within the court's discretion. MRE 611; *Hartland Twp v Kucykowicz,* 189 Mich App 591, 595-596; 474 NW2d 306 (1991). The trial was originally scheduled for three days. When it became apparent that three days would be insufficient, the parties were consulted with regard to the amount of time each would need to present the case. Both parties agreed that each would need three days and those restrictions were set. All were in agreement with the restrictions until the fourth day of trial. At that point, plaintiff indicated that he needed more time. Defendant argued that she had structured her case in order to fit within the agreed upon time limits and that plaintiff should not have more time. The trial court did not extend the time frame beyond what was originally agreed to by the parties. Under the circumstances, we find no abuse of discretion

because the parties knew what the time limits were at the outset of the hearing and the court allowed them to present their cases as they wished. Plaintiff's arguments are without merit.

Plaintiff also argues that the trial court abused its discretion by prohibiting plaintiff from calling an expert rebuttal witness to refute testimony of a defense expert who was hired two months before trial. Plaintiff sought to introduce the testimony of Dr. Garner, the father of the parental alienation theory, to rebut defendant's expert. Defendant's expert was a psychiatrist, who testified with regard to defendant's lack of psychological problems and about defendant's relationship with the child. Plaintiff's counsel participated in the videotaped de bene esse deposition of the expert and cross-examined him at that time. The court had previously heard extensive testimony from numerous other expert witnesses regarding the issues and theories in the case. Dr. Gardner's testimony was not directly responsive to defendant's expert, but rather was being offered to "deal with standards of care and practice for psychiatrists" and to testify about the parental alienation theory, which was plaintiff's theory of the case. Plaintiff should have presented this testimony in his case in chief. It was not proper rebuttal testimony and the trial court did not abuse its discretion by refusing to allow Dr. Garner as a rebuttal witness. See *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996).

Next, plaintiff argues that the trial court erred by ruling that taped telephone conversations between defendant and the minor child were not admissible. We disagree. Both parties surreptitiously recorded telephone calls between the child and defendant. MCL 750.539c; MSA 28.807(3) provides:

> Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.

"Eavesdrop" is defined as "to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse." MCL 750.539a(2); MSA 28.807(1)(2).

Contrary to plaintiff's claims, the statute is applicable and the conversations between defendant and child were private. A conversation is private if it is "intended for or restricted to the use of a particular person or group or class of persons. . . [and is] intended only for the persons involved." *Dickerson v Raphael*, 222 Mich App 185, 193; 564 NW2d 85 (1997), lv pending. When defendant was on the phone with the child, she believed the conversations were private and she intended them to be only for herself and the child. Thus, they were private conversations within the meaning of the statute. All parties to the taped conversations had not waived their privacy rights or consented to be taped. Moreover, plaintiff, who taped the conversations, was not a participant to the conversations and thus, did not meet the exception that a participant to a conversation may tape the conversation without consent of all of the other participating parties. *Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982). The tapings were illegal and thus, were inadmissible. The trial court did not abuse its discretion.

Finally, plaintiff argues that the trial court's ruling was the product of its improper partiality or bias against plaintiff. There is no evidence from the record that the trial court was prejudiced against plaintiff or that the trial court improperly favored defendant. Although the trial court questioned plaintiff with regard to his statement that he was not embarrassed by having a child out of wedlock, the court's questioning did not demonstrate a bias against plaintiff. We also disagree that defendant improperly attempted to influence the court by calling State Representative Gotschka to testify in her favor. Plaintiff never objected to Gotschka's testimony and there is no evidence that it was improper or that it improperly influenced the trial court. Plaintiff's argument is not supported by the record.

In her cross-appeal, defendant argues that the trial court abused its discretion by refusing to award her costs and attorney fees associated with defending plaintiff's failed petition and by requiring her to return money previously paid by plaintiff to aid her in her defense. We disagree. Defendant possesses a bachelor of science degree in mechanical engineering. By her own choice, she has not worked since graduating from college. There was no evidence that she was unemployed for any reason other than personal choice. Her husband works and, at the time of the trial court's decision, earned approximately $39,000 per year. In addition, defendant receives child support payments from plaintiff. Defendant's parents, like plaintiff's parents, financed the rest of her litigation costs[1]. Plaintiff earned approximately $37,000 per year and his wife earned approximately $23,000. He borrowed a significant amount of money against his retirement to help finance his portion of the litigation. The record demonstrates that the financial positions of the parties were relatively similar. Given this, the trial court did not abuse its discretion by rejecting defendant's request for costs and fees and by ordering defendant to return the sums that were previously advanced to defendant for defending the claim. *Eigner v Eigner*, 79 Mich App 189, 204; 261 NW2d 254 (1977).

Defendant next argues that the trial court erred by requiring her to pay half of the costs associated with the child's transportation for visitation. We disagree. The trial court found that the parties were in a relatively similar financial position and were able to share the costs of transportation for visitations. The trial courts findings with respect to the relative financial positions of the parties were supported by the record. For that reason, we find no abuse of discretion in the trial court's order that the parties share the transportation costs. See *Overall v Overall*, 203 Mich App 450, 460; 512 NW2d 851 (1994).

Defendant also argues that the trial court erred by ordering that the child's surname be changed to that of plaintiff, her father. We disagree. The court was required to use the best interest factors, MCL 722.23; MSA 25.312(3), when resolving the dispute between the parents about the child's surname. *Garling v Spiering*, 203 Mich App 1, 3; 512 NW2d 12 (1993). In this case, the trial court did not rearticulate its conclusions with regard to the best interest factors when ordering that the child's surname be changed. However, it is clear from the record that the trial court utilized and considered each of the best interest factors in making its ruling. Specifically, the trial court noted that it reexamined the criteria and evaluated the factors, but would not go through each of them as it did in reaching its ultimate opinion in the case. Instead, it pointed out that it was particularly drawn to factor J, the extent to which defendant was able to facilitate and encourage a close and continuing relationship between

plaintiff and the child, and its interview with the child. The trial court's determination that it was in the child's best interest to carry plaintiff's surname was not an abuse of discretion.

Lastly, defendant requests costs and attorney fees for this appeal. There is no authority upon which we will grant defendant attorney fees associated with this appeal. The appeal was not vexatious. MCR 7.216(C). Moreover, because defendant did not prevail in full, her claims on her cross-appeal having failed, she is not entitled to tax costs. MCR 7.219.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Harold Hood
/s/ Gary R. McDonald

[1] The parents of both plaintiff and defendant financed the litigation by advancing the respective parties money from their anticipated inheritances.