STATE OF MICHIGAN

COURT OF APPEALS

GARRETT W. KAISER,

Plaintiff-Appellee,

v

GWENDOLYN R. ESSWEIN, f/k/a GWENDOLYN R. KAISER,

Defendant-Appellant.

UNPUBLISHED
September 4, 1998

No. 208706
Jackson Circuit Court
LC No. 88-048600 DM

Before: MacKenzie, P.J., and Whitbeck and G.S. Allen, Jr.*, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order denying her motion for reconsideration and her request for supervised parenting time with the parties' two minor children. We affirm in part and reverse in part.

The trial court properly described the instant proceedings as having "a complicated and tragic procedural history" and as being a "nightmare" for both parties. Plaintiff and defendant were married May 21, 1983 and divorced August 15, 1989. The judgment of divorce provided for joint legal custody of the parties' two minor children, with physical custody to plaintiff and reasonable rights of visitation to defendant. Plaintiff remarried in 1990. In September, 1990, plaintiff petitioned for supervised visitation and a friend of the court investigation to determine whether defendant was sexually abusing the children, both of which were granted by the trial court.

Thereafter, the trial court terminated defendant's visitation rights until a favorable psychological report was obtained. In 1992, defendant was charged with, and subsequently acquitted of, first-degree criminal sexual conduct with regard to her daughter Sabrina. Defendant's parental rights were then terminated in 1996, a decision which was later reversed by this Court in a published opinion. See *In re Kaiser*, 222 Mich App 619; 564 NW2d 174 (1997).

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant promptly filed a motion for supervised parenting time, which the trial court denied. In so doing, it stated that while the court was unable to determine in November, 1997 whether defendant had in fact molested the children in 1990, it was undisputed that at this time the children believed their mother committed the wrongful acts and would be emotionally traumatized to meet with her, even in a supervised setting. However, the court did not completely close the door to future supervised parenting:

> I think these children need therapy. If a therapist believes that a mother should participate in that therapy, either in person, in writing, or on videotape, then the mother should cooperate with the therapist's request. I think to ignore this issue until the children reach adulthood is a dangerous course to take. If a therapist after a number of therapy sessions believes that some contact with the mother would be of benefit for the children and that there is any mental or emotional reason for trying to promote a relationship between the mother and children, then I would order supervised parenting time.

The trial court ordered plaintiff to obtain an evaluation of, and counseling for, both children. In her motion for reconsideration, defendant objected to plaintiff having sole discretion over choosing the therapist, since the parties had joint legal custody. In order to avoid this conflict, the trial court sua sponte granted plaintiff sole legal custody of the children. It is from this order that defendant now appeals.

Defendant first argues the trial court erred by finding that supervised parenting time would endanger the children's mental or emotional health We strongly disagree. Parenting time shall be granted if it is in the best interests of the child. MCL 722.27a(1); MSA 25.312(7a)(1). 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. *Id*. However, such a presumption can be overcome by clear and convincing evidence on the record that it would endanger the child's physical, mental or emotional health. MCL 722.27a(3); MSA 25.312(7a)(3); *Rozek v Rozek*, 203 Mich App 193, 194; 511 NW2d 693 (1993). Read as a whole, the record in this case establishes by clear and convincing evidence that defendant's request for supervised parenting time is not in the best interests of either child because such forced contact, even in a supervised setting, would cause the children emotional trauma and would not serve to foster a strong relationship between the children and defendant. *Rozek*, *supra*.

Both children testified in the criminal trial as to how defendant allegedly molested them. As of 1997, both children expressed concern to their therapist, Dr. Dian Breining, about visiting with their mother. In particular, Sabrina told her that she would not feel safe with defendant and did not want to see her. Defendant stipulated that the children did not want to see her and believed she had sexually molested them. Dr. Breining, the children's therapist, unequivocally advised against supervised visitation, noting that they would be better able to deal with defendant as adults. While defendant's two experts both asserted that visitation would help the children heal, one had never even met with the children and the other had not seen them since 1992. Accordingly, the trial court properly relied on Dr. Breining's testimony and reasonably concluded that at this time, visitation would endanger the children's emotional health.

Finally, we reject defendant's argument that her acquittal in the criminal case establishes her innocence and by itself entitles her to visitation rights. The verdict merely established that the jury could not find her guilty beyond a reasonable doubt of the charged offense. Furthermore, the verdict had no bearing on her guilt or innocence with regard to the alleged molestation of the parties' son, Garrett, Jr. Therefore, the trial court order denying defendant's request for supervised parenting time is affirmed.

Defendant next argues that the trial court erred by sua sponte awarding sole legal custody of the minor children to plaintiff. We agree. It is clear legal error for a court to award sole legal custody to a party that has never requested it. *Mann v Mann*, 190 Mich App 526, 538; 476 NW2d 439 (1991). Here, neither party requested modification of the joint legal custody and there was no indication that the court was considering such action. Accordingly, the trial court order awarding sole legal custody to plaintiff must be reversed. *Mann*, *supra*.

Lastly, in a footnote, plaintiff asserts that the trial court erroneously failed to consider the best interest factors under the Child Custody Act, MCL 722.23; MSA 25.312(3), when deciding to modify legal custody of the minor children. Although we recognize that this is an issue of first impression, we decline to address it at this time. First, because we find the trial court committed clear legal error by sua sponte modifying legal custody, *Mann*, *supra*, it is unnecessary to address the issue raised at this time. Second, plaintiff did not raise this issue in her statement of questions presented and review is therefore inappropriate, *Weiss v Hodge (After Remand)*, 223 Mich App 620, 634; 567 NW2d 468 (1997). *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); *Meagher v McNeely & Lincoln, Inc.*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Finally, defendant failed to cite any supporting authority for the proposition that a trial court must review the statutory best interest factors when legal, as opposed to physical, custody, is modified. This Court will not search for authority to support a party's position. *Weiss*, *supra* at 637.

Affirmed in part and reversed in part.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.