STATE OF MICHIGAN

COURT OF APPEALS

JILL K. AGEMY,

Plaintiff-Counter Defendant-Appellee,

v

KHALIL DALAL,

Defendant-Counter Plaintiff-Appellant.

UNPUBLISHED
April 4, 2000

No. 221637
Washtenaw Circuit Court
LC No. 98-010714-DS

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court order awarding sole legal and physical custody of the parties' minor child to plaintiff and providing for support. We affirm in part and reverse in part.

On appeal, defendant challenges virtually every aspect of the lower court's decision, including its determination regarding holiday and vacation custody, child care arrangements, the qualifications of a neutral interpreter, make-up parenting time and many others. These issues, which are not included in defendant's statement of questions presented or supported by citation to authority, are not properly preserved for appellate review. *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998); *Brookshire v Oneida Twp*, 225 Mich App 196, 201; 570 NW2d 294 (1997). We note, however, that the trial court spent a great deal of time explaining its rulings to defendant, and that it permitted a continuance when defendant brought an interpreter to the evidentiary hearing who was defendant's relative and involved with defendant's family. Defendant's complaints in this regard are without merit.

Defendant argues on appeal that the trial court improperly denied defendant's request to call the friend of the court investigator as a witness at the de novo hearing. This claim is without merit. Defendant argues that the evidentiary hearing was held in order to determine whether "the recommendation of the Friend of the Court [was] going to be adopted." This is not the case. Because defendant objected to the recommendation, the trial court was required to conduct a de novo hearing as if no friend of the court hearing had ever been conducted and to arrive at an independent conclusion. *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 101 (1986). An evidentiary hearing under these circumstances is a de novo trial at which the friend of the court's report has a very limited use.

Nichols v Nichols, 106 Mich App 584, 591; 308 NW2d 291 (1981). While the trial court may consider the report, its ultimate findings relative to custody must be based on competent evidence adduced at the hearing. *Duperon v Duperon,* 175 Mich App 77, 79; 437 NW2d 318 (1989).

Apparently, because defendant believed that the trial court could simply adopt the recommendation of the friend of the court, defendant felt obligated to discredit the report and its author and wished to call the investigator as a witness in order to attack his investigative and analytical techniques. However, absent the agreement of the parties, the friend of the court report is not admissible as evidence and is given no evidentiary weight at a de novo custody hearing. *Id.; Marshall, supra,* 591. Therefore, because defendant wished to question the investigator about issues that were not relevantly related to the issues to be addressed at the de novo hearing, the trial court did not abuse its discretion by denying defendant's request to call him as a witness.

Defendant also wished to question the investigator about alleged ex parte communications with plaintiff, and promises the investigator allegedly made to defendant regarding custody. Again, defendant's desire to question the investigator on these issues demonstrates a misunderstanding of the purpose of the evidentiary hearing. Further, the trial court made it clear that it was willing to permit any witness defendant proposed if defendant could show by affidavit that their testimony would be useful. We find no abuse of discretion.

Defendant's next argument on appeal is that the trial court improperly transformed an interim evidentiary proceeding into a de novo trial. There is no merit to this claim. As noted previously, the hearing which commenced on November 23, 1998, was a de novo hearing and could not have been an interim proceeding. Moreover, the trial court clearly explained to both counsel at the September 24, 1998, motion hearing that the upcoming evidentiary hearing would involve not only "all the issues of custody and visitation," but also "everything that's in dispute at the moment." The trial court's only "interim" action was to implement the friend of the court's recommendation on an interim basis until the de novo hearing had been held.

Defendant challenges almost all the trial court's findings with regard to the statutory "best interest" factors. Each of these claims is without merit. In determining whether a finding of fact is against the great weight of the evidence, we will not substitute our judgment on questions of fact unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher,* 447 Mich 871, 878; 526 NW2d 889 (1994). We review the record to determine whether the finding is so contrary to the great weight of the evidence as to disclose an unwarranted finding, or whether the verdict is so plainly a miscarriage of justice as to call for a new trial. *Id.* Thus, the trial court's findings as to each factor will be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* at 879.

Defendant contends that the trial court's findings were against the great weight of the evidence with regard to nine out of the twelve factors. The first factor the trial court considered was "the love, affection and other emotional ties existing between the parties involved and the child." MCL 722.23(a); MSA 25.312(3)(a). The court found that this factor favored plaintiff. The court found that plaintiff is the infant child's primary caregiver, and that defendant had demonstrated an inability to separate the child's needs from his own. These findings were supported by the evidence.

The second factor involves "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." MCL 722.23(b); MSA 25.312(3)(b). The trial court found that plaintiff was favored under this factor because "she dresses the child, tends to the child's needs when sick, and has responsibility for the actual and proposed child care arrangements." Although defendant argues that plaintiff drank to excess on a few occasions while they were living together, defendant also acknowledged at trial that he used to smoke marijuana. The trial court's finding was not against the great weight of the evidence.

The third factor involves "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." MCL 722.23(c); MSA 25.312(3)(c). The trial court found that plaintiff and defendant were "equally able to meet this criterion." This finding was not against the great weight of the evidence. Defendant testified that he had food, and clothing and diapers for the child at his residence. As noted above, plaintiff not only provided for the child at her residence, but also prepared food and medical instructions for the child when he was to be with defendant. Despite defendant's belief that he has the better home, the evidence supports the trial court's finding that both defendant and plaintiff are "eager to see the child does not go without food, clothing, and medical care and will work to be sure it is provided."

The fourth factor involves "the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity." MCL 722.23(d); MSA 25.312(3)(d). The court found that plaintiff was favored under this factor because of the undisputed evidence that plaintiff was the infant child's "primary day to day caregiver." This finding was not against the great weight of the evidence. As the court noted, defendant did not dispute that the child had lived primarily with plaintiff since her separation with defendant, or that plaintiff had been the child's primary caregiver since that time.

The fifth factor involves "the permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e); MSA 25.312(3)(e). The trial court held that neither plaintiff nor defendant was favored under this factor because "[e]ach is capable of providing permanence." This finding was not against the great weight of the evidence. The evidence established that both defendant and plaintiff planned to provide the infant with a permanent home.

The sixth factor involves "the moral fitness of the parties involved." MCL 722.23(f); MSA 25.312(3)(f). The court found that neither defendant nor plaintiff was favored under this factor because "[t]he morality of neither is an issue." Neither party contended that the other was not morally fit to be a parent. The trial court's finding was not against the great weight of the evidence.

The seventh factor involves "the mental and physical health of the parties involved." MCL 722.23(g); MSA 25.312(3)(g). The trial court found that neither plaintiff nor defendant was favored under this factor. The court noted that while there had been testimony regarding defendant's depression, "[i]t was insufficient to be a basis for finding in favor of plaintiff on this factor, since it did not address the affect of his illness on his ability to parent." This finding was not against the great weight of

the evidence. Defendant did not contend that plaintiff had any mental or physical conditions that would adversely effect her ability to parent.

The tenth factor[1] the trial court had to consider was "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 parents." MCL 722.23(j); MSA 25.312(3)(j). The trial court found that plaintiff was favored under this factor:

> Plaintiff has encouraged defendant to come to her house and speak with her about matters pertaining to the child. He refuses. This is something he will need to work on in order to develop a more coordinated approach to child rearing as [the child] grows older.

Defendant presented no evidence that plaintiff was unwilling to encourage such a relationship.

The eleventh factor involves "domestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k); MSA 25.312(3)(k). The trial court found that this factor was not relevant in this case. Defendant contends that plaintiff committed an act of domestic violence when she allegedly pushed and kicked defendant's mother when defendant's mother tried to stop plaintiff from taking her infant child from defendant's parents' home. Plaintiff asserted that defendant's father was physically abusive during that incident. Although defendant's parents denied any wrongdoing on their part, they agreed that they refused to allow plaintiff to take her child. This Court gives deference to the trial court's ability to judge the credibility of witnesses. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). The trial court's finding was not against the great weight of evidence.

The trial court reasonably found that plaintiff was favored under four of the statutory "best interest" factors, and that defendant was favored under none of the factors. The remaining factors were found to be either not relevant to the case, or favorable to both defendant and plaintiff. The trial court concluded that, by a preponderance of the evidence, it was in the best interest of the child for plaintiff to have sole legal and physical custody. The trial court's findings were not against the great weight of the evidence, the trial court did not commit clear legal error in its analysis, and there was no palpable abuse of discretion in the trial court's decision awarding custody to plaintiff. *Id.* at 30.

Finally, defendant argues that the court improperly deviated from the child support formula without articulating its reasons for doing so. We agree. An award of child support rests in the sound discretion of the trial court, and its exercise of discretion is presumed to be correct. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992). The party appealing the support order has the burden of showing the abuse of discretion. *Thompson v Merritt*, 192 Mich App 412, 416; 481 NW2d 735 (1991).

Defendant objected to the child support payment amount suggested by the friend of the court. Therefore, the trial court was obliged to address this issue in the de novo hearing. MCL 552.507(5); MSA 25.176(7)(5), MCR 3.215 (E)(3), *Cochrane v Brown*, 234 Mich App 129, 131-132; 592

NW2d 123 (1999). The trial court heard testimony and accepted evidence regarding the parties' actual and potential incomes at the de novo hearing. Defendant is incorrect in his assertion that the trial court failed to hold a de novo hearing on the issue of child support. However, we find the evidence presented at the de novo hearing insufficient to support the trial court's support order.

In determining the child support contribution that a parent must make, the trial court may use the support schedules prepared by the friend of the court as guidelines, but they are not determinative. *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987). However, a trial court may deviate from the support formula only if application of the formula would be unjust or inappropriate. MCL 552.16(2); MSA 25.96(2), MCL 722.27(2); MSA 25.312(7)(2), *Ghidotti v Barber*, 459 Mich 189, 196; 586 NW2d 883 (1998). The court must specify in writing or on the record the reasons the formula would be unjust or inappropriate. MCL 552.16(2); MSA 25.96(2), MCL 722.27(2); MSA 25.312(7)(2).

In its opinion, the trial court noted that its child support order was based on "the testimony at trial as it relates to the child support guidelines." The trial testimony suggests, however, that defendant had a net weekly income consistent with a child support obligation of $101 per week. The trial court ordered defendant to pay $126 per week for support. Although it appears that the trial court may have either imputed income to defendant or deviated from the support formula, it did not specify in writing any reason for such a decision. Therefore, we remand this case to allow the trial court to either calculate a support order that conforms with the support formula, or to articulate in writing its reasons for either the deviation or the imputation of income. *Ghidotti, supra*, 204.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[1] Defendant does not contest the trial court's findings regarding factors eight and nine.