STATE OF MICHIGAN

COURT OF APPEALS

KEVIN CHARLES ARIETTA,

Plaintiff-Appellee,

v

DIANE MARIE ARIETTA,

Defendant-Appellant.

UNPUBLISHED
July 30, 2002

No. 232548
Antrim Circuit Court,
Family Division
LC No. 00-001054-DM

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a divorce judgment entered following a bench trial. We affirm in part, reverse in part, and remand.

Defendant contends that the trial court improperly accelerated the trial date. During a hearing on December 7, 2000, the trial court moved the trial date up to December 22, 2000. A trial court may on its own initiative move a scheduled trial to an earlier date. MCR 2.501(B)(1). However, each party must receive notice of a trial date at least twenty-eight days before trial, unless (1) a rule or statute provides otherwise for that type of action, (2) the date was set after an adjournment of a scheduled trial, or (3) the trial court determines good cause exists. MCR 2.501(C); See also *Vicencio v Jaime Ramirez*, 211 Mich App 501, 504-505; 536 NW2d 280 (1995).

Here, the trial court presumably relied on the "good cause" exception to the twenty-eight day notice requirement, MCR 2.501(C)(3). We review the trial court's finding of good cause for an abuse of discretion. See *Soumis v Soumis***,** 218 Mich App 27, 32; 553 NW2d 619 (1996). Upon review of the December 7, 2000, hearing transcript, it is apparent that defense counsel acquiesced to the trial court's acceleration of the trial date. In fact, defense counsel noted: "I know my client does not want to wait until February to be with this, Judge. We would like to resolve this now . . . ." In addition, because of scheduling issues, defense counsel rejected two earlier trial dates before accepting December 22 as the new trial date. It is well established that an error does not require reversal if the aggrieved party contributed to it by plan or negligence. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Similarly, a party cannot agree to something and then protest on appeal.

Dresselhouse v Chrysler Corp, 177 Mich App 470, 477; 442 NW2d 705 (1989). Consequently, defendant is not entitled to relief on this claim of error.[1]

Defendant also contends that the trial court erred in awarding the parties joint physical custody of the parties' minor child because it failed to ask the minor child his custodial preference. In *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001), we explained the three standards of review applicable to our review of child custody decisions:

> 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). Findings of fact are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id.* Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. *Id.*

"To determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in MCL 722.23(a)-(l) applying the proper burden of proof." *Foskett, supra* at 9. MCL 722.23(i) provides that the one of the factors for the trial court to consider is the "reasonable preference of the child, if the court considers the child to be of sufficient age to express preference."

As noted above, defendant contends that the trial court failed to ask the minor child his custodial preference. However, the trial court stated on the record:

> His comments were helpful to me, and I have taken them into consideration in what I'm doing, but I don't believe that the end of all of this, when this trial is over, that he's going to be jumping up and down with joy. I think that there probably are some solutions that he would have liked better, and at least two of them. All with mom or all with dad. Either one probably would have been preferable, but he, without getting into any specifics, he [sic] indicated very strongly that he loves both parents. He wants to have a continued relationship with both parents, and he looks to both parents, and, so, you know, that that's to the good. I'm happy to hear that he does feel that way.

Accordingly, the record reveals that the trial court made an inquiry into the minor child's preference.

On appeal, defendant offers two affidavits that suggest that the trial court did not specifically question the minor child regarding his custodial preference. It should be noted that these affidavits were not part of the lower court record; therefore, we may not consider the affidavits on appeal. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 526 n 4; 542 NW2d 912 (1995). Regardless, the assertions in the affidavits are insufficient to establish that the trial

[1] Moreover, in light of the evidence of the parties' financial troubles, we are not persuaded that the trial court's decision constituted an abuse its discretion.

court failed to comply with its obligation to consider the minor child's custodial preference. Although the affidavits suggest that the trial court did not specifically ask the minor child which parent he preferred to live with, the record plainly indicates that the trial court questioned the minor child on issues that were germane for determining his "reasonable preference." Indeed, the trial court suspected that its ruling might not please the minor child. It is also plausible that the trial court phrased its questions to avoid making a direct inquiry, thereby preventing "coached" answers from being an issue. Accordingly, even if we were to consider the affidavits, we would find no error.

Both parties also assert that that are entitled to sole physical custody based on the totality of the aforementioned statutory factors, MCL 722.23(a)-(l). However, contrary to defendant's assertions, we do not believe that the trial court's findings of fact were against the great weight of the evidence, nor do we believe that the trial court's custodial ruling was an abuse of discretion. *Foskett, supra* at 4-5. In addition, plaintiff's request for primary custody must be denied because he failed to file a cross-appeal. *Kosmyna v Bottsford Community Hospital*, 238 Mich App 694, 696; 607 NW2d 134 (1999). Therefore, the parties are not entitled to relief on their separate requests for sole physical custody of the minor child.

Defendant further contends that the trial court erred by refusing to admit an appraisal report and expert testimony regarding the value of the parties' business. Generally, we review a trial court's decisions regarding both the admission of evidence and a determination of an appropriate remedy for a discovery violation for an abuse of that discretion. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 470; 624 NW2d 427 (2000); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Here, defendant concedes that she was required by order to provide the appraisal report within ninety days of June 21, 2000, but did not provide the report until the day of trial. Defendant contends that her failure should be excused because plaintiff delayed discovery. In addition, we note that plaintiff's expert testified even though he did not provide a report in advance of trial. Accordingly, we believe that the that the trial court abused its discretion by not, at the very least, allowing defendant's expert to similarly testify. However, the trial court ultimately valued the business at $88,000, which was less than plaintiff's expert's range of $88,704 to $110,880. The trial court supported its finding by noting that plaintiff's expert failed to consider general economic conditions. In fact, in light of the trial court's detailed findings on the issue, it is highly unlikely that the excluded evidence would have impacted the trial court's valuation of the business. Consequently, we conclude that the exclusion of the evidence was harmless error.

Defendant also contends that the judgment of divorce should be reversed and the matter remanded for a new trial because of a mathematical error in the trial court's property distribution. Although the trial court indicated that it intended an equal division of the property, plaintiff was awarded $3,536 more, resulting in an unequal division of the property. Indeed, it appears that the trial court erred when adding the value of plaintiff's share of the assets. The court used that erroneous total to determine the amount of alimony in gross needed to equalize the amounts; accordingly, we remand for correction of the error.

Finally, defendant contends that the trial court improperly characterized plaintiff's obligation to pay defendant $1,000 per month for thirty-six months as "spousal support in gross." We agree. Although the trial court noted that defendant could *use* the monetary award as if it were a rehabilitative spousal support award, the record indicates that the trial court's primary purpose in ordering the payments was to equalize the property settlement. Accordingly, the trial court erred by later characterizing the award as spousal support in gross.[2]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens

[2] It should be noted that the "relief requested" section of plaintiff's brief includes a request for attorneys fees. However, to the extent that plaintiff's request relates to the trial court proceedings, his failure to file a cross-appeal precludes such an award. See *Kosmyna*, *supra* at 696. Further, defendant's appeal may not be considered vexatious, MCR 7.216(C), inasmuch as several of her arguments have merit.