STATE OF MICHIGAN

COURT OF APPEALS

LISA MARIE HERLOCHER,

Plaintiff-Appellee,

v

JON BROWN GILBERT, JR.,

Defendant-Appellant.

UNPUBLISHED
September 28, 2004

No. 254335
Lenawee Circuit Court
LC No. 01-024300-DM

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right the order denying his motion to change custody of the parties' three minor children and awarding sole legal custody and attorney fees to plaintiff. We affirm.

On September 4, 2002, the trial court entered a consent judgment of divorce granting the parties joint legal custody of the children and granting physical custody of the children to plaintiff. The judgment provided that either party could bring a petition for change of custody without alleging a change of circumstances no later than one year from the entry of the judgment of divorce.

On August 29, 2003, defendant filed a "Motion for Change of Custody," asserting in part that "It would be in the best interest of the children to have the judgment of divorce modified to award joint legal custody of the minor children to both parties and primary physical custody to Defendant with parenting time to Plaintiff." A hearing on the motion was held on January 30, 2004, with both parties and several witnesses offering testimony. In addition, twenty exhibits were entered into evidence. Much of the testimony focused on the animosity between the parties and their inability to be consistent with each other and support each other in decisions regarding the children, as well as the effects of the parties' behavior on the children. In closing arguments, defendant's attorney suggested that "custody would be best with [defendant]," and plaintiff's attorney stated that, "I'm not sure that joint custody is best in this case . . . it seems like they continue to argue about things."

After summarizing the testimony and the evidence presented, the trial court found no credible evidence to support a change of physical custody. The trial court also determined that there was clear and convincing evidence that a change from joint legal custody to sole legal custody with plaintiff was warranted "due to the bickering and acrimony between the parties."

The court noted that "defendant's own attorney states that for some reason these parties cannot work it together. And that certainly is an understatement." The court awarded sole legal and physical custody of the children to plaintiff. The court also awarded plaintiff attorney fees in the amount of $2,500.

Defendant first argues that the trial court erred in granting plaintiff sole legal custody of the children because plaintiff did not request sole legal custody. We disagree.

Defendant relies on this Court's opinion in *Mann v Mann*, 190 Mich App 526, 538; 476 NW2d 439 (1991). In *Mann*, the parties' divorce judgment awarded the parties joint legal custody of their children, with the defendant being awarded sole physical custody. Id. at 527-528. The plaintiff filed a motion to change physical custody based on the living conditions at the defendant's house. *Id*. at 528, 538. Even though the plaintiff did not request a change in legal custody, the trial court granted the plaintiff "sole legal custody, without notice to the parties and without even stating its reasons for doing so." *Id*. at 538. Under these facts, we held that the trial court committed clear legal error, reasoning that the court deprived the defendant of notice to be heard on the issue of legal custody and noting that the defendant may have presented different proofs or made different tactical decisions if she knew that the court would decide the issue. *Id*.

However, *Mann* is distinguishable from the present case because defendant's own motion raised the issue of modification of the judgment of divorce "to award joint legal custody of the minor children to both parties and primary physical custody to Defendant." Although defendant already had joint legal custody of the children, he raised the issue of modification of the judgment with regard to both legal and physical custody. He clearly had notice and an opportunity to be heard with regard to the issue of legal custody. Although plaintiff in the present case did not request sole legal custody of the children in a written response to the motion, plaintiff's counsel pointed out after the proofs were taken at the hearing that joint legal custody was "not working." The trial court had to rule on whether to modify physical custody and had to consider the children's best interests. Because the overwhelmingly predominant factor in child custody cases is the welfare of the child, *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993), we conclude that the trial court in the present case should not have been restricted to maintaining the status quo of joint legal custody. Accordingly, we hold that the trial court did not err when it awarded plaintiff sole legal custody of the children.

Defendant also argues that the trial court's decision to change legal custody "went against the great weight of the evidence," and that the trial court erred in changing custody "with no reasonable basis to do so." Defendant suggests that minimal evidence was presented with regard to the issue of legal custody and that the evidence did not support the court's decision to change legal custody. We disagree.

In custody appeals, the great weight of the evidence standard applies to all findings of fact. MCL 722.28; *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). The trial court's findings concerning each custody factor are to be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* An abuse of discretion standard applies to discretionary trial court rulings regarding custody. *Vodvarka, supra* at 507-508.

"Joint custody" means that the parents shall share decision-making authority as to the important decisions affecting the welfare of the child. *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994), quoting MCL 722.26a(7). It assumes that "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." *Wilcox v Wilcox (On Remand)*, 108 Mich App 488, 495; 310 NW2d 434 (1981); see also *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 496 (1999); MCL 722.26a(1)(b).

Here, the court found that joint legal custody was "not working." The court noted that the parties shared an acrimonious relationship and that the parties lacked the ability to be consistent and support each other in decisions regarding the children. The evidence presented at trial supported the trial court's finding that, "the parties cannot agree and . . . haven't agreed, and they won't agree. This impasse must stop." On the record before us, we cannot conclude that the trial court abused its discretion in concluding that the best interests of the children would be better served by granting sole legal custody to plaintiff.[1]

Lastly, defendant argues that the trial court erred in awarding plaintiff attorney fees. We disagree.

A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). An abuse of discretion occurs only where 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.'" *Id.* at 438.

A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); MCR 3.206(C)(2). However, under MCR 3.206(C)(2), the party requesting the fees must allege facts sufficient to show that the party is unable to bear the expense of the action. *Kosch, supra* at 354.

Here, plaintiff is currently in Chapter 13 bankruptcy. She earns approximately $600 every two weeks, but $450 is taken out of every paycheck by the bankruptcy court, leaving plaintiff with $150 per paycheck. The evidence presented at trial showed that defendant was $950 in arrears for child support. Defendant admitted at trial that he made $50,000 per year and that he currently possessed the money to pay the arrearage but that he had not paid it because he was going to appeal the arrearage. Plaintiff stated that she had to borrow money from her father to pay her attorney fees, which did not include the $3,000 for the custody trial. Plaintiff was

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[1]Defendant also argues that the trial court erred in ordering defendant to attend a parenting course. However, because defendant failed to list this issue in his statement of questions presented in his brief on appeal, as required by MCR 7.212(C)(5), we need not address this issue. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

repaying her father $25 a month for the money he loaned her. Furthermore, plaintiff has had to accept donations from non-profit charities in order to bring her bills up to date. Plaintiff alleged facts sufficient to show that she is unable to bear the expense of this action and that defendant is able to pay. The trial court did not abuse its discretion in awarding her attorney fees. *Kosch, supra* at 354.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey