STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA PIIPPO BOWLDS, a/k/a VIRGINIA PIIPPO WHEELER, Plaintiff-Appellant, v MARK ANDREW BOWLDS, Defendant-Appellee.	UNPUBLISHED March 20, 2008 No. 277949 Washtenaw Circuit Court LC No. 99-015137-DM

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals the trial court's March 30, 2007 order denying her motion for change of custody. We affirm the trial court's order denying plaintiff's motion for change of custody.

We must affirm a trial court's custody order unless the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. MCL 722.28. We review the trial court's factual findings by the great weight of the evidence standard. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). A factual finding is against the great weight of the evidence if it clearly preponderates in the opposite direction. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). We review the trial court's discretionary findings for abuse of discretion. *Id.* at 507-508. In child custody cases, a trial court's decision constitutes an abuse of discretion if it is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Shulick v Richards*, 273 Mich App 320, 323-324; 729 NW2d 533 (2006). Finally, a trial court commits clear legal error if it incorrectly chooses, interprets, or applies the law. *Vodvarka, supra* at 508.

Plaintiff moved for sole legal and physical custody—a request which, if granted, would have terminated the joint legal and physical custody arrangement that had been in effect since the parties divorced in 2001. Because an established custodial environment existed with both parents, the trial court was prohibited from granting plaintiff's motion unless she proved by clear

and convincing evidence that a change in custody is in the best interests of the two children. MCL 722.21(1)(c); *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005).[1] The trial court analyzed the statutory best interest factors, MCL 722.23, and found that the parties were equal in all the factors. The court further found that the children preferred to continue the joint physical and legal custody arrangement. Accordingly, the court properly concluded that disturbing the established custodial environment was not in the children's best interests.

Plaintiff contends that the trial court clearly erred in finding that she failed to prove by a preponderance of the evidence that defendant sexually abused their daughter. We disagree. The court's finding was not against the great weight of the evidence. Following her July 15, 2003 examination of the parties' daughter, Dr. Karen Burnard reported the daughter to Child Protective Services (CPS) as a suspected victim of sexual abuse. However, in her deposition, Dr. Burnard acknowledged that the gynecological condition of the parties' daughter could have causes other than sexual abuse. Moreover, CPS, along with the Washtenaw County Sheriff's Department, investigated the alleged sexual abuse, and interviewed the parties and their daughter. At the conclusion of the investigations, no charges of sexual abuse were filed against defendant. On review of the record, we conclude that the evidence presented at the evidentiary hearing does not clearly preponderate in the opposite direction of the trial court's finding. *Vodvarka, supra*. We affirm the trial court's finding.[2]

Plaintiff also argues that the trial court failed to use the in camera interview with her daughter to determine the truth of the sexual abuse allegations. This argument is clearly without merit, because the trial court may not use the in camera interview for any purpose other than to learn the child's custody preference and make factual findings with respect to the child's preference. MCR 3.210(C)(5); *Surman v Surman*, 277 Mich App 287; __ NW2d __ (2007); *Molloy v Molloy*, 247 Mich App 348, 353; 637 NW2d 803 (2001), aff'd in part, vacated in part on other grounds 466 Mich 852 (2002). The trial court was permitted to question the daughter

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[1] Before the trial court recited its findings and conclusions regarding the best interest factors, it did not determine if an established custodial home existed with plaintiff, defendant, or both. It merely stated that plaintiff needed to prove by clear and convincing evidence that a change in custody was in the best interests of the children. Generally, when a trial court fails to make a finding regarding the existence of an established custodial environment, we will remand for a finding unless there is sufficient evidence for us to make a determination. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). However, when it denied plaintiff's motion for reconsideration, the trial court stated that an established custodial environment existed with both parties. Plaintiff does not argue on appeal that the trial court erred in failing to determine whether an established custodial environment existed with defendant, much less does she argue that such an environment did not exist. We, therefore, see no reason to question the finding by the trial court, stated in its order denying plaintiff's motion for reconsideration, that an established custodial environment existed with both parties.

[2] Plaintiff first accused defendant of sexually abusing their daughter in 2003, at the time defendant moved for sole physical and legal custody. The trial court did not hold an evidentiary hearing on defendant's motion because the parties became involved in a protracted controversy over the appointment of an independent psychological evaluator.

about the alleged abuse to test the authenticity of her custody preference, see *Molloy*, *supra* at 353, but it was prohibited from questioning the daughter to determine whether the alleged abuse occurred. MCR 3.210(C)(5).

Plaintiff further contends that the trial court, by ignoring defendant's "history of domestic violence," erroneously concluded that domestic violence was not an issue in this custody dispute. In this regard, plaintiff attempted to introduce evidence pertaining to events that predated the consent judgment of divorce. This would have involved relitigating issues that the trial court previously considered, but obviously rejected, when it ordered joint custody of the parties' minor children.

Plaintiff says that the trial court should have considered defendant's prejudgment history of domestic violence because past domestic violence is always relevant pursuant to MCL 722.23(k). However, MCL 722.23(k) merely provides that domestic violence is a necessary factor for consideration. It does not provide that the court, when considering a motion to change custody, must consider acts of domestic violence that were previously considered and weighed when the original custody order was entered. Moreover, contrary to plaintiff's position, the trial court did not ignore the domestic violence factor. Rather, it expressly considered the factor and concluded that it was not relevant to the question of whether there were changed circumstances that necessitated a change of custody for the best interests of the children. We find no error with respect to the trial court's findings on domestic violence.

Plaintiff also maintains that the trial court erred in denying her motion for sole legal and physical custody of the children because defendant's controlling and abusive behavior prevented the parties from cooperating as joint parents. Because an established custodial environment existed with both parents, the trial court was prohibited from granting plaintiff's motion unless she showed by clear and convincing evidence that a change in custody was in the best interests of the two children. MCL 722.21(1)(c); *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005).[3]

When parents are unable to cooperate and make joint decisions, a trial court may be required to grant sole custody to one parent:

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making authority and discipline—and they must be willing to cooperate with each other in joint decision-making. If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which

[3] See footnote 2.

> parent shall have sole custody of the children. [*Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982) (citations omitted).]

However, the parents' ability to cooperate is only one factor for a trial court to consider in determining whether to grant or deny a request for joint custody. *Shulick, supra* at 273; *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987). The trial court must also consider the best interest factors. MCL 722.26a(1); *Shulick, supra* at 326.

The evidence established that the parties were unable to cooperate on some basic child rearing issues. They could not agree on day-to-day decisions regarding matters such as their daughter's extracurricular activities, their son's enrollment in driver's education, or choices of caregivers for the children. They also had difficulty cooperating on ordinary health care issues. Defendant refused to let the children attend counseling sessions, and the parties could not agree on where the children should receive medical care. They also could not agree on whether it was necessary to inform the other party of doctor and dental appointments. The parties' inability to cooperate, however, was based on personal animosity toward each other, rather than any basic difference regarding fundamental beliefs. See *Nielsen, supra* at 434.

In analyzing the best interest factors, the trial court found the parties to be equal in all aspects, with the possible exception of the preference of the children,[4] and it specifically stated the children were satisfied with the homes provided by the parties. Accordingly, the best interest factors provide no clear and convincing basis for concluding that a change in custody was in the best interests of the parties' children. Because the parties' inability to cooperate centered on personal animosity, we cannot say their inability to cooperate was divisive enough to require the trial court, pursuant to *Fisher, supra*, to award sole custody of the children to plaintiff. Accordingly, we find the trial court did not abuse its discretion in holding that plaintiff did not prove by clear and convincing evidence that a change in custody was in the best interests of the parties' children. *Vodvarka, supra*.[5]

Plaintiff also asserts that the trial court erred when it failed to grant her request for a permanent parenting schedule. The trial court did not make an explicit ruling on this request, but we interpret its omission as an implicit denial. The judgment of divorce provided that the parties would abide by a permanent parenting schedule when they had equal seniority to bid on work assignments. The parties do not yet have equal seniority, and defendant's foreseeable change of classification from copilot to captain will likely cause greater disparity in the parties' seniority. Accordingly, it is premature to address the question of a permanent parenting schedule.

Finally, plaintiff argues that the trial court erred in implicitly denying her request for sanctions pursuant to MCR 2.114(D) and (E). She contends that defendant failed to present any

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[4] The trial court interviewed both children, but did not place their preferences on the record.

[5] Because the trial court did not abuse its discretion in concluding that it was not in the best interests of the children to be removed from the established custodial environment provided by defendant, the trial court did not abuse its discretion in denying plaintiff's request that defendant only be allowed supervised visitation with the children.

evidence in support of his claim that granting him sole custody was in the children's best interests. However, defendant presented evidence that plaintiff was not willing to cooperate with him and that plaintiff failed to obey certain portions of the judgment of divorce. Accordingly, plaintiff is not entitled to sanctions.[6]

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio

[6] We decline to address defendant's arguments in his reply brief that Richard Ducote, one of plaintiff's attorneys, should not be granted *pro hac vice* status in the current appeal and that he is entitled to $3,000 in attorney fees for the time spent in responding to plaintiff's false claims. We have already granted *pro hac vice* status to Ducote in the present case. *Bowlds v Bowlds*, unpublished order of the Court of Appeals, entered September 27, 2007 (Docket No. 277949). Further, because defendant placed his request for sanctions in his reply brief, his request is improperly before the Court. See MCR 7.211(C)(8).