STATE OF MICHIGAN

COURT OF APPEALS

ALEXANDER M. HAKAM,

Plaintiff-Appellee,

v

SUE ANN HAKAM,

Defendant-Appellant.

UNPUBLISHED
July 15, 2008

No. 279931
Oakland Circuit Court
LC No. 2005-703801-DM

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion for sole physical and legal custody of their two daughters in this acrimonious custody dispute. We affirm.

On appeal, defendant challenges the trial court's evidentiary rulings in relation to the children's videorecorded statements taken during a Child Protective Services (CPS) investigation that resulted from defendant's unsubstantiated accusations that plaintiff physically and sexually abused one or both of the children. First, defendant argues that the trial court's decision to quash her subpoena for the release of these videorecorded statements constituted an abuse of discretion. We disagree.

After being served the subpoena for the videorecording of the children's statements, the prosecutor filed a motion to quash arguing that its release was prohibited by MCL 600.2163a(8) because this matter was neither a criminal case nor a child protective proceeding. The trial court agreed. Further, the court held, the recorded interviews—which were conducted to determine if criminal or child protective proceedings should be conducted—were hearsay and irrelevant to this custody dispute. In any event, the trial court continued, seeing the video was unnecessary as the court personally interviewed the children. Thus, the subpoena was quashed. Defendant challenges this ruling, arguing that MCL 600.2163a does not apply to custody matters. We disagree.

Issues of statutory interpretation are reviewed de novo on appeal. *Bates v Gilbert*, 479 Mich 451, 455; 736 NW2d 566 (2007). This Court's primary goal is to ascertain and give effect to the intent of the Legislature. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). We first turn to the plain language of the statute; if the language is unambiguous, no judicial construction is required or permitted and the statute must be enforced as written. *Id*., quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

The videorecorded statements at issue were taken pursuant to MCL 600.2163a in the course of a criminal and child abuse or neglect investigation. MCL 600.2163a, provides as follows:

> (1) As used in this section:
>
> (a) "Custodian of the videorecorded statement" means the family independence agency, investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.
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> * * *
>
> (c) "Videorecorded statement" means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (5) . . . .
>
> (d) "Witness" means an alleged victim of an offense listed under subsection (2) who is either of the following:
>
> (i) A person under 16 years of age.
>
> * * *
>
> (2) This section only applies to prosecutions and proceedings under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g, or under former section 136 or 136a of the Michigan penal code, 1931 PA 328.[1]
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> * * *
>
> (5) A custodian of the videorecorded statement may take a witness's videorecorded statement before the normally scheduled date for the defendant's preliminary examination . . . .
>
> (6) A videorecorded statement may be considered in court proceedings only for 1 or more of the following:
>
> (a) It may be admitted as evidence at all pretrial proceedings, except that it may not be introduced at the preliminary examination instead of the live testimony of the witness.
>
> (b) It may be admitted for impeachment purposes.

[1] The cited statutes pertain to the crimes of child abuse, child sexually abusive activity, assault with intent to commit criminal sexual conduct, and various degrees of criminal sexual conduct. The proceedings, other than prosecutions, involving those crimes relate to termination of parental rights and abuse and neglect cases.

(c) It may be considered by the court in determining the sentence.

(d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea.

* * *

(8) A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement . . . to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under section 8 of the child protection law, 1975 PA 238, MCL 722.628. The defendant and, if represented, his or her attorney has the right to view and hear a videorecorded statement before the defendant's preliminary examination. Upon request, the prosecuting attorney shall provide the defendant and, if represented, his or her attorney with reasonable access and means to view and hear the videorecorded statement at a reasonable time before the defendant's pretrial or trial of the case. In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement, the court may order that a copy of the videorecorded statement be given to the defense.

* * *

(10) Except as provided in this section, an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or, consent to release a videorecorded statement or a copy of a videorecorded statement.

(11) A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness.

(12) A videorecorded statement shall not be copied or reproduced in any manner except as provided in this section. A videorecorded statement is exempt from disclosure under the freedom of information act, . . . is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery. This section does not prohibit the production or release of a transcript of a videorecorded statement.

* * *

(20) A person who intentionally releases a videorecorded statement in violation of this section is guilty of a misdemeanor . . . .

The statutory language is unambiguous; videorecorded statements taken in prosecutions and proceedings referred to in subsection (2), under the authority of subsection (5), may only be

released by the custodian as prescribed by subsection (8)—"to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under section 8 of the child protection law, 1975 PA 238, MCL 722.628." Further, subsection (12) makes clear that such statements are not subject to discovery—"[a] videorecorded statement is exempt from disclosure under the freedom of information act, . . . is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery." Therefore, the trial court properly interpreted the relevant statute and properly quashed defendant's subpoena.

Next, defendant argues that the trial court improperly struck from the record certain witness testimony relative to what the children said in their videorecorded statements because "a careful reading of [MCL 600.2163a] shows that the statute is meant to prohibit improper dissemination of videos, and not of actual statements made during the interviews." We disagree.

At trial, CPS Investigator Chris Anderson and a forensic interviewer from the Child Abuse and Neglect Council (Care House), Cynthia Bridgman, testified as to statements made by the children during the course of their MCL 600.2163a interviews. Later in the trial, after the trial court became aware of MCL 600.2163a, the trial court held:

> The Care House interview with the children I am going to tell you this, anything that came out of Care House is struck from the record period.
>
> * * *
>
> I am not going to consider anything that came out of Care House because that's a violation of the law. So, you can strike it from here [counsel's proposed findings of fact], you can strike it from yours [counsel's proposed findings of fact], but Ms. Bridgman's testimony and anything that Mr. Anderson said relative to the Care House interview those are gone, people.

Defendant claims that "[n]owhere in the statute does it state that a person cannot testify as to what was said at a Care House interview; the statute merely applies to the dissemination of the actual video recording."

We disagree with the premise of defendant's apparent argument—that the content of the statement is not protected from disclosure. Under MCL 600.2163a, a "videorecorded statement" is defined by subsection (1)(c) as a "witness's statement" that is taken by one of the authorities set forth in subsection (1)(a), in prosecutions and proceedings referred to in subsection (2), under the authority of subsection (5). Such statements are only to be released under the circumstances set forth under subsection (8) and are to be used in court proceedings only as prescribed by subsection (6). The recording of these witness statements on videotape is merely the means by which these statements are memorialized. It is the substance of these oral statements that is prohibited from release except under the circumstances provided by MCL 600.2163a. And, subsection (12) does not contradict this holding. Subsection (12) provides that:

> A videorecorded statement shall not be copied or reproduced in any manner except as provided in this section. . . . This section does not prohibit the production or release of a transcript of a videorecorded statement.

Thus, instead of a copy of the videotape, a proper party, for a proper purpose, may request from the custodian a transcript of the videorecorded statement.

Here, the trial court struck Bridgman's testimony, as well as Anderson's testimony, as it related to the children's videorecorded statements. This evidentiary decision does not constitute an abuse of discretion. See *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). Bridgman's testimony was exclusively derived from the MCL 600.2163a interviews—the content of which was prohibited from disclosure. And, even if MCL 600.2163a did not prohibit such disclosure, most of Bridgman's testimony consisted of hearsay and defendant has not claimed that such hearsay is admissible. Further, Anderson's testimony, to the extent that it merely repeated what the children said during their videorecorded statements, was also inadmissible. Thus, the trial court's decisions in this regard do not constitute an abuse of discretion.

Finally, defendant argues that the trial court's decision to modify the previous custody order constituted an abuse of discretion because its findings on the best interest factors were against the great weight of the evidence. We disagree.

Pursuant to MCL 722.27(1)(c), a trial court may only modify child custody orders for proper cause or because of a change of circumstances that establishes that the modification is in the child's best interest. See *Phillips v Jordan*, 241 Mich App 17, 24; 614 NW2d 183 (2000). To establish a "change of circumstances," the moving party "must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003) (emphasis in original). "Proper cause" exists when there are factors "that have or could have a significant effect on the child's life" necessitating a reconsideration of the prior custody arrangement. *Id*. at 511. Proper cause or a change of circumstances must be proved by a preponderance of the evidence. *Id*. at 509.

Here, the trial court held that defendant prompted a formal sexual and physical abuse investigation against plaintiff, intentionally and negatively influenced the children during the course of that investigation, and then, when the claims were unsubstantiated, persisted in her attempts to destroy plaintiff's relationship with the children without regard for their emotional well-being, or their sense of stability and safety. Thus, the court concluded that a preponderance of the evidence established that conditions surrounding custody of the children, which have or could have a significant effect on the children's well-being, had materially changed. The record evidence supports the trial court's conclusion.

Next, the trial court concluded that the children had an established custodial environment with defendant, thus, it was incumbent on plaintiff to show by clear and convincing evidence that a change in physical custody was in the children's best interest. See MCL 722.27(1)(c); *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451; 705 NW2d 144 (2005). Accordingly, the trial court turned to the best interest factors set forth in MCL 722.23, and issued its factual findings with regard to each factor. See *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). We review these factual findings under the great weight of the evidence standard, affirming the findings "unless the evidence clearly preponderates in the opposite direction." *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006),

quoting *Vodvarka*, *supra* at 507. And, contrary to defendant's claim, the trial court's factual findings, discussed in brief below, were not against the great weight of the evidence.

The court credited the parties equally with respect to factor (a)—the love, affection, and other emotional ties existing between the parties involved and the children. The evidence does not clearly preponderate against this finding. In brief, both children indicated that they were happy in both homes, testimony from Monique's teacher indicated that Monique appeared happier and better behaved since she had been returned to plaintiff's care, and plaintiff's relationship with Monique had much improved. Furthermore, the court interviewed the children in chambers and considered their statements in making this determination.

The court found in favor of plaintiff with regard to factor (b)—the capacity and disposition of the parties involved to give the children love, affection, and guidance and to continue the education and raising of the children in their religion or creed. The evidence does not clearly preponderate against this finding. The court questioned defendant's ability to provide proper guidance in light of the fact that the children reported that she watched television all day rather than finding work to end her financial difficulties. Despite repeated court orders to secure full-time employment, there was no evidence that defendant had secured full-time employment nearly two years after the judgment of divorce was entered. Further, defendant presented no evidence that she actually attends church, while it appears that plaintiff takes the children to temple. Evidence also indicated that plaintiff provides a more structured home environment. While defendant allowed the children to repeatedly miss school and arrive late, plaintiff consistently took the children to school, and on time.

The court also found in favor of plaintiff with regard to factor (c)—the capacity and disposition of the parties involved to provide the children with food, clothing, medical care . . . , and other material needs. The evidence does not clearly preponderate against this finding. Since the divorce, defendant had relied on others to support her and the children. She had not paid her share of the children's tuition at the French School or the costs of the children's therapy sessions—plaintiff did. Although defendant had a bachelor's degree and experience as a paralegal, she only held a series of part-time jobs. Plaintiff, however, was gainfully employed and financially supported the children. While defendant had taken the children to their medical and dental appointments in the past, the court "assume[d]" that plaintiff would take over that role given the newly ordered parenting time arrangement. Furthermore, defendant exhibited an unwillingness or inability to provide therapy or counseling for Monique despite the child's need for such services. The court recognized that both parties alleged that the other was negligent in taking care of the girls' hygiene. However, the court found that the situation had been remedied.

The evidence also does not clearly preponderate against the trial court's finding that factor (d)—the length of time the children have lived in a stable, satisfactory environment, and the desirability of maintaining continuity—favored plaintiff. The parents have contradictory parenting styles—defendant's was found to be "lackadaisical," while plaintiff's was determined to be more formal. Under defendant's care, the children were not on a schedule and they were allowed to stay up late. Their grades faltered, they missed school, were late to school, and they stopped attending activities. In plaintiff's care, the children were on schedules, they had earlier bedtimes, they had to clean up after themselves, they were involved in many activities, and they had to finish their homework before they could watch television. The parties cannot agree on discipline and day-to-day decision-making. Joint physical custody was not in the children's best

interest because these conflicting styles would negatively impact their sense of continuity, emotional stability, academic success, and development. As noted by this Court in *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982):

> 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 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 parent shall have sole custody of the children. [citations omitted.]

The parties were found to be equal with regard to factor (e)—the permanence, as a family unit, of the existing or proposed custodial home or homes. The evidence does not clearly preponderate against this finding. Plaintiff had lived in the same apartment complex for six years, while defendant had lived with her mother since the divorce. There is no evidence that either party planned to change their living arrangements in the near future.

Factor (f)—the moral fitness of the parties involved—was found in favor of plaintiff. The evidence does not clearly preponderate against this finding. Defendant continued to try to alienate the children from plaintiff even after CPS, the prosecutor, and the police all determined that the allegations of physical and sexual abuse were unsubstantiated. Defendant also perjured herself in court. She claimed that plaintiff had not allowed her contact with the girls while in his care since May 11, 2007, and claimed that he now refused to respond to her e-mails. However, the court reviewed plaintiff's e-mail records and found that defendant had only sent him one message since May 11, 2007. The court also reviewed plaintiff's phone records and noted a lack of incoming calls from defendant. Defendant also stated that she voluntarily returned the girls to plaintiff's care on Father's Day when it fell during her parenting time. However, defendant later admitted that she agreed to return the girls on Father's Day when asked to do so by plaintiff in the hallway of the courthouse.

The parties were also found to be equal with regard to factor (g)—the mental and physical health of the parties involved. The court noted, however, that it harbored concerns over defendant's "questionable credibility and emotional stability." The evidence does not clearly preponderate against this finding. Plaintiff has exhibited some anger management issues. Defendant has exhibited a compulsive need to alienate the children from plaintiff and has admitted that she continues to believe that plaintiff abused the children in some fashion despite the fact that the investigation revealed no substantiating evidence.

Plaintiff was credited with factor (h)—the home, school, and community record of the children. The evidence does not clearly preponderate against this finding. The children's academic performance deteriorated under defendant's care. They were late to, or absent from, school on many occasions. Many of their school assignments were late or incomplete.

The court did not divulge the children's stated preference with regard to factor (i)—the reasonable preference of the children. The court interviewed the children and found that they loved both parents and did "not appear to fear either one." This limited statement was proper

under *MacIntyre*, *supra* at 458. Accordingly, despite defendant's assertion that the girls would prefer to stay with her, the court properly declined to comment.

The court did not find in favor of either party in relation to factor (j)—the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the children and the other parent or the children and the parents. The evidence does not clearly preponderate against this finding. Both parties have behaved inappropriately. Plaintiff has called defendant names, and defendant has made statements that caused the children to be afraid of plaintiff. There was also evidence that defendant had influenced or "coached" the children with regard to their statements during the investigation against plaintiff. There is evidence that both parties interfered with the children's relationships with the other parent.

The court also did not find in favor of either party in relation to factor (k)—domestic violence, regardless of whether the violence was directed against or witnessed by the children. The evidence does not clearly preponderate against this finding. Both parties had spanked the children. The allegations of physical and sexual abuse against plaintiff were unsubstantiated. Defendant attempted to influence the children against their father and made them feel fearful of him. Plaintiff admitted to using inappropriate physical discipline against Monique. In summary, both parties were inappropriate at times.

Finally, the trial court considered factor (l)—any other factor considered by the court to be relevant to a particular child custody dispute. The court noted defendant's refusal to admit her role in the instigation of the abuse investigation against plaintiff and her refusal to accept the findings of the professionals that plaintiff did not physically or sexually abuse the children. The court concluded that defendant was "completely preoccupied" with plaintiff's alleged conduct, ignoring the emotional effect on the children. To prevent further harm, the court found that the children should be placed in an "emotionally stable" environment, "free from any risk of further alienation," and that they would benefit from the "structured lifestyle" in plaintiff's home. The evidence does not clearly preponderate against these findings.

And defendant continues to, not only deny her role in the instigation of the abuse investigation, but she grossly mischaracterizes the events that led up to the investigation. In her brief on appeal, defendant states that "the hospital initiated the 3200, based on Vanessa's suspicious injury from the alleged fall from her chair." The hospital records belie defendant's claim. First, the injury was not considered "suspicious." At the hospital, the child indicated that she fell off a chair at school, the same thing she told her teacher at school when it happened. Second, although the child's pediatrician did not see any acute abnormality, defendant took the child to the emergency room and told the physician that "she is uncertain as to whether there could be some sexual abuse from the patient's father. The mother alleges that this patient's older sibling has been complaining to mother that her father allegedly sleeps with the girls and plays 'tickle games.'" Defendant also indicated to the physician that she was going to notify the police and file a police report. Thus, contrary to defendant's repeated claims, it was defendant's specific allegation of sexual abuse that caused the investigation of plaintiff to ensue.

In summary, the trial court's decision that plaintiff established by a preponderance of the evidence that a change of circumstances existed so as to warrant reconsideration of the custody award, MCL 722.27(1)(c), is affirmed. The trial court's factual findings as to each best interest

factor were not against the great weight of the evidence. The trial court's conclusion that plaintiff established by clear and convincing evidence that the change in custody was in the children's best interest is affirmed. And the trial court's ultimate decision to grant plaintiff sole physical and legal custody of the children did not constitute an abuse of discretion. See *Sinicropi*, *supra* at 155.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh