

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UNPUBLISHED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.

MURRAY, P.J. (*dissenting*).

In my view the pivotal question is whether the trial court abused its discretion in excluding the testimony of Cynthia Bridgman, defendant's forensic psychology expert, and if so, whether that error warrants a new hearing. In my view, and despite the deference given to the trial court judge on these issues, a new evidentiary hearing is necessary. I would therefore vacate the trial court's order and remand for further proceedings.

Although we review the trial court's evidentiary decision for an abuse of discretion, *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004), an abuse of discretion occurs when the trial court incorrectly interprets or applies the law. See *Donkers v Kovach*, 277 Mich App 366, 374; 745 NW2d 154 (2007). Here, the trial court erred as a matter of law in holding that Bridgman's testimony was excluded on the basis of MCL 600.2163a. First, the Legislature has indicated that this section only applies to certain prosecutions and proceedings, none of which include a post-judgment change of custody issue. See MCL 600.2163a(2) and (6). Thus, the provisions of MCL 600.2163a do not apply to this case, because the Legislature has limited their application. *People v Cervi*, 270 Mich App 603, 618; 717 NW2d 356 (2006). Second, even if these provisions did apply, pursuant to subsection 12, MCL 600.2163a(12), the production or release of a transcript of a video recorded statement is not prohibited.¹ In other words, it appears that the Legislature approved the release in *written form* of the words spoken in these interviews, but has precluded the release of all *videos* of the interviews except in certain circumstances. As such, and assuming the statute spoke to

¹ Of course, each of these provisions relate to the *disclosure* of the video recorded statements, not their admissibility in court. And, although the court quashed a subpoena issued to Care House, Bridgman and the attorneys had already viewed the tape, so disclosure was not an issue as it pertained to Bridgman's testimony.

admissibility, there is nothing under the statute, even if it applied, that would preclude testimony regarding the statements made during the Care House interview in this child custody dispute.²

In most situations, an evidentiary error during the course of a six-day bench trial would not require reversal. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003) (reversal only required for an evidentiary error if failure to do so affects substantial right and inconsistent with substantial justice). However, the unique circumstances of this case, requires reversal. For one, even though the trial court excluded Bridgman's complete testimony on the basis that she viewed and testified about the Care House interviews, the trial court subsequently relied upon witness statements made during the Care House interviews for its rulings. Specifically, when addressing factor j under the Child Custody Act, MCL 722.23(j), the trial court repeatedly discussed statements made by both girls:

The children did report that plaintiff was angry because they seemed to like defendant more than him. The girls also stated that plaintiff would ask the children which parent they loved more.

Regarding defendant, she plainly made statements to the children that would lead them to be fearful of their father. For instance, the children testified that defendant hates plaintiff and she thinks that he is scary and mean. According to Monique, defendant worries that plaintiff is going to hurt the children. Monique also stated that plaintiff wants the court to send their mother to jail. Dr. Okla opined that defendant's statements can establish an expectation or mindset to the children that plaintiff is a danger to them or will not take care of them.

Dr. Okla did testify to the likelihood that defendant has influenced the children against plaintiff. Mr. Anderson also felt that the children were coached somewhat. When asked if she had been coached, Monique did not respond directly.

During the Carehouse interview, Monique stated that plaintiff calls her the "b" word, "in his head." Monique also stated that she is suppose to tell the interviewer all the bad things that plaintiff does to the children. Additionally, Monique reported that defendant says that her bruises must be from plaintiff. *Throughout the interview*, Monique would spontaneously "oh yeah, I forgot to tell you" without being asked a question.

Based upon Monique's statements, the Court concurs with the opinions of Dr. Okla and Mr. Anderson that the child has been influenced by defendant.

² Even though there is a strong argument that Bridgman's testimony that repeated statements made by the children during the Care House interviews would otherwise be inadmissible under MRE 702 because there was no independent basis for the admission of those statements, see MRE 703, defendant was never faced with an objection on this ground and therefore was never required to articulate a basis for their admission.

Neither party is credited as to this factor. However, the Court shall attribute great weight to the parties' behavior in its determination of custody [Emphasis added].³

It conflicts with substantial justice for a trial court to exclude an expert witness's testimony on a certain basis, and then ignore that same basis and utilize the excluded evidence when ruling against the party who offered the excluded expert testimony. That is precisely what occurred here, and in my view that error compounded the evidentiary error noted above. Additionally, the trial court excluded *all* of Bridgman's testimony, rather than just her testimony that encompassed what the children actually said during the interview. At the very least, this blanket exclusion precluded defendant from utilizing Bridgman's opinions (as opposed to underlying facts), which were based on her acknowledged expertise.⁴ Each of these considerations together warrants a reversal and remand for a new hearing. I therefore respectfully dissent from the majority's opinion affirming the trial court's opinion and order.

/s/ Christopher M. Murray

³ Some of these statements are directly attributed to the Care House interviews, while the source of the others is not as clear. Neither child was called as a witness at trial and the only other sources for any statements were Dr. Okla and Mr. Anderson.

⁴ During the evidentiary hearing plaintiff's counsel represented to the court that even without the children's Care House statements, the experts would still be able to testify about their conclusions.