

STATE OF MICHIGAN
COURT OF APPEALS

AMANDA KAY CHURCHILL f/k/a AMANDA
KAY GRINSTEAD,

Plaintiff-Appellee,

v

ROBERT LEE GRINSTEAD, III,

Defendant-Appellant.

UNPUBLISHED
September 9, 2008

No. 283004
Eaton Circuit Court
LC No. 01-000630-DM

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

In this child custody action, defendant, Robert Lee Grinstead, III, appeals the trial court's award of sole physical and legal custody of his two minor children to plaintiff, Kay Grinstead. Because the trial judge's actions of driving by the parties' homes and participating in ex parte communications with the children's therapist constituted only harmless error, and because the trial court did not improperly fail to take into consideration the FOC and referee reports, and its dispositional ruling was not an abuse of discretion, we affirm.

Defendant and plaintiff divorced in 2001 and agreed to share legal and physical custody of their two minor children. Plaintiff was married a second time in April 2002 and defendant remarried in May 2004. Defendant's second marriage also ended in divorce. In March 2004, defendant was ordered to pay an increased amount of child support and in April 2004 defendant filed for a petition for a change of custody. A friend of the court ("FOC") investigation was conducted and a report and recommendation filed on September 3, 2004. The report recommended that the parties continue a joint custody arrangement and that the family undergo counseling. The custody matter was adjourned several times due to various motions by the parties, including a January 14, 2005 motion by plaintiff requesting sole custody. Finally, in the summer and fall of 2006 a referee held a four-day hearing. The referee's ultimate recommendation was for continued shared custody between the parties, despite the referee's statement that "every inkling of evidence" led to the conclusion that plaintiff should have sole custody and that joint custody would not work so long as defendant continued to alienate plaintiff. The referee's final decision was based on her conversation with the older child who expressed that she feels responsible for the well-being of both of her parents.

Plaintiff objected to the referee's opinion and requested sole legal and physical custody of the children. Following a de novo hearing, the trial court concluded that a change in

circumstances warranting a modification of the custody arrangement had been established. After considering the statutory best interest factors, MCL 722.23, the trial court awarded plaintiff sole physical and legal custody of both minor children.

Defendant first argues the trial judge erred in driving by the parties' homes and in conducting an ex parte communication with the children's therapist. While a court is empowered to view property when sitting as trier of fact, MCR 2.513(B), the court here did not inform the parties prior to the viewing that it was going to drive by the property, see *Travis v Preston (On Rehearing)*, 249 Mich App 338, 349-350; 643 NW2d 235 (2002). However, this error was harmless because it did not affect either party negatively or disproportionately. MCR 2.613(A). The judge gave no indication that his "drive-by" gave him "personal knowledge of disputed evidentiary facts" that could have resulted in his impartiality being called into question. MCR 2.003(B)(2). The record does not indicate any evidentiary dispute regarding the appearance of the outside of the parties' homes, the location of the homes, or anything else that could be discerned from driving along the road and viewing the homes. There was a dispute as to the older child's basement bedroom inside plaintiff's home, but it seems unlikely that this could have been settled by the judge's action. In any event, the judge implied that his driving by the houses confirmed his conclusion that both parties provided an adequate home for the children.

Regarding the judge's ex parte communication with the children's therapist, defendant argues that the children's therapist was treated by the court as an expert witness and that defendant's due process rights were violated because he was not given the opportunity to cross-examine her. The Code of Judicial Conduct, Canon 3.A(4)(e) provides that "[a] judge may initiate or consider any ex parte communications when expressly authorized by law to do so." MRE 706 states that expert witnesses "may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness." A party's right to cross-examine witnesses is a basic due process right, which should not be unduly interfered with by the trial court. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 502; 421 NW2d 213 (1988).

The therapist was not officially called on to testify as an expert witness. The judge, in his oral opinion, stated that the instant case had been delayed for almost three years due to a mistake and that the therapist, out of concern for the children, wrote a letter to him bringing this to his attention. The judge initiated the telephone call to apologize for the delay and also to discuss with the therapist whether she and the older child had a workable relationship. In addition, the judge stated that he did tell the therapist which way he was leaning regarding custody and noted that he was concerned on how the information would be communicated to the children because the judge could not rely on the parents to pass on the information in an effective way. The therapist stated that the judge could leave a message on the therapist's answering machine once it had decided and that the therapist would then tell the children the judge's ruling. However, there is no indication that the therapist expressed an opinion on the judge's stated preference regarding custody.

The judge should not have initiated a conversation with the therapist without allowing the parties the opportunity to examine the therapist. Even if his communication with the therapist is characterized as being for administrative purposes because it came in response to a communication allowed regarding delay in the case, the judge should have notified the parties in

time to give them a meaningful opportunity to respond. Code of Judicial Conduct, Canon 3.A(4)(a). In addition, the telephone call certainly raises the specter of impropriety. Code of Judicial Conduct, Canon 2(A). Though the judge, by his own admission, did discuss the nature of the therapist's relationship with the older child, there is no indication that the phone call influenced the dispositional ruling. Defendant offers no evidence to support his argument that the judge relied on this conversation in reaching his opinion. Rather, it appears that the judge was concerned with how the children, especially the oldest, would respond to the court's ruling on custody, and was attempting to find out if this child had some sort of support system in place that could help her deal with the consequences of that ruling. Although defendant would have had a right to cross-examine the therapist if she had been a witness whose statements became part of the record of evidence, this was not the case here. Thus, this error was harmless. See MCR 2.613(A).

Defendant next argues that the trial court erred in failing to take into consideration or explain why its conclusion differed from the FOC and referee reports and that the trial court's ruling was unsupported by the evidence. A custody award is a discretionary dispositional ruling limited by the statutory best interest factors that we review for an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 880-881; 526 NW2d 889 (1994).

A court may modify a custody order for proper cause shown or because of a change in circumstances. MCL 722.27(1)(c). There must be presented clear and convincing evidence that the modification is in the best interest of the child. *Id.* MCL 722.23 provides as follows:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The record reveals that the trial court went through each of the best interest factors except for factors k and l. Eventually, the trial court focused on factor j—“The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent”—and concluded that this factor weighed heavily in favor of plaintiff. “I can only—it leaves me numb, this factor,” the trial court observed, “because I . . . can only conclude, Mr. Grinstead, that you don’t have any willingness or ability or desire or wherewithal to facilitate any type of a close relationship between your ex-wife and the children.” Although the trial court had weighed most of the first nine factors evenly, the trial court stated that factor j “trumps and clouds every other factor in the plaintiff’s position, favor. Probably every single one. . . . It wins on all of them.”

The custody hearing was de novo, and thus the trial court had full authority to make an independent decision on the record as a whole and was not bound by either the FOC report or the referee opinion. Nonetheless, there is no indication that the trial court failed to consider the reports although it did not explicitly reject or accept each finding in the reports in its decision from the bench. Indeed, the trial court did mention both reports throughout its opinion and we can reasonably assume especially given the comprehensive ruling placed on the record that the trial court took the findings in those reports into consideration.

The trial court’s decision was based in large part on circumstances concerning defendant’s manipulative behavior that became clear only after the referee hearing. Defendant’s argument on appeal is that he has the best interests of his children at heart. However, the trial court found, after reviewing the extensive record, that defendant is not willing and able to encourage a relationship between the children and their mother and that he continues to jeopardize the emotional well-being and satisfactory development of his children.

The trial court properly decided on each of the statutory best interest factors, looking to the record as a whole. As recounted by the trial court, there was overwhelming evidence that factor j weighed heavily in plaintiff’s favor. Indeed, the great weight of this evidence supports the trial court’s conclusion that this factor tainted every other factor. Accordingly, defendant has

not shown an abuse of discretion in the dispositional ruling.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald