STATE OF MICHIGAN

COURT OF APPEALS

RONDA L. GUENTHER, Plaintiff-Appellee,	UNPUBLISHED December 2, 2008
v	No. 283559 Wayne Circuit Court Family Division
MARK L. GUENTHER, Defendant-Appellant.	LC No. 06-632075-DM

Before: Gleicher, P.J., and Murray and Kelly, JJ.

PER CURIAM.

In this child custody dispute, defendant father appeals as of right the circuit court's order granting plaintiff mother sole physical and legal custody of their minor daughter, MG, and awarding plaintiff attorney fees. We affirm the circuit court's custody award, but vacate the circuit court's attorney fee award and remand for a hearing regarding attorney fees.

I. Facts and Proceedings

Plaintiff and defendant married in 2001, and in 2002 plaintiff gave birth to MG, the only child of the marriage. In November 2006, plaintiff filed a complaint for divorce, alleging that defendant "has emotional problems and is not the proper party for physical custody of the child." Before defendant answered the complaint, plaintiff petitioned for his removal from the family home. According to the petition, defendant damaged the home by attempting renovations, and "coache[d]" MG to refer to plaintiff "in derogatory and profane terms." In defendant's answer to the divorce complaint, he asserted that plaintiff worked as a bartender at "an establishment with a reputation that precedes itself," had partially completed waitress training at "Hooters," had a "drinking and marijuana problem," on "most nights" failed to return home from work until after 3:00 a.m., and "spent many mornings sleeping in and visibly ill." Defendant admitted that he had "been diagnosed with Bi-Polar Disorder," and recently was hospitalized for his mental condition. But defendant still insisted that he was "the fit and proper party to have physical custody of the minor child." With these opening salvos, the parties launched a lengthy and contentious custody battle.

On January 8, 2007, defendant filed a response to plaintiff's petition seeking his removal from the family home. Defendant averred that plaintiff chronically used marijuana, smoked it in MG's presence, sold it from the family home, and used it with her own parents. Defendant urged

the court to order drug testing for both parties. On January 18, 2007, the circuit court conducted a hearing regarding the petition. During the hearing, plaintiff's counsel accused defendant of showering with MG, then 4-1/2-years of age. The court ordered that both parents undergo drug testing and scheduled an evidentiary hearing to determine whether defendant should be removed from the home.[1] Before the evidentiary hearing could occur, plaintiff obtained a personal protection order (PPO) against defendant on the basis of her allegation that he had shoved her into a coffee table during an argument. The PPO required that defendant vacate the marital home.

On February 21, 2007, the circuit court conducted a brief evidentiary hearing. When the hearing concluded, the parties agreed on a parenting time schedule, and stipulated that plaintiff would have exclusive occupancy of the marital home. In August 2007, a friend of the court (FOC) psychologist completed an assessment of the parties and MG. The psychologist reported no concerns regarding plaintiff's parenting capacity, noting, "Overall, Ms. Guenther appears reasonably confident in her child management skills and, while experiencing normal periodic swings in her level of confidence, she remains in control of and attached to [MG]." Regarding defendant, the psychologist observed,

> . . . Mr. Guenther attempted to present himself in an extremely positive manner. Mr. Guenther is very concerned about how he is perceived by others. In general, Mr. Guenther tends to deny or repress unfavorable thoughts and impulses and exhibits a lack of personal understanding of his own behavior. He is prone to minimize and disregard problems with himself. He prefers to look at the optimistic side of life and avoids thinking about or confronting unpleasant [issues]. Deliberate defensiveness is also suggested.

The psychologist observed "little interaction" between defendant and MG during their play session, and that defendant remained "generally nonverbal."

The FOC psychologist evaluated the statutory best interest factors in MCL 722.23, and determined that most of them favored neither parent.[2] According to the psychologist's report,

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[1] The record does not include any drug testing results.

[2] Pursuant to MCL 722.23, the '"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

(continued…)

four factors favored plaintiff: (d), (e), (g) and (k). The psychologist recommended that the circuit court award the parties joint legal custody, with plaintiff having sole physical custody.

On November 19, 2007, the parties commenced a custody trial.[3] Plaintiff testified that she had two children, ages 16 and 9, from previous unmarried relationships, and that she, MG, and the elder siblings resided together in a four-bedroom home. Plaintiff described that she had worked for 16 years in the same lounge, tending bar and helping to manage the establishment. Plaintiff denied that she drank more than one beer daily, although she admitted to occasional marijuana use, and to smoking a pack of cigarettes a day. Plaintiff also admitted that her evening work hours often left her tired in the morning, and sometimes unable to wake up without assistance. Plaintiff expressed that she had no objection to MG spending weekends with defendant because MG loved her father; plaintiff insisted, "I would never keep her from him." Plaintiff recounted that she and defendant had argued regarding his decision to take showers with MG, and that defendant nonetheless had continued to shower with MG through January 2007, when the child had reached five years of age.

(…continued)

> 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.

[3] When trial began, the parties also contested the division of the marital debt. They resolved this issue before the trial concluded, leaving MG's custody as the sole issue requiring circuit court resolution.

Defendant testified that he had been married three times before marrying plaintiff, and had two children from the prior marriages. Additionally, defendant described that he had impregnated "Liz," the wife of a friend, at the couple's request. Defendant never met the child born to Liz, although he maintained contact with Liz during his marriage to plaintiff. Defendant acknowledged that he had tried to install video cameras in the marital home to spy on plaintiff, but averred that he had discontinued these efforts on the advice of his attorney. He also admitted to showering with MG, but claimed that plaintiff had instructed him to do so. Defendant denied having pushed plaintiff into a coffee table, and claimed that plaintiff had thrown a book at him during an argument. According to defendant, plaintiff confessed that she had worked in the past as a prostitute.

Defendant owed between $4000 and $5000 in child support for MG, and at least $11,000 in unpaid child support for his eldest son. He also had owed between $20,000 and $40,000 in child support for his middle child, before that child's mother waived her right to collect it. The trial evidence revealed that defendant promised to pay his ex-wife $300 a month in lieu of the outstanding child support owed to his middle son, that he did so for a period of time, but that he stopped making any payments after separating from plaintiff. Defendant described that he suffered from back pain and depression, and admitted to having attempted suicide in October 2006, resulting in an eight-day psychiatric ward hospitalization.

Defendant presented several witnesses who accused plaintiff of selling marijuana, smoking it frequently every day, and using marijuana in the presence of MG. All of defendant's witnesses described him as an "awesome" or "wonderful" father. Defendant characterized plaintiff's family members as "extreme marijuana smokers" and alcoholics. Defendant criticized plaintiff's choices regarding MG's clothing, claimed that plaintiff never cooked a meal, enjoyed a "partying type lifestyle," needed constant male attention, and provided a "terrible" role model for MG.

Several weeks after the trial concluded, the circuit court rendered a bench opinion. The circuit court began by noting that most divorcing parents settle their differences regarding custody without a trial, "[l]argely because they come to realize that a battle over the child and the subsequent animus which is left in its wake does enormous damage to the child in and of itself, and leaves the parties in such hostile position[s] that they find it difficult to co-parent post-judgment." The circuit court described the parties' custody trial as having included "mudslinging beyond anything I have seen yet in 13 ½ years on this bench." After summarizing in detail the testimony presented by both sides and finding that MG lived in an established custodial environment with plaintiff, the circuit court then reviewed the best interest factors. The circuit court concluded that factors (b), (c), (f), (g), and (h) favored plaintiff. The circuit court then opined,

> [G]iven the animus between the parties, for the present the Court feels number one that it would be, and it feels this by clear and convincing evidence, that it would be unlikely that these two parties in the posture they are in to co-parent the child.
>
> There is a lack of trust. The hostility of each of you towards the other, which would seem to the Court to make it impossible for these two to make joint decision[s] with regard to MG's future.

The circuit court awarded legal and physical custody to plaintiff, continued "approximately" the parenting time schedule used during the preceding months, and ordered that defendant pay plaintiff $4000 in attorney fees.

II. Analysis

A. Best Interest Factors

Defendant challenges on appeal the circuit court's rulings regarding several of the statutory best interest factors. The Child Custody Act governs our review of defendant's arguments. It provides that "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "[A] trial court's findings on each factor should be affirmed unless the evidence 'clearly preponderates in the opposite direction.'" *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). A circuit court's factual finding regarding a particular factor can be set aside only if it is against the great weight of the evidence. *Id*. at 881. This Court defers to the circuit court regarding issues of credibility. *Harper v Harper*, 199 Mich App 409, 414; 502 NW2d 731 (1993). Whether the trial court employed a flawed legal analysis presents a question of law to which we apply a de novo standard of review. *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 569 n 7; 592 NW2d 360 (1999).

Defendant first asserts that the circuit court improperly based its best interest determinations on irrelevant evidence when it concluded that (1) his "adultery" in impregnating Liz, his friend's wife, implicated defendant's moral fitness as a parent; (2) the educational records of the parties' other children reflected on their abilities to parent MG; (3) his suicide attempt rendered him less capable to parent than plaintiff, who admitted to using marijuana; and (4) his family included a history of child molestation. Defendant additionally maintains that the circuit court bore an "animosity" toward defendant because he insisted on his right to have a full custody trial, and this animosity "permeate[d] the judge's ruling."

1. Factor (b)

Defendant complains that the circuit court's analysis of factor (b), the parties' capacity and disposition to give the child love, affection and guidance, improperly took into account the evidence that defendant had showered with MG, and "inadmissible hearsay" regarding a history of child molestation in defendant's family. The circuit court explained its analysis as follows:

> I am also exceedingly concerned about his experiences in showering with [MG], at least to the time she was 3. And there's some testimony that it was to the age of 5. I am unconvinced that this was at the Plaintiff's urging. I am very troubled given the fact of a history of some child molestation within Defendant's family that Defendant is insensitive to the need to provide a level of personal space and safety for [MG] that protects her from the kinds of things that will later echo in her life as early shocks.
>
> * * *

> The showering with a child of sufficient age to observe and ultimately be troubled by those experiences shows a failure of the Defendant to be sufficiently attuned to her needs and his own in that respect.

The record supports the circuit court's factual finding that defendant showered with MG. The circuit court also noted that defendant lacked sensitivity to his own emotional problems, and put his needs ahead of MG's. In contrast, the FOC psychologist noted that plaintiff supplied MG with "reasonably confident" care. In light of the circuit court's well-supported finding that defendant violated MG's boundaries and did not adequately understand or protect her individual needs, we conclude that the evidence did not clearly preponderate against the court's finding that factor (b) favored plaintiff.

2. Factor (f)

Regarding factor (f), "[t]he moral fitness of the parties involved," the circuit court summarized as follows:

> I think I have at great length discussed there are negatives on both sides, and I think on balance this factor favors the Plaintiff.
>
> The extra marital affair … Defendant had with Liz. His attempt to control [MG]'s life and the Plaintiff's life as I've outlined. And the lives of others even tangentially involved, such as psychologists or psychiatrists are a problem and bear both on that, and on the mental and physical health of the parties. And therefore I find that the weight goes slightly to Ms. Guenther, although probably none of the above might be more accurate.

To the extent that the circuit court considered defendant's sexual relationship with Liz, the court committed clear legal error. In *Fletcher*, *supra*, our Supreme Court explained that factor (f) "relates to a person's fitness *as a parent*." *Id*. at 886-887 (emphasis in original). Defendant's extramarital relationship with Liz, which occurred years before his marriage to plaintiff, did not bear on his ability to parent MG. However, even excluding any consideration of defendant's involvement with Liz, the circuit court's ultimate finding regarding factor (f) did not contravene the great weight of the evidence.

3. Factor (g)

Defendant next argues that when the circuit court considered factor (g), the mental and physical health of the involved parties, the court placed undue emphasis on defendant's suicide attempt, "while minimizing Plaintiff's current habitual drug use." The circuit court opined,

> The parties have some back problems that they both reported. Physically, they both seem to be fine.
>
> Mr. Guenther, as I've outlined, is under treatment, which is to his credit, but abandoned treatment when he truly needed it. And the Court is very troubled that unless he is required to be in treatment, that he may not continue, as he failed to during the one attempt before the suicide attempt. This is of great importance

> because of the enormous ability that a parent has on the mental health of a child. This factor favors Ms. Guenther.[4]

Contrary to defendant's assertion that the circuit court "minimized" plaintiff's marijuana use, the circuit court observed in its bench opinion that plaintiff

> has testified to occasional marijuana use. Defendant and his relatives have testified to persistent continuous marijuana use and sale. My sense is the Defendant's witnesses, and there were many who supported that position, have loyalties that run towards the Defendant and I find that the truth is probably somewhere in between.

The circuit court proceeded to criticize plaintiff's use of marijuana and other prescription medications, and opined, "She's, without acknowledging it, more depende[nt] on substances than she probably ought to be. And the smoking is hardly a good thing for [MG] to be around."

The circuit court's findings regarding defendant's suicide attempt and his failure to consistently abide by the medication recommendations of his physicians provide ample evidentiary support for its determination that factor (g) favored plaintiff. We note that the FOC psychologist also favored plaintiff regarding factor (g). In summary, we find no basis for disturbing the circuit court's ruling regarding this factor.

4. Factor (h)

Defendant next asserts that the circuit court improperly considered evidence regarding the school records of children other than MG. During trial, both parties presented evidence regarding the educational experiences of their other children and step-children. During defendant's testimony, he claimed that plaintiff's elder daughter repeatedly reported late to school. Defendant offered the testimony of his step-daughter and son in support of his claim that he could better parent MG than plaintiff. In the bench ruling, the circuit court observed that defendant's son was not "living up to his full potential," and that while defendant's stepdaughter "laud[ed] Mr. Guenther's attentiveness and guidance," she had "dropped out of highschool and has [n]ow earned a GED. Which doesn't reflect overly well on the kind of influence he provided in terms of the child getting herself appropriately educated."

The circuit court explained its conclusion regarding factor (h), "the home, school, and community record of the child," as follows:

> [MG] is fine. As I've said earlier, I've looked to the other children in the lives of these two parties. The two children of Ms. Guenther seem to fair [sic] well and are making reasonable progress. And in life, my sense is that the two

[4] Earlier in the bench opinion, the circuit court noted that before defendant attempted suicide in October 2006, he had entered treatment for depression, but discontinued taking Welbutrin "because he thought he didn't need it."

> under the immediate guidance of Mr. Guenther, who I've heard, had testimony from have not. This favors Mrs. Guenther.

We reject defendant's assertion that the circuit court improperly considered the parties' other children when it evaluated factor (h). The evidence presented by both sides qualified as relevant, and neither party objected to its introduction. Because MG had only entered kindergarten and thus had a limited school record, the circuit court properly considered all relevant evidence submitted that could aid its determination of this factor. We find no error in the circuit court's conclusion that plaintiff had shown a more favorable home, school and community record.

5. Defendant's Right to Trial

Defendant next asserts that the circuit court improperly deviated from the statutory best interest factors by "railing against Defendant for insisting upon his right to a trial and to present evidence on the record." Defendant correctly observes that the circuit court expressed its displeasure regarding the inability of the parties to resolve their differences before trial. In this regard, the circuit court criticized plaintiff as well as defendant. But the circuit court also expressed its willingness to provide the parties with the trial they sought, and the court did not again mention or reference defendant's unwillingness to settle during its discussion of the best interest factors. Because the record is simply devoid of any indication that the circuit court punished defendant for electing a custody trial, defendant has failed to support his claim that the circuit court premised its ultimate custody decision on an improper animus, rather than the record evidence.

B. Attorney Fees

Defendant lastly asserts that the circuit court erred by awarding plaintiff attorney fees. "[A]ttorney fees in divorce actions are not recoverable as of right." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). However, "[a] party to a divorce action may be ordered to pay the other party's reasonable attorney fees if the record supports a finding that such financial assistance is necessary to enable the other party to defend or prosecute the action." *Id*., citing MCL 552.13(1). "This Court has also held that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Id*. We review for an abuse of discretion a circuit court's decision regarding the necessity or reasonableness of attorney fees. *Id*. "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

In MCL 552.13(1), the Legislature has authorized as follows the imposition of fees and costs in divorce actions:

> In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. It may award costs against either party and award

> execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

The language of MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

The circuit court explained as follows its decision to award plaintiff attorney fees:

> [T]he Defendant, while bringing this on, I think for some of the same control reasons that have caused me to rule as I have still had a legitimate argument to make. It was not frivolous, I just rejected it, and heard enough to rule against him on the legal custody issue.
>
> On the other hand there is a fair disparity in the incomes of the parties. And the Defendant did lose this matter and Plaintiff was willing to compromise. But in light of all these factors, especially the disparity in income, I'm going to award $4000 in counsel fees payable $500 a month for the next eight months by Defendant to Plaintiff's counsel, as part reimbursement for the expenses of this case.

In *Reed*, *supra*, this Court explained that attorney fees in divorce actions "may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id*. at 164. When a party requests attorney fees, the circuit court should "conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Id*. at 166. "The trial court may not award attorney fees . . . solely on the basis of what it perceives to be fair or on equitable principles." *Id*.

Although a court may award attorney fees because of a party's misconduct, the circuit court here specifically found that defendant "had a legitimate argument to make" that did not qualify as "frivolous." The circuit court failed, however, to assess whether the parties' income disparity resulted in plaintiff's *inability to pay her legal expenses*, for example by holding an evidentiary hearing regarding the factual basis for a fee award. Consequently, we vacate the attorney fee portion of the circuit court's order and remand for an evidentiary hearing limited to the basis for the attorney fee award. On remand, we direct the circuit court to specifically

consider the justification for an attorney fee award under MCR 3.206(C)(2) and the reasonableness of any fees actually incurred by plaintiff.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly