STATE OF MICHIGAN

COURT OF APPEALS

THERESA L. WILLIAMSON, Plaintiff-Appellee,	UNPUBLISHED July 22, 2010
v	No. 295134 Macomb Circuit Court Family Division
KEITH G. WILLIAMSON, Defendant-Appellant.	LC No. 2008-004088-DM

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

In this custody dispute, defendant appeals as of right from the trial court's judgment of divorce. On appeal, defendant argues that the trial court erred when it excluded testimony from defendant's witnesses. We reverse and remand.

At trial, defendant sought to present testimony from Janet Sherrington, who authored a Friend of the Court (FOC) custody recommendation, and from the parties' grown children, who provided statements to Sherrington in support of the FOC recommendation. The FOC recommended that defendant be awarded physical custody of the two minor children; the trial court ultimately awarded physical custody to plaintiff. The trial court excluded the proposed testimony from Sherrington and the grown children.

We review a trial court's decision to exclude or admit evidence for an abuse of discretion. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). We also review the trial court's ultimate decision regarding a custody issue for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* "[A] trial court clearly does not abuse its discretion when its decision falls within the range of principled outcomes." *Taylor*, 279 Mich App at 315.

Defendant first argues that the trial court should have admitted the FOC recommendation as evidence. The trial court initially stated, "The [FOC] custody report is . . . not evidence in this case." However, the court later agreed to the request by defendant's attorney that the court "take judicial notice" of the FOC recommendation.

We first note that the FOC recommendation is not the proper subject of judicial notice. MRE 201(b) provides that a court may take judicial notice of a fact that is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The FOC recommendation, which contains Sherrington's opinions and her summary of the parties' and witnesses' statements, is not a fact and, therefore, is not subject to judicial notice.

Rather, the trial court gave full consideration to the FOC recommendation, as it expressly stated at the end of the trial and in response to defendant's motion for a new trial. The court read and considered the FOC recommendation and the letters in support of the recommendation, but concluded that it was not persuasive. Defendant appears to draw from this conclusion that the court did not actually consider the FOC recommendation. This inference is misguided; the court necessarily considered the FOC recommendation when it made conclusions regarding the weight and credibility of its contents. The court then made factual findings regarding the best interests of the children.

Defendant next argues that Sherrington should have been permitted to testify regarding the content of the FOC recommendation. Yet although defendant acknowledges in his brief on appeal the trial court's conclusion that Sherrington's testimony was inadmissible as hearsay, he provides no argument or citation to authority indicating that the trial court's reason for refusing to admit this testimony was incorrect. Because defendant has failed to properly establish this claim of error, we need not address it further. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Finally, defendant argues that the trial court should have permitted the testimony of the parties' grown children. We agree. Two of the parties' adult children planned to testify at trial regarding the parties' parenting skills and the well-being of their minor siblings in a custody situation. The trial court refused to allow them to testify, stating:

> I don't basically allow children to testify against their parents, I mean even adult children. I don't allow it. I think this, basically, when these people leave this court they still have their relationship together and I really don't, I am not, not interested in being a part of destroying their ability to have a relationship.

The trial court gave no other reason for disallowing the testimony besides its concern that the children's testimony, if permitted, would damage their relationship with one or both of their parents.

Like the trial court, we recognize that when children testify against their parents in court, the relationship that they share with their parents might be affected in a negative way. Further, we recognize that the trial court issued its ruling in an attempt to keep the parties' adult children from being caught in the middle of contentious divorce proceedings. However, the trial court's reasons for prohibiting the adult children from testifying, although altruistic, are not permissible grounds for excluding testimony under the Michigan Rules of Evidence. See MRE 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court.").

Defendant planned to introduce testimony from two of the parties' adult children concerning the parties' parenting styles and overall ability to properly care for the parties' minor children. Because custody of the parties' minor children was at issue in the divorce proceedings, the comparative ability of each party to properly parent the minor children was relevant to a proper determination of custody. Similarly, the parties' adult children would be in the best position to testify regarding the parenting style of each party and its effect on the parties' children. Accordingly, it is highly likely that the children's testimony would be relevant and, therefore, admissible. MRE 401; MRE 402.

Although testimony may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," MRE 403, there is no indication that the adult children planned to present testimony that was so prejudicial that it would substantially outweigh any probative value of the testimony. Although defendant acknowledged that the parties' adult children planned to testify regarding the same information that they included in letters that Sherrington attached to the FOC report, their in-court testimony would allow for expanded inquiry into, and cross-examination of, the issues raised in their letters. More importantly, the adult children could provide a unique perspective, commenting on the parties' parenting skills as the recipients and products of the parties' parenting, not as third-party observers trying to understand and comment on intra-family dynamics. Accordingly, their testimony would not constitute a "waste of time" or a "needless presentation of cumulative evidence."

The trial court abused its discretion when it prohibited the parties' adult children from testifying. On remand, the trial court should permit the adult children to testify and then take this testimony into consideration when making its determination regarding the custody arrangement for the two minor children.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens