STATE OF MICHIGAN

COURT OF APPEALS

MELINDA KALKMAN,

Plaintiff-Appellant,

v

GERALD J. DANHOFF, JR.,

Defendant-Appellee.

UNPUBLISHED
September 30, 2010

No. 295160
Saginaw Circuit Court
LC No. 95-006069-DP

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

This appeal involves a dispute over custody of the parties' teenage daughter. Plaintiff appeals as of right the trial court's October 29, 2009 order granting sole physical and legal custody of the child to defendant. Plaintiff also maintains that the trial court erred in an earlier custody order granting joint physical and legal custody to the parties, and challenges two intermediate orders finding her in contempt of court. We affirm in part, reverse in part and remand for a new custody hearing.

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Berger*, 277 Mich App at 706. An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). A trial court's decision to hold a party in contempt is reviewed for an abuse of discretion. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

The Child Custody Act of 1970 (CCA), MCL 722.21 *et seq.*, governs child custody disputes between parents, agencies, or third parties. The purpose of the CCA is to promote the best interest of children, and it is to be liberally construed. MCL 722.26(1); *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). The CCA creates presumptions and standards by which competing custody claims are judged and sets forth the procedures and reliefs available. *Ruppel v Lesner*, 421 Mich 559, 565; 364 NW2d 665 (1984). Generally, once the circuit court

exercises jurisdiction over a child and issues an order under the CCA, the court's jurisdiction continues until the child is 18 years old. *Hayford v Hayford*, 279 Mich App 324, 327; 760 NW2d 503 (2008).

Plaintiff first argues that the trial court erred in utilizing a "conference-style" method during the September 11, 2009 hearing preceding the September 25, 2009 order changing plaintiff's sole custody to joint custody. The court indicated that it would conduct the hearing in a conference style where witnesses that had all been sworn in would give input as the court considered each of the child custody factors. The Court directed the witnesses' discussion of the information relating to the child custody factors, and the attorneys for the parties were also able to ask questions. The hearing consisted primarily of questioning of the Friend of the Court investigator, Jill Hogenson, by the court and the parties regarding each of the statutory best interests factors. Additionally, plaintiff, defendant, defendant's sister and plaintiff's brother also spoke and were questioned. Prior to the court's decision to proceed with the conference style method, two witnesses, the child's school counselor and defendant's ex-wife, testified using traditional trial procedure. Each of the parties was also given five minutes to provide a narrative.

Use of non-traditional case dispositional tools in domestic relations cases with the express consent of the parties has been given approval by this Court in *Watson v Watson*, 204 Mich App 318; 514 NW2d 533 (1994) and *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). In *Watson*, this Court found that MCR 3.211(A)(3) authorized the use of the conference method of resolving custody disputes as a settlement tool. *Id.* at 320-321. Later, in *Brown*, the Court authorized the use of the conference style in an evidentiary hearing. However, because there was both an absence of express agreement to the non-traditional procedure and each case ultimately involved the due process rights attendant to changes of custody, both cases were remanded for traditional hearings applying the rules of evidence, the principles that govern the means of adducing proof and the statutory burdens of proof. *Watson*, 204 Mich App at 321; *Brown*, 260 Mich App at 600.

Here, it is evident from the trial court's reasoning concerning its use of the conference method, that the trial court was engaging in a method of resolving the dispute, similar to *Watson*, rather than conducting a trial to decide the custody issue. The court rule, MCR 3.211, analyzed in *Watson* was renumbered, with minor stylistic changes, to MCR 3.216 in 1993. *Watson*, 204 Mich App at 321 n 1. The renumbered MCR 3.216(A)(4) provides, "The court may order, on stipulation of the parties, the use of other settlement procedures." Here, there is no record of an explicit agreement to utilize a conference style hearing, just as there is no record of the parties objecting to such a method. The trial court did comment, "We have talked about the conference style, and as I understand it we're kind of ready to swing to that moment." In *Watson*, it was noted that the failure to object to a settlement procedure is not a stipulation to the procedure. *Watson*, 204 Mich App at 321 n 2.

Although the parties had the opportunity to question witnesses, the court took the responsibility of developing the record based mainly on questioning Hogenson regarding her report and her opinion of the child custody factors. Without a stipulation from plaintiff, this method of hearing impermissibly usurped plaintiff's right to have the court apply the rules of evidence and the principles that govern the means of obtaining proof. Consequently, the chosen method denied plaintiff her right to a trial. *Watson*, 204 Mich App at 321; *Brown*, 260 Mich App at 600. In addition, because the trial court appeared to acknowledge that the proposed parenting

time change would also result in a change to the established custodial environment, it should have instead conducted a full evidentiary hearing. *Brown*, 260 Mich App at 600. The September 11 conference method hearing was inadequate to meet the requirements of a custody trial.

Next, plaintiff argues that the trial court erred in its use of the Friend of the Court report and recommendations to make the custody determination. We disagree. The Friend of the Court is authorized to investigate a child custody dispute and issue a report and recommendation according to MCL 552.505(1)(g). The court's consideration of a report and recommendations submitted under MCL 552.505(1)(g) is not subject to the rules of evidence. MRE 1101(b)(9). Considering admissible evidence, such as live testimony, affidavits, documents, or other admissible evidence was necessary for a trial court to properly make the determination or make the findings of fact necessary to support its custody determination. *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991).

Here, the trial court had substantial evidence presented to it on which it could make its determination. The trial court did receive the Friend of the Court's report, and discussed it extensively. However, there was significant testimony from the author of the report regarding its contents, as well as testimony from the parties, two relatives, an ex-spouse, and the school counselor. Additionally, the trial court's findings did not exclusively agree with the Friend of the Court's findings. For example, the trial court's finding that factor I, the child's preference, favored plaintiff was contrary to the Friend of the Court's report that the factor was equal. The trial court also awarded joint physical custody, in contrast to the Friend of the Court recommendation that defendant have sole physical custody. It is apparent that the trial court made an independent determination based on admissible evidence and did not misuse the Friend of the Court report.

Plaintiff also argues that the trial court impermissibly modified Brianna's custody without following the dictates of the CCA, including the requirement to make findings of fact on each of the child custody factors, prior to its award of sole custody to defendant on October 29, 2009. We agree.

The trial court entered its September 25, 2009 order granting the parties joint legal and physical custody, and later issued an order on October 29, 2009 granting sole legal and physical custody to defendant. In the interim, plaintiff was twice in front of the court, before a different judge. The first proceeding was a contempt proceedings because she refused to provide the child to defendant. Thereafter, a second contempt proceeding arose because she appeared at defendant's home and the child's school allegedly in attempt to visit the child. When the original trial judge returned, he found her in contempt and indicated that the proper remedy for plaintiff's actions was to consider revising the earlier custodial order, and stated that it would "contemplate a change of custody by motion of [d]efendant or sua sponte at the hearing on [p]laintiff's motions set for Monday, October 26, 2009."

At the October 26 hearing, the court remarked that plaintiff's actions were grounds for a change of custody and stated that it was holding an evidentiary hearing at that time. Defendant and his wife then testified primarily regarding the effects of joint custody on the child. Three days later the court issued an order reciting the recent history of the case, and granting defendant sole legal and physical custody of the child.

The party seeking a change of custody must first establish proper cause or change of circumstances by a preponderance of evidence. *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009). If a party fails to establish proper cause or change of circumstances, the trial court may not hold a child custody hearing. *Corporan v Henton*, 282 Mich App 599, 603-604; 766 NW2d 903 (2009).

Here, the trial court modified custody without specifically finding that a change in circumstance had occurred since the September custody order. Significantly, the trial court did not determine how any change in circumstance had or could have had a significant effect on the child's well-being. *Brausch v Brausch*, 283 Mich App 339, 356; 770 NW2d 77 (2009). There was no evidence that the child was aware of any of plaintiff's behavior that resulted in her being found in contempt of court. In fact, defendant specifically testified that the child did not know of plaintiff's behavior. Custody disputes are to be resolved in the best interests of the child, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). This standard cannot be altered. *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996). The trial court must consider and explicitly state its findings and conclusions regarding each factor, and the failure to do so is reversible error. *Rittershaus*, 273 Mich App at 475; *Daniels v Daniels*, 165 Mich App 726, 730-731; 418 NW2d 924 (1988). Here, the trial court based its September custody order on a detailed determination of the statutory child's best interest factors. The Ocotober 29 order, however, failed to make findings on the best inertest factors. The record is silent regarding the court's analysis of any changed circumstances. The trial court was required to evaluate each factor contained in MCL 722.23 and state a conclusion on each, thereby determining the best interests of the child. *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004). It is vitally important for the protection of the fundamental rights of the parties involved to have some indicia on the record showing that the court has satisfied itself that its custody determination was in the child's best interests. *In re AP*, 283 Mich App at 608.

The trial court cited *Wright v Wright*, 279 Mich App 291; 761 NW2d 443 (2008), as its authority for changing to sole custody where the parties have difficulty working together. In *Wright*, 279 Mich App at 299-300, the court, citing MCL 722.26a(1)(b), did state that "joint custody was not an option, because the record reflected that the parties would not be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." However, the custody decision in *Wright* was made after explicit consideration and findings regarding the statutory child's best interest factors. *Id.* at 300-304.

Here then, the trial court erred in both its initial custody determination and its later order changing custody. Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing. *Foskett v Foskett*, 247 Mich App 1, 12-13; 634 NW2d 363 (2001). On remand, the trial court should consider up-to-date information, including the child's current and reasonable preferences, and any other changes in circumstances arising since the original custody order. *Fletcher*, 447 Mich at 889.

Next, plaintiff argues that the trial court committed clear legal error in making ex parte contact with the child's former therapist. However, because the case is remanded due to deficiencies in the custody determinations, we need not consider whether the ex parte contact requires reversal.

Plaintiff next argues that the trial court erred on October 7, 2009, in finding plaintiff in contempt of the court's initial custody order. We disagree. The September 25, 2009 custody order stated that it was "effective on entry of this Court." On September 28, 2009, defendant filed an emergency motion to hold plaintiff in contempt of the court order because plaintiff refused to provide the child to defendant on September 27th in accordance with the custody order. The trial court found that plaintiff understood that defendant was to have the child during the school week by virtue of the court order and that there had been no appeal filed. The court stated that it was going to enforce the custody order and found plaintiff in contempt of the court. The court ordered that plaintiff was sentenced to 30 days in jail, but could purge herself of the contempt by turning the child over to defendant that day, and also assessed $450 in attorney fees. Plaintiff then turned the child over to defendant.

Plaintiff argues that the trial court could not have found her in contempt because the custody order, according to MCR 2.614, could not have been enforced until twenty-one days after it was entered. However, regardless of the applicability of MCR 2.614, plaintiff was obligated to follow the court order. Parties to actions are obliged to obey the court's orders, even if erroneous, until the orders are reversed. *Rose v Aaron*, 345 Mich 613, 615; 76 NW2d 829 (1956); *In re Contempt of Calcutt*, 184 Mich App 749, 756; 458 NW2d 919 (1990).

Here, the court's custody order provided that it was effective the day it was entered. Plaintiff was obligated to comply with this order. *In re Contempt of Calcutt*, 184 Mich App at 756. Additionally, plaintiff testified that she was aware that the court ordered physical custody of the child to defendant during the school week and refused to provide her to defendant as ordered. The trial court properly found that this violated the custody order and found plaintiff in contempt. The trial court's contempt order of October 7, 2009 was not an abuse of discretion.

Next, plaintiff argues that the trial court erred in issuing the October 21, 2009 contempt of court order. We agree. At the September 28, 2009, hearing regarding the first contempt charge against plaintiff, the court ordered "a suspension of any visitation time with [plaintiff] until Judge Crane can review this matter on his return." The court issued the first contempt order on October 7, 2009, after another accusation of contempt had been made, that provided, "All visits between [p]laintiff and the minor child shall be suspended pending a hearing before the assigned judge, who is away for two weeks." On October 6, 2009, defendant filed a second emergency motion to find plaintiff in contempt alleging that she tried to see the child by driving to defendant's home and tried to pick her up from her new school. On October 13, 2009, the parties appeared before the original trial judge over the custody matter. The court indicated that it had spoken to the judge who heard the previous contempt motions and had reviewed the transcripts. The court found that plaintiff had been in contempt of court and that the more appropriate remedy would be to consider a change in custody. On October 21, 2009, the court issued an order finding plaintiff in contempt. The order stated that the court would contemplate a change in custody by motion of the court or defendant, that parenting time would be restored, and it also awarded attorney fees.

Plaintiff argues that the court did not specify which court order was violated and did not establish which actions of plaintiff were contemptuous. Contempt of court is a willful act that tends to impair the authority of a court. *In re Contempt of Auto Club Ins Assoc*, 243 Mich App 697, 708; 624 NW2d 943 (2000). Proceedings regarding contempt can be civil or criminal, as distinguished by the character and purpose of the punishment. *In re Contempt of Rochlin*, 186

Mich App 639, 644; 465 NW2d 388 (1990). If the contempt sanction is punitive, as it is here, to vindicate the authority of the court, the contempt proceedings are criminal. *In re Contempt of Dougherty*, 429 Mich 81, 93; 413 NW2d 392 (1987). The purpose of criminal sanctions is to punish past disobedient conduct through an unconditional and fixed sentence. *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007).

In a criminal contempt proceeding, a willful disregard or disobedience of a court order must be clearly and unequivocally shown, and must be proven beyond a reasonable doubt. *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971); *DeGeorge*, 276 Mich App at 592. The alleged contemnor must have acted culpably. *People v Little*, 115 Mich App 662, 665; 321 NW2d 763 (1982). Here, the court presumably found plaintiff in contempt for violating the court's order that plaintiff was not to have "visitation time" with the child, and that her presence at defendant's home and the child's school violated this order. However, it was not clear what constituted visitation time, and there was no evidence that plaintiff did visit the child. Even though this Court may not weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the trial court's findings, *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009), it was not clear from the testimony what plaintiff's intentions were in arriving at defendant's home, and the record regarding plaintiff's visit to the school was not fully developed.

When adjudicating contempt proceedings without a jury, a court must make findings of fact, state its conclusions of law, and direct entry of the appropriate judgment. *In re Contempt of Henry*, 282 Mich App at 674. Here, the trial court did not specify the acts constituting contempt or make findings of evidence that demonstrated plaintiff's culpability beyond a reasonable doubt. Additionally, criminal sanctions for committing a forbidden act are generally limited to a fine of up to $7,500 or imprisonment for up to 93 days, or both, or placement on probation. MCL 600.1715(1); *In re Contempt of Henry*, 282 Mich App at 681-682. The recovery may include attorney fees incurred as a result of the contemptuous conduct. *Taylor v Currie*, 277 Mich App 85, 100; 743 NW2d 571 (2007). Here, the court imposed sanctions of attorney fees, planned to entertain a change in custody, and restored plaintiff's parenting time. The trial court found plaintiff in contempt of court on October 21, 2009 without an adequate basis, and its decision to base a change in custody on plaintiff's alleged contempt was also improper. We thus reverse the court's October 21, 2009 order finding plaintiff in contempt.

We affirm the court's October 7, 2009 order finding plaintiff in contempt of court and vacate the court's October 21, 2009 order finding plaintiff in contempt of court. We also reverse the court's custody orders of September 25, 2009 and October 29, 2009 and remand for a new custody hearing, considering up-to-date information, including the child's current and reasonable preferences, and any other changes in circumstances arising since the original custody order. *Fletcher*, 447 Mich at 889.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens