STATE OF MICHIGAN

COURT OF APPEALS

SHANDELL LAVONNE VAN MALSEN, Plaintiff-Appellant,	UNPUBLISHED April 24, 2012
v	No. 303689 Kent Circuit Court
ROBERT C. VAN MALSEN, Defendant-Appellee.	LC No. 2009-004389-DM

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order striking language from the parties' judgment of divorce and awarding attorney fees in favor of defendant. We affirm.

The parties in this matter have three children in common. They managed to settle most matters pertaining to the divorce between them, with the exception of one issue—whether, in the event that defendant's parenting time fell on a weekend where he was required to serve his National Guard duty, plaintiff would have the minor children in her care. A consent judgment of divorce was prepared and, at the motion hearing for entry of the judgment of divorce held on August 27, 2010, the above issue was addressed with the trial court. The trial court indicated that the "right of first refusal" is often more problematic then helpful and indicated that it would enter the judgment "without that language." A consent judgment of divorce was entered on the same date which contained the following language in the Custody provision:

> The parties' respective rights and responsibilities in exercise of their joint legal custody shall be as follows:
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> ***
>
> i. If either party is unable to care for the minor children for four (4) hours or longer, that party shall give the other party the opportunity to spend this time with the minor children before contacting any other individual to do so.

Defendant thereafter moved to correct the judgment of divorce nunc pro tunc, to remove the above provision. Defendant contended that because the trial court ruled at the motion for entry of the judgment of divorce that it would be entering the judgment without the "right of first refusal" language, and the above provision conflicts with trial court's ruling, as well as with

another provision in the judgment stating that neither party could take the other parent's time unless agreed to by the parties, it must be stricken from the judgment of divorce. The trial court granted the motion on October 20, 2010, finding that an error had been made. Although the trial court did not expressly refer to MCR 2.612(A)(1) as the basis for its decision, the effect of the October 20, 2010, order was to correct the August 27, 2010, judgment of divorce, as permitted by the court rule.

Plaintiff thereafter moved for reconsideration, contending that in granting defendant's motion, it was amending the judgment of divorce with respect to parenting time. Plaintiff argued that before it could alter parenting time, the trial court was required to conduct a hearing to determine what was in the best interests of the children pursuant to the Michigan Child Custody Act. The trial court denied the motion for reconsideration, but allowed for a brief evidentiary hearing on the issue of whether subsection (i) in the Custody provision had been a negotiated provision. At the conclusion of the evidentiary hearing, the trial court again struck subsection (i) from the judgment of divorce and awarded defendant $750.00 in attorney fees/costs. Plaintiff now appeals.

On appeal, this Court reviews a decision made pursuant to MCR 2.612 for an abuse of discretion. *Detroit Free Press, Inc v Department of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Safian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). We review the lower court's factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992).

On appeal, plaintiff first contends that the trial court's ruling to strike the "first right of refusal" language from the judgment of divorce was against the great weight of the evidence, was an abuse of discretion, and constituted clear legal error. We disagree.

MCR 2.612(A)(1) states:

> Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

The purpose of this rule is "to make the lower court record and judgment accurately reflect what was done and decided at the trial level." *McDonald's Corp v Canton Township*, 177 Mich App 153, 159; 441 NW2d 37 (1989), quoting *Stokus v Walled Lake Bd of Ed*, 101 Mich App 431, 433; 300 NW2d 586 (1980). Thus, a judgment may be corrected under this rule where it does not comport with the trial court's intended and orally expressed ruling. *McDonald's Corp*, 177 Mich App at 159.

In the matter at hand, the parties presented themselves to the court with a previously drafted judgment of divorce indicating that they had agreed upon essentially all terms necessary to enter a judgment except for one. At the hearing on the motion for entry of the judgment of divorce the following exchange took place:

Defendant's counsel: Yes, Your Honor. Mr. Doele [plaintiff's counsel] and I have narrowed it down really to one issue. That issue, Your Honor, is that my client is in the National Guard. Ms. VanMalsen wants basically when my client does his one weekend every other month, that she should have the minor children in her care.

At the time that we discussed this case, that was not my client's position. The parties have difficulty with regard to communication and as a result, Your Honor, I'm asking that when it's my client's time, regardless if he has to go into the National Guard every other month, that that's his time and he'll make arrangements for the minor children unless they can agree otherwise at some point once this matter is completed . . .

Plaintiff's counsel: Your Honor, it is [plaintiff's] opinion that the—because the weekends do occur on a frequent basis, that they occur for a lengthy period of time, and because the children already spend a tremendous amount of time with their grandparents already when they're supposed to be with their father, that this would be most appropriate since the children would like to be with her.

So we're asking—the only first right of refusal we're asking for deals directly with the National Guard weekends. We think that it's appropriate and [plaintiff] would request that you allow that provision to be in this judgment.

Other than that, yes, we have gone through these judgments several, several times. I just checked it again and made one minor change with respect to odd and even spring breaks, but that's the only issue before this Court.

The trial court indicated that "right of first refusal" provisions in judgments generally cause parties more distress and children more upset than they do resolution and granted defendant's request to "enter the judgment without that language." Despite the trial court's ruling, a judgment of divorce was entered on the same date of the hearing which contained the following language in the Custody provision:

The parties' respective rights and responsibilities in exercise of their joint legal custody shall be as follows:

***

i. If either party is unable to care for the minor children for four (4) hours or longer, that party shall give the other party the opportunity to spend this time with the minor children before contacting any other individual to do so.

According to plaintiff, in removing the language from the judgment of divorce, the trial court effectively altered the custody and parenting time provisions agreed upon by the parties. However, the parties presented themselves to the trial court at the August 27, 2010 hearing

explaining that they had agreed upon all divorce terms except for one—the right of first refusal, i.e., the very provision appearing in subsection (i) above. It appears then, that there was no agreement with respect to the provision and its inclusion in the judgment was an oversight or accident.

While plaintiff contends that the disagreement presented to the trial court was limited only to whether plaintiff should have the right of first refusal with respect to those weekends where defendant was required to serve National Guard duty, such argument is disingenuous. If, as plaintiff suggests, subsection (i) was a negotiated right of first refusal provision, there would be no need to specifically argue for a right of first refusal with respect to defendant's National Guard weekends. Subsection (i), as worded, is unlimited in that it would provide either party the right to care for the children in the event that the other party were unable to do so for four hours or longer. The four-hour time period presumably would encompass those weekends where defendant was scheduled to care for the children but would be away for National Guard duty. Were this "right of first refusal" negotiated and understood between the parties to operate as such, there would have been no need to appear before the trial court to settle whether plaintiff would have the right to care for the children on the National Guard weekends. It would be assumed that this option were available to plaintiff through the exercise of the negotiated, expansive provision set forth in (i).

Moreover, defense counsel made clear at the motion hearing that defendant was not referring to only the National Guard weekends with respect to the right of first refusal. Counsel specifically informed the court that he was asking the trial court to rule that "when it's my client's time, regardless if he has to go into the National Guard every other month, that that's his time." And the trial court did not limit its ruling to simply the National Guard weekends. Had it intended to do so, it could and would have stated so on the record or incorporated such limiting language into a written order. Instead, the trial court referenced "right of first refusal" language in general terms and stated that it would "enter the judgment without that language." At the hearing on defendant's motion to correct the judgment nunc pro tunc, the trial court further indicated that, "[M]y recollection is that I - - I intended that there would be no right of first refusal in any portion of the judgment. But I'm happy to allow for very brief testimony on that if you would like."

To account for the argument that the parties may, in fact, have negotiated and agreed to the inclusion of (i) in the divorce judgment and have it serve as a right of first refusal, despite the arguments made before the trial court on August 27, 2010, the trial court allowed the parties to present brief testimony at an evidentiary hearing. At the hearing, the trial court again repeated, "This came to me with clerical error that it was an oversight and a mistake in putting that provision in the definition of joint custody which is unusual as I looked at it," and "In reviewing the motion to correct judgment, the court believed that the provision of the first right of refusal in the definition paragraph, was a mistake and/or clerical error since the Court had removed the right of first refusal with regard to any parenting time and/or National Guard parenting and specifically made findings in that regard." Thus, the trial court did not alter the custody and parenting time provisions agreed upon by the parties and did not abuse its discretion in correcting the judgment of divorce to comport with its ruling by striking subsection (i). *Detroit Free Press, Inc*, 233 Mich App at 556.

The trial court's decision was also not against the great weight of the evidence presented at the evidentiary hearing. The great weight of the evidence standard applies to all findings of fact. Under such standard, a trial court's findings of fact should be affirmed unless the evidence "clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

Again, the trial court allowed for a brief evidentiary hearing to hear evidence as to whether the disputed provision was, in fact, a provision that the parties had negotiated and agreed to. At the hearing, defendant testified that when it came to finalizing the judgment of divorce, he directed his attorney that he did not want a right of first refusal provision in the judgment of divorce. Defendant testified that communication between him and plaintiff was not good and that plaintiff was not willing to accommodate even a switching of parenting time weekends with respect to the children. Plaintiff testified that during negotiations in the divorce proceedings, she requested a right of first refusal provision. Plaintiff appeared to be a little confused, however, as to whether subsection (i) was a negotiated provision. Plaintiff was questioned specifically about that subsection by her counsel:

> Q: What is your recollection of whether we actually negotiated that?
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> A: We didn't negotiate that section.
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> Q: We did not?
>
> A: No, we did not.
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> Q: Why was it in the judgment of divorce?
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> A: 'Cause that's what Mrs. Mobilia [defendant's counsel] submitted, and that was part of the negotiations.
>
> Q: Okay. Did you agree to this provision?
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> A: Yes, I did.

Plaintiff also testified that when she had to be away from the children while they were in her care, she relied upon her husband to care for the children, and that she had never contacted defendant to offer him the right of first refusal.

The trial court ruled again in favor of defendant, stating, "I find no evidence that this was a negotiated provision. I believe I ruled on the issue on August 27th at the time the judgment was entered. I believe this paragraph was a companion to a requested paragraph for National Guard duty that was stricken and that this paragraph should have been stricken and was omitted at the time the final revisions were made to the judgment on August 27th." Given the evidence presented, we cannot find that the evidence clearly preponderates in the opposite direction.

Plaintiff next asserts that the trial court's award of attorney fees constituted an abuse of discretion where it failed to first assess the financial need of the receiving party and the ability of the other party to pay as well as the reasonableness and amount of fees. We review a trial court's

ruling on a request for attorney fees for an abuse of discretion. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258, 263 (2008).

Here, defendant requested an assessment of attorney fees against plaintiff "for the litigation of the same issue now three times." After the trial court ruled that the language contained in subsection (i) of the judgment of divorce would be stricken, plaintiff moved for reconsideration. The request was not, however, provided to the trial court. Plaintiff also failed to request an evidentiary hearing until three months after being advised that she would be allowed to seek the same. In its January 24, 2011, order denying plaintiff's motion for reconsideration, the trial court thus ordered that costs would be assessed against plaintiff, in an amount to be determined at the evidentiary hearing "based on the delay in requesting an evidentiary hearing . . . and additional time and costs relative to this Motion for Reconsideration." At the conclusion of the evidentiary hearing, the trial court awarded defendant $750 in attorney fees.

In domestic relations actions, attorney fees are authorized by both statute and court rule. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Relevant to the instant matter, MCR 3.206(C)(1) provides, "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 . . ." Contrary to plaintiff's argument, however, a party requesting attorney fees need not always prove financial need and the ability of the other party to pay. The party seeking attorney fees must allege facts sufficient to show *either* that the party is unable to bear the expense of the action, and that the other party is able to pay, MCR 3.206(C)(2)(a), *or* that the attorney fees were incurred because the other party refused to comply with a previous court order, despite having the ability to comply, MCR 3.206(C)(2)(b). *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63, 76 (2010). An award of legal fees has also been authorized where the party requesting the fees has been forced to incur them as a result of the other party's unreasonable conduct. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71, 83 (2007). On the record before us, we cannot conclude that the trial court abused its discretion in awarding $750.00 in attorney fees. It correctly found that plaintiff was responsible for the protracted nature of the litigation and the expenses incurred in disputing the single issue over and over, despite evidence to the contrary. And, though defendant requested $1500.00 in attorney fees, the trial court awarded only one half of the requested amount.

Moreover, plaintiff can claim no error in the trial court's failure to conduct a hearing or find facts regarding the reasonableness of the fees incurred where she did not request the same. Generally, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634, 636 (2002). The trial court was aware of this obligation, as evidenced by its statement at the evidentiary hearing: "the Court will grant attorney fees in the amount of $750, and I'm going to ask [defense counsel] that you provide a copy of your bill, which I believe is required, to [plaintiff's counsel], and if they want a hearing on reasonableness, I will grant that." Plaintiff did not, however, request a hearing. This failure constituted a forfeiture of the issue. *Id*. at 692.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens