

STATE OF MICHIGAN
COURT OF APPEALS

OLGA ORTIZ BUTTON,

Plaintiff-Appellant,

v

RANDALL R. BUTTON,

Defendant-Appellee.

UNPUBLISHED

January 13, 1998

No. 194175

Allegan Circuit Court

LC No. 91-013859-DM

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals by right the order changing custody of her three young sons to defendant, their father. We affirm.

Defendant left the marital home in early 1991, when the parties' three sons were ages four, eighteen months, and four months. The 1993 divorce judgment reflected the parties' agreement to joint legal custody, with physical custody to plaintiff. Defendant received liberal visitation. The parties' animosity, however, remained intense. Plaintiff repeatedly denied defendant scheduled visitation, culminating in the court twice finding her in contempt for failing to abide by the agreed-upon visitation order. Plaintiff's reasons for denying visitation included allegations that defendant sexually abused the children.

In January 1995, defendant moved to modify the divorce judgment, seeking custody of the children. At the conclusion of a two day custody hearing, the trial court determined that a change of custody was in the children's best interests. The court thereafter denied plaintiff's motion for rehearing or new trial.

I. Custody Determination

Plaintiff first argues that the trial court's findings of fact regarding the best interest factors were against the great weight of the evidence. We disagree. This Court reviews the trial court's findings of fact in a custody matter under the great weight of the evidence standard, the court's discretionary rulings for a palpable abuse of discretion, and the court's rulings on issues of law for clear legal error. *Fletcher*

v Fletcher, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *York v Morofsky*, __ Mich App __, __; __ NW2d __ (Docket No. 188845; issued 9/12/97) slip op p 1.

Because the children's established custodial environment was with plaintiff, the trial court could change custody under MCL 722.27(1)(c); MSA 25.312(7)(1)(c) only if clear and convincing evidence established that a change was in the children's best interests. *Ireland v Smith*, 451 Mich 457, 461 n 2; 547 NW2d 686 (1996). In making this determination, the court must consider the following statutory best interest factors:

(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 the 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. [MCL 722.23; MSA 25.312(3).]

In this case, the trial court found that factors (a), (e) and (g) favored neither party, factors (b), (c), (d) and (f) favored defendant, and factors (h) and (i) favored plaintiff, though the court placed little

or no weight on factor (i). The court found that factor (k) did not apply, and chose not to rely on additional considerations under factor (l). The trial court's key factual finding, however, concerned plaintiff's allegation that defendant abused his children. The trial court found no support for the allegation and determined that plaintiff "manufactured" it, apparently to punish defendant by frustrating his relationship with his children.

The trial court's finding regarding the abuse allegation was not against the great weight of the evidence. The record reflects no allegations of specific incidents of sexual abuse. The one incident vaguely referenced at trial allegedly occurred prior to the divorce, before plaintiff agreed to the initial visitation schedule. No investigator ever concluded that the abuse had actually occurred, nor did the prosecutor initiate any criminal charges against defendant. One witness opined that the child who remembered the alleged abuse had been "rehearsed" in the matter. In light of this evidence, the court's findings concerning plaintiff's pursuit of unsubstantiated sexual abuse allegations were not against the great weight of the evidence.

Plaintiff also challenges the trial court's findings regarding factors (a), (b), (c), (d), (f), (i), and (j). Regarding factor (a), plaintiff argues that the court erred in finding that plaintiff lacks the capacity to give the children proper guidance regarding their relationship with their father. We reject plaintiff's argument because the court actually rated the parties equal under factor (a). Moreover, the question of guidance arises under factor (b), not (a).

Regarding factor (b), plaintiff argues that the trial court erred in finding that plaintiff's frequent changing of her residence was irrational and beyond comprehension. The court, however, did not mention this fact when evaluating this factor. Instead, the court found that plaintiff demonstrated the capacity to provide love, affection, and guidance, but that defendant could also, if provided the opportunity. The court additionally found that plaintiff lacked the capacity to give the children proper guidance regarding their relationship with defendant. The court added that plaintiff's "ill intent" or "misguided" determination to pursue abuse allegations was seriously detrimental to the children. The record supports the court's findings. Plaintiff refused to permit visitation on countless occasions and repeatedly orchestrated nebulous allegations of sexual abuse.

The trial court's finding regarding factor (c) was likewise not against the great weight of the evidence. The court noted defendant's child support arrearage, but more strongly disapproved of plaintiff's repeated changing of her residence because the marital home provided substantially better housing. The court found that defendant's current home and circumstances were superior to plaintiff's home. We reject plaintiff's argument that she had to move because of foreclosure proceedings. Plaintiff knew that she had redemption rights and did not have to leave the home. Moreover, in light of the trial court's finding that plaintiff's pursuit of unsupported abuse allegations led to the children fearing defendant, we are not persuaded by plaintiff's argument that she moved because her children feared defendant.

Regarding factor (d), the trial court found that defendant maintained a stable home, whereas plaintiff did not because she unnecessarily changed her residence. Although the children had lived with plaintiff since the separation, the court's assessment of factor (d) involves more than comparing the time the children reside in the respective homes. The "desirability of maintaining continuity" is also part of the

determination. The trial court's finding that plaintiff destroyed this continuity without good reason was not against the great weight of the evidence.

Regarding factor (f), plaintiff objects to the trial court's criticism of her for continuing to pursue the abuse allegations because she was merely trying to protect the children. As previously discussed, the trial court's finding that plaintiff harmed her children by pursuing abuse allegations in an effort to destroy defendant's relationship with them was not against the great weight of the evidence. Therefore, the record supports the trial court's finding for defendant on this factor.

Regarding factor (i), plaintiff argues that the trial court erred in failing to inquire about the youngest child's preference. The court stated:

The children expressed a preference to the Court. Wait a minute, the two oldest children expressed a preference. I don't think the youngest did.

That preference was for Ms. Button. They gave me the reasons, which if true would seem reasonable, but in great part they related to issues of abuse and fear that are unsubstantiated, and which I think the respondent has helped to engender and imprint indelibly in their minds on the part of Mr. Button. So, I placed little or any [sic] reliance on it. I guess I'm just not going to--I'm not going to give it much weight, if any.

Assuming that the trial court did not question the five year-old child, the court's error, if any, does not require reversal because the court analyzed the factor as if the child expressed a preference for living with plaintiff. See *Treutle v Treutle*, 197 Mich App 690, 696; 495 NW2d 836 (1992).

We likewise reject plaintiff's contention that the trial court did not explain its reasons for discounting the two oldest children's preference for plaintiff. The court properly discounted the children's preference because it was not reasonable. The children's preference was clearly the product of plaintiff's use of unsupported abuse allegations to instill in them a fear of defendant.

Regarding factor (j), plaintiff argues that the trial court should have rated the parties equal because they both contributed to visitation problems. The record, however, reflects that plaintiff engaged in a pattern of denying visitation, culminating in the court twice finding her in contempt. Further, plaintiff's use of unsubstantiated abuse allegations as a means to destroy defendant's relationship with his children supports the trial court's determination that plaintiff will not facilitate and encourage a close relationship between defendant and the children. Therefore, the trial court's finding was not against the great weight of the evidence.

Plaintiff next argues that the trial court abused its discretion in changing custody because no clear and convincing evidence existed that the change was in the children's best interest. Again, we disagree. The record amply supports the trial court's decision. The court carefully weighed the evidence and properly determined that a change of custody was in the children's best interest. *Fletcher, supra* at 879-881.

II. Evidentiary Rulings

Plaintiff argues that the trial court abused its discretion in sustaining five of defendant's objections because the hearsay evidence fell within MRE 803(3). This Court reviews the trial

court's evidentiary rulings for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997). This Court, however, will not reverse on the basis of an evidentiary error unless the trial court's ruling affected a party's substantial rights. MCR 2.613(A); MRE 103(a); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329; 454 NW2d 610 (1990).

Plaintiff first asserts that the trial court abused its discretion in excluding her expert's testimony regarding the children's desire to remain with plaintiff. The record, however, reflects that the trial court did not rule on defendant's objection. Rather, counsel simply continued her direct examination after defendant objected. Therefore, the alleged error does not require reversal because error requiring reversal must be that of the trial court. *Fellows v Superior Products Co*, 201 Mich App 155, 165; 506 NW2d 534 (1993). Further, a party may not assign as error something his counsel deemed proper at trial. *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). In any event, the error, if any, was harmless because the trial court recognized the children's preference for plaintiff.

Plaintiff's remaining assertions of error likewise do not require reversal. Plaintiff contends that the trial court abused its discretion in excluding testimony by plaintiff, her expert and a friend of the court investigator regarding the children's expressions of fear of their father because the hearsay evidence was admissible under MRE 803(3). The court's error, however, was harmless because the record is replete with evidence of the children's fear. Further, the court considered the evidence in determining whether to change custody. Finally, the trial court did not abuse its discretion in excluding plaintiff's testimony regarding the children's statements about defendant's alleged drug use. The evidence was clearly hearsay and did not fall within MRE 803(3).

III. Other Issues

Plaintiff argues that the trial court abused its discretion in denying her request for either a new trial or to reopen proofs so that she could present six additional witnesses. We disagree. This Court reviews the trial court's decision to either grant a new trial or reopen proofs for an abuse of discretion. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959); *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997); *In re Merry Estate*, 174 Mich App 627, 635; 436 NW2d 421 (1989). Applications to reopen proofs "must be meritorious and show reasonable diligence in obtaining the claimed newly discovered evidence." *Cowan v Anderson*, 184 Mich 649, 656; 151 NW 608 (1915). In this case, however, plaintiff does not argue that the evidence is newly discovered. Rather, plaintiff asserts that trial counsel simply failed to subpoena four of the witnesses and subpoenaed the other two but they were "apparently unavailable."

We decline plaintiff's invitation to recognize counsel's alleged error in failing to call witnesses as grounds for reopening proofs. Plaintiff did not have a right to effective assistance of counsel in this custody proceeding. See *Haller v Haller*, 168 Mich App 198, 199; 423 NW2d 617 (1988). Moreover, counsel's incompetence is not grounds for a new trial in a civil action. *Everett v Everett*, 319 Mich 475, 482-483; 29 NW2d 19 (1947). Here, plaintiff offers no explanation for the witnesses' absence at trial other than counsel's alleged error. Therefore, the trial court properly declined to either reopen the proofs or grant a new trial.

Plaintiff next argues that the trial court erred in not appointing a guardian ad litem for her minor children. We disagree. In a custody dispute, the circuit court may appoint a guardian ad litem or counsel for a child if to do so is in the child's best interests. MCL 722.27(1)(e); MSA 25.312(7)(1)(e). Here, the trial court did not abuse its discretion in denying plaintiff's belated request during trial for appointment of a guardian ad litem.

Affirmed.

/s/ Maura D. Corrigan

/s/ Martin M. Doctoroff

/s/ E. Thomas Fitzgerald