STATE OF MICHIGAN

COURT OF APPEALS

LORI JO THEMEL,

Plaintiff-Appellant,

v

RANDOLPH MARSHALL ROBERTS,

Defendant-Appellee.

UNPUBLISHED
March 19, 2002

No. 233523
Ingham Circuit Court
LC No. 00-018881-DM

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce that granted the parties joint legal and physical custody of their daughter. We affirm.

At trial, defendant moved to preclude plaintiff from presenting evidence of her mental health pursuant to MCR 2.314(B)(2) because of her refusal to sign a release allowing defendant's witness to testify about a disputed joint counseling session. The trial court granted the motion over plaintiff's objection, and as a result, defendant's witness was the only non-party to testify at trial.

On appeal, plaintiff challenges the trial court's application of MCR 2.314 to her case. Whether a court rule is applicable is a question of law reviewed de novo. *In re PAP*, 247 Mich App 148, 152; __ NW2d __ (2001); see *LeGendre v Monroe Co*, 234 Mich App 708, 721; 600 NW2d 78 (1999).

The first consideration is whether plaintiff asserted a privilege in the manner specified by MCR 2.314(B)(1). By its terms, in order for this rule to apply, "[t]he privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C)." MCR 2.314(B)(1). In this case, there is no evidence in the record to show that plaintiff asserted a privilege in any of the four ways set forth in the court rule. Therefore, the rule is inapplicable.

Furthermore, "MCR 2.314 clearly contemplates the discovery of documentary or tangible medical information rather than testimonial medical information." *Gibson v Bronson Methodist Hospital*, 445 Mich 331, 336; 517 NW2d 736 (1994) (Levin, J.). Here, defendant's own

appellate brief states that plaintiff was asked to sign the release before trial "so that one of the Defendant-Appellee's witnesses, [a psychologist and marriage and family therapist], could discuss what occurred during a one-hour joint marital counseling session with the parties." Because defendant sought testimonial rather than documentary information, the rule is inapplicable for this reason as well.

Incorrectly choosing, interpreting, or applying the law constitutes clear legal error. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). However, this Court will only reverse if the trial court made a clear legal error on a major issue and the error was not harmless. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 882, 889; 526 NW2d 889 (1994). In this case, the erroneous application of the court rule was harmless. Because the court found that there was no established custodial environment, the trial court's custody decision was governed by the duty to decide, by a preponderance of the evidence, what custodial arrangement was in the child's best interests as defined in MCL 722.23 dictated. *Baker v Baker*, 411 Mich 567, 582; 309 NW2d 532 (1981); *Lewis v Lewis*, 138 Mich App 191, 193; 360 NW2d 170 (1984). Even if plaintiff had been able to present testimony regarding her mental health that the court found more persuasive than the testimony that defendant presented, it is doubtful that the trial court would have concluded that MCL 722.23(g) (regarding the mental and physical health of the parties involved) favored her, where the court's direct observation of plaintiff's behavior indicated that she had "major anger issues and hostilities" and anger dating back to the day the parties married, if not before then. Were factor (g) weighed equally, as were all other factors besides factor (j) (regarding the willingness and ability of each party to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents), the trial court's determination that factor (j) favored defendant demonstrates that, if sole physical custody were to be awarded, it more likely would be awarded to defendant. Yet, in spite of its determination that some of the factors (at least one) favored defendant, the trial court granted joint physical custody of the child. Further, the trial court admonished plaintiff that if that arrangement did not work out, there was a possibility of physical custody being awarded to defendant. Under these circumstances, we find the trial court's error harmless.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra