STATE OF MICHIGAN

COURT OF APPEALS

DAVID ROBERT SCHMIDT,

Plaintiff-Appellant,

v

LISA MARGARET SCHMIDT,

Defendant-Appellee.

UNPUBLISHED
July 26, 2002

No. 238454
Leelanau Circuit Court
LC No. 00-005142-DM

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce, contending that the trial court erred in awarding custody of the parties' two children to defendant and that the trial court's property award was inequitable. We affirm.

I

Plaintiff first argues that the trial court erred in awarding physical custody of the parties' two minor children to defendant.

A

Plaintiff contends that the trial court improperly excluded his rebuttal expert witness, Dr. Wayne Simmons, at trial. Plaintiff asserts that Dr. Simmons' testimony was necessary to discuss the findings of another expert, Dr. David Halstead, who had previously performed psychological evaluations of the parties and their children pursuant to the parties' stipulation.

We review the trial court's decision for an abuse of discretion. *Levinson v Sklar*, 181 Mich App 693, 699; 449 NW2d 682 (1989). Although this Court has stated that "[t]rial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires," *Pastrick v General Telephone Co of Michigan*, 162 Mich App 243, 245; 412 NW2d 279 (1987), plaintiff here has failed to show that the trial court's decision not to allow Dr. Simmons' testimony was an abuse of discretion.

Plaintiff maintains that he provided notice of his intent to call Dr. Simmons in early June 2001, which was more than three months before trial. As the trial court observed when deciding this issue, trial was scheduled to begin on June 11, 2001, and defendant did not receive notice of

plaintiff's intent to call Dr. Simmons until June 7, 2001. Also, the record does not support plaintiff's claim that justice required the late endorsement of this witness. The parties had previously stipulated to the use of Dr. Halstead as the psychiatrist in this case. "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). The record indicates that Dr. Halstead's report was available to both parties before the original referee hearing in February and March 2001, and Dr. Halstead testified at the referee hearing and was subject to cross-examination. Plaintiff did not seek an additional expert at that time and, instead, chose to rely on Dr. Halstead's determinations regarding defendant's mental health history as favoring a custody determination in his favor. Furthermore, even when plaintiff requested a de novo hearing before a judge after the referee's decision was not in his favor, plaintiff did not seek the endorsement of Dr. Simmons as an expert witness at that time. Nor did plaintiff inform defendant of his intention to call Dr. Simmons during the *de bene esse* deposition of Dr. Halstead on June 1 and 6, 2001. The first notice that defendant received regarding this undisclosed witness was in plaintiff's motion to adjourn trial, which was submitted on June 7, 2001, but not filed until June 11, 2001, the day trial was to commence. We agree with the trial court that plaintiff had ample opportunity to procure an additional expert prior to the referee's decision, complaining only when the referee's decision went against him. Under the circumstances, the trial court did not abuse its discretion in refusing to allow the late endorsement of Dr. Simmons.

B

Plaintiff next argues that the trial court erred in allowing the *de bene esse* deposition of Dr. Halstead at trial. The admission of deposition testimony at trial is generally left to the trial court's discretion. *Niemi v Upper Peninsula Orthopedic Associates, Ltd*, 173 Mich App 326, 328; 433 NW2d 363 (1988). Deposition testimony of an expert witness properly may be used in place of live testimony if the opposing party is given an opportunity to cross-examine the witness. MCR 2.308(A); MRE 803(18); MRE 804(b)(1); *Niemi, supra* at 328.

The record does not support plaintiff's claim that he was not afforded an opportunity to cross-examine Dr. Halstead during his deposition. The record indicates that plaintiff's counsel examined Dr. Halstead at length during the second day of his deposition on June 6, 2001. Moreover, plaintiff had ample opportunity to schedule further examination during the months following the deposition, but did not do so. There was no showing that Dr. Halstead was not amenable for further questioning. Furthermore, plaintiff has not shown what additional questions he desired to ask the expert. Under the circumstances, plaintiff has not shown that the court abused its discretion in allowing Dr. Halstead's deposition testimony.

C

Plaintiff also argues that the trial court erred in finding that no established custodial environment existed with plaintiff. The trial court's factual determination regarding the existence or absence of an established custodial environment is reviewed under a great weight of the evidence standard, which will be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

When defendant first moved to Lapeer in November 1999, plaintiff remained in Suttons Bay with the children, who were enrolled there in school. The parties agreed at that time that plaintiff and the children would join defendant at the end of the semester in December 1999. That did not occur as planned and the children were still residing in Suttons Bay in March 2000, when plaintiff filed for divorce. Shortly after plaintiff filed for divorce, defendant went to Suttons Bay and took the children with her to Lapeer, but they returned to plaintiff in Suttons Bay seventeen days later. The children remained with plaintiff until the summer of 2001, while the issue of custody was still in dispute, but defendant was allowed visitation every other weekend, alternating two-week periods during the summers, and some holidays and vacation periods. The trial court found that the children continued to rely on both parents for guidance during this time period. In April 2001, following the referee's recommendation, primary custody of the children was awarded to defendant, which took effect at the end of the school year in June 2001. Plaintiff was then allowed similar visitation privileges until the trial in September 2001.

We agree that the subsequent custody transfers and continuing custody dispute destroyed any custodial environment that may have initially been established with plaintiff. It is clear that the children were subject to repeated and continuous uncertainty about the eventual outcome of the dispute and, although they remained for various periods in somewhat stable situations, at no point was the environment so marked by stability, permanence, or security so as to render the trial court's decision against the great weight of the evidence.

D

Plaintiff next argues that the trial court erred in its consideration of the statutory best interest factors and in awarding defendant primary physical custody of the children.

Child custody disputes are to be resolved in the best interests of the children, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The great weight of the evidence standard applies to all findings of fact regarding each custody factor, and we will affirm those findings unless the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20. The abuse of discretion standard applies to the trial court's discretionary rulings, such as to whom custody is granted. *Id*.

The trial court found that the parties were equal with regard to factors a, b, h, and i, and found that factors c, d, e, f, g, j, k, and l favored defendant. Plaintiff challenges each of these findings, with the exception of factor b.

Regarding factor a (the love, affection, and other emotional ties existing between the parties involved and the children), the trial court found that both parties clearly loved the children and that the children were bonded equally to both parents. Although challenging this finding on appeal, plaintiff's counsel acknowledged in his opening argument that "both parents in this case are very loving and capable parents," and plaintiff himself testified at trial that defendant was a good mother to the children. Plaintiff has not shown that the trial court's decision to weigh this factor evenly is against the great weight of the evidence.

Regarding factor c (the capacity and disposition of the parties to provide food, clothing, medical care and other material needs), the trial court found that this factor favored defendant, given her higher income level and her efforts in focusing on the family and children while

plaintiff pursued his own interests. A review of the record reveals nothing to suggest that this finding is against the great weight of the evidence. Defendant testified that she pursued her education and career while continuing to care for the children while plaintiff pursued his own interests and that defendant was solely responsible for meeting the children's medical needs. Although plaintiff contends that defendant has a history of money mismanagement, he cites no evidence to support this assertion.

Regarding factor d (the length of time the children have lived in a stable, satisfactory environment and the desirability of maintaining stability), the trial court found that this factor favored defendant because, at the time of trial, the children had become well settled in Lapeer with defendant. Defendant testified at length about the children's current situation and adjustment. Plaintiff has not demonstrated that the trial court's determination with regard to this factor is against the great weight of the evidence.

Regarding factor e (the permanence as a family unit of the existing or proposed custodial homes), the trial court found that it favored defendant because of her large, supportive family, who were involved with the children on an ongoing basis. The evidence supports this finding and plaintiff has not shown that the trial court's finding is against the great weight of the evidence.

The trial court found that factor f (the moral fitness of the parties involved) also favored defendant, because of plaintiff's long history of drug and alcohol abuse. The trial court correctly noted that this factor relates to the parent-child relationship and the effect that the parent's conduct may have on that relationship. *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994). At trial, both defendant and her brother testified about plaintiff's extensive drug use, which included the use of marijuana, psychedelic mushrooms, "crystal meth," and cocaine. Defendant admitted using marijuana sparingly in the past, but not since 1991. There was also testimony that plaintiff's alcohol use led to an incident of domestic violence in February 1999, in the presence of the children. Moreover, defendant testified that plaintiff's ongoing drug use precipitated the divorce, that it had gotten worse from 1996 to 1999, and that the children observed such use. The trial court's decision to credit defendant's testimony and find that this factor clearly favored defendant is not against the great weight of the evidence.

The trial court found that factor g (the mental health of the parties) also favored defendant, noting that, while defendant admitted to a history of depression and anxiety, she had addressed it through treatment and medication, whereas plaintiff's erratic and emotional behavior and diagnosed "personality disorder, not otherwise specified, with significant traits of immaturity" continued to remain a greater problem. A review of the testimony, including the psychological report prepared by Dr. Halstead, supports the trial court's decision to weigh this factor in defendant's favor. Therefore, the trial court's finding with regard to this factor is not against the great weight of the evidence.

The trial court found that factor h (the home, school, and community record of the children) favored neither party. The trial court noted that the children had good school records and were well adjusted and behaved students. Plaintiff cites no evidence to support his assertion that the children's positive behavior was due more to his efforts than to defendant's, nor anything to suggest that the children's behavior changed for the worse when they moved to Lapeer with defendant. Moreover, plaintiff admitted at trial that both he and defendant had always nurtured

the children's education. The trial court's decision to weigh this factor equally was not against the great weight of the evidence.

Following an *in camera* hearing, the trial court found that the parties were equal with regard to factor i (the children's reasonable preference to remain with either parent), although the trial court did not disclose the preferences of the children on the record. Plaintiff's contention that the record indicates a repeated and unequivocal preference of the children to remain with plaintiff is overstated, inasmuch as the only reference is a single-sentence notation made by the referee in the April 25, 2001, recommendation and order that the children wanted to remain with their father so they could continue to attend St. Mary's school. Here, too, the referee stated that the children wanted the parties to reunite and the referee found this factor to be neutral because the children could not express a reasoned preference regarding whether they wished to stay with either party. Consequently, the trial court's finding is not against the great weight of the evidence.

With regard to factor j (the willingness of each parent to foster a relationship between the children and the other parent), the trial court found that defendant demonstrated a complete and sincere understanding of the need for the children to have their father in their lives, whereas plaintiff had engaged in behavior suggesting an attempt to manipulate the children in order to reconcile with defendant. The trial court, therefore, found that this factor favored defendant. We find no basis in the record for disturbing the trial court's determination on this factor, which was based largely on its evaluation of the credibility of the parties' testimony. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Plaintiff has not shown that the trial court's finding regarding this factor is against the great weight of the evidence.

The trial court found that factor k (the occurrence of domestic violence), strongly favored defendant. As the trial court observed, the record reveals several episodes of domestic violence by plaintiff, as well as other instances of emotional abuse by plaintiff. The trial court specifically noted one incident, in February 1999, during which plaintiff assaulted defendant's brother at the parties' home, breaking his wrist and biting him in the leg while terrorizing defendant's mother in the presence of the children. Plaintiff's version of the incident (that it arose because defendant's brother brought drugs into the house and he would not leave when plaintiff confronted him) does not reconcile with the testimony of either defendant or her mother, who both stated that plaintiff was under the influence of alcohol and was acting irrationally. Plaintiff's differing version of this incident is insufficient to render the trial court's finding with regard to factor k as being against the great weight of the evidence.

Regarding factor l (any other relevant factor), it appears that the trial court largely reiterated its prior findings, determining that defendant was the more fit parent because of her continued involvement in the children's lives and her willingness to direct her energies toward the family and the children rather than her own interests. Plaintiff has failed to show that the trial court's finding was against the great weight of the evidence.

Having reviewed the record, we find no error in the trial court's evaluation of the best interest factors. We emphasize that the trial court's factual findings regarding the statutory factors should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 879. Here, the record supports the factual findings and we cannot conclude that the evidence clearly preponderates in the opposite direction. Therefore, we conclude that the

trial court did not abuse its discretion in awarding custody of the children to defendant. *Id.* at 880-881.

II

Next, plaintiff challenges the trial court's property distribution, maintaining that the trial court's ruling in this regard was unfair and inequitable.

A

Plaintiff first contends that the trial court erred in failing to award spousal support to him. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party; alimony is to be based on what is just and reasonable under the circumstances of the case. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). We review the trial court's factual findings in connection with the decision whether to award alimony for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Once a determination has been made that the factual findings are not clearly erroneous, we will affirm the trial court's decision unless convinced that it was inequitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

The trial court noted the income disparity between the parties, but found that it was principally due to plaintiff's lack of motivation and follow through rather than any acts of family sacrifice, noting that plaintiff failed to take advantage of either of two full scholarship opportunities. Further, plaintiff offered no explanation for why he did not pursue his parents' offer to take over their flower shop business. The trial court also found plaintiff to be primarily responsible for the dissolution of the marriage because of his continuing substance abuse problem, his mental and emotional abuse of defendant, and his "pursuit of his own needs and desires while leaving it to defendant to essentially support the family and provide stability in the home."

The trial court considered the relevant factors, *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993), and its findings are supported by the record. Consequently, we conclude that the trial court's decision to not award spousal support to plaintiff was not inequitable in light of the facts of the case.

B

Plaintiff next argues that the trial court erred in deciding to charge plaintiff with an outstanding debt arising from a loan by plaintiff's mother to the parties. In evaluating a trial court's property distribution, we review the trial court's findings of fact for clear error. If the factual findings of the trial court are upheld, we then determine whether the property distribution is fair and equitable in light of the facts found. *Sparks*, *supra* at 151-152.

A review of the record reveals that the trial court did not clearly err in finding that the parties did not owe plaintiff's mother the entire amount of the original loan ($30,000), but a lesser amount. As the trial court observed, there was evidence that a portion of that amount had been repaid and plaintiff never identified the remaining balance that allegedly was due. Moreover, defendant, while admitting borrowing a sum several years earlier, testified that she

did not know how much was originally borrowed and could not obtain the current balance from plaintiff's mother. The trial court's decision to allocate this debt to plaintiff, viewed in the context of the overall property distribution and decision to hold defendant responsible for other debts, was not inequitable in light of the facts.

C

Lastly, plaintiff argues that the trial court erred in allowing defendant the option of filing individual tax returns for the last years of the parties' marriage. In this regard, the parties had failed to file tax returns for several years. Plaintiff maintains that this would result in a disproportionate allocation of the tax liability to him and that defendant was solely responsible for the failure to pay the taxes.

Plaintiff has not cited any portion of the record in support of this factual assertion, nor does he cite any legal authority in support of his position, making our review of this issue nearly impossible. We note that the record does not support plaintiff's claim that defendant was solely responsible for the failure to pay the taxes. Defendant's testimony in this regard was that she had assumed the responsibility to file the taxes. Moreover, the trial court allowed the parties to file either jointly or singly after consultation with an accountant. Plaintiff has not established any error with respect to the trial court's determination in this regard.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder