STATE OF MICHIGAN

COURT OF APPEALS

CRAIG ANSON WINNIE,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

JULIE ANN WINNIE,

Defendant/Counterplaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
November 22, 2002

No. 237719
Alger Circuit Court
LC No. 99-003370-DM

Before: Hood, P.J. and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce that awarded plaintiff legal and physical custody of the parties' two minor daughters. Plaintiff cross appeals, challenging in several respects the circuit court's division of marital assets. We affirm the trial court's decision in all respects.

To characterize this proceeding as contentious and acrimonious is an understatement. The record consists of numerous pre-trial motions and hearings and nine days of testimony, much of which addressed the custody issues. The trial court then rendered a thorough opinion, with which we agree.

I

The parties' fourteen-year marriage disintegrated in 1999, after defendant made allegations that the parties' older daughter Rachael, who was born in 1992, had been sexually abused by her second grade teacher and other members of the local community in Grand Marais, Michigan, who allegedly belonged to a satanic cult. In early 2000, defendant also accused plaintiff of being involved in sexually abusing the parties' children. Plaintiff disbelieved the allegations of abuse regarding Rachael and attributed their origin to defendant. Plaintiff denied ever abusing the children himself. During the seven-day custody phase of the trial, plaintiff presented evidence that several state police and Family Independence Agency investigations had uncovered no abuse of the children by anyone. Defendant presented evidence that included an opinion by a psychologist specializing in ritual abuse that Rachael likely had been sexually abused, and the testimony of a forensic psychologist who opined that defendant reasonably

believed that the children had suffered abuse and that plaintiff posed a danger to the children's safety.

II

Defendant first challenges the circuit court's determinations that the children had an established custodial environment with plaintiff, and that an award of legal and physical custody of the children to plaintiff served the children's best interests.

In a child custody dispute, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. The court's factual findings regarding the existence of an established custodial environment and regarding each custody factor within MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). When reviewing a circuit court's factual findings, this Court defers to the court's credibility determinations. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

A

Before making a determination regarding the children's best interests, the circuit court must ascertain whether an established custodial environment exists. MCL 722.27(1)(c); *Mogle*, *supra* at 197. An established custodial environment exists

> 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment may arise pursuant to a temporary court order with respect to custody, pursuant to a court order that subsequently was reversed, in violation of a court order, or in the absence of a court order. *Hayes v Hayes*, 209 Mich App 385, 388-389; 532 NW2d 190 (1995).

Ample evidence supports the circuit court's determination that the children had an established custodial environment with plaintiff. By the time the circuit court issued its August 2001 opinion, the children had resided in the parties' marital home in plaintiff's primary custody for approximately twenty-one months pursuant to court orders.[1] Furthermore, the testimony of plaintiff, defendant's mother, Rachael's teacher, the superintendent of Rachael's school and a Friend of the Court counselor, as well as the court-appointed psychologist's evaluations of the

[1] Since December 1999, the children had resided primarily in plaintiff's custody pursuant to a temporary custody order that placed the children with plaintiff on weekdays and authorized defendant to have weekend visitations, and a May 5, 2000, order of the court restricting defendant to 1-1/2 hours of weekly, supervised visitation with the children.

children, indicated that (1) both children appeared happy and performed well at school since arriving in plaintiff's custody, (2) the children appeared more confident and outgoing since being placed in plaintiff's custody, (3) the children loved plaintiff and displayed no fear of him or other signs of abuse, (3) plaintiff actively participated in the children's education and took them to Sunday school, and (4) plaintiff displayed concern for the children's well being and otherwise performed as a good and loving father. The children also had friends near the marital home, where plaintiff intended to remain.

This evidence shows that the children had a relationship with plaintiff of significant duration, which was "marked by qualities of security, stability and permanence." *Mogle, supra* at 197, quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). The evidence did not clearly preponderate against the circuit court's finding that an established custodial environment existed with plaintiff. *Phillips, supra*. To the extent that defendant relies on her expert witness' characterization of plaintiff as a threat to the children, the circuit court expressly noted that it simply did not find the expert's testimony credible, and this Court will not second guess the circuit court's credibility determination. *Mogle, supra* at 201.

B

Defendant also challenges the circuit court's various findings regarding the children's best interests, arguing that many of the court's best interest findings incorporated the court's erroneous determination that defendant's beliefs regarding the children's abuse derived from delusions or paranoia.

Because the children had an established custodial environment with plaintiff, to prevail with respect to her claim for custody of the children defendant had to demonstrate clearly and convincingly that a change in the children's custody would serve the children's best interests. MCL 722.27(1)(c); *Heltzel v Heltzel*, 248 Mich App 1, 27 n 17; 638 NW2d 123 (2001). In reaching its conclusion regarding the children's best interests, a court must apply the statutory factors listed in MCL 722.23.

We initially reject defendant's suggestion that the circuit court erred in its factual finding that defendant, "as a result of her own personality disorder of paranoia, has projected her erroneous beliefs on her daughters." The voluminous record contains abundant evidence establishing that no abuse of the children occurred at the hands of plaintiff or others in Grand Marais, including: (1) the testimony that the children did not appear afraid of plaintiff and did not exhibit any signs of abuse; (2) the testimony of Rachael's teacher and the school superintendent that Rachael did not display a fear of the school where some of her abuse allegedly took place; (3) the superintendent's testimony that he closely monitored the activity within the small school and would have known whether the alleged acts of abuse occurred; and (4) the superintendent's and another teacher's testimony regarding the unlikelihood that a teacher could successfully accomplish the acts of abuse alleged by defendant. Further evidence that no abuse occurred included the testimony of three state police officers and an FIA worker detailing their investigations into defendant's allegations of the children's abuse by plaintiff and others,

none of which uncovered evidence corroborating defendant's allegations and all of which concluded that no abuse occurred.[2]

Plaintiff, defendant's mother, the school superintendent, the investigating police officers and the FIA worker all specifically testified that they believed that defendant had made up the allegations of abuse and projected them onto the children. Plaintiff suggested that the allegations of abuse of Rachael reported by defendant appeared similar to those detailed in a book authored by defendant's therapist. Plaintiff also recalled that defendant and her sister previously had alleged their own sexual abuse by their father and brother, which plaintiff and defendant's mother denied had validity.

This evidence amply supports the circuit court's determination that defendant "imposed thoughts on the children about abuse that were not true." To the extent that defendant again heavily relies on the testimony of her proffered expert witnesses, the circuit court expressly discounted and found incredible the testimony of these experts. The court cited the experts' lack of or minimal contact with the parties and the children, and one expert's questionable credentials and apparent bias against plaintiff. We reiterate that we will not revisit the circuit court's credibility determinations. *Mogle*, *supra* at 201.

Best interests of the children

With respect to MCL 722.23(a), "[t]he love, affection, and other emotional ties existing between the parties involved and the child[ren]," the circuit court characterized this factor as even because it had no doubt that the parties "love their children and the love is reciprocated." The record appears virtually undisputed that both parties loved the children and that the children loved the parties.

Regarding MCL 722.23(b), "[t]he capacity and disposition of the parties involved to give the child[ren] love, affection, and guidance, and to continue the education and raising of the child[ren] in . . . [their] religion or creed, if any," the circuit court found that this factor favors plaintiff because defendant's adherence to beliefs that the children suffered abuse adversely affected her capacity and disposition to offer the children guidance. Ample evidence discussed above reflects that, while plaintiff provided the children an established custodial environment, defendant repeatedly made unsupported allegations of abuse and attempted to persuade the children of the veracity of the allegations.

With respect to MCL 722.23(c), "[t]he capacity and disposition of the parties involved to provide the child[ren] with food, clothing, medical care . . . and other material needs," the circuit court found that this factor favors plaintiff because defendant had not demonstrated her capacity or disposition to provide the children appropriate medical care. The record indicates that on two occasions while this case was pending defendant took the children to emergency rooms on the basis of her allegations that plaintiff had sexually abused them, and that neither hospital visit

[2] These investigations included multiple interviews with the children, the parties, the alleged abusers and others, physical examinations of the children, plaintiff's submission to a polygraph examination, visitation of alleged crime scenes, and examinations into the presence or absence of tattoos on alleged abusers.

substantiated any abuse. The record also reflects that defendant took Rachael to a therapist specializing in ritual abuse whom defendant hoped would verify the allegations of abuse. Defendant also indicated repeatedly during the circuit court proceedings her desire that the children undergo further examinations and therapy to ascertain what happened to them. Accordingly, the record supports the circuit court's determination that factor (c) favors plaintiff.

Regarding MCL 722.23(d), "[t]he length of time the children ha[ve] lived in a stable, satisfactory environment, and the desirability of maintaining continuity," the evidence discussed above regarding the children's established custodial environment with plaintiff amply supports the circuit court's determination that factor (d) favors plaintiff.

In regards to MCL 722.23(e), "[t]he permanence, as a family unit, of the existing or proposed custodial home," the evidence established that the children had resided in the parties' marital home for most of their lives, including during the divorce proceedings when the children resided in an established custodial environment with plaintiff, and that plaintiff intended to continue living in the marital home. This evidence, and defendant's failure to testify regarding a plan for the children, supports the circuit court's finding that factor (e) favors plaintiff.

With respect to MCL 722.23(f), "[t]he moral fitness of the parties involved," the circuit court found that this factor did not favor either party. Defendant repeatedly questioned her expert therapist and plaintiff regarding plaintiff's past acts of masturbating with the aid of nylons, and suggested when questioning her expert therapist that plaintiff had forced defendant to engage in nonconsensual, "sadomasochistic" activities. The circuit court found no credible evidence that plaintiff had forced defendant to have sex or that plaintiff had displayed any sexual behavior to the children, and our review of the record supports the court's determinations.

Regarding MCL 722.23(g), "[t]he mental and physical health of the parties involved," the circuit court found that this factor favors plaintiff because defendant appeared to have and to act on "delusional beliefs regarding ritual sexual abuse." As we have discussed, the evidence amply supports the circuit court's finding that defendant repeatedly projected onto the children allegations that they had suffered sexual abuse despite substantial evidence to the contrary. To the extent that defendant suggests that the court should not have considered the independent psychologists' expert opinions and other testimony proffered by plaintiff, we repeat that we will not second guess the court's decision to weigh more heavily the evidence provided by plaintiff than the contrary opinions set forth by defendant's expert psychologist. *Mogle, supra*.

With respect to MCL 722.23(h), "[t]he home, school, and community record of the child[ren]," the testimony regarding the children's enjoyment of and good performance at school, plaintiff's active participation in the children's schooling, and the children's loving and positive relationship with plaintiff supports the circuit court's determination that this factor favors plaintiff.

Regarding MCL 722.23(j),[3] "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child[ren]

[3] The circuit court did not address "[t]he reasonable preference of the child[ren]," MCL 722.23(i), because the parties stipulated that the court should not interview the children.

and the other parent," the circuit court found that this factor favors plaintiff. Plaintiff testified that he knew the children needed their mother and that he would facilitate the continuity of the children's relationship with defendant. The testimony of plaintiff and defendant's mother indicated that defendant previously had refused to permit Rachael contact with her grandparents and uncle, all of whom defendant had accused of abuse. We also note the testimony reflecting that defendant once kidnapped the children on the basis of an ultimately unfounded suspicion that plaintiff had sexually abused them. All of this evidence supports the court's finding that this factor favors plaintiff.

With respect to MCL 722.23(k), "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child[ren]," our review of the record supports the circuit court's finding that this factor does not favor either party in light of the scarcity of evidence regarding the occurrence of domestic violence during the marriage.

Regarding MCL 722.23(l), "[a]ny other factor considered by the court to be relevant to a particular child custody dispute," the circuit court noted that it placed "considerable weight on the [guardian ad litem's] recommendation." The guardian ad litem interviewed the parties and the children, participated in the lengthy trial, and produced a very thorough summary of the evidence presented, which supports the circuit court's decision to award plaintiff legal and physical custody of the children.

After reviewing the record, we cannot conclude that the evidence clearly preponderates against any of the circuit court's findings regarding the statutory best interest factors. *Phillips*, *supra* at 20. Because the circuit court correctly found that most of the statutory factors favor plaintiff, we conclude that the court did not abuse its discretion in awarding plaintiff legal and physical custody of the children. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998).

III

Defendant next argues that the circuit court judges who presided over the case deprived her of due process by acting on biases in favor of plaintiff and against her throughout the proceedings. Defendant's due process claim raises a constitutional question that we review de novo. *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 222; 591 NW2d 52 (1998).

We note that defendant has failed to properly present this issue for our review because she presents no authority supporting the proposition that her various allegations of improper conduct amounted to a due process violation. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002). Nonetheless, in the interest of enhancing defendant's perception of justice in this case, we will briefly address the due process argument. *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998).

Most of defendant's complaints have been reviewed and rereviewed by several judges during four pretrial hearings held pursuant to defendant's repeated motions to disqualify the presiding judges and other judicial officers. Defendant characterized nearly every occurrence even remotely adverse to her during the entire proceedings as an "abuse" by either one of the

several different judges who presided over the trial or by other court personnel that had a part in the case.[4]

Our review of the entire record and defendant's heavily documented motions to disqualify reflect several judges' careful consideration of defendant's repeated allegations of bias and impropriety, yet no substantiation of defendant's claims. After repeated examination of the record in the context of defendant's allegations of bias and improper conduct, the five different judges who heard defendant's motions all determined that no evidence of actual bias or prejudice against defendant existed, and that defendant had not otherwise been deprived of due process. Nonetheless, in an effort to alleviate defendant's fears and perceptions of impropriety, two of the presiding judges were removed from the case on the bases that defense counsel had strongly criticized one of them, and that another judge had presided over a criminal matter involving defendant. *Crampton v Dep't of State*, 395 Mich 347, 351-353; 235 NW2d 352 (1975).

We reject defendant's suggestion that the judge who presided over the trial "canceled 1-1/2 days of remaining trial time rather than allow [defendant's] testimony." Our review of the record reveals that after the court allotted the parties 351 minutes of trial time going into the sixth day of the custody phase of trial, defendant expended approximately 320 of her minutes interrogating for very nearly an entire day her expert witness, who already had testified at some length, and plaintiff. Defendant ignored the court's cautions regarding her waning trial time. Defendant's knowing expenditure of her remaining trial time on witnesses other than herself precludes her from arguing on appeal that any error in this regard occurred. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998).

We lastly reject defendant's suggestion that the judge who ultimately presided over the trial displayed undue "hardness" toward her and her case or engaged in an "obstruction of disfavored proofs." The record reflects that the trial judge, who more than once characterized the instant case as "the longest divorce case in the history of Marquette County," occasionally chastised *both* plaintiff's and defendant's counsel for their repetitious arguments and objections, from time to time criticized defense counsel's confusing and improper questions, once sanctioned or threatened to sanction defense counsel with contempt for tossing a pen in the air after the court had warned him not to do so, and otherwise made certain that the parties understood that he was "in control of this proceeding." However, the trial judge also permitted defendant generous time for examining and cross-examining witnesses and granted defense counsel leeway in admitting many items of evidence. Because none of the judge's actions in controlling the conduct of the trial especially affected defendant, precluded defense counsel's vigorous advocacy on behalf of defendant, or otherwise prevented defendant from presenting her case, we conclude that no due process violation occurred. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000).

[4] Defendant's arguments included that the various presiding trial judges and other authorities had assisted plaintiff in winning his case, that the judges had engaged in improper ex parte communications, that plaintiff had bribed nonjudicial officials involved in the case, that judges had unfavorable dispositions toward defense counsel, and that the judges had deprived defendant of her right of access to the courts by refusing to give her requested hearings and by making up their minds regarding the merits of defendant's positions before any hearings occurred.

IV

Plaintiff contends on cross appeal that in calculating the marital property distribution the circuit court erred in failing to award plaintiff credits for (1) $7,114.49 that defendant expended from a joint stock account to pay for litigation expenses, and (2) insurance proceeds arising from the destruction of a barn on a parcel of marital real property that the court awarded to defendant. Plaintiff has provided this Court no argument with supporting authority regarding his claims of entitlement to credits with respect to these amounts. Plaintiff may not rely on this Court to discover and rationalize the basis for his claims, or unravel and elaborate his arguments *Columbia Assoc's, LP v Dep't of Treasury*, 250 Mich App 656, 678; 649 NW2d 760 (2002).[5]

V

Plaintiff also argues on cross appeal that the circuit court improperly calculated a property distribution credit for monthly payments of $2,000 that he made to defendant during the pendency of the proceedings. If the circuit court's factual findings are not clearly erroneous, this Court should affirm the circuit court's discretionary dispositional ruling unless it possesses the firm conviction that the circuit court's property division was inequitable. *Welling v Welling*, 233 Mich App 708, 709-710; 592 NW2d 822 (1999).

In December 1999, a stipulated order was entered that provided for plaintiff's monthly payment of $2,000 to defendant for the shorter of five months or the duration of the proceedings, and further explicitly provided that these amounts were "a preliminary property distribution and not support" for which "[p]laintiff will receive credit . . . off the top of the property settlement." In May 2000, the circuit court entered a subsequent order that provided for continuation of the $2,000 monthly payments to defendant "as a disbursement from the marital estate" "until further order of this Court," but the order made no mention that plaintiff would receive credits for these further payments.

We find no fault in the circuit court's decision to award plaintiff a credit of $10,000 for his monthly payments pursuant to the December 1999 order, and not to award plaintiff a $26,000 credit for the thirteen monthly payments that he made pursuant to the May 2000 order. The circuit court properly enforced the parties' agreement that plaintiff would receive credit pursuant to the December 1999 order. *Bers v Bers*, 161 Mich App 457, 463; 411 NW2d 732 (1987). In light of the fact that the May 2000 order did not expressly contemplate plaintiff's entitlement to credit and that the record supports the circuit court's observation that plaintiff had maintained

[5] We further observe that the circuit court's property distribution appears wholly equitable. *Welling v Welling*, 233 Mich App 708, 709-710; 592 NW2d 822 (1999). Plaintiff's own exhibits and testimony established that he spent between $15,000 and $25,000 on attorney fees utilizing money that the parties had earned during the marriage. Furthermore, the insurance proceeds existed to compensate the diminishment in value of real property that the circuit court, without objection, awarded to defendant.

exclusive control over nearly the entire marital estate throughout the extended divorce proceedings, we cannot characterize the court's decision not to award plaintiff a further credit of $26,000 as unfair or inequitable. *Welling*, *supra*.

Affirmed.

/s/ Harold Hood
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell