STATE OF MICHIGAN

COURT OF APPEALS

JANICE KAY COATES,

Plaintiff-Appellant,

v

ALLAN GRAYSON COATES,

Defendant-Appellee,

and

COATES MINORS,

Appellee.

UNPUBLISHED
February 28, 2008

No. 279912
Kent Circuit Court
LC No. 03-011857-DM

Before: Wilder, P.J., Saad, C.J., and Smolenski, J.

PER CURIAM.

In this child custody dispute, plaintiff appeals as of right from a divorce judgment awarding sole legal and physical custody of the parties' three children to defendant. We affirm.

Three standards of review apply in child custody cases. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). As explained in *Foskett v Foskett*, 247 Mich App 1, 4-5, 634 NW2d 363 (2001):

> The clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law. Findings of fact are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this Court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. [Citations omitted.]

We shall first consider plaintiff's claim that the trial court erred by admitting and considering the report prepared by the lawyer-guardian ad litem (LGAL), who was appointed to represent the children.

We conclude that plaintiff waived any challenge to the admission of the LGAL's report by stipulating to the admission of all reports generated by the LGAL, as part of the stipulated order appointing the LGAL. The Child Custody Act, MCL 722.24(3), authorizes the admission of reports pursuant to stipulations. Stipulations relating to evidentiary matters, which are evidenced by a writing subscribed by the party against whom the agreement is offered, are binding. MCR 2.507(G)[1]; *In re Freiburger,* 153 Mich App 251, 261; 395 NW2d 300 (1986).

And while it is appropriate to consider the surrounding circumstances when construing a stipulation and it should not be given a construction that would "give the effect of waiver of a right not plainly intended to be relinquished," *Whitley v Chrysler Corp,* 373 Mich 469, 474; 130 NW2d 26 (1964), plaintiff here has not established anything about the content of the LGAL's report or her statutory duties that take the report outside the bounds of the stipulation. Both parties took the risk that the LGAL's report might be adverse to their interests. Further, we find no merit to plaintiff's treatment of the report as a "witness" in contravention of MCL 712A.17d(3). This provision applies only to the calling of the LGAL as a witness. The Child Custody Act, MCL 722.24(3), authorized the filing of the LGAL's report and recommendation by stipulation. An unambiguous statute is to be enforced as written. *Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007). Therefore, the parties' stipulation was binding under MCR 2.507(G) and plaintiff waived any objection to the admission of the LGAL's report as evidence at trial.

Plaintiff's argument in her reply brief that the trial court should have granted her pretrial motion to remove the LGAL is a distinct issue. This issue is not properly before this Court, however, because "[r]eply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc,* 259 Mich App 241, 252; 673 NW2d 805 (2003). To properly present an issue for appellate consideration, it must be set forth in the statement of questions presented. MCR 7.212(C)(5); *Busch v Holmes,* 256 Mich App 4, 12; 662 NW2d 64 (2003). Although this Court may overlook preservation requirements, *Steward v Panek,* 251 Mich App 546, 554; 652 NW2d 232 (2002), considering plaintiff's cursory treatment of this issue and the grounds on which the trial court denied her motion, appellate consideration is not appropriate. *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 14; 672 NW2d 351 (2003); *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court").

But our determination that plaintiff has not established that the LGAL's report was erroneously admitted at trial is not dispositive of whether the report was properly used by the trial court. This is so because essential to the admissibility of evidence is its purpose. See *People v Sabin (After Remand),* 463 Mich 43, 56; 614 NW2d 888 (2000). The admission of a report can raise hearsay concerns when statements contained therein are offered to prove the truth of the matter asserted. See MRE 801(c); MRE 805; *In re Freiburger, supra* at 259-260.

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[1] Formerly MCR 2.507(H).

In this case, however, plaintiff failed to raise any evidentiary objection, despite being given the opportunity to do so, when the LGAL's report was admitted at trial. Further, while a court may take notice of plain evidentiary error affecting a party's substantial rights, MRE 103(d), plaintiff has not adequately briefed any improper hearsay use of the report by the trial court. *Prince, supra* at 197. Plaintiff also claims that the trial court improperly delegated its judicial functions to the LGAL, contrary to *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116; 559 NW2d 54 (1996). The record does not support plaintiff's claim. Although the trial court's decision indicates that the report was considered, the court gave both parties an opportunity to present other evidence at trial, interviewed the children, made its own findings regarding the best interest factors in MCL 722.23, and exercised independent judgment in concluding that custody should be awarded to defendant. We therefore reject plaintiff's claim that the trial court's use of the report requires reversal.

Next, plaintiff argues that the trial court erred by excluding the testimony and progress notes of Clifton Burrows, with respect to his counseling sessions with defendant. Burrows was not available when plaintiff offered to either present his testimony or, alternatively, take his deposition. Substantively, plaintiff's offer at trial is more appropriately viewed as a motion to adjourn the trial to secure testimony of an unavailable witness. See MCR 2.503(C). A trial court has discretion in deciding such a motion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). Considering that the case had been pending for approximately 2 ½ years before the custody trial was conducted, and that plaintiff had notice of the trial dates, we find no abuse of discretion. Plaintiff's counsel's explanation regarding the subpoena served on Burrows shortly before trial and Burrows's planned vacation was inadequate to demonstrate that plaintiff exercised due diligence to either secure Burrows's presence or preserve or present his testimony in some other manner. See MCR 3.210(A)(3) and (4); *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

Because plaintiff did not make an offer of proof at trial with regard to Burrows's progress notes, without his testimony or other evidence to authenticate it, we conclude that plaintiff failed to preserve any claim that the trial court should have admitted the documentary evidence without Burrows's testimony. MRE 103(a). And while a court may take notice of plain evidentiary error affecting a party's substantial rights, MRE 103(d), the proponent of evidence has the burden of establishing the relevance and admissibility of evidence. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Because plaintiff does not address any basis for finding plain error based on the offer made at trial, we decline to consider this issue further. *Prince, supra* at 197.

Next, plaintiff argues that the trial court erred by not allowing Susan deGroot to testify as an expert witness with regard to the children's problems. Plaintiff's counsel offered deGroot as an expert in the area of "assessing the children's mental and emotional health problems." However, plaintiff abandoned any claim that deGroot should have been permitted to testify about what she was told by the children. The trial court agreed to consider the admissibility of deGroot's testimony for this purpose, but plaintiff failed to follow through with the trial court's request for a legal memorandum on this issue. Cf. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979).

To the extent that plaintiff challenges the trial court's determination—before it requested the memorandum—that deGroot was not qualified to testify as an expert, the record does not

support plaintiff's argument that the trial court relied solely on deGroot's educational level in reaching this decision, or declined to allow her testimony in order to shorten the trial. Further, plaintiff has not demonstrated that the trial court's decision to disallow deGroot's testimony, subject to plaintiff's ability to submit the memorandum, fell outside the range of principled outcomes. See *Barnett v Hidalgo,* 478 Mich 151, 158-159; 732 NW2d 472 (2007). Therefore, plaintiff is not entitled to relief on this basis.

Next, plaintiff argues that she was deprived of procedural due process. We disagree. Due process requires fundamental fairness. *Reed v Reed,* 265 Mich App 131, 159; 693 NW2d 825 (2005). "Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co,* 210 Mich App 249, 253; 533 NW2d 13 (1995). A party must be allowed a chance to know and respond to evidence. *Id.*

But due process is not violated where evidentiary rulings comport with constitutional and other rules of evidence. *Woodard, supra* at 571 n 16. Here, we have already rejected plaintiff's claims of evidentiary error. Further, we have rejected plaintiff's claim that the trial court improperly delegated judicial authority to the LGAL. We find no merit to plaintiff's position that she was deprived of an impartial decisionmaker. Further, plaintiff has not established that the trial court's decision to schedule the trial for two days contravenes fundamental fairness. A trial court has broad discretion in matters of trial conduct, including the presentation of evidence. MRE 611. "Child custody cases are tedious and slow. The evidence tends to be cumulative and repetitive. The trial court does have discretion to discourage cumulation and repetition." *Wealton v Wealton,* 120 Mich App 406, 410; 327 NW2d 493 (1982). Considering that there is no indication in the record that plaintiff timely objected to the trial court's scheduling decision, and has failed to show evidentiary error, we conclude that she was not denied due process.

Turning to plaintiff's claim that the trial court abused its discretion by denying her motion for reconsideration of its custody decision without explaining its decision, we note that the court rule on which plaintiff relied, MCR 2.119(F), applies only to motion practice. Even if the rule applies to the trial court's custody decision, however, a trial court is not required to explain a decision denying reconsideration. MCR 2.517(A)(4); see also *Yakowich v Dep't of Consumer & Industry Services,* 239 Mich App 506, 510 n 6; 608 NW2d 110 (2000). Therefore, the trial court did not err by failing to explain its decision.

With respect to plaintiff's challenge to the trial court's denial of her motion for a new trial under MCR 2.611, we generally review such a decision for an abuse of discretion. *Gilbert, supra* at 761. An abuse of discretion occurs when a decision "results in an outcome falling outside the principled range of outcomes." *Woodard, supra* at 557. Here, however, plaintiff has insufficiently briefed the issue. She presents this issue by simply quoting her post-trial motions for a new trial and a stay. Although the trial court's explanation for denying the motions was brief, we deem plaintiff's claim that the trial court should have recognized the legal errors that she raised in her motion abandoned for failure to adequately brief this claim. *Peterson Novelties, Inc, supra* at 14; see also MCR 7.212(C)(7); *Derderian v Genesys Health Care Systems,* 263 Mich App 364, 388; 689 NW2d 145 (2004) (stating that this Court will not search the record for factual support for a plaintiff's claim).

To the extent that the quoted motions raise the same issues that we have already considered in this appeal, we find no basis for a new trial. To the extent that plaintiff attacked the performance of her trial counsel, we agree with defendant that relief is not warranted because a claim of ineffective assistance of counsel is not available to a party in a divorce action. See *Haller v Haller*, 168 Mich App 198, 199; 423 NW2d 617 (1988).

Finally, to the extent that plaintiff challenges the trial court's findings with respect to best interest factors in MCL 722.23, a motion for new trial was unnecessary for plaintiff to raise this issue on appeal. MCR 2.517(A)(7). We review the trial court's findings under a great weight of the evidence standard. *Foskett, supra* at 5. Deference is given to the trial court's superior ability to judge the credibility of witnesses who appeared before it. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). The trial court's application of the law is reviewed for clear legal error. *Foskett, supra.*

Plaintiff has failed to show that any finding by the trial court warrants appellate relief. In particular, we note that the trial court's remarks regarding its interviews of the children do not reflect that the court used the interviews for a purpose other than to apply MCL 722.23(i). See MCR 3.210(C)(5); *Thompson v Thompson*, 261 Mich App 353, 364-365; 683 NW2d 250 (2004). Further, the testimony regarding plaintiff's sessions with Dr. Osborn, while indicating that the sessions provided plaintiff with a supportive environment, was not inconsistent with the trial court's finding when evaluating MCL 722.23(g), that plaintiff was developing little or no insight into her own emotional health and struggles. Overall, it is apparent that this was a difficult case because the trial court also found, when evaluating the domestic violence factor, MCL 722.23(k), that defendant was primarily responsible for the problems that plaintiff may continue to endure. But the overriding concern in applying the best interest factors is the children's welfare. *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 595; 532 NW2d 205 (1995). Each best interest factor relates to parental fitness. *Fletcher, supra* at 887. Limiting our review to the trial record, plaintiff has not identified any best interest factor for which it could be said that the trial court committed a clear legal error or made findings that were against the great weight of the evidence. Therefore, we affirm its custody decision. MCL 722.28; *Foskett, supra* at 4-5.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski