STATE OF MICHIGAN

COURT OF APPEALS

EDWARD JEFFREY VANDERVELDE,

Plaintiff-Appellant,

v

CHRISTINE ANDREA MATTERN, f/k/a CHRISTINE ANDREA VANDERVELDE,

Defendant-Appellee.

UNPUBLISHED
December 2, 2008

Nos. 276268; 278234
Kent Circuit Court
LC No. 98-003765-DM

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

The parties shared joint legal and physical custody of their minor children under a judgment of divorce entered in 2000. In docket no. 276268, plaintiff appeals by leave granted the trial court's January 4, 2007 order, which granted in part defendant's amended motion to change parenting time. In docket no. 278234, plaintiff appeals by leave granted the trial court's May 4, 2007 order, which denied plaintiff's motion to remove a guardian ad litem (GAL). These cases were consolidated on June 29, 2007. *VanderVelde v VanderVelde*, unpublished order of the Court of Appeals, entered June 29, 2007 (Docket Nos. 276268, 278234). In docket no. 276268, we affirm the January 4, 2007 order of the trial court but remand for an evidentiary hearing to give plaintiff an opportunity to cross-examine the GAL. In docket no. 278234, we affirm the trial court's May 4, 2007 order.

I. FACTS

On April 21, 2000, a divorce judgment was entered between plaintiff and defendant. They have two children, Madeline Andrea VanderVelde (Maddie), born April 16, 1994, and Edward Jay VanderVelde (EJ), born November 22, 1996. The judgment provided that the parties share joint legal and physical custody of their minor children and maintain roughly equal parenting time. The parenting time arrangement, however, came under challenge in 2006. On May 9, 2006, sensing that the case was not progressing toward settlement, the trial court entered an order appointing Donna E. Mobilia as the GAL to act in the best interests of the VanderVelde children. The May 9, 2006 order appointing the GAL provided detailed duties and responsibilities for Mobilia. The relevant section of the order reads:

> The Guardian Ad Litem may make minor temporary changes in parenting time in deviation of any schedule [sic] parenting time pursuant to Court Order to

effectuate make-up parenting time or as may be necessary for the children's best interest.

After the GAL conducted her investigation, she was required to submit a written report to the court containing any recommendations in a variety of areas. The GAL was permitted to recommend changes in dates, times, and methods of pick up and delivery of the children for parenting time. Additionally, the GAL was permitted to recommend psychological testing for the parties.

On May 17, 2006, the Kent County Friend of the Court completed a custody evaluation report and recommendation, which was filed with the trial court on May 19, 2006. The GAL recommended that defendant have sole legal and physical custody of the children. She further recommended that plaintiff have supervised parenting time up to four hours per week. Lastly, the report recommended that plaintiff receive a psychological evaluation and subsequent counseling. On May 24, 2006, the trial court entered a stipulated order compelling plaintiff, defendant, and the children to be psychologically evaluated. The court ordered the evaluations to be forwarded to the GAL and viewed "in camera" by the respective counsels.

A meeting was conducted where the parties' psychological evaluations were reviewed. Defendant's attorney, the judge, and William Padding, the children's therapist, attended the meeting. Plaintiff's counsel was not able to attend, but he authorized the review of the psychological evaluations by defendant's counsel without his presence. Plaintiff's attorney was apparently unaware that the judge and Padding would be reviewing the psychological evaluations as well.

On June 9, 2006, defendant filed a motion to change parenting time, and on August 21, 2006, defendant amended her motion. The amended motion provided that "this is not a request for change in custody but only a change in parenting time." On September 6, 2006, defendant's amended motion was "adjourned without date." The trial court subsequently entered a notice for an evidentiary hearing.

On December 11, 2006, the parties appeared for an evidentiary hearing per the notice, but they indicated that they were close to a settlement. However, negotiations subsequently broke down. The trial court and the parties then agreed to short notice for the amended motion to change parenting time, which would be heard on December 15, 2006. The trial court and the parties also agreed that the GAL would submit her report to the trial court and the parties' counsel on December 14, 2006 by 3:00 p.m.

The GAL submitted her report to the trial court and the parties' counsel on December 14, 2006 at 8:30 a.m. The GAL report recommended that defendant be given sole legal and physical custody of the children, pending an evidentiary hearing, and that plaintiff have supervised parenting time for two hours per week with EJ at Bethany Christian Services at his expense. The GAL's report was not filed with the trial court or admitted into evidence. But the trial court did review and consider it.

During the hearing on December 15, 2006, plaintiff objected to the trial court's consideration of the GAL's report. Plaintiff declared, "I'm flabbergasted that this Court would receive that information and roll it into consideration of this issue before the Court when it was

provided to me twenty-four hours before this hearing. I'm astonished." The trial court then reminded plaintiff that all parties agreed that the GAL would submit her report on December 14, 2006 by 3:00 p.m. The trial court then confirmed this fact with the GAL who said that "both [counsels] indicated that I could submit [the report] to them by [December 14th] at 3. I delivered it to everybody by 8:30 [that] morning." The court overruled plaintiff's objection and considered the report. And plaintiff "strenuously" disagreed with the ruling. In response, the trial court further explained that when plaintiff agreed to have the report submitted, he waived his objection. Plaintiff again objected and argued that there is "another problem with this [report] … It wasn't properly submitted… It's not been subjected to any level of scrutiny or cross-examination." Plaintiff concluded by repudiating the trial court's conduct in admitting unreliable evidence.

On January 4, 2007, the trial court entered its order following the December 15, 2006 hearing. It ruled that defendant's motion was denied pending a two-day evidentiary hearing and that the parties retain joint legal and physical custody. It further ordered that plaintiff have no parenting time with Maddie until authorized by the GAL. And the trial court ruled that plaintiff have supervised parenting time of four hours a week with EJ. Plaintiff filed a motion for reconsideration, which was denied.

On January 24, 2007, plaintiff filed a motion to remove Mobilia as GAL, claiming that the actions taken by Mobilia violated the order appointing the GAL and other provisions of Michigan law. On May 4, 2007, the trial court denied plaintiff's motion to remove the GAL. Plaintiff now appeals.

II. MODIFICATION OF PARENTING TIME

In docket no. 276268, plaintiff argues that defendant's amended motion to modify parenting time should not have been granted because the trial court abused its discretion when it relied on the GAL report, which should not have been admitted or received by the trial court, and because there was no other competent clear and convincing evidence to support defendant's motion. We agree in part.

A. Standard of Review

All orders concerning parenting time or custody must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the trial court committed a palpable abuse of discretion, or the trial court made a clear legal error on a major issue. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). "The great weight of the evidence standard applies to all findings of fact." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). The trial court's findings should be affirmed "unless the evidence clearly preponderates in the opposite direction." *Berger*, *supra* at 705. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* A trial court commits clear legal error when it "incorrectly chooses, interprets, or applies the law." *Id.*

B. Analysis

Plaintiff argues that the trial court's receipt and review of the GAL report, without affording plaintiff's counsel the opportunity to cross-examine the GAL, violated MCR 5.121 and constitutes an abuse of discretion. We agree.

MCR 5.121(D) provides that the person who is the subject of a GAL report received and relied on by the trial court shall be permitted to cross-examine the individual making the report if the person requests such an opportunity. Here, plaintiff did not make an unequivocal request to cross-examine the GAL. Plaintiff, however, "strenuously" objected to the trial court's use and reliance on the GAL's report without the report's reliability being tested. This ground for objection triggered the trial court's obligation to permit plaintiff the opportunity to cross-examine the GAL before the trial court relied on the report.

The trial court concluded, however, that plaintiff's counsel voluntarily elected to proceed with the motion hearing on the amended motion to change parenting time on December 15, 2006, without an evidentiary hearing. Thus, no provision for cross-examination of the GAL report was warranted. The record reveals that plaintiff's counsel agreed that the amended motion to change parenting time would be heard on December 15, 2006, and the GAL report would be submitted the day before the hearing. However, plaintiff's counsel apparently understood that he would be given an opportunity to cross-examine the GAL before her report would be received and relied on by the trial court in deciding the amended motion to change parenting time. There was obvious miscommunication as to the nature of the proceedings that would occur on December 15, 2006. Regardless, the trial court was required to permit cross-examination of the GAL. Under MCR 5.121(D), requested cross-examination was required if the trial court was going to receive, rely on, or consider such information in making its decision on the amended motion to change parenting time. And plaintiff's counsel wanted such cross-examination but was deprived of it before the trial court read and relied on the challenged report.

In ruling that the trial court erred, this Court is aware that the order appointing the GAL provided that "[t]he Court shall review the report and recommendations. All report(s) filed by the Guardian are admissible into evidence." But this order does not foreclose the trial court's obligation, under to MCR 5.121(D), to allow cross-examination if such an opportunity is requested. The court rules govern all proceedings in cases. *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 336; 602 NW2d 596 (1999); see also MCR 1.102. Further, the word "shall" as used in MCR 5.121(D) is used to designate a mandatory provision. *Mollett v Taylor*, 197 Mich App 328, 339; 494 NW2d 832 (1992). Therefore, MCL 5.121(D) did not give a trial court discretion whether to allow cross-examination. *Id*.

Accordingly, we affirm the January 4, 2007 interim order. But we remand the case for an evidentiary hearing to give plaintiff an opportunity to cross-examine the GAL.

Plaintiff also argues that the trial court's admission of the GAL report without plaintiff's stipulation at the December 15, 2006 hearing was an abuse of discretion. In this case, the trial court did not admit the GAL report and recommendations into evidence. Therefore, plaintiff's argument fails.

III. REMOVAL OF THE GAL

In docket no. 278234, plaintiff argues that the trial court abused its discretion by denying plaintiff's motion to remove the GAL because the GAL improperly exercised her authority, the GAL failed to promote a cooperative resolution between the parties, and the GAL was biased in favor of defendant. We disagree.

A. Standard of Review

This Court reviews a trial court's decision regarding when to terminate the appointment of a GAL for an abuse of discretion. See *In re Toth*, 227 Mich App 548, 557; 577 NW2d 111 (1998) (The trial court did not abuse its discretion by dismissing the GAL after the probate court confirmed the adoption of the minor child). An abuse of discretion occurs when the trial court chooses an outcome that is not one of the reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. Analysis

On appeal, plaintiff specifically argues that the GAL exceeded her authority when she: (1) released plaintiff's psychological evaluation to the trial court and other unauthorized persons; (2) sought, coordinated, and required the psychological testing of the parties' minor children to proceed over plaintiff's objections and without court order; (3) unilaterally terminated plaintiff's parenting time with Maddie; (4) routinely filed pleadings, as if a litigant, and not for the purpose of enforcement of a court order; (5) unilaterally declared its file non-discoverable and did not allow access to plaintiff; and (6) made custody recommendations in the GAL report. Additionally, the GAL participated in ex parte communication when it released plaintiff's psychological evaluation to the trial court and other unauthorized persons. Therefore, the trial court abused its discretion in not removing the GAL.

First, plaintiff argues that the GAL exceeded her authority when she released plaintiff's psychological evaluation to the trial court and other unauthorized persons, specifically William Padding, a therapist for the children. Plaintiff also argues that this conduct resulted in ex parte communications. On May 24, 2006, the trial court entered a stipulated order regarding psychological evaluations for plaintiff, defendant, and the children. It ordered that all psychological evaluations be forwarded to the GAL to be reviewed only "in camera" by counsel and not to be copied or distributed. And each party could review their own client's evaluation but not the evaluation of the other party or the children.

On August 7, 2006, a meeting was conducted where the parties' psychological evaluations were reviewed. Defendant's attorney, the judge, and Padding were at the meeting. Plaintiff's counsel was not able to attend, but he authorized the review of the psychological evaluations by defendant's counsel without being present. Plaintiff's attorney later averred that he was unaware that the judge and Padding would be reviewing them as well.

The term "in camera" is defined as: "[i]n the judge's private chambers; [i]n the courtroom with all spectators excluded; ([o]f a judicial action) taken when court is not in session." Black's Law Dictionary (8th ed). The trial court concluded that the term "in camera" did not mean to the exclusion of the judge. We agree. Both the phrases "[i]n the courtroom with all spectators excluded" and "([o]f a judicial action) taken when court is not in session" imply that "in camera" review is a judicial function and, as such, the judge should be present for it. Further, the

modifier "by counsel" in the order does not appear to exclude the judge. Therefore, we conclude that the term "in camera" as used in the stipulated order of May 24, 2006, did not mean to the exclusion of the judge. The GAL did not exceed her authority by allowing the judge to be present for the in camera review of the psychological evaluations.

The May 24, 2006 order also did not forbid the trial court from having a copy of the psychological evaluations of the parties because the trial court must look at the parties' mental and physical health, under MCL 722.23(g), when determining the best interests of the children. Therefore, the GAL did not exceed her authority by allowing the trial court to have a copy of the parties' psychological evaluations.

With regard to the GAL allowing Padding to review and obtain the psychological evaluations, we find that plaintiff's counsel waived any objection to this in the trial court by informing the trial court "I do not object to [Padding] having seen them." Waiver is the intentional relinquishment or abandonment of a known right. *Couper v Metropolitan Life Ins Co*, 250 Mich 540, 544; 230 NW 929 (1930). "One who waives his rights under a rule may not then seek appellate review of the claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, by waiving any objection to Padding seeing the psychological evaluations, plaintiff may not now claim error. *Id*.

On the record, we find no abuse of discretion in the trial court's decision to deny removal of the GAL based on disclosure of the reports to Padding in light of the waiver and because it was the only example of the GAL exceeding her authority. The trial court's decision was not outside the principled range of outcomes.

In ruling, we note that none of plaintiff's other complaints against the GAL have merit.

The GAL's release of plaintiff's psychological evaluation to the judge was not an ex parte communication. An ex parte communication is "[a] communication between counsel and the court when opposing counsel is not present. Such communications are ordinarily prohibited." Black's Law Dictionary (8th ed). Plaintiff's attorney gave his permission for the psychological evaluations to be reviewed without him. It is irrelevant that plaintiff's attorney did not realize that the judge would be present. As stated above, it was proper for the judge to be present for the in camera review and for the judge to receive a copy of the psychological evaluations.

Additionally, plaintiff has cited no authority to support his position that the GAL's giving plaintiff's psychological evaluation to Padding was an ex parte communication. This Court will not search for authority to sustain or reject a party's position because failure to cite authority in support of an issue results in it being deemed abandoned on appeal. *Spires v Bergman*, 276 Mich App 432, 444; 741 NW2d 523 (2007).

Moreover, while we agree that there were ex parte communications at the in camera review, specifically discussion of substantive issues between Padding, the judge, the GAL and presumably defendant's counsel, we do not find that these were the fault of the GAL. The record does not support such a finding.

Plaintiff next argues that the GAL sought, coordinated, and required the psychological testing of the parties' minor children over plaintiff's objections and without court order, and this resulted in the GAL exceeding her authority. The challenged psychological testing is separate and apart from the previously referenced psychological evaluations. Plaintiff asserts that since the GAL knew that the plaintiff objected to the testing, and since the GAL is a fiduciary of the court and required to ensure that the May 9, 2006 order not be violated, which required that the GAL could not have psychological testing performed on the children without the parties consent or a court order, the GAL should have stopped the testing from proceeding. The record reveals, however, that the GAL did not order the psychological testing; rather, Padding ordered it after he reviewed the parties' minor son's psychological evaluation. The record also suggests that Padding had a release from the parents to have such testing performed. Plaintiff has not provided any evidence that the GAL ordered the challenged testing, or was authorized or required to stop testing that she did not order. Since plaintiff has not explained, rationalized, or properly supported his argument with relevant authority, then his position is abandoned. *Id*.

Plaintiff next argues that the GAL exceeded her authority when she unilaterally terminated plaintiff's parenting time with the parties' daughter. There is no evidence to support this position in the record. Rather, the record supports the proposition that plaintiff agreed not to exercise parenting time with his daughter and to allow her to get counseling. When an argument is raised, but it is not supported by sufficient argument, citation to the record, or supporting authority, the issue is deemed abandoned. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003).

Plaintiff further contends that the GAL also exceeded her authority when she routinely filed pleadings, as if a litigant, and not for the purpose of enforcement of a court order. Again, plaintiff has cited no authority to support the proposition that the GAL cannot file responses to motions that specifically attack the GAL's recommendations, and motions that, if granted, would affect the best interests of the children. We will not search for authority to sustain or reject a party's position, and the failure to cite authority in support of the issue results in its being deemed abandoned on appeal. *Spires*, *supra* at 444.

Additionally, plaintiff argues that the GAL exceeded her authority when she unilaterally declared that her file was non-discoverable and did not allow access to plaintiff. Specifically, plaintiff sought discovery of a letter written by Dr. Joseph Horak, Ph.D., to the trial court. The trial court, however, resolved this issue by indicating that the letter was discoverable and providing that, if plaintiff wanted a copy of it, he should make a written request to discover it. Consequently, the trial court quickly remedied the discovery issue. Since the issue was addressed by the trial court and resolved in plaintiff's favor, we disagree that the issue provided a basis on which to find that the GAL should have been removed and that the trial court abused its discretion by not removing her.

Finally, plaintiff argues that the GAL exceeded her authority when she made custody recommendations in the GAL report. The GAL report indicates that defendant should have sole legal and physical custody of the children pending an evidentiary hearing. The order appointing the GAL provides that the GAL shall perform a full investigation regarding parenting time and that the GAL may make recommendations regarding various disputes that may arise. Further, the order appointing the GAL provides that the GAL will make a recommendation based on the best interests of the children. MCR 5.121(c) provides that a GAL shall conduct an investigation,

make a report, and make recommendations. However, plaintiff challenges the custody recommendations because the order appointing the GAL in this case does not specifically indicate that the GAL may make recommendations regarding custody, as opposed to parenting time.

We find that the GAL did not exceed her authority when she made custody recommendations in the GAL report. At the time the order appointing the GAL was executed, the parties shared joint legal and physical custody of the children and the only issues that were arising related to parenting time. Therefore, it would be nonsensical to execute an order that specifically provided that the GAL could make custody recommendations when custody was not an issue. Further, any significant recommendation with respect to parenting time necessarily might affect custody, thus precluding consideration of custody is impractical. It may not have been clear until an investigation was conducted that an actual change in custody may be in the best interests of the children. The GAL did not exceed her authority in making this recommendation, which was, in her opinion, in the best interests of the children. Consequently, the trial court did not abuse its discretion in refusing to remove the GAL on this ground.

The January 4, 2007 order of the trial court is affirmed, but the matter is remanded for an evidentiary hearing giving plaintiff an opportunity to cross-examine the GAL. We also affirm the May 4, 2007 order. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette