STATE OF MICHIGAN

COURT OF APPEALS

JO ELLEN HUNT, Plaintiff-Appellee,	UNPUBLISHED March 17, 2009
v	No. 285266 Kent Circuit Court
DOUGLAS HUNT, Defendant-Appellant.	LC No. 05-010591-DM

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. On appeal, he challenges the trial court's refusal to set aside the entry of a default, the court's decision awarding plaintiff legal and physical custody of the parties' child, and the court's valuation of the parties' respective homes for purposes of the property division. Defendant also argues that the trial court was biased against him. We affirm.

I. Entry of Default

Defendant first argues that the trial court erred in denying his motion to set aside a default, which was entered after he failed to appear at a mandatory settlement conference. We disagree.

An entry of default or default judgment is committed to the trial court's discretion and will not be set aside absent a clear abuse of that discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 223-224; 600 NW2d 638 (1999); *Park v American Cas Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). An abuse of discretion occurs only when the trial court's decision is outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court defaulted defendant under MCR 2.401(G), which states:

> (1) Failure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes,

> including settlement, as directed by the court, *may constitute a default to which MCR 2.603 is applicable* or a ground for dismissal under MCR 2.504(B).
>
> (2) The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that
>
> (a) entry of an order of default or dismissal would cause manifest injustice; or
>
> (b) the failure was not due to the culpable negligence of the party or the party's attorney.
>
> The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2). [Emphasis added.]

In pertinent part, MCR 2.603(A)(1) provides:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

A notice of entry of default must be sent to the defaulted party by the party who sought the entry of default. MCR 2.603(A)(2)(b). Once defaulted, a party may not proceed with the action unless and until the default is set aside. MCR 2.603(A)(3).

Regarding the setting aside of a default, MCR 2.603(D)(1) provides:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

MCR 2.603(D) applies to divorce actions. See *Koy v Koy*, 274 Mich App 653, 657-659; 735 NW2d 665 (2007).

In the present case, defendant was defaulted for failing to attend a mandatory settlement conference. Thus, both MCR 2.401(G) and MCR 2.603 apply. Under MCR 2.401(G), the trial court was required to excuse defendant's failure to attend and not enter a default if defendant made a showing of manifest injustice *or* lack of culpable negligence. Under MCR 2.603(D), an entry of default could be set aside if defendant showed good cause and a meritorious defense.

We begin our analysis with MCR 2.603(D). A meritorious defense is one which, "[i]f proven at trial, . . . would preclude liability on plaintiff's claims." *Gavulic v Boyer*, 195 Mich App 20, 26; 489 NW2d 124 (1992), overruled on other grounds by *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 289; 602 NW2d 572 (1999). We note that the meritorious defense prong is not readily applicable to divorce actions, where the objective is to decide custody issues

in the child's best interests, and to decide property issues in an equitable manner. In any event, although defendant asserts that he had a meritorious defense to the issues of child custody, child support, parenting time, and the division of marital property, he does not specifically indicate what those defenses were. The record discloses that despite entry of a default, the trial court permitted defendant to testify and present evidence in order to adequately develop the record and enable the court to decide the issues presented. Under these circumstances, there is no basis for concluding that defendant satisfied the meritorious defense requirement.

"Good cause sufficient to warrant setting aside a default or a default judgment includes: (1) a substantial defect or irregularity in the proceeding on which the default was based, (2) a reasonable excuse for the failure to comply with requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default or default judgment were allowed to stand." *Park, supra* at 67; *Gavulic, supra* at 24-25. Defendant does not claim that his failure to attend the settlement conference was due to any nonculpable negligence. Rather, he admits that he purposefully failed to appear, but contends that he had a reasonable excuse for doing so.

Defendant asserts that he reasonably did not attend the settlement conference because plaintiff had physically assaulted him in the past, and plaintiff's attorney had assaulted him at a previous hearing. However, defendant had appeared at numerous prior hearings despite his continuing claims of domestic violence by plaintiff. In addition, the alleged assault by plaintiff's attorney involved defendant being struck by a swinging courtroom door at a prior hearing, and there was no credible evidence showing that plaintiff's attorney purposefully struck defendant with the door. Moreover, defendant's alleged concern of being assaulted in court was unreasonable given the security available in the courtroom. Thus, the trial court did not err in finding that defendant failed to provide a reasonable excuse for not attending the settlement conference.

Defendant also claims that there was good cause to set aside the default because plaintiff allegedly failed to send him notice of the entry of a default. See *Gavulic, supra* at 25. However, the record discloses that after the trial court issued an order allowing entry of a default, it sent defendant a notice to appear at an evidentiary hearing for entry of a default judgment. Plaintiff's counsel also sent defendant a notice of hearing for the same evidentiary hearing. Thus, defendant received notice of the entry of default, was advised that an evidentiary hearing had been scheduled for entry of a default judgment, and was allowed to participate at that hearing. Accordingly, there is no merit to defendant's claim of a substantial defect or irregularity in the proceeding sufficient to establish good cause to set aside the default.

Regarding manifest injustice, our Supreme Court has stated that "properly viewed, 'manifest injustice' is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently." *Alken-Ziegler, supra* at 233. "Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule." *Id.* In this case, defendant failed to satisfy either the good cause or meritorious defense requirements. Therefore, he cannot establish manifest injustice.

Under MCR 2.401(G), defendant failed to show either manifest injustice or lack of culpable negligence. Therefore, the trial court did not err in refusing to excuse his failure to appear. Under MCR 2.603(D), defendant failed to satify either the good cause or meritorious defense requirements. Thus, the trial court did not err in denying defendant's motion to set aside the entry of default.

Although defendant asserts that the trial court should have considered a lesser sanction than default in order to encourage the parties to work together, the record is replete with evidence of defendant's unwillingness and refusal to cooperate with plaintiff on any issue. Further, at the evidentiary hearing for entry of a default judgment, defendant was allowed to testify and submit evidence on all relevant issues. Therefore, while the entry of default precluded him from calling witnesses and cross-examining plaintiff, it did not completely preclude him from participating in the proceeding. The trial court did not abuse its discretion in defaulting him rather than imposing a lesser sanction.

II. Child Custody

Defendant challenges the trial court's decision to award legal and physical custody of the parties' child to plaintiff. He argues that the trial court misunderstood and misapplied the statutory best interest factors, MCL 722.23(a) – (l), but challenges only three of those factors on appeal.

In child custody cases, 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 the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. MCL 722.28. De novo review is precluded. *Fletcher v Fletcher*, 447 Mich 871, 882 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). We review any questions of law for clear legal error. *Id*. at 881 (Brickley, J.), 900 (Griffin, J.). The trial court's findings of fact are reviewed under the great weight of the evidence standard, and should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*. at 879 (Brickley, J.), 900 (Griffin, J.). The court's dispositional rulings, such as to whom custody is granted, are reviewed for palpable abuse of discretion. *Id.* at 880-881 (Brickley, J.), 900 (Griffin, J.); *Berger v Berger*, 277 Mich App 700, 705-706; 747 NW2d 336 (2008).

A. Defendant's Participation

Initially, there is no merit to defendant's arguments that the trial court deprived him of a fair trial by not allowing him to call witnesses or cross-examine plaintiff. As previously indicated, the trial court properly entered a default against defendant for failure to attend a mandatory settlement conference. Once defaulted, a party may not proceed with the action unless and until the entry of default is set aside. MCR 2.603(A)(3). In divorce cases, however, even when a default has been entered, the trial court has a responsibility to "adequately develop" the record and make findings of fact in support of its decisions. *Koy*, *supra* at 659. But this does not require the court to allow a defaulted party to participate in the proceedings. *Id.*; *Dragoo v Dragoo*, 223 Mich App 415, 425-429; 566 NW2d 642 (1997). In the present case, the trial court did not have to allow defendant to participate, but it nonetheless allowed defendant to testify and

introduce evidence. Therefore, there is no merit to defendant's argument that he was unfairly precluded from addressing relevant issues.

B. MRE 404(b)

Defendant also argues that the trial court erred by considering his statements from an earlier divorce proceeding involving defendant's ex-wife. We disagree.

Because defendant failed to object to the trial court's consideration of the transcripts of his first divorce trial, this issue is unpreserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Contrary to what defendant argues, the record indicates that plaintiff's counsel provided the trial court with the transcript of defendant's prior divorce proceeding, and the transcript was mentioned by defendant himself with regard to the assets that defendant brought into the marriage and the property division in the first divorce. The trial court examined the transcript and noted that there were factual similarities between plaintiff's testimony and the testimony of defendant's first wife.

Although defendant argues that the evidence was not admissible under MRE 404(b)(1), the evidence was not offered to show defendant's propensity to act in conformance with a given character trait. See *People v Sabin (After Remand)*, 463 Mich 43, 55-56, 59; 614 NW2d 888 (2000). Rather, the incidents referred to in the testimony of defendant's ex-wife were sufficiently similar to incidents described by plaintiff to show a common scheme, plan, or system by defendant, which is a proper purpose under MRE 404(b)(1). *Sabin*, *supra* at 62-64. Further, the evidence was relevant to an issue of fact of consequence at trial (domestic violence and plaintiff's credibility) and, given that this was a bench trial, its probative value was not substantially outweighed by the danger of unfair prejudice. *Id*. at 55-56, 59. Thus, this evidence did not constitute plain error.

C. Best Interest Factors

Defendant argues that the trial court misunderstood and misapplied best interest factors (f), (g), and (k), in light of several "areas of concern" identified in his brief. We disagree.

MCL 722.27(1) mandates that child custody disputes be resolved in the best interests of the child. MCL 722.23 states:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Where the trial court finds that an established custodial environment exists with one of the parties, MCL 722.27(1)(c) provides that "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." In this case, defendant does not challenge the trial court's determination that an established custodial environment existed with plaintiff. Thus, to support a change of custody to defendant, defendant was required to show by clear and convincing evidence that a change in custody was in the child's best interests.

The trial court found that plaintiff prevailed on factor (g), that plaintiff prevailed slightly on factors (c), (f), and (j), that the parties were equal on factors (a), (b), (d), (e), (h), and (k), and that factor (i) was inapplicable due to the child's young age. On appeal, defendant only challenges the trial court's findings concerning factors (f), (g), and (k).

1. Factor (f) - Moral Fitness of the Parties

The trial court found that plaintiff prevailed slightly on factor (f). The record indicates that the court considered each parties' allegations of domestic violence, and the incident when defendant prevented plaintiff from calling 911. The trial court found a slight preference for plaintiff because, unlike defendant, she had no criminal convictions. The court's findings are supported by the record.

None of the "areas of concern" identified by defendant are particularly relevant to this factor, except plaintiff's alleged plan to extort money from her ex-boyfriend. However, defendant admitted assisting her in this regard by preparing a thick package of goals and documentary evidence, which he based on a list written by plaintiff. The trial court did not err in weighing this factor slightly in plaintiff's favor.

2. Factor (g) – the Parties' Mental and Physical Health

The trial court found that factor (g) favored plaintiff. The record indicates that the trial court considered the evidence of domestic violence, the parties' psychological evaluations, defendant's counseling evaluation, the events of October 2006, and defendant's behavior in the courtroom, including his numerous voicemails and prevalent over-documentation. The trial court's findings concerning these matters are amply supported by the record.

Regarding defendant's "areas of concern," we agree that plaintiff's alleged threats to kill herself are relevant to this factor, as well as her alleged inability to control herself due to being a victim of abuse. However, the trial court found that plaintiff's psychological evaluation was normal. Plaintiff's shirt-ripping behavior also seems relevant, and the trial court characterized this incident as bizarre. But the court found that defendant's personality disorder, as supported by his psychological evaluation, was of overriding concern because it affected his ability to parent. Considering all the evidence, defendant has failed to show that the trial court erred by weighing this factor in favor of plaintiff.

3. Factor (k) - Domestic Violence

The trial court found that factor (k) did not favor either party. The trial court found that both parties engaged in domestic violence, that both were controlling and verbally and physically abusive, that both had acted inappropriately, and that both had anger management issues. Both parties needed continued counseling.

The trial court considered the 911 incident, the episode when each party accused the other of threatening to jump out of a moving car, the events of October 2006, and the several affidavits submitted by defendant concerning plaintiff's role in domestic violence, her behavior during counseling, and her admissions at the domestic violence shelter. The trial court also considered the testimony of defendant's first wife, plaintiff's bizarre shirt-ripping behavior, and both parties' roles in preparing to sue plaintiff's ex-boyfriend. Once again, the trial court's findings are amply supported by the record.

Defendant raises an "area of concern" with regard to the trial court's finding that the child told several people that plaintiff had hurt her. The statement quoted by defendant was part of the trial court's discussion of factor (l). Considered in context, it is clear that the court found that the child had made statements that plaintiff hurt her. However, the court agreed with a Protective Services caseworker that the statements were unreliable, and that there was no real evidence of abuse. This finding is supported by the medical evidence, which indicated that the child was examined for suspected abuse, but no indication of abuse was found. The court also considered all of defendant's behavior, and the child's statements. The court was understandably concerned that defendant was obsessive in his refusal to accept that there was no real evidence of abuse, and repeatedly subjected the child to multiple unnecessary medical examinations.

The trial court sufficiently addressed defendant's areas of concern and defendant has failed to show that the court erred in finding that this factor did not favor either party.

Viewing the record as a whole, we find no error in the trial court's decision to award legal and physical custody of the child to plaintiff.

III. Division of Property

Defendant argues that the trial court erred by overvaluing defendant's home and by undervaluing plaintiff's home, resulting in an unfair and inequitable division of marital property. We disagree.

The division of property in a divorce action need not be equal, but it "must be equitable." *Sparks v Sparks*, 440 Mich 141, 158-159; 485 NW2d 893 (1992). We review the trial court's findings of fact under the clearly erroneous standard. *Id.* at 151. "A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Sparks, supra* at 151-152.

It appears that in valuing plaintiff's home at $145,000, the trial court may have mistakenly relied on the January 2006 market analysis of defendant's home, which recommended listing the home for sale at an asking price of between $145,000 and $153,900. However, the trial court's valuation of plaintiff's home is supported by plaintiff's testimony that she was unable to sell the home even when she reduced the asking price to $146,000. Thus, we are not left with a definite and firm conviction that the trial court erred in valuing plaintiff's home at $145,000.

The trial court found that defendant's home was valued at $170,000. The record discloses that defendant submitted voluminous amounts of evidence on other issues, but failed to present a current appraisal of his home. Under the circumstances, the trial court appropriately relied on defendant's August 2005 deposition testimony in which he admitted that his home was worth between $170,000 to $180,000. In light of this testimony, the trial court did not clearly err in valuing defendant's home at $170,000.

IV. Trial Court's Alleged Bias

Defendant argues that the trial court was biased against him, and in favor of plaintiff, thereby depriving him of a fair trial. We disagree.

This Court reviews de novo a claim that there was judicial bias in conducting the proceedings which deprived a party of his constitutional right to a fair trial. *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002).

A trial judge is presumed to be fair and impartial, and any litigant who challenges that presumption bears a heavy burden to prove otherwise. *Id*. at 237. "[R]ulings against a litigant, even if erroneous, do not themselves constitute bias or prejudice sufficient to establish a denial of due process." *Id*. Rather, the party must show that these decisions reflect a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994)

On appeal, defendant argues that the trial court was biased against him because: (1) it did not respond to his alleged request for an adjournment, (2) it defaulted him, (3) it wrote the prologue to plaintiff's counsel's book, (4) it told defendant that it did not have to allow him to participate, (5) it participated in ex parte communications with Protective Services and plaintiff's counsel concerning the October 2006 incident, (6) it referred to testimony from defendant's prior divorce proceeding, (7) it ordered defendant not to contact Protective Services, even if he saw suspicious injuries on the child, (8) it believed that defendant prepared the binder of evidence against plaintiff's former boyfriend, (9) it accepted plaintiff's unfounded accusations that defendant had attempted to manufacture evidence of abuse and unfairly terminated defendant's liberal unsupervised visitation based on a gut feeling, (10) it ignored the child's statements that plaintiff had hurt her, and (11) it asked leading questions and interrupted the parties' testimony throughout the hearing.

We note that the record contains no evidence indicating that the trial judge wrote the prologue to a book written by plaintiff's counsel. Even if she had, however, doing so does not rise to a showing of actual bias and favoritism. See *In re Susser Estate*, *supra* at 237 (witness involved in the judge's election campaign). Further, as in *In re Susser Estate*, defendant's remaining claims of bias are based on the trial court's rulings which, in the absence of a more specific demonstration of bias or prejudice, fail to overcome the presumption of judicial impartiality.

A review of the record discloses that the trial court displayed commendable patience and went out of its way to ensure that defendant was treated fairly, despite his frequent disruptive and erratic behavior. The trial court could have precluded defendant from participating in the evidentiary hearing, and made its rulings based solely on the evidence presented by plaintiff, which defendant need not have been allowed to dispute. See *Koy*, *supra* at 659-661. However, the court permitted defendant to testify and present evidence. In the end, despite defendant's outbursts, the court granted him liberal unsupervised visitation, and ordered plaintiff to pay him a substantial amount of money.

For these reasons, we find no merit to this issue.

Affirmed.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro