STATE OF MICHIGAN

COURT OF APPEALS

BAMBI LYNN DIBELL, Plaintiff-Appellee,	UNPUBLISHED December 28, 2010
v	No. 297205 Montcalm Circuit Court
TY MATTHEW KIRBY, Defendant-Appellant.	LC No. 2004-002666-DP

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Defendant Ty Matthew Kirby appeals as of right the trial court's order denying his motion for a change of custody. We affirm.

I. UNDERLYING FACTS

The minor child in this case was born on November 25, 2003. The child has lived with plaintiff Bambi Lynn Dibbell for her entire life. Defendant originally disputed that he was the father and moved to North Dakota in July 2004. Plaintiff moved to Arkansas with the minor child shortly thereafter with the permission of the court. By all reports, the minor child is happy, well adjusted, and generally healthy. She had nothing bad to say about defendant, but reported that she misses plaintiff when she goes to visit him.

Defendant has not seen the minor child very frequently. This is partly because he has not always exercised his parenting time, and partly because on at least one occasion plaintiff refused to let defendant see the child. The trial court cited plaintiff for contempt in 2007 for refusing to allow defendant's parenting time. Plaintiff and defendant do not get along very well. The record contains evidence of numerous arguments between them, and each has reported the other to child protective services (CPS).

Defendant is married and has two children with his wife. One of the children has substantial medical needs stemming from epilepsy, eczema, and scoliosis. Defendant and his wife were both convicted of writing bad checks in 2006, and were also convicted of a felony charge of theft of property by deception in 2008. They stole cash, gas, and lottery tickets from the gas station where defendant's wife was employed at the time. Their stated reason for committing these crimes was that they needed money for the medical bills caused by their child's illnesses. Defendant and his wife each have seasonal employment, though defendant is working

on getting a commercial driver's license so that he can work year round. Defendant is not up-to-date with his child support payments, but he has made payments when he has been able to do so.

On at least one occasion, defendant and his wife left their children (then 20 months and 3½ years old) at home alone. Defendant and his wife worked different shifts, and defendant was unable to get home before his wife left. The local CPS agency found that defendant and his wife were an "intermediate" risk of child neglect, and also expressed concerns about defendant's alcohol consumption.

On June 15, 2009, plaintiff remarried. Plaintiff, her new husband, and the minor child moved back to Michigan in 2009. Plaintiff and the minor child have changed residences frequently in the last few years, within both Arkansas and Michigan.

Plaintiff and her husband are both currently unemployed, but are looking for work. Plaintiff and the minor child live with defendant's mother and stepfather, while plaintiff's husband lives with his father. Plaintiff is attending community college, and hopes to finish her bachelor's degree in social work at Central Michigan University. She pays for college with a combination of grants and student loans. Plaintiff relies on government assistance to pay for the minor child's medical needs, which include allergy treatments.

Approximately nine years before plaintiff and her now-husband married, a juvenile court found the husband guilty of first-degree criminal sexual conduct involving a minor under the age of 13 for engaging in oral sex with a seven-year-old boy. The husband was age 14 or 15 at the time. The husband was also alleged to have digitally penetrated the victim's anus.[1]

Plaintiff's husband's probation officer reported that he did well during his rehabilitation, received extensive treatment, and no longer poses a significant threat of reoffending. The trial court ordered an expert evaluation of the husband, and the expert concluded that there is a low to moderate risk that he will reoffend, with the risk additionally reduced because he was a juvenile at the time of the offense and because he has been out of supervision for an extended period of time already without reoffending. The expert also reported allegations by the husband that he had been sexually abused by defendant as a child.[2]

Plaintiff testified that she has never seen any indication that her husband has abused the minor child. Plaintiff was a victim of sexual abuse herself when she was younger, and stated that she is especially aware of the signs of abuse. There is no allegation that her husband has harmed the minor child in any way. Additionally, plaintiff stated to the Friend of the Court investigator that her husband has not had any unsupervised contact with the child.

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[1] During a psychological evaluation, the husband denied penetrating the victim. It is not clear from the record if he was specifically convicted of penetration, but he admitted engaging in oral sex and touching the victim near the anus.

[2] Plaintiff's husband and defendant are cousins.

The Friend of the Court investigator recommended that custody be granted to defendant. The case was originally heard by a referee, who agreed with the recommendation of the investigator. Plaintiff demanded a de novo review by the trial court. The trial court held a de novo hearing on October 16, 2009, wherein it ordered a sex offender evaluation of plaintiff's husband. Upon receipt of the evaluation, the trial court continued the de novo hearing on March 5, 2010. On March 8, 2010, the trial court issued a five-page written opinion wherein it found that: a change of circumstances, which is required to re-visit custody, existed; an established custodial environment existed with plaintiff; and based on the court's de novo review of the record, defendant failed to establish by clear and convincing evidence that custody in his favor was in the best interests of the child. In its March 19, 2010, order the court ordered that plaintiff shall have physical custody of the minor child, that plaintiff's husband shall not have any unsupervised contact with the minor child, and that defendant submit to a sex offender risk assessment as a condition to any unsupervised contact with the minor child—based presumably on plaintiff's husband's allegations of sexual abuse by defendant.

II. THE EXPERT'S REPORT

Defendant first argues that the trial court erred by admitting the expert evaluation regarding plaintiff's husband without allowing defendant an opportunity to examine the report or question the expert. However, defendant was represented by counsel at the hearing where the report was admitted, and his counsel stated that he had reviewed the report and would defer to the court regarding the expert's credentials, as the court had appointed the expert. Since defendant did not object to the report below, he has either waived or forfeited this issue. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002). Waiver requires an "intentional and voluntary relinquishment of a known right," whereas forfeiture merely involves a "failure to assert a right in a timely fashion." *Id*. (quotation marks and citation omitted). Assuming that defendant merely forfeited the issue, we review for plain error. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights" or showed prejudice in the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We find no plain error in this case. On appeal, defendant's only grounds for finding this evidence inadmissible are that he did not get a chance to review the evidence or question the expert. But defendant's counsel reviewed the proffered evidence and made no objection, and did not seek to question the witness. Moreover, defendant cites no authority under which the evidence would be inadmissible. An appellant may not simply announce his position and leave the task of supporting that position to the court. *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Defendant's failure to provide any support for his position constitutes abandonment of the argument. See *id.* The trial court did not err by admitting the expert report.

III. CUSTODY DECISION

Defendant next argues that the trial court abused its discretion by refusing to grant his motion for a change in custody. We must affirm a custody order "unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The trial court's factual findings regarding an established custodial environment and the statutory best interest factors are against the great weight of the evidence if "the evidence clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court defers to the trial court's findings on issues of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

An abuse of discretion occurs "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."[3] *Berger*, 277 Mich App at 705. The trial court's custody decision receives the "utmost level of deference." *Id.* at 705-06.

The Child Custody Act ("the Act"), MCL 722.21 *et seq.*, governs child custody disputes. The Act is liberally construed to support the best interests of children. MCL 722.26(1); *Berger*, 277 Mich App at 705. Under the Act, the court may not change an established custodial environment unless there is clear and convincing evidence that a change in custody is in the best interests of the minor child. MCL 722.27(1)(c); *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996). There is an established custodial environment "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). In this case, the trial court found an established custodial environment based on the fact that the minor child has lived with plaintiff for her entire life and appears to be happy and well cared for according to the record evidence. It is clear, and defendant does not dispute, that there is an established custodial environment with plaintiff.

When there is an established custodial environment, the non-custodial parent has the burden of proving by clear and convincing evidence that the best interests of the child would be better served if the court were to grant him or her custody. The best interests of the child are determined by the court's findings regarding the statutory best interest factors listed in MCL

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[3] This definition of abuse of discretion, from *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959), continues to apply to child custody determinations despite the new "default" definition for abuse of discretion, i.e., outside the principled range of outcomes, announced in *Maldanado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 (2006). See *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006).

722.23.[4] The court is free to give greater weight to certain factors than to others. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

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[4] MCL 722.23 provides:

> 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:
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> (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.

Defendant first argues that the trial court incorrectly found factor (f), the moral fitness of the parties, in favor of plaintiff. He argues that the court misconstrued the facts of an investigation by CPS, improperly inferring that he had an alcohol problem and failed to properly supervise his children. The court stated that it was concerned with "alcohol use by the father and the acknowledged failure to provide supervision of his minor children." The court did not find that defendant had an alcohol problem, merely noted it as a possibility. The record clearly supports the finding that defendant and his wife did not always properly supervise their children; indeed, defendant's wife admitted as much. Further, CPS expressed concern about defendant's alcohol consumption. Although it is true that there was no finding of neglect by CPS, there is sufficient support in the record for the trial court's concerns.

Defendant next objects to the trial court's finding that the domestic violence factor, factor (k), favored plaintiff. Defendant argues there is no evidence that he ever tried to strike plaintiff, and that he never admitted anything. Defendant himself raised the issue of violence at the hearing before the referee, volunteering that, "I supposedly puffed my chest out and drew back to hit [plaintiff], because it was a heated argument." The trial court held that this evidence "would seem to substantiate a finding of domestic violence," and found that the domestic violence factor "maybe favors the mother."

As indicated, this Court defers to credibility determinations made by the trial court. *Mogle*, 241 Mich App at 201. Although defendant did not admit that he attempted or threatened to strike plaintiff, the trial court was free to discredit his testimony. In addition, there was evidence that the minor child returned from one visit with defendant covered in bruises. We find that the evidence in the record does not clearly preponderate against the court's finding for this factor.[5]

Defendant also attacks the trial court's findings for factor (d), the length of time the child has lived in a stable home. However, the court found factor (d) in favor of defendant, noting that plaintiff and the minor child had lived at six addresses in the previous five years. The court did note that this frequent movement does not seem to have negatively impacted the child, and defendant has not provided any evidence to the contrary. The court's finding on this factor is not against the great weight of the evidence.

Defendant further argues that the trial court should not have taken into account the minor child's preference regarding custody. However, MCL 722.23(i) states that the court should

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[5] Defendant also argues that plaintiff is abusive. However, this argument is based entirely on an affidavit that was not part of the trial court record. Our review is "limited to the record developed by the trial court, and we will not consider references to facts outside the record." *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989). Because defendant did not present to the trial court the evidence he now proffers in the affidavit, we must disregard it. Similarly, defendant alleges on appeal that plaintiff's husband is currently residing with plaintiff, despite purporting to live with his father, and that a drug raid was conducted at his home. There is no support in the trial court record for these allegations, and we will not consider them. See *id*.

consider the "reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." The trial court relied on the Friend of the Court investigator, who determined that the child, who was five years old at the time, was sufficiently mature to express a preference. Defendant cites a case that states that children of six are generally old enough to express a preference, but provides no authority to the effect that a child of five would be incapable of expressing a preference. *See Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). We decline to hold that a five-year-old child is legally incapable of expressing a preference.

Defendant also argues that the trial court failed to properly consider plaintiff's history of denying his visitation rights. But the court did note under factor (j) that plaintiff was likely more at fault for the problems with parenting time. However, the court also found that each party had caused problems by making complaints about each other to CPS. This finding is supported by the record. The evidence does not clearly preponderate against the court's finding that factor (j) did not favor either parent.

None of the trial court's findings are opposed by the great weight of the evidence. Although on some issues there is evidence in defendant's favor, it does not "clearly preponderate" in his favor. Therefore, we uphold the trial court's factual findings regarding the statutory best interest factors. We further note that the trial court found six of the factors in favor of plaintiff, two in favor of defendant, and three in favor of neither party.

In its conclusion, the trial court found that defendant failed to establish by clear and convincing evidence that he should be granted physical custody. The court noted that by all accounts the minor child was doing well. Although the court expressed concern with plaintiff's husband's status as a sex-offender, it found those concerns insufficient "to undo a working, custodial environment with the mother."

Defendant argues that the trial court's conclusions should be reversed because they differ from the conclusions of the Friend of the Court investigator and the referee. However, in a de novo hearing the trial court must render its own decision. *Truitt v Truitt*, 172 Mich App 38, 43; 431 NW2d 454 (1988). In fact, it would be grounds for reversal if the trial court simply decided the case based on the Friend of the Court's recommendation instead of reaching its own conclusions.[6] See *id*. at 43-44. Therefore, the court's refusal to follow the recommendation of the referee in this case cannot be grounds for finding an abuse of discretion.

Finally, defendant argues that the trial court was biased against him. As evidence, he points to the fact that at oral argument the court demanded defendant's authority for a statistic on

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[6] A trial court "may conduct the judicial hearing by review of the record of the referee hearing" subject to certain conditions. MCR 3.215(F)(2); See also MCL 552.507, and *Dumm v Brodbeck*, 276 Mich App 460, 465-66; 740 NW2d 751 (2007). While the trial court was free to review and adopt the referee's findings of fact, credibility assessments, and conclusions of law, because the hearing is de novo, the court was not obligated to defer to the referee on these matters.

recidivism rates, but did not require plaintiff's attorney to produce the citation for a case. However, the court took issue with defendant's study because he stated that he had found it on the Internet. From the record, it appears that the court was reasonably trying to determine if the study came from any sort of reputable authority. Defendant could not remember where he found it, only that it was a "national study." In addition, the court did not rely on the case described but not cited by plaintiff. Under those circumstances, the court rightfully excluded defendant's evidence, and this cannot serve as evidence of bias.

The record as a whole gives every indication that the trial court seriously and impartially considered defendant's arguments. The court ordered the psychological evaluation of plaintiff's husband so that it could have more complete information on which to base its decision. The court also issued a written opinion instead of ruling from the bench, because the case presented a close call and the court wanted to make sure it carefully addressed all the arguments. We find no indication that the court's judgment was influenced by personal bias for or against either party.

The trial court's decision in this case must be upheld unless it 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." *Berger*, 277 Mich App at 705. As discussed above, the court did not display any bias, and did not commit any reversible errors in finding that the majority of the factors favored plaintiff. The court was free to place less weight than the referee on the fact that plaintiff's husband is a convicted sex-offender, particularly since it had the benefit of the expert psychological evaluation, which the referee did not. The court properly found based on the expert report that there is a low to moderate risk of plaintiff's husband reoffending, and further mitigated the risk by ordering him not to have unsupervised contact with the minor child. Although another court might well have granted custody to defendant, leaving custody with plaintiff under all the facts as the trial court found them does not evidence a perversity of will or defiance of judgment.

The trial court did not abuse its discretion in refusing to grant defendant's motion for change of custody.

IV. DUE PROCESS

Defendant next argues that the trial court violated his procedural due process rights when it ordered him to submit to a sex offender risk evaluation before having unsupervised contact with the minor child based on plaintiff's husband's allegation of sexual abuse perpetrated upon him by defendant. Defendant argues that he did not know of the allegations until the trial court issued its opinion, and did not have notice and an opportunity to be heard regarding the sex offender assessment.

Whether an action violates due process is a question of law. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). We review the trial court's conclusions of law de novo. *Walters v Snyder (After Remand)*, 239 Mich App 453, 456; 608 NW2d 97 (2000). As a discretionary ruling, the trial court's order requiring defendant to submit to a sex offender risk evaluation is reviewed for abuse of discretion in the absence of a constitutional defect. *Berger*, 277 Mich App at 705.

The specific requirements of due process vary with the circumstances, but the essential requirement is one of fundamental fairness. *Reed*, 265 Mich App at 159. In a civil case, the essence of due process is notice and a meaningful opportunity to be heard before a neutral decision-maker. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). A party does not receive a meaningful opportunity to be heard when the court raises an issue sua sponte without giving the party a chance to present arguments or evidence on that issue. See *id.* at 488-489.

We hold that defendant did have notice and an opportunity to be heard in this case. Although the trial court made no mention of a sex offender risk evaluation prior to its opinion, the court's order for defendant to submit to the evaluation was part of the broader issue of how to serve the best interests of the child, and how often the parties should be allowed to see their child. Defendant claims he was not aware of the allegations of sexual abuse against him until the trial court issued its opinion. But, his lawyer reviewed the psychological evaluation of plaintiff's husband, which referenced the sexual abuse allegations, and did not offer any objections. Despite the fact that these allegations could damage defendant's chances to obtain custody of the minor child, defendant chose not to respond by seeking to offer rebuttal evidence or to cross-examine plaintiff's husband about the allegations.

Moreover, defendant knew that the court was considering his custodial rights in connection with the best interests of the minor child. The interest of the child is the real issue here. The court did not raise an issue sua sponte, only granted a specific form of relief that had not been requested. Defendant had notice of the issue and an opportunity to argue his case before a neutral decision-maker. Therefore, we find no violation of defendant's procedural due process rights.[7]

The trial court was authorized to consider the statutory best interest factors in determining the "frequency, duration, and type of parenting time to be granted." MCL 722.27a(6). Faced with an unrebutted allegation of sexual abuse perpetrated by defendant, the court chose to grant only supervised visitation until defendant submits to the evaluation. It cannot be said that the court's attempt to ensure the safety of the minor child was grossly violative of fact or logic. The trial court did not abuse its discretion in issuing this order.

V. SHOW CAUSE MOTION

Defendant's final argument on appeal is that the trial court erred by ignoring his motion seeking an order for plaintiff to show cause why she should not be held in contempt for denying his visitation rights. Defendant did not argue this issue before the trial court, thereby forfeiting

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[7] Defendant also asserts that the trial court violated his substantive due process rights. However, defendant does not provide sufficient support for this claim. He cites authority to the effect that parental rights constitute a protected liberty interest, but does not explain why the trial court's action deprived him of substantive due process. This is insufficient to support appellate consideration. See *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009).

the issue. We therefore review only for plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763. In addition, defendant does not cite any authority as to why the trial court should have issued a show cause order. We are not obligated to research defendant's position for him. See *McIntosh*, 282 Mich App at 484. Moreover, it is not plain that any error occurred. The facts in the record do not clearly show that plaintiff denied defendant's visitation rights during the period alleged in defendant's motion.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens