STATE OF MICHIGAN

COURT OF APPEALS

TINA SOLOMON, Plaintiff-Appellee,	UNPUBLISHED February 9, 2016
v	No. 327979 Macomb Circuit Court
PAUL SMITH, Defendant-Appellant.	LC No. 2014-002146-DP

Before: CAVANAGH, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

This case arises out of a child custody determination that occurred after the parties' minor child, KM, suffered injuries, including facial bruising and a fractured left ankle, while in defendant's care. Defendant appeals as of right[1] the trial court's order granting plaintiff's motion to modify the existing child custody order on an interim basis and denying defendant's motion for declaratory relief on the issue of collateral estoppel. We affirm the trial court's judgment, but remand for the ministerial task of amending the language in the order appealed to reflect the trial court's oral ruling.

[1] Plaintiff argues on appeal that two of the issues raised by defendant do not arise out of "a postjudgment order affecting the custody of a minor" under MCR 7.202(6)(a)(*iii*), so this Court lacks jurisdiction to consider the issues. See MCR 7.203(A)(1) ("An appeal from an order described in [MCR 7.202(6)(a)(*iii*)] is limited to the portion of the order with respect to which there is an appeal of right."). This Court explained in *Rains v Rains*, 301 Mich App 313, 321-322; 836 NW2d 709 (2013), that an order in a domestic relations action need not *change* the custody of a minor to *affect* it. By maintaining the status quo, a denial of a motion regarding custody necessarily affects custody. *Id.* at 323-324. After review of the record, we conclude that the trial court's denial of defendant's motion to apply the doctrine of collateral estoppel affected the custody of the minor because it allowed the court to proceed on plaintiff's motion to change custody and involved analysis of the factors necessary to the custody determination. On the other hand, the trial court's order denying defendant's motion to disqualify the trial judge, which came about after the court issued its custody decision, falls outside the ambit of defendant's appeal by right of the trial court's April 20, 2015 custody order. Nevertheless, in the interest of judicial economy, we will consider the judicial disqualification issue as on leave granted. See *Pierce v City of Lansing*, 265 Mich App 174, 182-183; 694 NW2d 65 (2005).

I. JUDICIAL DISQUALIFICATION

Macomb Circuit Judge Tracey A. Yokich presided over the child custody proceedings at issue in this appeal after presiding over child protective proceedings in which the Department of Health and Human Services (DHHS) sought to terminate defendant's parental rights to all of his children, including KM. Defendant argues that, when announcing her child custody ruling, Judge Yokich made comments demonstrating a high probability that she had developed "an unshakable bias" against defendant after she presided over the child protective proceedings, which contravened his rights to due process and an impartial fact-finder. We disagree.

"The factual findings underlying a ruling on a motion for disqualification are reviewed for an abuse of discretion, while application of the facts to the law is reviewed de novo." *Butler v Simmons-Butler*, 308 Mich App 195, 226; 863 NW2d 677 (2014). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* The due process inquiry related to judicial disqualification—i.e., "the constitutional due-process impartiality requirement"—is a constitutional issue reviewed de novo. *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006).

"A trial judge is presumed to be unbiased, and the party moving for disqualification bears the burden of proving that the motion is justified." *Butler*, 308 Mich App at 227. MCR 2.003(C) provides in part that disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.
>
> (c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

Due process affords parties the right to a fair trial before an impartial tribunal. *Caperton*, 556 US at 876. But in most instances, questions of *potential* bias or prejudice do not implicate due process. *Id.* at 876-877. There are, however, certain instances where, "as an objective matter," due process mandates disqualification of the presiding judge. *Id.* at 877. "These are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' " *Id.*, quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). Such circumstances include cases in which (1) the judge has a financial interest in the outcome, (2) the judge previously made the decision to bring charges against a criminal defendant, and (3) one of the parties made sizable political contributions to the judge's campaign during the pendency of the proceedings. *Caperton*, 556 US at 877-882.

We conclude that, in context, Judge Yokich's comments do not demonstrate a constitutionally intolerable probability of bias or prejudice. Rather, her comments suggest that she remained unbiased despite her unfavorable ruling against defendant. Although she candidly

explained that she would have acted differently had she been the fact-finder during the adjudication trial in the child protective proceedings, and that she found defendant's prior testimony in those proceedings incredible, Judge Yokich noted that she thought defendant could become "a safe and appropriate part" of KM's life and that she would "take every step" to ensure defendant received the services he required to become a suitable parent.

The mere fact that Judge Yokich ruled against defendant does not indicate that she was personally biased against him. *Butler*, 308 Mich App at 228. Nor has defendant cited any authority indicating that it was improper for Judge Yokich to take judicial notice of the record from the child protective proceedings as the factual basis for her child custody ruling. To the contrary, it is well-settled that a trial court can take notice of its own files and records. See, e.g., *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). Judge Yokich's decision to do so in this case served the interests of judicial economy and did not demonstrate judicial bias.

II. COLLATERAL ESTOPPEL

Defendant next argues that the trial court erred by holding that collateral estoppel did not preclude it from considering plaintiff's change of custody motion. We disagree.

Whether the doctrine of collateral estoppel applies is a question of law that we review de novo. *Holton v Ward*, 303 Mich App 718, 731; 847 NW2d 1 (2014). "Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529; 866 NW2d 817 (2014). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (citation and quotation marks omitted; alteration in original). Further, for collateral estoppel to preclude relitigation of an issue, "the ultimate issue to be concluded must be the same as that involved in the first action." *Rental Props*, 308 Mich App at 529. "The issues must be identical, and not merely similar." *Id.* As the party seeking to assert collateral estoppel, defendant bears the burden of persuasion regarding its applicability. *City of Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

In this case, the issue for the jury to decide at the adjudication trial was whether one or more of the statutory grounds for adjudication had been proven by a preponderance of the evidence. See *In re SLH*, 277 Mich App 662, 674; 747 NW2d 547 (2008). In contrast, to decide plaintiff's custody motion in the instant action, Judge Yokich was charged with considering the following distinct issues: (1) whether KM had an established custodial environment and, if so, with whom, (2) whether a change in custody would alter the established custodial environment, (3) whether proper cause or a change in circumstances justified modification of the existing custody order, and (4) whether such a modification was in KM's best interests. MCL 722.27(1)(c); MCL 722.23; *Thompson v Thompson*, 261 Mich App 353, 357; 683 NW2d 250 (2004). Although there is some factual similarity between the issues in this action and the issue decided at the adjudication trial, the issues are far from "identical."

Further, although defendant is correct that plaintiff qualified as a "party" to the child protective proceedings as that term is defined by MCR 3.903(A)(19)(a) (" 'Party' includes the . .

. parent, guardian, or legal custodian in a protective proceeding."), he has failed to demonstrate that plaintiff had a full and fair opportunity to litigate the ultimate issue decided in the adjudication trial. Defendant simply announces that plaintiff's status as a party necessarily afforded her a full and fair opportunity to litigate the issue decided in the child protective proceedings, but he provides no analysis, thus abandoning this issue on appeal.[2] Moreover, defendant's argument lacks merit. Plaintiff was not the petitioner in the child protective proceedings, so she lacked any real opportunity to control those proceedings. Further, it is unlikely that plaintiff had standing to appeal the adjudication decision. See *In re Sanders*, 495 Mich 394, 419; 852 NW2d 524 (2014) ("[I]t is difficult to see how an unadjudicated parent could have standing to appeal any unfavorable ruling."). Indeed, Judge Yokich explicitly stated that plaintiff "had no say in the disposition of [the child protective proceedings.]" Additionally, because it is the best interests of the *child* that are considered in a custody proceeding, not the parents, it would be contrary to both the public interest and common sense to allow defendant's proposed application of collateral estoppel to interfere with the trial court's ability to independently safeguard KM's best interests. Accordingly, we decline to hold that the doctrine of collateral estoppel applies in this case.

III. THE CUSTODY DETERMINATION

A. STANDARDS OF REVIEW

In *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), this Court set forth the standards of review applicable to child custody appeals:

> We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial courts discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [Citations omitted.]

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings 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." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005).

B. APPLICABLE LAW

"Under MCL 722.27(1)(c), a trial court may '[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . .' " *Shade*, 291

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[2] See *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 413; 766 NW2d 874 (2009) ("An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position.").

Mich App at 22 (alteration in original). As this Court explained in *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003):

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors.

Before a trial court makes a best-interest determination, however, it must first address whether an established custodial environment exists. *Butler*, 308 Mich App at 203. A custodial environment exists if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). If modification of a custody order would change the child's established custodial environment, the moving party must prove by clear and convincing evidence that the proposed change is in the child's best interests. *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010). "If the proposed change does not change the custodial environment, however, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Shade*, 291 Mich App at 23.

A "trial court must consider and explicitly state its findings and conclusions with regard to each [best interest] factor" enumerated in MCL 722.23. *Thompson*, 261 Mich App at 357. "A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). A trial court need not consider every piece of evidence, but must develop a record sufficient for an appellate court to determine whether the evidence clearly preponderates against the trial court's findings. *Rains*, 301 Mich App at 329.

C. THRESHOLD DETERMINATIONS FOR MODIFYING CHILD CUSTODY

Defendant first argues that the trial court's findings that proper cause existed and that the child had an established custodial environment with plaintiff were against the great weight of the evidence. We disagree. In support of its "proper cause" finding, the trial court cited the evidence adduced during the adjudication trial, which spanned eight days. The court correctly noted that it was shortly after defendant was first granted parenting time—during his fourth overnight visit—that KM suffered severe injuries. Due to the nature and severity of KM's injuries, the trial court found that the injuries were a product of either neglect or intentional abuse, which was directly supported by the testimony of a medical expert who testified in the child protective proceedings. Further, the court found that defendant's failure to promptly seek medical treatment for the child betrayed a serious lack of judgment. Considering the circumstances of this case, there were appropriate grounds for the trial court to take action, and those grounds were relevant to many of the best-interest factors in MCL 722.23. Therefore, the trial court's finding of proper cause was not against the great weight of the evidence.

Defendant also contests the trial court's finding that KM had an established custodial environment with plaintiff. However, defendant acknowledges that KM has resided with plaintiff exclusively since birth, and he cites no evidence to contravene the trial court's finding,

let alone evidence that would clearly preponderate in the opposite direction. To the contrary, the fact that KM has lived exclusively with plaintiff firmly supports the trial court's finding.

D. BEST-INTEREST DETERMINATION

Defendant next argues that the trial court clearly erred on a major legal issue, palpably abused its discretion, and relied on findings against the great weight of the evidence when it announced its best interest determination. We disagree.

As a preliminary matter, in making its best-interest determination, the trial court seemingly applied a higher standard of proof than necessary. Specifically, the court stated that clear and convincing evidence was required to support its best-interest determination. However, because KM had an established custodial environment with plaintiff, which would not be altered by the trial court's decision awarding plaintiff sole custody and granting defendant supervised parenting time on an interim basis, the court needed only to conclude that a preponderance of the evidence supported its decision. *Shade*, 291 Mich App at 23. Any error was harmless, however, because the trial court ultimately concluded that its best-interest determination was supported by a standard of proof that was higher than necessary. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994) ("[U]pon a finding of error an appellate court should remand the case for reevaluation, unless the error was harmless.").

Although defendant disagrees with several of the trial court's findings regarding the child's best interests, his mere disagreement is neither an indication that the trial court's findings were against the great weight of the evidence nor proof that the trial court palpably abused its discretion. After review of the lower court file, we are satisfied that the trial court reviewed the best-interest factors and developed a sufficient record to support the interim custody order, pending further evidentiary hearings. Defendant offered no contrary evidence to rebut the evidence relied on by the trial court in rendering its best-interest findings. The trial court's best-interest determination was prudent, particularly given (1) the serious injuries KM sustained while in defendant's care, (2) the trial court's credibility determination that defendant was "less than candid" about how the child sustained the injuries, (3) its finding that KM's injuries were likely caused by neglect or intentional abuse, and (4) the poor judgment demonstrated by defendant's failure to promptly seek medical treatment for the child. The trial court's custody order protected the child from a seemingly high potential for abuse or neglect while ensuring that KM could continue to develop a relationship with defendant through supervised parenting time. Accordingly, we will not disturb the trial court's conclusions on appeal.

E. SUPERVISED PARENTING TIME

Finally, defendant argues that the trial court abused its discretion by limiting his parenting time to a supervised setting. We disagree. "Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Shade*, 291 Mich App at 31. In pertinent part, MCL 722.27a provides the following:

> (6) The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:
>
> (a) The existence of any special circumstances or needs of the child.

* * *

> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
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> * * *
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> (i) Any other relevant factors.

Whereas a trial court must generally state its findings regarding each best-interest factor when announcing a change of custody, "parenting time decisions may be made with findings on only the contested issues." *Shade*, 291 Mich App at 31-32.

At the hearing on plaintiff's motion to change custody, the trial court orally announced its ruling regarding parenting time, stating the following:

> [O]n an interim basis, I am going to grant sole custody to plaintiff and parenting time is going to be supervised. Parenting time will be supervised twice a week at CARE [House] at defendant's cost or three hours twice a week with an agreed upon supervisor. CARE doesn't do three-hour blocks of parenting time I don't believe. So if the parties could agree upon a supervisor, [defendant] can have three hours twice a week with [KM].

The trial court considered all of the best-interest factors under MCL 722.23 before making its decision, but it did not explicitly reference any of the parenting time factors enumerated in MCL 722.27a(6). It is clear, however, that the trial court's ultimate decision was rooted in its concern that KM might suffer abuse or neglect during an unsupervised parenting visit with defendant, which is a factor properly considered under MCL 722.27a(6)(c). Indeed, at the conclusion of its best-interest determination, the trial court noted that, pending further evidence regarding the statutory best-interest factors, it would take whatever steps were "necessary and reasonable . . . to keep [KM] safe."

Defendant argues that, contrary to the trial court's finding, there was a dearth of evidence that KM would face a "reasonable" likelihood of abuse or neglect during unsupervised parenting time with defendant. Defendant's argument is unconvincing. Combined with evidence of abuse or neglect, a parent's "outright denial of culpability" oftentimes "indicate[s] a strong likelihood of continued abuse." *Sturgis v Sturgis*, 302 Mich App 706, 715; 840 NW2d 408 (2013) (discussing MCL 722.27a(6)(c)). In his testimony during the child protective proceeding, defendant steadfastly denied that KM's injuries were the result of neglect or intentional abuse, but his descriptions of the purported accident noticeably changed over time and were rife with inconsistencies and contradictions.[3] At the adjudication trial, an expert in the field of child abuse

[3] Specifically, the day after the accident, defendant told a physician's assistant that KM had fallen and hit her face, which explained her facial bruising, but that he "had no idea" how the toddler had broken her ankle. Later that same day, he told a CPS investigator that he thought KM had twisted her ankle. He also told CPS and several police officers that he saw KM fall twice, but at trial he claimed that he was looking away from the child during her first fall, which

and pediatrics testified that KM's injuries were "abusive," that is, they were not adequately explained by the child's purported accident. Accordingly, the record supports the trial court's finding that defendant was "less than candid" when he testified about KM's injuries. Moreover, given the conflicting testimony, the trial court's finding that KM's injuries were a result of abuse or neglect represents an implicit credibility determination to which this Court defers. See *Pierron*, 486 Mich at 96. Further, regardless of how KM's injuries were sustained, it is undisputed that those injuries occurred while she was in defendant's care. Under the circumstances, we conclude that the trial court did not palpably abuse its discretion by limiting defendant's parenting time with KM to a supervised setting.

As a final matter, we note that the trial court's oral ruling regarding the amount of supervised parenting time, which is quoted above, differs substantially from its subsequent written order regarding parenting time, which was evidently drafted by the parties, not the trial court. Although a trial court generally speaks through its written orders rather than its oral pronouncements, "there are circumstances in which an oral ruling has the same force and effect as a written order, as when, for example, an oral ruling clearly communicates the finality of the court's pronouncement." *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 388; 853 NW2d 421 (2014) (citation and quotation marks omitted). To determine whether "an oral ruling has equal effect to that of a written order," this Court "consider[s] whether the oral ruling contains indicia of formality and finality comparable to that of a written order." *Id*. After reviewing the trial court's oral ruling, we conclude that it has indicia of formality and finality comparable to that of a written order—indeed, it has *higher* indicia of formality and finality than the written order in this instance. Because the trial court's subsequent written order regarding parenting time differs from what it orally ruled, we remand this matter to give the trial court the opportunity to amend the order to conform with its oral ruling.

We affirm the trial court's judgment, but remand this matter to the trial court for the limited purpose described above. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J. Riordan
/s/ Michael F. Gadola

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he heard but did not see. In a sworn affidavit, defendant remembered that, after KM fell a first time, he tried to pick her up, but her "left foot was caught in a crevice approximately 4-6 inches long," so the child "slipped from [his] grasp" and fell a second time, again striking her face. At trial, however, contrary to the assertions in his affidavit, defendant testified that he never actually saw KM's ankle "entrapped" in a crevice. Instead, he felt resistance when he tried to lift KM, which led him to assume "that her foot was caught or part of her body was caught."