STATE OF MICHIGAN

COURT OF APPEALS

MORGAN T. FISHER,

Plaintiff-Appellant,

v

JORDI LLORÉ JUSTRIBO,

Defendant-Appellee.

UNPUBLISHED
October 15, 2013

Nos. 312106 & 314077
Leelanau Circuit Court
Family Division
LC No. 2009-008198-DM

In the Matter of F L FISHER, Minor.

No. 313387
Leelanau Circuit Court
Family Division
LC No. 12-008704-NA

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right the trial court's orders changing custody of the minor child and ordering plaintiff to pay a portion of defendant's attorney fees (Docket Nos. 312106 and 314077) and closing child protective proceedings after denying authorization of plaintiff's petition (Docket No. 313387). For the reasons stated below, we affirm.

I. BACKGROUND

A. EVENTS LEADING UP TO AND INCLUDING THE CUSTODY HEARING

This case began with plaintiff's complaint for divorce in 2009. The divorce was resolved by consent judgment in July 2010, with plaintiff and defendant sharing legal custody of their son, FL; plaintiff was given primary physical custody and defendant was given standard parenting time. They shared legal custody. In March, 2011, plaintiff filed a motion seeking to limit defendant's ability to travel with FL and to modify defendant's visitation as provided in the

original order. The motion was heard on May 10, 2011, but the hearing was running long and was set to continue on May 24.

However, before the hearing could continue, plaintiff filed an emergency motion to suspend defendant's visitation, attaching the reports of a police investigation conducted on May 6, 18, and 22, 2011, after a referral from Child Protective Services (CPS). The reports described plaintiff's allegations that FL was acting out sexually and that he said things implying inappropriate or abusive conduct by defendant and his girlfriend. The detective investigating the allegations could not get any confirmation or corroboration from FL, and he noted that the boy "could not tell the difference between a truth and a lie." The hearing referee denied plaintiff's emergency motion, stating that the proper process was to allow CPS to follow up on the allegations and to file a petition if the allegations were supported by a preponderance of the evidence.

Before any further action was taken, plaintiff filed a second emergency motion, again seeking to suspend defendant's visitation and terminate joint legal custody. The court then entered orders denying plaintiff's second emergency motion and denying in full plaintiff's motion regarding travel limits and change of custody and parenting time. Despite the court's ruling, plaintiff refused to let defendant have his parenting time. She was found in contempt and sentenced to two days in jail.

On October 5, 2011, defendant filed a motion to change custody, citing as changed circumstances the increased hostility and resistance plaintiff displayed in refusing to allow defendant his parenting time and in instigating CPS investigations. He sought an order awarding him primary physical care of FL and reversing the parenting time arrangement, modifying child support, and requiring plaintiff to undergo counseling. In his trial brief, defendant asserted that, since the time of the order denying her motion for change of custody, plaintiff had called his new employer (an elementary school) to report that defendant was abusing their son, subpoenaed defendant and his girlfriend while there was no pending action, had the hearing referee investigated, made additional complaints to CPS, and had agreed to entry of a restraining order against her in favor of defendant. Soon after defendant's motion was filed, plaintiff filed another emergency motion to suspend visitation, attaching a copy of the CPS and police reports that were the subject of the May 2011 emergency motions and including the affidavit of the therapist plaintiff had been taking FL to since June 2011. The trial court denied plaintiff's emergency motion, noting that it was yet another in a series of unsubstantiated accusations that plaintiff had made against defendant.

Defendant then moved for fees and costs, asserting that plaintiff's conduct required him to file both his motion regarding custody and defend against plaintiff's numerous motions, depositions, and other conduct, and he could not afford to do so on his salary. The court reviewed the history of the litigation and concluded, "What we have is a history of very aggressive behavior, litigation behavior, by the plaintiff and the defendant, who has very modest means. And, we have a plaintiff that can afford all these assets to go after the defendant." Accordingly, the court awarded defendant $20,000 as requested, and left open the possibility of future awards.

In February 2012, plaintiff began filing affidavits detailing conduct of and statements made by FL after he returned from visits with defendant, and in March, she moved to disqualify the trial court judge. Plaintiff's motion was denied as was her request for de novo review. The reviewing judge found that the real basis for plaintiff's motion was her dissatisfaction with rulings adverse to her position and there was no proof of bias by the trial court.

One month later, plaintiff filed another emergency motion to suspend defendant's visitation time, including new allegations reporting things FL purportedly said to plaintiff and objecting to the unofficial supervision arrangement that defendant initiated.[1] Included with the motion as an exhibit was a notice from plaintiff's counsel that plaintiff would be denying defendant's parenting time immediately. The court denied plaintiff's request for an emergency hearing and ruled that the hearing would be consolidated with the upcoming custody hearing.

Plaintiff made good on her threat to unilaterally suspend defendant's parenting time, and was arrested and jailed ten days for contempt. By the time of her arrest, plaintiff had filed a petition seeking authorization to file her own petition for child protection proceedings, but the trial court stayed those proceedings because the allegations were the same as those that would be dealt with in the upcoming custody hearing.

By then the trial court had received this Court's remand order regarding plaintiff paying defendant's attorney fees.[2] The evidentiary hearing on that remand was held June 7, 2012. At the start, plaintiff's counsel informed the court that she had just filed another motion to disqualify the judge (the second one) and another (the fifth) emergency motion to suspend defendant's visitation. The court declined to address those motions immediately, seeing them as an ambush and not a serious attempt to address an issue.[3] The hearing on the parties' abilities to pay for the litigation went forward, with defendant testifying about his income, expenses, debt, and legal bills. Defendant also testified about plaintiff's resources based on her 2010 tax return and his personal knowledge. Plaintiff did not personally appear for the hearing and her counsel did not present any evidence.

In reviewing the evidence, the court noted that defense counsel's hourly rates of $150 and $200 were "pretty reasonable" for the area, and found it "hard to believe" that counsel was able to address all the matters in issue in the time reported considering the level of activity in the case, which the court found "breathtakingly aggressive." The court found the evidence showed defendant's attorney fees "have now dwarfed what he can cover realistically on his own." The

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[1] Defendant had been advised to have another adult with him during his visitation time.

[2] In lieu of granting leave to appeal, this Court vacated the trial court's order awarding defendant attorney fees, and remanded, stating the court erred by "awarding attorney fees without requiring defendant to first establish that defendant is 'unable to bear the expense of the action, and that the other party is able to pay.' MCR 3.206(C)(2)(a); *Smith v Smith*, 278 Mich App 198; 748 NW2d 258 (2008), lv den 482 Mich 1053 (2008)." *Fisher v Justribo*, unpublished order of the Court of Appeals, entered May 24, 2012 (Docket No. 309078).

[3] The court ultimately denied the motion to disqualify.

court concluded that the circumstantial evidence of plaintiff's tax return and the amount of litigation she had instigated, "coupled with a 1040 that reflect[s] no need to work apparently and considerable financial assets that have been sold and generated, six figures, [$]600,000 plus, less some amount of debt that we can't determine" indicated that plaintiff had the resources to pay defendant's attorney fees. The court also found that there was no need at the time for an evidentiary hearing on the reasonableness of the fees sought because the remand order instructed the court to look at the ability of each party to pay. The court stated it did not intend to "make the defendant . . . whole" but only "to make it possible for him to defend whatever legitimate rights he may have." Thus, the court declined to award the entire $50,000 that defendant was seeking and instead set the award at $30,000.

B. THE COURT'S CUSTODY RULING

The custody bench trial was held for six days beginning June 20, 2012, and the court delivered its highly detailed and well-reasoned opinion from the bench on August 3, 2012. The court reviewed all of the testimony and exhibits, noting its conclusions regarding credibility throughout. The court commented at length on a video plaintiff made one evening in which she repeatedly questioned FL in an effort to document the disclosures FL allegedly had made to her; the court called it "a critical piece of evidence" that the court found "disturbing." The court also noted that none of the professionals investigating the case found substantiation for plaintiff's theory that defendant was abusing FL. And the court discussed at length a report prepared by the University of Michigan Family Assessment Clinic, finding that several of its conclusions were "without credibility" because they were based on hypotheses, possibilities, and assumptions or were simply unreasonable conclusions based upon unreasonable value judgments.

Relevant to the issues on appeal, the court found that FL had an established custodial environment with plaintiff because FL had lived practically all his life in the house with plaintiff who had primary physical custody. Accordingly, the court next examined the statutory best-interest factors of MCL 722.23 and found that the parties were equal on factors (a), (c), and (e), that defendant prevailed on factors (b), (d), (f), (g), and especially (j), and that factors (h), (i), (k), and (*l*) did not apply. The court found by clear and convincing evidence that a change in custody would be in the best interest of the child, and so awarded primary physical custody to defendant. It continued joint legal custody with some specific guidelines.

With respect to plaintiff's parenting time, the court decided to allow plaintiff two periods of supervised parenting time each week, and it appointed Barbara Cross as the family therapist. The parties were prohibited from engaging any other therapist for FL unless approved by Cross or ordered by the court.

Plaintiff then moved for removal of the May 24, 2012 order staying the child protective proceedings plaintiff had initiated before trial. The court stated the allegations in the petition were not substantiated, as determined in the course of the custody proceedings, and, noting the prosecutor had not joined the petition, stated that no further proceedings would be taken in the matter. Accordingly, the petition was not authorized.

Defendant moved for attorney fees and sanctions pursuant to MCR 3.206(C)(2) (parties' relative ability to pay) and MCR 2.114 (groundless or frivolous pleadings). A hearing was held

on the motion for attorney fees, as well as plaintiff's motion to quash the subpoena he served on her for her financial records, in late November 2012. By that time, defense counsel had billed a total of $89,178.91. Plaintiff did not appear, though her counsel was present, and she had not disclosed any of the financial information defendant had requested that was the subject of her motion to quash. Defendant testified regarding his income, the amounts he had been billed, his living expenses, and his debts.

The trial court declined to grant fees pursuant to MCR 2.114, but did award them pursuant to MCR 3.206(C). The court began by incorporating by reference its June 8, 2012 decision and taking note of its August 3, 2012 custody decision. The court found defendant had an inability to pay because defendant's net income had not changed significantly since then, he had nearly used up his home equity line of credit, and his legal fees continued to mount as he defended against plaintiff's numerous motions. The trial court then noted that plaintiff's ability to pay had been determined in June and, although no additional evidence about her ability to pay had been presented at the hearing, trial testimony further supported that conclusion. Thus, the court found plaintiff had the ability to pay defendant's legal fees.

The court ordered the plaintiff to pay the $23,178.91 balance defendant still owed his counsel for billings to that date and all reasonable and necessary fees and expenses incurred from then on by defendant in connection with the custody matter. Defense counsel was to send a monthly bill to plaintiff's counsel, who would then have time to file written, itemized objections, that would be heard on the monthly motion day. These appeals followed.

II. BEST INTERESTS

Plaintiff argues that the trial court's determination that a change in custody was in the child's best interests was contrary to the great weight of the evidence. Plaintiff disagrees with the court's findings on all of the statutory best-interest factors, MCL 722.23, except for factor (k). We must affirm the trial court's findings with respect to each best-interest factor "unless the evidence clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We defer to the trial court's credibility determinations, and review for abuse of discretion the trial court's discretionary rulings, such as the weight it gives to each best-interest factor and to whom it awards custody. *Id*. A trial court abuses its discretion when its decision "falls outside the range of reasonable and principled outcomes." *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012) (quotation marks omitted).

The Child Custody Act, MCL 722.21 *et seq*., promotes the best interests of the child and controls in custody disputes. *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). Under the act, "[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." MCL 722.27(1)(c).[4] MCL 722.23 provides as follows:

> 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.

[4] Defendant makes a short argument that the trial court should not have found an established custodial environment with plaintiff, and therefore, should have utilized a preponderance of the evidence standard in ruling on the best interest factors. We reject this argument because he did not file a cross-appeal and the trial court's finding was supported by the evidence.

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

In making her arguments on the best interest factors, plaintiff relies heavily on the U of M report. "While trial courts may consider psychological evaluations, and, at their discretion, afford them the weight they deem appropriate in accord with the Michigan Rules of Evidence, psychological evaluations are not conclusive on any one issue or child custody factor. The ultimate resolution of any child custody dispute rests with the trial court." *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). Here, the trial court clearly identified which parts of that report it found credible and which parts it did not, and gave its reasons for those findings. In doing so, the trial court was properly fulfilling its duties by thoroughly examining the record and providing very specific findings on all relevant factors.

The court's finding the parties equal for factor (a) was consistent with testimony given by personal friends and relatives of both parties that they loved their son and expressed that love appropriately. The testimony plaintiff points to is not relevant to whether defendant and FL have loving, emotional ties.

The trial court found factor (b) favored defendant because plaintiff's conduct, which fostered abuse allegations, "is the exact opposite" of giving proper guidance. The court noted that the U of M report indicates that FL tries to please his mother, and referenced the report of DHS employee Stacie Bladen that concluded plaintiff lacked credibility and distorted normal child behavior. The court also referenced the video plaintiff made of herself questioning FL, which the court found "disturbing" and "abusive." While it is true that none of the witnesses concluded plaintiff was encouraging or fabricating the allegations, Kathleen Faller, Ph.D., A.C.S.W., testified that even though "there is no evidence of programming, that doesn't mean that [plaintiff's] focused attention on concerns about abuse when she interacts with [FL] don't have an impact on him, I think they do." Other witnesses testified to having concerns regarding plaintiff's mental health and, in the words of one, her "manipulate[ion of] CPS to achieve a desired outcome." And the trial court was free to reach its own conclusion about plaintiff's taped questioning of FL. The court did not err in relying on the evidence it found credible and disregarding or giving little weight to witnesses and reports it found incredible. *Berger*, 277 Mich App at 705. Thus, its conclusion that factor (b) favored defendant was supported by the evidence.

For factor (c), the court found the parties equal in their capacity to provide for the child's material needs. The court relied on the testimony from the remand hearing, noting that both parties appeared able to adequately support FL. Evidence in the record supported this conclusion. The trial court correctly analyzed factor (c) as looking at whether each party could provide for the child's needs, not at which party had greater resources to provide for luxuries and legal expenses. See *id.* at 712 ("Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity* and *disposition* to provide for the children's material and medical needs.").

When considering factor (d), the court did not ignore the fact that plaintiff had provided a home for FL's entire life. But the court found that the factor nonetheless favored defendant because of plaintiff's conduct with respect to FL's allegations, which the court found was "a

serious problem [that] does make it not a satisfactory and stable and desirable environment." Citing the video and the U of M report, the court concluded that plaintiff's conduct was either manipulative and badgering or FL was saying things to try to please plaintiff. This view was supported by the testimony of a police officer, who had interviewed FL, that the child might feel a sense of duty to say something or might feel there might be some sort of reward to either do or say what is being asked. The court's finding was supported by the evidence.

The court found the parties equal on factor (e) because "they each have a home, they each live essentially alone." The court indicated that plaintiff "starts with some advantage because there is considerable family" nearby, but that this was tempered by the fact that plaintiff was not significantly involved with her extended family. Defendant testified that even though his parents are in Spain, he and FL communicated with them by videophone. We cannot conclude the court's determination that the overall permanence as a family unit of the homes of both parties was about equal was contrary to the evidence.

The court found that factor (f) heavily favored defendant. The court found immoral plaintiff's "interrogating" FL about sexual matters as demonstrated on the video she made, as well as her insinuating to immigration authorities and defendant's employer that he was guilty of child sexual abuse. The court found incredible, as it was free to do, both the finding of the U of M report that defendant had made errors in judgment and its reliance on hypotheses and assumptions.

As for factor (g), the physical health of the parties was not an issue. But a psychological evaluation of plaintiff conducted in June 2011 found "both the psychopathic deviancy and paranoia scales approach significance." The report also found plaintiff harbored bitter and angry feelings toward defendant that she needed to address, otherwise FL was at risk for exposure to parental alienation. In contrast, the evaluation of defendant made no specific negative comments about his mental health. The court was within its discretion to conclude that the psychological evaluations indicated that plaintiff "has some serious problems that do bear on this question of the [the child] and how [the child is] going to be treated here."

Plaintiff argues that the trial court erred in finding factor (h) to be irrelevant, asserting that FL had been socializing with children in daycare and preschool and that he would continue to be with those children if he remained in her custody. However, plaintiff points to no testimony at trial regarding children with whom FL socialized. The trial court's decision that this factor did not weigh in favor of plaintiff was not against the weight of the evidence.

Under factor (i), plaintiff argues that the trial court erred in not considering the preference of the child. She cites the U of M report as establishing his preference, and the court also noted that the report indicated FL feared being taken from his mother. However, the trial court concluded that since FL was young and did not understand the proceedings, the child was not able to express a knowledgeable preference. The trial court had the discretion to determine whether the child was then of sufficient age to express a reasonable preference regarding custody arrangements. *Dempsey v Dempsey*, 96 Mich App 276, 282-283; 292 NW2d 549 (1980), mod on other grounds 409 Mich 495 (1980). Further, not only was there evidence of the child's potential willingness to say what he thought his mother wanted to hear, but there was also testimony that he made disparaging statements about his father that were at odds with his behavior.

The court found that factor (j) counted heavily against plaintiff. There is no dispute that plaintiff filed numerous motions to suspend defendant's visitation with FL despite the fact that allegations of abuse were never substantiated. Plaintiff's own testimony makes it clear that she could not accept the findings of every investigator who looked into the allegations. Moreover, contacting defendant's employer and homeland security had nothing to do with pursuing the allegations made by FL, but revealed her inability to cooperate with defendant now or in the future. Her psychological evaluation, describing plaintiff's continuing anger toward defendant, also supports the court's conclusion that plaintiff would have trouble encouraging a close relationship between FL and defendant. The trial court's finding that factor (j) favored defendant "by a very large amount" was supported by the evidence.

Finally, the trial court properly concluded that there were no other issues not already considered in the first eleven factors and that nothing needed to be added under factor (*l*). On appeal, plaintiff merely reargues her position that the allegations of abuse support finding that factor (*l*) weighs in her favor. Given that the allegations against defendant were thoroughly considered within the other factors, the trial court did not err in finding factor (*l*) did not require consideration of anything further.

Accordingly, we affirm the trial court's decision that clear and convincing evidence established that a change of custody was in FL's best interests.

III. LEGAL CUSTODY

Plaintiff argues that despite the court's express statement that joint legal custody was not being changed, the trial court's custody order did in fact change the nature of the joint legal custody originally ordered, reducing plaintiff's ability to make legal decisions regarding FL to the point that she no longer had legal custody. A trial court's award of legal custody is discretionary, so we review it for abuse of discretion. *Berger*, 277 Mich App at 705.

To begin, we reject the notion that the trial court's limit on plaintiff's decision-making authority amounted to a change in legal custody. When parties who have joint legal custody "cannot agree on an important decision, . . . the court is responsible for resolving the issue in the best interests of the child." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Given plaintiff's behavior, the court concluded that the best interests of the child required that "all decisions regarding treatment of [FL]'s physical and mental health shall be made by Defendant." We believe that the court acted prudently, and in FL's best interests, in anticipating that plaintiff and defendant would not agree on medical decisions regarding FL. There was credible expert testimony that too much interviewing and interrogation was harmful to FL and that he experienced trauma every time he was reinterviewed about the abuse allegations. Moreover, the trial court also ordered that FL was not to see "any other counselor or therapist without the approval of [the court-appointed therapist] or the court," which effectively limited each parties' authority. These are targeted limitations that leave parental authority in other areas intact.

IV. ATTORNEY FEES

Plaintiff argues that the trial court erroneously ordered her to pay defendant's attorney fees, both by conducting flawed proceedings after we remanded the issue of attorney fees

originally ordered and by committing the same errors when defendant moved for attorney fees after trial. Her argument consists of three prongs: (1) that the trial court erred by reinstating an award of attorney fees after this Court had vacated it, (2) that defendant both times failed to meet his burden of proof that plaintiff can afford to pay defendant's fees, and (3) that the trial court was required—and failed—to analyze in detail the reasonableness of the fees claimed.

We first address the matter of the remand. A trial court must follow the scope of a remand order and may not exceed it by including matters not addressed. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005); *Waatti & Sons Electric Co v Dehko*, 249 Mich App 641, 646; 644 NW2d 383 (2002). Our remand order stated:

> The trial court abused its discretion in awarding attorney fees without requiring defendant to first establish that defendant is "unable to bear the expense of the action, and that the other party is able to pay." MCR 3.206(C)(2)(a); *Smith v Smith*, 278 Mich App 198; 748 NW2d 258 (2008), lv den 482 Mich 1053 (2008). This matter is REMANDED to the trial court for the purpose of reevaluating defendant's motion after a hearing at which defendant will be provided the opportunity to satisfy MCR 3.206(C)(2). [*Fisher v Justribo*, unpublished order of the Court of Appeals, entered May 24, 2012 (Docket No. 309078).]

MCR 3.206(C) provides as follows:

> (1) A party may, at any time, request that the court order the other party to *pay all or part of the attorney fees and expenses* related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) *A party who requests attorney fees and expenses must allege facts sufficient to show that*
>
> *(a) the party is unable to bear the expense of the action, and that the other party is able to pay*, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. [Emphasis added.]

Our prior order anticipated that defendant may have been able to satisfy the requirement that he show he cannot pay his attorney fees and plaintiff could, and we expressly ordered the trial court to give defendant the opportunity to do so. Thus, plaintiff's argument that the trial court's ordering her to pay fees was contrary to our remand order is meritless.

We next examine the parties' relative ability to pay and conclude that the evidence was sufficient to support the trial court's findings. Defendant testified at length about his inability to pay his legal fees, and we are satisfied that the trial court did not clearly err in concluding his income was only sufficient to support his modest lifestyle and not the extensive legal fees he had accrued in the course of litigation. Plaintiff's ability to pay was not supported with much direct evidence, but defendant provided circumstantial evidence in the form of his testimony about

plaintiff's ability to support them both on her trust fund income and plaintiff's 2010 tax returns. Other evidence in the record, which includes exhibits filed in anticipation of the divorce trial, also supports the trial court's conclusion. We cannot say the court abused its discretion in finding the requirements of MCR 3.206(C)(2)(a) were met. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).

Although "attorney fees are not recoverable as of right in divorce actions[,]" under MCR 3.206, the trial court has discretion to award attorney fees in a divorce action when a party needs financial assistance to prosecute or defend the suit.[5] *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The court rule does not expressly include a requirement that the fees be reasonable or necessary; however, this Court has imposed such a requirement. See, e.g., *Ewald v Ewald*, 292 Mich App 706, 726; 810 NW2d 396 (2011); *Reed*, 265 Mich App at 165-166; *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). In making the determination of reasonableness, the court should consider and at least briefly explain its findings on several factors, identified as including:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [*Smith v Khouri*, 481 Mich 519, 530; 751 NW2d 472 (2008), quoting MRPC 1.5(a).[6]]

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[5] MCL 552.13(1) also authorizes the court in a divorce action to award costs and to require a party to "pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency."

[6] *Smith* also identified six factors from *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), which are largely duplicative of the MPRE factors: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature

However, under MCR 3.206(C)(2)(a), the court is not necessarily required to undertake the detailed analysis described in *Smith*, which includes first identifying a baseline reasonable fee, because that case addressed a different court rule, one that mandates an award pursuant to case evaluation sanctions. *Univ Rehabilitation Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008); *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 172; 712 NW2d 731 (2005).

Nor was the court necessarily required to hold a second, separate evidentiary hearing as long as the existing record was sufficient to review the issue. *Head v Phillips Camper Sales & Rental Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). In any event, the court did hold two evidentiary hearings, one on June 7, 2012 and the other on November 28, 2012, and it expressed its intent to receive evidence. Plaintiff's counsel was also afforded the opportunity to review the details of counsel's billing, but counsel refused and instead insisted a second hearing was required. See *Taylor v Currie*, 277 Mich App 85, 101-102; 743 NW2d 571 (2007).

Despite all of this, the court was still required to—and did—make a finding of reasonableness based on more than simply a sense of fairness. *Reed*, 265 Mich App at 166. In this case, despite its conclusion that no finding of reasonableness was necessary, the trial court nonetheless found defense counsel's hourly rates of $150 and $200 to be "pretty reasonable" for the area, and that billing 221 hours was so low it was "hard to believe that they were able to do it" considering the level of activity in the case, which the court found "breathtakingly aggressive." The court thus covered several of the required factors expressly and, in the course of its opinion, indicated its conclusions regarding the difficulty and extent of the case, the amount expended, the fact that what was at stake was the potential for serious damage to FL, the professional standing of defense counsel, and the investment of time he had made. Ultimately, the court awarded $53,178.91 of the $89,178.91 defense counsel had billed through October 31, 2012, having found at the June hearing that requiring defendant to pay some of it "would be fair and reasonable."

We note that plaintiff does not here, and did not at any other time, dispute the reasonableness of the fees, but argues only that the trial court's failure to follow in detail the procedure outlined in *Smith v Khouri* requires reversal. We thus conclude that any procedural error by the trial court was harmless. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

V. CHILD PROTECTION PROCEEDINGS

In Docket No. 313387, plaintiff argues that the trial court's refusal to deny plaintiff's motion to remove the stay and refusal to conduct hearings was an abuse of discretion because the court ignored the statutory and court-rule requirements that apply to child protective proceedings, particularly in failing to consider the evidentiary value of the child's own statements.

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and length of the professional relationship with the client." *Smith*, 481 Mich at 529 (citation omitted).

Under MCR 3.962(A), "the court *may* conduct a preliminary inquiry" regarding a petition filed to initiate child protective proceedings, MCR 3.962(A) (emphasis added), and at that inquiry, "the court *may* . . . [d]eny authorization of the petition," MCR 3.962(B)(1) (emphasis added). Thus, the court's decision to deny authorization of the petition is discretionary, and we review it for an abuse of discretion. See *People v Watkins*, 491 Mich 450, 483-484; 818 NW2d 296 (2012); *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *Id.* at 467.

MCR 3.962 provides in full:

> (A) **Purpose.** When a petition is not accompanied by a request for placement of the child and the child is not in temporary custody, the court may conduct a preliminary inquiry to determine the appropriate action to be taken on a petition.
>
> (B) **Action by Court.** A preliminary inquiry need not be conducted on the record or in the presence of the parties. At the preliminary inquiry, the court may:
>
> (1) Deny authorization of the petition.
>
> (2) Refer the matter to alternative services.
>
> (3) Authorize the filing of the petition if it contains the information required by MCR 3.961(B), and there is probable cause to believe that one or more of the allegations is true. For the purpose of this subrule, probable cause may be established with such information and in such a manner as the court deems sufficient.

First, the trial court did not deny plaintiff's motion to remove the stay; the order unambiguously granted that relief when it ordered the stay be "terminated." Also, the court's decision that "[n]o further proceedings . . . will be taken" amounts to a decision to deny authorization of the petition, nothing more. This decision was not an abuse of the court's discretion:

> The circuit court is permitted to conduct a "preliminary inquiry" off the record "[w]hen a petition is not accompanied by a request for placement of the child and the child is not in temporary custody." MCR 3.962(A). The permissible actions following a preliminary inquiry are limited to granting or denying authorization to file the petition, or referring the matter to "alternative services." See MCR 3.962(B)(1)-(3). [*In re Kyle*, 480 Mich 1151; 746 NW2d 302 (2008).]

Plaintiff's petition did not request placement of the child. Indeed, she had primary physical custody of FL and did not seek to change that.[7] Rather, she sought to have defendant's visitation terminated, to have a guardian ad litem appointed, and to have defendant's parental rights terminated, if necessary. Because there was no request to place the child or to take temporary custody of the child, the preliminary inquiry provisions of MCR 3.962 apply. Thus, the court was permitted to take action without holding a hearing on the record. MCR 3.962(B). And the court's decision was limited to one of three possible actions: granting authorization, denying authorization, or referring the matter. MCR 3.962(B); *In re Kyle*, 480 Mich at 1151. The court could have granted authorization if it found "there is probable cause to believe that one or more of the allegations is true." MCR 3.962(B)(3). Notably, the rule contains its own standard for finding probable cause: "For the purpose of this subrule, probable cause may be established with such information and in such a manner as the court deems sufficient." MCR 3.962 (B)(3).

When it denied authorization of plaintiff's petition, the trial court determined that separate judicial proceedings were not necessary. Thus, MCL 722.630, which mandates the appointment of a lawyer-guardian ad litem in cases requiring judicial proceedings, did not apply. Likewise, other statutory and court-rule requirements, such as those provided by MCR 3.972, apply only when a petition has been filed—that is, authorized—or the child is in protective custody. MCR 3.972(A); MCR 3.963; MCR 3.965. But plaintiff's petition was never authorized, and so the trial court was not required to follow the statutes and court rules applicable to child protective proceedings.

The allegations in the original petition were examined thoroughly during the six-day trial. The trial court's conclusions that those allegations had been dealt with at that time and had been found unsubstantiated are within the range of principled outcomes. Even if plaintiff could raise a new allegation of abuse in her motion to remove the stay, the trial court acted within its discretion when it decided that plaintiff's conclusory allegation did not establish probable cause to believe the allegation of abuse was true, particularly in light of the evidence that the bruising cited had been caused by an overexcited dog.

Affirmed.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

[7] "'Placement' means court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency." MCR 3.903(C)(8).