

STATE OF MICHIGAN
COURT OF APPEALS

SHEHNAZ ABDRABBOH ZEINEH,

Plaintiff-Appellant,

v

WISAM ROBERT ZEINEH,

Defendant-Appellee.

UNPUBLISHED

May 17, 2018

No. 339443

Clinton Circuit Court

Family Division

LC No. 16-026965-DM

Before: MURRAY, C.J., and SERVITTO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the judgment of divorce entered by the trial court after a bench trial. We affirm in part, vacate in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties were married in 2014, and have one minor child. During the marriage, the parties opened a business, Capital Area Tactical (CAT). Plaintiff filed a complaint for divorce in 2016. After the parties participated in a conciliation hearing at the Clinton County Friend of the Court (FOC), the trial court entered an ex parte order granting the parties joint legal and joint physical custody, creating a parenting time schedule, and ordering the FOC to determine child support. Plaintiff objected to the ex parte order, and hearings were conducted in March and April 2017. The trial court found that there was an established custodial environment with both parties. Following a review of the best-interest factors, the trial court found that there was clear and convincing evidence to grant the parties joint physical custody and to grant sole legal custody to plaintiff, and it entered a temporary custody order to that effect. The trial court limited the issue at trial to that of property division, stating that it would not relitigate custody, parenting time, or child support.

On May 11, 2017, defendant filed a motion to compel discovery, asking the trial court to compel plaintiff to answer interrogatories concerning CAT's financial status. At a June 6, 2017 hearing on the motion, defendant stated that the discovery was "very important," because the parties had recognized that the business was a marital asset, yet all documentation relating to the business was in plaintiff's exclusive possession. However, both parties acknowledged that they had each failed to answer the other's interrogatories. The trial court held that because both parties had failed to abide by the time limit for answering interrogatories, and trial was only two

weeks away, both parties were precluded from presenting any evidence about the business at trial.

A bench trial was held on June 23, 2017. At the beginning of trial, plaintiff's counsel stated that plaintiff had "made it clear" that she believed that he was not "effectively representing her" and he orally requested to withdraw because of "that conflict of interest."¹ The trial court stated that counsel could withdraw as long as plaintiff understood that they would be moving forward with the divorce trial that day and that the court would not grant an adjournment. After the court gave plaintiff an opportunity to consult with counsel, counsel stated that plaintiff "ha[d] not expressed a preference one way or the other" and that she had left it to the court's discretion whether to release counsel. The court instructed counsel to remain in the case at that time.

During her trial testimony, the trial court asked defendant whether plaintiff "gets the business," and defendant responded in the affirmative. Plaintiff's counsel also stated that plaintiff had represented at settlement negotiations that "she was the owner and operator of the business, so she can have the business and all its assets and debts." Defendant relinquished his claim to any marital property apart from one of their vehicles, his nursing books, and a "right of first refusal" should plaintiff decide to get rid of the family dog. The trial court awarded defendant a vehicle (and ordered that defendant assume any liens associated with it), his nursing books, and the right of first refusal for the dog. The trial court also awarded each party his and her own bank account, and awarded plaintiff the remaining marital assets, including CAT's assets and debts.

The trial court then stated that the provisions for custody, parenting time, and child support as addressed at the evidentiary hearing on April 20, 2017 would be incorporated into the final judgment, and asked whether the parties wished to comment on that matter. Plaintiff stated that she continued to dispute the trial court's grant of joint physical custody but acknowledged that the trial court had stated that it would not be addressing that issue at trial. Defendant stated that he took issue with plaintiff's approach to the minor child's medical treatment. After hearing testimony from both parties, the court found that there was proper cause to revisit legal custody. The trial court briefly reviewed the best-interest factors and granted the parties joint legal custody.

Plaintiff's counsel submitted a proposed judgment of divorce, and the trial court entered the judgment on July 7, 2017. This appeal followed.

II. DENIAL OF MOTION TO WITHDRAW

Plaintiff argues that the trial court erred when it required plaintiff's counsel to continue representing her at trial despite the existence of a conflict of interest. We disagree. We generally review for an abuse of discretion a trial court's decision on a motion to withdraw. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). The trial court

¹ The transcript also references an earlier request by plaintiff's trial counsel to withdraw from the case. However, the lower court record reflects no written motions to withdraw.

abuses its discretion “when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The record does not support plaintiff’s contention that the trial court flatly denied her counsel’s motion to withdraw. Rather, the trial court indicated that it would grant the motion, provided that plaintiff understood that it would not adjourn the trial. Plaintiff chose to leave the matter to the court’s discretion. The trial court then stated that it would deny the motion and that plaintiff’s counsel would continue to represent her.

“A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008). Nor should a party be permitted to *refuse* to take a position, ask the trial court to make the decision for them, and then take issue with the result. The trial court gave plaintiff the opportunity to consult with counsel and decide whether she wanted to continue the trial with his representation or release her counsel (and presumably represent herself.)² Plaintiff chose not to release her counsel at that time, and she cannot now protest that the trial court should have ordered her to represent herself. *Holmes*, 281 Mich App at 587-588; see also *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010) (“A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.”).

Further, even if we were to review the trial court’s ultimate denial of plaintiff’s motion, we would hold that it was not an abuse of discretion. Although an attorney must withdraw when there is a conflict of interest unless the attorney reasonably believes the conflict will not adversely affect representation and the client consents after consultation, MRPC 1.7, plaintiff has failed to identify any conflict of interest or support her argument with any authority. “A party cannot simply announce a position and expect the court to search for authority to sustain or reject that position.” *Hodge v Parks*, 303 Mich App 552, 557 & n 1; 844 NW2d 189 (2014). The trial court’s decision not to allow a withdrawal on the day of trial when plaintiff’s counsel did not identify any specific conflict of interest³ was not an abuse of discretion.

III. PROPERTY DIVISION

Plaintiff also argues that the trial court erred when, as a discovery sanction, it barred the parties from introducing evidence about CAT at trial, and when it failed to make specific

² Defendant represented himself at trial.

³ In context, it appears that counsel may have meant “a breakdown in the attorney-client relationship” rather than an actual conflict based on counsel’s prior or current representation of other clients. See MRPC 1.16(b); see also *Ambrose v Detroit Edison Co*, 65 Mich App 484, 488-489; 237 NW2d 520 (1975). Nonetheless, plaintiff also did not present below, and does not present on appeal, any specific argument concerning any breakdown in the attorney-client relationship.

findings of fact regarding the value of the business. Plaintiff argues that these errors rendered the property distribution inequitable, because the award to her of CAT rendered her solely responsible for a sizeable debt. We disagree.

Even if the trial court erred by ordering discovery sanctions and by failing to make specific findings of fact, plaintiff has waived this issue. Plaintiff's counsel stated at trial that throughout the settlement negotiations plaintiff had represented that she was the owner and operator of CAT and should receive the business, and she agreed that CAT's assets and debts should be awarded to her. A party cannot state a position at trial and then request relief on appeal based on the opposite position. See *Bates*, 290 Mich App at 64; *Holmes*, 281 Mich App at 587-588. Because plaintiff expressly requested that she be awarded ownership of CAT, knowing that this included all associated assets and liabilities, she cannot assert on appeal that the trial court should not have granted the business to her.⁴

IV. CUSTODY

Finally, plaintiff argues that the trial court erred when it made a change from sole to joint legal custody without determining the established custodial environment. We agree. "This Court must affirm all custody orders 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).

A trial court can modify a previous order for custody if a party shows proper cause or change of circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). The court must find by a preponderance of the evidence either proper cause or a change of circumstances before it considers whether an established custodial environment exists. *Id.* at 509. Assuming it has found proper cause or a change of circumstances, a trial court must determine a child's established custodial environment before making a custody determination. *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). The "failure to determine whether there is an established environment is not harmless," because a trial court must make a determination regarding the established custodial environment in order to determine the "proper burden of proof" to apply to the best-interest factors. *Id.* at 62.

⁴ We further note that, with respect to plaintiff's challenges to the trial court's failure to specifically value the business, the trial court's lack of information concerning CAT was caused by plaintiff's own noncompliance with discovery rules. This Court has stated, although in the context of failure to comply with an order to compel discovery rather than noncompliance with the opposing party's discovery requests, that a party may not challenge the accuracy of a trial court's valuation on appeal when there is "no certain way of knowing whether the trial court's valuation was accurate in the absence of [the party's] own compliance with the court's orders compelling discovery." *Draggoo v Draggoo*, 223 Mich App 415, 430; 566 NW2d 642 (1997).

In this case, the trial court failed to consider whether there was an established custodial environment. We conclude this was clear legal error and that remand is required. *Berger*, 277 Mich App at 705. On remand, the trial court must determine whether there is an established custodial environment with either or both parents before conducting its evaluation of the best-interest factors. If the court determines that there is an established custodial environment with both parents, with plaintiff, or with defendant, the party seeking to change the established custodial environment must show by clear and convincing evidence that the change is in the child's best interests. *Kessler*, 295 Mich App at 62. The trial court should evaluate the best-interest factors and determine whether either party has met its burden. The court should consider new information or other changes in circumstances that has emerged since the entry of the judgment of divorce. *Id.* at 62-63.⁵

We vacate the award of joint legal custody, and we remand for further proceedings consistent with this opinion. In all other respects, we affirm.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Mark T. Boonstra

⁵ Plaintiff also argues that the trial court erred by incorporating into the judgment of divorce its findings of fact concerning child support and parenting time from the temporary custody order. However, because the court did not modify child support or parenting time at trial, and plaintiff did not request that the court revisit those issues, there was no need for the court to address child support or parenting time at trial. See *Shade v Wright*, 291 Mich App 17, 28-30; 805 NW2d 1 (2010) (discussing how a court should approach a modification of parenting time); see also *Clarke v Clarke*, 297 Mich App 172, 188-189; 823 NW2d 318 (2012) (discussing how a court should approach a modification of child support).