

STATE OF MICHIGAN
COURT OF APPEALS

LONNIE CHESTER AMERSON, JR.,

Plaintiff-Appellee,

v

JASMINE JANE SMILEY,

Defendant-Appellant.

UNPUBLISHED

April 16, 2020

No. 350930

Wayne Circuit Court

LC No. 18-110438-DC

Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM.

In this child-custody action, defendant, the minor child’s mother, appeals as of right from the trial court’s modification of a child support order. Defendant also challenges the trial court’s earlier order that found defendant in contempt and modified parenting time. We affirm.

I. BACKGROUND

This case arises out of a complaint for custody that plaintiff, the child’s father, filed with the trial court on August, 2018, requesting joint legal custody and sole physical custody of the child. Plaintiff asserted that defendant neglected the child’s education because the child had not attended school since April 2018. In August 2018, plaintiff suggested that the child live with him and that defendant have weekend parenting time.

Thereafter, plaintiff filed an ex parte motion for immediate return of the child. He alleged that, on Sunday, October 7, 2018, defendant informed him that she would take the child to school the following day. When plaintiff contacted the school he was informed that the child was not only absent, but had also been disenrolled. Within a few weeks, the trial court entered a temporary order providing for joint legal custody order and placing the child with plaintiff to ensure that the child attended school. The matter was also referred for review, and, after hearing plaintiff’s motion for custody in April 2019, the trial court concluded that it was in the child’s best interest for the parties to have joint legal custody and for plaintiff to have primary physical custody with defendant having parenting time.

Later, defendant failed to return the child after a parenting time visit. The trial court ordered defendant to show good cause why she had failed to comply with its prior orders. Defendant failed to appear for the show cause hearing, and thus, a bench warrant was issued. Defendant was also arrested for parental kidnapping, MCL 750.350a, and arraigned in the district court. The trial court held a contempt hearing and found that defendant's violations of the court's orders were willful, and sentenced defendant to 30 days in jail for civil contempt of court, MCL 600.1701(g).

II. DISCUSSION

On appeal, defendant, proceeding *in propria persona*, raises multiple arguments regarding the various lower court proceedings. Our review reveals no error requiring relief.

As an initial matter, this Court requested defendant to produce transcripts for the October 26, 2018 hearing on the parties' custody motions as well as the September 6, 2019 contempt hearing, cautioning that her "[a]ny issue raised which requires consideration of these materials *may be deemed waived*[" Defendant failed to produce the requested transcripts, stating her belief that the record contained all of the necessary transcripts. As the appellant in this appeal, defendant is responsible for securing the filing of "the transcript of any testimony or other proceedings in the case appealed[" MCR 7.210(A)(1) and (B); *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991) ("[T]he appellant[] [has the] obligation to secure the complete transcript of all proceedings in the lower court unless production of the full transcript is excused by order of the trial court or by stipulation of the parties. A party may not unilaterally make the determination that less than the full transcript of all proceedings is required for the appeal."). Given defendant's failure to provide necessary transcripts, we consider any arguments requiring review of those transcripts waived. See *PT Today, Inc v Comm'r of Office of Fin & Ins. Servs*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006).

A. DUE PROCESS

Defendant argues that she was denied her due-process rights when she was arraigned in district court before a different judge, who did not know anything about the case. Defendant also argues that the trial court violated her due-process rights when it did not allow her to speak with her attorney and when the court's bailiff intimidated defendant and her defense counsel. We disagree.

Michigan follows a "raise or waive" rule of appellate review in civil matters. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (quotation marks omitted). Accordingly, "appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually." *Id.* at 388. Here, defendant never raised a due-process objection in the trial court. Therefore, her due-process claim is unpreserved.

We review unpreserved issues for plain error. *Demski v Petlick*, 309 Mich App 404, 426-427; 873 NW2d 596 (2015). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (quotation marks omitted). The third prong requires a showing of prejudice,

meaning that the error must have impacted the outcome of the lower court proceedings. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

Under the United States and Michigan Constitutions, no person shall be deprived of life, liberty, or property, without due process of law. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 288; 831 NW2d 204 (2013), citing US Const, Am XIV; Const 1963, art 1, § 17. “Moreover, due process is a flexible concept, the essence of which is to ensure fundamental fairness.” *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005) (citations omitted). Due process “requires the opportunity to be heard at a meaningful time and in a meaningful manner.” *York v Civil Serv Comm*, 263 Mich App 694, 702; 689 NW2d 533 (2004) (quotation marks omitted). This includes the ability to have “the chance to know and to respond to the evidence against h[er.]” *Id.* (quotation marks omitted).

Defendant first asserts that her due-process rights were violated when she was arraigned in district court on September 5, 2019 on the bench warrant for contempt because the district court had no knowledge of the child-custody case. The record shows that on September 4, 2019, defendant was arrested and arraigned in the district court on a criminal charge of parental kidnapping, MCL 750.350a(1). Because the circuit court was not in session, defendant was not arraigned there on the bench warrant for the contempt charge. Instead, the circuit court remanded defendant to the custody of Wayne County Sheriff and ordered her to be arraigned at the next available circuit court session on September 6, 2019. Thus, the record reveals that defendant was not improperly arraigned for the contempt proceedings by the district court; instead, she was properly arraigned on her separate criminal matter.

Defendant also argues that it was improper for another circuit court judge to enter the September 5, 2019 order remanding her to the Wayne County Sheriff because “[t]he practice of allowing another judge to stamp orders is improper.” But MCR 2.613(B) explicitly allows a different judge to enter an order if the original judge “is absent or unable to act.” Here, the circuit court’s order specifically stated that the circuit court judge assigned to the custody case was unavailable because the circuit court was not in session. Therefore, defendant’s argument lacks merit.

And to the extent that defendant challenges her contempt charge and the trial court’s order finding her in contempt, we conclude that the circuit court’s order was authorized because the record demonstrates that defendant willfully failed to appear for three court hearings regarding this ongoing custody dispute. See MCL 600.6076 (authorizing civil arrest for contempt of court). Moreover, as defendant has failed to provide the transcript of this hearing, this issue is waived because, without that transcript, we are cannot further review the circuit court’s decision.¹

¹ Defendant also seems to indicate that there was an abuse of process during these proceedings, but does not provide any factual support or legal development of this claim. For this reason, even if the issue had not been waived by defendant’s failure to provide the relevant transcript, it was abandoned. See *Yee v Shiawassee County Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (“[W]here a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court” (quotation marks omitted)).

Defendant next argues that she was denied due process when the trial court prevented her from speaking with an attorney. Defendant provides no record citation in support of her contention. Our review of the record reveals that defendant may be referencing the April 4, 2019 custody hearing. The trial, which was scheduled on February 11, 2019, was already in progress when defendant, who had called the court that morning, arrived over an hour late. As the trial court was questioning defendant about why she had yet to return the child in violation of the court's order, defendant claimed that she believed the court's order had changed. After the court inquired about why defendant would think that, defendant eventually explained that she had car issues and wanted "an adjournment because I don't have my lawyer and I'm not aware of my rights and I would like a lawyer present." The trial court denied defendant's request for an adjournment and continued with the proceeding.

Our review of the available record demonstrates that defendant did not retain an attorney at any point during this child-custody proceeding. All of defendant's motions were submitted to the trial court *in propria persona*. Moreover, defendant's failure to retain counsel does not necessarily require an adjournment. See *e.g.*, *Wykoff v Winisky*, 9 Mich App 662; 669; 158 NW2d 55 (1968) ("The right to representation by counsel contemplates the allowance of a reasonable opportunity to obtain counsel."). And, to the extent that defendant's statement at the custody hearing was a request for court-appointed counsel, a litigant in a child-custody dispute does not have a due-process right to appointed counsel. *Haller v Haller*, 168 Mich App 198, 199-200; 423 NW2d 617 (1988). Accordingly, defendant was not denied due process when the trial court exercised its discretion and declined to adjourn an in-progress custody hearing so that defendant could speak with an attorney. For these same reasons, defendant's claim that her right to attorney-client privilege was violated also fails.

Defendant next argues that her due-process rights were violated when the trial court's bailiff engaged in "witness intimidation" against her and her defense counsel. Defendant has not provided any record citation for where this alleged intimidation occurred. Moreover, as we previously discussed, defendant never retained an attorney throughout these proceedings. The record before us reveals two instances where the bailiff spoke during the custody hearing:

Defendant: And I found out that [the custody hearing was scheduled], so that's why I came here. I had to get someone to watch my daughter while I came down here.

Bailiff: Quiet.

The Court: Okay. Your daughter is supposed to be with her father, right.

* * *

Defendant: I feel like—I was told that he likes to engage in sexual behavior with underage girls.

Bailiff: Shhh, quiet.

The Court: Okay.

Defendant has failed to establish that the bailiff's two comments for quiet in the courtroom were directed at her. The bailiff could have been quieting others in the courtroom or plaintiff, whom defendant had just accused of illegal sexual activity based on unsupported hearsay. But, even assuming that the bailiff's requests for quiet were directed at defendant, she has not proffered the relevant information she was prevented from presenting. Our review of the record reveals that defendant participated in the remainder of the custody hearing without interruption and argued that plaintiff should not have custody of the child. Thus, the record does not support defendant's allegation that the court bailiff's intimidation deprived her of her right to due process.

Defendant also asserts that the circuit court judge was generally biased against her and violated the rules of professional conduct. Defendant failed to file a motion for disqualification below, and thus, this issue is unpreserved. See MCR 2.003(D)(1)(a); *Meagher v Wayne State Univ*, 222 Mich App 700, 726; 565 NW2d 401 (1997). We will not consider an unpreserved claim of judicial bias absent unusual circumstances. *Meagher*, 222 Mich App at 726. We do not find such circumstances here. See *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009) ("The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment."). Likewise, defendant's allegation that the trial judge violated the Rules of Professional Conduct is abandoned, *Yee*, 251 Mich App at 406, and, our review of the record reveals the court's behavior comported with the rules governing attorneys and judges.

Lastly, defendant argues that the trial court generally denied her notice and an opportunity to be heard. Again, defendant has failed to provide us with the full record required to review this contention. And based on our review of the available record, defendant was provided with notice of the proceedings and had the opportunity to be present and heard. Because this is all due process requires, we conclude that the trial court did not violate defendant's rights. *York*, 263 Mich App at 702.

B. PHYSICAL CUSTODY

Defendant also argues that the trial court erred when it gave plaintiff sole physical custody and failed to make appropriate factual findings. We disagree.

" '[A]ll orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.28. "Thus, a trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion." *Id.* "In child custody cases, an abuse of discretion exists 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." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010) (quotation marks and alteration omitted).

We note that the order defendant appeals from in this case is the order modifying child support. However, defendant's issue on appeal challenges the trial court's earlier order, awarding sole physical custody to plaintiff. Defendant previously appealed the April 4, 2019 order, but we dismissed defendant's appeal because it was untimely. *Amerson v Smiley*, unpublished order of the Court of Appeals, entered May 30, 2019 (Docket No. 348777). And, even if we addressed defendant's arguments, we would find them meritless.

Defendant argues that the trial court failed to address the best-interest factors regarding child custody. "[C]ustody disputes are to be resolved in the child's best interests," which are measured by the factors outlined in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Relevantly, one of the best interest factors to be considered is "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). Another best interest factor to be considered is the moral fitness of the parties. MCL 722.23(f). The trial court must evaluate each of the best interest factors and explicitly state its findings and conclusions as it relates to each factor. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008). "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).

Our review of the record establishes that the trial court explicitly addressed each of the best interest factors during the custody hearing and we deduce no clear error in the trial court's weighing of these factors. Although defendant specifically asserts that the trial court did not consider plaintiff's domestic abuse and alleged alcohol and drug use, the record belies defendant's claim:

Factor K favors [defendant,] domestic violence regardless of whether the violence was directed against or witnessed by the child.

[Plaintiff] has been convicted of domestic violence. However, he has acknowledged that, taken responsibility for it, and indicated that he is working on his relationship with his wife.

The trial court also noted that plaintiff had a prior arrest for driving under the influence and admitted to marijuana usage. Thus, at the only hearing available for our review, the trial court clearly considered plaintiff's prior history of domestic violence and alcohol and drug usage during its best interest determination.²

Defendant next argues that the trial court did not address the best interest factors when it awarded temporary custody to plaintiff in October 2018. Defendant also indicates that the trial court did not make any finding that she was an unfit parent in order to alter the custody. However,

² Defendant also asserts that the trial court failed to consider the personal protection orders she had filed against plaintiff and failed to implement "safety and protection measure[s]." However, this record contains no evidence of personal protection orders and defendant fails to specify how the trial court failed to adequately ensure the child's and defendant's safety.

as we stated above, defendant failed to provide the transcript from that hearing on appeal. Thus, this claim is abandoned. *PT Today, Inc*, 270 Mich App at 151-152.

Defendant next asserts that the trial court erred because it failed to consider a number of laws in making its best-interest determination. In particular, defendant relies upon 2015 HB 4413, 2015 HB 4476, 2015 SB 253, 2015 SB 257, and 2015 SB 258. With the exception of 2015 HB 4476, the Michigan House and Senate bills defendant cites to were not enacted, see Const 1963, art 4, § 33, and, therefore, without legal effect. Accordingly, the trial court did not err when it failed to consider these failed bills during its best-interest determination. Turning to 2015 HB 4476, it became effective in August 2016, and amended 1961 PA 236 to add MCL 600.1035. See 2016 PA 93. MCL 600.1035 addresses mediation in domestic relations cases; it does not apply to this child-custody case. Therefore, the trial court did not err by failing to consider an inapplicable statute.

Defendant further indicates that she did not violate the April 2019 parenting time order, which allowed her to have parenting time after school on Friday through 5:00 p.m. on Sunday, because there was no specific parenting time schedule for summer vacation. However, defendant has failed to adequately brief this issue, and we consider it abandoned. *Yee*, 251 Mich App at 406. In any event, in the absence of a specific parenting time schedule for the child's summer vacation, the default parenting time schedule is effective. And the record is replete with evidence that defendant routinely violated the parenting time schedule by failing to timely return the child to plaintiff. For these reasons, defendant's argument fails.

Finally, defendant challenges the trial court's order of supervised parenting time without proof that defendant was an unfit parent or a danger to the child. To the contrary, there was significant evidence that defendant violated the trial court's orders multiple times when she failed to return the child to plaintiff after her scheduled parenting time. This alone justified the trial court's order of supervised parenting time. Additionally, defendant kept the child out of school without providing a reason. Therefore, the trial court was justified in ordering supervised parenting time.

Affirmed.

/s/ David H. Sawyer

/s/ Anica Letica

/s/ James Robert Redford