STATE OF MICHIGAN

COURT OF APPEALS

KERRY LYNNE WHALEN,

Plaintiff-Appellant,

v

JAMES WHALEN,

Defendant-Appellee.

UNPUBLISHED
May 23, 1997

No. 193098
Genesee Circuit Court
LC No. 92-172177-DM

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging several provisions of the parties' February 16, 1996, judgment of divorce. We affirm in part, reverse in part, and remand.

Plaintiff first argues that the trial court erred in failing to set forth its findings of fact supporting its conclusions in the judgment of divorce. We agree.

We review this question of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). A circuit court must make findings of fact and dispositional rulings in divorce actions. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). MCR 2.517 requires a court to make factual findings and conclusions of law. Remand is proper where the trial court has failed to make the findings of fact that are essential to the proper resolution of the legal questions. See *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992). In the instant case, the trial court made no findings of fact in its opinion or on the record. It is therefore impossible to determine the factual bases for the court's ultimate legal conclusions. We remand this matter to the trial court to state the findings of fact supporting its legal rulings.

Because findings of fact are necessary to review issues of custody, MCL 722.28; MSA 25.312(8); *Soumis v Soumis*, 218 Mich App 27, 33; 533 NW2d 619 (1996), property division, *Hanaway v Hanaway*, 208 Mich App 278, 292-293; 527 NW2d 792 (1995), alimony, *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993), and child support, *Thames v Thames*, 191 Mich App 299, 306-307; 477 NW2d 496 (1991), we cannot review these issues as raised by

plaintiff. The trial court must set forth its findings of fact supporting each of these conclusions and rulings in the judgment of divorce.

Plaintiff next asserts that the trial court abused its discretion in admitting the testimony of a psychologist after defendant had asserted a privilege as to the witness' records. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996). MCR 2.314 governs the discovery of medical information concerning a party. The rule provides: "When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery" providing that it is otherwise discoverable and "the party does not assert that the information is subject to a valid privilege." MCR 2.314(A)(1)(b). The party holding a valid privilege may assert it and prevent discovery of the medical information by asserting the privilege (1) in their written response to a request for production of documents under MCR 2.310; (2) in an answer to an interrogatory under MCR 2.309(B); (3) either before or during a deposition; or (4) by moving for a protective order pursuant to MCR 2.302(C). MCR 2.314(B)(1). If the privilege is not timely asserted, it is waived in that action. Once a party has asserted the privilege as to the medical information, thus preventing discovery of such information that is otherwise discoverable, the party may not then present or introduce physical, documentary, or testimonial evidence as to the party's medical history or mental or physical condition. MCR 2.314(B)(2).

Plaintiff argues that since defendant asserted the privilege with regard to the witness' records relating to his evaluation of defendant, the trial court should not have admitted the witness' testimony at trial. However, we find no valid assertion of the privilege by defendant. Plaintiff considered defendant to have waived the privilege after her counsel received a letter from the witness, stating that defendant told him that defendant intended to continue to assert confidentiality pertaining to the witness' records of his contact with defendant. The court had ordered the witness to provide the parties with any and all records he had regarding the parties and their minor children. However, our review of the record reveals no document filed by defendant in which he asserted the privilege in the manner required by MCR 2.314(B)(1). It appears both from the lower court file and plaintiff's questioning of the witness that the witness himself, orally and then through a letter, informed plaintiff that defendant did not waive the privilege.

Because there was no valid assertion of the privilege by defendant, plaintiff's reliance on MCR 2.314(B)(2) in support of her argument that it was not proper for the trial court to admit the witness' testimony is misplaced. We note that plaintiff was provided with the witness' reports, but not his notes. The trial court did not abuse its discretion in admitting the witness' testimony.

Plaintiff argues that the trial court abused its discretion in failing to sanction defendant with default judgment for his failure to comply with discovery orders. We disagree.

A trial court's decision on a motion for sanctions for discovery violations is reviewed for an abuse of discretion. *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 618; 550 NW2d

580 (1996). Default judgment as a sanction for abuses of discovery is authorized by MCR 2.313(B)(2)(c), but should be used with caution. *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994). In deciding whether to impose such a sanction,

> the trial court should consider whether the failure to respond to discovery requests extends over a substantial period, whether there was a court order directing discovery that was not complied with, the amount of time that elapsed between the violation and the motion for default judgment, and whether willfulness has been shown. The court should also evaluate other options before concluding that a drastic sanction is warranted. The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary. [*Id*. at 244.]

We note that plaintiff made several motions to compel discovery and the trial court ordered defendant to comply with plaintiff's discovery requests several times. The court first ordered defendant to fully comply with plaintiff's request for production of certain documents in January 1993, and its last order compelling discovery was entered a year later. The trial court found that defendant was impeding plaintiff's discovery of information. Considering the numerous motions filed by plaintiff, the slow response of defendant in providing the information, defendant's long-term failure to respond to the discovery requests, the court orders that defendant did not comply with, and the apparent lack of cooperation, it appears that the trial court would have been within its discretion in ordering some sort of sanction. However, in this matter, we find that default judgment would have been inappropriate considering the nature of the case. The only other sanction requested by plaintiff was a bar on defendant from testifying as to the matters that were the subject of the discovery requests. It appears, however, that all the information sought by plaintiff was received over one year prior to trial. Plaintiff had adequate time to review the materials and prepare her argument based on them. Therefore, barring defendant from referring to the discovery materials in his testimony was not necessary. In light of the circumstances of this case and the nature of the sanctions sought by plaintiff, the trial court did not abuse its discretion in failing to order the sanctions requested by plaintiff.

Plaintiff also argues that the court should have sanctioned defendant for failing to list one of his witnesses in the discovery requests. The trial court has the discretion to permit the testimony of an undisclosed witness, and this Court should not disturb that decision unless the trial court abused its discretion. *Jernigan v General Motors Corp*, 180 Mich App 575, 584; 447 NW2d 822 (1989). The witness testified concerning the value of defendant's law practice after plaintiff's own expert testified on the matter. Plaintiff was provided with a copy of the witness' report and was given time to consult with her own witness regarding the report. There is no indication from plaintiff's counsel's cross-examination of the witness that he was disadvantaged. We find that the trial court did not abuse its discretion in admitting the witness' testimony.

Plaintiff sought a contempt order against defendant because he sold properties owned by the parties in violation of an asset restraining order. The trial court did not enter a contempt order, and plaintiff claims this was error. We disagree.

This Court reviews a trial court's decision regarding an order of contempt for an abuse of discretion. *Deal v Deal*, 197 Mich App 739, 743; 496 NW2d 403 (1993). The circuit court has independent and statutory power to punish parties for disobeying a lawful court order. MCL 600.1701(g); MSA 27A.1701(g); *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). When the charged contemptuous conduct was committed outside the presence of the court, the accused must be advised of the charges, afforded a hearing, and given an opportunity to defend. *Robertson*, *supra* at 438. At the hearing, the rules of evidence apply and proof of contempt must be clear and unequivocal. *Id.* at 439.

No contempt hearing was held. However, through witness testimony plaintiff established that defendant disposed of the Tawas property during the time the asset restraining order was in effect and collected and disposed of the proceeds on the Mary Court property during that time. In its property distribution, the court ordered the parties to split evenly the proceeds from the sale of the Tawas property. The Mary Court property was not referred to in the judgment of divorce. Although it would have been appropriate for defendant's conduct with regard to the Mary Court proceeds to have been taken into consideration in the dispositional rulings, we find that the trial court did not abuse its discretion in failing to issue a contempt order against defendant for his violations of the asset restraining order.

Plaintiff asserts that the trial court erred in extinguishing the rights of her daughter to real property in the property disposition. We agree.

This issue presents a question of law, which we review de novo. *Cardinal Mooney High School*, *supra*. In divorce actions, a trial court generally has no authority to adjudicate the rights of third parties. *Thames*, *supra* at 302. Neither of the two exceptions to the general rule applies in the instant case. *See Id.*

First, we note that defendant's parents, as well as the parties' daughter, had interests in some of the properties. In the judgment of divorce, the trial court recognized these interests, but ruled that it "extinguishes the interest of all but the two parties hereto . . . ." The trial court was clearly without authority to extinguish the rights these third parties had in the various properties. We reverse the trial court's order extinguishing the rights of these parties to their properties.

Finally, plaintiff asserts that this case must be reassigned to a different judge on remand. Because plaintiff failed to seek the chief judge's review of the trial judge's denial of her motion for disqualification, this issue is not preserved for appeal. MCR 2.003(C)(3); *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996).

Affirmed in part, reversed in part, and remanded for the trial court to state its findings of fact in support of its rulings in the judgment of divorce. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald