

STATE OF MICHIGAN
COURT OF APPEALS

LENORE KAGEN, a.k.a. LENORE GAURINO,
Plaintiff-Appellee,

UNPUBLISHED
December 18, 2014

v

RICHARD J. KAGEN,
Defendant-Appellant.

No. 318459
Oakland Circuit Court
LC No. 2010-779424-DM

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Following the parties' divorce, defendant Richard Kagen discovered that plaintiff Lenore Kagen had discontinued their children's vaccinations several years earlier. The pair could not agree on whether the children's vaccinations should be updated and brought their dispute before the Oakland Circuit Court. The circuit court failed to describe the applicable burden of proof and made no consideration of any statutory best interest factor in deciding the matter as required by *Pierron v Pierron*, 486 Mich 81, 91; 782 NW2d 480 (2010), and *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993). The court also abused its discretion in excluding from evidence government-issued statements about the safety, potential risks, and benefits of childhood vaccinations. We therefore vacate the circuit court's June 27, 2013 opinion and order rejecting Mr. Kagen's bid to vaccinate the children and remand for a continued hearing.

I. BACKGROUND

Mr. and Mrs. Kagen were divorced in 2012, and were awarded joint legal and physical custody of their two daughters. Pursuant to the divorce judgment, neither party was permitted to make major medical decisions relating to the children without consulting the other.

Mrs. Kagen discontinued the vaccinations of the couple's daughters when they were three and five years old, long before the couple's divorce. Mrs. Kagen asserted that she maintains religious objections to employing vaccinations that contain poisonous ingredients. She further contended that Mr. Kagen previously shared her concerns and joined her decision to forego further inoculations. Mr. Kagen, on the other hand, claimed that he was blindsided by his ex-wife's religious reformation and was completely unaware of the cessation of vaccinations until five years later.

Over Mrs. Kagen’s objections, Mr. Kagen secured four vaccinations for their eldest daughter in February 2013. Mrs. Kagen then filed a motion in the circuit court to prevent any further unilateral action on Mr. Kagen’s part, and Mr. Kagen filed a countermotion to update both children’s vaccinations. The circuit court conducted a brief evidentiary hearing at which both parties testified. Mrs. Kagen reiterated that Mr. Kagen had joined her decision and she therefore filed documents with both the school and pediatrician indicating her intent to waive vaccinations for the children. Mr. Kagen testified that Mrs. Kagen never discussed with him any plan to stop vaccinating the children, and expressed his desire to have the children immunized.

After excluding the only expert evidence offered at the hearing—four statements from government agencies regarding the benefits of vaccination proffered by Mr. Kagen—the court denied Mr. Kagen’s motion to vaccinate the children. The court credited Mrs. Kagen’s testimony that the parties had previously agreed not to vaccinate the children. The circuit court concluded that Mr. Kagen failed to present sufficient evidence that a change in this course of conduct was in the children’s best interests.

II. ADEQUACY OF CIRCUIT COURT PROCEEDING

Mr. Kagen now challenges the circuit court’s resolution of this dispute between joint legal custodians. We must affirm all judgments entered under the Child Custody Act, MCL 722.21 *et seq.*, “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*, 486 Mich at 85, quoting MCL 722.28. Here, however, the circuit court failed in its duty to properly analyze the parental disagreement under the strictures of the Child Custody Act.

The Child Custody Act “applies to all circuit court child custody disputes and actions, whether original or incidental to other actions.” MCL 722.26(1). The act provides that when parents share joint legal custody—as the parties do here—“the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.” MCL 722.26a(7)(b). However, when the parents cannot agree on an important decision, such as a change of the child’s school, the court is responsible for resolving the issue in the best interests of the child. [*Lombardo*, 202 Mich App at 159]; see also MCL 722.25(1). [*Pierron*, 486 Mich at 85.]

Although not cited as such in the circuit court, the evidentiary hearing conducted on June 14, 2013, was essentially a *Lombardo* hearing. In *Lombardo*, 202 Mich App at 157-158, this Court described the judicial process of resolving disputes regarding “important decisions affecting the welfare of the child” between the child’s joint custodians. The Supreme Court clarified a court’s role in such circumstances in *Pierron*.

Before the court considers the substance of the dispute, it must determine “whether the proposed change would modify the established custodial environment” of the children. *Pierron*, 486 Mich at 85. If it would, the moving party bears a heightened burden of proving by clear and convincing evidence that the change is in the children’s best interests. *Id.* at 86. If not, the moving party need only establish by a preponderance of the evidence that the proposed change serves the children’s best interests. *Id.* at 89-90. The decision to vaccinate the children in no

way affects their established custodial environment; the decision has no bearing on who the children “look[] to . . . for guidance, discipline, the necessities of life, and parental comfort.” *Id.* at 86 (quotation marks and citation omitted). Accordingly, Mr. Kagen needed to establish by the lesser preponderance of the evidence standard that vaccinating the children was in their best interests.

The court must then resolve the underlying dispute. As stated in *Lombardo*:

[J]oint custody in this state by definition means that the parents share the decision-making authority with respect to the important decisions affecting the welfare of the child, and where the parents as joint custodians cannot agree on important matters such as education, it is the court’s duty to determine the issue in the best interests of the child. [*Lombardo*, 202 Mich App at 159.]

“The controlling consideration” must be “the best interests of the children.” *Id.* at 159-160; see also *Pierron*, 486 Mich at 91. In this regard,

The court should not relinquish its authority to determine the best interests of the child to the primary physical custodian. Accordingly, we conclude that a trial court must determine the best interests of the child in resolving disputes concerning “important decisions affecting the welfare of the child” that arise between joint custodial parents. [*Lombardo*, 202 Mich App at 160.]

In determining the best interests of the child, the court “must consider, evaluate, and determine each of the” best interest factors of MCL 722.23. *Lombardo*, 202 Mich App at 160. In *Pierron*, 486 Mich at 91, quoting *Parent v Parent*, 282 Mich App 152, 157; 762 NW2d 553 (2009), the Supreme Court clarified that the trial court must ““make explicit factual findings with regard to the *applicability* of each factor”” when the decision will not affect the children’s established custodial environment. (Emphasis in original.) If a factor is relevant to the decision, the court must “make substantive factual findings” on the record; if not, the court need not reach the substance of that matter. *Pierron*, 486 Mich at 91.

Here, the circuit court made absolutely no finding required by *Lombardo* or *Pierron*. The court failed to consider whether the vaccination decision would change the children’s custodial environment (in fact, it would not). The court did not mention the burden of proof that it applied. Accordingly, we cannot know whether the court utilized the preponderance of the evidence standard as required or incorrectly applied the stricter clear and convincing evidence standard. The circuit court never cited MCL 722.23 or considered the best interest factors as required.

Given these failures, we are unable to review the circuit court’s best-interest analysis. Accordingly, we vacate the circuit court’s June 27, 2013 opinion and order and remand for a continued hearing. At the hearing, the court must declare that its decision will not affect the children’s custodial environment and therefore apply the preponderance of the evidence standard. The court must then consider and expressly state whether each best interest factor of MCL 722.23 is relevant in this case, and then must analyze on the record the substance of any

relevant best interest factors. We will retain jurisdiction and consider the propriety of the circuit court's decision after an adequate record is made.

III. ADMISSIBILITY OF GOVERNMENT REPORTS

Mr. Kagen also challenges the circuit court's exclusion of his proffered evidence at the hearing. This evidence included statements and summaries of scientific studies regarding the safety, benefits, and risks of childhood inoculations. These statements were issued by the Center for Disease Control, National Institute of Health, Food and Drug Administration, and Michigan Department of Community Health. The circuit court excluded this evidence, finding that it fit within no exception to the hearsay rule.

We review for an abuse of discretion a circuit court's evidentiary rulings. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). "Whether a rule of evidence . . . precludes admissibility" is a legal question subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The circuit court correctly concluded that the proffered evidence was hearsay. Hearsay is a statement made by a declarant outside of the courtroom that is "offered in evidence to prove the truth of the matter asserted." MRE 801. The authors of the documents presented by Mr. Kagen were not present in the courtroom. Mr. Kagen offered the evidence to prove the truth of the matter asserted—that childhood vaccinations are beneficial and safe while deciding not to immunize your child is a dangerous decision that can result in disease and death. As hearsay, this evidence was not admissible unless Mr. Kagen established it fell within an exception to the hearsay rule. MRE 802.

Mr. Kagen relied upon MRE 803(24), the catch-all exception to the hearsay rule, which provides:

Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

In *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003), the Supreme Court held that this catch-all exception "may be used to admit statements that are similar to, but not admissible under, the categorical hearsay exceptions." However, "the requirements of the exceptions are stringent and will rarely be met, alleviating concerns that the residual exceptions will 'swallow' the categorical exceptions through overuse." *Id.* at 289. "To be admitted under MRE 803(24), a

hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission.” *Id.* at 290.

In relation to the first factor, the Supreme Court advised that “courts should consider all factors that add to or detract from the statement’s reliability.” *Id.* at 292. To meet the second factor, the evidence must be relevant to “[a] fact that is significant or essential to the issue or matter at hand.” *Id.*, quoting *Black’s Law Dictionary* (7th ed).

The circuit court excluded the evidence on the third factor, adjudging that Mr. Kagen should have presented the testimony of his children’s pediatrician on the topic. As described in *Katt*, 468 Mich at 293:

The third requirement is that the proffered statement be the most probative evidence reasonably available to prove its point. It essentially creates a “best evidence” requirement. This is a high bar and will effectively limit use of the residual exception to exceptional circumstances. For instance, nonhearsay evidence on a material fact will nearly always have more probative value than hearsay statements, because nonhearsay derives from firsthand knowledge. Thus, the residual exception normally will not be available if there is nonhearsay evidence on point. [Quotation marks and citation omitted.]

Finally, under the fourth factor, a court may refuse to admit evidence that satisfies the first three prongs “if the court determines that the purpose of the rules and the interests of justice will not be well served by the statement’s admission.” *Id.*

The circuit court abused its discretion in excluding Mr. Kagen’s proffered evidence based on the “best evidence” requirement of MRE 803(24). The court contended that the best evidence about the safety and necessity of childhood vaccinations would have come from the children’s pediatrician. The pediatrician’s live testimony would be nonhearsay derived from firsthand knowledge. However, as noted by Mr. Kagen, the children’s pediatrician is a general practitioner and likely does not possess detailed personal knowledge on the safety, effectiveness, and potential risks of immunizations. The four reports proffered by Mr. Kagen were prepared by experts in the field of child immunizations and were based on scientific study. The fact that the reports were otherwise hearsay does not render them less worthy of belief. And, as noted by Mr. Kagen, it would impose an unreasonable burden to expect him to present the testimony of the government agents who compiled or prepared the reports.

Moreover, the evidence was reliable. *Katt*, 468 Mich at 291 n 11, instructed that we may employ the nonexhaustive list of reliability factors accompanying the federal rules, including consideration of “[w]hether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.” Federal Rules of Evidence Manual (Matthew Bender & Co Inc, 2002), § 807.02(4). All four reports are official (formal) statements by government agencies. The presentation of this information in a public forum and as part of the authors’ official duties suggests “that the declarant would have been likely to consider the accuracy of the statement

when making it.” *Id.* As noted in Grant, *The Trustworthiness Standard for the Public Records and Report Hearsay Exception*, 12 Western State U L Rev 53, 56 (1984), “The principal basis for the presumption of trustworthiness of public records is the assumption that public officials will properly perform their duties with accuracy and fidelity. Officials have the duty to make accurate statements, and this special duty will usually suffice as a motive to incite the officer to its fulfillment.”

The proffered materials are also highly relevant to a material point, as acknowledged by the circuit court. The focus of the hearing was the parties’ disagreement on childhood vaccinations. Mr. Kagen believed such vaccinations to be safe, necessary and in the children’s best interests while Mrs. Kagen thought they are poisonous, unnecessary and contrary to the children’s best interests. The opinions of these particular government agencies would certainly assist the fact finder in resolving whether the best interests of the children would be served by vaccination against disease.

The circuit court made no discussion in relation to the final factor. However, the interests of justice seem to support admission of Mr. Kagen’s evidence. This is a custody matter; it would be cost prohibitive to require Mr. Kagen to present high-paid experts to testify regarding the benefits and safety of vaccinations. It does not unduly burden Mrs. Kagen’s ability to present her side of the dispute; there are a plethora of studies regarding vaccination ingredients and side effects that she could present as well, assuming that the studies likewise meet the requirements of MRE 803(24).

Ultimately, the circuit court’s best-interest analysis will be assisted by this evidence, which is admissible under an exception to the hearsay rule. Accordingly, the circuit court abused its discretion in excluding Mr. Kagen’s proffered government reports.

IV. JUDICIAL NOTICE

Mr. Kagen further challenges the circuit court’s failure to take judicial notice that vaccinations save millions of lives worldwide and have been deemed safe.

Pursuant to MRE 201(b), for a trial court to take judicial notice of a fact, it “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” [*Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009).]

As Mr. Kagen’s own evidence supports, there is an ongoing international debate regarding the risks and benefits of childhood vaccinations. This simply is not the type of fact over which a court may take judicial notice.

V. FINDING REGARDING PARTIES’ AGREEMENT

Mr. Kagen also contends that the circuit court clearly erred in finding that he and Mrs. Kagen had reached an agreement not to vaccinate their children and that he was forever bound by any such agreement. In relation to the existence of an agreement, the parties presented

conflicting evidence and we must defer to the circuit court's assessment of the witnesses' credibility. *Ambs v Kalamazo Co Rd Comm'n*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

The circuit court's decision to bind Mr. Kagen to his prior agreement is part and parcel of its failure to adequately consider the best interests of the children. Whether the parties had previously agreed on a course of preventive medical treatment for their children is certainly relevant. However, Mr. Kagen's reasons for changing his mind are equally important as they pertain to the children's welfare. On remand, the circuit court should consider these factors as relevant to the best-interest analysis.

We vacate the circuit court's opinion and order and remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

Court of Appeals, State of Michigan

ORDER

Lenore Kagen v Richard J Kagen

Docket No. 318459

LC No. 2010-779424-DN

Peter D. O'Connell
Presiding Judge

Stephen L. Borrello

Elizabeth L. Gleicher
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the circuit court must conduct a continued evidentiary hearing and issue detailed factual findings regarding the children's best interests. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 18 2014

Date

Chief Clerk