STATE OF MICHIGAN

COURT OF APPEALS

BRIAN SCOTT HARNER,

Plaintiff-Appellee,

v

KAYLA JO HARNER, also known as KAYLA JO CHAPMAN-SHADIK,

Defendant-Appellant.

UNPUBLISHED
January 23, 2018

No. 338746
Jackson Circuit Court
LC No. 14-000981-DM

Before: MURPHY, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

In this divorce litigation, defendant appeals as of right the judgment of divorce and a child support order entered by the trial court. On appeal, defendant maintains that the trial court erred in several respects when it awarded sole legal and physical custody of the children to plaintiff. Defendant also argues that the trial court improperly ordered her to pay a portion of plaintiff's attorney fees and erred when it set child support. We conclude that defendant has not shown that the trial court committed any errors that warrant reversing the court's judgment. However, we agree that the trial court erred when it entered a child support order that amounted to a deviation from the Michigan Child Support Formula (MCSF) without complying with the requirements for a deviation. Accordingly, we affirm the judgment of divorce, but vacate the trial court's order of child support and remand for further proceedings consistent with this opinion.

Plaintiff and defendant were married in 2001, and they had three boys during the marriage who were 13, 11, and 9 at the time of trial. There was evidence that all three boys were on the autism spectrum. The primary issue in the divorce trial concerned the custody of the children. Pursuant to a stipulated temporary order, the parties were to share joint legal and physical custody pending trial. The evidence at trial showed that defendant began to substantially interfere with plaintiff's parenting time by making frequent calls to the children and asking police officers to conduct welfare checks. There was also evidence that the children soon thereafter began to complain about incidents of neglect and abuse while in plaintiff's care. The claims escalated over time to include allegations of sexual abuse, which became more disturbing with each retelling. The allegations resulted in numerous referrals to Child Protective Services (CPS) and three criminal investigations. All the allegations of neglect and abuse were found to be unsubstantiated with the exception of an allegation that plaintiff threatened to harm defendant

in front of the children. The record showed that plaintiff cooperated fully with the investigations and performed every task that CPS asked him to do. Because of the abuse allegations and resulting investigations, plaintiff was unable to continue exercising his parenting time with the children. There was an abundance of evidence supporting a conclusion that defendant engaged in conduct that alienated the children from plaintiff and that resulted in the numerous unsubstantiated claims that plaintiff had abused the children.

During the pendency of the divorce proceedings, the trial court asked two psychologists to prepare expert reports. One prepared a custody evaluation, and the other psychologist prepared a psychological evaluation of the children. Both psychologists indicated in their reports that there were reasons to believe that the children's claims of neglect and abuse were not founded on actual experiences.[1] Both psychologists also reported that there was a basis to conclude that defendant, perhaps inadvertently, caused the children to make the unfounded allegations against plaintiff. In one report, the psychologist noted that defendant admitted to having control issues and had expressed distrust in the legal system because—in her view—the CPS workers and police officers whom she asked to conduct welfare checks had not done their jobs. The psychologist also offered that defendant was alarmist, overprotective, intrusive, controlling, and felt compelled to check on the children whenever they were in plaintiff's care. Further, according to the psychologist, defendant interpreted even minor events as major problems and "overreacted by summoning the police, contacting [CPS], requesting welfare checks, and seeking a personal protection order."[2] The psychologist quoted a CPS report wherein concern was expressed that defendant was abusing the system and that the children may have been coached and appeared easy to manipulate.

During the trial, the trial court asked one of the psychologists to recommend a therapist who could provide reunification therapy in order to help the children overcome their estrangement from plaintiff and reintegrate them into his life. The psychologist issued his recommendations in what constituted his "second" report, which the trial court adopted.

After the close of proofs, the trial court found that defendant had engaged in acts that caused the unsubstantiated abuse claims against plaintiff and resulted in the disruption of his parenting time over a period of more than one year. The trial court ruled that it was in the children's best interests to award plaintiff sole legal and physical custody of the children, but it also determined that the children could not be reunified with plaintiff absent some initial therapy considering all of the circumstances. The trial court ordered reunification therapy, directing that a therapist set the initial parenting time schedule, subject to the court's review.

Defendant first argues that the trial court erred when it considered, adopted, and relied on the second report prepared by the one psychologist, as ordered by the court during the trial.

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[1] There was also testimony by CPS personnel and the police that seriously called into question the repeated claims of abuse and that suggested coaching by defendant.

[2] On one occasion, defendant reported plaintiff for allegedly throwing a water balloon at one of the children.

Specifically, defendant claims that the trial court could not utilize the report because it was never admitted into evidence.

Following the second day of trial, the trial court entered the order directing the psychologist to select a reunification therapist. Subsequently, on the third day of trial,[3] the psychologist indicated his willingness to recommend a therapist, but he also requested time to examine more recent events, along with associated documents, that had transpired since his first report, so as to make a proper recommendation. The trial court agreed to provide the psychologist with access to records and treatment notes, and the psychologist later submitted his second report, which he characterized as a case review with recommendations; it was 24 pages long. The psychologist divided his report into three sections: (1) a summary review of the events in the case; (2) clinical impressions; and (3) options and recommendations. He identified three psychologists in the report as prospective reunification therapists, opining that each one was qualified to address the issues and problems that pervaded the case. This second report was submitted to the trial court, and the court scheduled a hearing for purposes of entering an order consistent with the psychologist's various recommendations. At the hearing, neither defendant nor her attorney appeared. The court stated that it had sent notice of the hearing to the parties (plaintiff's counsel was present), and the court noted that the report had earlier been sent to defendant's counsel. The trial court issued an order adopting the psychologist's recommendations contained in his second report. Subsequently, the final day of trial was conducted, and the parties later filed written closing arguments. At no point did defendant raise any issues or arguments concerning the second report or the court's utilization of the report. Indeed, on the last day of trial, defendant's attorney engaged in a discussion with opposing counsel and the court regarding how to go forward in regard to implementing the recommendations in the psychologist's report.

Under the circumstances described above, we hold that the "second" report was effectively placed in the record and admitted for purposes of the ongoing divorce trial. MCR 3.219 (dissemination of a professional report) provides:

> If there is a dispute involving custody, visitation, or change of domicile, and the court uses a community resource to assist its determination, the court must assure that copies of the written findings and recommendations of the resource are provided to the friend of the court and to the attorneys of record for the parties, or the parties if they are not represented by counsel. The attorneys for the parties, or the parties if they are not represented by counsel, may file objections to the report before a decision is made.

The psychologist constituted a community resource who prepared a professional report that was used by the court, and defendant and her counsel were certainly made aware of the psychologist's report; there is nothing in the record to indicate to the contrary.

[3] The trial was four days long, spread out over a seven-month period.

Moreover, by choosing not to appear at the hearing that was held expressly for the purpose of addressing the report and the recommendations, whereat defendant could have raised challenges, and by then going forward and proceeding through the end of trial absent objection to the report and actually working under it, we find that defendant waived, as opposed to merely forfeited, any appellate challenge to the court's consideration of the report. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Finally, we conclude that any assumed error was harmless, MCR 2.613(A), as there was plenty of other evidence, including the psychologist's initial report, establishing acts and conduct by defendant that caused alienation between plaintiff and the children and which gave rise to allegations of abuse that were not substantiated.

Defendant next argues that the trial court erred when it improperly delegated the authority to set the children's parenting time schedule to a therapist. The judgment of divorce provided that "[p]arenting time and reintegration of the children in the Plaintiff's home shall be as recommended by the treating therapist." The divorce judgment also indicated that the trial court would "schedule regular reviews to monitor the transition and parenting time." In *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), our Supreme Court observed:

> The [Child Custody] [A]ct[, MCL 722.21 *et seq*.,] makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at MCL 722.23 [and] MCL 722.25(1). It places an affirmative obligation on the circuit court to declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act whenever the court is required to adjudicate an action involving dispute of a minor child's custody. Taken together, these statutory provisions impose on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child. [Citations and quotation marks omitted.]

Here, the trial court did not improperly delegate its authority to the therapist or otherwise abdicate its duty to protect the best interests of the children with respect to parenting time. The trial court, astutely recognizing the damage that had been done by defendant to the relationship between plaintiff and the children, and being sensitive to the psychological difficulties in restoring that relationship, appreciated that an expert would be best suited to provide direction in the reunification process. But while the trial court recognized the need for a therapist in structuring appropriate parenting time, the court still ultimately held the reins in regard to parenting time by retaining its authority to regularly review and monitor parenting time and the overall transition to plaintiff having sole legal and physical custody of the children. At the first postjudgment review hearing, the parties updated the trial court on the therapist who would handle the reunification therapy, and defendant's lawyer indicated that the therapist was uncomfortable setting parenting time. The trial court agreed with the suggestion that the therapist might convey her thoughts on parenting time to a lawyer-guardian ad litem (LGAL), who could then advocate for an appropriate parenting time schedule. The court indicated that the therapy itself should begin even before the appointment of a LGAL. After the hearing, the trial court appointed a LGAL for the children. It is evident from the review hearing that the trial court never intended for the therapist to have absolute discretion in determining parenting time. Rather, consistent with the judgment of divorce, the court intended to oversee the transition and

to order whatever parenting time it should find to be in the children's best interests after considering the recommendations of the treating therapist. Reversal is unwarranted.

Defendant next argues that the trial court's finding that she was responsible for the parental alienation was drawn from speculative and inconclusive testimony of witnesses who were unqualified to render expert opinions on alienation. Thus, according to defendant, the court's finding was against the great weight of the evidence. MCL 722.28 provides:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all 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.

A finding is against the great weight of the evidence when the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994).

Defendant asserts that "[p]arental alienation is a complex, challenging, hotly contested, misunderstood, often mismanaged, and highly specialized area of psychology." While this may perhaps be true, defendant does not cite any evidence in the record to support this contention, nor does she even cite a general non-record source for the proposition. On the basis of this alleged nature of parental alienation, defendant maintains that the two psychologists and a CPS worker involved in the case were unqualified to render opinions on the subject of parental alienation. At no time during the extensive divorce proceedings did defendant challenge the credentials and qualifications of the two psychologists and the CPS worker to provide reports and/or testimony. Indeed, in an early motion filed by defendant, she specifically requested the involvement of the two psychologists in the case, as they "have been qualified as expert witnesses on numerous occasions in the Jackson County Circuit Courts[,]" and "are qualified to conduct a custody evaluation." A custody evaluation would encompass any issues concerning parental alienation. See MCL 722.23(j).

To the extent that this issue was not waived outright, MRE 103, which addresses preservation of evidentiary matters, provides, in subsection (d), that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." Because defendant did not develop a record on the issue now being presented, we have no way of assessing whether the psychologists and CPS worker had adequate knowledge, skill, experience, training, or education in the area of parental alienation, MRE 702, even assuming that expertise is required as claimed by defendant.

In any event, the trial court did not need to have an expert explain the implications of the evidence on the stability of defendant's home, her moral fitness, the preferences of the children, or defendant's willingness to facilitate a parental relationship between the children and plaintiff; the latter of which goes directly to the issue of parental alienation. See MCL 722.23(d), (f), (i), and (j). There was evidence of numerous, ever-growing, increasingly-egregious, and highly-suspect claims of abuse by the children that were unsubstantiated and called into question by several witnesses, giving rise to a reasonable conclusion that no abuse occurred, along with a reasonable inference that the claims were attributable to conduct, coaching, and communications

by defendant, which can be properly characterized as acts fostering parental alienation. The implications drawn from the evidence are matters of common understanding.

Defendant complains that the psychologists voiced concerns about both parties and did not directly conclude that she was intentionally alienating the children. While there may have been concerns about both parties, the concerns regarding defendant far outweighed those pertaining to plaintiff. He was the person being accused of horrific acts of abuse, which were inferentially traced back to conduct by defendant. And the psychological reports showed that both psychologists primarily attributed the children's estrangement from plaintiff to defendant's behavior. Indeed, the evidence overwhelmingly suggested that defendant was responsible—whether directly or indirectly, and without regard to intent—for the repeated unsubstantiated allegations of physical and sexual abuse against plaintiff. Those allegations in turn prevented plaintiff from continuing to engage in parenting time with his children, which, when it was being exercised, was regularly and substantially disrupted by defendant. The evidence that the children's views of their father changed dramatically at a time when they were solely within defendant's care permitted an inference that defendant influenced the children.

Although defendant argues that the children's claims of abuse may have arisen because of their estrangement from plaintiff and his behaviors and not anything done or said by defendant, this argument goes to the trial court's tasks of weighing the evidence and making credibility assessments, which are matters for the trial court and to which we give deference. *Kessler v Kessler*, 295 Mich App 54, 64; 811 NW2d 39 (2011). The same is true with respect to the trial court's clear rejection of the testimony by a therapist for the children who testified favorably for defendant.[4] The evidence did not clearly preponderate in a direction opposite to the court's finding that defendant engaged in conduct that alienated the children from plaintiff.

Defendant next argues that by incorporating the same findings of fact regarding parental alienation into four different best-interest factors, the trial court artificially tipped the scales in plaintiff's favor, resulting in a custody ruling that constituted an abuse of discretion. As part of this argument, defendant contends that, pursuant to *McCain v McCain*, 229 Mich App 123; 580 NW2d 485 (1998), a trial court may not give dispositive weight to any one factor when considering the best interests of the children. This argument pertains to MCL 722.23(j), which touches on the subject of parental alienation, addressing "[t]he 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." Defendant also maintains that the trial court's findings on several of the best-interest factors were against the great weight of the evidence.

In resolving the custody dispute, the trial court had to consider all of the factors set forth in MCL 722.23, stating its findings and conclusions as to each factor. *Foskett v Foskett*, 247

[4] Defendant selected this particular therapist to provide therapy related to the children's allegations of sexual abuse. The therapist's testimony reflected that she adopted defendant's view of events and uncritically accepted every statement that the children made, regardless of the mountain of evidence suggesting that there was no sexual abuse.

Mich App 1, 9; 634 NW2d 363 (2001). The trial court did not, however, have to make its custody determination on the basis of a mathematical calculation of the factors; rather, it could properly assign differing weights to the factors when making its determination. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Contrary to defendant's argument, *McCain* does not stand for the proposition that a trial court may not give dispositive weight to any one factor. Instead, the *McCain* panel determined that the trial court was not *required* to give dispositive weight to a single factor. We can envision cases where a trial court might reasonably assign dispositive weight to a single factor. See *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995) ("we are unwilling to conclude that mathematical equality on the statutory factors *necessarily* amounts to an evidentiary standoff that precludes a party from satisfying the clear and convincing standard of proof").

With respect to defendant's argument that the trial court's findings regarding parental alienation "drove" its findings under factors other than factor (j), which is the only factor that directly encompasses alienation, she has not offered any meaningful analysis of this issue and has not identified any authority for the proposition that a trial court cannot consider the implications of particular conduct under multiple factors. Consequently, she has abandoned this claim of error on appeal. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Turning to the trial court's actual findings and determinations, we conclude that the trial court did not err when it found that there was clear and convincing evidence to warrant a change in the children's established custodial environment in favor of plaintiff. Defendant challenges the trial court's findings on factors (d), (f), (i), and (j), as found in MCL 722.23. In *Berger*, 277 Mich App at 705-706, this Court explained:

> [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. This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors. The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. 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. . . . This Court reviews questions of law for clear legal error that occurs when a trial court incorrectly chooses, interprets, or applies the law. [Citations omitted.]

Factor (d) concerns the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). Although the trial court found that this factor did not favor either party because the children did not enjoy stability in either parent's home environment, the court came to that conclusion partly on the basis of the evidence that defendant prevented the children from having a stable, satisfactory home environment with their father due to her nearly constant interference with his parenting time, her actions in alienating the children from plaintiff, and defendant's conduct that gave rise to unfounded and unsubstantiated claims of abuse by plaintiff. There was overwhelming evidence to support these findings. And there was sufficient evidence supporting the trial court's

conclusion that defendant did not provide the children with stability in her home, given that, while the children were still struggling with the breakup of the marriage, defendant foisted a new boyfriend on them, and considering that she caused or influenced the children to accuse defendant of abuse, doing so from defendant's home environment. There was no error relative to factor (d).

With respect to factor (f), it concerns the "moral fitness of the parties involved." MCL 722.23(f). There was evidence that the children have special needs, are impressionable, have social deficits, and could be manipulated, and there was evidence from which it could reasonably be inferred that defendant influenced or coached these suggestable children to wrongfully accuse their father of abuse. Any moral deficiencies in regard to some of plaintiff's conduct pale in comparison to defendant's actions. The trial court did not err in finding that factor (f) strongly favored plaintiff.

With respect to factor (i), it concerns the "reasonable preference of the child." MCL 722.23(i). The trial court interviewed all of the children, indicating that "each expressed strong and alarmingly negative opinions about their father with little to no explanation." The court noted that the children similarly could not provide one of the psychologists with any concrete or consistent examples of bad conduct by plaintiff. The trial court, therefore, found that the children's preference to be with defendant "was not reasonable." Generally, a court must consider the reasonable preference of a child under MCL 722.23(i), if a preference exists, and a child over the age of six is presumed to be capable of forming a reasonable preference. *Maier v Maier*, 311 Mich App 218, 224-225; 874 NW2d 725 (2015). However, a child's presumed capacity can be compromised by surrounding circumstances. *Id.* at 225. Such a circumstance includes where a child has been coached or has been subjected to significant efforts to influence his or her preference, in which case a court does not err in declining to find or rejecting a preference. *Id.* at 226. Given the evidence indicating that defendant had coached or otherwise influenced the children, we cannot conclude that the trial court erred in rejecting the claimed preferences of the children.

Finally, with respect to factor (j), it concerns, as mentioned earlier, "[t]he 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." MCL 722.23(j). There was more than sufficient evidence, discussed above, supporting the trial court's ruling that factor (j) "overwhelmingly" favored plaintiff. Factor (j) also provides that "[a] court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent." *Id.* In light of the evidence supporting a conclusion that myriad and ever-mounting allegations of abuse were untrue, resulting from conduct, coaching, or influencing by defendant, her actions to supposedly protect the children cannot be characterized as reasonable. The trial court did not err in regard to evaluating factor (j).

In sum, the trial court's findings were not against the great weight of the evidence, it made no clear legal errors, and the ruling to award plaintiff sole legal and physical custody of the children did not constitute an abuse of discretion.

Defendant next argues that the trial court improperly awarded attorney fees to plaintiff under MCR 3.206(C)(2)(b), where he failed to present evidence of a causal connection between defendant's conduct and the fees. She also asserts that the court erroneously applied an arbitrary formula in setting the fee award. Defendant did not object below to the fee amount awarded by the trial court; therefore, we decline to address this issue. See *Jansen v Jansen*, 205 Mich App 169, 173; 517 NW2d 275 (1994) ("Objection to the reasonableness of the amount of an award of attorney fees may not be raised for the first time on appeal[,]" and "[a]ccordingly, this issue is not properly before us.").

Finally, defendant argues that the trial court erred when it ordered plaintiff to pay up to $650 per month in therapy expenses in lieu of child support and awarded him the right to claim the children on his tax return even though the children did not yet live with him. First, defendant's cursory and inadequate treatment of the tax issue precludes appellate review. Defendant has not identified the law applicable to the trial court's decision. See, e.g., *Fear v Rogers*, 207 Mich App 642, 645-646; 526 NW2d 197 (1994) (holding that a trial court may award a tax exemption for children to either party and may consider it part of the support order or part of the property division). Defendant has not offered any meaningful discussion of the trial court's decision to allow plaintiff to claim the children on his tax return beyond stating that the decision enriched plaintiff. By failing to advance any supporting legal analysis or reasoning, defendant has abandoned the tax issue on appeal. *Mitcham*, 355 Mich at 203.

With respect to child support, plaintiff had been paying about $650 per month to defendant prior to the conclusion of trial. Pursuant to the divorce judgment, child support was temporarily reserved for both parties pending completion or stabilization of the custodial transition. After defendant's initial claim of appeal was dismissed for lack of jurisdiction on the basis that the divorce judgment was not a final judgment given the reservation of child support, *Harner v Harner*, unpublished order of the Court of Appeals, entered February 28, 2017 (Docket No. 337005), a hearing was held wherein the trial court ordered plaintiff to make payments of up to $650 per month to the reunification therapist as a form of child support.

The parents of a minor child have a legal obligation to support the child. MCL 722.3. When ordering support, a trial court must generally apply the Michigan Child Support Formula (MCSF). See *Borowsky v Borowsky*, 273 Mich App 666, 673; 733 NW2d 71 (2007), citing MCL 552.605(2). A trial court may deviate from the MCSF if it finds that application of the MCSF would be unjust or inappropriate:

> If the trial court determines that deviation from the formula is warranted, it must set forth in writing or on the record (1) the amount of child support determined by application of the formula, (2) how the order deviates from the formula, (3) the value of property or other support awarded instead of the payment of child support, if applicable, and (4) the reasons why application of the formula would be unjust or inappropriate in the case. [*Borowsky*, 273 Mich App at 673 (citations omitted).]

In this case, the trial court ordered plaintiff to pay the costs associated with the children's reunification therapy up to $650 a month, characterizing that order as child support. The trial court's decision to order such payments can be viewed as a deviation from the MCSF, which the

trial court could not do without first finding that application of the formula would be unjust or inappropriate and then setting forth the requirements stated under MCL 552.605(2). Consequently, the trial court erred as a matter of law when it deviated from the formula without establishing the requisite grounds for doing so.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, neither may tax costs. MCR 7.219(A).

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane M. Beckering