

STATE OF MICHIGAN
COURT OF APPEALS

BRADLEY D. PACKARD,

Plaintiff/Counter-Defendant-
Appellant,

V

LAURA RAE BICKLE,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
September 7, 2006

No. 262530
Washtenaw Circuit Court
LC No. 94-002347-DM

BRADLEY D. PACKARD,

Plaintiff-Appellant,

V

LAURA RAE BICKLE,

Defendant-Appellee.

No. 264561
Washtenaw Circuit Court
LC No. 94-002347-DM

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff Bradley Packard, in Docket 262530, appeals as of right from the trial court's April 28, 2005 order awarding defendant Laura Bickle sole legal and physical custody of the parties' minor child, suspending plaintiff's parenting time, and granting defendant's motions for retroactive child support and attorney fees. In Docket No. 264561, plaintiff appeals by delayed leave granted the June 21, 2005 post-judgment order setting child support and imposing attorney fees. Plaintiff asserts that a number of errors committed by the trial court in the protracted 2003-2005 custody proceedings resulted in these two orders. Based on these errors, plaintiff asks this Court to vacate the orders, and remand for a de novo hearing on all issues before another judge. We affirm in part, reverse in part, and remand.

I

Plaintiff and defendant were married in 1993. Their minor child was born in February 1994. Their 1995 consent judgment for divorce awarded defendant sole temporary physical custody of the child, joint legal custody, and gave plaintiff liberal visitation every other week. Between 2000 and 2002, the parties each moved to change custody and parenting time, ultimately resulting in a January 2003 order granting joint legal custody and sole physical custody to defendant with liberal visitation to plaintiff.

In March 2003, both parties again moved to change custody and parenting time. Defendant alleged plaintiff was verbally abusive and physically threatening toward the child. Plaintiff alleged defendant had a history of mental instability and had fabricated all of the allegations in her motion. Both parties agreed that the child had been deteriorating mentally and emotionally, showing increased stress, anxiety and depression, beginning in January 2003. At an April 9, 2003 hearing, the parties requested a psychological/custodial evaluation. Defendant suggested licensed social worker Vicky Bennett as a possible evaluator; plaintiff suggested Dr. Robert Cohen, Ph.D. or Dr. Beth Clark, Ph.D. The parties agreed to allow the trial court to choose one of the three as an evaluator. The trial court initially appointed Dr. Clark to conduct the psychological evaluation. When she indicated she was unavailable, the trial court appointed Bennett. Bennett issued her final report in September 2003. In her report, she recommended that plaintiff's parenting time with the child be suspended based on the child's expressed fear of plaintiff and desire not to see him.

The trial court held several evidentiary hearings on the parties' cross motions. On April 28, 2004, the trial court found proper cause and a change in circumstances sufficient to revisit custody and parenting time. It further found that the child had an established custodial environment with both parties. Based largely on Bennett's report, the trial court found that clear and convincing evidence supported sole legal and physical custody to defendant. In a June 21, 2005 post-judgment order, the trial court ordered plaintiff and his counsel jointly and severally responsible for a portion of defendant's and Bennett's attorney fees, and ordered plaintiff to pay child support retroactive to April 2003 when plaintiff's parenting time was first suspended. Plaintiff now appeals.

II

A trial court's legal decisions in a custody matter are reviewed for clear legal error on a major issue, including decisions regarding the admission of evidence that involve preliminary questions of law, i.e., whether evidence rules preclude admissibility of the evidence. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing MCL 722.28; see also *Michigan DOT v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 700 NW2d 380 (2005). Findings of fact are reviewed pursuant to the great weight of the evidence standard. *Fletcher, supra* at 24. In accord with that standard, this Court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

A trial court's determination regarding expert witness fees is discretionary. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 380; 533 NW2d 373 (1995). Similarly, a trial court's decision to admit expert testimony is also a discretionary ruling. *Clerc v Chippewa War Mem*

Hosp, 267 Mich App 597, 601; 705 NW2d 703 (2005), citing *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 170 (2004). We review a trial court’s discretionary decisions for a palpable abuse of discretion. *LaFleche*, *supra* at 695.

III

A.

We first address plaintiff’s contention that the trial court impermissibly denied him the right to voir dire and cross-examine Bennett. In related claims, plaintiff contends (1) Bennett, as a certified social worker, was not qualified to render a psychological evaluation of the minor child, (2) the trial court repeatedly denied plaintiff the opportunity to expose Bennett’s lack of qualifications, (3) the trial court abruptly discontinued his cross-examination of Bennett and (4) the trial court improperly rejected plaintiff’s offer of proof pertaining to Bennett’s lack of qualifications. We agree, in part.

A trial court has wide discretion in deciding the manner of trial, *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), including the scope of cross-examination. *Heshelman v Lombardi*, 183 Mich App 72, 84; 454 NW2d 603 (1990). While MRE 706 allows parties to cross-examine a court-appointed expert, a trial court has a duty to “limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.” MCL 768.29. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

In this case, we find no abuse of discretion regarding the scope of cross-examination or voir dire. Contrary to plaintiff’s assertion, “. . .the court *may* in its discretion allow the opposing party to cross-examine an expert witness as to his qualifications before permitting him to give his opinion, [however] such preliminary cross-examination, [i.e. voir dire], is not a matter of right.” *People v Kimbrough*, 193 Mich 330, 335; 159 NW 533 (1916). In any event, plaintiff’s rights were sufficiently protected as plaintiff’s counsel was permitted to cross-examine Bennett regarding the bases for her opinions pursuant to MRE 703 and MRE 706(a). However, the record evidence demonstrates that plaintiff’s counsel disregarded the trial court’s instructions to limit his cross-examination to relevant matters. On five occasions, the trial court instructed plaintiff’s counsel to stay within the boundaries of relevant evidence, admonishing plaintiff’s counsel to refrain from questioning Bennett regarding the content of treatises and medical records she was either unfamiliar with or did not rely upon in her assessment of the parties and child. In our judgment, given plaintiff’s failure to show the relevancy regarding the challenged line of questioning and counsel’s complete failure and apparent unwillingness to follow the trial court’s instructions, the trial court did not commit a palpable abuse of discretion in terminating plaintiff’s cross-examination of Bennett.

B.

Next, plaintiff argues the trial court erred in finding Bennett qualified to testify as a psychological evaluator and in admitting her report and testimony under MRE 702. We agree.

MRE 706 establishes the power of the court to appoint an expert; the qualification of the expert and admissibility of her testimony remains subject to the requirements of MRE 702. MRE 702 requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. MRE 702 Note; *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999); *Gilbert, supra* at 780. MRE 702 sets forth three preconditions to the admission of expert testimony. First, the proposed expert must be “qualified” to render the proposed testimony due to her “knowledge, skill, experience, training, or education.” MRE 702; *Craig v Oakwood Hosp*, 471 Mich 67, 78; 684 NW2d 296 (2004). Second, the proposed testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue.” MRE 702; *Craig, supra* at 79. Third, expert testimony: (a) must be based on sufficient facts or data; (b) must be the product of reliable principles and methods; and (c) the witness must have applied the principles and methods reliably to the facts of the case. MRE 702(1)-(3).

Here, the trial court erred in determining that, because Bennett was court-appointed, she was qualified to conduct psychological evaluations. See *People v Crawford*, 66 Mich App 581, 585 n 2; 239 NW2d 670 (1976) (“ . . . [A] social worker, unlike a psychologist, does not have the training or expertise to administer and evaluate psychological tests”); see, e.g., *People v Parney*, 74 Mich App 173, 179-180; 253 NW2d 698 (1977) (holding that social workers are unqualified to testify as experts regarding a defendant’s competency to stand trial); see also *People v Skowronski*, 61 Mich App 71; 232 NW2d 306 (1975) (holding that a social worker was not qualified to evaluate the psychological tests given a defendant and thus was not competent to testify at a competency hearing).

Here, it is undisputed that Bennett is licensed by the state as a certified social worker, is certified as a Diplomate in Clinical Social Work, certified as a Diplomate in Clinical Work and certified by the Academy of Certified Social Workers. However, none of these certifications, nor Bennett’s experience assessing and treating behavioral, emotional and school problems of minors establish the required expertise in conducting psychological evaluations of adults and minors. An expert’s testimony may not exceed his or her area of expertise. *Gilbert, supra* at 785-78; see also MCL 333. 18211(2) (“a person shall not engage in the practice of psychology unless licensed or otherwise authorized by this article”). Because Bennett was not simply given the task of conducting a custodial evaluation, where the lack of a psychology license may not be critical, but rather was appointed with the specific task of conducting a psychological evaluation, we conclude that the trial court committed a clear legal error by finding Bennett qualified to conduct a psychological assessment of the parties and child under MRE 702. Given that the psychological condition of the parties was the dispositive issue, and the trial court relied substantially upon Bennett’s report, we cannot reasonably state that the error was harmless. Accordingly, remand is required for the purpose of conducting a psychological evaluation.

Our resolution of this issue resolves many of plaintiff’s claims on appeal.¹ However, we briefly address those issues likely to reemerge on remand.

¹ For example, we need not address plaintiff’s claim that the trial court improperly rejected plaintiff’s offer of proof subsequent to the trial court’s termination of plaintiff’s cross-
(continued...)

C.

Next, plaintiff presents a number of arguments contending that defendant misled the trial court into making several mistakes. First, plaintiff contends that the trial court erred when it “temporarily suspended” plaintiff’s parenting time in April 2003 pending an evidentiary hearing. We agree, in part.

Michigan law presumes that it is in a child’s best interests to have a strong relationship with both parents. *Rozek v Rozek*, 203 Mich App 193, 194-195; 511 NW2d 693 (1993), citing MCL 722.27a. The Child Custody Act “permits the trial court to order visitation with a multitude of differing terms and conditions to best serve the interests of, and in an appropriate case to protect, the child” *Rozek, supra* at 195 n 2. However, before it enters an order suspending visitation, even temporarily, a trial court must find by clear and convincing evidence that visitation would “endanger the child’s physical, mental, or emotional health.” *Id.* at 194, citing MCL 722.27a(3).

Here, the trial court erred by suspending plaintiff’s visitation *before* an evidentiary hearing. The court was obligated under MCL 722.27a to suspend visitation only *after* it held a hearing on the record. See *Rozek, supra* at 194-195. Upon a finding of legal error, this Court is required to remand to the trial court unless the error is harmless. *Id.* at 882. Undoubtedly, plaintiff was deprived of visitation that he should not have been. However, based on the record before us, we consider the trial court’s failure to conduct a hearing before suspending plaintiff’s parenting time as harmless. A full evidentiary hearing was subsequently held and the temporary suspension did not affect the trial court’s determination regarding the existence of an established custodial environment with both parties. As such, the premature termination of parenting time was not determinative of the ultimate outcome and does not warrant reversal or a de novo hearing before a different judge.² See MCR 2.613(A), *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 15; 651 NW2d 356 (2002).

Next, plaintiff, in reliance on this Court’s decision in *Molloy v Molloy*, 247 Mich App 348, 351-352; 637 NW2d 803 (2001) (“*Molloy I*”) aff’d in part, vacated in part 466 Mich 852 (2002) (“*Molloy II*”) argues that, because a “best interest hearing was not pending,” the trial court erred when it conducted an in-camera examination of the minor child. We disagree.

In *Molloy I*, this Court held that all in camera interviews of children in custody cases be recorded and sealed for appellate review. *Molloy I* at 351-352. However, in *Molloy II*, our Supreme Court subsequently issued an order affirming that decision in part, and specifically vacated that portion of this Court’s opinion holding that such in camera interviews be recorded. Further, the Supreme Court amended MCR 3.210(C)(5) to provide for in-camera interviews to

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examination of Bennett. Nor do we need to address plaintiff’s claim that the trial court erred because it ignored evidence of defendant’s mental health history and testimony on plaintiff’s behalf by his family members and his expert, Terence Campbell, Ph.D.

² Plaintiff is entitled to make up visitation for the visitation improperly suspended, a matter to be addressed by the trial court on remand.

determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. MCR 3.210(C)(5); *Molloy II, supra*.

Here, at the time the court interviewed the child in April 2003, both parties' motions for custody modification were pending, and defendant had requested a temporary suspension of plaintiff's visitation. Further, the child's deteriorating psychological state was acknowledged by both parties. Thus, it was neither clear legal error nor a palpable abuse of discretion for the trial court to speak with the child, without recording the session, to address the child's preference, in light of the allegations of verbal abuse and the child's fear of plaintiff alleged in defendant's March 2003 motion.

Plaintiff next asserts that the trial court erred when it ordered him to immediately pay Bennett's \$500 retainer. We disagree and find no palpable abuse of discretion. At the April 4, 2003 hearing, Bennett's name was placed, along with two others, on the parties' list of possible experts to conduct a psychological evaluation. Plaintiff expressed a preference for Drs. Clark or Cohen, but he did not object to Bennett's inclusion on the list. After the trial court appointed Bennett to conduct the evaluation on April 22, 2003, plaintiff did not cooperate with her attempts to arrange a meeting with him. When plaintiff finally met with Bennett for the first time in July 2003, he told her he objected to her qualifications to conduct a psychological evaluation. He did not, however, inform the trial court until December 2003 or January 2004. It was thus not a palpable abuse of discretion for the trial court to order plaintiff to pay Bennett's retainer for her time in trying to contact and arrange an appointment with plaintiff in the eight months he was neither cooperating, nor informing the court of his objection.

Plaintiff next argues that the trial court erred when it calculated his 2003 and 2005 child support monthly payment based on his 2004 income. Although plaintiff preserved this issue for review, he abandoned the claim given his failure to cite any supporting authority for his position. Thus, we decline to review the issue. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

Next, plaintiff argues that the trial court erred when it ordered plaintiff and his counsel jointly and severally responsible for portions of defendant's attorney fees in its June 21, 2005 post judgment order. We agree.

As an initial matter, we reject plaintiff's contention that the trial court's June 21, 2004 order was a sua sponte order. Rather, the order ruled on defendant's request for modification of support. However, we do find, given our decision to remand for a proper psychological evaluation of the parties, an award of attorney of fees to defendant is premature. Generally, attorney fees are generally not recoverable as costs in the absence of a statute or court rule authorizing an award of attorney fees. MCL 600.2405(6); *Haliw v Sterling Heights*, 471 Mich 700, 707; 691 NW2d 753 (2005). For example, upon a motion, a trial court is required to award to the prevailing party the costs and fees incurred by that party if the court finds that an action or defense was frivolous. MCL 600.2591(1). Where there is only one cause of action, the party who prevails on the entire record is deemed to be the prevailing party. MCR 2.625(B)(2).

Because it remains to be determined which party, if any, will prevail on the entire record, the trial court committed a palpable abuse of discretion and a clear legal error when it ordered plaintiff and his counsel jointly and equally responsible for defendant's attorney fees.³

Finally, plaintiff argues that the trial court erred when it ordered plaintiff and his counsel jointly and severally responsible for portions of Bennett's attorney fees. We disagree.

MRE 706 gives a court discretion in ordering costs and fees of a court-appointed expert on one or both of the parties. MRE 706(b). Both at a hearing and in an order, the trial court informed the parties it would impose Bennett's professional and attorney fees on the party that deposed her. Because plaintiff and his counsel served two subpoenas on Bennett to appear for deposition, requiring her to retain an attorney as a result of plaintiff's two subpoenas, we find no palpable abuse of discretion in the trial court's decision to impose a portion of Bennett's attorney fees on plaintiff and his counsel.

As a final matter, although not raised in his statement of questions presented, plaintiff, in his request for relief, asks that any remand of this matter be ordered before a different judge based on the original judge's purported bias, prejudice and adverse decisions. Because plaintiff has failed to demonstrate that the trial judge had actual prejudice or bias, versus an understandable frustration with the protracted proceedings involved in this case, and because the mere fact that a judge rules against a litigant, even if the rulings are determined to be erroneous, is not sufficient to require disqualification or reassignment, *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001), we conclude remand before a different judge is not required.

We reverse and remand the April 28, 2005 order as to the court's findings on the best interest factors. We vacate the June 21, 2005 order as to plaintiff and his counsel's responsibility for defendant's attorney fees. Our decision is based on the following errors: (1) the trial court's

³ Alternatively, we also find, that plaintiff's counsel's claims did not rise to the level of "frivolous" as defined in by MCL 600.2591(3)(i)-(iii). In this case, the trial court deemed plaintiff's initial agreement to Bennett as a possible psychological evaluator, a "waiver" of his right to challenge her qualifications under MRE 702. However, a party's failure to object to a proposed expert does not entail a "waiver" of MRE 702 requirements, nor does it absolve a trial court of its gate-keeping obligations. "While the trial court's exercise of its role as a gatekeeper under MRE 702 to ensure that expert testimony is reliable "is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.' " " *Clerc, supra* at 601-602, citing *Gilbert, supra* at 780. In addition, the trial court incorrectly deemed the action frivolous, based in part on plaintiff's alleged request that his attorney, also a licensed psychologist, be admitted as an expert to challenge Bennett's qualifications. However, the record demonstrates that plaintiff never proposed that his counsel testify as an expert or any other kind of witness. Plaintiff merely stated to the court that his attorney is a licensed psychologist, who wished to demonstrate, via two subpoenas served on Bennett, that Bennett was unqualified under MRE 702. Accordingly, it was a clear legal error and a palpable abuse of discretion for the trial court to find plaintiff's actions met the definition of "frivolous" in MCL 600.2591(3)(i)-(iii).

clear legal error and palpable abuse of discretion in holding social worker Vicky Bennett qualified to conduct a psychological evaluation under MRE 702; and (2) the trial court's clear legal error and palpable abuse of discretion in ordering payment of defendant's attorney fees.

We remand for: (1) appointment of a licensed psychologist or psychiatrist (preferably agreed to by the parties) to conduct a psychological evaluation of the parties and child; and (2) a de novo hearing as to the statutory best interests factors. The trial court may consider Bennett's report and testimony in the proceedings below as to custody only, but not the parties' psychological status.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder