

STATE OF MICHIGAN
COURT OF APPEALS

MIKKI JAMIE SHENKENBERG,
Plaintiff-Appellee,

UNPUBLISHED
December 18, 2014

v

DAVID LEE SHENKENBERG,
Defendant-Appellant.

No. 321384
Oakland Circuit Court
Family Division
LC No. 2012-803306-DM

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

PER CURIAM.

In this child custody dispute, defendant appeals as of right the judgment of divorce granting plaintiff sole legal and physical custody of the minor child and setting forth supervised parenting time for defendant. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties married for the first time in 2007, and their daughter, RS, was born later that year. Initially, the parties lived in Massachusetts; however, when plaintiff's grandmother became ill, plaintiff and RS traveled to Michigan to spend time with her. They returned for a short time after plaintiff's grandmother passed away, but due to defendant's physical abuse of plaintiff, they returned to Michigan in June or July of 2008. Defendant, who remained in Massachusetts, filed for divorce. He would occasionally travel to Michigan to visit with RS. In September of 2009, defendant lost his job. About a month later, defendant moved to Michigan. The parties' divorce was finalized in February of 2010. Plaintiff was awarded custody of RS, and defendant received supervised parenting time.

In January of 2011, plaintiff and defendant rekindled their relationship. Later in 2011, defendant had moved in with plaintiff, plaintiff became pregnant, and the two remarried. Their second daughter, LS, was born in 2012. Then, in September of 2012, plaintiff observed RS jump on defendant's lap and begin "dry humping" him. Defendant asked RS to stop and then left the home to pick up dinner. Plaintiff asked RS if defendant tickled her. RS responded by disclosing that defendant tickled her vagina, and she gave a physical demonstration to plaintiff. The following day, RS disclosed the same conduct to her babysitter, who in turn, reported the conduct to plaintiff. Plaintiff contacted Child Protective Services (CPS) and police. She also removed the children from the home and filed for divorce. Ultimately, both CPS and the police declined to take action with regard to the sexual abuse allegations.

On February 1, 2013, plaintiff filed a motion seeking temporary sole physical and legal custody of the children and limiting defendant to supervised parenting time. On February 13, 2013, the trial court granted plaintiff's motion, awarding plaintiff sole legal and physical custody of the children and ordering defendant to have supervised parenting time. Plaintiff's mother, Fran Cohen, was to serve as the supervisor at the visits. Approximately six months later, the trial court ordered that parenting time take place through an agency, and defendant began to see the children weekly. A parenting time report from the first session indicated that defendant had not seen the children in six months.

In the meantime, RS began therapy with Melissa Farrell. During her therapy, RS apparently repeated the allegations of sexual abuse to Farrell. She also apparently reported that defendant physically abused her by "trapping" her and punching her in the stomach. RS's allegations were reported to CPS. RS was forensically interviewed at Care House, but was generally uncooperative with the investigation. CPS declined to take further action.

After a lengthy bench trial, the trial court issued an opinion and order that awarded plaintiff sole legal custody and primary physical custody of both children, with defendant limited to supervised parenting time through the agency. The trial court found that both children had an established custodial environment with plaintiff and found that factors (a), (b), (c), (d), (h), (j), and (k) of the statutory best interest factors from the Child Custody Act, MCL 722.21 *et seq.*, favored plaintiff. The trial court also found that factors (e), (f), and (g) favored neither plaintiff nor defendant, and that factor (i) was inapplicable because of the age of the children. Finally, in regard to factor (l), the "catch-all" factor, the trial court stated that defendant's testimony, and particularly the anger he harbored towards plaintiff, demonstrated that the parties would not be able to work together "with respect to important decisions that are to be made for the children."

On March 18, 2014, a mere twelve days after the court's opinion was issued, defendant filed a motion requesting additional time with the children, and that his time be unsupervised at the discretion of the children's guardian ad litem (GAL). However, at the hearing regarding the motion, defendant essentially admitted that there had been no change in circumstance since the court's opinion issued. Accordingly, the court found the motion frivolous, sanctioned defendant \$1,250, and awarded plaintiff \$1,250 in attorney fees. Subsequently, on April 30, 2014, plaintiff filed a motion to quash discovery requests defendant served after the court's opinion issued and requested attorney fees. At the hearing regarding the motion, defendant admitted to serving a discovery request on Dr. Diana Yurk, plaintiff's psychologist, but explained that he hoped to obtain evidence for use in this appeal. The trial court noted that discovery had long since closed and found the request inappropriate. Accordingly, the court ordered defendant to pay an additional \$1,000 in attorney fees to plaintiff.

II. BEST INTERESTS

"Above all, custody disputes are to be resolved in the child's best interests." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). "Generally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Id.* Here, the trial court carefully weighed all of the factors in a thoughtful and detailed opinion. On appeal, defendant challenges the court findings with regard to factors (a), (g), and (j). Because the record evidence supporting each factor did not clearly preponderate in the other direction, the

trial court's findings on the challenged factors were not against the great weight of the evidence. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009).

There are three standards of review in child custody cases. *Id.* In *McIntosh*, this Court summarized them as follows:

First, the trial court's findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. This Court defers to the trial court's determinations of credibility. Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. Third, discretionary rulings are reviewed for an abuse of discretion. [*Id.* at 474-475 (quotation marks and citations omitted).]

Defendant first argues that the trial court's finding that factor (a) favored plaintiff was against the great weight of the evidence. We disagree. Factor (a) considers "[t]he love, affection, and other emotional ties existing between the parties involved and the child[ren]." MCL 722.23(a). In finding that factor (a) favored plaintiff, the trial court reasoned:

[Plaintiff] testified that she has loved the children through everything and they are "her world." There is no dispute that they are bonded to her and look to her for comfort and care. Dr. Farrell testified that . . . [RS] has grown to depend on [plaintiff] and that upsetting that stability would not be in [RS]'s best interest.

[Defendant] testified that he used to take care of the children when the parties lived together. However, he has not been present for [RS]'s infancy and toddlerhood.

Fran Cohen testified that [defendant]'s involvement with the minor children prior to the filing of the instant divorce action was limited, at best. Furthermore, even when he was with the minor children, he was not engaged with them.

Here, the record evidence clearly supported that plaintiff loved her children and that her children were bonded to her. However, the testimony clearly showed (1) that when defendant was with the children he was mainly focused on his computer, (2) that he opted to not contact the children's school to find out if there were events he could have attended, (3) that he voluntarily chose not to attend parenting time for six months, (4) and that, in spite of defendant's assertions to the contrary, he was not a "constant" presence in the children's lives. Because the record evidence did not clearly preponderate in the other direction, the trial court's findings on factor (a) were not against the great weight of the evidence. *McIntosh*, 282 Mich App at 474.

Defendant next argues that the trial court's finding that factor (g) favored neither plaintiff nor defendant was against the great weight of the evidence. We disagree. Factor (g) considers

“[t]he mental and physical health of the parties involved.” MCL 722.23(g). In finding that factor (g) favored neither party, the trial court reasoned:

Neither party has any physical health problems that would interfere with his or her ability to parent.

As stated previously, Dr. Yurk testified that although [plaintiff] is a “woman in crisis” and has depression surrounding what is currently going on in her life, she has been able to maintain relationships, care for her children and manage well. She believes that [plaintiff] has taken the steps necessary to ensure that she is appropriately caring for the minor children.

Dr. Yurk found that [plaintiff] had no inhibition to parent and was conscientious in handling the children. She stated that [plaintiff] was “above average in handling her children.”

Defendant Father was hospitalized two times as a psychiatric patient and takes a prescribed anti-depressant.

Defendant takes specific issue with the court’s finding that he was hospitalized two times as a psychiatric patient. He asserts that the record only shows that he was hospitalized once when he was in college. However, our review of the record shows that he was also taken to the hospital for a psychiatric evaluation at the request of police after plaintiff reported that defendant had sexually abused RS. Thus, the trial court’s findings are supported by the record. Defendant also argues that the court should have found factor (g) favored him because plaintiff smokes, has a history of assaultive behavior, and has a variety of mental health problems that she takes medications for. However, he ignores the testimony from Dr. Yurk, who testified that plaintiff’s mental health problems do not affect her ability to parent, and that, despite her mental health issues, plaintiff is above average in handling her children. Because the record evidence did not clearly preponderate in the other direction, the trial court’s findings on factor (g) were not against the great weight of the evidence. *McIntosh*, 282 Mich App at 474.

Defendant finally argues that the trial court’s finding that factor (j) favored plaintiff was against the great weight of the evidence. We disagree. Factor (j) considers “[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” MCL 722.23(j). In finding that factor (j) favored plaintiff, the trial court reasoned:

The evidence demonstrates that [plaintiff] has shown a willingness and ability to facilitate a close and continuing relationship between [defendant] and the minor children so long as that relationship is in the children’s best interest[s]. [Plaintiff] has followed all orders of the [c]ourt regarding parenting time and driving the children to all supervised parenting time sessions. Plaintiff Mother has made efforts to ensure that the children’s paternal grandparents are able to continue their relationship with the children.

Although [d]efendant claims that he would encourage a relationship between [p]laintiff and the children, as stated previously, he characterized her as

“selfish, bipolar, delusional, mentally ill and a kidnapper.” Also, [d]efendant told Dr. [Jack] Haynes that he wants to prove in court that [p]laintiff is evil and that “anybody can see she’s crazy.” These statements are evidence that he will not likely cooperate with [p]laintiff to facilitate parenting time. He thinks *he* is a “model person.” He also testified that he would work with the grandparents

The [c]ourt does not find his testimony to be credible on this issue. [emphasis in original.]

Defendant does not challenge any of the factual conclusions discussed by the trial court in his argument. Rather, he argues that the trial court’s finding was against the great weight of the evidence because plaintiff waged a successful campaign to separate him from the children. His evidence of the alleged campaign is a timeline of events which he believes demonstrates an effort by plaintiff to eliminate defendant from the children’s lives. These events include contacting CPS when RS reported defendant tickled her vagina, removing the children from the home, seeking a personal protection order (PPO) against defendant, seeking therapy for RS, filing for divorce, and the entry of various orders restricting defendant’s parenting time with the children. While defendant believes the timeline demonstrates a “campaign” against him, it is equally plausible, if not more so, that these events simply demonstrate a parent who, after being abused herself by defendant, and then having her daughter report and demonstrate acts of sexual abuse to her, sought to protect her children from further harm. Defendant’s belief that plaintiff has waged a campaign to eliminate him from the children’s lives is simply conjecture and speculation.

As the trial court noted, plaintiff complied with the trial court’s orders and made the children available for parenting time. The parenting time reports generally show that plaintiff brought the children to parenting time sessions on time, and that only a few sessions were cancelled, usually because a child was ill. Plaintiff testified that she desired for the children to have a relationship with defendant, so long as he was “safe for them to be around.” The trial court found defendant’s assertions that he would encourage a relationship with plaintiff were not credible. We defer to the trial court’s credibility determinations. *McIntosh*, 282 Mich App at 474. Because the record evidence did not clearly preponderate in the other direction, the trial court’s findings on factor (j) were not against the great weight of the evidence. *Id.*¹

III. PARENTING TIME

¹ In his reply brief, defendant raises challenges to best-interest factors (f) and (k). He also raises a general challenge to the trial court’s custody decision, asserting that the court erred by failing to find clear and convincing evidence warranting a change in the children’s established custodial environment, as well as a claim of judicial bias. However, “[r]eply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal.” *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Because these issues are raised only in defendant’s reply brief, we decline to address them.

Defendant next argues that the trial court abused its discretion by restricting him to supervised parenting time. We disagree.

As this Court explained in *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010):

Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction. 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. Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law. [Quotation marks, brackets, and citations omitted.]

Parenting time is considered part of a court's child custody determination. *Id.* at 22; see also MCL 722.1102(c). Pursuant to MCL 722.27a(1), “[p]arenting time shall be granted in accordance with the best interests of the child.” Further, there is a presumption that it is “in the best interests of a child for the child to have a strong relationship with both of his or her parents.” MCL 722.27a(1). Generally, “parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.” MCL 722.27a(1). However, “[a] parenting time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent, including . . . [r]equirements that parenting time occur in the presence of a third person or agency.” MCL 722.27a(8)(f). MCL 722.27a(6) lists eight factors, as well as a catchall provision, that the court “*may* consider . . . when determining the frequency, duration, and type of parenting time to be granted” (Emphasis added).

Regarding supervised parenting time, the Michigan Parenting Time Guideline, promulgated by the State Court Administrative Office, states:

In some cases, concern arises about the safety or well being of the child(ren) during parenting time. For these cases, supervised parenting time can assist in managing and facilitating the contact between the parent and child(ren). Given the presumption in favor of parenting time, supervised parenting time should occur only when other, less restrictive methods of ensuring a child(ren)'s well-being during parenting time cannot be implemented. The primary purpose of supervised parenting time is to provide for the safety of the child(ren). The welfare of the child(ren) is the paramount consideration in determining the manner in which supervision is provided. [Friend of the Court Bureau, Mich Supreme Court, *Michigan Parenting Time Guideline* (Lansing State Court Admin Office), p 13.]

Here, in a temporary order, the trial court initially limited defendant's parenting time to two supervised sessions each week. At the hearing regarding the motion, the trial court found plaintiff's allegations that defendant sexually abused RS and physically abused plaintiff credible. Subsequently, after the conclusion of the bench trial, the trial court ordered that defendant continue to have two supervised parenting time sessions each week with the children. This order was not an abuse of discretion. Our review of the record shows that there was evidence that defendant sexually abused RS, including testimony from plaintiff and from RS's therapist. Further, the reports from supervised parenting time indicate that RS frequently exposed her genital area to defendant during the visits, and that LS also engaged in what appeared to be sexual gestures aimed toward defendant. Further, RS also reported that defendant had physically abused her, and during supervised parenting time, RS has asked defendant why he did bad things to her, and specifically mentioned "trapping," which was one type of physical abuse that RS reported to her therapist. RS also engaged in self-harm activities during parenting time sessions.² In addition, defendant admitted that he drinks nightly, watches pornography daily, and has employed escorts in the past.³ Additionally, while defendant claimed that he had only one or two drinks a night, Dr. Jack Haynes stated that defendant could have more of an issue with alcohol than defendant believed, and could be drinking more than he stated, based on defendant's description of his drinking tendencies to Haynes.⁴ Considering all of the record evidence, the trial court's parenting time order was not an abuse of discretion. Rather, the trial court's parenting time order was well-tailored to meet the best interests of the children.

² On appeal, defendant directs this Court to a statement from the second CPS report in which RS stated, "It's not true what momma said." He argues that RS's statement is evidence that there was no need for supervised parenting time. However, defendant neglects to cite the entire passage from the CPS report, which states, "[RS] stated 'It's not true what momma said[.]' *She then said, 'It's really true, I was kidding[.]'*" Defendant's selective quotation of the CPS report does not demonstrate that supervised parenting time was an abuse of discretion.

³ Defendant argues that the trial court abused its discretion because it ordered supervised parenting time solely because it disagreed with defendant's lifestyle. Defendant does not believe that his drinking, hiring of escorts, or daily viewing of pornography is relevant to his fitness as a parent. However, given the allegations of physical and sexual abuse, defendant's drinking, hiring of escorts, and regular viewing of pornography is relevant, in that it is evidence that defendant continues to be a danger to his children. Defendant mainly disputes the trial court's statement at the hearing on defendant's motion to expand parenting time in which the trial court indicated that its parenting time decision was based, at least in part, on allegations that defendant viewed pornography in the presence of his children. He argues that the court was factually incorrect, and that there was no testimony whatsoever that defendant had done so. However, at the bench trial, after discussing the "dry humping" incident, plaintiff was asked if RS had ever seen anyone having sex or viewed pornography, such as would explain where RS learned this type of behavior. Plaintiff explained that the couple did not have cable television, and testified that "[t]he only exposure she could have had would have been through [defendant] and his computer." Thus, the trial court's finding is supported by the evidence.

⁴ Dr. Haynes performed psychological evaluations to both plaintiff and defendant.

IV. ATTORNEY FEES AND SANCTIONS

Finally, defendant argues that the trial court erred in imposing attorney fees and sanctions against him. We disagree. A trial court's determination that a filing is frivolous is reviewed for clear error. *Contel Sys Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). This Court reviews "a trial court's grant or denial of attorney fees for an abuse of discretion." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Id.*

Defendant argues that the trial court imposed attorney fees and sanctions, which he characterizes as punitive damages, because it sought to punish him for viewing pornography or was otherwise biased against him. Defendant is correct that, as a general matter, Michigan does not allow punitive damages except where authorized by statute. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400; 729 NW2d 277 (2006). However, the trial court did not award punitive damages, and there is no support for defendant's contention that the awards were punishment for his viewing of pornography or represented a personal bias of the trial court. Instead, at the April 2, 2014, hearing regarding defendant's motion to expand parenting time, the trial court repeatedly stated that it found defendant's motion frivolous. Pursuant to MCR 2.114(E), after concluding that the motion was frivolous, the trial court was required to "impose upon the person who signed [the motion], a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Defendant does not challenge the trial court's conclusion that his motion was frivolous. Because defendant has not disputed the basis for the trial court's ruling, this Court need not even consider granting relief. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

The trial court later awarded plaintiff attorney fees related to a motion she filed to, among other requests, quash a subpoena issued by defendant's attorney to plaintiff's psychologist. At the hearing regarding this motion, the trial court found the subpoena entirely inappropriate, as it was filed not only after the close of discovery, but after trial was completed, and the trial court issued its opinion. MCR 2.302(G) authorizes sanctions, including the payment of attorney fees, for discovery violations. Once again, defendant does not address the basis for the imposition of fees, and accordingly, this Court need not even consider granting relief. *Derderian*, 263 Mich App at 381. Further, the basis of the trial court's order awarding attorney fees had nothing to do with defendant's viewing of pornography or bias against defendant. Rather, the trial court acted in response to what it determined was a discovery violation. Defendant's argument is without merit.

Affirmed.

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