

STATE OF MICHIGAN
COURT OF APPEALS

HUGO E. REYES,

Plaintiff-Appellant,

v

CHERYL M. NIGHTINGALE,

Defendant-Appellee.

UNPUBLISHED

August 28, 2001

No. 231112

Wayne Circuit Court

Family Division

LC No. 00-012641-DC

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In this child custody dispute, plaintiff appeals as of right from an order awarding the parties joint legal custody of their daughter, but awarding physical custody to defendant. We affirm.

We review the trial court's findings of fact under the great weight of evidence standard, its dispositional ruling for an abuse of discretion, and its application of the law for clear legal error. MCL 722.28; *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Because an established custodial environment existed with defendant, plaintiff had the burden of presenting clear and convincing evidence that a change would be in the child's best interests. MCL 722.27(1)(c); *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-595; 532 NW2d 205 (1995).

Plaintiff contends that the trial court correctly enunciated the clear and convincing evidence standard of proof applicable to this case, but then proceeded to apply an incorrect standard. Having examined the trial court's challenged remarks in the context in which they were made, we find that plaintiff has failed to show any clear legal error. *Fletcher, supra*. We note that while plaintiff challenges the trial court's remark that "until [defendant] violates a court order and has to be held in contempt of court, there is nothing that this Court feels that it should do," the court made this statement *after* it had ruled not to change custody. The court plainly directed the remark at facilitating cooperation between the parties to ensure plaintiff's parenting time. Examined in context, the remark does not clearly reflect that the trial court applied an incorrect legal standard to its custody decision.

Plaintiff also argues that this Court should reverse because there is a high likelihood that the trial court used its interview of the child for a purpose other than to determine her preferred

custodian. Although this Court convened a special panel to consider this issue in *Molloy v Molloy*, 243 Mich App 595, 628 NW2d 587 (2000), vacated in part 243 Mich App 801 (2001), the holding in *Hilliard v Schmidt*, 231 Mich App 316; 586 NW2d 263 (1998), that the interview may be used for other purposes remains binding authority until reversed or modified by the special panel or the Supreme Court. MCR 7.215(I)(1).

Furthermore, we find no clear legal error on the basis of plaintiff's mere speculation that the trial court may have used its interview for an improper purpose. Plaintiff's failure to cite record support for his claim of error precludes appellate review. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998) (An appellant may not leave it to this Court to search the record for a factual basis to sustain or reject his position.). Moreover, we note that although our review of the record reflects that the trial court commented on its interview with the child when addressing best interest factors other than the child's preference, we nonetheless are satisfied that even absent its interview with the child the trial court would have reached the same decision not to change custody. Thus, even assuming that the trial court's use of the interview constituted error, it does not warrant relief. Any clear legal error was harmless. *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996).

Plaintiff next challenges the trial court's analysis of best interest factor (g) of MCL 722.23 (the parties' mental and physical health), in particular the trial court's failure when assessing defendant's mental health to give weight to testimony of a limited licensed psychologist who participated in a pretrial psychological evaluation of the parties. We find no basis, however, for disturbing the trial court's assessment of the limited licensed psychologist's testimony. Although a witness qualified as an expert may give testimony within the bounds of MRE 702 *et seq.*, this Court defers to the trial court's ability to judge the credibility of witnesses. *Fletcher, supra* at 25. Furthermore, we are not persuaded that the evidence clearly preponderated against the trial court's finding regarding factor (g). *Fletcher, supra* at 24.

Lastly, having considered plaintiff's challenges to the trial court's findings regarding best interest factors (b), (d), (e), (h) and (j) of MCL 722.23, as well as the court's dispositional ruling not to change custody, we are unpersuaded that plaintiff has established any basis for disturbing the trial court's decision. We conclude that the evidence did not clearly preponderate against the trial court's findings and that the trial court committed no palpable abuse of discretion in refusing a change of custody. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998); *Fletcher, supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey