

STATE OF MICHIGAN
COURT OF APPEALS

BYRON C. FLOYD,

Plaintiff-Appellant,

v

JULIE E. SHELDON, a/k/a JULIE E. MOORE,

Defendant-Appellee.

UNPUBLISHED

September 18, 2003

No. 245585

Washtenaw Circuit Court

LC No. 02-001004-DP

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order awarding physical custody of the parties' minor child to defendant. We affirm.

On appeal, plaintiff challenges several of the trial court's findings regarding the best interest factors set forth in MCL 722.23. All custody orders 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. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994).

I.

Plaintiff first argues that the evidence does not support the trial court's finding that factor (g) favored defendant. We disagree. Factor (g) looks to the "mental and physical health of the parties involved." MCL 722.23(g). The trial court's analysis of factor (g) consisted of the following:

With regard to factor (G), the mental and physical health of the parties involved. [Defendant] has argued that there is a difference in the health of the parties given the party's [sic] ages. Perhaps some of the physical maladies and/or injuries that [plaintiff] has had over the years, the fact that [defendant] does have or will have health insurance to provide those kinds of necessary benefits to her, where [plaintiff] has indicated neither a necessity, nor willingness for his own personal well-being.

In fact, he flatly stated on the stand that he can afford to pay whatever expense and did, in fact, in the past. He paid all the child birth expenses out of his own assets. The Court's going to identify that [defendant] is slightly favored on this factor.

At trial, defendant testified that plaintiff suffered from repeated injuries to either his feet or knees, often requiring crutches, and that on one occasion, plaintiff broke his collarbone, yet opted not to see a physician.

While injuries to limbs are not uncommon, it was entirely proper for the trial court to consider the type and frequency of injuries suffered by plaintiff. The evidence showed that plaintiff had somewhat frequently suffered injuries, while there was no such evidence with respect to defendant. Moreover, the fact that a person makes a considered choice to not see a physician for proper treatment is relevant in considering this factor. In reviewing the trial court's findings of fact, this Court defers to the trial court's determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Plaintiff's failure to seek proper medical attention for his injuries, and the numerous injuries themselves, weighed against him. Based on the relevant testimony, the trial court's conclusion that factor (g) slightly favored defendant was supported by the evidence.¹

II

Plaintiff next argues that the trial court should have given more weight to its determination that factor (i) favored plaintiff. We disagree.

Factor (i) looks to "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). In order to prevent the child from having to testify in front of his or her parents, the trial court can interview the child *in camera* and exclude the child's testimony at trial. *Impullitti v Impullitti*, 163 Mich App 507, 510; 415 NW2d 261 (1987). However, the interview "must be limited to a reasonable inquiry into the child's parental preference." *Molloy v Molloy*, 247 Mich App 348, 351; 637 NW2d 803 (2001), *aff'd in part, vacated in part on other grounds*, 466 Mich 852 (2002).

The trial court's analysis of factor (i) consisted of the following:

[T]he child has expressed a preference to live with his father. And I guess I should say from the standpoint of the court, it's really not a preference for living with his father. It's a preference for living in Ann Arbor, going to school in Ann Arbor, and maintaining the friends and the friendships that he's had in Ann Arbor.

¹ Although the trial court's consideration of plaintiff's health insurance decisions was not necessarily relevant to this factor, the other reasons noted by the trial court were a sufficient basis on which to find that this factor slightly favored defendant.

The factor clearly favors and the Court must find that it favors [plaintiff] .

...

It was a clear preference really dealing more with his friendships and his school here. And as the testimony has shown and has been argued by [defendant] that, in fact, that preference really may be more out of loyalty for and concern for his very good friend and the promise that they made to each other that they were going to go to school at Slauson but that's not something that this Court was made directly aware of by the child, nor is it something the Court is going to determine is factored into the child's determination. So the Court does, in fact, find the child's preference is clearly to stay with the father.

After considering the trial court's findings, we conclude that the trial court provided the proper weight to this factor. We have held that the child's preference "does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child." *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992). The trial court's finding that the child's preference was with plaintiff did not contradict the evidence, nor was it clear error for the trial court to comment on *why* the child had the preference that he did.

III

Plaintiff next argues that the trial court erred in failing to acknowledge that he was equal to defendant under factor (j), which looks to the "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). We disagree.

There was sufficient evidence on the record to support the trial court's conclusion that factor (j) favored defendant, including plaintiff's behavior of disparaging defendant in the presence of the minor child, as well as plaintiff's insistence on keeping the minor child in the car with him until the exact time scheduled for exchange of the minor child. Additionally, the friend of the court recommendation favored defendant on factor (j). The trial court determined that when considering all of the evidence in the case, defendant was favored under factor (j). We do not believe that the trial court's findings were against the great weight of the evidence.

IV

Plaintiff next argues that the trial court erred in using information from its *in camera* interview with the minor child – other than his reasonable parental preference – in determining a factor other than factor (i). We disagree. This Court has held that "a child's *in camera* interview during custody proceedings must be limited to a reasonable inquiry into the child's parental preference." *Molloy, supra*.

In the instant case, the trial court stated, "With regard to factor (I) and (J), those are somewhat interrelated for the Court's determination." After having an *in camera* interview with the minor child, the trial court determined that factor (i) favored plaintiff. During its discussion of factor (j), the trial court stated "[s]ome of what the minor child is saying and the context in which he said it that I just went over in the last factor also factors into the Court's determination on this factor." As we view it, the trial court was referring to its findings of fact under factor (i),

which referred not only to the child's statements, but also to the friend of the court's recommendation indicating that the minor child may have been coached by the parties, as well as plaintiff's testimony that he did not coach the minor child.

The record reveals that the trial court's statement concerning the interrelatedness of factors (i) and (j), although inartfully phrased, does not equate to the trial court erroneously considering information from the *in camera* interview with the minor child to determine factor (j). The trial court's statement was more in the vein of a transitional phrase, rather than anything else. We do not believe that the trial court's statement rises to the level of clear legal error, and in any event, any error is harmless. *Burghdoff v Burghdoff*, 66 Mich App 608, 612-614; 239 NW2d 679 (1976).

Viewing the record as a whole, we do not believe that the trial court made findings of fact against the great weight of the evidence, that the trial court's statements amounted to a palpable abuse of discretion, or amounted to clear legal error on a major issue. It is well settled that a trial court's findings "regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). Because the evidence does not clearly preponderate in the opposite direction, we affirm the trial court's finding that defendant was favored under factor (j).

V

Finally, plaintiff argues that the trial court abused its discretion when it denied his motion for reconsideration. Specifically, plaintiff argues that: 1) the trial court should have employed a lawyer-guardian ad litem, or a non-lawyer-guardian ad litem, such as a psychologist, to aid in its assessment of factor (i), the reasonable parental preference of the child; and 2) the trial court should have taken additional testimony concerning the child's new diet and exercise habits (or lack thereof) and whether health insurance had been purchased for the child. While plaintiff, in his brief, separated these two issues, we believe they present the same question for review: whether the trial court abused its discretion in denying plaintiff's motion for reconsideration.

We review a denial of a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609-610; 450 NW2d 6 (1989). MCR 2.119(F)(3) states:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

An abuse of discretion exists "when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). Having reviewed plaintiff's arguments, we find no abuse of discretion.

First, given the language of MCL 722.24(2), we find that the trial court was under no obligation to appoint, sua sponte, a lawyer-guardian ad litem, or a non-lawyer-guardian ad litem, such as a psychologist. There is nothing in the record to establish that the best interests of the child were not being adequately addressed by the parties and their counsel. Second, plaintiff's motion seeking to produce and submit additional evidence was not one for rehearing as much as it was a motion to reopen the proofs. See *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959). In this case, the evidentiary hearing had concluded, the court had rendered its opinion, and plaintiff had never been improperly prevented from producing any evidence during the hearing. As such, even if plaintiff's motion had been properly characterized as one to reopen the proofs, the trial court did not abuse its discretion in denying plaintiff's motion. *Id.*

VI

The trial court's findings with regard to factors (g), (i), and (j) were supported by the evidence. Moreover, there was sufficient evidence on the record to render any error committed by the trial court harmless. Additionally, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray