

STATE OF MICHIGAN
COURT OF APPEALS

KRISTOPHER MARK WEIDE,
Plaintiff-Appellant,

UNPUBLISHED
September 20, 2011

v

NYLA ELIZABETH WEIDE,
Defendant-Appellee.

No. 301943
Delta Circuit Court
LC No. 10-020505-DM

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Plaintiff-father appeals by right the portion of a divorce judgment awarding primary physical custody of the parties' minor child to defendant-mother and granting partial attorney fees to defendant-mother. We affirm.

Plaintiff-father and defendant-mother were married in February 2005 and are the parents of one minor child. During the relatively short duration of the marriage, the parties frequently separated then reconciled. Eventually, plaintiff-father instituted this divorce action and requested joint physical and legal custody of the minor child. In contrast, defendant-mother argued that because plaintiff-father had a drinking problem, it would be in the minor child's best interest that she be awarded primary physical custody.

A three-day divorce trial was held during which the trial court heard testimony from the parties, their family members, a number of friends of the parties, and several representatives from various day care facilities that the minor child had attended. A primary topic covered during the hearing was plaintiff-father's history of alcohol use. Thereafter, the trial court analyzed each of the statutory best interest factors in light of the facts of the case and concluded that the parties were equal as to factors (a), (c), (d), (e), (j), and (k). In addition, the trial court found that defendant-mother should be favored in relation to factors (b), (f), (g), and (h). The trial court did not make a determination related to factor (i) because the minor child was too young to state a preference for either parent.

Plaintiff-father first argues the trial court improperly evaluated the statutory best interest factors. Plaintiff-father specifically challenges the trial court's determinations as to factors (b), (f), (g), and (k).¹ Each contested factor will be addressed in turn.

Three standards of review apply in custody cases. The trial court's findings of fact are subject to review under the great weight of the evidence standard. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court will affirm the findings of the trial court concerning the existence of an established custodial environment and with respect to each best interest factor unless the evidence clearly preponderates against those findings. *Id.* This Court also reviews a trial court's discretionary rulings, such as a determination of custody, for an abuse of discretion; and reviews questions of law for clear legal error. *Id.* "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id.*

To determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in MCL 722.23 and apply the proper burden of proof. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). Because the trial court found there was no established custodial environment in the instant case, it was required to determine the best interest of the minor child by the preponderance of the evidence. *Pierron v Pierron*, 282 Mich App 222, 245; 765 NW2d 345 (2009).

Plaintiff-father first challenges the trial court's finding on factor (b). Factor (b) relates to the capacity and disposition of the parties to provide love, affection, and guidance to the minor child, as well as see to the educational and religious needs of the child. A party's drinking problem can be considered when making a determination related to this factor. *Bowers v Bowers (After Remand)*, 198 Mich App 320, 329; 497 NW2d 602 (1993). In finding this factor favored defendant-mother, the trial court acknowledged that plaintiff-father undoubtedly possessed the capacity identified in the factor, but nevertheless concluded that plaintiff-father's largely untreated drinking issues impaired his ability to provide for the minor child's emotional and psychological needs. Plaintiff-father contends this finding was against the great weight of the evidence because he had testified that he had received an evaluation from alcohol treatment services one month before the divorce trial. We disagree.

Despite plaintiff-father's assertion that he met with an alcohol treatment representative and thereafter followed the recommendations he had received, there was overwhelming evidence that plaintiff-father has struggled with alcohol issues for years. The timing of the evaluation and plaintiff-father's continued denial that he did indeed have a drinking problem until the final day of trial supports the trial court's finding that this factor favored defendant-mother.

¹ We note that the parties' respective briefs identify one of the challenged factors as factor (j). However, because factor (j) relates to the willingness of the parties to facilitate a relationship between the minor child and the other parent, and the parties' discussion relates instead to domestic violence issues, which is addressed by factor (k), we treat plaintiff-father's challenge as one to the trial court's finding for factor (k).

Plaintiff-father next challenges the trial court's determination on factor (f). Factor (f) relates to the moral fitness of the parties involved. The trial court found this factor to favor defendant-mother primarily due to plaintiff-father's drinking problem. Plaintiff-father asserts this finding was against the great weight of the evidence and maintains that he should have been favored under this factor due to defendant-mother's alleged computer spying activity. However, the trial court specifically stated that it did not "draw moral conclusions" from the parties' respective spying activities. Moreover, the evaluation of factor (f) requires a trial court to consider only questionable conduct that "necessarily has a significant influence on how one will function *as a parent*." *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (emphasis in original). Plaintiff-father fails to explain how defendant-mother's alleged conduct would have affected her ability to function as a parent.

Plaintiff-father also challenges the trial court's finding related to factor (g). Factor (g) relates to the mental and physical health of the parties. In finding in defendant-mother's favor, the trial court noted plaintiff-father's drinking problem and stress-related mental health episodes. Plaintiff-father's discussion of this factor consists solely of a reiteration of his earlier argument that he had obtained treatment by seeking an evaluation and was following the recommendations he received. Based upon the evidence we have discussed, this argument is unpersuasive.

Plaintiff-father's final challenge to the trial court's findings related to factor (k). Factor (k) relates to domestic violence. Plaintiff-father maintains this factor should have been found in his favor, rather than equal between the parties, because he had testified that defendant-mother had hit him before they were married and had thrown objects, without making contact after they were married. We disagree.

Plaintiff-father has failed to acknowledge that defendant-mother testified that plaintiff-father had pushed her on one occasion. This Court will defer to the trial court's credibility determinations. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). The trial court's finding that the parties had engaged in sometimes heated exchanges, but did not rise to the level of domestic violence, demonstrates that it exercised its ability to weigh the credibility of the witnesses.

Because the trial court's determinations as to the best interest factors were supported by the record, the trial court did not abuse its discretion in finding that by the preponderance of the evidence it was in the best interest of the minor child for defendant-mother to be awarded primary physical custody.

Plaintiff-father next argues the trial court abused its discretion by limiting the amount of time each side had to present its case. We disagree.

Generally, we review for an abuse of discretion a trial court's exercise of its power to control the interrogation of witnesses. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 615; 792 NW2d 344 (2010). A trial court is authorized to control the mode and order of the presentation of witnesses and evidence for the purpose of effectively ascertaining the truth and protecting witnesses from harassment or undue embarrassment while avoiding wasted time. MRE 611(a). In *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595-596; 474 NW2d 306 (1991), this Court articulated that the trial court had properly exercised its discretion when it had

imposed a time limit for the examination of witnesses. This Court again upheld a trial court's decision to limit witness examination in *Alpha Capital*, 287 Mich App at 615.

Applying the principles of *Hartland Twp* and *Alpha Capital* to the instant case, the trial court did not abuse its discretion in instituting a time limit and holding the parties to it. Each party was afforded the same amount of time, specifically a total of eight hours, to use any way he or she chose. Plaintiff-father has not shown that this was an arbitrary allotment of time that prevented him from fully presenting his case. While plaintiff-father does indicate in his brief that he would have liked to have more time to cross examine defendant-mother on certain issues, he has failed to argue that further cross-examination would have led to a different result. We further find no merit in plaintiff-father's claim that the trial court miscalculated the amount of time used by the parties and effectively "shorted" plaintiff-father's opportunity to present his case. Our review of the record demonstrates that the trial court realized its error at the beginning of the third day of trial and adjusted the allotted time accordingly.

Plaintiff-father's final claim of error relates to the trial court's decision to partially grant defendant-mother's request for attorney fees. In a divorce action, "[n]ecessary and reasonable attorney fees may be awarded to a party to carry on or defend" the action. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). A trial court may award attorney fees pursuant to MCR 3.206(C)(2)(a), if the party requesting the fees alleges sufficient facts to show that "the party is unable to bear the expense of the action, and that the other party is able to pay." We review a trial court's findings of fact on attorney fee issues for clear error. *Stallworth*, 275 Mich App at 288. We review the trial court's decision to award fees for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). An abuse of discretion occurs if the trial court's decision falls outside a range of principled outcomes. *Jamil v Jahan*, 280 Mich App 92, 100; 760 NW2d 266 (2008).

Here, the trial court found defendant-mother's assets and wages were insufficient to pay her attorney fees, and that plaintiff-father had a greater ability to pay the fees. Contrary to plaintiff-father's argument on appeal, the trial court did not base its finding solely upon a predicted income from plaintiff-father's business. Rather, the court noted that plaintiff-father's expenses were low, and that plaintiff-father had current access to funds from the business. Moreover, the court found that defendant-mother had incurred additional attorney fees and costs as a result of plaintiff-father's failure to acknowledge his alcohol problem until the final day of testimony. The record supports these findings; therefore, we find no clear error in the findings.

Plaintiff-father also argues that the trial court erred by failing to require defendant-mother to submit proof that the fees were reasonable. A trial court must hold a hearing to assess the reasonableness of fees when the attorney fees are contested. *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005). Here, however, plaintiff-father points to nothing in the record to demonstrate that he ever contested the fees. In his brief on appeal, plaintiff-father claims that the time limits imposed by the trial court prevented him from challenging the fees. We disagree. Nothing prevented plaintiff-father from making a record or an offer of proof concerning any proposed challenge to the fee award or to the reasonableness of the fees. Absent any challenge in the trial court to the reasonableness of the fees, we find the issue unpreserved for appeal and we decline to address it. See *Jansen v Jansen*, 205 Mich App 169, 173; 517 NW2d 275 (1994);

Milligan v Milligan, 197 Mich App 665, 671; 496 NW2d 394 (1992) (this Court need not address an objection to the reasonableness of attorney fees raised for the first time on appeal).

In her brief on appeal, defendant-mother requests this Court to award appellate attorney fees. We decline this request. Cf. MCR 7.216(P) (attorney fees may be awarded on vexatious appeal).

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering