

STATE OF MICHIGAN
COURT OF APPEALS

AMBER ROSE TAFE,

Plaintiff-Appellant,

v

VANCE DOMINICK MCCLENTON,

Defendant-Appellee.

UNPUBLISHED
December 9, 2014

No. 318713
Kent Circuit Court
LC No. 04-005320-DS

Before: MARKEY, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right a change of custody order, which granted the parties joint legal custody and awarded defendant physical custody of the parties' two children. We affirm.

Plaintiff first argues that the trial court erred by denying plaintiff's request for a continuance of the custody hearing. We review for an abuse of discretion a trial court's decision on a motion for a continuance in a civil proceeding. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993). "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." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000) (citation omitted).

A trial court may grant an adjournment to "promote the cause of justice," MCR 2.503(D)(1), but the motion "must be based on good cause." *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991), citing MCR 2.503 and *In re Krueger Estate*, 176 Mich App 241, 247; 438 NW2d 898 (1989). Generally, the trial court does not abuse its discretion by denying a motion for an adjournment where past continuances have been granted, where the movant fails to exercise due diligence, and where there is a lack of injustice to the movant. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). "Withdrawal of counsel does not give a litigant an absolute right to a continuance; the decision to grant a continuance rests in the sound discretion of the trial court." *Bye v Ferguson*, 138 Mich App 196, 207; 360 NW2d 175 (1984).

The custody dispute had been pending for several months and the parties historically fought over parenting time and schools. Plaintiff had been aware of the trial date for two months. She stipulated to the withdrawal of her counsel, so she clearly had notice of the withdrawal. See *Bye*, 138 Mich App at 207-208. She had 10 days from the time of withdrawal

to the hearing to secure new counsel, but appears to have waited until the last minute. Although plaintiff claims she was given misinformation from Legal Aid, she should have been certain that she would have representation before stipulating to her counsel's withdrawal 10 days before the hearing. This does not show due diligence on plaintiff's part. See *Tisbury*, 194 Mich App at 20. More importantly, the trial court explained that granting the adjournment would not be in the children's best interest because it would prolong the determination regarding the school the children would attend and create the potential for the children to have to change schools in the middle of the school year. This does not promote the cause of justice on the children's behalf. The issues associated with the last minute substitution of counsel appear to have been brought on by plaintiff herself. Therefore, the trial court's decision was not "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." *Churchman*, 240 Mich App at 233. Finally, contrary to plaintiff's argument, there is no indication that the trial court's decision to deny the continuance denied her due process and equal protection rights where plaintiff did not use due diligence to obtain an attorney promptly and where counsel was able to effectively cross-examine the witnesses and had weeks to prepare for the remainder of the trial.

Plaintiff also argues that the custody order should be reversed due to the trial court's violation of judicial canons. Because plaintiff failed to preserve this issue for appellate review, we review this issue for plain error affecting plaintiff's substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Plaintiff refers to four "canons of court conduct," which do not exist. Essentially, it appears plaintiff is trying to argue that (1) the trial judge violated Canon 2, by not avoiding the appearance of impropriety when he indicated that he was "getting emotional," and imposed a cruel and unusual punishment when he ordered plaintiff to write letters of apology and pay \$150, even though she was indigent; and (2) the trial judge violated Canon 3, impartiality, because he was discriminatory and biased on numerous occasions and allowed the custody evaluator to testify after plaintiff attempted to remove the evaluator for not following the proper procedures.¹

Canon 2 states, "A judge should avoid impropriety and the appearance of impropriety." Canon 2(B) states,

A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

¹ To the extent plaintiff argues that the trial court violated its "duty to serve" because it knew before the trial began that she did not have counsel, her argument is without merit. As discussed, the trial court did not err by declining to grant plaintiff a continuance where she stipulated to withdrawal of counsel and hired new counsel last minute.

First, plaintiff asserts that the trial judge admitted to “getting emotional” and cites the February 14, 2013 show cause hearing. However, a review of the transcript reveals that the trial court did not state those words. The trial court did state, “I’m sorry if I lost my temper,” but there is no indication on the record that the trial court was irate or unreasonable. The statement came after plaintiff consistently refused on the record to tell the trial court and defendant where the children were so defendant could pick them up after the hearing because plaintiff was found in contempt for violating parenting time and required to go to jail. Accordingly, plaintiff has failed to demonstrate how the trial court violated the appearance of impropriety standard.

Second, other than that she was indigent, plaintiff has not shown how the trial court’s imposition of a \$150 fine and instruction that plaintiff write three apology letters, one to defendant and one to each of her two children, was cruel and unusual punishment. The imposition of the fine and apology letters came after plaintiff was found in contempt for denying defendant parenting time for the third time. It is well-settled that contempt proceedings to enforce court-ordered parenting time are civil. *Porter v Porter*, 285 Mich App 450, 458; 776 NW2d 377 (2009). The fine and apology letters are not viewed as a punishment, because “the purpose of civil contempt is to enforce compliance with an order, rather than to punish for disobedience.” *In re Moroun*, 295 Mich App 312, 339; 814 NW2d 319 (2012). See also *Int’l Union, United Mine Workers of American v Bagwell*, 512 US 821, 831; 114 S Ct 2552; 129 L Ed 2d 642 (1994) (“[C]ivil contempt sanctions are viewed as nonpunitive and avoidable.”). Further, “the court may use the *coercive* sanctions permitted by civil contempt, including a fine of up to \$250.” *In re Contempt of Auto Club Ins Ass’n*, 243 Mich App 697, 711; 624 NW2d 443 (2000). Given plaintiff’s past parenting-time violations and her continuous lack of cooperation, it appears the trial court’s sanctions were actually less severe than what they could have been. Accordingly, there is no indication the sanctions were cruel or unusual, or that the trial court violated the appearance of impropriety standard.

Plaintiff also argues that the trial court was not impartial. Canon 3 states, “A judge should perform the duties of office impartially and diligently.” First, plaintiff does not identify any instances where the trial court was discriminatory or biased. This Court cannot render relief when plaintiff does not fashion an argument. Thus, plaintiff has abandoned this claim. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) (“A party abandons a claim when it fails to make a meaningful argument in support of its position.”). Second, plaintiff argues that the trial court was not impartial when it allowed the custody evaluator to testify after plaintiff attempted to remove the evaluator for not following the proper procedures, specifically the best interest factors during investigation. However, the record does not indicate that plaintiff ever attempted to remove the evaluator, and the Friend of the Court (FOC) report and recommendation reveals that the evaluator thoroughly discussed each best interest factor and determined whether each one weighed in favor of plaintiff or defendant or was neutral. Accordingly, plaintiff has not shown how the trial court was not impartial.

Plaintiff next argues that the trial court erred by relying on *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993). However, the trial court did not rely on *Lombardo* when it issued its opinion and order. The only time the trial court mentioned *Lombardo* was to inform the parents that as joint custodial parents, if a parent wished to change schools, under *Lombardo*, the parent “must file for the change within 30 days of th[e] opinion.” Accordingly, plaintiff’s argument is without merit.

Plaintiff next argues that the custody evaluator used alienation tactics when issuing the FOC report and recommendation where she did not review all of the custody factors and showed favoritism toward defendant by requesting additional information from defendant, but not plaintiff. Because plaintiff failed to preserve this issue for appellate review, we review this issue for plain error affecting plaintiff's substantial rights. See *Carines*, 460 Mich at 764.

First, there is no indication on this record that the evaluator used alienation tactics. Contrary to plaintiff's argument, the evaluator did review all the best interest factors in the FOC report and recommendation and testified at length about each factor at the evidentiary hearing. Further, plaintiff fails to identify what information the evaluator requested from defendant, but not plaintiff. And the evaluator made it clear at the evidentiary hearing that if the FOC report and recommendation mentioned documentation submitted by defendant, but was silent regarding similar documentation submitted by plaintiff, it did not mean plaintiff did not submit documentation or that the evaluator did not interview plaintiff regarding the subject in question. Rather, it just was not pertinent to include it in the report and recommendation. Moreover, to the extent plaintiff argues the evaluator erred by using the parental alienation syndrome, her argument is without merit, as the evaluator did not mention this once in the FOC report and recommendation or in her testimony. Finally, plaintiff asserts that the evaluator's testimony was defamatory and cites her entire testimony. This is insufficient. Plaintiff was required to identify the exact language that she alleges to be defamatory. See *Ghanam v Does*, 303 Mich App 522, 543; 845 NW2d 128 (2014).

Plaintiff next argues that the trial court erred in determining that there was a sufficient change of circumstances to revisit the custody arrangement. However, plaintiff does not explain how the trial court "made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. This Court cannot render relief when plaintiff does not fashion an argument or properly support her claim. Thus, plaintiff has abandoned this claim. *Berger*, 277 Mich App at 712.

Plaintiff next argues that the testimony of various school employees at the evidentiary hearing was inadmissible. However, the statutes plaintiff cites are inapplicable to the admissibility of such testimony.² Plaintiff makes no argument, and there is no indication on this record, that the testimony was inadmissible under the rules of evidence. Although plaintiff states the hearsay rule in full, she does not explain how the testimony was hearsay, or at the very least identify the testimony she alleges was hearsay. She also alleges that the testimony was defamatory, but does not explain how, and she cites no law supporting her position. Again, this Court cannot render relief when plaintiff does not fashion an argument. Thus, plaintiff has abandoned this claim. *Berger*, 277 Mich App at 712.

Plaintiff next argues that the trial court and its employees withheld relevant information. However, plaintiff does not explain how the information was relevant for trial or how it would

² Plaintiff cites the No Child Left Behind Act, PL 107-110, 115 Stat 1425, § 9532, the Family and Educational Right and Privacy Act of 1974, 20 USC 1232g, and the Child Protection Law, MCL 722.622 and MCL 722.630.

have affected the trial court's decision. She also does not provide facts showing that she was prevented from presenting the information or that the trial court or its employees intentionally withheld the information. Further, plaintiff makes no citation to the record of which things defendant was allowed to introduce, and she cites only to sections of the Child Custody Act and Child Protection Law, both of which are inapplicable. Plaintiff does not even request any relief for the alleged error. Merely asserting that the trial court and its employees withheld information that was relevant to trial without more is insufficient for this Court to render relief. Thus, plaintiff has abandoned this claim. *Berger*, 277 Mich App at 712.

Plaintiff next argues that the trial court did not properly consider the children's reasonable preference for custody. We review this unpreserved issue for plain error affecting plaintiff's substantial rights. See *Carines*, 460 Mich at 764.

Plaintiff argues that the trial court was required to follow the "Guidelines for Interviewing Children About Custody" by the Honorable Bruce Newman of the 7th Circuit Court. However, there is no such requirement. Rather, when determining whether to change custody, the trial court must consider the children's best interest using the 12 factors set forth in MCL 722.23, one of which is "[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).

Here, on August 23, 2013, the trial court conducted an in camera interview of both children to ascertain their reasonable preference. The trial court noted that it interviewed each child separately and considered the preference. Notably, "due process, in the context of custody disputes, permits in camera interviews of children for the limited purpose of determining their parental preference." *In re HRC*, 286 Mich App 444, 452; 781 NW2d 105 (2009). Further, there is no requirement that the in camera interview be recorded for later scrutiny. *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002). Therefore, contrary to plaintiff's argument, the trial court did properly consider the custody preferences of the children.

Finally, plaintiff argues that the trial court erred by not appointing a lawyer-guardian ad litem (LGAL) or ordering psychological evaluations of the children. Plaintiff argues that the children were entitled to a LGAL pursuant to MCL 712.17d³ and MCL 330.1451(1)(7), and a psychological evaluation pursuant to MCL 723.630, but these statutes do not exist. Other than the mere assertion that the children were entitled to a LGAL and psychological evaluation, plaintiff provides no legal or factual support for her argument. Thus, it is abandoned. *Berger*, 277 Mich App at 712.⁴

³ Plaintiff was likely referring to MCL 712A.17d, which governs a LGAL's duties.

⁴ We note that contrary to plaintiff's argument, the children are not automatically entitled to a LGAL; rather, it is within the trial court's discretion if it deems that the children's best interests are inadequately represented. MCL 722.24(2).

Affirmed.

/s/David H. Sawyer
/s/ Donald S. Owens