S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SANDRA LYN MODRESKE, Plaintiff-Appellant,	UNPUBLISHED December 22, 2009
v BRUCE JOHN MODRESKE, Defendant-Appellee.	No. 291288 Allegan Circuit Court LC No. 02-032556-DM

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

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

The parties married in 1999 and were divorced in 2003. They have one child, a daughter born in 2000. As part of the divorce judgment, the parties were awarded joint legal custody of the child and physical custody was awarded to plaintiff. In 2007, defendant moved to change custody, asserting that circumstances had changed such that it was no longer in the child's best interest to remain in plaintiff's custody. The trial court held an initial hearing, after which it determined that there was sufficient evidence to reevaluate custody. The trial court then referred the matter to the friend of the court for a custody investigation and ordered the parties to submit to psychological evaluations. After a six-day evidentiary hearing, the trial court concluded that the child's best interest warranted a change in custody, and it awarded defendant sole physical and legal custody.

In a child custody dispute, the trial court's order must be affirmed on appeal "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Under this statute, the trial court's findings of fact are reviewed under the "great weight" standard and must be affirmed on appeal unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.* at 881. Discretionary rulings are reviewed for an abuse of discretion. *Id.* at 879. In child custody actions, an abuse of discretion occurs when the result reached by the trial court is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of reason but rather of passion or bias." *Id.* at 879-880, quoting *Spalding v Spalding*, 355 Mich 382, 384-

385; 94 NW2d 810 (1959); *Shulick v Richards*, 273 Mich App 320, 324-325; 729 NW2d 533 (2006), quoting *Spalding*, 355 Mich at 384-385.

Where, as here, a party seeks to modify a custody award, the first inquiry required under the Child Custody Act (CCA), MCL 722.21 *et seq.,* is whether that party has established by a preponderance of the evidence, that either proper cause or a change in circumstances exists to warrant a change in custody. MCL 722.27(1)(c); *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009); *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). An evidentiary hearing is not necessarily required to resolve this initial query. *Id*. at 512; see also MCR 3.210(C)(8).

Plaintiff argues that the trial court erroneously resolved this initial inquiry when it denied her motion to dismiss made at the close of defendant's proofs during the contested custody hearing. However, the trial court had previously determined, at a hearing on May 11, 2007, that defendant had satisfied his preliminary burden of demonstrating proper cause or a change of circumstances to revisit the issue of custody. The court thereafter issued an order, dated June 25, 2007, in which it stated that it had "found by a preponderance of the evidence that the allegations contained in the Defendant's Petition are sufficient to warrant his motion to be heard." The trial court's subsequent ruling denying plaintiff's motion to dismiss at the custody hearing indicates that it substantively treated the motion as one seeking a directed verdict, consistent with the standards applicable to such a motion under MCR 2.515, which applies to both jury and bench trials. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 326-327; 657 NW2d 759 (2002).

Plaintiff's failure to address the trial court's earlier decision precludes appellate relief with respect to the issue whether defendant established the requisite proper cause or changed circumstances under MCL 722.27(1)(c). See *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (an appellant's failure to address a necessary issue precludes appellate relief). Furthermore, "appellate courts often look to the substance of the motion or ruling to determine its true nature, and not its label." *Keywell & Rosenfeld*, 254 Mich App at 326. Consequently, considering the substance of plaintiff's assertion of error, that the trial court erred by denying her motion to dismiss made at the close of defendant's proof, we conclude that plaintiff has not established that the trial court committed a clear legal error in ruling, consistent with the standards applicable to a motion for a directed verdict, that at the time of plaintiff's motion, the evidence was more than sufficient to continue. *Id.* at 326-327.

We now turn to plaintiff's challenges to the trial court's consideration and application of the various statutory best interest factors set forth in MCL 722.23. As a preliminary matter, we observe that, contrary to plaintiff's assertion, the trial court did not err by considering evidence relevant to factor (j) when assessing other statutory factors. As this Court has previously explained, there is some natural overlap between the different best interest factors and a single fact or circumstance can be relevant to, and can be considered in evaluating, more than one of the factors. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998); *Carson v Carson*, 156 Mich App 291, 300; 401 NW2d 632 (1986). Therefore, a trial court is free to apply evidentiary findings to as many factors as those findings relate; the same fact or circumstance may be applied repeatedly to the extent that it logically bears on each custody factor for which it is considered. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996); *Carson*, 156 Mich App at 299-300. Thus, it does not constitute improper weighting or focus by the trial court to

consider the same facts under multiple best-interests factors so long as the facts are relevant to each factor for which they considered. *Sinicropi v Mazurek*, 273 Mich App 149, 180-181; 729 NW2d 256 (2006); *Fletcher*, 229 Mich App at 25-26; *Carson*, 156 Mich App at 299-300.

Turning specifically to the trial court's evaluation of factor (a), a trial court is free to consider a parent's influence on the other parent's relationship with the child, even though the evidence is also relevant under factor (j), when assessing the emotional ties between the parties and the child. *Fletcher*, 229 Mich App at 25-26. Here, while the trial court considered circumstantial evidence in drawing inferences with respect to plaintiff's efforts to alienate the child from defendant, "[c]ircumstantial evidence in support of or against a proposition is equally competent with direct." *Ricketts v Froehlich*, 218 Mich 459, 461; 188 NW 426 (1922). "Reasonable inferences drawn from circumstantial evidence are reviewed in the same manner as direct evidence." *People v Murphy (On Remand)*, 282 Mich App 571, 582; 766 NW2d 303 (2009). Considering the evidence as a whole, and giving due deference to the trial court's assessment of the witnesses' credibility, *Fletcher*, 229 Mich App at 25, we are not persuaded that the trial court drew unreasonable inferences from the evidence with respect to plaintiff's conduct, or that its decision that factor (a) did not weigh in favor of either party is against the great weight of the evidence.

With respect to factor (b), although the trial court did not comment on every aspect of this factor in finding that defendant was far superior to plaintiff, the record is sufficient to conclude that the evidence does not clearly preponderate against the trial court's finding. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007); *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). Similarly, while the trial court's consideration of factors (c) and (d) was brief, the evidence does not clearly preponderate against the trial court's finding that neither party had an advantage over the other with respect to these factors. Likewise, we are not persuaded that the trial court's findings with regard to factors (f), (g), (h), and (j) are against the great weight of the evidence.

We disagree with plaintiff's argument that the trial court failed to render any findings with respect to factor (e). The trial court's decision indicates that it considered this factor as part of its analysis of factors (c) and (d). Factor (e) overlaps with factor (d), but focuses on the child's prospects for a stable family environment. *Ireland*, 451 Mich at 465. It requires consideration of the "permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). Here, the trial court found nothing about the "family unit" in each home that demonstrated the superiority of one over the other. The trial court's decision is sufficient to indicate that the court minimally complied with its duty to render findings with respect to each best interest factor. *Rittershaus*, 273 Mich App at 475. Further, plaintiff has not established anything about defendant's relationship with his current wife or his new spouse's prior marriages that, compared to plaintiff's own circumstances, establishes that the trial court's decision to weigh this factor equally is against the great weight of the evidence.

Finally, with respect to factor (i), we reject plaintiff's argument that the trial court committed clear legal error by not considering the child's preference. Factor (i) 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). By requiring a *reasonable* preference, the Legislature "intended to exclude preferences that are arbitrary or inherently indefensible." *Pierron v Pierron*, 282 Mich App 222, 259; 765 NW2d 345 (2009), lv gtd 483 Mich 1135 (2009).

Although there may be some natural overlap between a child's stated preference and the emotional ties to a parent considered under factor (a), *Carson*, 156 Mich App at 300, it is also appropriate to consider the parent's influence on the other parent's relationship when evaluating the emotional ties, Fletcher, 229 Mich App at 25-26.

A trial court may conduct an in camera interview of a child to determine the child's preference, however, the interview is not intended to be a reliable form of fact-finding and the information received during the interview shall be applied only to the reasonable preference factor. MCR 3.210(C)(5); *Surman v Surman*, 277 Mich App 287, 301-302; 745 NW2d 802 (2007). The in camera interview need not be recorded, *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002), but the trial court must state on the record whether the child was able to express a reasonable preference and, if so, whether that preference was considered by the court in arriving at its custody determination, *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988).

Here, the trial court rendered the necessary findings with respect to factor (i). The court did not reveal the child's preference, but stated that it was not grounded on reason and common sense in light of plaintiff's conduct and manipulative behavior, which resulted in a child seemingly unable to separate fact from fantasy. Again, evidence may be applied to any factor on which it logically bears. *Ireland*, 451 Mich at 465; *Sinicropi*, 273 Mich App at 180-181; *Fletcher*, 229 Mich App at 25-26; *Carson*, 156 Mich App at 299-300. Further, this Court has recognized that there is some natural overlap between a child's stated preference and emotional ties to a parent, *Id*. at 299-300, and that it is appropriate to consider one parent's influence on the child's relationship with the other parent when evaluating the emotional ties between the child and each of her parents, *Fletcher*, 229 Mich App at 25-26. Thus, it was not error for the trial court to consider plaintiff's conduct, and the effect of that conduct on the child, when determining the reasonableness of the preference expressed by the child. The trial court was clearly concerned that plaintiff's influence on the child affected her ability to speak truthfully or to otherwise separate "fact from fantasy" in expressing her preference. Considering the evidence as a whole, we conclude that the trial court's findings as they relate to the reasonableness of the child's preference are not against the great weight of the evidence.

In sum, plaintiff has not established any basis for appellate relief arising from the trial court's evaluation of the best interest factors. We review the trial court's ultimate determination that clear and convincing evidence existed to change the existing custodial environment for an abuse of discretion. MCL 722.27(1)(c); *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). Where, as in this case, a parent seeks to continue a joint custody arrangement, the trial court is required to consider the best interest factors in MCL 722.23 and also determine "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b); see also *McIntosh*, 282 Mich App at 475. Statutory best interest factors need not be given equal weight. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). The overriding concern is the best interests of the child. *McIntosh*, 282 Mich App at 475. Considering the record in this case, we find no basis for disturbing the trial court's determination that plaintiff is not an appropriate joint legal custodian. The trial court did not abuse its discretion in finding by clear and convincing evidence that it was in the child's best interests that defendant be awarded sole legal and physical custody of the child.

Next, we disagree with plaintiff's argument that the trial court deprived her of due process by considering Victor Dmitruk's report of the psychological evaluations of the parties and the child. The trial court notified the parties at the hearing on May 11, 2007, that it intended to consider the court-ordered psychological evaluations, and the trial court's June 25, 2007, order afforded the parties an opportunity to raise objections to the evaluations and to have Dmitruk testify. Thus, plaintiff was afforded due process. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). Further, while we agree that the trial court was required to exercise its own judgment based on properly received evidence, *McIntosh*, 282 Mich App at 475; *Nichols v Nichols*, 106 Mich App 584, 588; 308 NW2d 291 (1981), we find no indication in the record that the trial court failed to do so.

We next consider plaintiff's argument that her right to due process was violated on the third day of the custody hearing when the trial court quashed her subpoena for videotapes recorded in defendant's home. Plaintiff did not raise any due process claim in the trial court, but rather asserted, in response to the trial court's request for authority recognizing plaintiff's right of access to the videotapes, that the videotapes were potentially relevant. Because plaintiff did not present any due process claim to the trial court, this issue is unpreserved. "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).

Even if we were to overlook this deficiency, however, plaintiff has not demonstrated that she is entitled to any relief. Although a subpoena issued under MCR 2.506 is considered unrelated to discovery proceedings, *Boccarossa v Dep't of Transportation*, 190 Mich App 313, 316; 475 NW2d 390 (1991), a trial court has discretion in deciding whether to quash the subpoena. *Detroit Bar Ass'n v American Life Ins*, 264 Mich 495, 499; 250 NW 288 (1933). A court's power to compel the production of private papers requires a party to show the materiality of the evidence, the necessity for production, and the reasonableness of the action. *Id.* at 498-499.

Here, plaintiff's request for production was overly broad because all videotapes were sought. It was essentially a discovery subpoena, seeking evidence that was potentially relevant to a custody hearing. It was not an abuse of discretion for the trial court to require a more specific foundation, with supporting authority, showing a right to access private video recordings. The proponent of evidence has the burden of showing its relevancy and admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Further, a trial court should protect parties from excessive, abusive, or irrelevant discovery requests. *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005).

Examined in this context, plaintiff has not substantiated her claim that she was denied due process. Procedural due process requires fundamental fairness, which is evaluated in a particular situation by first considering relevant precedent and then assessing the several interests at stake in the case. *In re Brock*, 442 Mich 101, 111; 449 NW2d 752 (1993). A parent's custodial rights are entitled to due process protection. *Aichele v Hodge*, 259 Mich App 146, 164; 673 NW2d 452 (2003). But considering that the trial court did not abuse its discretion in quashing the subpoena, subject to plaintiff's opportunity to present supporting authority in support of the subpoena and to object to specific testimony regarding videotapes as it was

presented at the custody hearing, we find no due process violation. Due process is not violated where a trial court's ruling comports with constitutional or other rules of evidence. See *Woodard v Custer*, 476 Mich 545, 571 n 16; 719 NW2d 842 (2006).

Finally, having rejected plaintiff's various claims of error, and thus finding no basis for a remand to the trial court, it unnecessary to address plaintiff's claim that the case should be reassigned to a different judge on remand.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey