STATE OF MICHIGAN

COURT OF APPEALS

BROOKE LEE HOYT also known as BROOKE LEE BRENEMAN,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

COLBEY DAVID HOYT,

Defendant/Counterplaintiff-Appellee/Cross-Appellant.

UNPUBLISHED
November 18, 2021

No. 356019
Calhoun Circuit Court
LC No. 2019-003406-DM

Before: RICK, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting the parties joint physical and legal custody of their minor child, KLH, and the trial court's income determination for child support. Defendant cross-appeals the trial court's denial of attorney fees. In plaintiff's appeal, we affirm the trial court's custody determination but remand for the trial court to redetermine plaintiff's income. In defendant's cross-appeal, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The parties married in April 2017, and had KLH in December 2018. In November 2019, plaintiff filed for divorce. In January 2020, the trial court ordered that the parties share joint legal and physical custody of KLH, alternating weekly parenting time with exchanges on Fridays. Thereafter, the parties participated in mediation and completed a Property Settlement Agreement (PSA). However, child-related issues remained unresolved.

On September 15, 2020, defendant moved to show cause for contempt because plaintiff wrongfully withheld KLH from him during a week of his parenting time. Defendant requested make-up parenting time and attorney fees.

On September 25, 2020, a bench trial began to address the child-related issues, as well as defendant's motion to show cause. At the conclusion of the trial, the court found that plaintiff wrongfully withheld KLH from defendant for two weeks in September 2020, and it held plaintiff in contempt. For custody, the trial court held that it would continue the parties' joint legal and physical custody of KLH, with alternating weeks of parenting time unless the parties mutually agreed otherwise.

Plaintiff now appeals as of right, and defendant cross-appeals.

II. CUSTODY DETERMINATION

Plaintiff argues first that the trial court abused its discretion and made findings against the great weight of the evidence when it awarded joint physical custody and alternating week parenting time. We disagree.

A. STANDARD OF REVIEW

In order to "expediate the resolution of a child-custody dispute," all orders and judgments must be affirmed "unless the trial judge 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. Thus, this Court (1) will affirm a trial court's findings of fact "unless the evidence clearly preponderates in the other direction," *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012), (2) will affirm discretionary decisions unless the court's decision was "so palpably and grossly violative of fact and logic that it evidence a perversity of will, a defiance of judgment, or the exercise of passion or bias," *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), and (3) will affirm legal conclusions unless there exists clear error, *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014).

B. ANALYSIS

A trial court must resolve custody disputes by determining what is in the child's best interests as provided in MCL 722.23. See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The factors under MCL 722.23 are as follows:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) 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. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

The trial court must consider each factor and explicitly state its findings regarding the factor. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). However, the trial court is not required to discuss every matter in evidence, *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1982), nor is the court required to give equal weight to each of the factors, *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). A trial court may not modify a custody order that changes an established custodial environment without clear and convincing evidence that it is in the best interests of the child. MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010).

Here, in issuing its custody decision, the trial court found that an established custodial environment existed with both parties. When considering the best-interest factors, the trial court found the parties equal under Factors (a), (b), (c), (d), (e), (f), (g), (h), and (k). The trial court found that KLH was too young to express a preference of whom she wanted to live with under Factor (i). For Factor (j)—the parties' willingness and ability to facilitate KLH's relationship with the other parent—the court found that it slightly favored defendant.

On appeal, plaintiff takes issues with the court's findings with respect to Factors (c), (j), and (k).

1. FACTOR C

Factor (c) is "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs."

Plaintiff testified that she provided most of the care for KLH while the parties were still together, including taking KLH to her medical appointments and not often leaving KLH alone with defendant. According to plaintiff, this more or less continued after the parties separated. Plaintiff testified that defendant did not ask about KLH after he moved out, and plaintiff reached out to defendant on multiple occasions to see if defendant wanted to see KLH. Plaintiff testified that after the trial court ordered alternating weeks of parenting time, she became concerned because KLH would return from defendant's care with diaper rashes and bruises. Plaintiff also noticed that KLH lost weight while in defendant's care. Plaintiff was concerned that defendant's mother was watching KLH while defendant worked because defendant's mother was an alcoholic, and the parties had previously agreed that she would not watch KLH

In contrast, defendant testified that, before he and plaintiff separated, plaintiff took care of KLH during the day while defendant worked "first shift," and then defendant took care of KLH while plaintiff worked in the evenings. According to defendant, after the parties separated, plaintiff would not let him see KLH. At one point, he tried to drop off items for KLH, but plaintiff's family called the police, reporting that defendant had violated a PPO that plaintiff had against defendant (that PPO was dismissed in January 2020). Defendant further testified that KLH ate well while in his care, and that he would cook meals for her. Defendant denied that KLH had constant diaper rashes, and explained that he had numerous diaper-rash creams because KLH had sensitive skin. Defendant also denied agreeing with plaintiff that his mother should not care for KLH. Defendant testified that his mother never drank while KLH was in her care, and he explained that plaintiff had never liked his family, but KLH and defendant's mother were "best friends."

The trial court did not err by finding that the parties were equal under Factor (c). In support of its finding, the trial court noted that, in the ten months that the alternating parenting schedule had been in place since the parties' mediation, KLH's material needs were met by both parents. The trial court also pointed to testimony that defendant was a "good cook," provided meals for KLH, and was "well stocked" with the materials needed to care for KLH, such as diapers and diaper-rash creams. As for the allegation of constant diaper rashes, the court believed that the testimony showed that defendant had properly responded to those rashes. The court lastly noted that there were no concerns about plaintiff's ability to meet KLH's material needs. The evidence did not clearly preponderate against these findings, and the findings provide ample support for the trial court's ruling with respect to Factor (c).

Plaintiff argues that the trial court erred in concluding that the parties were equal under Factor (c) because the court "entirely ignored" that plaintiff had been KLH's primary caregiver before the parties' separation and that plaintiff was the only parent involved in KLH's medical care. However, as defendant argues, the record showed that defendant cared for KLH while plaintiff was at work, as plaintiff cared for KLH while defendant was at work. Plaintiff argues that defendant "admitted" to only being able to spend a few hours with KLH after work each day, but the fact that defendant worked during the day to help provide for the family is not a basis for

finding that defendant did not have the capacity or disposition to provide for KLH. See *Bofysil v Bofysil*, 332 Mich App 232, 246; 956 NW2d 544 (2020).

Plaintiff also argues that the trial court erred by finding Factor (c) equal for both parties because (1) defendant "did not know KLH's doctor's name or title and had never attended a regularly scheduled appointment with KLH" and (2) when defendant took KLH to the emergency room after injuring her elbow, defendant "billed the emergency room visit to" plaintiff and "refused to allow" plaintiff into the emergency room. As for the first point, while defendant had not previously attended KLH's medical appointments, apparently mispronounced KLH's primary care provider's name, and incorrectly identified the provider's profession as a pediatrician rather than a nurse practitioner, defendant was aware of where KLH went for medical care. Further, there was no indication that defendant ever failed to take KLH for medical care when necessary. As for plaintiff's second argument, the evidence supporting such an argument was largely in dispute. For instance, defendant testified that he took KLH to the hospital immediately after her injury, that he was upset by her distress, that he was focused on getting her care, and that he called plaintiff *after leaving* the hospital to tell her what happened. Indeed, plaintiff confirmed that defendant called her when he left the hospital. Moreover, both parties seemingly provided health insurance for KLH. Defendant represented that he did not know that the visit was billed to plaintiff's insurance and that when he followed up with his own insurance, they told him that they were still processing the bill because KLH had two health insurance policies. Accordingly, we are not convinced that the trial court's findings in this respect should be disturbed.

2. FACTOR J

Factor (j) relates to "[t]he 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."

As relevant to this factor, the trial court found that plaintiff impermissibly withheld KLH during defendant's parenting time. Karla Titus, a Children's Protective Services (CPS) investigator, testified that on September 11, 2020, she met with plaintiff and KLH after receiving a complaint about KLH sustaining an elbow injury while in defendant's care in June of that year. Titus and plaintiff created a safety plan providing that KLH would remain with plaintiff until Titus was able to meet with defendant and address the allegations. Titus coordinated with another CPS worker in defendant's county, Elizabeth Fankhouser, who met with defendant and reported that she did not find any abuse. Titus also spoke with defendant, and based on her conversations with him, she too found that defendant had not abused or neglected KLH. Titus explained that defendant grabbed KLH's arm to stop her while she was chasing another child running out of a door toward a road and lawncare equipment. KLH expressed that her arm hurt, and defendant took KLH to a hospital for medical care. The medical staff who treated KLH did not document any concerns or make a report to CPS.

According to Titus, she told plaintiff sometime before defendant's parenting time was to begin on September 18, 2020, that plaintiff needed to send KLH to defendant because there was no reason keep KLH from defendant. Plaintiff indicated that she was going to keep KLH, and Titus told plaintiff that the court would likely award defendant make-up parenting time. When it came time for KLH to go with defendant for his parenting time beginning on September 18,

plaintiff refused to send KLH with defendant. As a result, defendant was unable to exercise his parenting time between September 18, 2020 and September 25, 2020, despite there being no safety plan in place.

Defendant's testimony about the elbow incident and plaintiff's withholding of KLH was largely similar to Titus's. He explained that in the elbow incident, he had grabbed KLH by the arm in order to stop her from running outside. KLH started to cry, and defendant took her to the hospital. Defendant called plaintiff after they left the hospital to tell her what had happened. In September 2020, plaintiff did not bring KLH to their exchange. When he asked her why, plaintiff told him that KLH was not safe. Defendant testified that plaintiff withheld KLH from him for a second week after Titus finished her investigation and had told plaintiff not to keep KLH from defendant.

Plaintiff, for her part, testified that in September 2020, she was contacted by defendant's ex-girlfriend who had been seeing defendant after he and plaintiff separated, and defendant's ex expressed concern about defendant's care of KLH.[1] Defendant's ex-girlfriend told plaintiff different information about the incident than defendant had. When plaintiff talked to defendant about what she had learned, defendant told her not to believe his ex because he had broken up with her and she was lying. Nevertheless, plaintiff was concerned for KLH, and contacted CPS on September 11, 2020. At that time, however, plaintiff had already withheld KLH from defendant for his parenting time from September 4, 2020 to September 11, 2020. Then, on September 18, 2020, defendant texted plaintiff to tell her that she needed to drop off KLH pursuant to the court order, but plaintiff told defendant that KLH was not safe. Plaintiff testified that Titus told her that she was still investigating, and plaintiff thought that the investigation was still open. Plaintiff remembered talking with Titus on September 18, 2020, but she did not remember Titus telling her that CPS found that there was no reason to withhold KLH from defendant. Plaintiff remembered Titus telling her that it was a violation of the court order to withhold parenting time and that defendant would probably get make-up parenting time.

In finding that Factor (j) slightly weighed in favor of defendant, the trial court noted that it had found that plaintiff improperly denied defendant parenting time from September 4 to September 11, 2020 (before plaintiff contacted CPS), as well as from September 18 to September 25, 2020 (after CPS had told plaintiff that there was no reason to withhold KLH). The trial court stated that plaintiff's "feigned memory is not a defense" for her actions. The trial court explained that plaintiff's denying defendant parenting time "does go to the issue of encouraging a parent/child relationship," and therefore concluded that the factor slightly favored defendant.

Plaintiff argues that she was "understandably concerned" about KLH as a result of hearing different stories about KLH's elbow injury. It may be true that plaintiff was "understandably concerned" about KLH's well-being after defendant's girlfriend contacted her. However, defendant told plaintiff about KLH's elbow injury immediately after KLH received medical care. Although plaintiff may have remained concerned, she kept KLH from defendant on September 4,

[1] Defendant's ex-girlfriend testified at trial that she had lied to plaintiff about defendant because she was upset about their breakup.

2020, but did not contact CPS until September 11, 2020. Crucially, Titus worked with plaintiff to create the safety plan to withhold KLH for one week, but then told plaintiff that there was no evidence of abuse and that plaintiff should not withhold KLH again. Plaintiff withheld KLH again, however, and only returned to the parenting-time plan once trial began.

Further, although plaintiff argues that defendant did not share information about who cared for KLH during his parenting time, plaintiff testified that defendant told her that his mother was watching KLH. Defendant testified that plaintiff did not like his family, but there was no evidence that defendant's mother was unable to properly care for KLH. Moreover, there was no indication that defendant was unwilling to support plaintiff's relationship with KLH. Plaintiff again asserts that defendant did not let her see KLH when she was in the hospital, but plaintiff also testified that defendant told her about the incident after leaving the hospital.

Defendant testified that both parents suffered by not seeing KLH every day, and he testified positively about plaintiff's relationship with KLH. Defendant seemingly kept KLH for two weeks in January 2020 after plaintiff offered for him to take KLH on the basis of a misunderstanding of the court order, but otherwise there have been no allegations that defendant kept KLH from plaintiff. Plaintiff and defendant significantly differed in their testimony about defendant's interest in or ability to see KLH before the temporary parenting-time order, but Titus's testimony about plaintiff withholding KLH in September 2020 was clear, and the trial court plainly credited that testimony in concluding that plaintiff wrongfully withheld KLH for two weeks in September 2020. That finding provided adequate support for the trial court's conclusion that Factor (j) slightly favored defendant.

3. FACTOR K

Factor (k) relates to "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." With respect to this factor, plaintiff argues that the trial court failed to consider that defendant subjected her to "financial abuse" by locking her out of financial accounts, placing the mortgage into forbearance, and not cooperating with plaintiff's assumption of the mortgage.

While plaintiff's testimony supports her assertion that she was subject to financial abuse, that testimony was largely contested by defendant. Defendant admitted that he canceled plaintiff's debit card in the summer of 2019, but he asserted that plaintiff could have contacted the bank, as her name was also on the account. Defendant also testified that he repeatedly provided plaintiff with the information that she needed in order to log in to the mortgage and auto loan accounts. Plaintiff disputed this and argued that defendant refused to provide her with the information. It is unclear why plaintiff would be unable to contact the financial institutions for access to joint accounts. It is also unclear whether defendant informed plaintiff that he put the mortgage into forbearance or why he did not inform her. However, plaintiff testified that she knew that defendant was not paying the mortgage. Additionally, although plaintiff argues that defendant prevented her from assuming the mortgage, the PSA provided that plaintiff would refinance the mortgage within 130 days. The parties seemingly agreed that plaintiff did not provide defendant with official documentation for *refinancing* the mortgage, but instead provided paperwork for an assumption of the mortgage. Defendant expressed concern about his liability for the mortgage under that arrangement, which did not comply with the agreed-upon terms of the PSA.

Overall, the testimony between the parties was clearly inconsistent on these matters, and it was the trial court's role to determine the credibility of the witnesses and find the facts. See *Rains v Rains*, 301 Mich App 313, 339; 836 NW2d 709 (2013). In light of the trial court's apparent crediting of defendant's account, we cannot conclude that it erred by finding that Factor (k) did not favor either party.

In light of the foregoing discussion of the best-interest factors, we conclude that the trial court did not abuse its discretion by ordering joint physical custody with alternating weeks of parenting time. See *Berger*, 277 Mich App at 705.

III. CHILD-SUPPORT DETERMINATION

Plaintiff argues next that the trial court erred by using the wrong income for plaintiff when determining child support. We agree.

This Court reviews for clear error a trial court's factual findings in a divorce case. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous when this Court is left with a definite and firm conviction that the trial court made a mistake. *Id*. When a trial court determines child support obligations, it must generally follow the Michigan Child Support Formula (MCSF). *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003). This Court reviews de novo whether a trial court properly applied the MCSF to the facts of a case. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

The MCSF considers the needs of the child and the resources of each parent. *Shinkle*, 255 Mich App at 225. Chapter 2 of the 2017 MCSF Manual provides that "[t]he first step in figuring each parent's support obligation is to determine both parents' individual incomes."

At the time of the final hearing, plaintiff testified that she earned between $300 and $500 on a biweekly basis. Defendant testified that he received $362 a week from unemployment benefits. The trial court found that defendant's income was $362 a week and that plaintiff's income was $500 a week, and these values were included in the judgment of divorce.

The trial court's finding that plaintiff earned $500 a week did not comport with the testimony at trial that plaintiff earned up to $500 on a *biweekly* basis. We are therefore left with a definite and firm conviction that a mistake has been made. See *Beason*, 435 Mich at 805. Although plaintiff argues that defendant's income was three times higher than plaintiff's income, defendant testified on the final day of trial that he received $362 a week from unemployment. Plaintiff refers to defendant's previous unemployment benefits that included an extra $600 per week, but defendant testified at the final hearing that he received $362 a week. Plaintiff also refers to defendant's previous jobs, but defendant was unemployed on the last day of trial. Therefore, the trial court did not clearly err in its findings regarding defendant's income at the time of trial, but only in its findings regarding plaintiff's income. See *Beason*, 435 Mich at 805.

IV. DEFENDANT'S CROSS-APPEAL

In his cross-appeal, defendant argues that the trial court erred by denying his request for attorney fees after it held plaintiff in contempt. We agree.

This Court reviews for clear error a trial court's findings of fact underlying its decision whether to award attorney fees. *Brown v Home-Owners Ins Co*, 298 Mich App 678, 689-690; 828 NW2d 400 (2012). A finding is clearly erroneous when this Court is left with a definite and firm conviction that the trial court made a mistake. *Id*. at 690. This Court reviews for an abuse of discretion a trial court's decision whether to award attorney fees. *Id*. A trial court abuses its discretion when its decision is "outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted).

Attorney fees are not generally recoverable "unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The party requesting attorney fees bears the burden of proving that the costs were incurred and that the costs were reasonable. *Id*. at 165-166. A trial court may not award attorney fees "solely on the basis of what it perceives to be fair or on equitable principles." *Id*. at 166.

MCL 600.1721 provides that when "misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant." "[U]nder a plain reading of MCL 600.1721, a court *must* order a person found to be in contempt of court to indemnify any person who suffers an actual loss or injury as a result of the contemnor's misconduct," which may include attorney fees. *Taylor v Currie*, 277 Mich App 85, 100; 743 NW2d 571 (2007) (emphasis added). Further, MCR 3.206(D)(2)(b) provides that a party may request attorney fees and expenses when the costs "were incurred because the other party refused to comply with a previous court order, despite having the ability to comply."

The trial court found that plaintiff failed to comply with its temporary custody order when she withheld KLH from defendant for two weeks in September 2020. As a result of plaintiff's refusal to comply with the court order, defendant incurred costs by having to move to show cause and for make-up parenting time. Defendant was permitted to request attorney fees on the basis of plaintiff's failure to comply with the parenting-time order, see MCR 3.206(D)(2), and the trial court was required to order costs under MCL 600.1721 after finding plaintiff in contempt, see *Taylor*, 277 Mich App at 100. If defendant's requested attorney fees are contested, the trial court must conduct a hearing "regarding the reasonableness of the fees incurred" by defendant when seeking plaintiff's compliance with the court order, which includes determining "what services were actually rendered, and the reasonableness of those services." *Reed*, 265 Mich App at 165-166.

We affirm the trial court's decision awarding the parties joint physical custody of KLH. We reverse the trial court's findings of plaintiff's income and remand for the trial court to redetermine plaintiff's income. We also reverse the trial court's decision to deny defendant's request for attorney fees and remand to the trial court for an evidentiary hearing, if necessary. We do not retain jurisdiction.

/s/ Michelle M. Rick
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron