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507 N.W.2d 788
202 Mich.App. 151
Maureen R. LOMBARDO, Plaintiff-Appellant,
v.
Charles M. LOMBARDO, Defendant-Appellee.
Docket No. 145361.
Court of Appeals of Michigan.
Submitted June 2, 1993, at Grand Rapids.
Decided Oct. 18, 1993, at 9:30 a.m.
Released for Publication Dec. 3, 1993.

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[202 Mich.App. 152] Elhart & Power, P.C. by Michael E. Hall, Traverse City, for plaintiff-appellant.

Cunningham, Davison, Beeby, Rogers & Alward by Thomas R. Alward, Traverse City, for defendant-appellee.

Before SHEPHERD, P.J., and HOLBROOK and MacKENZIE, JJ.

HOLBROOK, Judge.

In this child custody dispute, plaintiff appeals as of right the September 24, 1991, Grand Traverse Circuit Court order denying her motion to enroll the parties' minor son, Robert, in a program for gifted and talented children. We vacate the trial court's order and remand.

The parties were divorced on May 14, 1985, and awarded "joint custody, care, control and education"[202 Mich.App. 153] of their children Michael, Erin, and Robert. The original divorce judgment awarded physical custody of the children to plaintiff, but the judgment was amended later to transfer physical custody to defendant. Plaintiff was awarded visitation rights.

On the Traverse City school district's third-grade placement test, the parties' son Robert ranked fourth of nine hundred students. Robert completed a fourth-grade curriculum as a third grader at the Old Mission School. Robert was selected to attend the school district's talented and gifted program, which selects children from home schools and places them with other gifted children for education.

The parties disagree over whether to enroll Robert in the program for gifted children. Plaintiff thinks that Robert's attendance in the program is essential for him to reach his scholastic potential. After watching Robert's brother Michael go through the program, defendant believes that Robert would experience difficulty adjusting to the program and might narrow his focus on academics only. Unable to agree with regard to the issue, plaintiff filed a motion to order Robert into the program.

Following a hearing regarding the matter, the trial court entered its order denying plaintiff's motion. The trial court found that an established educational environment was in place and that Robert was doing well in that environment. The trial court noted the problem of transporting Robert to the school and the segregated nature of the program. In the absence of any law regarding the subject, the trial court determined that the parent who is the primary physical custodian should make the decision. The trial court concluded that if a different standard of review was applicable, [202 Mich.App. 154] then there had not been a showing that keeping Robert at his current school was not in his best interest.

On appeal, plaintiff first argues that the trial court erred in refusing to admit the deposition testimony of Karen McClatchey into evidence. McClatchey was Robert's third-grade teacher. Plaintiff's counsel sought to introduce the deposition testimony on the basis that McClatchey was unavailable to appear personally. The trial court refused to admit the deposition because there was no agreement of counsel and because McClatchey was not under subpoena. Defendant argues that the deposition is inadmissible because it was not taken in compliance with the law.

Our review of a decision regarding the admissibility of depositions is limited to determining whether the trial court abused its discretion. Bonelli v. Volkswagen of America, Inc., 166 Mich.App. 483, 502, 421 N.W.2d 213 (1988). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. Gore v. Rains & Block, 189 Mich.App. 729, 737, 473 N.W.2d 813 (1991). The burden of establishing admissibility

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rests on the party seeking admission. Bonelli, supra.

Generally, a deposition is considered hearsay under MRE 801(c) and is inadmissible under MRE 802. Shields v. Reddo, 432 Mich. 761, 766, 443 N.W.2d 145 (1989). However, MCR 2.308(A) provides: "Depositions or parts

thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence." At the time of the hearing in this case, MRE 804 provided in pertinent part:

[202 Mich.App. 155] (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * * *

(5) Deposition Testimony. Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, "unavailability of a witness" also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

By the terms of MRE 804(b)(5), deposition testimony is not excluded by the hearsay rule if: (1) the person deposed is unavailable as a witness; (2) the deposition was taken in compliance with law; and (3) in the course of the same proceeding or another proceeding, the party against whom the testimony is now offered, or in a civil action a predecessor in interest, had an opportunity and similar motive to develop the testimony by examining the witness.

In this case, we find that plaintiff did not establish the deposition's admissibility. There appears to be no dispute that McClatchey was unavailable as a witness under MRE 804(b)(5)(A). McClatchey [202 Mich.App. 156] was on vacation at the time of the hearing and was more than one hundred miles away. The third requirement of MRE 804(b)(5) was also met because the deposition was taken in the same proceeding. However, plaintiff submitted no proof at the hearing that the deposition was taken in compliance with the law. The record indicates that defense counsel sent his associate to the deposition because he was unable to attend the deposition with only four days' notice. The record does not support plaintiff's contention that defense counsel's associate agreed with plaintiff's counsel at the time of the deposition to admit the deposition transcript into evidence. Considering the facts on which the trial court acted, we decline to say there was no justification or excuse for the ruling made. Gore, supra. Thus, the court did not abuse its discretion in denying the admission of the deposition testimony of McClatchey. Bonelli, supra.

Next, plaintiff argues that the trial court erred in determining that the parent who is the primary physical custodian of a child should decide where the child goes to school when the parents are joint custodians of the child and cannot agree concerning that issue. Plaintiff further argues that to the extent that the trial court considered the best interests of the child, it erred in its determination of the best interests of Robert under these circumstances.

M.C.L. § 722.28; M.S.A. § 25.312(8), § 8 of the Child Custody Act, provides:

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall 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.

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[202 Mich.App. 157] In Fletcher v. Fletcher, 200 Mich.App. 505, 511-512, 504 N.W.2d 684 (1993), this Court recently clarified the standard of review in child custody cases:

In accord with Beason [v. Beason, 435 Mich. 791, 460 N.W.2d 207 (1990)], this Court reviews the trial court's findings of fact under the clearly erroneous standard. This review is not de novo. We will not reverse the decision of the trial court if the trial court's view of the evidence is plausible. Otherwise, this Court will review de novo the child custody decision. However, as provided by statute, we will affirm the trial court's decision unless the trial court committed a palpable abuse of discretion or a clear legal error on a major issue. Because child custody decisions are dispositional in nature, the trial court's ultimate disposition is subject to review de novo. Id.; Schubring v. Schubring, 190 Mich.App. 468; 476 N.W.2d 434 (1991).

Defendant has primary physical custody of the children, and plaintiff has physical custody of the children for not less than 128 days each year. When a child resides with a parent, that parent decides all routine matters concerning the child. M.C.L. § 722.26a(4); M.S.A. § 25.312(6a)(4). Because the parties in this case were awarded joint custody of their children, they share the decision-making authority with respect to the "important decisions affecting the welfare of the child." M.C.L. § 722.26a(7)(b); M.S.A. § 25.312(6a)(7)(b). This Court has held that a trial court properly denies joint custody in a proceeding to modify the custody portion of a divorce judgment where the parties cannot agree on basic child-rearing issues, in light of the state's interest in protecting the child's best

interests. Fisher v. Fisher, 118 Mich.App. 227, 324 N.W.2d 582 (1982). Unfortunately, the Legislature has not provided guidance concerning how to resolve disputes [202 Mich.App. 158] involving "important decisions affecting the welfare of the child" that arise between joint custodial parents.

Citing Griffin v. Griffin, 699 P.2d 407 (Colo.1985), defendant argues that the parent who has primary physical custody of a child has the power to decide the type of educational program the child will experience. In Griffin, the divorce decree awarded custody of the parties' child to the petitioner mother. The petitioner and the respondent agreed in the divorce decree that they were to select jointly the child's schools. When the parties were unable to agree about the choice of schools for their child, the respondent father moved to enforce the education provision of the decree. Noting that the agreement did not provide a means of resolving deadlocks over school selection, the Colorado Supreme Court ruled that the agreement was unenforceable because the court has no power to force the parties to reach agreement. Id. at 409. The Griffin court determined that "any attempt to enforce the agreement by requiring the parents to negotiate and reach a future agreement would be not only futile, but adverse to the interests of the child as well." Id. at 410. The court in Griffin further determined that the power to control the child's education remained with the mother as the custodial parent in accordance with a Colorado statute that authorizes the custodial parent to make child-rearing decisions in the absence of an enforceable agreement concerning the child's education. Id. at 411.

Griffin is similar to the present case where the parties have agreed through the use of joint custody to share the decision-making authority with respect to decisions concerning the welfare of the children. However, Griffin is distinguishable by the existence of the Colorado statute that authorizes [202 Mich.App. 159] the custodial parent to make child-rearing decisions in the absence of an enforceable agreement concerning the child's education.

We are mindful of the fact that a court is usually ill-equipped to fully comprehend and act with regard to the varied everyday needs of a child in these circumstances, because it is somewhat of a stranger to both the child and the parents in a marital dissolution proceeding. Von Tersch v. Von Tersch, 235 Neb. 263, 271, 455 N.W.2d 130 (1990). We also recognize that requiring the parent to meet and resolve the issue "exposes the child to further discord and surrounds the child with an atmosphere of hostility and insecurity." Griffin, supra at 410. However, joint custody in this state by definition

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means that the parents share the decision-making authority with respect to the important decisions affecting the welfare of the child, and where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child. See Novak v. Novak, 446 N.W.2d 422, 424 (Minn.App.1989). See also Belknap v. Belknap, 265 Ky. 411, 412-413, 96 S.W.2d 1012 (1936).

We believe the trial court in this case clearly erred in determining that the parent who is the primary physical custodian has the authority to resolve any disputes concerning the important decisions affecting the welfare of the children. M.C.L. § 722.27(1)(c); M.S.A. § 25.312(7)(1)(c), provides that a court shall change a previous custody order only if there is clear and convincing evidence that it is in the best interests of the children. In allowing the primary physical custodian to resolve the important disputes, a trial court might tacitly violate § 7 of the Child Custody Act.

The controlling consideration in child custody [202 Mich.App. 160] disputes between parents is the best interests of the children. M.C.L. § 722.25; M.S.A. § 25.312(5). Parties to a divorce judgment cannot by agreement usurp the court's authority to determine suitable provisions for the child's best interest. West v. West, 241 Mich. 679, 683-684, 217 N.W. 924 (1928); Ebel v. Brown, 70 Mich.App. 705, 709, 246 N.W.2d 379 (1976). Similarly, the court should not relinquish its authority to determine the best interests of the child to the primary physical custodian. Accordingly, we conclude that a trial court must determine the best interests of the child in resolving disputes concerning "important decisions affecting the welfare of the child" that arise between joint custodial parents.

We agree with plaintiff that the trial court did not make specific findings concerning the best interests of Robert. A trial court must consider, evaluate, and determine each of the factors listed at M.C.L. § 722.23; M.S.A. § 25.312(3), in determining the best interests of the child. Mann v. Mann, 190 Mich.App. 526, 536, 476 N.W.2d 439 (1991). The trial court in this case merely determined that plaintiff had failed to show that keeping Robert at his current school was not in his best interest. Consequently, we remand this case to the trial court to determine the best interests of Robert according to the relevant factors contained in M.C.L. § 722.23; M.S.A. § 25.312(3).

Believing that all relevant evidence should be before the court, we do not preclude the use of Karen McClatchey's testimony at the new hearing in the circuit court if she is properly subpoenaed or if a new deposition is taken and introduced in conformity with the court rules.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.