STATE OF MICHIGAN

COURT OF APPEALS

COLLETTE L. ROBERTSON, a/k/a COLLETTE L. ALFORD,

Plaintiff/Counter-Defendant-Appellant,

v

RICKY L. ROBERTSON,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
April 13, 2006

No. 264321
Wayne Circuit Court
LC No. 01-113651-DM

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Plaintiff appeals as of right the denial of her motion to change custody of the parties' two minor children. We affirm.

After the parties' divorce, sole legal and physical custody of the two minor children was awarded to defendant. In 2004, citing changed circumstances, plaintiff moved for a modification in custody. The trial court denied the motion without making findings or taking evidence. In Docket No. 254319, we remanded for a full evidentiary hearing. On remand, the trial court found that an established custodial environment existed with defendant and that the statutory factors of MCL 722.23 weighed in defendant's favor. Plaintiff's motion was denied on July 14, 2005.

In child custody proceedings, findings of fact are reviewed under the great weight of the evidence standard. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The court's ultimate decision regarding custody is reviewed for an abuse of discretion. *Id.* Further, whether the court properly applied MCR 2.517(A) is a question of law, which we review de novo. See *Cranbrook Professional Bldg, LLC v Pourcho*, 256 Mich App 140, 142; 662 NW2d 94 (2003).

Plaintiff argues that the trial court failed to make sufficient findings and wholly disregarded certain relevant evidence. We disagree. A trial court must make findings of fact and conclusions of law. MCR 2.517(A)(1). Findings are sufficient if brief, definite and pertinent, without over-elaboration of detail or particularization of facts. MCR 2.517(A)(2); *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994). The trial court's findings in a child custody case "need not include consideration of every piece of evidence entered and argument

raised by the parties." *MacIntyre v MacIntyre* (*On Remand*), 267 Mich App 449, 452; 705 NW2d 144 (2005).

Plaintiff contends that the court disregarded defendant's general credibility as a witness. Under MCR 2.517(A)(1), the court is only required to "find the facts specially." The trial court's finding on any given issue "necessarily includes the credibility of the witnesses." See *Aiello v Nat'l-Ben Franklin Fire Ins Co*, 79 A2d 758, 759 (R.I., 1951). No independent findings of credibility are therefore required. Further, the mere fact that the trial court may not have mentioned defendant's credibility does not mean that the court ignored the issue. "[T]he trial court's failure to address the myriad facts pertaining to a factor does not suggest that the relevant among them was overlooked." *Fletcher, supra* at 883-884. The court's determinations of witness credibility were necessarily subsumed by its other findings.

Plaintiff also asserts that the trial court failed to consider the psychological evaluations previously ordered by the trial court. Contrary to plaintiff's contention, the record plainly indicates that the court considered these evaluations. The court found that plaintiff had never been diagnosed as mentally ill, but observed that the psychological evaluators had nonetheless recommended that defendant retain custody of the children. Similarly, plaintiff contends that the court disregarded the report of the initial guardian ad litem. However, the court actually found that the report of the initial guardian ad litem was favorable to plaintiff. Because the report of the second guardian ad litem favored defendant, the trial court determined that the reports equally favored both parties. But, this does not negate the fact that the court properly considered the issue. Finally, plaintiff contends that the trial court disregarded defendant's previous incarceration and prior drug use. The court specifically found that defendant's jail sentence had already been completed and that the issue was therefore moot. Moreover, although the court found that defendant had likely used drugs in the past, it determined on the basis of the testimony that he was no longer using drugs. Contrary to plaintiff's assertions, the court did not fail to consider any of these relevant facts in reaching its decision.

Plaintiff next asserts that certain of the trial court's findings were against the great weight of the evidence. Again, we disagree. We will sustain the trial court's findings unless the evidence clearly preponderates in the opposite direction. *Foskett, supra* at 5.

Plaintiff first argues that the trial court erred in discounting her past allegations of abuse and in finding that defendant had not abused the children. Plaintiff maintained below that defendant had sexually abused the children. However, there was substantial countervailing evidence showing that no such abuse had occurred. The trial court's finding on this issue therefore turned on witness credibility. The trial court occupies the best position to make accurate determinations because it can view the witnesses' demeanor and evaluate the competing testimony. *Fletcher, supra* at 890. Thus, we defer to the trial court on issues of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Among the evidence on this matter was not only the testimony of both parties, but also the testimony of a police officer who had investigated the abuse allegations. The officer testified that all of the allegations had been investigated, and each proved to lack merit. From its superior position to weigh the evidence, the trial court found that plaintiff's testimony was not worthy of belief, and that defendant had not abused the children. We defer to this finding. *Mogle, supra* at 201. The trial court's finding on this matter was not against the great weight of the evidence. *Foskett, supra* at 5.

Plaintiff next argues that the trial court erred in finding that the children would not be better served by living in Farmington Hills than in Detroit. Plaintiff believed that the children should live with her in Farmington Hills, rather than with defendant in Detroit, so that they could attend the Farmington Hills schools. Plaintiff asserted that the schools in Farmington Hills would provide a more enriching environment than the children's current school in Detroit. However, two teachers testified that the children were quite intelligent, and that both were excelling in their current school environment. The court found that there was no reason to disrupt the children's young lives by removing them from their established and familiar academic environment. The evidence did not clearly preponderate against this finding, and it was not against the weight of the evidence. *Id.*

Plaintiff also argues that the trial court made findings against the great weight of the evidence under MCL 722.23(j). Specifically, plaintiff argues that the trial court erred in concluding that she would be less likely than defendant to foster a continuing relationship between the children and the other parent. MCL 722.23(j) requires that the court consider "[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." The evidence in this case showed that plaintiff had made false allegations of sexual abuse against defendant on several prior occasions. The evidence also showed that plaintiff had left the state with the children in 2002 for a substantial period of time. This was evidence that plaintiff did not inform anyone of her whereabouts or the whereabouts of the children.

The court found that the past allegations of abuse had been "designed to destroy the relationship of the minor children with the defendant." The court also found that plaintiff's flight from the state with the children had been designed to keep the children away from defendant. Overall, the court found that plaintiff's conduct was not conducive to building a strong relationship between the children and defendant. The court noted that although neither party had fostered a close relationship with the other parent in the recent past, plaintiff's behavior was "far more destructive than defendant's behavior." The court concluded that plaintiff was more likely than defendant to actively discourage a relationship between the children and the other parent. In light of the evidence, the trial court's finding that plaintiff had attempted to destroy the relationship between the children and defendant was not against the weight of the evidence. *Id.* The court did not err in concluding that factor (j) favored defendant.

Finally, plaintiff argues that the trial count made erroneous findings under MCL 722.23(k). Specifically, plaintiff contends that in light of defendant's history of domestic violence, the trial court erred in finding that this factor did not weigh in her favor. MCL 722.23(k) requires that the court consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Plaintiff testified that she had been verbally abused by defendant during the marriage, and that the verbal abuse had continued after the divorce. Further evidence showed that defendant had been verbally abusive toward his ex-girlfriend in the early 1990s. On the other hand, defendant testified that plaintiff had verbally abused him on several occasions, and the testimony of several witnesses established that both parties had been verbally abusive toward one another in public, including at the children's school and at plaintiff's place of employment.

The evidence regarding physical abuse was less clear. Plaintiff and plaintiff's friend testified that defendant had physically assaulted plaintiff on the grounds of the children's school,

but this testimony was not entirely consistent. Further, defendant's ex-girlfriend testified that defendant had physically abused her in the early 1990s. On the other hand, the evidence showed that plaintiff had a violent temper, and that she had thrown rocks at defendant's property on at least one occasion. Moreover, the trial court determined that certain accusations of violence made by plaintiff were incredible. The evidence showed that plaintiff had recently physically confronted defendant as he was dropping off the children for plaintiff's parenting time session. The court noted that if plaintiff had truly been concerned about the possibility of physical violence, she would not have confronted defendant in this manner. Thus, the court found that plaintiff had likely overstated or exaggerated certain allegations of physical violence made against defendant.

The trial court was in the best position to judge plaintiff's credibility on this matter by viewing the witnesses' demeanor and evaluating the competing testimony. *Fletcher, supra* at 890. On the basis of the testimony, the court concluded that factor (k) favored neither party and that both plaintiff and defendant were partially at fault. We defer to this finding, which was based largely on matters of credibility. *Mogle, supra* at 201. The trial court's finding that factor (k) equally disfavored both parties was not against the great weight of the evidence. *Foskett, supra* at 5.

Plaintiff raises no additional arguments with respect to any other specific finding of the trial court. However, plaintiff apparently attempts to argue that the trial court erred generally by failing to consider the remainder of the best-interest factors "reasonably" and "impartially." An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Ambs v Kalamazoo Co Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Nor may an appellant give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). An appellant's failure to properly address the merits of an assertion of error constitutes abandonment of the issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). In light of plaintiff's failure to properly brief this argument, or indeed to adequately articulate it at all, it is abandoned on appeal. *Id*.

Plaintiff next argues that the trial court improperly denied her post-judgment motion to modify custody on the basis of newly discovered evidence. After filing her claim of appeal in this case, plaintiff filed a motion claiming that she had gone to defendant's home and that defendant had assaulted her. Plaintiff asserted that this incident resulted in criminal charges against defendant and that a change in custody was therefore warranted. The trial court denied plaintiff's post-judgment motion. Plaintiff now asks us to review the trial court's denial of this post-judgment motion.

This issue is not properly before us. In order to vest this Court with jurisdiction over an appeal from a particular order, the appellant must file a claim of appeal or an application for leave to appeal with respect to that *particular* order. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 609; 478 NW2d 669 (1991). A claim of appeal with respect to one final order does not vest this Court with jurisdiction over an appeal from a subsequent order in the same case. *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 197; 452 NW2d 471 (1989). The claim of appeal filed by plaintiff on August 3, 2005, referenced only the trial court's final order of July 14, 2005. It could not and did not reference the trial court's subsequent order denying her post-judgment motion to modify. Because plaintiff did not file a separate claim of appeal with

respect to the denial of her post-judgment motion, we are without jurisdiction to review this decision. *McDonald*, *supra* at 609.

Finally, plaintiff argues that the trial court violated her constitutional liberty interest in child rearing. Plaintiff suggests that by relying solely on the best interest factors of MCL 722.23 to determine custody, the trial court interfered with her substantive due process rights. We disagree. We note that this argument was not raised before or addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nevertheless, we will address the matter because it presents a question of law for which the necessary facts are available. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

"[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000). We fully recognize the importance of this liberty interest. See *Heltzel v Heltzel*, 248 Mich App 1, 18-23; 638 NW2d 123 (2001). However, the interest is simply not implicated in this case because neither party has been found unfit and because this case does not involve a dispute between plaintiff and a third party. See *Mason v Simmons*, 267 Mich App 188, 197; 704 NW2d 104 (2005). Rather, it involves a custody dispute between two fit parents, both of whom benefit *equally* from the constitutional liberty at stake. In a custody dispute between two fit parents, the court's decision is based on the best interest factors of MCL 722.23. See *In re JS & SM*, 231 Mich App 92, 100-101; 585 NW2d 326 (1998), overruled on other grounds sub nom *In re Trejo*, 462 Mich 341, 343; 612 NW2d 407 (2000). Inasmuch as both fit parents are entitled to the same due process right, the equal constitutional interests balance, leaving only the best interest analysis to decide the parties' dispute.[1] The trial court properly relied on the best interest factors alone. Plaintiff's substantive due process rights were not violated.

---

[1] See e.g. *Rico v Rodriguez*, 120 P3d 812, 818 (Nev, 2005) ("In a custody dispute between two fit parents, the fundamental constitutional right to the care and custody of the children is equal"); *McDermott v Dougherty*, 385 Md 320, 353; 869 A2d 751 (2005) ("[E]ach fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the *sole standard* to apply to these types of custody decisions") (emphasis in original); *Ward v Ward*, 874 So2d 634, 637 (Fla App, 2004) ("When a custody dispute is between two parents, where both are fit and have equal rights to custody, the test involves only the determination of the best interests of the child"); *Owenby v Young*, 357 NC 142, 145; 579 SE2d 264 (2003) ("[T]he protected right is irrelevant in a custody proceeding between two natural parents, whether biological or adoptive . . . . In such instances, the trial court must determine custody using the 'best interest of the child' test"); *Griffin v Griffin*, 41 Va App 77, 83; 581 SE2d 899 (2003) ("Custody and visitation disputes between two fit parents involve one parent's fundamental right pitted against the other parent's fundamental right. The discretion afforded trial courts under the best-interests test . . . reflects a finely balanced judicial response to this parental deadlock"); *Watkins v Nelson*, 163 NJ 235, 253; 748 A2d 558 (2000) ("When the dispute is between two fit parents, the best interest of the child standard controls because both parents are presumed to be equally entitled to custody. The child's best interest rebuts the presumption in favor of one of the fit parents").

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis