STATE OF MICHIGAN

COURT OF APPEALS

KRYSTAL SUE KOLAR, formerly known as KRYSTAL SUE PIORUNEK,

Plaintiff/Counterdefendant-Appellant,

v

KYLE ALDEN FLIKKIE,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
May 9, 2019

No. 346281
Tuscola Circuit Court
Family Division
LC No. 07-024627-DP

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Plaintiff-mother appeals as of right the trial court's order denying her motion for change of legal custody of the parties' child, KF, and temporarily modifying the parenting time of defendant-father. We affirm.

In 2011, the trial court entered a final order granting both parties joint legal custody, granting plaintiff physical custody, and awarding defendant school-year parenting time pursuant to a specified schedule, including alternating weekends, alternating holidays, each Father's Day, and alternating weeks during summer break.

In early 2017, KF was diagnosed with ulcerative colitis, and in August 2017, he was hospitalized due to complications, including anemia and an infection. KF's medical care eventually became the subject of litigation when plaintiff filed an emergency ex parte motion requesting suspension of defendant's holiday parenting time on the basis of plaintiff's concerns that defendant would not comply with KF's treatment requirements. In March 2018, plaintiff filed a motion requesting sole legal custody of KF and requesting a reduction in defendant's parenting time. The Friend of the Court referee recommended denial of plaintiff's motion. Following a de novo review, the trial court denied plaintiff's request for sole legal custody, but granted a temporary reduction in defendant's parenting time. Plaintiff appeals both decisions.

I. STANDARD OF REVIEW

In child custody and parenting-time disputes, " 'all orders and judgments of the circuit court shall 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.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.28. The great weight of the evidence standard applies to all findings of fact; a trial court's findings—including as to the existence of an established custodial environment, the existence of cause to modify custody, and each custody factor—should be affirmed unless the evidence clearly preponderates in the opposite direction. *Pierron*, 486 Mich at 85; see also *Mitchell v Mitchell*, 296 Mich App 513, 519-520; 823 NW2d 153 (2012). In reviewing the findings, this Court should defer to the trial court's determination of credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

Our Supreme Court has explained that MCL 722.28 "distinguishes among three types of findings and assigns standards of review to each." *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. *Id*. at 878-879. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. *Id*. at 879. An abuse of discretion exists when the trial court's decision is "palpably and grossly violative of fact and logic . . . ." *Id*. (quotation marks and citation omitted). Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. *Id*. at 881.

II. CUSTODY

Plaintiff argues that the trial court abused its discretion by denying her motion for sole legal custody because she is already making all legal decisions for KF and defendant refused to jointly participate in those decisions.

"The Child Custody Act [of 1970 (CCA)], MCL 722.21 *et seq*., governs child custody disputes between parents." *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992) (citation omitted). The purpose of the CCA is to promote the best interests and welfare of children, and it is to be liberally construed. *Kessler v Kessler*, 295 Mich App 54, 60; 811 NW2d 39 (2011); MCL 722.26(1).

Once a child's paternity is established, the trial court has the authority and responsibility to enter orders controlling child custody and parenting time. *Demski v Petlick*, 309 Mich App 404, 441; 873 NW2d 596 (2015). Child custody and parenting-time decisions begin with a determination of the child's established custodial environment. *Id.* at 445. "An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). After the court determines the established custodial environment, the court cannot modify the environment absent proof by clear and convincing evidence that the modification is in the child's best interests. *Demski*, 309 Mich App at 446; MCL 722.27(1)(c). To be clear and convincing, the evidence must produce in

the trier of fact a firm conviction as to the truth of the precise facts at issue. *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009).

Above all, custody disputes are to be resolved in the child's best interests, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The best-interest factors are:

> (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.
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> (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. [MCL 722.23.]

"A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

In a custody dispute between parents, the parents must be advised of the possibility of joint custody, and, at the request of a parent, joint custody must be considered by the court. MCL 722.26a(1); *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006). The court must determine whether joint custody is in the child's best interests through consideration of the best-interest factors, MCL 722.26a(1)(a), as well as the general ability of the parties to cooperate and agree, *Dailey v Kloenhamer*, 291 Mich App 660, 667; 811 NW2d 501 (2011). Under a joint custody order, the parents share the decision-making authority regarding the important decisions affecting the child's welfare, while the parent with physical custody decides all routine matters. MCL 722.26a(4); MCL 722.26a(7); *Dailey*, 291 Mich App at 670. When parents with joint custody cannot agree on an important issue, the court may not order that responsibilities be apportioned between the parties but must decide the issue based upon the child's best interests. *Shulick*, 273 Mich App at 328-329.

As a preliminary matter, the trial court concluded that defendant's lack of participation in medical appointments, the alleged lack of appropriate care, and KF's change in medical conditions were sufficient to rise to the level of a change in circumstances or proper cause to warrant a review of custody and parenting time. Additionally, the trial court determined that because KF looked to both parents for guidance and direction, an established custodial environment existed with both parents, and plaintiff's burden of proof for the modification of custody was clear and convincing evidence. Plaintiff does not dispute these findings and conclusions.

Rather, plaintiff contends that the trial court erred in the weighing of some of the best-interest factors. The trial court found the parties equal on factors (a), (b), (d), (e), (g), and (j), and that factors (f), (i), and (k) did not apply. The trial court concluded that factors (c) and (h) favored plaintiff because she "possese[d] the greater disposition" to handle KF's medical issues, while defendant did not attend appointments, and the lack of consistency in KF's medical treatment plan during defendant's parenting time affected KF's home and community life.

Regarding factor (*l*), the trial court noted:

> The main issue that propelled the motion was the medical condition of [KF]. When [KF] was first diagnosed through the current date, [KF] has met with different doctors and has been provided with different medications and treatments. Mother desires to make all of the decisions regarding [KF]'s condition. This is, in part, premised upon father's non-appearance at medical appointments. However, it is obvious to this court that the parties do not always communicate well. It is also apparent that the parties may have their own philosophy or "way of thinking" as it relates to [KF]. There were times when mother did not always inform father of [KF]'s daily/weekly progress. There were times when father did not always inform mother of [KF]'s daily/weekly progress. Mother allowed [KF] to voice his dislike for Dr. Bitar, so mother did not continue with treating with him. However, it wasn't until the hospitalization in August

> 2017, at the direction (if not insistence) of Dr. Moore and father that Dr. Fatima began to treat [KF]. Without the addition of this specialist, the court wonders what the condition of [KF] would be today; and thus this factor is weighed accordingly.

Plaintiff asserts that factors (a), (b), (c), (d), and (e) should favor her. More specifically, plaintiff argues that factor (a) should favor her because of her testimony that KF hid under the bed to avoid going to defendant's home and because KF only looks to her to provide his healthcare needs. However, factor (a) addresses only the "love, affection, and other emotional ties existing between the parties involved and the child," MCL 722.23(a), and does not include any consideration of the child's medical needs, which is addressed by MCL 722.23(c). Additionally, the court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *Fletcher*, 447 Mich at 883.

Relative to this factor, there was undisputed testimony that defendant and KF had a loving relationship. Moreover, plaintiff does not dispute that an established custodial environment existed with both parties. Accordingly, we find no support for the proposition that the trial court's finding on this factor was against the great weight of the evidence.

In regard to factor (b), plaintiff contends that the trial court's conclusion that she oversees KF's education and lifestyle should support an award of sole custody to her because the parties do not "jointly" make decisions and she alone makes all the important decisions for KF. However, factor (b) considers only "[t]he 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," MCL 722.23(b), and evidence shows that defendant also provides KF with love, affection, and guidance. Moreover, although plaintiff is more involved with KF's education given that KF resides primarily with her during the school year, there is nothing in the record to support a conclusion that defendant would lack the capacity to continue KF's education. Indeed, defendant testified that he discussed schooling with KF and would contact the school if there were any concerns that required addressing. Additionally, the topic of religion was not discussed throughout these hearings. In whole, we are unable to conclude that the trial court's finding the parties to be equal on this factor was against the great weight of the evidence.[1]

In regard to factors (d) and (e), plaintiff appears to argue that KF's temporary displacement from his bedroom in defendant's home and defendant's prior out-of-state residency should be weighed against him, and therefore, the trial court should have found that these factors favored her. During the de novo hearing, defendant admitted that KF was temporarily without a bedroom because defendant's brother and his family had temporarily moved into the home while

[1] Plaintiff's brief also mentions that she agrees with the trial court's conclusion that factor (c) favors her, but she argues that the trial court made several errors in arriving at that conclusion. Because plaintiff has not presented any meaningful argument, we need not address the merits of plaintiff's additional assertions. See *Ewald v Ewald*, 292 Mich App 706, 726; 810 NW2d 396 (2011).

their house was being finished. However, no testimony was presented on whether defendant's prior out-of-state residency affected KF, and plaintiff presents no authority to support the proposition that a temporary displacement from one's bedroom disrupts an otherwise stable and satisfactory environment. Again, we are unable to conclude that the trial court's finding that the parties are equal on both factors was against the great weight of the evidence.[2]

Lastly, plaintiff "vehemently objects" to the trial court's findings on factor (l),[3] arguing that defendant is not involved with KF's healthcare treatment because he does not attend appointments, speak with the doctors, or follow treatment plans. Plaintiff argues that because she makes all medical decisions and defendant refuses to participate in the decision-making process, she should be granted sole legal custody.

Plaintiff cites *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982), for the proposition that the parties must cooperate, must be able to agree with each other, and must make joint decisions for joint custody to work. However, in *Fisher* the parties did not simply disagree, they were in conflict over the children's religion. *Id*. at 234. As plaintiff acknowledges, this is not the case here. Indeed, the trial court noted that each party had "their own way of thinking as it relate[d] to KF." Our review of the record also suggests that both parties agree about the need to pursue appropriate care for KF and both parties have been instrumental in ensuring KF receives the care needed. The crux of plaintiff's argument revolves around the fact that defendant is not involved in attending appointments or speaking with KF's physicians. However, that defendant did not personally attend the appointments at the times and dates set by plaintiff does not indicate that he is not participating in KF's healthcare.

The record shows that although defendant was not involved in all appointments, he met with Dr. Lepor at the point at which he was concerned with KF's treatment. Defendant also took KF to Dr. Harrington Kramer in August 2017 when KF's health was deteriorating, and he took the appropriate steps to get him to the emergency room. Furthermore, it is undisputed that following KF's hospitalization defendant selected Dr. Fatima as KF's specialist. Dr. Fatima continues to manage KF's colitis, and KF has shown improvement under her care. Defendant testified that he had spoken with Dr. Fatima's office about KF's treatment. Accordingly, while the parties may participate in different ways, the evidence shows that defendant has participated

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[2] Plaintiff also agrees with the trial court's conclusion that factor (h) favors her, but adds that defendant failed to participate in KF's education. As noted, the court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *Fletcher*, 447 Mich at 883. Moreover, because plaintiff has not presented any meaningful argument, we need not address the merits of plaintiff's additional assertion. See *Ewald*, 292 Mich App at 726.

[3] Plaintiff disagrees with the trial court's determination that the parties are equal in regard to factor (j), mostly because defendant refuses to discuss KF's healthcare with her. We will consider any issues related to factor (j) in context of factor (l), where plaintiff's main argument is regarding medical care.

in KF's treatment and has been arguably instrumental in getting KF the necessary care with a specialist. The trial court appropriately concluded that "just because one parent unilaterally makes decisions does not justify an award of sole legal custody." Indeed, the circumstances of this case support the trial court's decision to maintain joint legal custody because it allows both parties to advocate for KF's best interests, even if they do not always agree.

Plaintiff also argues that the trial court's order is similar to the order overturned in *Shulick*, 273 Mich App at 328, that apportioned the authority between the parties in that case by allowing each party to make decisions during their parenting time. The *Shulick* Court concluded that a joint custody arrangement is not appropriate in cases where the parents would not have to reach any agreement because of the apportionment of authority. *Id*. Plaintiff argues that the only authority provided by the trial court to defendant was the equivalent of the power to veto plaintiff's decisions. However, unlike in *Shulick*, the trial court is not allowing the parties to make decisions unilaterally during their parenting time. Rather, the trial court is providing a means for communication of medical information between the parties that requires plaintiff to communicate the information and defendant to state his objections on a timely basis so that the parties can work together toward obtaining KF the care he needs.[4]

In summary, plaintiff has not shown any basis on which to overturn the trial court's findings of fact, and the court's dispositional ruling is not "palpably and grossly violative of fact and logic." *Fletcher*, 447 Mich at 879. Accordingly, the trial court did not abuse its discretion by denying plaintiff's request for sole legal custody.

III. PARENTING TIME

Plaintiff also argues that while the trial court correctly reduced defendant's parenting time from August 2018 to May 2019, the trial court abused its discretion in only temporarily reducing defendant's parenting time because it was repeatedly shown by the testimony that extended parenting time with defendant resulted in medical issues for KF. Plaintiff argues that it is in KF's best interests to permanently reduce defendant's parenting time because otherwise KF will resume experiencing medical issues when extended parenting time resumes in 2019.

"[P]arenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). A parent seeking to modify a parenting-time order must first establish that there is proper cause or a change in circumstances that warrants the modification. MCL 722.27(1)(c); *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). Further, "[i]n a parenting-time matter, when the proposed change would not affect the established

[4] Plaintiff argues that Dr. Moore's testimony lacks credibility, but this Court may not "determine the credibility of witnesses"—"no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). This Court has also recognized that in reviewing the findings of the trial court, this Court should defer to the trial court's determination of credibility. *Shann*, 293 Mich App at 305.

custodial environment, the movant must prove by a preponderance of the evidence that the change is in the best interests of the child." *Lieberman*, 319 Mich App at 84. The parenting-time factors are:

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
>
> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
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> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
>
> (i) Any other relevant factors. [MCL 722.27a(7).]

The trial court concluded that plaintiff's request for modification of parenting time would not alter the custodial environment, and that plaintiff was required to prove by a preponderance of the evidence that the modification was appropriate. Following an analysis of the parenting-time factors, the trial court concluded that evidence suggesting that defendant had failed to always strictly adhere to KF's treatment plan was sufficient to "rise to a level of a temporary reduction in parenting time." The trial court limited defendant's parenting time to alternating weekends, including holiday and summer break time that did not exceed "a weekend period of time" from August 2018 through May 2019. However, beginning June 2019, defendant's parenting time would be as outlined by the Tuscola County Parenting Time Guidelines.

As a preliminary matter, we note that during the de novo hearing, plaintiff's counsel specifically argued that defendant's parenting time should be reduced and that the court should award him "at best . . . every other weekend during the summer until this—maybe when the child gets older, maybe this will start to heal." Counsel added, "Maybe not on a permanent basis." Generally, a party may not intentionally relinquish an argument at the trial court and then argue on appeal that the resultant action was error. See *People v Kowalski*, 489 Mich 488, 503; 803

NW2d 200 (2011). Accordingly, because plaintiff's counsel suggested a temporary reduction rather than a permanent change, this argument is waived. Further, in her brief, plaintiff states, "[T]he trial court concluded that, 'It may take a period of time to assess what will and will not work for the child . . . .' This is exactly correct." Plaintiff therefore agrees that some period of time is needed to find a proper treatment for KF. However, the amount of time needed was not established during these proceedings, and there is no indication that once the proper treatment is established KF's condition will not be manageable for extended periods. Accordingly, the trial court's decision is not so "palpably and grossly violative of fact and logic" to constitute an abuse of discretion. *Fletcher*, 447 Mich at 879.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Michael J. Riordan