STATE OF MICHIGAN

COURT OF APPEALS

LOUIS WILLIAM EBERBACH II,

Plaintiff-Appellee,

v

LYNNEA NICOLE MASSEY,

Defendant-Appellant.

UNPUBLISHED
May 21, 2019

No. 346025
Washtenaw Circuit Court
LC No. 17-000187-DC

Before: SWARTZLE, P.J., and M. J. KELLY and TUKEL, JJ.

PER CURIAM.

Plaintiff, Louis William Eberbach, II, and defendant, Lynnea Nicole Massey, share a minor child in common but were never married. In this parenting-time dispute, defendant appeals as of right the trial court's October 4, 2018 order establishing a short-term schedule of plaintiff's supervised, unsupervised, and overnight visits with the child and restoring equal parenting-time to plaintiff. We affirm.

I. BACKGROUND

The minor child at issue in this case was born in 2013. Although the parties' romantic relationship ended in 2014, they continued to reside together until January 2017. At that time, plaintiff married another woman and moved into an apartment with her, while defendant obtained her own apartment and became engaged to another man. After the parties moved into separate residences, plaintiff filed a complaint on January 30, 2017, requesting sole-legal and sole-physical custody of the parties' minor child. The trial court referred the matter to the Washtenaw County Friend of the Court (FOC). On May 22, 2017, the FOC recommended that defendant and plaintiff have joint-legal and shared-physical custody of the child. In the event that the parties could not agree on a parenting-time schedule, the FOC recommended parenting time according to the following schedule: defendant had the child Monday and Tuesday overnight; plaintiff had the child Wednesday and Thursday overnight; and the parties alternated every other Friday, Saturday, and Sunday overnight, with exchange times at 6:00 p.m. Because neither plaintiff nor defendant filed objections to the FOC recommendation, on June 23, 2017, the trial court adopted the FOC's evaluation and recommendation regarding custody and

parenting time. Neither party appealed the trial court's June 23, 2017 order regarding custody and parenting time.

Plaintiff exercised his parenting-time rights from March through September 2017. On August 26, 2017, defendant filed a complaint with Children's Protective Services (CPS) alleging that plaintiff's mother-in-law sexually assaulted the child. CPS investigated but did not substantiate defendant's allegations of sexual assault. On September 26, 2017, the child then made allegations of sexual assault against both plaintiff and plaintiff's mother-in-law. On September 29, 2017, the trial court issued an ex-parte personal protection order (PPO) against plaintiff that temporarily prohibited plaintiff from having any unsupervised contact with the child, during the CPS investigation of the child's allegations. CPS investigated but did not substantiate the allegations of sexual assault, and the trial court terminated the PPO in March 2018. At that time, plaintiff resumed unsupervised, overnight-parenting time with the child. Neither party appealed the trial court's termination of the PPO or plaintiff's resumption of the parenting-time-schedule established by the trial court's June 23, 2017 order.

On April 27, 2018, the child again made allegations of sexual assault against plaintiff. Although plaintiff took the position that defendant and her fiancée had coached the child to make false accusations as part of defendant's ongoing efforts to alienate the child from him, plaintiff agreed to suspend his exercise of parenting time to allow the third CPS investigation to run its course. Once again, CPS investigated but did not substantiate the allegations of sexual assault. A 2018 CPS report indicated concern that defendant was coaching the child to make false allegations of sexual assault.

On August 3, 2018, plaintiff filed a motion in the trial court seeking a modification of the June 23, 2017 order regarding custody and parenting time. Plaintiff again sought sole-legal and sole-physical custody of the child. In the alternative, plaintiff sought to enforce his rights to the 50/50 parenting-time schedule established by the trial court's June 23, 2017 order. The trial court heard oral arguments on plaintiff's motion on August 22, 2018, September 5, 2018, and October 3, 2018. On August 22, 2018, the trial court entered a temporary order that allowed plaintiff to have parenting time "as the parties agree," so long as the parenting time was supervised by an independent third-party who served as a parenting-time supervisor. Neither party appealed the trial court's August 22, 2018 order regarding plaintiff's resumption of parenting time after the third CPS investigation.

On September 20, 2018, defendant filed a motion with the trial court seeking an order that both parties submit to a psychological evaluation to determine the parties' fitness to participate in parenting time with the child. On September 21, 2018, plaintiff filed a motion arguing that defendant caused or allowed alienation between him and the child by making false allegations against him and instructing the child to make false allegations of sexual assault. Plaintiff requested that the trial court order an equal amount of parenting time for both parties or order defendant to take reasonable steps to facilitate plaintiff's supervised-parenting time.

On October 4, 2018, the trial court entered an order in response to plaintiff's August 3, 2018 motion. That order provided a path for plaintiff to resume the full amount of parenting time that he exercised before the CPS investigations. The trial court ordered that plaintiff could have supervised visits with the child and that plaintiff's parenting time could progress from

supervised to unsupervised visits and then to overnight visits, and finally to the parties' prior parenting-time schedule established in the trial court's June 23, 2017 order regarding parenting time.

On October 10, 2018, the trial court heard oral arguments on defendant's motion for a psychological evaluation of both parties. On October 16, 2018, the trial court entered an order denying defendant's motion without prejudice. Defendant filed an application for leave to appeal that order with this Court, arguing that the trial court abused its discretion when it refused to order both parties to undergo psychological evaluations. This Court denied that application for leave to appeal. *Eberbach v Massey*, unpublished order of the Court of Appeals, entered March 8, 2019 (Docket No. 346266).

Defendant now appeals as of right the trial court's October 4, 2018 order regarding plaintiff's parenting time with the child.

II. ANALYSIS

A. JURISDICTION

Plaintiff contends that this Court lacks jurisdiction to decide defendant's appeal. Plaintiff argues that the October 4, 2018 order establishing the schedule of plaintiff's parenting-time was not a final order under MCR 7.202(6)(a)(*iii*), as amended effective January 1, 2019. We disagree that the amended court rule applies and determine that this Court has jurisdiction in this case.

Defendant timely filed her claim of appeal and filing fee on October 22, 2018. This Court's jurisdiction therefore vested on the day defendant filed her claim of appeal, which was before January 1, 2019, the effective date of the amendment to MCR 7.202(6)(a)(*iii*). The former language of MCR 7.202(6)(a)(*iii*) defined a final order in a domestic relations action as "a postjudgment order affecting the custody of a minor." MCR 7.202(6)(a)(*iii*). The amended version of MCR 7.202(6)(a)(*iii*) defines a final order in a domestic relations action as "a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile." MCR 7.202(6)(a)(*iii*), as amended effective January 1, 2019.

Generally, newly adopted court rules apply to pending actions unless the application of the new rule would work injustice. See *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 336-337; 602 NW2d 596 (1999), citing MCR 1.102. In this case, the application of the newly amended language of MCR 7.202(6)(a)(*iii*) would invalidate this Court's earlier evaluation of defendant's filing of her claim of appeal and would work injustice by depriving defendant of an appeal as of right already filed and accepted. Therefore, we conclude that the former language of MCR 7.202(6)(a)(*iii*) applies. Applying the former language of MCR 7.202(6)(a)(*iii*), we conclude that the trial court's October 4, 2018 order was a final order in a domestic relations action because it was "a postjudgment order affecting the custody of a minor." Therefore, we determine that this Court has jurisdiction to decide this appeal.

B. THE TRIAL COURT'S INITIAL ORDER

Defendant did not appeal the trial court's June 23, 2017 order adopting the FOC's evaluation and recommendation regarding custody and parenting time. In her brief on appeal from the October 4, 2018 order, defendant argues that the FOC's evaluation and recommendation "was legally erroneous in several respects," but admits that "it is too late to challenge" the FOC's alleged errors. Nonetheless, defendant urges this Court to hold that the trial court erroneously relied on the FOC's evaluation and recommendation. We agree that it is too late to challenge the FOC's May 22, 2017 evaluation and recommendation regarding custody and parenting time. Because defendant did not appeal the trial court's June 23, 2017 order adopting the FOC's evaluation and recommendation regarding custody and parenting time, this issue is not properly before us and we decline to address it.

C. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant argues that plaintiff's failure to exercise parenting time during the third CPS investigation changed the established-custodial environment from a 50/50 shared-parenting-time schedule to sole custody of the child with defendant. Furthermore, defendant argues that the resumption of the 50/50 shared-parenting-time schedule again changed the established-custodial environment that existed solely with defendant. In essence, defendant argues that the trial court's October 4, 2018 order erroneously affected the custody of the child without first determining whether the parenting-time modification would alter the child's established-custodial environment. Defendant also argues that the trial court erroneously issued the parenting-time-modification order before determining whether the modification of parenting time was in the child's best interests. We disagree.

1. ISSUE PRESERVATION

"Generally, an issue is not properly preserved if it is not raised before, addressed, *or* decided by the circuit court or administrative tribunal and need not be addressed if first raised on appeal." *Loutts v Loutts*, 298 Mich App 21, 23; 826 NW2d 152 (2012) (cleaned up). In the trial court, defendant did not challenge the trial court's failure to make a determination regarding the existence or modification of an established-custodial environment. This Court may overlook a party's failure to preserve a claim, however, when "failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Mitchell v Mitchell*, 296 Mich App 513, 521; 823 NW2d 153 (2012) (cleaned up). Because consideration of this issue "deals with child custody and parenting time for defendant," and consideration of the issue is necessary for a proper determination of the case, this Court will overlook the issue of preservation. See *id*. at 522.

2. STANDARD OF REVIEW

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005), citing MCL 722.28. "Questions of law are reviewed for

clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017). Additionally, a trial court commits clear legal error if it fails to apply the proper legal framework. *Sulaica v Rometty*, 308 Mich App 568, 585; 866 NW2d 838 (2014).

This Court reviews a trial court's findings regarding a showing of proper cause, a change of circumstances, or the existence of an established custodial environment to determine whether the findings were against the great weight of the evidence. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings clearly preponderate in the opposite direction." *Id*. (quotation marks omitted). If a trial court "fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007) (cleaned up).

3. APPLICATION

A trial court may modify or amend its previous judgments or orders, including those addressing custody or parenting-time issues, "for proper cause shown or because of a change of circumstances." MCL 722.27(1)(c). Before doing so, a trial court "must first consider whether the proposed change would modify the established custodial environment." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). "The established custodial environment is the environment in which over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." *Id*. (quotation marks omitted), citing MCL 722.27(1)(c). "Whereas minor modifications that leave a party's parenting time essentially intact do not change a child's established custodial environment, significant changes do." *Lieberman*, 319 Mich App at 89-90 (cleaned up). If parenting-time adjustments "will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Pierron*, 486 Mich at 86. The trial court "shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). "It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1). "Whereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Shade v Wright*, 291 Mich App 17, 28-29; 805 NW2d 1 (2010).

In this case, we disagree with defendant's argument that the trial court's October 4, 2018 order modified the parenting-time arrangements provided in its June 23, 2017 order. Rather, the trial court's October 4, 2018 order reaffirmed the parenting-time arrangements provided in the June 23, 2017 order. Trial court orders "that leave a party's parenting time essentially intact do not change a child's established custodial environment." *Lieberman*, 319 Mich App at 89-90 (cleaned up). On the facts of this case, particularly when defendant did not request that the trial court do so, the trial court was not required to consider whether the resumption of the parties'

parenting-time schedule would modify an established-custodial environment or whether there was a showing of proper cause or a change in circumstances. We conclude that the trial court applied the proper legal framework to this parenting-time issue. We discern no palpable abuse of discretion and no trial court findings that were against the great weight of the evidence. Therefore, we affirm this order concerning the parties' parenting-time schedule. See *Pickering*, 268 Mich App at 5.

Affirmed.

/s/ Brock A. Swartzle
/s/ Michael J. Kelly
/s/ Jonathan Tukel