STATE OF MICHIGAN

COURT OF APPEALS

LEA-ANNE DAVIS,

Plaintiff/Cross-Defendant-Appellant,

v

BRIAN KEITH DAVIS,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
March 19, 2020

No. 351076
Shiawassee Circuit Court
Family Division
LC No. 2008-006615-DM

Before: O'BRIEN, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right the order changing primary physical custody of the parties' minor children to defendant. We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties divorced in 2010. The judgment of divorce granted joint legal custody of the two minor children to the parties, with plaintiff retaining primary physical custody. Pursuant to the judgment, defendant had parenting time on alternating weekends from 6:00 p.m. on Friday to 6:00 p.m. on Sunday,[1] every spring break from school, 10 days over Christmas break, and the last three weeks of June, all of July, and the first two weeks of August. During the summer period, plaintiff had parenting time on alternating weekends from 6:00 p.m. on Friday to 6:00 p.m. on Sunday. The party not exercising parenting time during the week had parenting time on Wednesday from 3:00 p.m. until 7:00 p.m. Defendant regularly exercised his parenting time, but when plaintiff moved approximately two hours away from defendant's home in Perry, defendant was unable to exercise his Wednesday parenting time because of his work schedule.

During a family getaway in August 2017, defendant noticed that his youngest daughter, then 12-year-old K, was not participating in activities and was spending a lot of time using her cell

[1] The custody order was later amended to change the weekend parenting time to 6:30 p.m. on Friday to 6:30 p.m. on Sunday to accommodate defendant's work schedule.

phone. Defendant requested to see K's cell phone and discovered that she was "sexting" with someone who was purportedly a 15-year-old boy in California. Defendant took away K's cell phone, and later told plaintiff about the inappropriate phone activity and that he did not approve of K having a cell phone with Internet access. He expressed concern that the person K was texting was an adult posing as a 15-year-old boy. Plaintiff refused defendant's request to provide him with the passcode to the cell phone so that he could determine the identity of the person K was communicating with. After defendant did not return K's cell phone, plaintiff provided K with a different cell phone.

K thereafter refused to attend parenting time with defendant, but the older daughter, A, continued to attend parenting-time visits. In late August 2017, plaintiff unilaterally changed the children's school district from Gobles schools to Portage schools. In response to plaintiff's unilateral decision, defendant, in September 2017, filed an ex parte motion with the family division of the circuit court seeking "full legal and sole physical custody" of the children. The trial court denied ex parte relief, but allowed the motion for a change of custody to proceed. In response, plaintiff filed a motion to change custody and parenting time. Plaintiff asserted that K was refusing to go to parenting time with defendant and that A wanted to spend more time at plaintiff's house during the summer because she wanted to have social interaction with her peers. Plaintiff requested that the court modify parenting time to eliminate defendant's parenting time with K and to provide that A would have parenting time with defendant on alternating weeks during summer vacation.

On January 9, 2018, the trial court held a *Vodvarka*[2] hearing on the competing motions for custody. The trial court concluded that the parties had demonstrated proper cause or a change in circumstances that would warrant an evidentiary hearing on the children's best interests. The trial court recognized that defendant had been denied approximately 140 days of parenting time with K and ordered plaintiff to comply with the parenting-time provision in the judgment of divorce.

Before the evidentiary hearing could be held, defendant filed an ex parte motion on November 13, 2018, to change custody and parenting time. He argued that the children were not safe in plaintiff's custody after then 13-year-old K stole plaintiff's car, cell phone, and purse, and drove as far as Iowa before being stopped while en route to California to see the person with whom she had been communicating with in August 2017. Defendant argued that plaintiff had allowed K to have a cell phone without monitoring its use and that K had continued to use the cell phone to communicate with the person that defendant had warned plaintiff about in August 2017. The court issued an ex parte order stating that the children would reside with defendant for 30 days and that plaintiff would have parenting time every other weekend from 10:00 a.m. Saturday until 5:00 p.m. Sunday. The order was extended by the trial court on an interim basis on December 17, 2018.

An evidentiary hearing spanning three days commenced on December 14, 2018, and concluded on March 15, 2019. At the hearing, the referee found that an established custodial environment existed with both parties and that the more exacting clear-and-convincing-evidence standard applied. After the hearing, the referee recommended that the parties retain joint legal

[2] *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003).

custody of the children, that plaintiff retain physical custody of A, and that defendant be awarded physical custody of K, with each parent having alternating parenting time with each child.

Defendant sought a de novo review of the referee's recommendation and the court conducted a short evidentiary hearing where it considered new evidence in the form of a written guardian ad litem (GAL) report that had been submitted after the evidentiary hearing. The trial court found that an established custodial environment existed with both parties. The trial court found that best-interest factors (a), (c), (e), and (f) favored both parties, that factors (d) and (i) slightly favored plaintiff, and that factors (b) and (h) slightly favored defendant. Under factor (*l*), the court found that the children needed clarity with respect to where they would be attending school in the fall. The court found that the remainder of the factors were inapplicable or favored neither party. The court found that plaintiff's disciplinary style was too lenient and that defendant's disciplinary style was too controlling, but concluded that defendant would have the opportunity to show whether he had "the ability to loosen the rope on these girls a little bit." The court awarded the parties joint legal custody, but modified the custody order to award the parties joint physical custody with defendant having primary physical custody of the children. The court ordered that the children attend Perry schools. The court awarded plaintiff parenting time every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday, as well as parenting time during the 2019 Thanksgiving and Christmas holidays. The court also gave the parties the opportunity, upon request, to review the custodial decision at the end of January 2020 "before the end of the first semester."

II. STANDARDS OF REVIEW

In a child custody dispute, "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." MCL 722.28. A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). Likewise, "[a] trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citation omitted). A trial court's discretionary rulings, such as custody decisions, are reviewed for an abuse of discretion. *Id*. In a child custody determination, an abuse of discretion occurs when "the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014). This Court reviews questions of law for clear legal error, which occurs when the trial court incorrectly chooses, interprets, or applies the law. *McIntosh*, 282 Mich App at 474.

Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citations omitted). In general, an error affects an individual's substantial rights if it "cause[s] prejudice, i.e., it affect[s] the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9.

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff argues that the trial court erroneously failed to make a determination, or place on the record any independent findings, with regard to whether an established custodial environment existed and the applicable burden of proof. Under MCL 722.27, the court is required to determine whether there is an established custodial environment before making any custody determination. MCL 722.27(1)(c) states that the circuit 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. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

See *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW 2d 77 (2009) (whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child's best interests); *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000) (the trial court must make a specific finding regarding the existence of an established custodial environment).

In this case, a referee was designated to hear the competing motions for a change in custody pursuant to MCL 552.507(2)(a) and MCR 3.215(B). The referee made a written report to the court containing a summary of the testimony, a statement of findings, and a recommended order pursuant to MCL 552.507(2)(c) and MCR 3.215(E)(1). The referee found that both parties had an established custodial environment and that the burden of proof was clear and convincing evidence.[3] The GAL also found that both parties had an established custodial environment.

A de novo hearing was held upon defendant's written request under MCL 552.507(4) and MCR 3.215(E)(4). It is apparent from the record that the trial court agreed with and chose to adopt the findings as set forth in the GAL's report.[4] The GAL found that an established custodial environment existed with both parents. There was no need for the trial court to have recited the GAL's finding from the bench. Plaintiff's suggestion that the trial court failed to *state* its finding is misplaced. Plaintiff seems to suggest that the trial court was required to make an independent finding of fact regarding the established custodial environment. However, the circuit court is not required to make independent findings of fact during a judicial hearing held after an objection to a referee's recommendation. See *Rivette v Rose-Molina*, 278 Mich App 327, 330; 750 NW2d 603

[3] Plaintiff did not object to the referee's report or recommended order and did not request a de novo hearing under MCL 552.507(4).

[4] In its findings from the bench, the trial court expressly noted when it did not agree with the GAL's finding.

(2008) (explaining that the circuit court may uphold a referee's custody recommendation without making any independent findings).

Because the circuit court found that an established custodial environment existed with both parties, neither plaintiff's nor defendant's established custodial environment could be disrupted except on a showing, by clear and convincing evidence, that such a disruption was in the children's best interests. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). Plaintiff argues that the trial court failed to state the applicable burden of proof on the record. By finding that an established custodial environment existed with both parties, it was apparent that the applicable burden of proof was clear and convincing evidence. The trial court's failure to explicitly state the applicable burden of proof on the record did not amount to error requiring reversal. Furthermore, plaintiff has failed to make any argument on appeal supported by court rule, statute, or caselaw that this error by the trial court was an error requiring reversal. Accordingly, the argument is abandoned. See *MOSES Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.").

IV. BEST-INTEREST FACTORS

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 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.

> (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.
>
> (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.]

Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor, and the failure to do so is usually reversible error. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007); *Rivette*, 278 Mich App at 329-330.

In this case, the referee's report and custody recommendation included an analysis of the best-interest factors. Similarly, the GAL's report included an in-depth analysis and meaningful consideration of the best-interest factors. The trial court generally agreed with the GAL's findings regarding the best-interest factors and adopted them as its own, supplementing the findings on the record and stating any disagreements that it had with the GAL's findings. Contrary to plaintiff's assertion, the trial court's findings are sufficient to allow appellate review.

Plaintiff argues there was not clear and convincing evidence to modify custody. The trial court found that two of the best-interest factors slightly favored defendant, two of the best-interest factors slightly favored plaintiff, and that the parties were equal on all of the other applicable best-interest factors. Plaintiff argues that the trial court's findings on the best-interest factors do not support its conclusion that defendant proved by clear and convincing evidence that it was in the children's best interests to modify the court's previous custody order.

Mathematical equality does not necessarily preclude a party from satisfying its clear-and-convincing burden of proof. *Heid v Aaasulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995). However, the quantitative results of a court's analysis of the best-interest factors may result in an "evidentiary standoff" in which a party cannot meet the clear-and-convincing standard required to change an existing custody arrangement. *Id*. Where the best-interest factors do not favor either party quantitatively, a party can satisfy a burden of clear and convincing evidence through its production of evidence qualitatively superior to the other evidence. *Id*. A court need not give equal weight to all the factors and may consider the relative weight of the factors as appropriate to the circumstances. *Sinicrop v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

Again, the trial court found that two factors slightly favored plaintiff, two factors slightly favored defendant, and that the rest of the factors were equal or inapplicable. The trial court found that the factors favoring plaintiff and the factors favoring defendant only slightly favored the respective party. The court ultimately concluded that the children's best interests warranted a change in physical custody—that is, joint physical custody with defendant having primary custody. The court found that plaintiff's approach to discipline was too loose for the children to develop and that the children needed a more disciplined environment. The court also found that defendant's approach to discipline was too controlling, but essentially found, without specific reference to the

children's best interests, that it would be in the children's best interests for defendant to have primary physical custody "if defendant could loosen the rope on these girls a bit."

Based on the trial court's findings, there is simply no reasonable or logical basis on which to conclude that defendant proved by clear and convincing evidence that it was in the children's best interests for custody to be modified. Clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks and citation omitted). While the trial court's quantitative determination of the best-interest factors—that two factors slightly favored defendant and two factors slightly favored plaintiff—was not dispositive, the trial court did not conclude that defendant carried his clear-and-convincing burden by producing qualitatively superior evidence, see *Heid*, 209 Mich App at 594, nor did it conclude that it was giving greater relative weight to the factors that favored defendant, see *Sinicrop*, 273 Mich App at 184. In short, the trial court found that two factors slightly favored each party and that the parties were equal on the other relevant factors, but then failed to in any way explain how these findings justified concluding that defendant proved by clear and convincing evidence that it was in the children's best interest to modify custody. Given the trial court's findings and explanation, no court could in good judgment conclude that defendant carried his burden of proving by clear and convincing evidence that it was in the children's best interests for the prior custody order to be modified. That is, the trial court's ruling in light of its findings and explanation "is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Butler*, 308 Mich App at 201. We therefore conclude that the trial court's decision to modify the custody order constituted a palpable abuse of discretion.[5]

V. NEW EVIDENCE AT THE DE NOVO REVIEW HEARING

Plaintiff argues that the trial court clearly erred by considering the GAL's report at the de novo review hearing because the evidence was inadmissible new evidence and she did not have the opportunity to question the GAL. Plaintiff did not object to the trial court's consideration of the report of the GAL at the de novo hearing and did not request to question the GAL. Thus, this issue is unpreserved.

In conducting a de novo hearing under MCR 3.512(F), the trial court is free to allow new evidence. See MCR 3.512(F)(2). In this case, the parties agreed to the appointment of a GAL and they were aware that a new GAL was being appointed following the final day of the evidentiary hearing. The court noted at the commencement of the de novo hearing on defendant's objection to the referee's report and custody recommendation that the GAL had submitted a report. Plaintiff did not raise an objection to the submission of the GAL's report, nor did she request to examine the GAL, who was present at the hearing. Plaintiff has not cited any authority in support of her

[5] Given our ruling, we need not address plaintiff's argument that the trial court's finding that factor (b) favored defendant was against the great weight of the evidence. Nor do we need to address plaintiff's challenges to the trial court's finding that the parties were equal with respect to best-interest factors (h), (j), and (k).

assertion that the trial court was not permitted to consider the GAL's report. Plaintiff has failed to show plain error affecting her substantial rights. *In re Utrera*, 281 Mich App at 8.

In sum, the trial court abused its discretion by changing the children's custodial environment without the attendant clear and convincing evidence presented to justify that decision. The trial court's order awarding the parties joint physical custody with primary physical custody to defendant is reversed. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher