STATE OF MICHIGAN

COURT OF APPEALS

ALYSIA MEDINA,

Plaintiff-Appellant,

v

SERGIO MEDRANO,

Defendant-Appellee.

UNPUBLISHED
April 16, 2020

No. 350487
Ionia Circuit Court
LC No. 2011-028698-DP

Before: CAVANAGH, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Following a Child Protective Services (CPS) order removing their son, AM, from plaintiff-mother's care, defendant-father successfully petitioned to change the custodial arrangement so he had sole legal and physical custody. Mother appeals, contending that the trial court failed to make a threshold finding of proper cause or a change of circumstances before proceeding to an evidentiary hearing on father's motion, abused its discretion by giving the Friend of the Court (FOC) referee recommendation immediate effect, erred by refusing to interview the minor child, erroneously limited the scope of the de novo hearing, and did not properly review the referee's best-interest findings. While most of these challenges lack merit, the trial court did fail in its duty to independently address each statutory factor underlying its best-interest determination. Accordingly, we must remand for a new de novo hearing.

I. BACKGROUND

Mother and father were never married; AM was born in 2009. In 2011, mother filed a custody action against father. An order of filiation was entered, but the court did not order father to pay child support as he was in prison at that time. Given father's imprisonment, the court awarded mother sole physical custody. Although the two were no longer romantically involved, mother would bring young AM to the prison to visit father so they could develop a father-son bond.

In August 2016, CPS removed AM and his two younger half-siblings from mother's care due to domestic violence perpetrated by mother's boyfriend in the children's presence. During the CPS proceeding, both parents participated in the Intensive Neglect Services Program in Ingham

County. Mother took parenting classes. And both parents were ordered to submit to drug screens. Father missed many tests and tested positive for cocaine at others. Mother missed the vast majority of her tests, but tested negative on the rare occasions that she participated.

During the CPS proceedings, AM's siblings were placed with their fathers. AM was eventually placed with his paternal grandmother and then with father. Since that time, AM has lived primarily with father, his new wife, and her four children from a previous relationship. Mother was awarded parenting time every Tuesday immediately after school until Wednesday evening, and every Friday immediately after school until 10:00 a.m. on Sunday.

Father ultimately filed the current motion to change custody in the family court matter, which the court waited to address until the CPS proceeding was closed. A two-day hearing was held before an FOC referee. The CPS worker who oversaw the juvenile court matter, AM's therapist, the child's maternal grandmother, and father testified on the first day of the hearing. Mother's counsel indicated that only mother intended to testify and she would present no additional witnesses. As the day had run long, the referee scheduled a second hearing day. Unfortunately, mother's counsel placed the wrong time in her calendar and neither mother nor her counsel appeared on the second day. The referee proceeded in mother's absence and took testimony from defendant and his wife.

The FOC referee issued a recommendation on February 1, 2019. The referee determined that CPS's removal of AM from mother's home amounted to a change of circumstances or proper cause warranting reconsideration of the standing custody order. The referee further found that AM had an established custodial environment with both parents and therefore father was required to prove by clear and convincing evidence that a change would be in AM's best interests. After reviewing the best-interest factors of MCL 722.23, the referee concluded that granting father sole legal and physical custody would be in the child's best interests. However, the referee recommended that mother have parenting time to be scheduled by the parties' mutual agreement.

Ten days later, the court adopted the FOC recommendation as follows: "Pursuant to 2004 PA 210, IT IS ORDERED that the terms of the Referee Recommendation are hereby adopted as an Order of this Court and shall become a continuing Order of this Court provided no written objection is filed with the court clerk within 21 days after the date of mailing." Thereafter, mother objected to the FOC recommendation and requested a de novo hearing before the circuit court. The circuit court conducted an additional day of hearing, but limited mother to presenting her own testimony as she had indicated in the FOC that she was her only witness. The court then affirmed its earlier decision to adopt the FOC recommendation, and later denied mother's motion for reconsideration.[1]

Mother now appeals.

[1] We note that proceedings regarding mother's parenting time continued in the FOC and circuit court after this appeal was filed. The orders disposing of those matters are not part of the record on appeal.

II. STANDARDS OF REVIEW

"All custody orders must be affirmed on appeal unless the trial court committed a palpable abuse of discretion, made findings against the great weight of the evidence, or made a clear legal error." *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012). "The great weight of the evidence standard applies to all findings of fact. A trial court's findings . . . should be affirmed unless the evidence clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). Further, the "abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id*. Finally, this Court reviews questions of law for clear legal error. *Id*. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id*.

III. CHANGE OF CIRCUMSTANCES/PROPER CAUSE

Mother argues that the circuit court erred by failing to make a threshold finding of proper cause or a change of circumstances before the referee hearing considering father's motion to change custody. According to MCL 722.27(1)(c), a trial court may modify its previous child-custody judgments or orders "for proper cause shown or because of change of circumstances . . . ." "The court shall not modify or amend its previous judgment 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).

In *Mitchell*, 296 Mich App at 517-518, this Court rejected that a court must "establish proper cause or a change in circumstances in a separate proceeding before the hearing to modify custody." Rather, we held that it sufficed for a court to state its reasons for finding proper cause or a change in circumstances before embarking on its best-interest analysis in the same judgment. *Id*. at 518.

Here, at the onset of the findings of fact, the FOC referee indicated that it found proper cause or a change in circumstances warranting a reconsideration of the existing custody order because CPS had removed AM from mother's care and placed him with father. Only after stating this finding did the referee consider the child's established custodial environment and whether changing custody was in the child's best interests. Accordingly, neither the FOC referee nor the circuit court erred. And, we note, mother does not challenge the validity of the FOC referee's reasoning.

IV. IMMEDIATE EFFECT

As noted, 10 days after the referee entered a recommendation, the court issued the following order: "Pursuant to 2004 PA 210, IT IS ORDERED that the terms of the Referee Recommendation are hereby adopted as an Order of this Court and shall become a continuing Order of this Court provided no written objection is filed with the court clerk within 21 days after the date of mailing." The order also outlined the parties' rights to request a de novo hearing. Mother complains that father used this order to immediately deny her parenting time with AM. And the court's order violated MCR 3.215(G)(3), mother contends.

MCR 3.215(G) governs the "interim effect for referee's recommendation for an order" and provides:

> (1) Except as limited by subrules (G)(2) and (G)(3), the court may, by an administrative order or by an order in the case, provide that the referee's recommended order will take effect on an interim basis pending a judicial hearing. The court must provide notice that the referee's recommended order will be an interim order by including that notice under a separate heading in the referee's recommended order, or by an order adopting the referee's recommended order as an interim order.
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> (2) The court may not give interim effect to a referee's recommendation for any of the following orders:
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> (a) An order for incarceration;
>
> (b) An order for forfeiture of any property;
>
> (c) An order imposing costs, fines, or other sanctions.
>
> (3) The court may not, by administrative order, give interim effect to a referee's recommendation for the following types of orders:
>
> (a) An order under subrule (G)(2);
>
> (b) An order that changes a child's custody;
>
> (c) An order that changes a child's domicile;
>
> (d) An order that would render subsequent judicial consideration of the matter moot.

The circuit court clearly violated MCR 3.215(G)(3)(b) by giving interim effect to a referee recommendation that changed AM's custody. However, this error does not warrant relief, nor could any relief be granted that would remedy the error.

MCR 3.215(E)(1)(c) provides that "[i]f the [referee] recommendation is approved by the court and no written objection is filed with the court clerk within 21 days after service, the recommended order will become a final order." Mother filed objections and requested a hearing. The court then conducted a de novo hearing as provided in MCR 3.215(F). After that hearing, the court issued its findings of fact and legal conclusions and reaffirmed its adoption of the referee's recommendation. The court's final order reached the same conclusion as the interim order: it was in AM's best interests to grant father sole physical custody with limited parenting time for mother. The only relief that could be ordered—to conduct the de novo hearing—has already occurred.

V. INTERVIEW OF THE CHILD

MCL 722.23(i) provides that the court must consider "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference" when considering the best interests of a child in a child custody proceeding. At the de novo hearing, mother asked the court to interview AM to determine his preference. The court declined to do so and noted that the child's preference would not alter its decision. Mother now challenges that ruling.

AM was 10 years old at the time of the de novo hearing and was certainly old enough to form a reasonable preference. See *Maier v Maier*, 311 Mich App 218, 224; 874 NW2d 725 (2015) ("A child over the age of six is presumed to be capable of forming a reasonable preference."). This Court has found reversible error where the trial court failed to take into consideration the reasonable preferences of children over the age of six. See *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991) (finding reversible error where the court declined to consider the preferences of a six and nine-year-old child because it deemed them too young to form a reasonable preference). However, the court in this case did not deem AM too young to form a reasonable preference. Rather, the court determined that AM's stated preference would not have impacted its finding under the circumstances of this case. Specifically, CPS had removed AM from mother's care and placed him with father, and father presented evidence that mother had coached AM to make false allegations against him in the CPS case and might be improperly swayed to state a preference for mother. Accordingly, even if the court erred in failing to interview AM, the error did not affect the outcome of these proceedings.

VI. EVIDENCE AT DE NOVO HEARING

Before the de novo hearing, mother filed a motion to supplement and asked to present additional witnesses at the hearing. The court permitted mother an opportunity to testify but denied her request to present additional witnesses.

MCL 552.507 permits a de novo court hearing of any matter that was placed before an FOC referee. The statute provides, in relevant part:

> (4) The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.
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> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:
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> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
>
> (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented

to the referee and to supplement that evidence with evidence that could not have been presented to the referee.

(6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:

(a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.

(b) A new decision based only on evidence presented at the time of the de novo hearing.

(c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing. [MCL 552.507.]

In addition, when a party objects to a referee's findings and recommendations, the circuit court's review is guided by MCR 3.215(F)(2), which provides:

To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:

(a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;

(b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;

(c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;

(d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

Under the statute and the court rule, a court is only required to allow additional evidence at the de novo hearing if the parties were not "given a full opportunity to present and preserve important evidence at the referee hearing." MCL 552.507(5)(a). If the parties had that opportunity, the decision to admit additional evidence is within the court's discretion.

Here, the only evidence that the parties did not have an opportunity to present was mother's testimony. The court rectified that error by allowing mother to testify at the de novo hearing. At the referee hearing, despite being given a full opportunity to present her case, mother indicated that she would be her only witness. Accordingly, it was within the court's discretion to limit the presentation of any additional evidence.

The court did not abuse its discretion in limiting the additional evidence at the de novo hearing. Mother indicated her desire to present testimony from the father of one of her other children, another CPS worker, and the child's therapist. The child's therapist testified at the referee hearing and mother had an opportunity to cross-examine him. As for the other witnesses, mother was aware of their existence and the content of their potential testimony at the time of the referee hearing and yet decided against presenting these witnesses. The court rule permitted their exclusion.

Mother further complains that the court abused its discretion in limiting the testimony presented at the de novo hearing to events that occurred before the second day of the referee hearing, i.e., the day on which mother was supposed to testify. Even if this was error, we deem it harmless. It appears that mother sought to present evidence that since the court entered its interim order, father had refused her parenting time with AM. Mother did raise this issue at the de novo hearing. The trial court explained that the referee's recommendation allowed mother parenting time and instructed mother to file a motion to show cause if father was violating that order. Ultimately, the referee permitted parenting time and mother's challenge to father's conduct was not an objection to a finding made by the referee. Accordingly, mother was not permitted under MCL 552.507(5)(b) "to supplement that evidence with evidence that could not have been presented to the referee." In any event, mother did pursue the issue of parenting time in a separate motion before the court and therefore did receive her day in court on the issue.

VII. BEST INTERESTS

Within her challenge to the court's evidentiary limitations, mother complains that the court should not have adopted the referee's findings in relation to the best-interest factors of MCL 722.23. As noted, we review the court's factual findings in this regard under the great weight of the evidence standard. Under this standard, "[a] trial court's findings . . . should be affirmed unless the evidence clearly preponderates in the opposite direction." *Phillips*, 241 Mich App at 20.

MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (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.
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> (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. 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.

In the FOC recommendation, the referee determined that factor (a) favored both parties, factors (f) and (i) were neutral, and factors (b), (c), (d), (e), (g), (h), (j), and (k) favored father. The referee did not consider factor (*l*). Mother objected to the findings as to all factors, arguing that all of the factors either should favor her or were neutral.

After hearing mother's testimony and argument from both attorneys, the court reaffirmed its adoption of the referee recommendation. In relation to the best-interest factors, the court noted that the referee applied the correct burden of proof. The court indicated that pursuant to caselaw, it could "rely on the referee's finding as it relates to those factors." Mother's testimony did not "change[] anything as it relates to those findings." The court proceeded to specifically address the mother's objections regarding certain alleged errors.

First, the court noted mother's argument that the referee erroneously concluded that she abused illegal drugs. The court acknowledged mother's testimony that she no longer used drugs, but also recognized that she had missed many drug screens during the CPS proceedings. Although the court "hope[d]" that mother merely missed the tests and would not have tested positive, the court still found the referee's recommended custody award to be in the best interests of the child. The court noted that even if the referee erred in this regard, "it wouldn't change the overall outcome of the case." The court later returned to this issue and noted the CPS worker's testimony that missed drug screens are treated as positive tests in child protective proceedings. Mother missed those tests "at her own peril" and left the court questioning the veracity of her claim of sobriety.

With regard to the remaining factors the court reasoned:

> The one thing that I think is painfully obvious, if I'm viewing it through [mother's] position, is the Court's being asked to review a case and factors that are in the best interest of the minor child that was not close to begin with. The Court sat down in preparation for this I went through those factors after I read the transcript. And incorporating what I've heard here today, when I say it's not close, the referee ruled in favor of both. Applied A, if you will, factor 1, factor A, to both parties. There were two that were neutral, F and I. But then most importantly, when I say this is not close, the rest of the factors, B, C, D, E, G, H, J, and K, were all in favor of . . . father. That is an overwhelming course of events if you will.
>
> And again, *reviewing this as a reviewing Court*, did the referee make an error of fact or applying the facts that are outlined in the transcript to these 12 factors? I don't believe that the referee did get that wrong. . . .
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> * * *
>
> And then that leads us back to this idea that this was not a close case to begin with, in that the vast majority of these factors were found in favor of [father]. In fact, none, zero were found in favor of [mother].
>
> Therefore, the Court simply cannot find that an error of law or fact, or an application of the facts that were contained in this transcript or what the Court has heard here today was done in error. So, therefore I'm going to affirm the order of the [FOC]. [Emphasis added.]

On appeal, mother contends that the court misunderstood its role at the de novo hearing by considering itself a "reviewing court" and not making independent findings regarding each best-interest factor. We agree that the circuit court erred in this regard.

The Child Custody Act "places an affirmative obligation on the circuit court to 'declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with' " the act "whenever the court is required to adjudicate an action 'involving dispute of a minor child's custody.' " *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), citing MCL 722.24(1). This means that the circuit court, when reviewing a referee's recommendations, must independently "satisfy itself concerning the best interests of the children" under the best interest factors of MCL 722.23. *Harvey*, 470 Mich at 192-193.

Although the circuit court clearly subjected the referee hearing to a thorough review, we cannot hold that the court satisfied itself that the award of sole legal and physical custody to father was in AM's best interests. "To determine the best interests of children in custody cases, . . . [t]he trial court must consider and *explicitly state its findings* and conclusions with respect to each" statutory best interest factor. *Bowers*, 190 Mich App at 54-55 (emphasis added). See also *Dailey v Kloenhamer*, 291 Mich App 660, 667; 811 NW2d 501 (2011) ("When ruling on a custody motion, the circuit court must expressly evaluate each best interest factor . . . ."); *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008) ("In deciding a child custody matter, the trial court must evaluate each of the statutory factors pertaining to the best interest of the child

and must explicitly state its findings and conclusions regarding each factor."); *Constantini v Constantini*, 171 Mich App 466, 470; 430 NW2d 748 (1988) ("In determining an issue of child custody between parents, a court must consider and state its findings on each of the best-interest-of-the-child factors enumerated in the Child Custody Act."). If the circuit court fails to explicitly state its findings on each best-interest factor, we must reverse and remand for a new de novo hearing before the circuit court. *Rivette*, 278 Mich App at 330; *Bowers*, 190 Mich App at 56; *Constantini*, 171 Mich App at 470.

Here, the court made some general findings, but did not address the individual factors in a reviewable fashion. Accordingly, we must remand for a new de novo hearing, at which up-to-date information may be presented,[2] and after which specific findings of fact must be made in relation to each factor.

Given our resolution of this issue, we need not consider mother's challenge to the lower court's denial of her motion for reconsideration.

We remand for a new de novo hearing consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher

[2] See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).