STATE OF MICHIGAN

COURT OF APPEALS

DANYLE MARIE MURRAY,

Plaintiff-Appellant,

v

JUSTIN DANIEL MURRAY,

Defendant-Appellee.

UNPUBLISHED
April 23, 2020

No. 350802
Genesee Circuit Court
Family Division
LC No. 17-321573-DM

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

PER CURIAM.

Plaintiff, Danyle Marie Murray, appeals as of right the trial court's order modifying the parties' child-custody arrangement by awarding joint physical custody of the parties' minor child to plaintiff and defendant, Justin Daniel Murray, and modifying the parties' parenting time. We affirm.

I. PERTINENT FACTS

The parties divorced by consent judgment in February 2018. Under the divorce judgment, the parties shared joint legal custody and plaintiff had primary physical custody of their minor child, who has special needs.[1] In the divorce judgment, the parties agreed that if either relocated closer in distance to the other, such a move would constitute sufficient proper cause or change of circumstances for a party to petition the court to revisit the custody and parenting-time schedule. When the judgment of divorce was entered, plaintiff lived in Portage, Michigan, and defendant lived in Oscoda, Michigan. By January 2019, plaintiff had moved from Portage back to Burton, Michigan. In March 2019, defendant filed a motion requesting a modification of custody, parenting time, and school for the minor child. Defendant argued that the change of circumstances

[1] Doctors diagnosed the child with, among other things, Attention-Deficient/Hyperactivity Disorder and Oppositional Defiant disorder, and as being on the autism spectrum.

warranting a modification included plaintiff's relocation, "which the Judgment of Divorce clear [sic] states will constitute proper cause and change of circumstance."

At an evidentiary hearing held in July 2019, testimony established that plaintiff and the minor child had moved approximately 123 miles closer to defendant and that the child had changed schools after the move, in the middle of the school year. Plaintiff testified that defendant agreed to the move and to enrolling the child in Kearsley School, a school in the Flint area. After the child was not accepted into Kearsley School, plaintiff enrolled the child in a different school. Defendant testified that plaintiff unilaterally enrolled the child in that school. Defendant also testified that the school was under the impression that he had abandoned the child and plaintiff. Defendant testified that plaintiff did not communicate with him and that plaintiff did not provide him with the child's medical information. Defendant also testified that plaintiff withheld parenting time.

The court-appointed guardian ad litem (GAL) testified that she investigated the case and believed that plaintiff had withheld defendant's parenting time, and that plaintiff had a history of impeding the relationship between the child and defendant. The GAL also testified that the child was aggressive toward plaintiff and toward children at school, and that the child regressed into a baby-like state when he was with plaintiff. Plaintiff agreed that she had had some issues controlling the child. The GAL testified that the child did not have the same behavioral issues when with defendant. The GAL reported that the child needed structure, a schedule, and stability, and that moving the child to a different school in the middle of the school year did not promote stability. The GAL was also concerned that plaintiff made unilateral decisions despite the fact that the parties shared joint legal custody. She recommended that the parties share both joint legal and physical custody, and that the child live with defendant during the school year instead of with plaintiff.

On the basis of the parties' stipulation in the judgment of divorce and plaintiff's move to Burton, the court found that defendant had established the proper cause or change of circumstances required to bring a motion for change of custody and parenting time. The court found that an established custodial environment existed with both parties and that defendant proved by clear and convincing evidence that a change in physical custody was in the child's best interests. Accordingly, the trial court granted defendant's motion and ordered that the parties share joint legal and physical custody and that the child would live primarily with defendant during the school year. Plaintiff now appeals from that order.

II. ANALYSIS

A. STANDARD OF REVIEW

Under the Child Custody Act, MCL 722.21 *et seq*., "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] custody award should be affirmed unless it represents an abuse of discretion." *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889, 893 (1994). "An abuse of discretion exists when the trial court's decision 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "[Q]uestions of law are reviewed for 'clear legal error.' " *Fletcher*, 447 Mich at 881 (citation omitted). "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (quotation marks and citation omitted).

B. PROPER CAUSE OR CHANGE IN CIRCUMSTANCE

Plaintiff first argues that the trial court erred by failing to make findings regarding whether defendant had established by a preponderance of the evidence proper cause or change in circumstances necessary to warrant a modification of custody and parenting time. We disagree.

Before the trial court can consider a change-of-custody motion, the movant must prove by a preponderance of the evidence that either proper cause or a change of circumstances exists. *Vodvarka*, 259 Mich App at 509.

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. [*Id*. at 512.]

To "establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed." *Id*. at 513.

Plaintiff does not dispute that the parties agreed in the judgment of divorce that if either party relocated closer to the other, such a move would be considered sufficient proper cause or a change in circumstances for a party to petition the court to review the custody and parenting-time order. Rather, the gravamen of her argument is that, the parties' agreement notwithstanding, the trial court was required to make additional, independent findings regarding whether defendant proved by a preponderance of the evidence that proper cause or a change in circumstances existed to warrant revisiting the custody order. Plaintiff provides no argument or authority for her position that the parties' agreement in the judgment of divorce is insufficient to meet defendant's burden. Indeed, the judicial system favors and generally upholds stipulations. *Napora v Napora*, 159 Mich App 241, 246; 406 NW2d 197 (1986). Matters included in a judgment of divorce, regardless of "how much negotiated and ultimately agreed on by the parties before the entry of the judgment," are "a part of the court's judgment, 'presumably reached by [the court] only after profound deliberation and in the exercise of [its] traditional broad discretion . . . .' " *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994), quoting *Greene v. Greene*, 357 Mich 196, 202, 98 NW2d 519 (1959). Plaintiff has not argued that the stipulation should be set aside on the basis of "fraud, mistake or unconscionable advantage." See *Greaves v Greaves*, 148 Mich App 643, 646; 384 NW2d 830 (1986).

Nor has plaintiff suggested that by entering into the agreement regarding what constitutes a proper cause or change in circumstances, she and defendant bargained away the minor child's right that, where an established custodial environment is found, physical custody will not be

changed "absent clear and convincing evidence that the change is in the best interests of the child." See *Napora*, 159 Mich App at 246-247; see also *Phillips v Jordan*, 241 Mich App 17, 22; 614 NW2d 183 (2000) (holding that the trial court erred by entering a stipulated order to change custody "without making any independent determination regarding the best interests of the child pursuant to the Child Custody Act."). In the present case, after determining that defendant met his burden to prove the existence of proper cause or a change in circumstances, the trial court determined that the child had an established custodial environment with each party and then analyzed the best-interest factors found in MCL 722.23. Accordingly, plaintiff has failed to establish her claim of error.

C. BEST-INTEREST FACTORS

Plaintiff argues that the trial court's findings regarding several of the statutory factors used to determine the best interests of the child were against the great weight of the evidence. Again, we disagree.

"[A] court's ultimate finding regarding a particular factor is a factual finding that can be set aside if it is against the great weight of the evidence." *Fletcher*, 447 Mich at 881. Under the great-weight-of-the-evidence standard, this Court "should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Id.* at 878 (quotation marks and citation omitted). "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705.

The trial court found that an established custodial environment existed with both parties; therefore, the court could not modify the previous custody arrangement or issue a new custody order unless there was clear and convincing evidence that it was in the best interests of the child. MCL 722.27(1)(c). "Evidence is clear and convincing when it produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, 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, 410 (1995) (quotation marks, citation, and alterations omitted).

Under MCL 722.23, factors a court must consider in determining the best interests of the child 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. 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 weighing the best-interest factors, the court found that factors (d), (h), and (j) favored defendant, (g) slightly favored defendant, and (b) slightly favored plaintiff. The court indicated it heavily weighted factor (j). The court found that factors (a), (c), and (f) were equal and that factors (e) and (i) did not apply.

Plaintiff argues that the trial court's findings regarding factors (d), (g), (h), and (j) were against the great weight of the evidence. Factor (d) addresses the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The trial court found that plaintiff's move to Burton during the school year was significant, occurred within a short period of time after her move to Portage, and resulted in the child having attended two schools in the little less than a year since entry of the judgment of divorce. In addition, the trial court found plaintiff's testimony regarding her reasons for moving "self-serving" and found that plaintiff intentionally or unintentionally misconstrued facts regarding how events transpired. By contrast, the trial court found that defendant had moved to Michigan to be near his family, that the nature of his job provided stability because it is performed in few places in Michigan, and that defendant testified that he intended to stay where he was. The court further noted defendant's testimony that the minor child had made friends in the community during parenting-time visits. In addition, the GAL testified that the child needed consistency and stability and that changing schools was not conducive to stability. Based on these facts and the court's assessment of the witnesses' credibility, the court found that this factor slightly favored defendant.

Plaintiff argues that the trial court failed to consider that the child primarily resided with plaintiff and that it was improper for the court to determine that plaintiff's reason for moving was self-serving. However, the record shows that the trial court clearly considered that the child had lived with plaintiff since birth. To the extent plaintiff's arguments are based on the court's credibility determination, we defer to the court's assessment of witness credibility. *Berger*, 277 Mich App at 705. Plaintiff has failed to establish that the evidence clearly preponderated against the trial court's findings regarding factor (d).

Factor (g) addresses the mental and physical health of the parties involved. Regarding plaintiff, the trial court found that plaintiff's demeanor, her "misleading" answers, and her tendency to misconstrue or misrepresent facts called to mind some of the findings in her psychological evaluation. As a specific example, the trial court mentioned plaintiff's statement during her testimony that she was glad defendant had a psychological evaluation because now he could get the help he needed. Whereas plaintiff's answer suggested that defendant's engagement with mental health services was something new, begun in response to defendant's psychological evaluation, the court noted that the evaluation showed that defendant had been in treatment and taking medication prior to the evaluation, and interpreted plaintiff's testimony as a misperception or misrepresentation of the facts. The court concluded that factor (g) only slightly favored defendant and that it did not give much weight to it in making its decision.

Plaintiff argues that the court abused its discretion by considering psychological evaluations that were hearsay and not admitted into evidence when determining best-interest factor (g). In a proceeding such as this, we assume that the trial court knows the law and considered only the evidence properly before it. See *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007). Our review of the record supports this assumption. As the foregoing shows, although the trial court noted that plaintiff's testimony appeared to substantiate certain of the findings in her psychological evaluation, the record clearly shows that the trial court based its conclusions on facts and testimony presented during the evidentiary hearing. Thus, the record does not support plaintiff's assertion that the trial court relied heavily on her psychological evaluation when assessing factor (g).

Factor (h) addresses the home, school, and community record of the child. Plaintiff contends that the trial court's finding that this factor slightly favored defendant was against the great weight of the evidence because defendant had never been the primary caregiver of the child and the child had never attended school near defendant. Plaintiff asserts that, when it came to the child's school record, the trial court based its conclusion on "what it hoped would be best for the child." Regarding the child's school record, there is some merit to plaintiff's argument. The trial court opined that both parents were working hard, but that they could be making more progress if the child "was in one spot and not changing and not transferring and starting over and forming new relationships." The court referred to testimony indicating that plaintiff had removed the child from a good school district to one of inferior quality, and that defendant was looking to enroll the child in a school district of higher quality. The court found that the factor favored defendant slightly, "as it relates to looking forward . . . as far as proposed school."

However, the record also shows that the trial court heard testimony about the child's school record in Portage, specifically, about the number of times the child had been disciplined for bullying, hitting, throwing things at, or stabbing (with a pencil) other children. In addition, the trial court heard testimony regarding the behavioral issues the child had when with plaintiff, and

that these were lacking when the child was with defendant. Although plaintiff challenged such testimony, we defer to the trial court's credibility determinations. *Berger*, 277 Mich App at 705. The trial court also heard that the child had developed friendships in each parent's community. On this record, we cannot say that the trial court's judgment regarding factor (h) clearly preponderated in the opposite direction. Even if the trial court did err with regard to this factor, we cannot say that the error impacted the court's overall assessment of the best-interest factors, given the court's explanation that, even though it found that factor (h) slightly favored defendant, the factor was not a detriment to plaintiff.

The court weighed factor (j) heavily. See *Berger*, 277 Mich App at 705 (noting the trial court's discretion to "accord differing weight to the best-interest factors"). Factor (j) addresses "[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 . . . ." MCL 722.23(j). The court gave four reasons why it found that this factor favored defendant.

The court first pointed to plaintiff's use of and testimony about the parties' communication platform, Our Family Wizard. The court noted that plaintiff used the platform as a sword and a shield: she testified that defendant's complaints about not receiving certain medical information were untrue because she had put all the information defendant had requested on Our Family Wizard, while at the same time excusing her own lack of response, or her delayed response, to defendant's messages by saying that Our Family Wizard was unreliable, that she had known it was unreliable from the start, and that she had been in touch with the parent company about problems with the platform. The court found that information—particularly medical information—about the parties' child was too important to engage in this type of "tit for tat" behavior rather than finding a solution to any genuine problems with the technology, such as sending a text message in addition to posting on Our Family Wizard.

The court also found problematic plaintiff's response to defendant's request for medical information that defendant could get his own copies of the child's medical records, and that she was not going to do his work for him. The court found this particularly problematic given that plaintiff's response occurred just 22 days after the parties had stipulated in their judgment of divorce that all medical information would be put on Our Family Wizard, and also in light of plaintiff's testimony that she had given defendant everything he asked for and she did not know what else she was supposed to do. The court opined that plaintiff was doing somewhat better in conveying the child's medical information to defendant since defendant filed his motion for modification of custody.

In addition, the court appeared disturbed by plaintiff's attempt to micromanage defendant's parenting time by construing a provision in the judgment of divorce dictating the storage and handling of, and access to, the parties' firearms to prohibit the child's use of a BB gun and a bow and arrow given to him by paternal family members, and by implying that defendant had to clear with plaintiff with whom the child was spending time during defendant's parenting time. The court explained that the parents were assumed to be fit and capable of ensuring the child's wellbeing during their respective parenting time without seeking the approval of the other parent.

Lastly, the court found unsupported by the record plaintiff's concern that the GAL had spoken only with people favorable to defendant's position while neglecting to speak with people

favorable to her position. The court noted that the GAL had talked to both parties and to doctors, teachers, and school personnel. The court further found that plaintiff had not offered into evidence any information allegedly overlooked by the GAL. Thus, based on the evidence that plaintiff was interfering with defendant's right to information about the child's medical conditions and his school, and attempting to interfere with defendant's relationship with the child by interpreting the judgment of divorce in unintended ways and micromanaging defendant's parenting time, the court found that factor (j) favored defendant.

Our review of the record convinces us that the trial court's factual findings were not against the great weight of the evidence, *Fletcher*, 447 Mich at 881, and to the extent that the trial court's conclusions relied on its assessment of the witness's credibility, we see no reason not to defer to that assessment, see *Berger*, 277 Mich App at 705. In addition, the weight to give each of the factors was within the trial court's discretion. *Id.* Accordingly, the trial court did not abuse its discretion by awarding joint physical custody of the child to plaintiff and defendant and modifying parenting time. Absent findings against the great weight of the evidence, a palpable abuse of discretion, or a clear legal error on a major issue, we affirm the trial court's order. See MCL 722.28.

D. INADMISSIBLE HEARSAY

Lastly, plaintiff argues that the court relied on inadmissible hearsay to justify its decision to grant defendant's motion to modify custody and parenting time. Plaintiff raises two arguments regarding this issue, neither of which have merit.

First, plaintiff argues that the trial court relied heavily on the parties' psychological evaluations in reaching its conclusions, and that statements from the evaluations were inadmissible hearsay. As the discussion of the trial court's analysis of the best-interest factors shows, the trial court occasionally mentioned where its analysis of the facts and evidence echoed certain findings of the psychological evaluation. However, the record simply does not support plaintiff's claim that the trial court relied on the psychologist's conclusions when it made its factual determinations and weighed the best-interest factors.

Second, plaintiff argues that the trial court erred by admitting into evidence hearsay statements from the psychological evaluation in violation of her Sixth Amendment right of confrontation. "Hearsay" is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless an exception applies. MRE 802. In the present case, on cross-examination, defendant's attorney asked plaintiff about her earlier statement that she disagreed with some of what was in the psychological evaluation. In so doing, he had plaintiff read two of several highlighted portions of the evaluation into the record before asking her if she agreed with them. After plaintiff read the second statement into the record, her attorney objected on hearsay grounds. Contrary to the impression given by plaintiff's assertion in her brief to this Court that the trial court' "essentially overruled the objection," the trial court actually instructed defendant's counsel simply to ask plaintiff if she agreed with certain highlighted portions, without reading those portions into the record. Even if we assume for the sake of argument that the two statements read into the record were inadmissible hearsay, the only prejudice plaintiff claims therefrom is a violation of the Confrontation Clause. US Const, Am VI. This claim of error is without merit,

however, because the " '[t]he Confrontation Clause does not apply to civil proceedings.' " *Galien Twp Sch Dist v Dep't of Ed*, 310 Mich App 238, 244; 871 NW2d 382 (2015), quoting *Hinky Dinky Supermarket*, 261 Mich App 604, 607; 683 NW2d 759 (2004), citing *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993).[2]

In conclusion, we hold that under the circumstances presented here, the trial court did not err by accepting the parties' stipulation in their judgment of divorce what evidence would be sufficient to establish proper cause or a change in circumstances necessary to revisit a custody order. Nor were the trial court's findings regarding the best-interest factors against the great weight of the evidence. Finally, even if the trial court erred by admitting into evidence two hearsay statements from plaintiff's psychological evaluation, there is no evidence that plaintiff was prejudiced thereby. Nor was there any constitutional violation because the Sixth Amendment's Confrontation Clause does not apply to civil proceedings such as the one at bar.

Affirmed.

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

[2] Plaintiff relies on *In re Mackin*, unpublished per curiam opinion of the Court of Appeals, issued November 14, 2013 (Docket No. 316355), to contend that the trial court violated plaintiff's Sixth Amendment right to confrontation. Unpublished opinions of this Court have no precedential effect, but may be considered persuasive. MCR 7.215(C)(1). *Mackin* is not persuasive on this issue because termination of parental rights cases are quasi-criminal in nature, while the instant custody proceeding is clearly civil.