STATE OF MICHIGAN

COURT OF APPEALS

SAIF M. FATTEH,

Plaintiff-Appellee,

v

TARANNUM S. FATTEH,

Defendant-Appellant.

UNPUBLISHED
July 30, 2020

No. 351182
Ingham Circuit Court
Family Division
LC No. 16-003901-DM

Before: METER, P.J., and BECKERING and O'BRIEN, JJ.

PER CURIAM.

Defendant-mother appeals the trial court's order granting plaintiff-father's request to modify parenting time.[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E). For the reasons stated in this opinion, we affirm.

I. PERTINENT FACTS

In July 2017, plaintiff and defendant divorced by consent judgment. Under the judgment of divorce, the parties shared joint legal and physical custody of their three minor children. Plaintiff received parenting time on Tuesdays overnight, alternating Thursday overnight, and every other weekend, and the parties alternated weeks during the summer and alternated holidays.

On September 24, 2018, plaintiff filed a motion to modify parenting time in which he argued that there was a change in his living arrangements and work schedule such that parenting time should be modified to an alternating "week on/week off" schedule. Plaintiff also argued that there was proper cause to modify the parenting-time schedule because the "exchanges between the parties [were] often acrimonious and not in the best interests of the minor children." The matter

[1] Plaintiff challenges this Court's jurisdiction to hear this appeal as of right. To the extent that this Court lacks jurisdiction to hear this appeal as of right, we exercise our power to consider the appeal "as on leave granted in the interest of judicial economy." *Rains v Rains*, 301 Mich App 313, 320 n 2; 836 NW2d 709 (2013) (quotation marks and citation omitted).

was referred to the Friend of the Court (FOC), and the FOC did not recommend a modification of parenting time. Plaintiff filed objections to the FOC recommendation.

At the referee hearing, plaintiff testified that he believed defendant was intentionally seeking unnecessary medical treatment for the children. Defendant acknowledged that the children had 21 doctor appointments between January and March 2019, but she said that she believed the appointments were necessary. Plaintiff testified that defendant did not always inform him of the appointments, the correct time of the appointments, or when she rescheduled appointments. Defendant explained that she had told plaintiff incorrect times for appointments in the past by mistake.

Plaintiff testified that the parenting-time exchanges occurred late and that he believed defendant was at fault. Plaintiff also testified that defendant scheduled the children's extracurricular activities during his parenting time. Defendant agreed that the children were involved in a lot of extracurricular activities and that she assured the children that plaintiff would take them to the activities during his parenting time. However, defendant acknowledged that she did not talk to plaintiff about enrolling one of the children in tennis lessons and cello lessons before she did so. Still, defendant testified that she expected plaintiff to take the child to tennis tournaments that occurred during his parenting time. Plaintiff also testified that, besides what defendant admitted to, defendant scheduled an unnecessary eye appointment[2] and an orchestra trip[3] for one of the children during plaintiff's parenting time over winter break and spring break.

The referee found that there was an established custodial environment with both parties and that plaintiff established proper cause or change of circumstances based on the testimony of Doctor Heather Zak, the family's therapist, who testified that the current parenting schedule was fragmented and affected the children's health. However, the referee found that it was not in the children's best interests to modify the parenting schedule. The referee found that best-interest factors (a), (b), (c), (d), and (e) favored the parties equally, that factor (j) did not favor either party, that factor (h) slightly favored defendant-mother, and that factors (f), (g), and (k) were not relevant.

Plaintiff filed objections to the referee recommendation and order and requested a de novo hearing. Specifically, plaintiff argued that the referee's finding regarding best-interest factor (c) was "against the preponderance of the evidence and clearly erroneous" because he was a board-certified pediatrician and was in a better position to provide medical care and treatment for the children. Regarding best-interest factor (j), plaintiff argued that the referee "failed to give weight to several incidents" where defendant attempted to interfere with his parenting time.

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[2] Plaintiff had a vacation planned with the children for winter break. The day before their flight, defendant told plaintiff that one child needed to go to an emergency eye appointment to get a new pair of glasses because she misplaced a pair, but the child already had a backup pair of glasses. Defendant wanted plaintiff to delay their flight for this eye appointment.

[3] Defendant scheduled an orchestra trip for one child during plaintiff's spring break with the children. Plaintiff already made plans to take a trip with the children, so he had to tell the child that she could not go on the orchestra trip.

A de novo hearing was held in September 2019 and addressed plaintiff's objections to best-interest factors (c) and (j). The trial court disagreed with the referee's findings on best-interest factors (c) and (j) and found that those factors favored plaintiff; it affirmed the referee's other findings. The trial court stated that it was concerned about defendant's "excessive" and "inappropriate" medical care and that the numerous medical appointments were "extremely excessive" and not in the children's best interests. Further, the trial court found that it was clear that defendant was interfering with plaintiff's relationship with the children. The trial court granted plaintiff's request and modified the parenting-time schedule so that plaintiff and defendant had equal parenting time with alternating weeks.

Defendant now appeals.

II. DE NOVO HEARING

On appeal, defendant first argues that reversal is required because the trial court failed to comply with the statutory and court rule requirements for a de novo hearing by admitting that it only read "most" of the hearing transcript. We disagree.

Defendant failed to preserve this issue by objecting in the trial court, therefore our review is for plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). Requirements for plain error are "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). For an error to have affected a party's substantial rights, it must have been outcome-determinative. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

Under MCL 552.507(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:

> (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.

Subject to MCL 552.507(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(6).]

Defendant has not established that the trial court failed to comply with MCL 552.507(6). Plaintiff filed objections to the referee's findings as to best interest factors (c) and (j). The record reflects that the trial court reviewed the referee's recommendations and the hearing transcripts; the trial court stated its disagreement with the referee's findings and explained in detail why it disagreed with those findings by referring to evidence presented at the referee hearing. The trial court ultimately made an informed decision based on the arguments from both parties and all the necessary and relevant evidence pertaining to best interest factors (c) and (j). Further, even if the trial court erred, defendant has not adequately explained why the alleged error was outcome-determinative. Therefore, defendant's argument does not warrant appellate relief.

III. BEST-INTERESTS THRESHOLD

Next, defendant argues that the trial court erred when it affirmed the referee's determination that plaintiff had met the threshold required to modify parenting time because it applied the wrong legal standard. We disagree.

A party must meet one of two standards before the trial court may review the best-interest factors. The first standard, outlined by *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003), applies to a change in custody and states that in order to establish a change of circumstances, the moving party must prove that since the entry of the last custody order, the conditions surrounding the custody of the child have "materially changed" and have or could have a "significant effect on the child's well-being." The *Vodvarka* Court further stated that the evidence must demonstrate something more than normal life changes that occur during the life of a child, and that there must be some evidence that the material changes have had or will have an effect on the child. *Id.* at 513-514. Conversely, the second standard outlined by *Shade v Wright*, 291 Mich App 17, 30-31; 805 NW2d 1 (2010), states that if the change requested is just a change in parenting time, the moving party must prove that that since the entry of the last custody order there have been "normal life changes" in the child's life that warrant a parenting time modification.

Defendant argues that the trial court should have applied the *Vodvarka* "significant effect on the child's well-being" standard instead of the *Shade* "normal life changes" standard because plaintiff's requested modification altered custody and the established custodial environment. However, defendant explicitly agreed that plaintiff requested a modification of parenting time, not custody, and that the *Shade* legal standard applied to the threshold determination. At the referee hearing on March 20, 2019, the following exchange occurred between the referee and defendant's counsel:

Referee Mendez: Ms. Conway, do you agree that there is a joint established custodial environment in this case?

Ms. Conway [defendant's counsel]: I do.

> *Referee Mendez*: So you believe that this is really a request to modify parenting time not custody and that *Shade* applies to the proper cause change of circumstances.
>
> *Ms. Conway*: I do.

At the de novo hearing on September 24, 2019, plaintiff's counsel stated that the burden of proof for a parenting time change is "by a preponderance of the evidence that the requested change is in the best interest of the children," and defendant did not object. Defendant's counsel then referenced the ample testimony placed on the record as to plaintiff "requesting a change in parenting time" and stated that the referee found that plaintiff "did not establish by a preponderance of the evidence that it was in the best interest of the children for the parenting time to change." When the trial court was making its ruling, it stated that the burden of proof is preponderance of the evidence, and defendant again did not object. At no point during the de novo hearing did defendant's counsel suggest that the referee applied the wrong legal standard. Therefore, defendant has waived the issue as to which legal standard applied. See *Hodge v Parks*, 303 Mich App 552, 556; 844 NW2d 189 (2014) ("A party cannot stipulate with regard to a matter and then argue on appeal that the resulting action was erroneous.").[4]

IV. PREPONDERANCE-OF-THE-EVIDENCE STANDARD

Defendant argues that the trial court erred when it applied the preponderance-of-the-evidence standard to the best-interest factors because the proposed modification affected the children's established custodial environment. We disagree.

Defendant failed to argue that the proposed modification would affect the children's established custodial environment, and she failed to object to the legal standard she deems incorrect on appeal. Therefore, this issue is unpreserved. This Court reviews unpreserved issues for plain error affecting a party's substantial rights. *Rivette*, 278 Mich App at 328. Requirements for plain error are "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. For an error to have affected a party's substantial rights, it must have been outcome-determinative. *Grant*, 445 Mich at 552-553.

After a party seeking modification demonstrates proper cause or a change in circumstances, the trial court must determine if the proposed modification serves the child's best interests by analyzing the best-interest factors. *Lieberman*, 319 Mich App at 83.

> When a modification would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest. If the proposed change does not change the custodial environment, however, the burden is on the parent proposing the change to

[4] In her brief on appeal, defendant does not contend that the trial court erred in its application of the *Shade* standard, so we do not address the issue.

> establish, by a preponderance of the evidence, that the change is in the child's best interests. [*Shade*, 291 Mich App at 23 (citation omitted).]

"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." *Marik v Marik*, 325 Mich App 353, 361; 925 NW2d 885 (2018) (quotation marks and citations omitted). "If the required 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 v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010).

In support of her argument that the change in parenting time changed the children's custodial environment, defendant relies primarily on *Lieberman*. When the parties in *Lieberman* divorced, they were awarded joint legal custody, but the defendant-mother was awarded sole physical custody. *Lieberman*, 319 Mich App at 72. The trial court granted the plaintiff-father's motion to change parenting time and the children's schools and in doing so, reduced the children's overnights with the defendant-mother by 85 days. *Id.* at 70-71, 76. The *Lieberman* Court concluded that a 38% reduction of the primary custodian's overnights constituted a change in custody because it effectively changed primary physical custody of the children from the defendant to the plaintiff. *Id.* at 72, 85-86. Further, the *Lieberman* Court held that "[b]y proposing a reduction in the number of overnights the children spend with [the] defendant to a distinct minority of the year, [the] plaintiff was proposing a change in custody[.]" *Id*. at 86. Here, the parties' judgment of divorce awarded joint legal and physical custody to plaintiff and defendant, and plaintiff proposed that he and defendant equally share the number of overnights. Also, defendant agreed that there was a joint established custodial environment. While this Court in *Lieberman* determined that a "substantial modification of parenting time" *may* alter the established custodial environment, *id*. at 89, defendant in this case has not established a "substantial" modification of parenting time because the modification reduced defendant's parenting time by only approximately 18%, while in *Lieberman*, the defendant's parenting time decreased by approximately 40%. *Id*. at 90. In addition, unlike in *Lieberman*, the change in this case did not modify the children's schools. We therefore conclude that unlike in *Lieberman*, the change in parenting time in this case did not affect the children's custodial environment. And, because the proposed modification did not alter the established custodial environment, the trial court did not err when it applied the preponderance-of-the-evidence standard regarding the best-interest factors.[5]

[5] Defendant also argues that the trial court recognized that the change requested by plaintiff was really a change in custody because when making its ruling at the de novo hearing, the trial court stated, "I am going to change the custody arrangement, and I am going to make it equal, 50/50, so alternate weeks." Then the same language was included in the written order following the hearing: "The parties' custody arrangement is changed so that the parties shall equally share parenting time 50/50 with their three minor children and shall alternate parenting time on a week on/week off basis throughout the year." Defendant does not cite to any legal authority in support of her argument. The trial court clearly made a mistake in terminology when making its ruling from the bench, and that mistake was then reflected in the written order. The trial court properly

V. CHILDREN'S BEST INTERESTS

Lastly, defendant argues that the trial court's findings regarding best-interest factors (c) and (j) were against the great weight of the evidence. We disagree.

A party is not required to take any special steps to preserve a challenge to the findings made by a trial court sitting as the finder of fact. MCR 2.517(A)(7). Therefore, this issue is preserved.

"To expedite the resolution of a child custody dispute by prompt and final adjudication, 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.

> The great weight of the evidence standard applies to all findings of fact. 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. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. 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*, 319 Mich App at 77 (quotation marks and citations omitted).]

A trial court's finding is against the great weight of the evidence when it is so contrary to the weight of the evidence that it is unwarranted or is so plainly a miscarriage of justice that it would warrant a new trial. *Fletcher*, 447 Mich at 877-878. "[A] trial court's findings on each factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Id.* at 879 (quotation marks and citation omitted). In reviewing the findings, however, this Court should defer to the trial court's determination of credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). "A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

The trial court found that best-interest factor (c) favored plaintiff. Factor (c) refers to "[t]he 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." The record supports the findings made by the court. During the referee hearing, defendant testified that the children had 21 medical appointments between January

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applied the *Shade* standard and the parties agreed there was already an established custodial environment with both parents. It is clear from both the discussion throughout the hearing by the parties' and the trial court that everyone agreed that the trial court was making a change to parenting time. Moreover, the substance of the trial court's order was clearly that of a change in parenting time, and so, like this Court did in *Lieberman*, we look to the substantive effect of the trial court's order (which was a change in parenting time), regardless of the language that the trial court used.

and March 2019. Plaintiff, who is a doctor, testified that he believed defendant was exposing the children to excessive and unnecessary medical treatment and harmful radiation, and that the children left many of the appointments without a diagnosis. When defendant was asked whether a diagnosis was made after the various appointments, she often responded "no," but also said that she could not recall or that she was still waiting for the doctor to let her know. The trial court stated that defendant's actions were not in the children's best interests and characterized them as "excessive" and "inappropriate."[6] The trial court added, "it's even more confounding because they have a parent who is a doctor and could be relied upon to be assessing what their needs were and were not." Although defendant testified that she believed the medical appointments and treatments were necessary, it is not this Court's role to judge the credibility of witnesses, as that role is better left to the trial court. *Shann*, 293 Mich App at 305.

The trial court also found that best-interest factor (j) favored plaintiff. Factor (j) refers to "[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 or the child and the parents." MCL 722.23(j). The record supports the trial court's findings. Regarding medical appointments, plaintiff testified that defendant did not always inform him of the appointments or of the correct appointment times. Further, defendant testified that she had canceled an appointment with Dr. Zak without informing plaintiff, and that there may have been one or two other doctor appointments that she forgot to tell plaintiff about. Defendant also testified she mistakenly gave plaintiff the wrong time for a parent-teacher conference, even though she was on time for the conference.

In addition, plaintiff testified that defendant interfered with his parenting time. He testified that the parenting-time exchanges occurred late and that he believed it was defendant's fault. Plaintiff also testified that defendant scheduled one child to attend an orchestra trip and an unnecessary eye appointment during his parenting time. Further, defendant admitted that she did not talk to plaintiff about enrolling another child in tennis lessons despite the fact that she expected plaintiff to take the child to tennis tournaments during his parenting time. Additionally, Dr. Zak's testimony did not refute plaintiff's assertion that defendant was disrupting his relationship with the children.

Therefore, because the evidence does not clearly preponderate in the opposite direction, we affirm the trial court's best-interests determination. *Fletcher*, 447 Mich at 879.

Affirmed.

/s/ Patrick M. Meter
/s/ Jane M. Beckering
/s/ Colleen A. O'Brien

[6] The trial court referred defendant for a psychological evaluation due it its concern regarding the excessive medical care for the children. The trial court also noted that it was excessive for defendant to have taken the children to appointments to have their baby teeth removed.