

STATE OF MICHIGAN
COURT OF APPEALS

EMILY JEAN BRENNER,

Plaintiff-Appellant,

v

DANIEL TED KERKSTRA,

Defendant-Appellee.

UNPUBLISHED

September 17, 2020

No. 353255

Allegan Circuit Court

LC No. 07-042476-DC

Before: REDFORD, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting defendant sole legal and physical custody of the parties’ minor child. This Court previously remanded this case to the trial court to make specific findings regarding (1) the existence of proper cause or a change of circumstances, (2) with whom the child had an established custodial environment, and (3) whether a change in custody would change the child’s established custodial environment. This Court instructed the trial court to apply the proper legal framework and articulate the standard it applied when considering the statutory best-interest factors under MCL 722.23, and make specific findings regarding best-interest factor (h), MCL 722.23(h), concerning the child’s home, school, and community record. *Brenner v Kerkstra*, unpublished per curiam opinion of the Court of Appeals, issued July 23, 2019 (Docket No. 346078). For the reasons discussed in this opinion, we remand again for further proceedings.

I. FACTUAL BACKGROUND

This Court’s previous opinion summarized the facts as follows:

The parties were involved in a romantic relationship when the minor child who is the subject of these proceedings was born on February 9, 2006. The parties did not live together and were never married. Approximately one year after the birth of the minor child, the parties ended their relationship and defendant and

plaintiff both married other people. A prior court order established that plaintiff had sole legal and physical custody of the child and granted defendant “reasonable parenting time.”¹

¹ Although defendant testified that he was not aware that plaintiff had sole custody because the parties made joint decisions regarding the child, defendant acknowledged and signed the court order granting plaintiff custody.

This case arose from defendant’s motion to change custody as a result of a Children’s Protective Services (CPS) investigation regarding plaintiff’s care and custody of the child. On February 17, 2017, the Michigan State Police and CPS investigated an allegation that plaintiff’s husband at that time, Jacob Proper, possessed materials depicting sexually explicit content of children. While executing a search warrant at Proper and plaintiff’s house, Proper admitted to police officers that he posted pictures of minor children online. Proper also admitted that he sexually abused the minor child in this case for approximately two years. Finally, the police officers found visual evidence of Proper sodomizing the family dog, Sugar. The police officers and CPS told plaintiff to not allow Proper to have any contact with the minor child. On March 13, 2017, defendant notified CPS that, on March 8, 2017, he observed Proper at plaintiff’s house when the minor child was present. Defendant additionally reported to CPS that the child informed him that Proper picked him up from school after the search had occurred. Following a preliminary hearing, the Family Division of the Allegan Circuit Court removed the child from plaintiff and placed the child in defendant’s care and custody.

On December 15, 2017, defendant filed a motion to change custody and requested legal and physical custody of the minor child. Defendant alleged that plaintiff exposed the child to Proper in contravention of a no-contact order. Defendant argued that plaintiff’s conduct constituted a substantial change in circumstances and that it was not in the child’s best interests to reside with plaintiff. Finally, defendant argued that the child had an established custodial environment with him and that he was able to provide proper care and custody of the child. Defendant also filed a motion for an ex parte order to maintain the “status quo” regarding defendant’s primary physical custody of the child and the child’s enrollment at Hudsonville. The trial court granted defendant’s ex parte order pending the hearing on defendant’s motion to change custody. The trial court ordered that plaintiff have parenting time each Tuesday and Thursday from 4:00 p.m. to 7:00 p.m. and that the child remain enrolled in and attend classes at Hudsonville Christian School.

Following a series of hearings on the matter, the trial court granted the parties joint legal and physical custody of the child. [*Id.* at 1-2.]

After remand, the trial court made factual findings and issued a new opinion and order changing its previous order of joint legal and physical custody to sole legal and physical custody in favor of defendant. The trial court based its decision on the evidence that existed in the record

at the time of its previous ruling and did not seek further evidence from the parties. This appeal followed.

II. STANDARDS OF REVIEW

When reviewing a custody order, we review questions of law for clear legal error. *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). “A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.” *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017) (quotation marks and citation omitted). We review a trial court’s factual findings in child custody cases to determine whether they were against the great weight of the evidence. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). A trial court’s factual findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Id.* If a trial court fails to make a finding regarding the existence of a custodial environment or the best-interest factors, this Court will remand unless the record contains sufficient evidence for this Court to make its own determination of this issue by de novo review. *Rittershaus v Rittershaus*, 273 Mich App 462, 471, 475-476; 730 NW2d 262 (2007). We review for abuse of discretion a trial court’s custody award. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We review de novo challenges to this Court’s jurisdiction regarding the timeliness of a party’s claim of appeal. *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 132-133; 624 NW2d 197 (2000).

III. ANALYSIS

Plaintiff argues that the trial court erred in a number of ways. Before addressing her claims of error, however, we first address defendant’s argument that this Court does not have jurisdiction over plaintiff’s appeal.

This Court has jurisdiction of an appeal of right filed by an aggrieved party from a final order of the circuit court. MCR 7.203(A)(1). In the child custody context, a final order includes an order granting or denying a motion to change a minor’s legal or physical custody or domicile. MCR 7.202(6)(a)(iii); MCR 3.993(A). To timely vest this Court with jurisdiction of an appeal of right, an appellant must file a claim of appeal within 21 days after entry of the order appealed from, MCR 7.204(A)(1)(a), or within 21 days after the denial of a timely motion for relief from the order, if the motion was filed within the initial 21-day appeal period, MCR 7.204(A)(1)(b). “The time limit for an appeal of right is jurisdictional.” MCR 7.204(A).

Defendant argues that this Court lacks jurisdiction because plaintiff failed to timely appeal the trial court’s January 13, 2020 order. Defendant asserts that plaintiff’s appeal concerns the trial court’s March 3, 2020 order which is not a final order. The record, however, reflects that plaintiff is essentially appealing the trial court’s January 13, 2020 order changing custody, not the trial court’s March 3, 2020 order denying relief from its January 13, 2020 order. Given that the January 13, 2020 order changed custody of the parties’ minor child, that order is the relevant final order. Plaintiff moved for relief from the January 13, 2020 order on February 3, 2020, within the 21-day time limit specified under MCR 7.204(A)(1)(b). The trial court denied the motion on March 3, 2020, and plaintiff timely filed this claim of appeal 21 days later on March 24, 2020. Accordingly, plaintiff timely filed her claim of appeal which vested this Court with jurisdiction.

Next, we address plaintiff's arguments on appeal.¹ Plaintiff argues that the trial court erred by failing to consider up-to-date information before ordering the change of the child's established custodial environment. We agree.

In *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994), our Supreme Court directed that, "on remand, the court should consider up-to-date information, including the child['s] current and reasonable preferences, as well as the fact that the child[has] been living with [a party] during [an] appeal and any other changes in circumstances arising since the trial court's original custody order." Trial courts "may elicit testimony, interview children, and invoke other judicial resources to assure a thorough and careful evaluation of the child's best interests." *Id.* at 890. In *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996), our Supreme Court clarified its holding in *Fletcher* and instructed that the trial court "is to review the entire question of custody on remand" and "consider all the statutory factors and conduct whatever hearings or other proceedings are necessary to allow it to make an accurate decision concerning a custody arrangement that is in the best interests of [the child]."

In this case, the record reflects that the trial court made its decision without soliciting up-to-date information from the parties or holding an evidentiary hearing to ascertain whether additional information existed that the trial court should have considered before making its child custody decision. Under *Fletcher* and *Ireland*, on remand the trial court should have considered all of the statutory factors and conducted whatever hearings or other proceedings necessary to fully inform itself so that it could make an accurate decision concerning the minor child's custody arrangement to ensure that its decision served the child's best interests. The trial court erred by not seeking up-to-date information on remand and considering such information before making its child custody decision. The trial court should not have considered and relied only on the information available to it when it made its original determination.²

The record reflects that plaintiff sought to further inform the trial court of up-to-date information but the trial court declined to consider it and revisit its decision. Plaintiff asserts that the trial court had an obligation to conduct an evidentiary hearing to obtain up-to date information.

¹ Plaintiff does not make any substantive argument respecting her procedural and substantive challenge to the trial court's alleged violation of the Child Custody Act. "An appellant may not merely announce h[er] position and leave it to this Court to discover and rationalize the basis for h[er] claims, nor may [s]he give issues cursory treatment with little or no citation of supporting authority." *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). We, therefore, deem this issue abandoned. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) ("[W]here a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.") (quotation marks and citation omitted).

² We acknowledge that this Court's previous opinion in this case directed the trial court to undertake specific actions on remand but that those instructions did not reference or incorporate the holdings of our Supreme Court's two binding opinions, *Fletcher* and *Ireland*, which require that, on remand in a child custody matter, the trial court must consider intervening events and evidence. To the extent that confusion resulted we clarify a trial court's duty on remand.

We are not convinced that *Fletcher* and *Ireland* dictate that a trial court must do so. A trial court has discretion to determine how it will inform itself of up-to date information, but it must so inform itself before making a final child custody decision on remand. The trial court failed to make a finding regarding the existence of a custodial environment or the best-interest factors based upon up-to-date information presented to the trial court, and the record lacks sufficient evidence properly admitted for this Court to make its own determination of this issue by de novo review. Therefore, we remand this matter once again so that the trial court may obtain and consider up-to-date information or changes that have occurred since the original custody order.

On remand, the trial court shall, in its discretion, either direct the parties to present up-to-date information and evidence through further submissions to the court or order the parties to appear and present such information and evidence at an evidentiary hearing. With such up-to-date information and evidence, the trial court shall make specific findings regarding the existence of a custodial environment and specific findings regarding the best-interest factors. The trial court shall also consider the parenting-time factors enumerated in MCL 722.27a(7) when granting custody of the child to plaintiff, defendant, or both.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ James Robert Redford
/s/ Jane M. Beckering
/s/ Michael J. Kelly