STATE OF MICHIGAN

COURT OF APPEALS

TIFFANIE JEANN EGAN,

Plaintiff-Appellee,

v

JAMES ROBERT EGAN,

Defendant-Appellant.

UNPUBLISHED
January 14, 2021

No. 353909
Calhoun Circuit Court
Family Division
LC No. 2018-001173-DM

Before: GADOLA, P.J., and BORELLO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion to change the minor children's school district. Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

The parties divorced in 2018. Their judgment of divorce provided that plaintiff would have primary physical custody and that the parties would have joint legal custody of the two minor children. Defendant was awarded parenting time as the parties could agree, or if they could not agree, under the following schedule: alternate weekends from after school on Thursday until Monday morning; Tuesdays from after school until 8:00 p.m.; and alternate Thursdays from after school until 8:00 p.m. Defendant had parenting time on alternate weeks during summer break, every even-numbered year for spring break, and half of Christmas break. The parties alternated holidays. The judgment of divorce stated that the children would continue to attend school in the Harper Creek school district but that if plaintiff were promoted at Meijer, she could ask the court for a change in schools.

In November 2019, plaintiff filed a motion for a change in schools on the basis that she had received a promotion at a different location within Meijer. Plaintiff requested that she and the children be allowed to move from her apartment in Battle Creek to live with her boyfriend in Howell, which was closer to where her new job would be located. Plaintiff argued that the move and change in school districts would be beneficial for the children primarily because she would be earning approximately $610 more per month. Plaintiff proposed that defendant receive an extra weekend of parenting time for every month that had five weekends, along with an extra week in

the summer. Defendant objected to the motion, arguing that although the relocation might improve plaintiff's life, it would remove the children from where they had lived for their entire life. Defendant stated that he had remarried and that although his wife lived in Grand Haven, he was renovating his new home in Battle Creek so the children did not have to change schools. Defendant argued that the elimination of his weekday parenting time would negatively impact his relationship with his children primarily because he would no longer be able to participate in the children's extracurricular activities.

Following an evidentiary hearing, the referee found that the proposed change in the parenting-time order would not alter the children's established custodial environment, which was with both parents, and that a change in schools and the accompanying modification in defendant's parenting time was in the children's best interests by a preponderance of the evidence. The referee recommended that plaintiff's motion be granted and that defendant receive parenting time every other weekend from Friday evening after school to Sunday evening, every fifth weekend of any month that has five weekends, and an extra weekend in the summer. Defendant filed an objection to the referee's findings and recommendations. Following an evidentiary hearing on defendant's objections, the trial court entered an order adopting the referee's findings and recommendations. This appeal followed.

II. CHANGE OF SCHOOL DISTRICT

A. STANDARD OF REVIEW

"[A]ll 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. Upon a finding of error, this Court should remand unless the error was harmless. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994).

Under MCL 722.27(1)(c), the party seeking to modify a child custody or a parenting-time order must first establish proper cause or change of circumstances. *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). Defendant does not challenge the referee's conclusion that plaintiff's potential promotion within Meijer constituted proper cause or change in circumstances. For parenting-time matters, if the proposed change does not alter the established custodial environment, a preponderance of the evidence must demonstrate that the change would be in the best interests of the child. *Id*. at 84. If the proposed change alters the established custodial environment and therefore amounts to a change in custody, there must be clear and convincing evidence that the change would be in the child's best interests. See *id*. at 83-84. "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.' " *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010), quoting MCL 722.27(1)(c).

1. BURDEN OF PROOF

Defendant argues that the referee's finding that the proposed change did not alter the children's custodial environment was against the great weight of the evidence and therefore

plaintiff was required to prove by clear and convincing evidence rather than a preponderance of the evidence that a change in schools and the accompanying change in the parenting-time order was in the children's best interests.

Defendant believes that the children's established custodial environment was altered because his parenting time was significantly reduced and because the "day-to-day role with his children [could not] simply be made up by adding an occasional fifth weekend or one week in the summer of parenting time." Although defendant received less parenting time under the trial court's final order than under the judgment of divorce, defendant testified that he was unable to dedicate the amount of time he would have liked to each child during his midweek parenting time because he had to balance his time with each child. Therefore, as the referee suggested, the increase in the frequency of overnights along with extra time during the summer would allow defendant to spend more meaningful, quality time with the children. Because the modification in parenting time would not change the children's established custodial environment, the referee properly applied a preponderance-of-the-evidence standard to the best-interests analysis. *Lieberman*, 319 Mich App at 84.

2. BEST-INTEREST AND PARENTING-TIME FACTORS

Next, defendant challenges the referee's finding that a change in schools and the accompanying modification in defendant's parenting time was in the children's best interests was not against the great weight of the evidence. "The best-interest factors in MCL 722.23 and the factors listed in [MCL 722.27a(7)] are relevant to determining a child's best interests." *Demski v Petlick*, 309 Mich App 404, 456; 873 NW2d 596 (2015). The factors in MCL 722.23 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.

The factors in MCL 722.27a(7) are:

(a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

In this case, the referee evaluated all 12 best-interest factors along with parenting-time factor (e). Defendant challenges the trial court's findings with respect to seven of the best-interest factors along with parenting-time factor (e). We review each challenge in turn.

The referee found that best-interest factor (c) weighed in favor of plaintiff on the basis that although the parties had sufficient income to provide for the children, plaintiff had a greater disposition to provide for the children. Defendant argues that this best-interest factor should have been neutral because he and plaintiff had the ability to provide for the children. However, this is precisely what the referee found, and defendant does not challenge the referee's finding that plaintiff had a greater disposition to provide the children with food, clothing, medical care, or other remedial care and other material needs. Therefore, defendant has failed to show that the referee erred by weighing best-interest factor (c) in favor of plaintiff.

The referee found that best-interest factor (d) weighed in favor of plaintiff on the basis that defendant exercised most of his overnights with the children at his wife's home in Grand Haven, that he had "fundamentally moved" to Grand Haven, and that the children had mostly been staying in plaintiff's home. These findings were not against the great weight of the evidence. Defendant testified that he and the children spent the night at his wife's home in Grand Haven on Fridays and Saturdays and that he slept at his wife's home in Grand Haven every night. Therefore, even if defendant did not intend to permanently move to Grand Haven, defendant's testimony supports the referee's findings that defendant exercised most of his overnights in Grand Haven and had moved there for all intents and purposes. Furthermore, best-interest factor (d) focuses on "[t]he length of time the child *has lived* in a stable, satisfactory environment, and *the desirability* of maintaining continuity." MCL 722.23 (emphasis added). Although defendant argues that best-interest factor (d) should have weighed in his favor because he was trying to maintain continuity by keeping his home in Battle Creek so the children would not have to change schools, defendant does not challenge the referee's finding that plaintiff provided a stable, satisfactory environment for the children. There was also no evidence that the children were not doing well in plaintiff's care. Therefore, although the move to Howell would require the children to change school districts, plaintiff provided the children with a stable, satisfactory environment, and there was no evidence to suggest that the move would impact her ability to continue to do so. Accordingly, the referee did not err by weighing best-interest factor (d) in favor of plaintiff.

With respect to best-interest factor (i), the referee found that the children were old enough to express a preference. The referee stated that he conducted *in-camera* interviews with the children and that to the extent that the children expressed a preference, they were "given the weight they merit." Although defendant argues that the trial court erred by failing to also conduct *in-camera* interviews with the children, he has abandoned this argument by failing to cite any authority to support his argument that the trial court was required to conduct a second interview. "An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority." *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015).

The referee found that best-interest factor (j) weighed in favor of plaintiff on the basis that although both parties showed "an admirable willingness and ability to facilitate the children's relationship with the other parent," defendant had moved to Grand Haven and was asking that

plaintiff be precluded from moving "due in part to the added inconvenience caused by his move." To the extent that the referee found that defendant's motivation for requesting that plaintiff be precluded from moving to Howell and changing the children's school district meant that defendant was less willing to facilitate and encourage a relationship between the children and plaintiff, we give due regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it, MCR 2.613(C), and we defer "to the trial court's determination of credibility," *Demski*, 309 Mich App at 445. Accordingly, on this record, the referee did not err by weighing best-interest factor (j) in favor of plaintiff.

The referee found that best-interest factor (*l*) favored plaintiff because of the nonmonetary benefit the children would receive if plaintiff accepted the promotion and because of the increase in overnights with the children would be more beneficial to defendant even though his day-to-day involvement with the children would be reduced. Defendant does not challenge the first consideration, i.e., the nonmonetary value of plaintiff's offered promotion. Rather, defendant argues that "[b]ecause of the significant parenting time reduction, it should cancel out any sort of advantage that children [had] seeing their mother climb the corporate ladder." Therefore, he argues that factor (*l*) should have favored neither party. Although defendant received less parenting time under the trial court's final order than he did under the judgment of divorce, as the referee stated, increasing the number of overnights would not only allow defendant to strengthen his relationship with the children, but also the overall relationship between the new blended family. Consequently, the referee did not err by weighing best-interest factor (*l*) in favor of plaintiff.

Next, we conclude that the referee committed legal error with respect to best-interest factor (e) because the referee found that there was "no evidence to indicate any impermanence with the family unit at either party's home," yet concluded that this factor weighed in favor of plaintiff. Nevertheless, the referee properly concluded that the best-interest factors favored plaintiff by a preponderance of the evidence. Therefore, despite the referee's error, this Court need not remand because this error was harmless. See *Fletcher*, 447 Mich at 882.

Finally, the referee found that parenting-time factor (e) slightly weighed in favor of plaintiff on the basis that the children were of a sufficient age in which travel was not "unduly burdensome" and that the travel may benefit them if they decided to obtain their driver's licenses. The parties' son had just turned 15 years old and the parties' daughter had just turned 12 years old at the time the referee entered his findings and recommendations. Contrary to defendant's assertion that there was no evidence the children were trying to obtain their driver's licenses, plaintiff suggested that their son would soon be enrolling in driver's education classes. Further, although defendant argues that the commute was objectively inconvenient because "children do not like commutes," he makes no argument that *the children* believed the commute was inconvenient. Therefore, the referee's finding that parenting-time factor (e) slightly weighed in favor of plaintiff was not against the great weight of the evidence.

III. CONCLUSION

In sum, because the established custodial environment was not altered by the change of school districts, the referee correctly applied the preponderance-of-the-evidence standard when reviewing the best-interest and parenting-time factors. Furthermore, the referee's decision to weigh best-interest factors (d), (i), (j), and (*l*) in favor of plaintiff was not against the great weight

of the evidence. And, although referee made a legal error by weighing best-interest factor (e) in favor of plaintiff, that error was harmless, so reversal is not warranted. Finally, because the referee did not err by finding that parenting-time factor (e) weighed slightly in favor of plaintiff, reversal is not warranted on that basis.

Affirmed.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Michael J. Kelly