

STATE OF MICHIGAN
COURT OF APPEALS

JARRID FAULKNER,

Plaintiff-Appellee,

v

BREANA CRUZ,

Defendant-Appellant.

UNPUBLISHED

January 28, 2021

No. 353906

Kent Circuit Court

LC No. 19-008822-DC

Before: SHAPIRO, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant, Breana Cruz, appeals as of right the trial court’s order granting the motion by plaintiff, Jarrid Faulkner, to change the legal and physical custody of the minor children. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

This case arises out of a custody dispute, which initially appeared before this Court because defendant challenged the trial court’s authority to decide custody, and this Court issued an opinion summarizing the underlying facts as follows:

Plaintiff and defendant have twin sons, but never married. On August 13, 2008, the Court of Common Pleas Juvenile Division in Montgomery County, Ohio established plaintiff as the legal father of the children and determined a child support schedule. On December 22, 2008, the Ohio court awarded plaintiff parenting time from Thursday to Sunday every third weekend of each month, two weeks of parenting time in the summer, and every other holiday. At that time, defendant resided in Ohio with the children and plaintiff resided in Michigan.

In 2010, defendant and the children moved to Michigan. For the next nine years, plaintiff and defendant ‘co-parented’ their children and resided in the same home in Michigan. The children attended school in Michigan and were involved in school activities. The children’s pediatrician and dentist were also located in Michigan.

In September 2019, defendant unilaterally moved to Ohio with the children, and enrolled the children in school there. On October 1, 2019, plaintiff filed a request with the Kent County (Michigan) Circuit Court to accept jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*, and for a child custody determination. Plaintiff also filed a motion requesting that the trial court accept jurisdiction, establish joint legal custody of the children, award plaintiff primary physical custody, and order that the children be returned to Michigan and be re-enrolled in school there. In response, defendant argued that jurisdiction was proper in Ohio, not Michigan.

After a hearing on the jurisdictional issue, the trial court contacted the Ohio court, and subsequently entered an October 20, 2019 order accepting jurisdiction. The court later held a hearing on the remaining issues raised in plaintiff's motion. On October 25, 2019, the trial court 'awarded joint legal and joint physical custody of the minor children,' granted plaintiff "extended parenting time with the minor children,' ordered 'that the minor children shall immediately be re-enrolled and attend Byron Center Public Schools,' restricted parenting time under the Hague Convention, and restricted the movement of the children's domicile to within a 100-mile radius. Defendant filed an objection to the transfer of jurisdiction with the Ohio court; that court entered an order on December 20, 2019 denying the objection and stating that it did not possess exclusive jurisdiction over the child custody dispute because the children had resided in Michigan for the previous 9 years. [*Faulkner v Cruz*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2020 (Docket No. 351409), pp 1-2.]

Defendant appealed the trial court's assumption of jurisdiction.¹ See *Faulkner*, unpub op at 1. However, the lower court proceedings continued, and after defendant refused to allow plaintiff to pick up the children and reenroll them in school in Michigan pursuant to the October 25, 2019 custody order, plaintiff requested that the trial court hold defendant in contempt. The trial court held a hearing on the matter, and defendant failed to attend, contending that the trial court did not have jurisdiction. At the hearing, plaintiff requested that the trial court issue a bench warrant for the arrest of defendant for failing to appear, and the trial court granted plaintiff's request. Shortly thereafter, Kent County Prosecutor's Office charged defendant with parental kidnapping, and defendant responded by issuing three subpoenas, one to the law firm of plaintiff's counsel, one to Kent County Prosecutor's Office, and one to the Wyoming Department of Public Safety for documents related to the charge. Plaintiff moved to quash defendant's subpoenas or for a protective order or both. Additionally, plaintiff moved to change custody and modify parenting time, specifically requesting that the trial court grant him sole legal and physical custody. The trial court held a hearing on plaintiff's motions, which defendant did not attend, and granted plaintiff's motion to quash. However, it declined to grant plaintiff a protective order. The trial court also found that there was proper cause or a change of circumstances to revisit custody. The trial court then held an evidentiary hearing during which plaintiff and his mother testified.

¹ On April 9, 2020, a panel of this Court affirmed the trial court's assumption of jurisdiction. *Faulkner*, unpub op at 1, 3.

Defendant failed to attend the hearing, and defense counsel failed to present any witnesses. The trial court then issued an oral opinion granting plaintiff sole legal and physical custody of the children and referring the issue of parenting time to the Kent County Friend of the Court. Defendant now appeals.

II. STANDARD OF REVIEW

In *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), this Court provided the relevant standards of review for custody appeals, which are as follows:

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. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878, 526 NW2d 889 (1994). An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. *Id.* Questions of law are reviewed for clear legal error. *Fletcher, supra*, 229 Mich App 24, citing MCL 722.28; MSA 25.312(8), and *Fletcher, supra*, 447 Mich 881. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher, supra*, 229 Mich App 24, citing *Fletcher, supra*, 447 Mich 881.

Additionally, we “review unpreserved issues for plain error.” *Demski v Petlick*, 309 Mich App 404, 426-427; 873 NW2d 596 (2015). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Id.* at 427 (quotation marks and citation omitted).

III. EVIDENTIARY HEARING

Defendant first argues that the trial court abused its discretion by prohibiting her from conducting discovery. We disagree.

The Michigan Court Rules provide guidance on conducting discovery. See MCR 2.300. For example, MCR 2.302(B)(1) provides general guidance on what a party may obtain while conducting discovery. Additionally, MCR 2.302(C)(1) permits trial courts to prohibit a party from conducting any discovery under certain conditions.

In this case, defendant mischaracterizes the record in support of her argument. After defendant subpoenaed the law firm of plaintiff's counsel, the Kent County Prosecutor's Office, and the Wyoming Department of Public Safety for documentation and communication between those entities regarding the parental kidnapping charge filed against her, plaintiff moved to quash the subpoenas or for a protective order against all discovery or both. Plaintiff contended that defendant issued the subpoenas in bad faith after being charged with parental kidnapping and that the documents requested were protected or irrelevant. The trial court granted plaintiff's motion to quash the three subpoenas and held that defendant “must purge herself of any outstanding findings of contempt of the Circuit Court as precondition for obtaining the relief that she seeks in these

subpoenas.” However, contrary to defendant’s claim on appeal, the trial court did not issue a general protective order preventing defendant from conducting discovery. The trial court specifically stated that “a protective order [was] not necessary in this case.” Therefore, the record indicates that defendant was free to conduct discovery outside of the subpoenas she issued. Additionally, the quashing of the subpoenas was only conditional, and the trial court was ultimately only able to quash two of the subpoenas because the Wyoming Department of Public Safety responded to its subpoena before the trial court had a chance to issue its ruling. Because defendant challenges the trial court’s nonexistent prohibition on all discovery, defendant’s argument must fail.

Defendant argues next that the trial court abused its discretion by prohibiting her from presenting witness testimony by telephone. We disagree.

MCR 3.210(A)(4) specifies that “[t]estimony must be taken in person, except the court may allow testimony to be taken by telephone in extraordinary circumstances, or under MCR 2.407.” In this case, nothing in the record supports defendant’s assertion that she ever requested or was denied an opportunity to have witnesses testify by telephone. The only time the record mentions any request regarding witnesses testifying by telephone was at the evidentiary hearing, when defense counsel asserted that the trial court denied her request to have witnesses testify by telephone. However, no formal or informal request appears in the record. Additionally, in defendant’s brief on appeal, when arguing that this issue is preserved for appeal, defendant fails to present a citation from the record that actually supports her contention. Defendant merely cites defense counsel’s assertion at the evidentiary hearing that defendant’s request to present witness testimony by telephone was denied. Additionally, defendant failed to provide any factual or legal authority in support of her argument that having witnesses from Ohio, including defendant, testify in Michigan qualified as a circumstance requiring testimony by telephone, nor did she evaluate the factors provided in MCR 2.407(C). See MCR 3.210(A)(4); MCR 2.407(C). See *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). Defendant alludes to the fact that presenting witness testimony by telephone was necessary because she was prohibited from conducting discovery and the trial court declined to appoint the children a lawyer-guardian ad litem. However, as stated earlier, defendant’s claim regarding discovery is meritless, and as discussed later, the trial court’s decision to not appoint the children a lawyer-guardian ad litem was not an abuse of discretion. Therefore, defendant’s argument must fail.

Defendant argues next that the trial court abused its discretion by declining to appoint the children a lawyer-guardian ad litem. We disagree.

The Child Custody Act of 1970, MCL 722.21 *et seq.*, governs most custody disputes in Michigan. See *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). MCL 722.24(2) provides that “[i]f, at any time in the proceeding, the court determines that the child’s best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child.” MCL 722.22(h) defines a “lawyer-guardian ad litem” as an attorney who “represents the child, and has the powers and duties, as set forth in section [MCL 722.24].” MCL 722.24(2) explains that “[a] lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in [MCL 712A.17d].” Additionally, MCL 722.24(3) provides that an appointed lawyer-guardian ad litem may “file a written report and

recommendation,” and the trial court may read and admit the report given certain requirements are met.

In this case, defendant contends that a lawyer-guardian ad litem was necessary to protect the children’s best interests because the trial court prevented defendant from calling witnesses and obtaining discovery. However, the trial court did not prevent defendant from calling witnesses at trial or conducting discovery, and defendant presents no other factual or legal authority in support of her argument. Furthermore, defendant did not request that the trial court appoint the children a lawyer-guardian ad litem until the evidentiary hearing, and defendant fails to explain how appointing a lawyer-guardian ad litem at that hearing, the last hearing in this case, would have given the lawyer-guardian ad litem time to properly represent the children. See MCL 722.24(3); MCL 712A.17d. Therefore, the trial court did not abuse its discretion by denying defendant’s request to appoint the children a lawyer-guardian ad litem.

IV. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Defendant argues next that there was not proper cause or a change of circumstances permitting the trial court to revisit custody. We disagree.

“MCL 722.27(1)(c) provides that if a child custody dispute has arisen from another action in the circuit court, the court may [m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (quotation marks and citation omitted; alteration in original). If the moving party does not prove that there is a proper cause or change of circumstances by a preponderance of the evidence, the trial court may not revisit custody. *Id.* at 508-509.

This Court defines “proper cause” as “one or more appropriate grounds that have or could have a significant effect on the child’s life to the extent that a reevaluation of the child’s custodial situation should be undertaken.” *Id.* at 511. “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. Additionally, this Court held that “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. The movant “must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child.” *Id.* at 513-514. Additionally, the determination must be “made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors.” *Id.* at 514.

“[E]vidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order.” *Id.* Therefore, a “movant cannot rely on facts that existed before entry of the custody order to establish a ‘change’ of circumstances.” *Id.* The same is not necessarily true for a finding of “proper cause.” *Id.* at 515. However, “a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which

they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order.” *Id.*

In this case, the trial court initially found that the proper cause or change of circumstances was defendant’s “complete unwillingness to abide by valid orders of the Court,” but the trial court later clarified that it was defendant’s “failure to abide by the Court’s order to return the children and allow plaintiff any contact with his children in furtherance of his desire to be a fully involved father figure to the boys.” Defendant contends that “failing to abide by court orders is precisely what this Court has held cannot constitute proper cause or a change of circumstances.” However, under MCL 722.23(j), trial courts consider “[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.” In this case, the record indicates that defendant was purposely keeping the children from plaintiff and interfering with the children’s relationship with plaintiff. Defendant prevented plaintiff from picking up the children and reenrolling them in school in Michigan on multiple occasions. Every time plaintiff tried to pick up the children, they were not at the home. Plaintiff also could not find them at school. Defendant failed to get plaintiff’s permission and failed to inform plaintiff about taking the children to a doctor in Ohio and about the children’s new medical conditions. Additionally, defendant refused to discuss the children with plaintiff, including their schooling and medical conditions. Furthermore, the record indicates that defendant may have prevented the children from attending school to keep plaintiff from the children. Defendant’s behaviors likely had “a significant effect on the child’s well-being to the extent that revisiting the custody order would be proper.” *Id.* at 512. Therefore, the trial court properly held that there was proper cause to warrant an evidentiary hearing and to revisit custody.

Additionally, the trial court’s finding that defendant’s behavior also constituted a change of circumstances was proper because the record indicates that defendant’s behavior, which likely materially changed “the conditions surrounding custody of the child[ren]” and significantly affected the children’s well-being, started occurring after the October 25, 2019 custody order. *Id.* at 513. After the trial court’s October 25, 2019 order, the children were diagnosed with two new medical conditions, they were removed from school in Ohio, and defendant failed to discuss either of those matters with plaintiff. Therefore, the record supports the trial court’s findings.

V. BEST-INTEREST FACTORS

Defendant argues next that the trial court abused its discretion by finding that there was clear and convincing evidence to award plaintiff sole legal and physical custody. We disagree.

“[I]f the moving party succeeds in making [the] threshold showing, the court must then determine if the child has an established custodial environment with one parent or both.” *Brausch v Brausch*, 283 Mich App 339, 355 n 6; 770 NW2d 77 (2009). “If an established custodial environment exists with either or both parents, the trial court must find clear and convincing evidence that a change in the established custodial environment is in the child’s best interests.” *Riemer v Johnson*, 311 Mich App 632, 641; 876 NW2d 279 (2015). “In determining whether a change of custody is in the best interests of a child, the best-interest factors set forth in MCL 722.23 are the appropriate measurement.” *Id.*

At the outset, we note that the trial court did not explicitly address the children's established custodial environment. Instead, after noting that plaintiff established proper cause or a change of circumstances, the trial court simply stated that the evidentiary standard was clear and convincing evidence. Because the trial court explicitly stated the evidentiary standard that it applied and it applied the highest evidentiary standard, the trial court's omission was harmless, and we analyze the trial court's findings regarding the children's best interests. Defendant specifically challenges the trial court's findings under MCL 722.23(b), (c), (d), (e), (g), (h), (j), (k), and (l).

Regarding MCL 722.23(b), trial courts consider "[t]he 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." The trial court properly weighed this factor in favor of plaintiff. At the evidentiary hearing, plaintiff testified about his ability to teach the children about responsibility and accountability. Additionally, he was the parent who disciplined the children because defendant struggled to do so. Defendant argues that the trial court improperly weighed this factor in favor of plaintiff simply because she violated various court orders throughout this case. However, the trial court properly explained that defendant's decision to keep the children from plaintiff indicated her inability to properly provide the children guidance.

Under MCL 722.23(c), trial courts consider "[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." Plaintiff testified that he was able to provide for the children. Plaintiff was employed full-time at his own business and had flexible hours. He also lived in a home that he owned for many years. Plaintiff was also still located near the children's pediatrician and dentist. It was unknown whether defendant was employed, but she had a history of being unable to maintain employment. Additionally, defendant took the children to a doctor who diagnosed the children with two conditions which were inconsistent with the children's medical history. Therefore, the trial court properly weighed this factor in favor of plaintiff.

Defendant argues that the lack of evidence surrounding this factor is unfair because she was prevented from presenting evidence and testimony at the evidentiary hearing in her favor. However, defendant's contention is meritless. The trial court declined to default defendant, gave defense counsel three hours at the evidentiary hearing to present her case, and indicated that it was expecting her to produce witnesses. However, defendant did not appear, defense counsel did not call her own witnesses, and the trial court had to analyze the evidence that plaintiff presented regarding defendant and himself.

Under MCL 722.23(d), trial courts consider "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." In this case, the children spent most of their lives living in Michigan, attending the same school district, and visiting the same pediatrician and dentist. They had friends and were active in sports. In Ohio, it was likely that the children lived with defendant's parents, but it was unclear what type of environment they lived in in Ohio. No one was ever home when plaintiff drove to Ohio to see the children or when law enforcement conducted welfare checks. However, the record does indicate that defendant removed the children from their school in Ohio because they developed anxiety and agoraphobia. Additionally, defendant, who was likely living with her parents, did not have a good relationship with her mother. Defendant again argues that this Court should reverse the trial court's

finding regarding this factor because the trial court prevented her from producing evidence to the contrary. However, defendant's assertion is meritless, and the trial court properly weighed this factor in favor of plaintiff.

We also affirm the trial court's findings regarding MCL 722.23(e). MCL 722.23(e) requires trial courts to consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." Plaintiff testified that he had a close relationship with his family, and his family lived nearby and were always willing to help him out with the children. He had also lived in the same area in the same home for many years and did not have plans to move. Additionally, although given an opportunity to present evidence regarding the permanence of the home defendant was staying at with the children, defendant failed to do so on her own volition. However, the record indicates that defendant was living with her parents in her parents' home. Defendant previously lived with her parents but eventually moved out because of her relationship with her mother. Therefore, the trial court properly weighed this factor in favor of plaintiff.

The trial court also properly weighed MCL 722.23(g) in favor of plaintiff. Under MCL 722.23(g), trial courts consider "[t]he mental and physical health of the parties involved." In this case, the trial court properly recognized that although plaintiff had previously had issues with alcohol and maybe even marijuana, both plaintiff and his mother testified that plaintiff had been sober since September 2019 and was working on getting his driver's license reinstated. See *McIntosh v McIntosh*, 282 Mich App 471, 480; 768 NW2d 325 (2009). However, the record indicates that defendant had an ongoing battle with depression during the time that she moved to Ohio that affected her ability to care for the children and maintain employment, and there was no indication that defendant had resolved her mental health issues after moving to Ohio with the children. Therefore, the trial court's finding was not against the great weight of evidence. See *Phillips*, 241 Mich App at 20.

Under MCL 722.23(h), trial courts consider the "home, school, and community record of the child." The trial court properly weighed this factor in favor of plaintiff. The record indicates that the children attended school in Byron Center until they moved to Ohio. Plaintiff testified that the children struggled with their attendance in Michigan because defendant struggled to get them to school. Plaintiff also testified that he supported the children by being involved in their schooling and discipline, and regarding the community record, plaintiff was involved with the children's sporting activities. However, the record indicates that after the children moved to Ohio and were diagnosed with anxiety and agoraphobia, the children were removed from school and received home instruction, which indicates that their community involvement was minimal. Additionally, even before they were removed from school, they had attendance issues at their school in Ohio. Furthermore, there was no evidence in the record regarding the children's home in Ohio except that every time plaintiff went to visit the children there, they were not home. Therefore, this Court properly weighed this factor in favor of plaintiff.

Under MCL 722.23(j), trial courts consider "[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." Contrary to defendant's argument, the trial court did not simply consider defendant's violation of its court order. Instead, it highlighted the impact of defendant's behavior on the children. The trial court properly noted that defendant was alienating the children from plaintiff. Plaintiff made multiple attempts to pick up the children and

bring them to Michigan, but during his attempts, he was unable to locate them at the home of defendant's parents or at their school in Ohio. Additionally, the record indicates that the children stopped communicating with plaintiff. Defendant also rarely replied to plaintiff's communication attempts to discuss the children, and defendant tried to exclude plaintiff from the children's schooling. Furthermore, plaintiff's mother testified that she no longer had contact with the children. However, plaintiff believed that defendant should remain in the children's lives. Therefore, the trial court properly weighed this factor.

Additionally, under MCL 722.23(k), trial courts consider domestic violence. In this case, the trial court properly determined that domestic violence was not an issue. Although defendant contended in her pleadings that plaintiff had emotionally and physically abused her, there was no evidence presented at the evidentiary hearing to support defendant's contention. In fact, plaintiff testified that he never physically abused defendant.

Finally, the trial court's findings regarding MCL 722.23(l) were proper. Under MCL 722.23(l), trial courts may consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." Contrary to defendant's argument on appeal, the trial court did not explicitly weigh this factor. The trial court simply commented on defendant's behavior and the circumstances surrounding the evidentiary hearing, which included the criminal charge against defendant, the trial court's contempt order, and defendant's nonappearance at the evidentiary hearing. See *McIntosh*, 282 Mich App at 482-483.

Therefore, given the circumstances and the evidence presented, the trial court did not abuse its discretion by finding clear and convincing evidence to award plaintiff sole legal and physical custody. See *id.* at 482.

VI. SANCTIONS

Finally, plaintiff requests that we sanction defendant for filing a vexatious appeal. However, we decline to do so. Plaintiff failed to request sanctions in the trial court and then subsequently raise the issue of sanctions in a cross-appeal. See *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005). Additionally, to the extent plaintiff was requesting appellate sanctions under MCR 7.216(C), plaintiff failed to properly move for sanctions under MCR 7.211(C)(8). See *id.*; MCR 7.211(C)(8).

Affirmed.

/s/ Douglas B. Shapiro
/s/ David H. Sawyer
/s/ Jane M. Beckering