STATE OF MICHIGAN

COURT OF APPEALS

JENNA LYNN LINDSAY, formerly known as JENNA LYNN VANWULFEN,

Plaintiff-Appellant/Cross-Appellee,

v

JASON BRASSFIELD,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
March 11, 2021

No. 354805
Livingston Circuit Court
Family Division
LC No. 12-046113-DC

Before: MURRAY, C.J., and M. J. KELLY and RICK, JJ.

PER CURIAM.

Plaintiff, Jenna Lindsay, formerly known as Jenna VanWulfen, appeals as of right an order denying her motion for a change of domicile[1] for the child she shares with defendant. Defendant, Jason Brassfield, cross-appeals from the same order, by way of which the court also denied his separate motion for a change of custody. We affirm in both appeals.

I. BASIC FACTS

Lindsay and Brassfield never married but initially lived together in Walled Lake. When their relationship ended, they were able, in 2013, to agree on custodial arrangements for AB, but relations between them turned highly acrimonious. Brassfield moved to Wayne, married, and had another daughter with his wife. Lindsay moved to her parents' home in Howell. Although the parties had joint legal custody of AB, Lindsay had primary physical custody, and AB began attending school in Howell. Lindsay eventually became engaged to a man from St. Joseph, and he placed her name on the deed of his St. Joseph home. In 2017, Lindsay filed a motion for a change of domicile, indicating that her parents were divorcing and that the Howell home, where she was living while in Howell, was being sold. The court denied the motion. Lindsay later married her fiancé and began splitting her time among her mother's condominium in Howell, her father's

[1] The currently used phrase is "change of legal residence," but this opinion employs the phrase used by the parties in their briefs.

apartment in Howell, and the home in St. Joseph. In 2019, she withheld AB from the first week of school in Howell and again filed a motion for a change of domicile, hoping to enroll AB in a school in St. Joseph. Brassfield countered with a motion to change primary physical custody of AB to him. A referee presided over a 2019 evidentiary on the motions. The referee recommended denying Lindsay's motion but granting Brassfield's. The trial court, after de novo review, denied both motions.

II. CHANGE OF DOMICILE

A. STANDARD OF REVIEW

Lindsay contends that the trial court erred by denying her motion for a change of domicile. "A trial court's determination on a request for a change of legal residence for a minor child is reviewed by this Court for an abuse of discretion and the trial court's findings are reviewed under the great weight of the evidence standard." *Grew v Knox*, 265 Mich App 333, 339; 694 NW2d 772 (2005).

B. ANALYSIS

In *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013), this Court stated:

> A motion for a change of domicile essentially requires a four-step approach. First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4) . . . support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence.

MCL 722.31(4) provides:

> (4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:
>
> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Lindsay challenges the court's findings regarding factors (a), (b), and (c). In discussing factor (a) and the home owned by Lindsay in St. Joseph, the court stated that it "should not allow [a] party to engineer [her] own hardship, and then grant that party relief from the rules so as to ease that hardship." The court added that testimony by AB's licensed professional counselor "very strongly supports a finding that the child will experience substantial distress and exacerbation of her adjustment disorder if she is removed from Howell and Howell schools, where all her friends, and some of her immediate family, are."

Based on the record before this Court, the court's findings on factor (a) were not against the great weight of the evidence. AB told her counselor that she was very adamant that she wanted to stay in the Howell schools. The counselor diagnosed AB with an adjustment disorder and stated that she had "a lot of anxiety or distress over adjusting to different situations." She recommended consistency in AB's schedule. In addition, moving to St. Joseph would take AB further away from her paternal grandmother, with whom she had a very close relationship. Moreover, while the change of domicile to St. Joseph would benefit Lindsay, see MCL 722.31(4)(a), the court's finding that Lindsay had engineered the hardship was supported by the record. Lindsay unilaterally "moved" herself to St. Joseph despite knowing that a court order existed prohibiting AB from living that far away. There is no basis for overturning the court's findings on factor (a).

For factor (b), the court stated that "both parents largely complied with the parenting time order" but added that because Lindsay had agreed to expand Brassfield's parenting time "just months before filing this emergency motion to change domicile" and then tried to unilaterally change AB's school, "it seems that [her] motion to change domicile is at least partly motivated by a desire to frustrate parenting time." The court's conclusion regarding factor (b) was not against the great weight of the evidence. Lindsay knew that the parties had joint legal custody of AB and knew that AB was not to reside in St. Joseph, yet she did not take AB to school in Howell for a week and did not consult with Brassfield before enrolling AB in the St. Joseph school.[2] Also,

[2] Lindsay argues that the fact that she enrolled AB in the St. Joseph school is balanced out by the alleged fact that Brassfield enrolled AB in a parochial school in Dearborn. But there was no evidence of this latter enrollment; Brassfield only testified that he was considering enrolling AB in this parochial school if he were to obtain primary physical custody of AB.

given the large distance between Wayne and St. Joseph, the move of AB to the St. Joseph school was likely to have an impact on Brassfield's ability to exercise his parenting time, especially his time on Mondays. In addition, Lindsay filed her change-of-domicile motion within eight months of Brassfield obtaining considerably more parenting time. Thus, the court's finding that there was at least a "part[ial] motivat[ion]" to interfere with Brassfield's parenting time was a reasonable inference from the evidence, especially in light of the extremely acrimonious relationship between the parties.

Regarding factor (c), the distance from Brassfield's home to St. Joseph supported the court's finding that a move to St. Joseph would necessarily impact his ability to participate in AB's events and appointments. And, although Lindsay asserts that Brassfield was not a particularly involved parent, substantial evidence indicated that he was, in fact, quite involved. Consequently, the court's findings were not against the great weight of the evidence.

In sum, Lindsay's challenges to the court's findings on factors (a), (b), and (c) are without merit, and Lindsay concedes that factors (d) and (e) were inapplicable. Given that no factor favored a change in domicile, the court's decision to deny Lindsay's motion was not an abuse of discretion. *Grew*, 265 Mich App at 339.

In challenging the court's denial of her motion to change domicile, Lindsay repeatedly contends that the court's decision placed her in an untenable position of having to travel between Howell and St. Joseph, but Lindsay herself caused this issue by trying to establish a residence in St. Joseph without obtaining prior court approval. Lindsay also makes arguments about some of the MCL 722.23 best-interests factors. But the court analyzed the best-interests factors in connection with Brassfield's motion to change custody—which was decided in Lindsay's favor—and *not* in connection with the motion to change domicile. Consequently, we will not analyze the best-interests factors in resolving the change-of-domicile issue. Finally, Lindsay's argument that the court somehow "changed custody" from St. Joseph to Howell is without merit. AB had been residing and attending school in Howell, and the court continued this arrangement so there was no change of custody from St. Joseph to Howell.[3]

II. CHANGE OF CUSTODY

A. STANDARD OF REVIEW

On cross appeal, Brassfield argues that the trial court erred by denying his motion for change of custody.

> We apply three standards of review in custody cases. 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

[3] Given our decision, we need not address Brassfield's alternative argument for affirmance, which is based on the alleged untimeliness of Lindsay's objections to the referee's recommendation. We note, at any rate, that the court acted within its discretion by finding "good cause" for the delay. See MCR 3.215(F)(1).

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. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (quotation marks and citations omitted.]

B. ANALYSIS

A parent seeking a custody change must show that the change is in the child's best interests. MCL 722.27(1)(c). If the modification would change the child's established custodial environment, the burden is on the moving parent to show by clear and convincing evidence that the modification is in the child's best interests. MCL 722.27(1)(c); *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010). Brassfield does not dispute that the clear-and-convincing standard of proof applied to his change-of-custody motion.

MCL 722.23 states:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (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.

Brassfield first complains that the trial court should have deferred to the referee's credibility findings. But the court conducted a de novo review. When reviewing an issue de novo, the reviewing court must "review the legal issue independently, without deference to the lower court." *In re Reliability Plans of Electric Utilities for 2017-2021*, 505 Mich 97, 118-119; 949 NW2d 73 (2020). Further, MCR 3.215(F)(2), which addresses the de-novo judicial hearing taking place after a referee hearing, provides:

(2) To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:

(a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;

(b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;

(c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;

(d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

In addition, MCL 552.507 states, in part:

(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.

(6) Subject to subsection (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.

See also *Dumm v Brodbeck*, 276 Mich App 460, 465-466; 740 NW2d 751 (2007) (stating that because the defendant did not seek to present new evidence or live testimony at the de-novo review, the trial court properly reviewed the Friend of the Court record and issued a proper order in reliance on the Friend of the Court's recommendation).

Here, there is no evidence that Brassfield sought to present new evidence or live testimony at the de novo hearing. Accordingly, the trial court was well within its rights to issue a *new decision* on the basis of the evidence introduced at the referee hearing. Given the filing of the instant appeal, this Court is now tasked with determining whether the *trial court's* findings were against the great weight of the evidence. *Vodvarka*, 259 Mich App at 507. Brassfield provides no support for his argument that it is the *referee's* findings that must be afforded deference. He cites *Harper v Harper*, 199 Mich App 409, 414; 502 NW2d 731 (1993), *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000), and *Fletcher v Fletcher*, 447 Mich 871, 890; 526 NW2d 889 (1994) (opinion of BRICKLEY, J.), but each of these cases mentions deferring to a trial court's assessment of credibility; they do not mention deferring to referees even after a trial court's makes a new decision upon de novo review.

Brassfield takes issue with the court's findings on factors (b), (c), and (d).[4] The court found that factor (b) weighed "slightly" in Lindsay's favor, stating that Brassfield was less involved with AB and that his excuse of being afraid of legal actions by Lindsay was not tenable. Brassfield complains that the court mentions personal-protection orders (PPOs) in its findings under this factor, but the court's purpose in mentioning the PPOs was to set forth that (1) Brassfield did not participate as much in AB's activities because he did not want to be around Lindsay; (2) Brassfield

[4] Brassfield raised factor (i) in his statement of questions presented for appeal but did not present an argument about it in the body of his primary brief. In such a situation, the issue is deemed abandoned. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Brassfield attempts to argue the issue in his reply brief; however, "[r]eply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Lawrence v Michigan Unemployment Ins Agency*, 320 Mich App 422, 443-444; 906 NW2d 482 (2017) (quotation marks and citation omitted). Because of the clear deficiencies in pleading, we do not address factor (i).

claimed that he was avoiding Lindsay because of his fear of legal actions; but (3) "this fear did not stop him from putting a tracker on [Lindsay's] husband's vehicle, which subsequently resulted in both her and her husband acquiring PPOs against [Brassfield]." Viewed in context, the court's mentioning of the PPOs was not improper.

Lindsay testified that she was the one to take AB to extracurricular activities. She also testified that Brassfield refused to accommodate AB's attending funerals and a wedding in Lindsay's family, and these are significant events in a child's life. Plaintiff added that she attended AB's parent-teacher conferences and school orientations and Brassfield did not. And, although Brassfield had attended some school concerts and other school events, Lindsay testified that he would leave the events early because he did not want to be around Lindsay. Brassfield said that he was afraid that Lindsay would lie and was afraid of what legal claims she might bring against him. This testimony supported the trial court's findings. It is true that there was also testimony that Brassfield was quite involved in AB's activities, but on balance, in light of the above-cited testimony, we cannot find that the court's findings on factor (b) were against the great weight of the evidence.

As for factor (c), the court found that Lindsay was favored because it was Lindsay who coordinated medical appointments and because Brassfield had been "dragging his feet" regarding AB's braces. Lindsay testified that she was the one to purchase material necessities such as clothes for AB and that she was the one to take AB to medical appointments and pick up her medications. An orthodontist had said that AB needed braces. According to Lindsay's testimony, Brassfield "didn't like what they said," wanted a second opinion, and made an appointment with a dentist that AB did not like. Lindsay testified that Brassfield had told her that "he was going to do a third consult" but had not made the appointment. All this testimony was adequate to support the court's findings on factor (c). Although Brassfield testified that he and Lindsay could not reach a decision about where to go for a third consultation regarding the braces, it still was not against the great weight of the evidence for the trial court to conclude that he was "dragging" out the process.

The court found that factor (d) was "a wash." Brassfield contends that the court should have found that this factor favored him and should not have relied on the possible change to the parochial school.[5] But Brassfield admits saying that "if granted custody the child would go to a private religious school in Dearborn." Factor (d) speaks to the "desirability of maintaining continuity," and AB's counselor spoke of AB's attachment to her Howell school. Accordingly, the court was within its rights to acknowledge, in the context of factor (d), that continuity would be disrupted if Brassfield's motion were to be granted. Brassfield contends that Howell schools are no longer an option for AB, but no such evidence was presented. Admittedly, Lindsay's living situation was much more in flux than Brassfield's. She was not sure where she would be living, whereas Brassfield had a long-term home. But given that AB was used to spending more time with Lindsay than with Brassfield and Brassfield intended to change AB's school, under the great-weight-of-the-evidence standard, we uphold the court's findings on factor (d).

The court concluded as follows regarding defendant's motion:

[5] See footnote 4, *supra*.

> [Brassfield] carries the burden of proving the change in custody is in the best interests of the child, by clear and convincing evidence. On review of the evidence presented and how that evidence fits into the statutory factors, it cannot be said that the change in custody substantially benefits the child. Instead, it appears that some evidence supports a change, and some evidence does not. It weighs heavily to this [c]ourt that [Lindsay] has been the primary custodian of the child for most of her life, and a change in custody that relegates [Lindsay] to a weekend and summer parent position represents a serious change for the child. [The counselor's] testimony shows that substantial change contributes to a downturn in the child's mental health. In light of the totality of the circumstances, this [c]ourt finds that the evidence presented slightly favors a change in custody, but does not "clearly and convincingly" serve the best interests of the child.

We cannot find that the court's custody decision was an abuse of discretion. *Vodvarka*, 259 Mich App at 507-508. It is unfortunate that Lindsay tried to circumvent court orders and owns a home far from Howell, but despite the unusual arrangement, it appears from the evidence as a whole that AB was doing quite well and was thriving in school. Significantly, the counselor opined it would be stressful to AB for Brassfield to obtain primary physical custody when right now he had approximately 40% custody. She said that "it would be very challenging and . . . stressful for [AB] to be separated from mom for so long since primarily she's with mom more of the time now."

As stated in *Maier v Maier*, 311 Mich App 218, 221; 874 NW2d 725 (2015), the definition of "abuse of discretion" means something different in child-custody cases as compared to other types of cases and involves determining whether "the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." (Quotation marks and citations omitted; brackets removed.) The court's decision does not meet this standard.

Brassfield next contends that the trial court incorrectly ruled that AB's established custodial environment was with plaintiff. Yet, because Brassfield concedes that the clear-and-convincing-evidence standard of proof applied to the trial court's custody decision, a resolution of whether the established custodial environment lies with both parents or with just Lindsay is not necessary to resolve the change-of-custody issue. See, e.g., *Kubicki v Sharpe*, 306 Mich App 525, 540-541; 858 NW2d 57 (2014). And, although Brassfield argues that this Court must evaluate the trial court's established-custodial-environment finding because the finding could impact further decisions in the case, this Court does not address issues that are not ripe. See, e.g., *People v Hart*, 129 Mich App 669, 674; 341 NW2d 864 (1983).

III. FRIVOLOUSNESS

A. STANDARD OF REVIEW

Brassfield argues that the court should have granted him sanctions because plaintiff's 2019 change-of-domicile motion was frivolous. A court's decision regarding whether to impose sanctions for a frivolous claim is reviewed for clear error. *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 730; 909 NW2d 890 (2017). A finding is clearly

erroneous if the reviewing court is left with a firm and definite conviction that the lower court made a mistake. *Id.*

B. ANALYSIS

MCR 1.109(E)(7) states that "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." MCR 2.625(A)(2) states, "In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." Relevant to this appeal, MCL 600.2591(3)(a)(*iii*) provides that an action is frivolous if it is devoid of legal merit.

Brassfield asserts that Lindsay's motion for change of domicile was devoid of arguable legal merit because nothing had changed from her similar 2017 motion—which was denied—aside from her having gotten married. He contends that this marriage was irrelevant to the change-of-domicile factors. He points out that in 2017, Lindsay was arguing about her living situation in Howell being in flux, as a result of her parents' divorce, and that a similar housing flux was at issue in 2019. However, Lindsay's marriage was arguably pertinent to change-of-domicile factor (a) ("[whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent"), see MCL 722.31(4)(a), because living as a *committed* nuclear family unit as a husband, wife, and child could conceivably improve the quality of Lindsay's and AB's lives. In addition, in 2017, the court noted that it did "not have any testimony" indicating that Lindsay's mother or father was not willing to cohabitate with Lindsay and AB. The Howell housing situation was a bit different from 2017 to 2019 because Lindsay testified in 2019 that her father's home was very small and that her mother did not want plaintiff and AB to live with her any longer. Accordingly, we conclude that the trial court did not clearly err by failing to grant sanctions on the basis of frivolousness.[6]

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Michelle M. Rick

[6] Brassfield contends that Lindsay presented no evidence on any of the change-of-domicile factors, but this is clearly inaccurate. Lindsay provided various reasons in support of moving AB to St. Joseph. She also testified about an employment opportunity in St. Joseph.