STATE OF MICHIGAN

COURT OF APPEALS

AMARETTA GRAY,

Plaintiff-Appellant,

v

THOMAS GRAY,

Defendant-Appellee.

UNPUBLISHED
December 20, 2016

No. 330929
Wayne Circuit Court
Family Division
LC No. 06-612136-DM

Before: K. F. KELLY, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

In 2015, the circuit court altered the parties' custodial arrangement with their son, BG, granting defendant-father physical custody and allowing plaintiff-mother parenting time on the weekends and school breaks only. Plaintiff complains that the court exhibited bias against her, refused to consider her proffered evidence, and erroneously "changed custody and parenting time" in the absence of "evidence" that a change was warranted. We discern no such errors and affirm.

I. BACKGROUND

BG was born in March 2005 to plaintiff and defendant. The couple divorced shortly thereafter. Plaintiff initially had sole physical custody of young BG, and defendant enjoyed parenting time two evenings during the week and one weekend overnight. Over time, however, plaintiff exhibited instability that ever increasingly impacted her child. Plaintiff ignored court orders and allowed unrelated romantic partners to live in her home. At least two were convicted sexual offenders. BG witnessed explosive arguments between his mother and her partners and was once accidentally injured in the interchange. At one point, plaintiff abused cocaine. Plaintiff had difficulty maintaining employment and following a 2014 eviction, moved frequently. Twice plaintiff permitted defendant to take physical custody of BG while she searched for employment and housing.

Other areas of concern included plaintiff's educational and medical neglect of BG. BG was described as an intelligent child who was placed in advanced classes. However, BG was tardy 19 times under plaintiff's watch during the 2013-2014 schoolyear. BG missed a field trip that plaintiff was scheduled to chaperone because of tardiness. Plaintiff did not ensure that BG brought home or completed homework and his grades began to suffer.

Plaintiff did not take BG for regular dental checkups or require him to consistently brush his teeth. She denied defendant parenting time on days that he scheduled dental appointments for the child. Plaintiff did not take BG to the doctor when he was ill and accused defendant of medical over-vigilance. On one such occasion, BG had a fever over 101 degrees. On another, the child was covered in flea bites from an uncurbed infestation in plaintiff's home. BG gained an unhealthy amount of weight as well because of his poor diet and lack of physical activity in plaintiff's home. Plaintiff also did not require BG to maintain his hygiene; the child often came to visitation dirty and in ill-fitting clothes.

Defendant, on the other hand, is purchasing his house and has lived there for three years. He and his current wife have known each other for eight years, have been married for more than five, and his current wife's daughter resides with them. In defendant's care, BG arrives at school in a timely fashion with homework complete. BG receives regular medical and dental care. In defendant's home, BG is required to maintain good hygiene, eat well, and participate in healthy activities. He gets along well with his stepmother and stepsister.

Over the years and in response to concerns regarding plaintiff's lifestyle, the circuit court entered a series of orders awarding defendant increasing amounts of parenting time. Finally, in 2015, the court awarded physical custody to defendant-father and granted parenting time to plaintiff-mother three weekends each month, with additional parenting time during school breaks. Plaintiff appeals this order.

II. STANDARD OF REVIEW

> Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A clear legal error occurs when the circuit court "incorrectly chooses, interprets, or applies the law . . . ." *Id*. at 881. [*Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014).]

We must affirm all custody orders on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). In reviewing the circuit court's factual findings regarding the best-interest factors, we must not "substitute [our] judgment . . . unless the factual determination clearly preponderates in the opposite direction." *Pierron*, 486 Mich at 85 (quotation marks and citation omitted). We are also bound to defer to the circuit court's assessment of witness credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

When faced with a request to change custody, the court must first determine whether the proponent has "established a change of circumstances or proper cause for a custodial change under MCL 722.27(1)(c)." *Kubicki*, 306 Mich App at 540, citing *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Proper cause exists if there is an appropriate ground for the court to take legal action—a ground that is relevant to at least one of the statutory

best interest factors and has a significant effect on the child's wellbeing. *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011). "Similarly, to establish a change of circumstances, the 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.*, quoting *Vodvarka*, 259 Mich App at 513.

Only if this threshold is met will the court consider whether the requested change in custody would alter the child's established custodial environment and whether such change would be in the child's best interests. *Kubicki*, 306 Mich App at 540. If the proposed modification would change the child's established custodial environment, it is incumbent upon the moving party to provide clear and convincing evidence that modification would be in the child's best interests. *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). If, on the other hand, modification would not alter the child's established custodial environment, the moving party need only prove that modification would be in the child's best interest by a preponderance of the evidence. *Pierron*, 486 Mich at 93.

III. BIAS/EVIDENTIARY CHALLENGES

We begin by addressing plaintiff's challenges to the manner in which these proceedings were handled. Plaintiff focuses on two points: defendant presented no evidence to support his position and the court denied plaintiff's attempts to present documentary evidence. In relation to the first point, plaintiff promotes the untenable position that testimony is not evidence. Defendant presented little documentation to support his claims, but he was not required to do more. Testimony is itself evidence. See *Black's Law Dictionary* (6th ed), p 1476 (defining "testimony" as "[e]vidence given by a competent witness under oath or affirmation, as distinguished from evidence derived from writings, and other sources"). Once presented, only the circuit court could assess the credibility and weigh the value of the testimony presented by the parties and their witnesses. *Shann*, 293 Mich App at 305. Accordingly, this challenge lacks merit.

Moreover, the record does not support that the court refused to consider plaintiff's evidence. Plaintiff came completely unprepared to the June 2, 2015 evidentiary hearing on defendant's motion to change custody. Plaintiff pleaded ignorance regarding the nature of the proceeding. The court retorted, "I told you that today was gonna be scheduled for a custody trial, and I told you [sic] needed to consider getting a lawyer to represent you." Defense counsel informed the court that plaintiff had not filed or served a witness or exhibit list. Plaintiff indicated that she had submitted all necessary documentary evidence during an evaluation before the Family Assessment, Mediation, and Education (FAME) Department. The court advised that documents presented to FAME were not made part of the court record. Accordingly, the court allowed plaintiff an opportunity that day to make copies of any evidence she wished to present and to provide copies to the defense and the court. Plaintiff apparently planned to make use of that opportunity as she confirmed the court's instructions regarding copying the documents before the lunch recess. However, she did not subsequently provide copies to the court, defendant, or defense counsel.

The hearing was continued on July 2. Plaintiff attempted to present BG's most recent report card to establish the improvement in his attendance record. The court stated that it

accepted as true plaintiff's testimony in this regard, making the documentary evidence unnecessary. Plaintiff presented a letter from her former landlord documenting that she remained in one residence from 2011 to 2014, contrary to the testimony of defendant and his second wife. The court admitted that letter into evidence. Plaintiff referenced her 2011 to 2013 drug test results and a 2014 Child Protective Services (CPS) report, but indicated that she failed to bring those documents to court, preventing their admission. Plaintiff also referred to BG's dental records and implied that she brought them to court. Despite the court's repeated prompts to submit any evidence plaintiff wished considered, plaintiff never provided the dental record to the court. Given this record, plaintiff's claims that the court "refused to review plaintiff's evidence," asserted it "did not have time" to consider plaintiff's evidence, and "often asked plaintiff for proof defending herself" but then "would not accept" the proof are not borne out.[1]

Plaintiff further argues that "[t]he court committed a clear error" by failing to ask defendant "why he did not take [plaintiff] every six months for [drug] testing" "if defendant was so convinced plaintiff was doing illicit drugs." Plaintiff accuses the court of "failing to allow [her] to ask [this question] at trial." We have combed the transcripts and found no indication that plaintiff ever tried to ask this question, let alone that the court barred her from doing so. But plaintiff did ask defendant's second wife to recount the number of drug tests in which plaintiff participated. And plaintiff was able to present her theory that defendant used the drug tests as a means of harassing her during her own direct testimony. As plaintiff was the opposing party, it was plaintiff's duty, not the court's, to ask these relevant questions. Ultimately, as these meritless evidentiary challenges are the sole focus of plaintiff's bias allegations, her bias claim must fail.

IV. CUSTODY DETERMINATION

Plaintiff does not challenge any of the circuit court's actual findings in the custody order. She does not challenge that BG had an established custodial environment with both parents. She does not specifically contend that defendant failed to establish proper cause or a change in circumstances meriting reconsideration of the custody arrangement. And she does not cite any statutory best interest factor or pose a different view of how the factors should have been weighed. Instead, as with her bias claim, plaintiff focuses on her meritless evidentiary challenges. We will consider the substance of the court's opinion and order.

We discern no error in the circuit court's conclusion that defendant met the threshold for reconsidering the custody arrangement. The court found that proper cause or a change in circumstances existed at the time defendant filed his motion: "Plaintiff's housing was unstable, she was unemployed, the child was tardy/missing an inordinate amount of school, has gained an unhealthy amount of weight and plaintiff has continually exposed her son to registered sex offenders." Plaintiff admitted that she lost her job and was evicted in 2014, leading to several months of instability. She did not contest that BG was often tardy or absent during the 2013-2014 schoolyear, but focused on how she had improved that record the following year. Plaintiff

[1] The court also agreed to let plaintiff call her mother despite that plaintiff had not identified her as a witness. Yet, plaintiff did not follow through.

did not deny that at least two of her former boyfriends were registered sex offenders, but contended that none of their crimes had been against children. And plaintiff presented no evidence or testimony to refute the claim of defendant and his second wife that BG had gained an unhealthy amount of weight.

The court also aptly determined that BG had an established custodial environment with both parents. Before the 2015 custody change, BG spent significant amounts of time with both parents and looked to both to fulfill his basic needs. Accordingly, we discern no error in this regard.

The circuit court held defendant to the clear and convincing evidence standard because it determined that limiting plaintiff's parenting time to non-school days would alter BG's established custodial environment. We do not necessarily agree that the change in custody would so affect the established custodial environment. In any event, plaintiff reaped the benefit of this potential error such that relief is unnecessary.

Finally, our review of the record reveals no error in the weighing of the best-interest factors requiring relief. When a court considers a custody motion, it must review and weigh the best-interest factors of MCL 722.23. Given plaintiff's lack of specificity in her arguments, we assume she does not challenge those factors which the court deemed equal or which weighed in her favor. But, the circuit court concluded that nine best-interest factors weighed in favor of granting defendant physical custody, specifically factors (b), (c), (d), (e), (f), (h), (j), and (*l*). We will consider those factors in turn.

MCL 722.23(b) requires a court to 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 record is clear that both parties love their son and have the capacity to give him affection. However, it was equally clear that defendant provided more guidance with respect to BG's education. Defendant scheduled regular meetings with BG's teachers to address BG's performance and ensured that BG arrived at school on time. Plaintiff testified that she valued BG's education and encouraged his participation in advance placement classes, but acknowledged that she was responsible for his poor attendance record during the 2013-2014 schoolyear. Plaintiff also admitted that she did not regularly ensure that BG brought assignments home and as a result, BG often did not complete his homework in her care. Given plaintiff's track record in relation to BG's academic career, the court's findings were not against the great weight of the evidence.

Under MCL 722.23(c), a court takes into account "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . ., and other material needs." Defendant owns a landscaping business and had financial difficulties that led him to file bankruptcy sometime after the parties divorced. He is obligated to pay child support to plaintiff, and was often in arrears. However, defendant testified that he was able to support his wife, stepdaughter, and BG. He often purchased BG new clothes when the child arrived for parenting time in garb he had outgrown. At the time of the evidentiary hearings, plaintiff was working as a waitress, but admitted that she had been fired from her previous employment. Plaintiff testified that she was forced to vacate her last residence because she could not afford to pay the rent after her termination. Plaintiff blamed her financial difficulties on defendant's failure to regularly and

timely pay child support. Plaintiff sought medical care for BG when she believed he was ill, but interfered with BG's routine medical care, particularly dental appointments. At one point, plaintiff actually cancelled BG's insurance through Medicaid to prevent defendant from taking BG to medical appointments she felt were unnecessary. Following that incident, defendant obtained private insurance for BG to ensure he would continue receiving routine medical treatment. Although we do not condone defendant's child support lapses, the overall record supports that defendant has the greater ability and history of providing for BG's material needs and medical and dental care. Accordingly, we cannot conclude that the evidence weighs against the court's conclusion that this factor favored defendant.

MCL 722.23(d) measures "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." Defendant has lived in the same house for three years. His second wife and stepdaughter have resided with defendant and BG for more than five years. Although plaintiff lived in the same apartment between 2011 and 2014, she left BG in defendant's care once in 2011 and again in 2014 because she lacked employment and housing for herself and her child. This evidence supports the circuit court's assessment of this factor.

MCL 722.23(e) requires consideration of "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." As already noted, defendant has lived in the same home with his wife and stepdaughter for an extended period. BG has his own room at defendant's house and enjoys a good relationship with his stepmother and stepsister. Plaintiff has only resided at her current residence since April 2014. Over the years, plaintiff has invited at least one boyfriend to live with her and BG, despite a court order barring overnight visits from unrelated individuals of the opposite sex. Although plaintiff testified that BG got along very well with one of her former boyfriends, she admitted that her relationship with another was volatile and that BG witnessed their disputes. The record evidence clearly supports the circuit court's conclusion that defendant's home provided a more permanent family unit.

MCL 722.23(f) weighs "[t]he moral fitness of the parties involved." In this regard, the court cited plaintiff's history of drug abuse and her romantic involvement with registered sex offenders. We agree with plaintiff that the circuit court gave her prior drug use inordinate weight. There is absolutely no evidence that plaintiff continued to use any drugs past 2011. Defendant conceded that he had no reason to believe plaintiff continued to use drugs.

Plaintiff admitted, however, that two of her former boyfriends were registered sex offenders, as well as a close family friend who was often in BG's company. Plaintiff opined that these individuals posed no threat to BG because their fourth-degree criminal sexual assault convictions involved what she considered minor offenses committed when the men were teenagers and not against children. When questioned further, plaintiff conceded that she was actually unaware of the factual basis for one boyfriend's conviction and only assumed it was a minor offense. The court could reasonably infer from this evidence that plaintiff does not always prioritize her role as a parent when it conflicts with her social life. Thus, although the circuit court should not have focused on plaintiff's historical drug use, we cannot conclude that the court's overall assessment was against the great weight of the evidence.

MCL 722.23(h) relates to "[t]he home, school, and community record of the child." Defendant testified at length about his involvement in BG's education and his concern about BG's recent difficulties in school. During the 2013-2014 school year, plaintiff brought BG late to school 19 times and defendant only once. Plaintiff explained that several tardies were caused when the school improperly locked the door between the first and second warning bells. As a result, the principal agreed to remove those tardies from BG's record. However, in making this argument plaintiff fails to recognize that the best remedy would have been to bring BG to school earlier. Both parties agreed that BG had fewer tardies during the 2014-2015 schoolyear.

Evidence also supported that BG's grades suffered because he had a habit of leaving his homework at school. Plaintiff admitted that BG left his materials at school several times when she picked him, but again shifted the blame. Plaintiff described that she did not have transportation for an extended period and had to rely on friends for rides. She failed to check BG's backpack at school to ensure he brought his homework because she did not want to delay her ride. Ultimately, plaintiff testified that BG sometimes prefers to do his homework at defendant's house. Defendant's current wife also noted that BG tries to complete more challenging assignments at defendant's home because he knows he will receive help there. The court's conclusion that factor (h) favored defendant was not against the great weight of the evidence.

Under MCL 722.23(j), a court considers "[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." Defendant has a history of talking to BG about court proceedings, although his wife noticed a positive change after defendant completed coparenting classes. Plaintiff, on the other hand, has a history of denying defendant parenting time and has, perhaps inadvertently, undermined BG's relationship with defendant. Plaintiff enables BG's fear of doctors by intervening when defendant tries to take BG for medical and dental appointments. Plaintiff's interference creates a divide between BG and defendant because it paints defendant as the "bad guy" for insisting that BG have regular medical and dental care. Plaintiff has also refused to participate in school functions with defendant, thereby leaving BG in the undesirable position of having to choose which parent to spend time with during his school activities. We discern no error in the court's weighing of this factor.

Under MCL 722.23(k), a court must take into account "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." There is no evidence that BG has been exposed to domestic violence in defendant's household. By contrast, plaintiff had a volatile relationship with her most recent boyfriend. The court found that "[a]t least one argument became physical." According to defendant and his current wife, BG reported that plaintiff threw objects during a recent argument with her exboyfriend. While it is unclear if plaintiff and her exboyfriend actually engaged in a physical abuse, plaintiff's actions during the fight can reasonably be characterized as "physical." More importantly, BG was inadvertently injured during this fight while plaintiff attempted to relocate her bed to another room. We again see no error.

Finally, under factor (*l*), the court considers "[a]ny other factor . . . relevant to a particular child custody dispute." MCL 722.23(*l*). The circuit court found that factor (*l*) favored defendant because plaintiff exposed BG to three registered sex offenders in recent years. Plaintiff did not

deny that she had romantic or social relationships with three registered sex offenders. As such, the court's finding was not against the great weight of the evidence. We acknowledge that the court also took this information into consideration under factor (f), essentially giving additional weight to plaintiff's questionable moral fitness as a parent. However, the court was free to "consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). In addition to exposing BG to these registered sex offenders, plaintiff seemed utterly unconcerned about the potential risks arising from her decisions, and a parent's inability to comprehend the significance of his or her behavior, or the effect it has on a child, is an appropriate consideration under factor (*l*). See *McIntosh v McIntosh*, 282 Mich App 471, 482-483; 768 NW2d 325 (2009).

In sum, it does not appear that the circuit court made findings of fact that were contrary to the great weight of the evidence. The vast majority of the evidence presented at the evidentiary hearing supported defendant's request for sole physical custody. Thus, the court did not abuse its discretion by granting defendant's motion.

V. OBJECTIONS TO PROPOSED ORDER

Finally, plaintiff complains that the circuit court improperly failed to review her objections to the custody order prepared by defense counsel. This claim lacks merit.

Pursuant to MCR 2.602(B)(3), when directed by the court, a party must prepare and submit an order consistent with the court's judgment. The other party may file objections "regarding the accuracy or completeness of the judgment." MCR 2.602(B)(3)(b). Plaintiff did not challenge the accuracy or completeness of defendant's proposed order; she contended that the circuit court erred in its judgment. Such concerns must be raised in a reconsideration motion or appeal, not through objections to a proposed order. As plaintiff did not seek reconsideration, the court had no basis to consider plaintiff's "objections."

We affirm.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro