STATE OF MICHIGAN

COURT OF APPEALS

JULIA WHITE,

Plaintiff-Appellant,

V

JASON TREZIL,

Defendant-Appellee.

UNPUBLISHED
May 14, 2020

No. 349855
Wayne Circuit Court
Family Division
LC No. 05-551871-DS

Before: JANSEN, P.J., and METER and CAMERON, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting the motion for a change of custody and modification of parenting time in favor of defendant. We affirm.

I. BACKGROUND

Plaintiff and defendant have three children together—ET, KT, and CT. Plaintiff and defendant's relationship ended in 2013. Following the end of their relationship, the trial court entered a consent order for custody granting plaintiff and defendant joint legal custody of the three children and defendant parenting time three weekends a month and every Wednesday night. On July 6, 2017, a consent order for custody was entered. The trial court ordered that plaintiff and defendant continue to have joint legal custody, defendant's parenting time with ET would be decided by ET's therapist, and defendant would have parenting time with KT and CT three consecutive weekends and one midweek dinner, defendant and plaintiff would alternate weeks during summer break, and defendant would get the first full week of summer break.

On August 2, 2018, defendant filed an emergency motion for change of custody and modification of parenting time. Defendant also requested that plaintiff submit to a psychological evaluation. Defendant contended that plaintiff had been living in Harrison Township, Michigan, with her boyfriend, Tyler Von Hargress, until Von Hargress kicked plaintiff and the children out his house. Plaintiff and the children then moved in with plaintiff's mother, Rhonda Loftin, in Jerome, Michigan. Defendant also contended that ET had attempted to commit suicide after an argument with Von Hargress, and ET had been sexually assaulted by plaintiff's intoxicated friend.

As support for defendant's motion, he attached a letter plaintiff wrote to Von Hargress, in which plaintiff expressed that she was suicidal and depressed, she felt unwanted and useless, and Von Hargress was a tyrant, controlled plaintiff's life, and made her serve him. Defendant also attached the affidavit of Loftin, in which she stated that she favored a change in parenting time, she was concerned for plaintiff's and the children's well-being in Von Hargress's house, and she was concerned about plaintiff's mental health.

Plaintiff filed a response, asserting that her mental health was stable, she and Von Hargress had worked on their relationship, and she never had any intention of anyone seeing the letter she wrote to Von Hargress. The trial court held a hearing and ordered plaintiff to submit to a psychological examination. Subsequently, an evidentiary hearing was held on defendant's motion to change custody and modify parenting time. The trial court granted defendant's motion, ordering that defendant have primary physical custody of KT and CT, ET live with Loftin, and plaintiff and defendant continue to share legal custody. This appeal follows.

II. DISCUSSION

Plaintiff argues that the trial court erred in granting defendant primary custody of KT and CT.[1] We disagree.

"All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue." *Lieberman v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017) (quotation marks and citation omitted; footnote omitted). As further explain in *Lieberman*:

> 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. 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. [*Id*. at 77 (quotation marks and citation omitted).]

"An abuse of discretion, for purposes of a child custody determination, exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014).

"The purposes of the Child Custody Act, MCL 722.21 *et seq*., are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Lieberman*, 319 Mich App at 78 (quotation marks and citation omitted). "A

[1] The trial court's analysis of the best-interest factors only pertained to KT and CT because the parties agreed that ET should live with Loftin.

trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances." *Brausch v Brausch*, 283 Mich App 339, 355; 770 NW2d 77 (2009). If a party fails to establish proper cause or a change in circumstances, the trial court may not hold a child custody hearing. *Id*. "[T]o establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court." *Lieberman*, 319 Mich App at 82 (quotation marks and citation omitted; alteration in original). "As is the case with a change of circumstances, [t]he 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*. (quotation marks and citation omitted; alteration in original). On appeal, plaintiff does not dispute that defendant met his threshold burden of proving proper cause or a change in circumstances.

Furthermore, "[a] court may not modify or amend a previous judgment or issue a new custody order that changes a child's established custodial environment 'unless there is presented clear and convincing evidence that it is in the best interest of the child.' " *Kubicki v Sharpe*, 306 Mich App 525, 540; 858 NW2d 57 (2014), quoting MCL 722.27(1)(c). "An established custodial environment exists 'if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort[.]' " *Lieberman*, 319 Mich App at 81, quoting MCL 722.27(1)(c). In the trial court, defendant conceded that the children had an established custodial environment with plaintiff, and that concession is not challenged on appeal. Thus, the only issue before this Court is whether the trial court properly found, by clear and convincing evidence, that it was in the best interests of KT and CT to change custody.

"In making a custody determination, a trial court is required to evaluate the best interests of the children under the 12 statutorily enumerated factors." *Kessler v Kessler*, 295 Mich App 54, 63; 811 NW2d 39 (2011). This Court "defer[s] to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Id*. at 64 (quotation marks and citation omitted). The best-interest factors are set forth in MCL 722.23, which provides:

> 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.

The trial court found that best-interest factor (b) favored defendant. Plaintiff argues that the trial court should have found that factor (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," was neutral because the children's guardian ad litem, Kathrine Zopf, testified that KT and CT had improved, Loftin no longer feared for the safety and well-being of plaintiff and the children, and plaintiff exaggerated the letter she wrote to Von Hargress.

The trial court found that both plaintiff and defendant demonstrated a capacity to give the children love, affection, and guidance. The trial court also found that plaintiff is not religious, but defendant appropriately provides religious education to the children. However, the trial court found that, in regard to providing guidance, plaintiff had not demonstrated good judgment as illustrated by the fact that she allowed the children to remain in a "disturbing" environment despite plaintiff's recognition of the environment. As support, the trial court found that, on one occasion, plaintiff allowed an intoxicated adult male friend to spend the night in the home, and during the night he entered ET's room and attempted to kiss her. Additionally, after a verbal altercation between ET and Von Hargress, ET attempted to commit suicide and was hospitalized as a result. The trial court also found that the testimony from Zopf established that neither KT or CT were not doing well emotionally.

The trial court's factual findings regarding to factor (b) were not against the great weight of the evidence. Zopf continued to be concerned about KT's and CT's well-being and recommended that defendant have primary physical custody. There was evidence to support that ET had been sexually assaulted by plaintiff's friend. There was also evidence of significant

concerns about the living environment at plaintiff and Von Hargress's home, illustrated by Loftin's affidavit, ET's suicide attempt following an argument with Von Hargress, the letter plaintiff wrote to Von Hargress, and the fact that plaintiff returned to Von Hargress's home after writing the letter and after ET's suicide attempt.

Plaintiff also argues that the trial court incorrectly considered ET's mental health because the court was not tasked with making findings regarding ET. This argument is without merit. Evidence was presented in the trial court regarding ET, and the court considered it as it related to plaintiff's ability to properly parent KT and CT, and which parent the children should reside with primarily.

The trial court found that best-interest factor (c) favored defendant. Plaintiff argues that the trial court should have found that factor (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," was neutral because plaintiff testified that she could provide for the children without Von Hargress, and plaintiff agreed that the children needed therapy.

The trial court found that plaintiff had not demonstrated an ability to live independently from Von Hargress or a family member, and although she receives social security, Von Hargress finically supports her, while defendant had a stable source of income and could provide for the children. Regarding the children's therapy, the trial court found that plaintiff had not demonstrated an understanding of the children's need for therapy, and although defendant's "efforts have been better but not great," defendant was ultimately the one to locate and engage a therapist for the children.

The trial court's findings regarding factor (c) were not against the great weight of the evidence. Despite plaintiff's testimony that she could provide for the children, she is not employed, and Von Hargress financially supports her, while the evidence supported that defendant has employment, his own home, and can provide the children with necessities. Regarding the children's need for therapy, although plaintiff testified that she understood that the children needed therapy, the trial court did not err in finding that there was ample evidence that the children needed therapy, and despite a lack of progress from both plaintiff and defendant, defendant was ultimately the person to engage the children in therapy.

The trial court found that best-interest factor (d) favored defendant. Plaintiff argues that the trial court should have found that factor (d) the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity" was neutral because requiring the children to move to Ferndale would only force the children to attend yet another school. Plaintiff also contends that the trial court relied on its "overt dislike for Mr. Von Hargress after his testimony."

The trial court's findings regarding factor (d) were not against the great weight of the evidence. The evidence supported the trial court's finding that plaintiff had not provided the children with a stable or satisfactory environment, as illustrated by the fact that she relocated the children to three communities and three schools in five years. Plaintiff and the children lived in Westland, Jerome, and Harrison Township, and plaintiff intended to move the children into a new

home and new school district in Attica. Plaintiff's contention, that the children should remain with plaintiff because giving primary physical custody to defendant would mean the children have to move to a new school district, is without merit. The children have to move to a new school district whether it be in Attica or Ferndale. The trial court also found that plaintiff lived with Von Hargress for over a year, despite her contentions that she and the children were mistreated by him, and Von Hargress's behavior in the courthouse "speaks volume as to his character and credibility." The trial court noted that there were multiple inconsistencies between plaintiff's and Von Hargress's testimonies, including plaintiff's admission that Von Hargress had been controlling, while Von Hargress asserted that their relationship is great and he does not control her. The trial court's findings are supported by the evidence as there was ample evidence presented for the court to find that plaintiff's relationship with Von Hargress caused instability and an unsatisfactory environment for KT and CT. Moreover, the trial court's reliance on Von Hargress's behavior in the courthouse was supported by evidence that he yelled obscene and violent things at defendant on two occasions, causing other people in the courthouse to notice.

The trial court found that best-interest factor (e) favored defendant. Plaintiff argues that the trial court should have found that factor (e), the "permanence, as a family unit, of the existing or proposed custodial home or homes," was neutral because, although plaintiff testified that she and Von Hargress had disagreements, there was no evidence to support that the relationship was unstable or unhealthy for the children aside from the letter that plaintiff wrote to Von Hargress.

The trial court found that this factor favored defendant because plaintiff intended to move to Attica into a home owned solely by Von Hargress, despite her relationship with Von Hargress appearing unstable and unhealthy, while defendant had no plans to relocate from his home in Ferndale, and his marriage appeared healthy. The court's findings regarding factor (e) were not against the great weight of the evidence. There was ample evidence that plaintiff's relationship with Von Hargress was unstable and unhealthy. In the letter, plaintiff expressed that she had suicidal thoughts, Von Hargress was a tyrant and everybody feared him, and he controlled her life. Despite claiming that the letter was exaggerated, plaintiff admitted that there was truth to the letter. Zopf explained that she believed the children were not doing well living with plaintiff and Von Hargress: ET attempted suicide after an argument with Von Hargress, and ET contacted defendant, whom she had not spoken to in 22 months, because she was concerned about the well-being of KT and CT in plaintiff and Von Hargress's home. Moreover, the evidence supported that defendant owned his own home, had no intention of relocating, and defendant's wife Abony Trezil had a good relationship with KT and CT.

The trial court found that best-interest factor (g) favored defendant. Plaintiff argues that the court should have found that factor (g), the "mental and physical health of the parties involved," was neutral because there was no evidence that plaintiff had "untreated mental health issues" that impacted her ability to parent KT and CT. The trial court found that neither parent had a physical illness which impaired their ability to parent, but plaintiff had "untreated mental health issues" that have impacted her decision making as it related to the children.

Plaintiff relies on *Pennington v Pennington*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 348090); slip op at 6, in which this Court recently concluded that the trial court erred in determining that a change of circumstances or proper cause was established by a preponderance of the evidence when the trial court relied on opinion testimony of the defendant

and a Child Protective Services (CPS) investigator to determine that the plaintiff was mentally unstable. The trial court ultimately concluded that a change in circumstances had been demonstrated because the plaintiff suffered from "some mental health issues that was [sic] subjecting the child to unnecessary, unpleasant evaluations" and was, at times, "acting in an irrational manner, which had an effect on the child," which created "a concern that the child was being traumatized overall by the mother's actions." *Id*. at ___; slip op at 6. On appeal, this Court concluded that these findings lacked any valid support in the record, and "a review of the record indicates that [the] plaintiff, rightly or wrongly, suspected abuse of the child and took the child to her pediatrician, which set in motion the process involving CPS and law enforcement," but "[n]o medical evidence of [the] plaintiff's mental health was presented; the trial court heard only the opinion testimony of the CPS investigator that [the] plaintiff's level of concern was irrational." *Id*. at ___; slip op at 6.

In the present case, testimony established that plaintiff had a history of mental health issues such as bulimia, anxiety, depression, and a psychiatric hospitalization as a child. In 2018, Loftin expressed concerns about plaintiff's mental health and whether she could care for her children because plaintiff was not acting in the children's best interests and there is a history of mental illness in plaintiff's family, including plaintiff's own mental health issues for which she had not received treatment. However, at the time of the evidentiary hearing, Loftin no longer had concerns about plaintiff's mental health. Moreover, in the letter plaintiff wrote to Von Hargress, she expressed suicidal thoughts, but at the evidentiary hearing, she testified that she was not suicidal. In addition, defendant testified that plaintiff has mental health issues. Plaintiff was ordered to submit to a psychological evaluation, but she was unable to complete it prior to the conclusion of the evidentiary hearing.

Although there was no medical evidence submitted to the trial court regarding plaintiff's alleged mental health issues, there was sufficient testimony by defendant to support the trial court's conclusion regarding factor (g). In *Pennington*, the only evidence of the plaintiff's mental health issues was the CPS worker's opinion testimony that the "plaintiff's level of concern was irrational." *Pennington*, ___ Mich App at ___; slip op at 6. Here, defendant submitted plaintiff's letter, in which plaintiff described that she had "never felt so hopeless, depressed, useless, and unwanted in [her] life," and that she had contemplated suicide. Although plaintiff testified that she was angry when she wrote the letter, and that the sentiments in the letter were exaggerated, the statements in the letter sufficiently concerned the trial court about plaintiff's mental health. Additionally, defendant testified that, while plaintiff and defendant were together, plaintiff had a general anxiety disorder and would be irritable and have dramatic mood swings when she was not taking her medication. Defendant's testimony about plaintiff's mental health, although not expert medical testimony, was sufficiently distinguished from the CPS worker's testimony in *Pennington* because defendant's testimony, unlike the CPS worker's testimony, was presumably based on first-hand knowledge of plaintiff's medical diagnosis of general anxiety disorder. Therefore, the trial court's findings regarding factor (g) were not against the great weight of the evidence. However, even if the findings for factor (g) were against the great weight of the evidence, factor (g) would only be neutral, and would not affect the disposition.

The trial court found that best-interest factor (h) favored defendant. Plaintiff argues that the trial court should have found that factor (h), the "home, school, and community record of the child," was neutral because plaintiff was cooperative with the children's extracurricular activities,

plaintiff tried to place the children in extracurricular activities, but was unable because of defendant's refusal to cooperate, and the children were doing well academically in their current school. The trial court found that the children had changed schools several times because of plaintiff relocating, the distance between plaintiff and defendant made it difficult for the children to establish a community, and although both parents supported extracurricular activities, defendant had been the primary supporter of the activities and could provide the stability the children need.

The trial court's findings regarding factor (h) were supported by the great weight of the evidence. As stated earlier, plaintiff had relocated the children three times and planned to relocate the children a fourth time, and the children had attended multiple different schools. The record also supported that defendant was the primary influence in the children engaging in extracurricular activities as he had placed the children in multiple sports and lessons, and because defendant had no intention of moving, Ferndale would provide a stable environment for the children.

The trial court found that best-interest factor (j) favored defendant. Plaintiff argues that the court should have found that factor (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," was neutral because the court failed to consider evidence that defendant also failed to facilitate a relationship between plaintiff and the children. The trial court found that defendant had failed to communicate with plaintiff regarding medical issues the children experienced, but recently he appeared to be communicating more frequently and appropriately. In regard to plaintiff, the trial court found that plaintiff communicated with defendant in a hostile and aggressive manner, and she had engaged in acts of alienation such as choosing to relocate the children again, further from defendant's home, which illustrated her lack of concern for the children's relationship with defendant.

The trial court's findings regarding factor (j) were not against the great weight of the evidence. Plaintiff chose to move farther from defendant's home, and evidence was presented that plaintiff had engaged in alienating behavior. Specifically, plaintiff instructed the children during a Family Assessment Mediation Evaluation (FAME) interview to not look at defendant. Furthermore, Loftin admitted that she had previously expressed to defendant that plaintiff was always "bashing him." Plaintiff contends that the trial court should have weighed the fact that defendant failed to inform plaintiff of medical issues with the children and his failure to communicate with plaintiff about parenting time exchanges. First, as noted above, the court considered defendant's failure to address medical issues with plaintiff and presumably weighed this evidence. Moreover, although evidence was presented that defendant failed to communicate with plaintiff regarding the proper exchange time, "a trial court need not consider every piece of evidence entered and argument raised by the parties when it states its factual findings and conclusions on each of the best interest factors." *Kessler*, 295 Mich App at 65 (quotation marks and citation omitted). "A trial court's failure to discuss every fact in evidence that pertains to a factor does not suggest that the relevant among them were overlooked." *Id*. (quotation marks and citation omitted). Thus, the court's findings were not against the great weight of the evidence.

The trial court found that best-interest factor (k) favored defendant. Plaintiff argues that the trial court should have found that factor (k), "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child," was neutral because there was extensive testimony that defendant was a violent person and abusive to plaintiff in front of the children. The

trial court found that the children, plaintiff, and Loftin expressed concerns about Von Hargress's treatment of plaintiff, and plaintiff's letter of the living environment with Von Hargress was "harrowing." The trial court found that "there must be truth in her written statements," noting that, despite plaintiff's testimony that her statements were exaggerated, plaintiff admitted that Von Hargress has controlling tendencies. The record supports these findings. Although plaintiff testified that the statements were exaggerated, she admitted that Von Hargress is controlling in certain ways, for example, he wants her to stay home and cook and clean instead of seeing her friends. In regard to abuse by defendant, the trial court found that plaintiff "alleges that she was the victim of domestic violence perpetrated by [defendant] during their relationship. She alleged that the abuse was verbal and that he punched holes in the wall." Despite considering allegations of defendant's abuse, the trial court found that this factor weighed in favor of defendant.

There was testimony presented regarding domestic abuse by defendant against plaintiff. Plaintiff did not testify that she was only verbally abused by defendant. Instead, plaintiff testified to multiple instances of physical abuse, including that defendant choked her, spit in her face, squeezed her shoulders, and shoved her head into a wall, and often times the children were present during these incidents. However, despite the trial court's omission of plaintiff's allegations of defendant's physical abuse against her, it is for the court to make credibility determinations and weigh the factors. *Kessler*, 295 Mich App at 64. Because there was evidence to support the trial court's finding that there was domestic violence between plaintiff and Von Hargress, the trial court's determination that this factor weighed in favor of defendant was not against the great weight of the evidence. Further, even if factor (k) was neutral, the disposition would not be affected because there were sufficient factors in favor of defendant.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Thomas C. Cameron