STATE OF MICHIGAN

COURT OF APPEALS

DRU ANNAJEAN TYLER,
formerly known as DRU ANNAJEAN SMEDLEY,

Plaintiff-Appellant,

v

MATTHEW A. JOHNSON,

Defendant-Appellee.

UNPUBLISHED
November 18, 2021

No. 356688
Clare Circuit Court
Family Division
LC No. 15-900105-DS

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiff-mother appeals as of right the trial court's order after a de novo hearing awarding defendant-father sole physical custody of the parties' three minor children. We affirm.

I. BACKGROUND

Plaintiff and defendant have three minor children in common: RJ, EJ, and KJ. Initial custody orders granted the parties joint legal custody of the children and plaintiff primary physical custody with defendant receiving overnight parenting time every weekend. The last custody order was entered in April 2019. In October 2020, defendant filed a motion seeking sole physical custody of the children. The motion expressed concern regarding plaintiff's ability to care for the children and incidents arising from parenting-time exchanges. A Friend of the Court (FOC) hearing was held before a referee and both parties testified. After the FOC hearing, the referee entered a recommended order awarding the parties joint legal and physical custody of the children. Both parties objected to the referee's recommended order, and the trial court subsequently held a de novo review hearing at which the parties again testified. After the hearing, the trial court awarded the parties joint legal custody and defendant sole physical custody of the children with plaintiff receiving parenting time on alternating weekends from Thursday at 5:00 p.m. until Monday at 5:00 p.m.

II. PROPER CAUSE

Plaintiff first argues that the trial court erred by finding proper cause to consider a change in custody.[1] We disagree.[2]

"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." *Merecki v Merecki*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353609); slip op at 3 (quotation marks and citation omitted). "As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests." *Brown v Brown*, 332 Mich App 1, 9; 955 NW2d 515 (2020) (quotation marks and citation omitted). Proper cause means "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." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). "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 . . . ." *Martin v Martin*, 331 Mich App 224, 236; 952 NW2d 530 (2020) (citation omitted).

In concluding that there was proper cause to revisit the custody order, the trial court found that, "since the entry of the last order, there [were] legitimate concerns raised regarding the medical care of the minor children while in the parents' care, as well as contentious parenting[-]time exchanges." Concerns regarding the children's medical care and the contentious nature of parenting-time exchanges both relate to best-interest factors and so are proper grounds for the court to consider a change in custody. As will be discussed in more detail, medical concerns relate to factor (c), MCL 722.23(c), and the contentious parenting-time exchanges relates to factor (j), MCL 722.23(j).

Further, the trial court's finding that there were legitimate concerns regarding the children's medical care and parenting-time exchanges was not against the great weight of the evidence. The

[1] While plaintiff also argues that the trial court erred by finding a change of circumstances, the trial court only found that proper cause existed; it did not make findings as to a change of circumstances. We therefore will only address proper cause.

[2] "All custody orders must be affirmed on appeal unless the trial court committed a palpable abuse of discretion, made findings against the great weight of the evidence, or made a clear legal error." *Bofysil v Bofysil*, 332 Mich App 232, 242; 956 NW2d 544 (2020) (quotation marks and citation omitted). "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). A trial court's factual findings are against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), mod 451 Mich 457 (1996).

parents' testimony established that KJ had contracted "MRSA"[3] and had experienced three or four outbreaks within the prior year. Defendant described the outbreaks as "really bad," explaining that during outbreaks the infection site becomes filled with pus and must be drained. KJ's MRSA required repeated medical attention and, in addition, special efforts to prevent outbreaks and the spread of the condition to others. Also, plaintiff and defendant both testified about a burn requiring medical attention that KJ sustained on her foot when she stepped on a hot curling iron plaintiff had left on the floor. According to defendant, plaintiff did not immediately seek medical attention for the burn despite its serious nature. Defendant further testified that plaintiff did not always address the children's medical issues appropriately or follow-up regarding their medical issues. Testimony and evidence at the de novo review hearing also established that RJ and EJ suffered from warts and open wounds. This was sufficient evidence to support the trial court's finding of proper cause on the basis of medical concerns.

As to the parenting-time exchanges, although plaintiff and defendant testified that there had not been any recent problems, they both provided testimony about contentious parenting-time exchanges in July 2020 and August 2020. Defendant testified that plaintiff's brother threatened him during an exchange and later plaintiff's stepfather threatened him during a phone call. The stepfather accompanied plaintiff to the very next parenting exchange, which created issues and resulted in the police being called. Defendant testified that during this incident the stepfather acted in a very aggressive and violent manner in front of the children. The children are young and witnessing such volatile parenting-time exchanges could have negative impact on their wellbeing.

In sum, the trial court's finding that proper cause existed to consider a change in the children's custodial environment was not against the great weight of the evidence.

III. BEST INTERESTS

Plaintiff next argues that the trial court's findings as to best-interest factors (c), (d), (e), (h), and (j) were against the great weight of the evidence. We again disagree.[4]

If proper cause or a change of circumstances exist allowing the trial court to modify a custody order, "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). The

[3] We presume that the parties were referring to "[m]ethicillin-resistant *Staphylococcus aureus* (MRSA)," which is "a cause of staph infection that is difficult to treat because of resistance to some antibiotics." <https://www.cdc.gov/mrsa/index.html> (accessed November 8, 2021).

[4] "We review the trial court's findings regarding the best-interest factors under the great weight of the evidence standard." *McRoberts v Ferguson*, 322 Mich App 125, 133; 910 NW2d 721 (2017) (quotation marks and citation omitted). "This Court review[s] the court's ultimate custody decision for an abuse of discretion." *Id.* at 133. "In the context of a child custody dispute, an abuse of discretion is found only in extreme cases wherein the trial court's decision is so palpably and grossly violative of fact and logic that it evidences the exercise of passion or bias or a perversity of will." *Id.* at 133-134.

trial court found that the children had an established custodial environment with both parties. Defendant, as the party advocating for a change in custody, therefore had to demonstrate by clear and convincing evidence that such a change was in the children's best interests. See *Bofysil v Bofysil*, 332 Mich App 232, 243; 956 NW2d 544 (2020).

MCL 722.23 defines the " 'best interests of the child' " as "the sum total of the" factors set forth in MCL 722.23(a)-(*l*). "In child custody cases, the family court must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them." *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007). "[T]he trial court has discretion to accord differing weight to the best-interest factors." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

First, plaintiff argues that the trial court erred by finding that defendant was favored under factor (c), which considers "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . and other material needs." MCL 722.23(c). The trial court made numerous findings in support of this conclusion, including that: (1) defendant maintained regular, fulltime employment; (2) defendant's employment provided benefits for the children, including health insurance; (3) plaintiff was unemployed, received unemployment in 2020, and was currently taking two online college courses; (4) defendant testified that he sought professional medical care to treat KJ's MRSA outbreaks, while plaintiff testified that she treated these outbreaks at home; (5) defendant's testimony and some of the admitted photographs depicted the children as extremely dirty when they were returned to his care; (6) KJ burned her foot while in plaintiff's care, CPS contacted plaintiff about this burn, and plaintiff took KJ to Urgent Care for treatment of this burn; and (7) the medical bill for all of the children's treatments was so significant that their doctor refused to provide further treatment to the children until payments were made.

Plaintiff contends that there was no evidence indicating that she could not financially support the children and that she only became unemployed as a result of COVID layoffs. However, defendant testified regarding his regular employment, the amount of money he earned while employed, and the benefits he and the children received as a result of his employment. In contrast, there was no evidence presented regarding plaintiff's financial status other than that she received unemployment benefits in 2020. Plaintiff also argues that the court did not adequately consider that KJ had been injured in both parties' care, after which each party sought appropriate medical care. Both parties testified regarding the children's medical issues, including KJ's burned foot, KJ's MRSA, and RJ's and EJ's warts. Defendant testified that the burn on KJ's foot was severe, yet he did not believe plaintiff immediately sought medical treatment for the burn given that plaintiff did not mention seeking treatment when she returned the child to his care. According to defendant, plaintiff merely told him to "keep an eye" on KJ. At some point, defendant called CPS on plaintiff regarding the burn. And the trial court noted that when KJ hurt her foot while in defendant's care, he sought medical treatment for her. The court also properly considered the parties' different approaches to treating KJ's MRSA.

Although plaintiff claims that the court punished her for seeking higher education and did not credit her ability to stay home with the children, these were not the only bases on which the court favored defendant under factor (c). Moreover, "[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." *Kessler v Kessler*, 295 Mich App 54, 65; 811 NW2d 39 (2011) (quotation marks and

citation omitted). And while plaintiff claims that the pictures of the children that the court relied on were not recent and had been taken out of context, this Court affords deference to a "trial court's superior fact-finding ability and its determination[s] regarding the relative weight to assign testimony as appropriate under the circumstances." *Berger*, 277 Mich App at 715. For these reasons, the trial court's finding regarding factor (c) does not clearly preponderate in the opposite direction of the evidence and, therefore, is not against the great weight of the evidence. *Pennington v Pennington*, 329 Mich App 562, 570; 944 NW2d 131 (2019).

Next, plaintiff disputes the trial court's weighing of factor (d), which addresses "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). Plaintiff argues that the court improperly favored defendant as to this factor on the basis of plaintiff's marriage to Dominic Tyler, the brief period of time Tyler lived in plaintiff's home, and an incident where the police were called while plaintiff and the children were at the home of her current boyfriend. According to plaintiff, defendant failed to present any evidence that Tyler had a significant effect on the children or that he had raised an objection to her relationship with Tyler until after plaintiff rejected defendant's attempts to reconcile. Plaintiff also argues that the court did not consider defendant's other romantic relationships.

Defendant testified, however, that he had lived in the same home for over a year and his children were the only ones who had lived with him during that time. In the same timeframe, plaintiff had married Tyler while he was incarcerated and he then moved into plaintiff's home after his release from prison in Fall 2020; he moved out of the home about three weeks later and plaintiff was in the process of divorcing him. While plaintiff asserts that there was no evidence demonstrating Tyler had a significant effect on the children, his brief appearance as the children's stepfather does not convey stability. Accordingly, we cannot say that the trial court's finding regarding factor (d) was against the great weight of the evidence.

For similar reasons, the trial court did not err by weighing factor (e) in defendant's favor. Factor (e) considers "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). Plaintiff argues that the court improperly favored weighed this factor on the basis of her romantic relationships when defendant did not refrain from introducing the children to his own romantic partners. Both parties testified that they had introduced the children to romantic partners, but defendant testified that none of his romantic partners moved in with him, while Tyler had briefly lived with plaintiff before he moved out and plaintiff filed for divorce. In addition, the court noted that, before Tyler, plaintiff had become involved with a different man while he was incarcerated and allowed him to move into her home following his release from prison. The evidence did not clearly preponderate against the trial court's finding that the permanence of the custodial homes favored defendant.

The trial court also found that factor (h), concerning "[t]he home, school, and community record of the child," MCL 722.23(h), slightly favored defendant given the number of RJ's unexcused school absences and tardies. Plaintiff argues that she should not be penalized under this factor because RJ's absences were a result of COVID and were excused; RJ's tardiness was a result of vehicle issues, not plaintiff being neglectful, and the vehicle issues no longer existed; and plaintiff attended parent-teacher conferences while defendant did not. Although defendant did not attend conferences, the trial court noted his testimony that he had regular contact with RJ's and

EJ's teachers. And while plaintiff claimed that the majority of RJ's absences were excused, defendant testified that the majority were unexcused. At the de novo hearing, testimony indicated that RJ had been absent from school between 18 and 21 days and tardy as many as 21 days. Having custody of the children during the week, plaintiff was the party responsible for getting RJ to school. Considering this record, the trial court's finding regarding factor (h) does not clearly preponderate in the opposite direction of the evidence.

Finally, factor (j) 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." MCL 722.23(j). Plaintiff argues that the trial court improperly favored defendant on the basis of the volatile parenting-time exchanges when defendant had often instigated the volatility and the parenting-time exchanges had not recently been contentious. Although the parties offered differing accounts of who instigated the contentious parenting-time exchanges, we generally defer to the trial court's credibility determinations. *McRoberts v Ferguson*, 322 Mich App 125, 134; 910 NW2d 721 (2017). Defendant testified that contentious parenting-time exchanges had occurred as recently as August 2020. According to defendant, one such exchange included plaintiff yelling at him and her brother threatening him in front of the children. The following weekend, plaintiff brought her stepfather to the exchange, even though he had made threatening remarks to defendant the previous weekend. Defendant testified that during the course of this exchange the stepfather acted aggressively in front of the children. Such volatile behavior during parenting-time exchanges demonstrates an unwillingness or inability to facilitate a close and continuing relationship between defendant and the children. And, as the trial court noted, the confrontations have primarily involved people associated with plaintiff. Therefore, the trial court's weighing of factor (j) was not against the great weight of the evidence.

In sum, the trial court's findings regarding factors (c), (d), (e), (h), and (j) were not against the great weight of the evidence. It follows that the trial court's custody decision was not an abuse of discretion.

IV. WEIGHT GIVEN TO THE EVIDENCE

Plaintiff also argues that the trial court erred regarding the evidence it admitted during the de novo hearing and the weight it gave to the evidence presented. We see no error.[5]

Plaintiff first asserts that the trial court erroneously admitted and considered photographic evidence that defendant failed to present at the FOC hearing despite the existence and availability of the photographs at that time. "A child-custody dispute may be submitted to a [FOC] referee for hearing, MCL 552.507(2)(d), and the referee's report and recommendation may be submitted to the court, MCL 552.507(2)(c). If either party objects to the referee's report, the trial court must hold a hearing de novo." *Harvey v Harvey*, 257 Mich App 278, 291-292; 668 NW2d 187 (2003), aff'd on other grounds 470 Mich 186 (2004). In the event of a judicial hearing following a party's objection to a referee's findings and recommended order, MCR 3.215(F)(2) provides:

[5] We review for an abuse of discretion the trial court's evidentiary decisions. See *Varran v Granneman*, 312 Mich App 591, 621; 880 NW2d 242 (2015).

> 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 resource of the parties and the court. [Emphasis added.]

Thus, under MCR 3.215(F)(2), a trial court "may, in its discretion" prevent "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[.]" Nothing in the court rule mandates the trial court prohibit such evidence; rather, it merely grants the court the discretion to do so. This Court has recognized that trial courts have "broad discretion" under MCR 3.215(F)(2). *Kostreva v Kostreva*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 352029); slip op at 11.

Nonetheless, plaintiff relies on MCL 552.507, which provides that at a de novo 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. [MCL 552.507(5)(b).]

Plaintiff argues that this statute precludes a trial court from receiving new evidence at a de novo hearing that could have been presented to the referee. While this is a reasonable reading of the statute, it conflicts with MCR 3.215(F)(2), which plainly gives the trial court discretion to admit new evidence even if it was not presented at the referee hearing. Thus, to the extent that MCL 552.507 conflicts with MCR 3.215(F)(2) on procedural grounds, MCR 3.215(F)(2), as the court rule, prevails. See *Stenzel v Best Buy Co, Inc*, 320 Mich App 262, 279; 906 NW2d 801 (2017), aff'd 503 Mich 199 (2019) ("In general, when a court rule conflicts with a statute, the court rule controls when the matter pertains to practice and procedure, but the statute prevails if the matter concerns substantive law."). Thus, the trial court did not err by admitting evidence that was not presented at the FOC hearing. Further, the trial court did not abuse its discretion by admitting the photographs, which were directly relevant to the children's medical conditions and general care, both of which were issues at the hearing.

Plaintiff's next argument, that the trial court erred by making its decision on the basis of the parties' credibility and demeanor, is without merit. Both plaintiff and defendant testified at the de novo review hearing, and we defer to a trial court's credibility determinations precisely because the trial court is in a better position than us to assess a party's demeanor while testifying.

See *Rains v Rains*, 301 Mich App 313, 338; 836 NW2d 709 (2013).[6] Moreover, while the trial court stated in its order denying plaintiff's motion to stay pending appeal that it believed its decision was correct based on the parties' credibility and demeanor, the court also expressly considered the FOC hearing transcript, the parties' testimony at the de novo hearing, and the admitted exhibits in making the custody decision.

Plaintiff's argument that the trial court erred by the weight it gave certain evidence is also unavailing. Like credibility determinations, we defer to the weight that the trial court assigns testimony. *Berger*, 277 Mich App at 715. And the facts that plaintiff argues that the trial court should have weighed more heavily do not establish an abuse of discretion by the trial court. For instance, plaintiff argues that the trial court failed to give adequate weight to the fact that she had primary custody of the children since they were born. But defendant has provided consistent care for the children throughout that time, as well. Plaintiff also argues that that the referee failed to consider defendant's motives for requesting the change in custody before issuing the recommended order. Regardless of defendant's motives, however, the purpose of the Child Custody Act is to promote the best interests of the child. *Merecki*, ___ Mich App at ___; slip op at 3. Plaintiff also claims that the court erroneously based its decision to change custody on her relationship with men with a criminal record. But it is clear that the trial court was concerned with the stability of plaintiff's home given that the men who moved into her home following their release from prison moved out shortly thereafter.

In sum, the alleged inconsistencies or oversights by the trial court do not change our conclusions that the trial court's best-interest findings were not against the great weight of the evidence and that the court's custody decision did not constitute an abuse of discretion.

Finally, plaintiff claims that the trial court made statements in its order after the de novo hearing that demonstrated bias against her. However, plaintiff does not point to any examples, and the trial court's order after the de novo hearing merely made findings on the basis of the testimony presented at the hearings. "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality." *TT v KL*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 351531); slip op at 9 (quotation marks and citation omitted; alteration in original). Nothing in the trial court's order displays a deep-seated favoritism or antagonism against plaintiff.

[6] Plaintiff seemingly cites *Beason v Beason*, 435 Mich 791; 460 NW2d 207 (1990), for the proposition that a court commits clear error by basing its conclusions on credibility determinations. Plaintiff's argument misconstrues *Beason*, which actually states that an appellate court *may* find that a trial court's factual findings based on credibility determinations constitute clear error if certain conditions are present, such as the existence of "[d]ocuments or objective evidence [that] contradict the witness' story" or where "the story itself [is] so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Id*. at 804 (quotation marks and citation omitted). *Beason* also stated that this Court may not reverse "if the trial court's account of the evidence is plausible in light of the record viewed in its entirety . . . ." *Id*. at 803.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, plaintiff argues that she was denied the effective assistance of counsel at the FOC hearing and the de novo review hearing. However, parties in custody proceedings do not have a due process right to counsel. *Haller v Haller*, 168 Mich App 198, 199-200; 423 NW2d 617 (1988). And, because plaintiff was not entitled to the assistance of counsel, she also was not entitled to the effective assistance of counsel. *Id*. at 200. Thus, plaintiff's ineffective-assistance-of-counsel claim has no legal basis and fails.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola