STATE OF MICHIGAN

COURT OF APPEALS

KRISTA JEAN CURTIS,

Plaintiff-Appellee,

v

COREY ADAM NORMAN,

Defendant-Appellant.

UNPUBLISHED
September 13, 2016

No. 332477
Montcalm Circuit Court
LC No. 2011-014702-DS

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In this child custody dispute, defendant Corey Norman appeals as of right a circuit court order, which denied Norman's motion to change custody and allowed plaintiff Krista Curtis to retain primary physical custody of the parties' minor daughter. Because the trial court did not abuse its discretion by denying Norman's motion to change custody, we affirm.

Curtis and Norman never married, but they have one daughter together named Sophia, who is currently six years old. Since 2011, the parties have shared legal custody of Sophia while Curtis has had primary physical custody. Curtis and Sophia live with Curtis's mother and step-father, and her mother assists with Sophia's care. Norman has parenting time every other weekend and a couple of hours two nights per week. Norman lives with a girlfriend, Holly Dines, with whom he has a two-year-old daughter. Dines provides much of Sophia's care when Sophia stays with Norman. Dines also has four other children from a previous relationship.

In August of 2015, Norman sought a change in custody after Curtis was arrested for drunk driving, her second such offense. Sophia was not in the car at the time of the incident. Curtis spent 30 days in jail and her license was suspended. She admits that she has a problem with "binge-drinking," which she is addressing through counseling, AA meetings, and participation in sobriety court that involves alcohol testing. As part of her probation, she must maintain sobriety, and there is no evidence that Curtis is currently drinking. By all accounts, aside from this recent incident, Curtis is a "great mother" who has had primary care of Sophia for Sophia's entire life, and Sophia's preference would be to live with Curtis. In comparison, there was evidence presented of Norman's anger issues, poor communication between the parties, choices Norman has made that were not to Sophia's benefit (including an ill-judged effort to unilaterally change her school), and Norman's own criminal history (which was somewhat older

than Curtis's recent arrest and included possession of marijuana as well as several motor vehicle related violations).

Based on Curtis's recent drunk-driving, the Friend of the Court (FOC) Investigator recommended, and the hearing referee concluded, that a change in custody was warranted. The hearing referee concluded that Sophia did *not* have an established custodial environment with either parent and that a preponderance of the evidence showed that a change in custody would be in Sophia's best interests. In reaching this conclusion, the hearing referee determined that Norman was not "the finest alternative." Nonetheless, in light of Curtis's drunk driving, the referee found that best interests factors (b), (c), (d), (e), (f), (g), and (*l*) favored Norman, factor (i) favored Curtis, factor (j) favored neither party, and the parties were equal on factors (a), (h), and (k). The referee determined that Norman should have primary physical custody and that Curtis should receive parenting time.

Curtis challenged the referee's recommendation and requested a de novo hearing. After a de novo hearing, the circuit court ruled in Curtis's favor and denied Norman's motion to change custody. Unlike the hearing referee, the circuit court concluded that Sophia had an established custodial environment with Curtis, meaning that Norman had to show by clear and convincing evidence that a change in custody was in Sophia's best interests. The circuit court also disagreed with several of the referee's best interests findings.

In doing so, the circuit court mainly considered the transcript from the referee hearing, but also took some new evidence from Curtis and Norman. It came to light at the de novo hearing that one of Dines's children recently made an allegation of sexual abuse against Norman, resulting in a Child Protective Services (CPS) report and investigation, which according to Norman is concluded, or almost concluded, and has not resulted in any negative findings against him. However, the child who made the allegations is now undergoing psychological counseling and she has apparently made threats against other children in the home. In addition, there were concerns expressed about Norman's stepfather bathing with Sophia as well as how appropriately Norman responded to this issue and, more generally, the circuit court highlighted evidence of Norman's poor behavior in communicating with Curtis. Regarding Curtis, the circuit court considered the severity of Curtis's recent drunk driving as well as her efforts to address her drinking problem, including her participation in counseling and the close monitoring required by the sobriety court.

Weighing the best interests factors, the circuit court concluded that factor (i), (j), and (*l*) favored Curtis, factors (b) and (f) favored Norman, factor (d) favored neither party, and the parties were equal under factors (a), (c), (e), (g), (h), and (k). Following these findings, the court concluded that Norman had not shown by clear and convincing evidence that a change of custody was in Sophia's best interests. Norman now appeals as of right.

On appeal, Norman argues that the trial court's finding of an established custodial environment with Curtis was against the great weight of the evidence, meaning that the trial court erred by applying a clear and convincing standard as opposed to a preponderance of the evidence. Even if the clear and convincing standard applies, Norman also maintains that, given Curtis's arrest and her lack of insight into her alcohol problem, he met his burden of proving that a change in custody was in Sophia's best interests. According to Norman, the trial court's best

interests analysis was incorrect, and the factors were instead properly evaluated by the hearing referee. We disagree.

When reviewing a child custody decision, pursuant to MCL 722.28, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." "Under the great weight standard, the trial court's factual determinations will be affirmed unless the evidence clearly preponderates in the other direction." *Butler v Simmons-Butler*, 308 Mich App 195, 200; 863 NW2d 677 (2014). Discretionary rulings, including the ultimate award of custody, are reviewed for an abuse of discretion, which occurs "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." *Id.* at 201. "In comparison, 'clear legal error' occurs when the trial court chooses, interprets, or applies the law incorrectly." *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014).

The Child Custody Act, MCL 722.21 *et seq.*, is a "comprehensive statutory scheme" that "applies to all custody disputes." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), citing MCL 722.26. The overriding concern in a child custody dispute is the child's best interests. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). "The purposes of the act are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Pierron v Pierron*, 282 Mich App 222, 243; 765 NW2d 345 (2009).

Consequently, "[o]nce the circuit court has entered an order or judgment in a child custody action, that order or judgment may be modified or amended only 'for proper cause shown or because of change of circumstances. . . .'" *Id.* at 243-244, quoting MCL 722.21(1)(c). If there is a showing of proper cause or change in circumstances, the court must make a threshold determination regarding whether the child has an "established custodial environment." *Id.* at 244. By statute, the "custodial environment of a child is established 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." MCL 722.27(1)(c). "The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c). In other words,

> An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

Such an environment may exist with both parents, it can exist with the noncustodial parent, and it "can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Id.* at 706-707. Ultimately, whether an established custodial environment exists, and with whom it exists, presents a fact question for the trial court. *Kessler v Kessler*, 295 Mich App 54, 62; 811 NW2d 39 (2011).

The finding of whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the children. *Id.* That is, if an established custodial environment exists with one or both parents, the court may only change the custodial environment if there is clear and convincing evidence that the change would be in the best interests of the child. MCL 722.27(1)(c); *Pierron*, 282 Mich App at 245. Thus, "a party who seeks to change an established custodial environment of a child is required to show by clear and convincing evidence that the change is in the child's best interests." *Kessler*, 295 Mich App at 61. In contrast, "if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests." *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001).

For purposes of the Child Custody Act, the child's best interests are evaluated under the best interest factors set forth in MCL 722.23, which 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.

(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.

"[W]hen making a determination regarding a child's best interest, a trial court is required to state its factual findings and conclusions with regard to each relevant statutory best interest factor listed in MCL 722.23." *Parent v Parent*, 282 Mich App 152, 156; 762 NW2d 553 (2009). However, "[t]hese findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties." *MacIntyre v MacIntyre*, 267 Mich App 449, 452; 705 NW2d 144 (2005). Further, "the trial court need not make its custody determination on the basis of a mathematical calculation and may assign differing weights to the various best-interest factors." *Berger*, 277 Mich App at 712.

In this case, the trial court concluded that Sophia had an established custodial environment with Curtis. The trial court based this finding of an established custodial environment on the facts that, since birth, Sophia has lived primarily with Curtis (and Curtis's family) and that Curtis "has been the primary coordinator of events in her life, and also regarding school and medical and that type of thing." In our judgment, this finding of an established custodial environment with Curtis was not against the great weight of the evidence. Testimony at the referee hearing amply supports the conclusion that, for her entire life, Sophia has lived primarily with Curtis and that it is Curtis to whom she looks to fulfill her needs. Curtis and her family described in detail Curtis's pivotal role in Sophia's life, including her provision of basic necessities (meals, clothing, bathing, etc.) as well as her responsibility for medical and dental appointments, school related concerns, staying home with Sophia when she is sick, and the implementation of an age-appropriate routine such as bedtime. Aside from basic necessities, the evidence also showed that Sophia looks to Curtis for affection and that they engage in fun parent-child activities such as camping, coloring, zoo trips, etc.

Norman does not dispute this primary role that Curtis has played for the entirety of Sophia's life and in fact repeatedly conceded at the hearing that Curtis is a "great mom." Nonetheless, he argues that Curtis's drinking and her recent arrest in particular should be found to have destroyed Sophia's established custodial environment with Curtis. However, an established custodial environment is one of "significant duration," *Berger*, 277 Mich App at 706, and considering Sophia's lifelong reliance on Curtis as her primary caregiver, the fact remains that, despite Curtis's recent problems, Sophia looks primarily to Curtis for her needs and she has done so for an appreciable time. Indeed, the trial court specifically addressed the impact of Curtis's drinking on her ability to provide care and, consistent with evidence that Curtis's drinking problem is in the nature of sporadic "binge-drinking," the court concluded that this is not a "situation where Ms. Curtis is regularly consuming alcohol to the point that she's unable to meet the needs of this child." Further, the trial court also credited evidence that Curtis has taken positive steps to address and rectify her problems with alcohol. Ultimately, the trial court certainly did not ignore Curtis's alcohol problem and, given Curtis's longstanding role as Sophia's undisputed primary caregiver, the trial court's finding of an established custodial environment with Curtis was not against the great weight of the evidence. See *Kessler*, 295 Mich App at 62. Once the trial court determined that an established custodial environment

existed, it then appropriately applied a clear and convincing standard to determine whether a change in custody was in Sophia's best interests. See *id.* at 61.

With regard to the best interest factors, Norman generally contests the trial court's findings to the extent those findings were unfavorable to him. However, he does not provide a detailed challenge to any particular factor and instead he simply announces that the referee correctly evaluated the best interests factors. But, this Court is not reviewing the referee's findings; rather, we are reviewing the circuit court's factual findings to determine if the evidence clearly preponderates in the opposite direction. See *Butler*, 308 Mich App at 200. In conducting a de novo hearing, the trial court was not bound by the referee's findings, but was instead free to review the record, allow new evidence, and make independent findings. See MCR 3.215(F)(2); *Rivette v Rose-Molina*, 278 Mich App 327, 332-333; 750 NW2d 603 (2008); *Truitt v Truitt*, 172 Mich App 38, 43; 431 NW2d 454 (1988); *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 101 (1986). Quite simply, Norman's reliance on the referee's findings without any meaningful discussion of the circuit court's analysis is not persuasive.

Although Norman does not discuss the trial court's findings on the best interests factors in any detail, we have considered the trial court's analysis and we conclude that the evidence does not clearly preponderate in the opposite direction.

First, the trial court weighed factors (b) and (f) in Norman's favor based on Curtis's recent alcohol-related arrest. Given the evidence presented at the hearings, these findings were not against the great weight of the evidence. Moreover, given that these factors favored Norman, there is obviously no basis for complaint on appeal.

Second, with regard to factor (d), the trial court concluded that this factor favored neither party. Under this factor, the trial court weighed Curtis's alcohol use against her and, with regard to Norman, found instability in his home as a result the recent CPS investigation involving Dines's daughter. Certainly, there was evidence of Curtis's alcohol use and, as it relates to Norman, by his own admission he had been subjected to a CPS investigation and he was still involved with ongoing concerns involving Dines's daughter and her mental health issues.[1]

[1] Norman briefly contests the trial court's consideration of the CPS investigation at the de novo hearing, claiming that much of the evidence about the investigation constituted inadmissible hearsay because the CPS representatives were not called to testify. We consider this unpreserved argument to be abandoned given Norman's cursory treatment of the issue as well as his complete failure to cite any legal authority or to provide citations to any specific portion of the record in support of his argument. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Eldred v Ziny*, 246 Mich App 142, 154; 631 NW2d 748 (2001). In addition, this evidentiary issue does not appear in the statement of the questions presented, meaning that that it is improperly presented for this Court's review and need not be considered. See MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 543; 730 NW2d 481 (2007). Nonetheless, we have reviewed the transcript of the de novo hearing and we note that much of the information introduced at the de novo hearing about the CPS investigation was introduced through testimony from Norman himself. It is well-recognized that a party cannot claim error on appeal for

Given the recent upheaval in both homes, the trial court's assessment of this factor was appropriate.

Third, the trial court weighed factors (i), (j), and (*l*) in Curtis's favor. Regarding factor (i), Sophia expressed a preference for Curtis, meaning this factor was properly found to favor Curtis. Cf. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991). Factor (j) relates to "[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." On Norman's side, the trial court considered evidence of Norman's general incivility during parenting exchanges to the extent that, for example, he refused to exit his vehicle and required Sophia to walk to the car by herself as well as buckle herself into the vehicle. The trial court contrasted this evidence with Curtis's attempts to discuss parenting matters with Norman (such as his stepfather's inappropriate bathing with Sophia) and evidence that Curtis allowed Norman extra parenting time. These findings were firmly rooted in the evidence and the trial court's determination regarding factor (j) was not against the great weight of the evidence. Factor (*l*) is the "catch-all" factor, under which the trial court considered the parties' poor communication, noting that Norman in particular is "disrespectful" to Curtis, a finding that was born out in the testimony of Curtis's former-boyfriend and stepfather. See *Diez*, 307 Mich App at 394 (finding father's treatment of mother was an appropriate consideration under factor (*l*) when evaluating the children's best interests).

Lastly, the trial court found the parties equal with respect to factors (a), (c), (e), (g), (h), and (k). The trial court concluded that factor (a) was equal because both parties love Sophia and she loves them in return, and nothing in the evidence contradicts this finding. Under factor (c), the circuit court found the parties equally capable and willing to provide for Sophia's needs, and this finding was supported by evidence that both parents are gainfully employed and have proven themselves willing to provide for Sophia's needs. The trial court also found the parties equal under factor (e), which relates to the permanence, as a family unit, of the existing or proposed custodial home. Consistent with the evidence presented, the trial court acknowledged Curtis's longstanding living arrangement with her mother and her mother's close connection to Sophia, but the court also recognized that Sophia has a half-sister with Norman, which the court believed lent permanence to Norman's relationship with Dines and the family dynamic in his home. These findings were not against the great weight of the evidence.

Regarding factor (g), the trial court again scored the parties equally, acknowledging Curtis's substance abuse, but finding it should not be weighed against her under this factor because she had taken meaningful steps to address her problem. While a close question, this finding was not against the great weight of the evidence given that Curtis had been rigorously pursuing treatment since her arrest and that, by the time of the de novo hearing in March of 2016, Curtis had been sober for more than 6 months.[2] Under factor (h), the trial court scored the

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something that he contributed to by plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Thus, having provided much of the evidence to which he now apparently objects, Norman is not entitled to relief on this basis. See *id.*

[2] Contrary to Norman's assertion on appeal that Curtis is in "complete denial" and has a "lack of meaningful insight" into her problem, Curtis fully admitted at the hearings that she had a

parties equally in terms of home, school and community because there was evidence that both parents were involved to some extent with Sophia's life. This finding was not against the great weight of the evidence. Indeed, if anything, this factor should have favored Curtis given that even Norman conceded that Curtis was the parent primarily responsible for Sophia's care and schooling needs. Lastly, factor (k) relates to domestic violence, which the trial court scored equally, mainly because there had been no convictions for domestic violence. Again, this finding is not against the great weight of the evidence and, if anything, the factor should have favored Curtis given Norman's own admission that he once grabbed a former girlfriend by the arms and threw her into a wall.

Overall, Norman has not shown that the trial court's assessment of any of the best interests factors was against the great weight of the evidence. This case presents a close question in which, unfortunately, neither parent is an ideal candidate. Faced with the various competing concerns and shortcomings in both homes, the trial court reasonably evaluated the evidence and, because the evidence does not clearly preponderate in the opposite direction, the trial court's factual findings regarding Sophia's best interests are affirmed. See *Butler*, 308 Mich App at 200. In light of the trial court's best interests analysis, Norman also has not shown that the trial court's denial of his motion to change custody was 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. See *Berger*, 277 Mich App at 705, 711. Because the trial court's custody determination was not an abuse of discretion, it is affirmed. See MCL 722.28.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering

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problem with binge-drinking and she detailed the counseling, AA meetings, alcohol testing, and other efforts she was making to combat this problem. Moreover, Beverly Shepard, an expert in substance abuse, conducted an assessment of Curtis and, consistent with Curtis's understanding of her problem, Shepard testified that Curtis has a "moderate" alcohol problem involving occasional binge-drinking, as opposed to a more severe problem involving more regular use and dependence on alcohol. Shepard also specified, based on her assessment of Curtis, that Curtis admitted she had an issue, that Curtis had "good insight" into her problem, and that Curtis was taking action to abate the problem.