STATE OF MICHIGAN

COURT OF APPEALS

KEVIN CASSIDY VIAL, Plaintiff-Appellee,	UNPUBLISHED September 22, 2016
v	No. 332549 Oakland Circuit Court
LACEY MARIE FLOWERS, Defendant-Appellant.	LC No. 2015-836387-DC

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant, Lacey Marie Flowers, appeals as of right a child custody judgment entered by the trial court that incorporated the terms of a mediation agreement signed by the parties. We vacate the judgment and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This case arises out of a child custody complaint filed by plaintiff, Kevin Cassidy Vial, in October 2015. The parties never married and share one minor child. In the complaint, plaintiff sought physical custody of the child, with reasonable and liberal parenting time for defendant, and joint legal custody. At the same time, plaintiff filed a verified petition for interim custody, under which he requested that the court enter an ex parte order granting the parties joint legal custody, but award him sole physical custody pending the court's ultimate custody determination.

In November 2015, the trial court entered an interim order, which awarded the parties joint legal custody, awarded parenting time to both parties in alternating one-week blocks, and referred the parties to mediation. After the mediation, plaintiff and defendant signed a "Memorandum of Agreement" in December 2015. The top of the memorandum states:

> We, the undersigned, having mediated our disputes regarding custody and parenting time with the assistance of Oakland Mediation Center, and being satisfied that the provisions of the resolution are mutually acceptable, have entered into this agreement.
>
> The terms of this agreement will be entered into a court order upon approval of the Oakland County Friend of the Court.

Next, the memorandum states, "Kevin Vial and Lacey Flowers agree to the following parenting time schedule for their daughter," and sets forth a detailed parenting time schedule. Near the bottom of the memorandum, the parties' signatures appear after the following statement: "Agreed on December 15, 2015."

In April 2016, the trial court held a hearing, at which time defense counsel indicated that defendant no longer approved of the mediated custody arrangement and, as a result, objected to the entry of a judgment consistent with the agreement. The court concluded that the parties were bound by the mediation agreement and stated that it would enter the proposed judgment. In response, defense counsel asserted that the court still needed to make an independent determination that the custody arrangement served the minor child's best interests. The court acknowledged its obligation and stated:

> I would like to say that there has been an agreement[;] an agreement of the parties is binding. There is no turning around and changing. I would also like to cite the case of *Harvey v Harvey*, 470 Mich 186, from the Supreme Court of Michigan, wherein the Court states, our holding should not be interpreted where the parties have agreed to a custody arrangement, which they have done in mediation, to require the Court to conduct a hearing or otherwise engage in intensive fact finding. Our requirement under such circumstances is that the Court satisfy itself concerning the best interest of the children. When the Court signs the order, it indicates that it has done so. A judge signs an order only after profound deliberation and in the exercise of the judge's traditional broad discretion.
>
> I have not heard any evidence that either parent is unfit, the parties have reached an agreement, and I will sign the judgment of custody.

At the end of the hearing, the court allowed defense counsel to voir dire defendant. She confirmed that she did not believe that the custody arrangement in the "Memorandum of Agreement" and proposed judgment served the minor child's best interests, and that she would like the court to conduct an evidentiary hearing and consider the best-interest factors under MCL 722.23 before entering a custody judgment. Despite defendant's request, the court entered the custody judgment, which awarded the parties joint legal custody and incorporated the parenting time schedule delineated in the "Memorandum of Agreement."

II. STANDARD OF REVIEW

This Court must affirm all child custody orders and judgments "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." MCL 722.28; *Pierron v Pierron* (*Pierron II*), 486 Mich 81, 85; 782 NW2d 480 (2010) (quoting MCL 722.28). A trial court's findings of fact are against the great weight of the evidence if "the evidence clearly preponderates in the opposite direction." *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). "An abuse of discretion with regard to a custody issue occurs 'when the trial court's decision 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.' " *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012), quoting *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

Questions of law are reviewed for clear legal error, which occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). Additionally, "[t]he finding of the trial court concerning the validity of the parties' consent to a settlement agreement will not be overturned absent a finding of an abuse of discretion." *Vittiglio v Vittiglio*, 297 Mich App 391, 397-398; 824 NW2d 591 (2012) (quotation marks and citation omitted).

III. ANALYSIS

A. BINDING CUSTODY AGREEMENT

As a threshold matter, defendant argues that no custody agreement existed between the parties at the time of the hearing. However, she fails to cite any legal support for her claim. "[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Berger*, 277 Mich App at 715 (quotation marks and citation omitted). Nevertheless, we disagree.

The record shows that the parties participated in mediation pursuant to MCR 3.216, which governs mediation in child custody cases. MCR 3.216(A)(1). "Domestic relations mediation is a nonbinding process in which a neutral third party facilitates communication between the parties to promote settlement." MCR 3.216(A)(2). MCR 3.216(H)(7) provides:

> If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording. After a settlement has been reached, the parties shall take steps necessary to enter judgment as in the case of other settlements.

See also *Wyskowski v Wyskowski*, 211 Mich App 699, 700-702; 536 NW2d 603 (1995) (considering a former version of the court rule in the context of a divorce case). As such, a party is bound by her signature on a child custody settlement agreement as long as the trial court agrees that the agreement is in the best interests of the child, *Harvey v Harvey*, 470 Mich 186, 187; 680 NW2d 835 (2004), and the party's signature did not result from fraud, mutual mistake, or duress, see *Myland v Myland*, 290 Mich App 691, 700-701; 804 NW2d 124 (2010), quoting *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990) (stating that a party is bound by a divorce settlement agreement or stipulation "in the absence of fraud, duress, mutual mistake, or severe stress" that inhibited her from reasonably understanding the agreement).

Here, it is apparent from the terms of the "Memorandum of Agreement" signed by the parties that the memorandum constituted a physical custody agreement, subject to the court's approval of the arrangement as being in the best interests of the child. See *Harvey*, 470 Mich at 194 ("Child custody determinations or agreements are not binding until entered by court order."); *id*. at 188 n 2 ("[P]arties must understand that a child custody determination resulting from alternative dispute resolution processes is not enforceable absent a court order."). In addition, however, the memorandum provided, "The terms of this agreement will be entered into a court order upon approval of the Oakland County Friend of the Court [("FOC")]." Defendant briefly mentions in the statement of facts in her brief on appeal that the settlement agreement "was never

approved by, let alone presented to, the Oakland County Friend of the Court," and it appears that this assertion is true based on our review of the record. However, she does not raise this as a reason for concluding that an agreement between the parties did not exist at the time of the hearing, and, nevertheless, we find no basis for concluding that this fact eroded the biding nature of the agreement under MCR 3.216(H)(7).[1] The parties participated in mediation, reached a settlement, and reduced the settlement to a writing signed by both parties. The parties' attorneys were not present during the mediation and they did not sign the agreement, but MCR 3.216 contains no provision requiring the parties' counsel to participate in the mediation or sign the resulting agreement.

Further, although defendant briefly notes in her statement of facts on appeal that she felt pressured to sign the agreement, she does not argue that the agreement should be set aside based on fraud, duress, or mutual mistake. She also provides no authority for the proposition that changing her mind before the hearing altered the binding nature of the parties' mediation agreement. Instead, contrary to her claims, it is well established that, pursuant to the plain language of MCR 3.216(H)(7), a signed writing binds the parties to the terms of their agreement, *Vittiglio*, 297 Mich App at 399, and parties may not disavow a written, signed agreement, see *Gojcaj v Moser*, 140 Mich App 828, 835; 366 NW2d 54 (1985), or dispute a signed agreement because they have "had a change in heart," *Vittiglio*, 297 Mich App at 399 (quotation marks and citation omitted). See also *Wyskowski*, 211 Mich App at 700 (affirming the trial court's entry of a judgment of divorce consistent with the parties' settlement agreement despite the defendant's refusal to consent to the judgment based on her subsequent belief "that the agreement was not fair and equitable"); *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128; 418 NW2d 700 (1987) ("[S]ettlement agreements should not normally be set aside and that once a settlement agreement is reached a party cannot disavow it merely because he has had 'a change of heart.' ") (citation omitted).

Thus, the trial court did not err in concluding that the "Memorandum of Agreement" signed by the parties constituted a mediation agreement that was binding on defendant.

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[1] Defendant may have intended to suggest, by mentioning this fact, that the Friend of the Court's approval of the agreement was a condition precedent to the agreement's approval and entry in the trial court. See, e.g., *Harbor Park Mkt, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999). However, she does not use that term on appeal, she presents no such argument in her brief, and she presents no authority in support of such a claim. Thus, to the extent that defendant intended to make such a claim, we deem it abandoned. See *Berger*, 277 Mich App at 715 ("[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.") (quotation marks and citation omitted).

Nevertheless, based on the language of the "Memorandum of Agreement," it is apparent *the parties' agreement to its terms* was unequivocal and not contingent on Friend of the Court approval. Accordingly, there is no basis for concluding that plaintiff did not agree to the terms of the agreement, as memorialized in the signed "Memorandum of Agreement."

B. BEST-INTEREST DETERMINATION

Defendant next argues that even if the parties had an agreement, the trial court erred by failing to adequately consider the best-interest factors under MCL 722.23 and determine whether an established custodial environment exists before it entered the judgment of custody. We agree.

A trial court is not bound by the parties' agreements regarding child custody, *Phillips v Jordan*, 241 Mich App 17, 20-21; 614 NW2d 183 (2000); *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994), but a trial court may accept and validate a custody agreement by entering a custody order or judgment incorporating the terms of the agreement, *Harvey*, 470 Mich at 194; *Koron*, 207 Mich App at 191. "Regardless of the type of alternative dispute resolution that parties use, the Child Custody Act requires the circuit court to determine independently what custodial placement is in the best interests of the children," *Harvey*, 470 Mich at 187 (footnotes omitted), as the paramount consideration in child custody disputes, and the trial court's duty, is "ensur[ing] that the resolution of any custody dispute is in the best interests of the child" involved, *id*. at 192-193; *Berger*, 277 Mich App at 705. Thus, when parties have entered into a custody agreement, the court is not relieved of its "obligation to examine the best interest factors[.]" *Harvey*, 470 Mich at 193.

However, even though a court is generally required to state findings of fact and conclusions regarding each best-interest factor under MCL 722.23 when making a custody determination, *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007), a court is not required "to conduct a hearing or otherwise engage in intensive fact-finding" to make its independent best-interest determination following a settlement agreement, *Harvey*, 470 Mich at 192. Instead, in the context of a settlement agreement, it must "satisfy itself concerning the best interests of the children." *Id*. at 192-193. By signing and entering a judgment of custody, a court implicitly acknowledges that it has examined the best interest factors, (2) it has engaged in "profound deliberation" as to its discretionary custody ruling, and (3) it is satisfied that the custody order is in the child's best interests. *Id.* at 193. See also *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994) ("Implicit in the trial court's acceptance of the parties' custody and visitation arrangement is the court's determination that the arrangement struck by the parties is in the child's best interest.").

Here, the court explicitly acknowledged its obligation to determine whether the judgment was in the minor child's best interests and cited *Harvey*, 470 Mich 186, for the proposition that it was not required to hold a hearing or otherwise engage in extensive fact-finding, but only needed to satisfy itself concerning the child's best interests. It then stated, "I have not heard any evidence that either parent is unfit, the parties have reached an agreement, and I will sign the judgment of custody."

Under the applicable caselaw, we reject plaintiff's claim that an evidentiary hearing was necessarily required given the custody agreement in this case, *Harvey*, 470 Mich at 192, but we cannot conclude that the court met its obligation to make an independent best-interest determination. The court recited the applicable rules in *Harvey*, stated on the record that it would consider the best interest factors "as [it] look[ed] at the judgment," and indicated that would "enter an order consistent with [the best interest of the minor child]." However, there is no evidence in the record that the court could have used to consider the best-interest factors and

no independent FOC evaluation examining the factors on which the court could have relied. The court merely focused on the fact that it had "not heard any evidence that either parent is unfit" and refused defendant's request to present evidence regarding the best-interest factors.

Thus, in effect, it appears that the trial court concluded that because the parties signed a mediation agreement, and because no evidence existed that either party was unfit to care for the child, it had satisfied itself that the judgment was in the child's best interests. On this record, despite the court's entry of the custody judgment, see *Harvey*, 470 Mich at 193; *Koron*, 207 Mich App at 191, we cannot deem the court's efforts in this case an adequate examination of the best-interest factors, see *Harvey*, 470 Mich at 193; *Koron*, 207 Mich App at 191.

If a trial court fails to properly consider the best interest factors, the appropriate remedy is to remand the case to the trial court for a new custody hearing. *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007), citing *Foskett v Foskett*, 247 Mich App 1, 12; 634 NW2d 363 (2001); see also *Rivette v Rose-Molina*, 278 Mich App 327, 333; 750 NW2d 603 (2008) (holding that the trial court's reliance on a referee's custody determination, where the referee did not consider the best-interest factors, "without satisfying itself that the best-interest factors were considered," required a remand to the trial court for consideration of the factors). Therefore, remand is necessary for the trial court to consider the best-interest factors and adequately satisfy itself that the custody judgment is in the minor child's best interests.

C. CONSIDERATION OF ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant also argues that the court erred by failing to consider whether an established custodial environment existed before entering the custody judgment. In general, a court must determine whether an established custodial environment exists before it makes any custody or parenting time determination. *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015); see also *Pierron*, 486 Mich at 85-86 ("When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment."). More specifically, "[w]hether an established custodial environment exists is a question of fact that the trial court must address *before* it makes a determination regarding the child's best interests." *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009) (quotation marks and citation omitted; emphasis added). A trial court may not modify a previous order or issue a new order that would change an established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c); see also *Pierron*, 486 Mich at 85-86 (stating same).

Although the Michigan Supreme Court did not address this issue in *Harvey*, based on the fact that a court must first consider whether an established custodial environment exists before determining the best interests of the child, *Demski*, 309 Mich App at 445, the trial court also erred by failing to consider whether an established custodial environment exists in this case before entering the judgment. "When a trial court fails to make a finding regarding the existence of a custodial environment, this Court will generally remand for such a finding unless sufficient information exists in the record for this Court to make a de novo determination of this issue" *Brausch*, 283 Mich App at 356 n 7. As mentioned above, there is no evidence in the record from which the trial court could determine the best interests of the child and, likewise, determine

whether an established custodial environment exists. For this reason, we are unable to make a de novo determination on this issue.

IV. CONCLUSION

We reject defendant's claim that the parties had not entered into a custody agreement at the time of the hearing. However, we agree that the trial court failed to adequately consider the child's best interests before it entered the custody judgment.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Michael J. Riordan