STATE OF MICHIGAN

COURT OF APPEALS

JUDY STEINBRINK, also known as JUDITH L. KEHN, Plaintiff-Appellee, v MARK DANIEL NOREYKO, Defendant-Appellant.	UNPUBLISHED March 21, 2017 No. 333115 Roscommon Circuit Court LC No. 02-723176-DP

Before: BECKERING, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

Defendant claims an appeal from the trial court's order granting plaintiff's motion for a change of custody, awarding plaintiff sole legal and physical custody of the parties' children, and suspending defendant's parenting time pending further order of the court. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

The parties, who never married, are the parents of two children, a daughter born in 2002 and a son born in 2005. Prior to entry of the trial court's order now challenged by defendant, the parties shared joint legal and physical custody of the minor children.

In late 2014, plaintiff moved for a change of custody, alleging, inter alia, that the children had become fearful of defendant and no longer wished to be in his presence. A Friend of the Court (FOC) referee held a three-day evidentiary hearing at which the parties and other witnesses, but not the children, testified. Plaintiff testified that the children no longer wanted to visit defendant and had told her that they were afraid of him. Plaintiff indicated that she attempted to comply with the parenting time order, to the extent of bribing the children to go to defendant's home for parenting time, and on occasion physically forced them to enter vehicles for the trip. Plaintiff stated that she and her current husband provided material support for the children, interacted with teachers and doctors, helped with homework, and provided love, comfort, and guidance. Plaintiff also testified to the bond between the two children and their half-sister, the daughter of plaintiff and her current husband. Plaintiff stated she had witnessed interactions between defendant and the children, and that the children had become visibly nervous in his presence and had told him that they did not want to be around him.

Plaintiff testified that during defendant's parenting time, defendant's girlfriend, Nikki Cortes, watched the children and disciplined them. Plaintiff stated that the children indicated to her that their interactions with Nikki were generally negative. Plaintiff stated that the children went to Florida with defendant, defendant's mother, Nikki, and Nikki's daughter in 2013, and the children were very upset and angry after the vacation, in part because Nikki had treated them badly. Plaintiff also testified that defendant was more than $12,000 in arrears in child support payments.

Defendant testified that he and the children engaged in activities such as hunting, fishing, boating, hiking, playing board games, and watching movies. Defendant stated that when he asked the children what he could do differently to make them want to come to his home for parenting time, they would not make any suggestions and would say that everything was fine. Defendant maintained that he attempted to talk to plaintiff about issues concerning the children, but that plaintiff would not answer his calls.

The referee found that plaintiff showed proper cause to modify the custody arrangement, and recommended that plaintiff be awarded sole legal and physical custody of the children, and that defendant's parenting time be suspended until further order.[1]

Defendant objected to the referee's recommendation and requested a de novo hearing. At a motion hearing, the trial court denied defendant's request to call Dr. Winkler, a counselor, to testify at the de novo hearing, noting that it had entered an order precluding the testimony of further witnesses unless the testimony was newly discovered and could not have been presented at the referee's hearing. The trial court observed that Dr. Winkler could have testified at the referee's hearing, but that the parties stipulated to present his report in lieu of defendant calling him as a witness. The trial court also denied defendant's request to call a CPS worker who defendant contends would have testified that allegations against defendant were found to be unsubstantiated.

At the de novo hearing, the parties' daughter, who was then 14 years old, testified that when she and her brother went to defendant's home for parenting time, defendant often left them at his mother's home, that defendant made them work and clean his house, and that defendant made them engage in activities that he enjoyed, but which they did not enjoy. In response to the trial court's question whether the child wanted to say anything else, the child offered that defendant had killed a pet cat because it had an accident on the couch. The minor child explained that she and her brother sobbed as they followed defendant outside to attempt to dissuade him from killing the cat, but that he did so in front of them.

The parties' son, who at the time of trial was 11 years old, testified that he and his sister stopped going to defendant's home because defendant did not treat them well. The minor child stated that defendant made them do work around the house, and that defendant forced him to eat

[1] The referee considered the best-interest factors in MCL 722.23, and found that factors (a), (c), (d), (e), (i), (j), and (l) favored plaintiff, that factors (b), (f), and (h) were equal, and that factors (g) and (k) were not applicable.

foods that he did not want to the point where he vomited. The child stated that he did not want to see defendant again.

The trial court rendered its decision on the record. The trial court found that clear and convincing evidence showed that an established custodial environment existed with plaintiff and also determined that the referee's findings on the best-interest factors were supported by the requisite evidence. The trial court rejected defendant's assertions that the referee gave too much weight to the children's preferences, and that the evidence did not support the referee's finding that having parenting time with defendant would harm the children. The trial court also rejected defendant's assertion that the referee gave insufficient consideration to Dr. Winkler's second report. The trial court suspended defendant's parenting time pending further order, and directed the parties to remain in counseling. This appeal then ensued.

II. ANALYSIS

A. Conduct of de Novo Hearing

On appeal, defendant argues that the trial court erred by relying on the record from the referee hearing, erred by refusing to allow the testimony of two additional witnesses, and erred by allowing the children to testify at the de novo hearing.

We review de novo the interpretation of statutes and court rules. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013); *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

On appeal, defendant first alleges that the trial court erred by relying too heavily on the record developed during the hearing conducted by the referee. Our review of the record evidence presented in this matter and applicable law leads us to conclude that the trial court did not err by conducting the hearing in the manner that it did. MCL 552.507 provides, in pertinent part:

> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:
>
> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
>
> (b) For findings of fact to which the parties have objected, that 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.
>
> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
>
> (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.

(b) A new decision based only on evidence presented at the time of the de novo hearing.

(c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

Defendant's assertion that the trial court erred by relying on the record, in part, from the referee's hearing is without merit in light of the clear language of MCL 552.507(6)(c) stated above, which explicitly allows the trial court to issue a new decision based in part on the record from the referee hearing, supplemented by new evidence that was not introduced at the previous hearing. Because that was precisely what occurred in this matter, plaintiff is not entitled to relief.

B. Denial of Witness Testimony

Defendant next alleges that the trial court erred by refusing to allow him to call Dr. Winkler and Mr. Nixon to testify at the de novo hearing. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A preliminary issue of law regarding the admissibility of evidence is reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

On this issue defendant alleges error in the trial court's refusal to permit live testimony relative to Dr. Winkler's second report. However, defendant's argument is somewhat disingenuous in that it fails to mention that the parties stipulated to the admission of Dr. Winkler's second report in lieu of him appearing for live testimony. During the motion hearing, the trial court noted that defendant could have called Dr. Winkler to testify at the referee hearing, but elected not to do so. Given that defendant waived Dr. Winkler's testimony at the referee hearing and then stipulated to the admission of his second report, we cannot glean any error by the trial court declining to allow Dr. Winkler to testify at the de novo hearing. Absent error, we cannot find the trial court abused its discretion by not allowing Winkler's testimony; accordingly, defendant is not entitled to relief on this issue.

We also conclude that the trial court did not abuse its discretion by declining to allow Mr. Nixon, a Child Protective Services worker, to testify at the de novo hearing. The trial court concluded that Nixon's testimony was not relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. As a general rule, "[a]ll relevant evidence is admissible," but "[e]vidence which is not relevant is not admissible." MRE 402. Defendant sought to call Nixon to testify that he had investigated an abuse allegation against defendant and that the allegation was unsubstantiated. Defense counsel acknowledged that plaintiff had also stated that she did not believe the allegation. Defendant asserts that Nixon's testimony would have been relevant to factors (j) and (l) in MCL 722.23, but he fails to explain how it could have been relevant after all parties agreed that the allegation was unsubstantiated. Evidence of an unsubstantiated allegation, where neither party was claiming that the allegation had any substance, does not meet the definition of relevance in MRE 401. Therefore, the trial court did not abuse its discretion by excluding this evidence.

C. Testimony of Minor Children

Next, defendant alleges that the trial court erred by allowing the minor children to testify at the de novo hearing. This argument is invalid as it was defendant who called the children as witnesses. Defense counsel declined to use alternative arrangements, such as having the children testify in another room. "A party may not harbor error as an appellate parachute by assenting to action in the lower proceeding and raising the issue as an error on appeals." *Wilcoxin v Detroit Election Comm*, 301 Mich App 619, 640; 838 NW2d 182 (2013). Defendant's decision to call the children as witnesses waives any claim that the trial court abused its discretion by allowing the children to testify at the de novo hearing. The waiver of an issue "extinguish[es] any alleged error and foreclose[s] appellate review." *In re Tiemann*, 297 Mich App 250, 265; 823 NW2d 440 (2012).

D. Best Interest Factors

Next, defendant argues that the referee's findings on several of the statutory best-interest factors are against the great weight of the evidence and should not have been affirmed by the trial court.

We must affirm a custody order unless the trial court findings were against the great weight of the evidence, the trial court committed a palpable abuse of discretion, or the trial court made a clear legal error on a major issue. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The great weight standard applies to all findings of fact and requires affirmance of the trial court's decision unless the evidence clearly preponderates in the opposite direction. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). The abuse of discretion applies to discretionary rulings, including the party to whom custody is granted. A ruling constitutes an abuse of discretion 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 522 (quotation marks omitted). A question of law is reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013).

A custody dispute is to be resolved in the child's best interests as measured by the factors set out in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The court must consider and state its findings as to each factor, *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007), but need not give equal weight to each factor if the circumstances do not warrant it. *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

The best interest factors are set out 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.

Defendant argues that the referee's findings that factors (a), (c), (d), (e), (i), (j), and (l) favored plaintiff are against the great weight of the evidence. A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Mitchell*, 296 Mich App at 519. Defendant objects to the findings, but essentially asserts that other evidence, particularly his own testimony, could have supported different findings. In addition, some assertions made by defendant, for example that the children likely suffered physical or verbal abuse at plaintiff's hands, are based entirely on unsupported speculation. Rather than base our ruling on speculation, we defer to the ability of the referee and trial court to judge the credibility of the witnesses. See, e.g., *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991); see also MCR 2.613(C). In his brief on appeal, defendant simply disagrees with the weight the referee and trial court gave to the evidence that supported the findings, but points to

no evidence that clearly preponderates in the opposite direction. *Id*. Accordingly, we find no evidence that any of the findings relative to the statutory best-interest factors were made in error. Accordingly, defendant is not entitled to relief on this issue.

E. Basis for Change of Custody

Defendant next argues that plaintiff failed to establish proper cause for a change of custody, and that the court abused its discretion by awarding plaintiff sole legal and physical custody of the children. Defendant's argument that plaintiff did not establish proper cause or a change of circumstances to revisit the existing custody arrangement is unpreserved, because defendant did not object on this basis below. Therefore, our review of this issue is limited to plain error affecting defendant's substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2003).

A custody award may be modified upon a showing of proper cause or a change of circumstances that establishes that a change would be in the best interests of the child. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009). The party seeking the change of custody must show proper cause or a change of circumstances before the court may consider the existence of an established custodial environment or the best interest factors. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). A showing of proper cause requires the establishment of appropriate grounds that have or could have a significant impact on the child's life such that custody should be reevaluated. *Id*. at 511. A change of circumstances exists when conditions pertaining to custody have been altered and the change has had or could have a significant impact on the child's well-being. *Corporan v Henton*, 282 Mich App 599, 604; 766 NW2d 903 (2009). The court must hold an evidentiary hearing before custody may be changed. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999).

As noted, to show proper cause, a party seeking a change of custody must establish grounds that have impacted or could impact a child's life to a degree that custody should be reevaluated. *Vodvarka*, 259 Mich App at 511. A trial court may look to the best-interest factors for guidance in this matter. *Id*. In this case, the referee noted that at the time plaintiff filed the motion to change custody, the parties shared joint legal and physical custody of the children. The referee relied on the testimony of the parties, and found that the evidence showed that since the previous custody order had been put in place, the children had come to fear defendant and no longer wished to be in his presence. The evidence showed that the existing custody arrangement was having a significant impact on the children's well-being. The best-interest factors (a) and (i) supported this conclusion. Accordingly, no plain error occurred.

The referee recommended that plaintiff be awarded sole legal and physical custody of the children, and that defendant's parenting time be suspended until further order of the court. The trial court affirmed that decision. The evidence showed that the children feared defendant and did not want to associate with him at all. The trial court observed that when the children testified at the de novo hearing, they twisted their bodies so that they did not have to look at defendant.

Defendant had killed the children's pet cat in their presence.[2] The record developed at the referee hearing and the de novo hearing supports the trial court's decision to award plaintiff sole legal and physical custody of the children. Despite defendant's numerous attempts to attack the trial court's findings and ultimate holding, we cannot find any factor or finding where the trial court abused its discretion. Accordingly, defendant is not entitled to relief. *Mitchell*, 296 Mich App at 522.

F. Suspension of Parenting Time

Next, defendant argues that the trial court abused its discretion by suspending his parenting time because doing so precludes him from having any kind of relationship with the children.

MCL 722.27a(1) governs parenting time, and provides:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

The trial court found that the evidence showed that the children's present relationship with defendant was dysfunctional, and that the children feared defendant and demonstrated anxiety in his presence. The trial court suspended defendant's unsupervised parenting time, but ordered that the parties continue with counseling with the goal being to repair the relationship between defendant and the children and eventually to resume defendant's unsupervised parenting time. Defendant obviously does not agree with the trial court's action, but cites no authority to this Court to support a finding that the trial court's decision was not authorized by MCL 722.27a(1). Quite the contrary, the language of MCL 722.27a(1) clearly supports the trial court's decision to suspend defendant's parenting time until the relationship between defendant and the children could be repaired. Accordingly, defendant is not entitled to relief.

G. FOC Representative

Next, defendant argues that the referee abused his discretion when he allowed Jennifer Councilman, an employee of the Roscommon County FOC, to testify at the evidentiary hearing. Councilman acted as a court reporter during the hearing and was not sequestered, as were the other witnesses.[3] Moreover, Councilman authored a report for this case. Defendant asserts that Councilman was prejudiced against him because he had approached her repeatedly and was

[2] Defendant does not deny this assertion.

[3] When Councilman took the stand to testify, another individual took over her duties as court reporter. We point this out only because it makes no sense to violate the sequestration order when there was another court reporter available.

persistent in attempting to ensure that he received his parenting time. Because defendant did not object to Councilman's testimony below, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Rivette*, 278 Mich App at 328.

Defendant requested that witnesses be sequestered before the referee hearing. Before Councilman was called to testify, the referee noted that she had been present in the courtroom that day. As noted earlier, defendant did not object to Councilman testifying. Councilman stated that she became familiar with this case as a result of her employment with the FOC, and that she had conducted an investigation and prepared a written report. Defendant's attorney asked if Councilman thought she was able to be objective when she prepared the report; she answered in the affirmative. In response to the referee's inquiry, Councilman stated that she was objective when she prepared the report.

Defendant's assertions that Councilman was prejudiced against him, and that her testimony was colored by the proceedings for which she acted as court recorder, are completely unsubstantiated, and therefore, do not establish plain error. Even though the referee should have sequestered Councilman until she testified, we cannot conclude that the error affected defendant's substantial rights. Councilman testified only to the contents of her report and how she prepared the report. She stated unequivocally that she acted objectively when she prepared the report. Defendant has established that the referee was negligent by not making other arrangements for a court reporter, but defendant has not established that Councilman's presence in the courtroom before she was called to testify was inconsistent with substantial justice.

Lastly, defendant argues that the report prepared by Councilman should not have been admitted by the referee over his objection, and that Councilman should not have prepared the report because she did not have the proper training to conduct an investigation and prepare a report and was prejudiced against him.

The FOC must conduct an investigation and prepare a report in a custody case if ordered to do so by the court. MCL 552.505(1)(g). Moreover, the rules of evidence, other than those rules with respect to privilege, do not apply to a court's consideration of a FOC report prepared pursuant to statute. MRE 1101(b)(9). A trial court may consider a report absent a stipulation of the parties if it also allows the parties to present live evidence. *Dumm v Brodbeck*, 276 Mich App 460, 465; 740 NW2d 751 (2007).

Because the parties were permitted to call witnesses and present evidence, the referee was entitled to admit and consider the report even though the parties did not stipulate to its admission. Moreover, the fact that the report contained hearsay did not preclude its admission. MRE 1101(b)(9); *Dumm*, 276 Mich App at 465.

Defendant cites no authority to support his assertion that Councilman was not qualified to conduct the investigation and prepare the report because this was the first case assigned to her. A party's failure to cite supporting authority constitutes abandonment of the issue. *Berger v Berger*, 277 Mich App 700, 714-715; 747 NW2d 336 (2008) (the defendant abandoned the argument when he offered no support for contention that the plaintiff's decision to seek a divorce should be considered questionable conduct under factor (f) in MCL 722.23). Moreover, the extent of Councilman's experience in conducting investigations and preparing reports are matters

affecting only the weight of her testimony and report, not the admissibility of this evidence. See *Triple E Produce Co v Mastronardi Produce*, 209 Mich App 165, 175; 530 NW2d 772 (1995) (limits of knowledge go to weight of testimony). Accordingly, defendant is not entitled to relief on this issue.

Affirmed. No costs are awarded. MCL 7.219(A).

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Stephen L. Borrello