STATE OF MICHIGAN

COURT OF APPEALS

MELISSA A. MATTHEWS ALLEN, Plaintiff-Appellant,	UNPUBLISHED March 13, 2018
v	No. 338365 Washtenaw Circuit Court
DANIEL W. ALLEN, Defendant-Appellee.	LC No. 11-000332-DM

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

PER CURIAM.

In this custody dispute involving the parties' minor child, plaintiff appeals as of right the trial court order terminating joint legal custody of the minor child, awarding sole legal custody to defendant, and requiring plaintiff's parenting time be supervised. We affirm.

I. PROCEDURAL DUE PROCESS

Plaintiff first argues that the trial court violated her due process rights when it awarded defendant sole legal custody to the parties' minor child after having limited the evidentiary hearing on defendant's motion to suspend parenting time to parenting time issues only. Specifically, plaintiff argues that she was denied due process because she was not provided with notice of the fact that legal custody of the parties' minor child was at issue, and consequently, she was denied a meaningful opportunity to be heard. We disagree.

Plaintiff failed to preserve this issue by raising a due process argument in the trial court. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 192-193; 740 NW2d 678 (2007). This Court reviews unpreserved constitutional claims for plain error affecting substantial rights. *Bennett v Russell*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 334859); slip op at 3. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. (footnote omitted).

"A natural parent possesses a fundamental interest in the companionship, custody, care, and management of his or her child, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution." *Frowner v Smith*, 296 Mich App 374, 381; 820 NW2d 235 (2012).

"Due process . . . generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker." *Okrie v State of Mich*, 306 Mich App 445, 470; 857 NW2d 254 (2014). In regard to notice, "[d]ue process is satisfied when interested parties are given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond." *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995).

Plaintiff's no-notice argument rests on the fact that on the first day of the evidentiary hearing on defendant's motion to suspend parenting time, the trial court limited the scope of the hearing to a change in parenting time, but subsequently "*sua sponte*" awarded sole legal custody to defendant after 12 days of testimony. However, plaintiff's characterization of the record is myopic. Although plaintiff correctly asserts that defendant's August 2, 2016 motion only requested a suspension of plaintiff's parenting, in her response to defendant's motion, plaintiff argued that defendant is "essentially asking the court for a **change of custody** to sole custody. . . . The [c]ourt's analysis should be that of a change of custody." Plaintiff went on to argue that a change in custody is unwarranted because defendant has failed to show there was "any *significant* change in the child's environment." Plaintiff requested that if "the [trial] court agrees that a change in custody/parenting time is warranted, [p]laintiff requests an evidentiary hearing on the best interests factors and any other relevant information[.]"

During a hearing on August 11, 2016, plaintiff's counsel reiterated the request for an evidentiary hearing should the trial court agree that "a change in custody is warranted or a change in parenting time is warranted[.]" Specifically, plaintiff's counsel argued that defendant's motion was "actually a change of custody because of all intents and purposes that is what they are asking. They're asking that my client not have any parenting time whatsoever which would result in sole custody to [defendant.]" The trial court *agreed with plaintiff*, that defendant's motion was "not merely a motion to suspend parenting time but is a change of custody[,]" and determined that an evidentiary hearing was necessary, prompting the following exchange between the trial court and defense counsel:

> *Defense Counsel*. The evidentiary hearing will be in regard to the change of custody and parenting time?
>
> *Trial Court*. Yes.

See *Lieberman v Orr*, 319 Mich App 68, 76-77 n 4; 900 NW2d 130 (2017) (citations omitted) ("A court is not bound by what litigants choose to label their motions 'because this would exalt form over substance.' Rather, courts must consider the gravamen of the complaint or motion based on a reading of the document as a whole."). On August 12, 2016, the trial court entered a scheduling order regarding the evidentiary hearing requested by plaintiff, and stated, in part:

> An Evidentiary Hearing shall be held on October 6, 2016 and October 7, 2016 at 9:00 a.m. as to the Custody and Parenting Time issues.

Based on the foregoing, we cannot conclude that plaintiff was without adequate notice that the proceedings "may directly and adversely affect [plaintiff's] legally protected interests

and afford [her] an opportunity to respond." *Wortelboer*, 212 Mich App at 218. Plaintiff herself placed the issue of change in custody before the trial court through her responsive briefs and oral arguments to the trial court. Although the trial court appeared to have limited the scope of the evidentiary hearing through its oral pronouncements during the October 6, 2016 hearing, such a limitation was never reduced to writing, and it is long been accepted that trial courts speak through written orders, not oral pronouncements. *Simcor Construction, Inc v Trupp*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 333383); slip op at 7. Additionally, the trial court's limitation was qualified: the trial court admitted it did not have the October 11, 2016 hearing transcript in front of it, and "in the absence of a formal transcript as to the events that occurred on August 11 at that hearing," it would limit the scope of the evidentiary hearing. The trial court was subsequently provided with a copy of the August 11, 2016 hearing transcript at a hearing on August 19, 2016. Accordingly, where plaintiff herself placed the issue of change of custody before the trial court, we conclude plaintiff's due process rights were not violated for lack of notice regarding the nature of the proceedings.

II. CHANGE IN LEGAL CUSTODY AND PARENTING TIME

Plaintiff next argues that the trial court committed error requiring reversal by awarding sole legal custody to defendant and requiring her parenting time be supervised. Plaintiff challenges the trial court's determinations that defendant had established proper cause or a change in circumstances to revisit the last custody order, that it was in the best interests of the minor child to award sole legal custody to defendant, and that plaintiff's parenting time be supervised. Although we do not find plaintiff's arguments to be meritorious, each is addressed in turn.

A. STANDARD OF REVIEW

This Court must affirm all custody orders unless "the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. *Liebermann v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017).

> Findings of fact are reviewed under the great weight of evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. Discretionary rulings are reviewed under a "palpable abuse of discretion" standard. Therefore, because the trial court's custody decision is a discretionary dispositional ruling, a custody award should be affirmed unless it constitutes an abuse of discretion. Finally, questions of law in custody decisions are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. [*Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1988) (citations omitted.]

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate

in the opposite direction." *Shade*, 291 Mich App at 21. In child custody cases, "[a]n abuse of discretion exists 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Clear legal error occurs "when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

B. PROPER CAUSE OR CHANGE IN CIRCUMSTANCES THRESHOLD

First, plaintiff argues that the trial court erred by finding that defendant had satisfied the threshold required to move forward with the hearing regarding change in custody and change in parenting time. We disagree.

When seeking to modify a custody order, the moving party must first establish proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). To establish "proper cause,"

> a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. 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. [*Vodvarka*, 259 Mich App at 512.]

"[I]n order to establish a 'change in circumstances,' a movant must provide that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed. *Vodvarka*, 259 Mich App at 513 (emphasis omitted). To constitute a change in circumstances under MCL 722.27(1)(c), "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514. The escalation of disagreements between the parties regarding matters that have a significant effect on the children's welfare may constitute proper cause or change of circumstances. See *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011).

Conversely, when modifying a parenting time order that would not affect the minor child's established custodial environment or environments, the threshold is less stringent. See *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010). Although defendant had sole physical custody of the parties' minor child, the parties do not dispute that there was an established custodial environment with plaintiff. By moving to suspend plaintiff's parenting time, defendant effectively sought to alter plaintiff's custodial environment because plaintiff's unsupervised and overnight visits would be stopped. Accordingly the trial court properly utilized framework set forth in *Vodvarka*, 259 Mich App at 499, to determine whether defendant had made a threshold showing of proper cause of a change in circumstances to revisit parenting time or custody. *Shade*, 291 Mich App at 27.

We conclude that the court's finding that there was a change in circumstances to warrant revisiting custody and parenting time was not against the great weight of the evidence. We

initially note that plaintiff contends the trial court improperly relied on a letter from the minor child's therapist, Robert K. Moesta, when determining that a change in circumstances had taken place. Specifically, plaintiff argues that the Moesta's letter constitutes inadmissible hearsay within hearsay. Plaintiff also challenges Moesta's live testimony at the evidentiary hearing on the same basis.

In his letter, Moesta wrote, in pertinent part:

> I am worried about [the minor child]. He continues to be put in adult situations and positions. He is troubled by this and has requested again on this day that I write a letter to the judge so "this stuff will stop. I'm still in the middle. I feel sad when mom cries. I worry about her feeling sad and it makes me cry." This 8-year-old youngster reported that his mother called him a liar and that she would be joining him for his sessions so he can tell [me] that he lied. She said she would be at all of his sessions. [The minor child] was extremely anxious regarding her being in session with him. At this time, I feel the ethical thing to do is to honor [the minor child's] feelings regarding his therapy sessions.
>
> Also, [the minor child] has continued to suffer from sadness, anxiety, and crying spells. He said that his mother . . . has been instructing him to tell his father and step-mother that he wants to spend more time with her. He has been quiet and tearful in his therapy sessions (which has increased in frequency and duration).
>
> * * *
>
> Finally, I believe this youngster's reporting, due to the consistency of his complaints, as well as his requesting help for the past several months. "Can't you get me out of the middle so I can just be normal?" reported [the minor child]. He said he doesn't want to feel scared when he is here and asked that his session time be alone. He explained, "I don't know what to say to her anymore. I just feel bad."

Plaintiff contends that the statements from the minor child contained in that letter are hearsay, and therefore are insufficient to establish changed circumstances. We disagree.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible unless it falls under one of the various established exceptions. MRE 802. Moesta's letter itself, as well as the statements made by the parties' minor child contained within the letter, is hearsay. However, the letter, as well as the statements contained within the letter, fall under exceptions to the rule against hearsay, and therefore were properly considered. See MRE 803(6) (records of regularly conducted activity) and MRE 803(3) (then existing mental, emotional, or physical condition). Further, we take no issue with Moesta's live testimony. Therapists frequently testify in custody matters, and in fact, provide valuable insight from the minor child's perspective. At the evidentiary hearing Moesta testified consistent with his letter. We conclude that testimony was admissible as an exception to the rule against hearsay. MRE 803(3); MRE 803(6).

With respect to the substance of Mesta's letter, we conclude that it proved by a preponderance of the evidence that a change in circumstances had occurred such that the trial court should consider a change in parenting time. Despite the fact that the friend of the court (FOC) had voiced concerns years prior about plaintiff's behavior being emotionally and mentally damaging to the parties' minor child, Moesta's letter showed that plaintiff continued to engage in a pattern of behavior that was emotionally and mentally damaging to the parties minor child. Specifically, plaintiff continued to place the parties' minor child in adult situations, discuss details of the custody or parenting time arrangements with the minor child, and make disparaging remarks about defendant and his wife. As a result, the minor child's stress, anxiety, guilt and "crying spells" had escalated to the point where the minor child was asking for Moesta's help not being put in the middle.

Furthermore, the letter illustrated that plaintiff continued to disregard Moesta's concerns, and instead, accused the parties' minor child of lying in his therapy sessions. Plaintiff's response showed that she was unwilling to take responsibility for her actions or change in a meaningful way to benefit the parties' minor child. Plaintiff's hostility toward Moesta's concerns showed that she did not place the minor child's best interests above her own self-interests. Her damaging pattern of behavior showed no signs of improvement since entry of the 2014 custody order awarding sole physical custody to defendant. Although plaintiff's behavior was not new, the letter showed that the behavior had escalated, and was having a detrimental impact on the minor child's mental and emotional well-being.

Based on the foregoing, we conclude that the conduct outlined in the letter established by a preponderance of the evidence that "the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, [had] materially changed[.]" *Vodvarka*, 259 Mich App at 513. As such, the trial court's finding that there were changed circumstances to revisit parenting time, and legal custody, was not against the great weight of the evidence.

C. CHANGE IN LEGAL CUSTODY AND PARENTING TIME

Plaintiff next argues that the trial court committed error requiring reversal by terminating joint legal custody and requiring plaintiff's parenting time be supervised. Plaintiff takes issue with the trial court's reliance on Moesta's "hearsay" testimony, and contends that absent Moesta's inadmissible testimony, defendant did not satisfy his burden of proving by clear and convincing evidence that it was in the minor child's best interests to aware sole legal custody to defendant, or to order supervised parenting time. We disagree.

Here, the trial court found that an established custodial environment existed with plaintiff, and therefore defendant had the burden of proving by clear and convincing evidence that modify the legal custodial environment was in the minor child's best interests. MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). The best interest of the child is statutorily defined as "the sum total of the . . . factors" set forth in MCL 722.23(*a*) – (*i*), which are to be "considered, evaluated, and determined by the court." MCL 722.23. "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." *McRoberts v Ferguson*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 337665); slip op at 4

(citation omitted). "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to afford differing weight to the best-interest factors." *Id*. (citation omitted). The best interests factors are:

> 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.
>
> (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. [MCL 722.23.]

Additionally, "[p]arenting time is granted if it is in the best interest of the child and in a frequency, duration, and type reasonably calculated to promote strong parent-child relationships." *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004), citing MCL 722.27a(1). "A parenting time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent, including . . . [r]equirements that parenting time occur in the presence of a third person or agency." MCL 722.27a(9)(f). In the event that an existing parenting time order is modified in such a way that it changes an established custodial environment, the order should not be entered

"unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child." *Brown*, 260 Mich App at 595. This is because "when the proposed parenting-time change alters the established custodial environment, the proposal is essentially a change in custody. . . ." *Lieberman v Orr*, 319 Mich App 68, 84; 900 NW2d 130 (2010).

In modifying a custodial environment, a trial court must make findings on the statutory parenting time best interests factors, which differ from the custody best interests factors, to determine if there is clear and convincing evidence that the change is in the child's best interests. *Meyer v Meyer*, 153 Mich App 419, 426; 395 NW2d 65 (1986). In this case, the parties do not dispute the trial court's finding that there was an established custodial environment with both parties, despite defendant having been awarded sole physical custody of the minor child in 2014. Modifying the parenting time order to require plaintiff's parenting time be supervised would affectively change the custodial environment established with plaintiff. Accordingly, the trial court was required to apply the statutory best interest factors to determine whether to modify parenting time. *Brown*, 260 Mich App at 595.

MCL 722.27a(7) provides the best interest factors to be considered when determining the frequency, duration, and type of parenting time to be granted. The best interests factors are:

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
>
> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
>
> (i) Any other relevant factors. [MCL 722.27a(7).]

In its 19 page opinion and order, the trial court addressed the best interests factors found in both MCL 722.23 and MCL 722.27a(7). The trial court first addressed legal custody of the minor child, and determined that factors (a), (b), (e), (g), (h), (j), and (l) favored granting sole legal custody to defendant, and that the remaining favors were either equal to both parties, or not applicable. Moving on to parenting time, the trial court adopted and included the custody best interest factors in its analysis of the parenting time best interest facts. The trial court further found that factors (a), (f), and (i) also weighed heavily in favor of defendant, and accordingly, the trial court ordered plaintiff's parenting time to be supervised.

We note that in her brief on appeal, plaintiff fails to identify which of the trial court's findings on the best interest factors found in MCL 722.23 and MCL 722.27a(7) were against the great weight of the evidence. Rather, plaintiff challenges only the admissibility of the evidence supporting the trial court's findings. Specifically, plaintiff argues that the trial court's findings on custody and parenting time were based on the hearsay testimony of Moesta, and that even addressing a change in legal custody was violative of her due process rights. However, we have addressed both of plaintiff's arguments *supra*, and found them to be without merit. Because plaintiff failed to contest specific best interests findings, we decline to make those arguments for her, and likewise we find it is unnecessary to engage in a lengthy discussion of each best interests factor. Regardless, based on our review of the record, we conclude that the evidence did not clearly preponderate against the trial court's findings that it was in the best interests of the minor child to award sole legal custody to defendant and to order plaintiff's parenting time be supervised.

We briefly address plaintiff's argument that in order to suspend plaintiff's parenting time, defendant needed to prove by clear and convincing evidence harm to the minor child's "physical, mental, or emotional health," pursuant to MCL 722.27a(3). Plaintiff is correct that under MCL 722.27a(3), a child has "a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." However, the trial court did not suspend parenting time. Instead, the trial court ordered that plaintiff's parenting time be supervised. MCL 722.27a(9)(f) provides that a trial court may place "reasonable terms or conditions" on parenting time including a requirement that parenting time "occur in the presence of a third person or agency." MCL 722.27a(9) does not require a heightened burden of proof, and the trial court therefore did not err in exercising its discretion under MCL 722.27a(9). Furthermore, plaintiff has failed to show that the trial court's decision was "so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias," or that the trial court clearly erred in its application of the law. *Berger*, 277 Mich App at 705; *Shulick*, 273 Mich App at 323. Accordingly, the trial court did not err in limiting plaintiff to supervised parenting time.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Patrick M. Meter