STATE OF MICHIGAN

COURT OF APPEALS

SARA KANTER,

Plaintiff-Appellant,

v

MICHAEL KANTER,

Defendant-Appellee.

UNPUBLISHED
February 22, 2018

No. 339159
Oakland Circuit Court
Family Division
LC No. 2009-761343-DM

Before: JANSEN, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

In this child custody action, plaintiff appeals an order granting defendant's motion to change, i.e. reinstate the originally ordered, parenting time. We reverse and remand for the trial court to determine whether the proposed change is in the best interests of the children.[1]

The parties' judgment of divorce was entered on November 16, 2009. Plaintiff and defendant have a daughter, PK, and a son, MK, who at the time of the divorce were ages four

[1] We begin our analysis by noting that "[I]n child custody disputes, all orders and judgments of the circuit court shall be affirmed . . . 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." *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014) (quotation marks and citation omitted). We review the findings of fact under the "great weight of the evidence" standard. *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017). A finding of fact that is "against the great weight of the evidence" means that this Court "should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (quotation marks and citation omitted). The award of parenting time is reviewed for an abuse of discretion. *Diez*, 307 Mich App at 389. "In the context of a child custody dispute, an abuse of discretion is found only in extreme cases wherein the trial court's decision is so palpably and grossly violative of fact and logic that it evidences the exercise of passion or bias or a perversity of will." *McRoberts v Ferguson*, ___ Mich ___; ___ NW2d ___ (2017); slip op at 3. Clear legal error occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Fletcher*, 447 Mich at 881.

and seven respectively. The judgment of divorce contained a parenting-time agreement that stated as follows:

> Father shall have two hundred seventeen (217) custodial overnights each year with the parties' minor children. The Mother shall have a minimum of one hundred forty eight (148) custodial overnights with the parties' minor children. Currently the parties share parenting time with the Father having 4 overnights and the Mother having 3 overnights each week. This schedule may be modified by mutual agreement of the parties.
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> The parties also agree that they may modify this agreement for parenting time with the children at such other times as the parties mutually agree. The parties further agree to diligently adhere to the agreed upon parenting time arrangements set forth in this agreement, subject to the reasonable need of the parties for occasional rescheduling.

On October 4, 2013, plaintiff filed a motion to change parenting time. She argued that despite the parenting time provisions of the judgment of divorce, defendant, since May 2012, had only been taking the children on alternating weekends. Plaintiff asserted that she and the children's stepfather provided all of the day-to-day care of the children, including transportation to school, doctor's appointments, and participation in school events and extracurricular activities. Plaintiff further stated that defendant's work, financial, and personal conflicts have caused him to be unwilling to effectively communicate with the children, the children's schools, and plaintiff. She also alleged that defendant was attempting to intimidate the children, and that the children were "experiencing extreme anxiety and ha[d] expressed fear of the current situation . . . ." In her motion Plaintiff asked the trial court to change the parenting time order as follows:

> The children to spend all overnights with Plaintiff with the exceptions of Wednesday overnights from school dismissal or 6:00 p.m. if school is not in session, and alternating weekends beginning at 6:00 p.m. on Friday and ending at 6:00 p.m. on Sunday, when they will be in Defendant's care.

Defendant denied these allegations and requested that the parenting order be modified in order to allow him to "resume regular overnights with the children, as stated in the original order dated from November 16, 2009 . . . [with] four (4) overnights for the defendant and three (3) overnights for the plaintiff [per week]."

Before the motion could be heard, the parties entered into a consent order on October 24, 2013. The consent order provided that parenting time would be divided so that "the mother shall have every Sunday, Monday, and every other Tuesday and father shall have every Wednesday and Thursday and every other Tuesday; the parents shall alternate the weekend from Friday until Sunday; Sunday exchanges shall be 6:00 p.m."

A little over two years later, on November 17, 2015, plaintiff filed a motion to suspend parenting time. She alleged that the children had reported that defendant and his wife, Elaine Taylor, had gotten into a violent and physical altercation while the children were in their home.

Plaintiff stated that both children told her that during the altercation, they hid in their rooms and heard glass breaking, shouting, swearing, and screaming. According to plaintiff, MK told her that he feared that defendant would push Taylor down the stairs during the altercation, and that he held the door to his room shut for the duration of the fight. Plaintiff alleged that defendant admitted that the altercation had occurred, and agreed that the children should stay with her, but that he changed his mind soon after and demanded to be given his parenting time with the children. Plaintiff stated that she had received a phone call from Child Protective Services ("CPS"), and that she was told that a report had been filed in relation to the incident. Plaintiff requested that the trial court suspend defendant's parenting time pending the completion of the CPS investigation.

Defendant denied that the altercation with Taylor had occurred, denied knowledge of a CPS report filed in response to the altercation, and alleged that he never agreed to allow plaintiff to keep the children indefinitely. Defendant also alleged that plaintiff did not allow him access to the children the next time that he went to plaintiff's house to pick the children up. He requested that the trial court allow him to receive make-up parenting time for the days that he missed as a result of plaintiff's refusal to allow him to see his children, and that the trial court issue "a suppression order on the prying and meddling into defendant's household, including questioning of the children about their time at the defendant's home."

On December 1, 2015, the trial court issued an order adjourning plaintiff's motion until the CPS case related to the incident was resolved. The trial court further ordered plaintiff and defendant to attend mediation through Oakland Mediation Services.[2]

On May 18, 2016, plaintiff filed an emergency motion to suspend parenting time alleging that the children returned home from another parenting time with defendant and reported another violent altercation between defendant and Taylor. The motion alleged that the fight between Taylor and defendant had started in PK's bedroom, and that defendant had pushed the door to the bedroom open "so hard that the door handle put a hole in the drywall of her bedroom." It further alleged that the children heard defendant screaming at Taylor, witnessed him attempting to push her down the stairs, and Taylor hitting defendant in the face. Finally, it alleged that defendant had told the children that they were not allowed to tell anyone what had happened with Taylor.

According to the emergency motion, plaintiff filed a police report and the police then contacted CPS to file a complaint. The responding officer, who went to defendant's house to investigate the allegations, told plaintiff that defendant had stated that the children were lying about the fight. Plaintiff alleged that six prior CPS complaints had already been filed against defendant, and that defendant and Taylor had a history of engaging in violent disputes. Plaintiff requested that the trial court suspend defendant's parenting time pending investigation and recommendation by a court appointed psychologist. In his response to the emergency motion, defendant denied that any altercation had taken place and stated that all of the CPS reports against him had been closed, and requested that he be allowed regular custody of his children.

[2] On January 13, 2016, plaintiff's motion to suspend parenting time was resolved through the Oakland Circuit Court Friend of the Court system.

However, before the emergency motion was decided, the parties agreed on a consent order, issued on June 8, 2016, which provided that "[d]efendant's parenting time shall occur on alternating Saturdays from 9:00 a.m. until 6:00 p.m. until further order of the court."

A little over four months later, on October 24, 2016, defendant filed a motion to reinstate the 50/50 parenting-time arrangement that had existed prior to the June consent order. Defendant argued that the inclusion of the language, "until further order of the court," in the June 8, 2016 order indicated that the order was intended to be temporary until such time as the CPS investigation was completed. Plaintiff responded that the June 8, 2016 order was not temporary, and that defendant was seeking modification of the parenting time arrangement without proper cause shown or evidence of a change of circumstances, and thus, that his motion should be denied.

At the motion hearing, plaintiff noted that the children's therapist had requested more time to work with the children prior to allowing them to return to overnights with defendant, and that the therapist had also recommended that the trial court maintain the consent order from June 8, 2016 and was particularly concerned about MK's emotional stability. Defendant argued that he had only agreed to reduced parenting time for a temporary period when he signed the June 8, 2016 order, and that there was no valid reason given by plaintiff not to reinstate his parenting time because a sufficient amount of time had passed, and any domestic violence allegations against him had not been substantiated. The trial court stated as follows:

> I had a chance to review the materials . . . and particularly a report provided by [the children's therapist] . . . [the children's therapist] apparently believes that it would be helpful to allow for more days and events with dad so that the kids can experience more positive time together, rebuild the relationship. Ah – does express concern about overnight but also further indicates that . . . after there's more positive foundation in place and the children feel safe in dad's home again they may be more comfortable with trying overnights again . . . and would then recommend biweekly weekend overnights as a fair starting point with continued counseling . . . . I think the circumstances are such that it's appropriate to um – at this time to have overnights and we'll see where things go.

On November 30, 2016, the trial court issued an order granting defendant's motion but did not at that time reinstate 50/50 parenting time. Instead, the trial court ordered that defendant be allowed to resume alternative weekend overnights with the children and requested that the parties return for a review hearing.

On May 17, 2017, the trial court reviewed the parenting time order and heard the parties' arguments regarding the modification of parenting time. Defendant requested that the trial court restore 50/50 parenting time and argued that a finding of change of circumstances or proper cause shown was not necessary because he was not seeking a change in the established custodial environment. In response, plaintiff argued that parenting time with defendant was causing the children substantial emotional distress and that given the time since there had been 50/50

parenting time, a reversion to that arrangement, even if pre-existing, required at a minimum a best interests review pursuant to *Shade*[3] or that it rose to the level of a change in custody and therefore required consideration under *Vodvarka*.[4] The trial court disagreed, and in its May 17, 2017 order, vacated the prior orders of June 8, 2016, and November 30, 2016, and ordered reinstatement of parenting time in accordance with the October 24, 2013 parenting time order. The court stated:

> [A]t the time of that [June 8, 2016] consent order entry [the court did not make a finding of] proper cause or change of circumstances for the entry of an order that would change parenting time or – or custody. And it's clear to me that that was entered as an interim order, a temporary order. It clearly was . . . something that would be re-evaluated after a period of time based on allegations of domestic violence that had occurred – were alleged to have occurred in the father's household, and a concern about obviously the impact on – on the kids.
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> So, ultimately now what's being requested of the court by defendant through this motion is to . . . essentially nullify the interim order, if you will, and return the matter back to the joint legal and physical custody situation before the entry of a consent order . . . . I am going to grant the motion because I don't, um – I don't believe there's proper cause or change of circumstances. I don't think it's ever been found, and under the circumstances I think it's appropriate to grant the motion for the reasons I've indicated.
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> So I – I don't believe there's been any finding of proper cause or change of circumstances . . . to modify that original order. Beyond that . . . I don't think there's a basis to make the finding. So not only . . . was there not a find – finding made of proper cause or change of circumstances, I don't think there's any basis for me to make that finding of proper cause or change of circumstances to support a modification of that original joint legal physical order when the basis of this interim consent order, and presumably any additional orders entered thereafter that modified that parenting time to some degree, were all premised on allegations of domestic violence and issues which have been proven to be unfounded.

"[I]n child custody disputes, all orders . . . of the circuit court shall be affirmed . . . 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." *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014) (quotation marks and citation omitted). We conclude that the trial court made a legal error in declining to address the best-interest factors and in concluding that because there had not been a finding of change of circumstances to justify the consent order

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[3] *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010).

[4] *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003).

reducing defendant's parenting time, such a finding was not necessary to later return to the status quo ante.

We agree that since the prior orders did not change custody, defendant was not required to meet the *Vodvarka* standard.[5] However, we find no caselaw to support the view that a change in parenting time, particularly one so substantial, can be ordered simply on the grounds that the reason for the earlier reduction has lessened or ceased. First, *Shade* speaks to the need to change parenting time due to "normal life change[s]." *Shade*, 291 Mich App at 30-31. Neither the reduction in parenting time, nor its subsequent increase were based on "normal life change[s]." Rather, they were based on concerns that the children were not safe at defendant's home and that one of the children reported suicidal ideation. That those concerns were, at least in part, ameliorated does not mean that a return to the status quo ante could be ordered without review under *Shade*.

We recognize, as did the trial court, that CPS did not substantiate the allegations against defendant and that no charges were brought. And we agree that the resolution of those matters could satisfy the "more expansive definition of "proper cause" or "change of circumstances" necessary to consider a change in parenting time. We also recognize that the trial court's approach to the issue was reasoned, with the November 2016 increase being in the court's view, an interim step until full reinstatement of father's parenting time was viewed in the children's best interests. However, we disagree with the court's conclusion that because it did not find proper cause or change of circumstances or best interests when the defendant's parenting time was curtailed, there was no need to consider whether a return to the original parenting time scheme, after nearly a year of a very different parenting schedule, was in the children's best interests.

Those factors, as defined in MCL 722.27a(7), are:

> (a) The existence of any special circumstances or needs of the child.
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> (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.
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> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
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> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
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> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

[5] If plaintiff seeks full custody over the children, she may file the appropriate motion. However, we do not agree with plaintiff that the court should have necessarily found defendant's request for a return to status quo ante parenting time tantamount to a change in custody request.

(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. . . .

(i) Any other relevant factors.

In *Shade,* we did not require that the trial court explicitly review each of the best-interest factors because "it was clear from the trial court's statements on the record that the trial court was considering the minor child's best interests in modifying . . . parenting time" *Id*. at 31. Based on the record before us, we cannot say the same is true in this case. The trial court focused on the return to the status quo ante and the failure to have made necessary findings when the consent order was entered. Moreover, the trial court mainly focused on whether the alleged domestic violence incidents had ever led to criminal charges or formal CPS petitions against defendant. It appears that the trial court concluded that determining that no criminal charges had been filed against defendant related to the domestic violence incidents could substitute for a best-interest determination.

As noted above, we are not convinced that we should simply consider the June 2016 order to be temporary and capable of substantial change without consideration of the best-interest factors. Moreover, although parenting time determinations are focused on "foster[ing] a strong relationship between the child and the child's parents," *Shade*, 291 Mich App at 29, such determinations still must turn on the best interests of the child.

Accordingly, we reverse the trial court's May 17, 2017 order and remand to the trial court for it to make findings as to the best-interest factors under MCL 722.27a. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro