STATE OF MICHIGAN

COURT OF APPEALS

JORDAN PAUL PERRY, Plaintiff-Appellee,	UNPUBLISHED March 13, 2018
v	No. 340144 Chippewa Circuit Court
KATHLEEN MALPASS, Defendant-Appellant.	LC No. 13-012662-DC

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

Defendant Kathleen Malpass appeals by right from an order denying her objections to a Friend of the Court (FOC) recommendation on matters involving custody and education of the parties' minor child. We affirm.

I. BACKGROUND

The parties had a child in 2011 when they were together in Sault Ste. Marie, Michigan. Shortly after, the parties broke up and defendant moved back to North Carolina. Defendant subsequently married, and the couple now lives in Smithfield, North Carolina. For his part, plaintiff is not married but has a girlfriend who resides with him in Sault Ste. Marie. When the child was approximately three years old, the trial court entered a stipulated order granting plaintiff and defendant joint legal and physical custody on a rotating six-weeks-on/four-weeks-off schedule that resulted in each party having equal parenting time. The order contemplated a change would need to be made when the child reached school age.

In May 2016, the spring before the child would start kindergarten, defendant filed a motion to determine the child's primary residence and for a change in parenting time. Near the end of summer, the FOC referee issued an opinion and recommendation (report) finding that there was proper cause and a sufficient change in circumstances to modify the prior stipulated order. The referee further found that the child had an established custodial environment with both parents, but that "both parties recognize that a change must occur to the child's established custodial environment in light of the child beginning school." Thus, the referee treated the dispute as one modifying an existing custodial environment rather than just parenting time. In analyzing the best-interest factors under MCL 722.23, the referee determined that plaintiff and

defendant were equal with respect to all factors except subsections (j) and (*l*), which favored plaintiff.

With regard to subsection (j), the referee found that plaintiff encouraged a close relationship between the child and defendant, and between the child and defendant's extended family. The referee based this determination on evidence that plaintiff allowed defendant to have daily phone calls with the child, allowed the child to have Skype conversations with defendant's parents and sister, and reached out to defendant to organize group outings between the families. The referee noted that defendant, contrastingly, had not accepted plaintiff's invitations to these outings and felt that it would be "awkward" if plaintiff attended the child's Christmas concert in North Carolina. Even so, the referee acknowledged that defendant ultimately expressed her willingness for plaintiff to attend the concert for the child's sake. Additionally, the referee noted that defendant became somewhat estranged from her parents when she was in a relationship with plaintiff, though defendant's parents had become very close with the child. The referee was not persuaded that defendant's parents were "particularly sincere" in testifying that they wanted plaintiff to maintain a close relationship with his son.

Regarding subsection (*l*), the referee considered defendant's mother's availability to care for the child during summers while defendant works; plaintiff's work schedule; the availability of plaintiff's live-in girlfriend to take the child to school and provide care until plaintiff returns from work; plaintiff's consistent communication with defendant regarding important developments in the child's life; and plaintiff's demonstrated respect for defendant's time with the child by limiting his phone calls to twice per week.

The referee concluded that that the parties should continue to share joint legal and physical custody, but that the child should reside with plaintiff during the school year and with defendant during summer break, spring break, and Thanksgiving and Christmas breaks. The referee recommended that the child attend the Joseph K. Lumsden Bahweting School (Bahweting) in Sault Ste. Marie. This revised arrangement would result in a reduction of defendant's evenings with the child from approximately 183 to 96 per year.

Shortly after the FOC report issued, plaintiff moved the trial court for a temporary order adopting the recommendation so that the child could attend the first day of kindergarten at Bahweting. While disagreeing on the merits, defendant's counsel conceded that the trial court could issue such an order, even going so far as to say that plaintiff's counsel "was correct to try to seek a temporary order." The trial agreed that it was important for the child to experience a first day of kindergarten and granted the order.

Defendant subsequently objected to the FOC report and requested a de novo hearing. The trial court held a hearing on October 24, 2016. At no point did either parent challenge the referee's finding that an established custodial environment existed with both parents. Defendant did object that the referee had not adequately explained how its recommendation would change the established custodial environment, if at all, and what standard should apply to a change in that environment. Moreover, during the hearing on the motion for a temporary order, plaintiff's counsel asserted that this was merely a dispute about "parenting time and school year recommendation." Neither party, however, submitted to the trial court any analysis, argument, or case law with respect to custody versus parenting time. In both the written submissions and

during the hearing, the dispute centered on the best-interest factors, especially with respect to where the child should go to school—in Michigan or North Carolina.

With respect to this issue, defendant testified about her concern that Bahweting had not closed the scholastic gap between its highest achieving students and its lowest achieving students. She also took issue with the presence of asbestos in the school and certain material taught in its classes, though she did not elaborate on the specific content that troubled her. Defendant also stated that the school she wanted the child to attend, the South Side Christian Academy (SSCA), a private religious school in North Carolina, did not ignore educational material based on scientific findings and that religion was only a "small component" of the curriculum. Earlier during the referee hearing, the referee had heard evidence that Christian values were at the forefront of students' education at SSCA, that biblical principles would be integrated into every subject, and that SSCA taught that the Bible is the ultimate authority on all matters. These core values were the same as the religious beliefs held by defendant's church. Defendant believed that the child's education at SSCA would likely include discussions on evolution and that the child should "learn that it's a theory." Plaintiff did not want the child to attend SSCA because he felt that the school's teachings were too extreme, especially those that called into question the teachings of modern science.

In August 2017, the trial court denied defendant's objections, indicating its agreement with the FOC report. The trial court did not explicitly reference the best-interest factors, but instead focused on which school would be better for the child. The trial court noted that SSCA was not a bad school but that "for the well-roundedness of a student" it was "just too restrictive" since "[i]n today's society, I think that students should be open to all sorts of opportunities and teaching." The trial court adopted the FOC report and the recommended schedule for the school year and summer, spring, and holiday breaks.

Defendant appealed.

II. ANALYSIS

Applicable Standards. A trial court's child-custody determination (including changes in custody or parenting time) is generally subject to three standards of review on appeal. For findings of fact, this Court applies the great-weight-of-the-evidence standard. A factual finding should stand absent evidence that clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994). For discretionary rulings such as custody decisions, this Court applies an abuse-of-discretion standard, where the trial court's ruling should stand unless it falls "outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). And, finally, this Court reviews a trial court's legal rulings for "clear legal error." MCL 722.28.

When, as here, a moving party seeks to modify a custody or parenting-time order under MCL 722.27(1)(c), the party must first establish "proper cause" or a "change of circumstances" before the trial court will consider whether the best interests of the child warrant such a modification. *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). If the request is for one to modify custody, then this Court looks to the standards set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). If the request is for one to modify

parenting time, then this Court looks instead to the more lenient standards set forth in *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010). If proper cause or a change of circumstances is shown under the appropriate standard, then the trial court considers whether a modification is in the best interests of the child, using the clear-and-convincing-evidence standard for a custody modification or the preponderance-of-the-evidence standard for a parenting-time modification. MCL 722.27(1)(c); *Shade*, 291 Mich App at 23.

Custody or Parenting Time? The first question to consider is whether the scheduling change necessitated by the child starting school was a custody or parenting-time modification. We begin with several observations. First, the referee found that there was proper cause and a sufficient change in circumstances to modify the prior stipulated order, and this was accepted by the trial court without objection by either party. Second, as the referee noted, the child had an established custodial environment with both parents. Third, the child's time split evenly between plaintiff and defendant became untenable once the child started school given the geographic distance between the parties (e.g., neither party suggested that home schooling split between the two households was a viable option). Fourth, by simple application of math, any modification would have resulted in one parent receiving significantly less time with the child, regardless of the parent to whom the trial court granted relief. And fifth, a change in parenting time can be so dramatic as to result in a change in custody, though not every (or even most) changes in parenting time will rise to this level. Compare *Lieberman*, 319 Mich App at 85-92 (majority) with *id.* at 107-110 (O'Connell, J., dissenting); see also *Griffin v Griffin*, __ Mich App __; __ NW2d __ (2018) (Docket No. 338810) (Murphy, P.J., dissenting); slip op at 4.

Here, as the FOC report noted, "both parties recognize that a change must occur to the child's established custodial environment in light of the child beginning school." The referee concluded that a change in the existing custodial environment was needed and it analyzed the matter under the higher *Vodvarka* standard, and the trial court accepted both contentions without objection. Neither party has challenged on appeal the referee's factual conclusions regarding the existing custodial environment or that some kind of change needed to be made to it, and neither party has challenged the referee's decision to analyze this matter through the lens of *Vodvarka*. Given this, we will likewise treat the matter as a modification to the existing custodial environment, even if an argument could have been made that this was a parenting-time change. See *Griffin*, ___ Mich App at ___; slip op at 4 n 5 ("Thus, the mere fact that an argument could have been made on this point [of custody versus parenting time] has no bearing on the outcome of this case.").

The Trial Court Independently Considered the Best-Interest Factors. Defendant first argues that she is entitled to relief because the trial court failed to indicate whether it independently arrived at the same conclusion as the FOC report on custody and the best-interest factors in MCL 722.23. She further maintains that the trial court fixated on the issue of the child's schooling to the detriment of other factors.

When reviewing a FOC report de novo, the trial court must independently consider the 12 best-interest factors in MCL 722.23. *Truitt v Truitt*, 172 Mich App 38, 43; 431 NW2d 454 (1988). The trial court may consider the report in performing the analysis, although it must allow the parties to present additional evidence not considered by the referee. *Dumm v Brodbeck*, 276 Mich App 460, 465; 740 NW2d 751 (2007). When reviewing a particular best-

interest factor, if the factor does not apply to the unique circumstances of that case, then the trial court need not explain why the factor is not relevant. *Pierron v Pierron*, 486 Mich 81, 91, 93; 782 NW2d 480 (2010). The trial court must instead "narrowly focus its consideration of each best-interest factor on the specific important decisions affecting the welfare of the child that is at issue." *Id*. at 90-91 (internal citation and notation omitted).

During the initial hearing on the motion for temporary order, the trial court made clear that it had reviewed the FOC report. The parties were then allowed to submit additional evidence to the trial court. Defendant testified at a subsequent evidentiary hearing and supplemented the record with information about the North Carolina school. The parties then had an opportunity to present closing arguments at a third hearing, during which the trial court again clearly indicated that it had reviewed the FOC report. When issuing its opinion, the trial court expressly addressed the primary issue at hand—where the child should attend school. The trial court explained why it agreed with the FOC report's recommendation, and then expressly adopted it as its own. We are satisfied that, on this record, the trial court made the requisite independent consideration of custody and the best-interest factors.

As for whether the trial court inappropriately fixated on where the child should attend school, we also find no error. Importantly, in her initial motion to change the parties' stipulated custody order, the only reason defendant gave for a change was the need for the child to begin school. In their respective closing arguments, both parties' counsel discussed only the child's schooling. While other issues were brought up during the proceedings, those issues were addressed in the FOC report. It was not error for the trial court to adopt the FOC report but provide additional explanation with regard to the issue of the child's schooling.

Defendant briefly mentions that the trial court also erred by purportedly focusing on the religious character of SSCA, even though she testified that she could send the child to a different school in North Carolina. This argument was not well-developed before the trial court, as defendant's focus regarding school was contrasting SSCA with Bahweting. Defendant only briefly testified about the possibility of a different school in North Carolina, and she did not identify any by name. Nor has defendant developed the argument on appeal and, accordingly, the argument has been waived. *Riemer v Johnson*, 311 Mich App 632, 653; 876 NW2d 279 (2015).

The Trial Court's Best-Interests Determination Was Not Against the Great Weight of the Evidence. Defendant next argues that she is entitled to reversal and a remand because the trial court's findings went against the great weight of the evidence with respect to best-interest factors (b), (d), (j), and (*l*). We disagree.

Subsection (b) concerns "[t]he 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." The referee found that subsection (b) favored neither plaintiff nor defendant. The referee specifically noted that both parties had consistently demonstrated their love and affection for the child, as well as their capacity to provide him with appropriate guidance and educational stimulation. The referee also expressly considered each parent's willingness to allow the child to attend church services with the other parent, despite diverging

religious beliefs. There was no testimony presented to the referee or to the trial court to suggest that the referee's determinations were against the great weight of the evidence.

Subsection (d) weighs "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." Defendant testified that plaintiff moved into a new home after the referee issued the FOC report. Neither the referee nor the trial court explicitly mentioned the effect, if any, that this might have on maintaining a "stable, satisfactory environment." Defendant offered no evidence, however, that the child's environment was rendered unstable or unsatisfactory as a result of this single move. There is not sufficient evidence in the record to support a finding that it did.

Subsection (j) requires the trial court to examine "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." Defendant argues that the referee found this subsection favored plaintiff only because defendant testified that she would find it "awkward" if plaintiff attended the child's Christmas concert in North Carolina. While this was one consideration, the referee also determined that this factor favored plaintiff because defendant had never accepted any of plaintiff's attempts to include her or her husband in group outings with the child. There was no evidence presented to the referee to refute this finding, and so it did not run against the great weight of the evidence.

Defendant also argues that the referee erroneously considered the willingness of defendant's parents to facilitate and encourage a continuing relationship between plaintiff and the child in its analysis of subsection (j). The plain language of subsection (j) requires consideration of "[t]he willingness and ability of each of *the parties* to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent." MCL 722.23(j) (emphasis added). Assuming arguendo that defendant is correct, the referee also included appropriate considerations in its analysis of subsection (j), and so its consideration of defendant's parents does not undermine the referee's overall analysis.

As for subsection (*l*), it permits consideration of "[a]ny other factor . . . relevant to a particular child custody dispute." Defendant argues that the referee should not have found that subsection (*l*) favored plaintiff because, although defendant frequently called the child while he was with plaintiff, the parties stipulated to those phone calls. The referee also considered, however, the availability of plaintiff's live-in girlfriend to care for the child when plaintiff was unable to, as well as defendant's failure to keep plaintiff informed of defendant's relationship with and eventual marriage to her husband. These findings likewise did not go against the great weight of the evidence.

Defendant argues that the referee should have considered the close relationship between the child and his extended family on defendant's side. The referee did not explicitly consider this point. Plaintiff correctly points out, however, that there was ample testimony surrounding the close relationship between the child and his extended family on plaintiff's side. Thus, the referee would likely not have been able to weigh this factor in favor of either party.

Defendant Waived Any Claim of Error on the Temporary Order. Finally, defendant claims that the trial court clearly erred when it issued a temporary order granting plaintiff

primary custody without first conducting a de novo hearing. As noted above, however, defendant's counsel conceded before the trial court that a party could seek such an order and that the trial court could issue one. We pass on the merits of the claim, as "[a] party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Braverman v Granger*, 303 Mich App 587, 608; 844 NW2d 485 (2014) (internal citation and notation omitted).

Affirmed.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Brock A. Swartzle