STATE OF MICHIGAN

COURT OF APPEALS

ERIK THOMAS CHUDZINSKI,

Plaintiff-Appellant,

v

LISA MARIE FINLAYSON,

Defendant-Appellee,

and

JUDITH BECHTOL,

Intervenor-Appellee.

UNPUBLISHED
February 12, 2019

Nos. 343480; 345018
Wayne Circuit Court
LC No. 13-100581-DC

Before: MURRAY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

I. DOCKET NO. 343480

In Docket No. 343480, plaintiff appeals as of right an order granting defendant's motion to modify parenting time and granting intervenor's motion for grandparenting time. We affirm the portion of the order granting defendant's motion to modify parenting time, reverse the portion of the order granting intervenor's motion for grandparenting time, and remand.

II. DOCKET NO. 345018

In Docket No. 345018, plaintiff appeals as of right an order following a review hearing regarding parenting time and grandparenting time. We affirm the portion of the order concerning parenting time, reverse the portion of the order concerning intervenor's grandparenting time, and remand.

III. FACTUAL BACKGROUND

These consolidated cases[1] arise out of a child custody dispute between plaintiff and defendant concerning their child, CC. Plaintiff and defendant originally agreed to equal shares of legal and physical custody and parenting time. However, in August 2015, defendant struck and killed a motorcyclist while driving under the influence (with CC in the vehicle) and was sentenced to a maximum of eight years' imprisonment. Defendant was able to have parenting time via telephone, but wanted to see CC in person while she was in prison. Defendant filed a motion to modify parenting time, which was granted by the trial court. At the same time, intervenor, who is defendant's mother, sought grandparenting time with CC in a motion for grandparenting time, which was also granted by the trial court.

IV. GENERAL ISSUES RAISED AND STANDARD OF REVIEW

Plaintiff argues that MCL 722.27b was unconstitutional as applied to this case, that MCL 722.27b(4)(b) was inapplicable to this case, and that the trial court abused its discretion by granting intervenor's motion for grandparenting time. We agree that the trial court abused its discretion by granting intervenor's motion for grandparenting time, but do not agree that MCL 722.27 was unconstitutional as applied, or that MCL 722.27b(4)(b) was inapplicable.

In general, "[o]rders concerning [grand]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." *Varran v Granneman (On Remand)*, 312 Mich App 591, 617; 880 NW2d 242 (2015) (quotation marks and citation omitted; alteration in original). "Issues of statutory interpretation are questions of law," which this Court reviews for clear legal error. *Id*. "Clear legal error occurs here when the trial court errs in its choice, interpretation, or application of the existing law." *Id*.

V. CONSTITUTIONAL CHALLENGE

With regard to the question whether MCL 722.27b(4)(b) is unconstitutional as applied, this Court notes that issues regarding child custody, parenting time, and grandparenting time must be raised before and decided by the trial court. *Mitchell v Mitchell*, 296 Mich App 513, 521; 823 NW2d 153 (2012). Plaintiff failed to preserve the issue by raising it in the trial court, and thus, this Court reviews the issue for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "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." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citations omitted). In general, an error will be found to have affected an individual's substantial rights if it "caused prejudice, i.e., it affected

[1] *Chudzinski v Finlayson*, unpublished order of the Court of Appeals, entered August 22, 2018 (Docket Nos. 343480; 345018).

the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9. A judgment or order may be reversed "only when the plain, forfeited error . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.*

Plaintiff first argues that MCL 722.27b is unconstitutional as applied because the standard of proof utilized by the trial court – a preponderance of the evidence – is insufficient to properly protect his parental rights. Plaintiff's argument is identical in every way to an argument we rejected in *Varran*, where the defendant argued that "the grandparenting-time statute is unconstitutional because of the use of the preponderance-of-the-evidence standard." *Varran*, 312 Mich App at 609. Although plaintiff argues that the statute was unconstitutional as applied, he has not presented any persuasive argument that his case is at all different than what we addressed in *Varran*.

Although plaintiff contends that the preponderance-of-the-evidence standard does not provide *enough* deference to the parental decision to deny grandparenting time, the Supreme Court has previously stated that, "[a]lthough a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a 'presumption of validity' or 'some weight.' " *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009). That Court has "never said that a clear-and-convincing-evidence standard, rather than a preponderance-of-the-evidence standard, was constitutionally mandated." *Varran*, 312 Mich App at 614. In accordance with *Hunter*, this Court has concluded that "the requirement that grandparents . . . prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child is sufficient to protect the fundamental rights of parents." *Id.* at 615. See, also, *Falconer v Stamps*, 313 Mich App 598, 645; 886 NW2d 23 (2015); *Keenan v Dawson*, 275 Mich App 671, 682-685; 739 NW2d 689 (2007). Accordingly, plaintiff's constitutional challenge fails.

VI. GRANDPARENTING-TIME DECISION

Plaintiff next argues that the trial court misapplied MCL 772.27b(4)(b) and abused its discretion by granting grandparenting time to intervenor without requiring her to rebut the fit-parent presumption created by MCL 722.27b(4)(b). As previously stated, we disagree with plaintiff's contention that MCL 722.27b(4)(b) was improperly applied, but agree that the trial court abused its discretion by granting grandparenting time to intervenor.

"Parents have a constitutionally protected right to make decisions about the care, custody, and management of their children," but "the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor . . . ." *Zawilanski v Marshall*, 317 Mich App 43, 49; 894 NW2d 141 (2016) (quotation marks and citations omitted). Thus, a parent's right to make decisions regarding a minor child, including decisions regarding grandparenting time, is not unconditional. *Id.* However, there is "normally . . . no reason for the State to inject itself into the private realm of the family to further question the ability of [fit parents] to make the best decisions concerning the rearing of [their] children." *In re Sanders*, 495 Mich 394, 410; 852 NW2d 524 (2014) (quotation marks and citation omitted; alteration in original). The parties do not dispute that plaintiff is a fit parent, and therefore, the statutory presumption that the denial of grandparenting time by a fit parent "does not create a substantial risk of harm to the child's mental, physical, or emotional health," *id.*, is applicable to plaintiff.

Plaintiff first contends that he never denied grandparenting time to intervenor, and therefore MCL 722.27b(4)(b) does not apply, because the statute requires that the parent first completely deny grandparenting time before the statute's provisions become effective. See, e.g., *Falconer*, 313 Mich App at 646; *Keenan*, 275 Mich App at 684. Plaintiff argues that this is not the case here, as he did offer grandparenting time to intervenor on multiple occasions. A review of the record indicates that plaintiff and intervenor (the only ones to testify on the issue) gave different accounts of how often plaintiff offered grandparenting time to intervenor, if at all. Plaintiff asserted that he had never denied a reasonable request by intervenor to see CC, and that he brought CC to intervenor's house for recent Thanksgiving and Christmas holidays. Conversely, intervenor testified that plaintiff stopped allowing intervenor to see CC altogether once defendant was incarcerated.

The trial court's ultimate decision to grant intervenor's motion for grandparenting time indicates that it implicitly found intervenor's testimony that plaintiff attempted to prevent her from having grandparenting time with CC credible. However, no actual finding was made, and at other points the court referenced that plaintiff had not completely denied intervenor grandparenting time. Accordingly, we will assume that MCL 722.27b(4)(b) is applicable, and proceed to a consideration of the merits.

Turning to the merits, plaintiff argues that even if he did deny grandparenting time to intervenor, he is a fit parent and is entitled to the presumption that the denial of grandparenting time did not create a substantial risk of harm to CC. See MCL 722.27b(4)(b). Plaintiff contends, however, that the trial court chose to do the opposite – it granted grandparenting time based on the assumption that grandparenting time would have a positive impact on CC, which effectively denied him the statutory presumption afforded to fit parents under MCL 722.27b(4)(b), and interfered with his constitutional right to parent CC.

The trial court's rationale for granting grandparenting time was as follows:

> Plaintiff['s] . . . refusal to develop an age appropriate plan for [CC] to spend time with [d]efendant mother and [intervenor] creates a risk of harm to the minor child now and in the future.
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> * * *
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> Regarding grand-parenting time, the burden of proof is on [intervenor] to show by a preponderance of the evidence that [p]laintiff's denial of grand-parenting time will create a substantial risk of mental or emotional harm to [CC]. For the reasons set forth above and placed on the record, the court finds the [intervenor] has met this burden. The court also finds that the evidence demonstrates that it is in the best interest of [CC] to have grand-parenting time with [intervenor].

Additionally, at the close of the evidentiary hearing regarding intervenor's motion for grandparenting time and defendant's motion to modify parenting time, the trial court stated:

> Even though the [p]laintiff says that he's willing to give grand parenting [sic] time to [intervenor], this [c]ourt still finds there is a substantial risk of harm to

> [CC]'s emotional health due to the very limited circumstances he has been allowed to see his mother's family. And I think that the, the facts that have presented to the [c]ourt in this—support that.

As noted, intervenor was required to produce evidence that the denial of grandparenting time would create a substantial risk of harm to CC in order to overcome the presumption that plaintiff's decision to deny grandparenting time would *not* result in a substantial risk of harm. MCL 722.27b(4)(b).

Intervenor's evidence on this issue consisted solely of her own testimony that she had an emotional bond with CC, that he was always excited to visit intervenor at her house, and that she feared CC might forget her if she was absent from his life. Intervenor believed that a lack of grandparenting time would create a substantial risk of harm to CC because "[CC] will not have known that we have not abandoned him . . . we tried to see him, we tried to keep our bond going, and be[] able to be a part of his life."

The trial court abused its discretion in granting the motion for grandparenting time. Based on the evidence presented, intervenor failed to rebut the presumption that plaintiff's denial of grandparenting time would not create a substantial risk of harm to CC. Although intervenor's testimony highlighted her close relationship with CC, her concerns were primarily focused on herself and her fear that CC would eventually forget her if she had no contact with him. At no point did intervenor provide evidence that her absence had actually affected CC, or evidence that a lack of grandparenting time was likely to cause him harm in the future. Even if grandparenting time would have a positive influence on CC, a trial court is not permitted to conclude that "grandparenting [time] is good, therefore it should occur," or that the denial of grandparenting time poses a substantial risk of harm, without concrete supporting evidence. *Keenan*, 275 Mich App at 682. This error is "not harmless; it unreasonably deprive[s] plaintiff of h[is] constitutionally protected right to make decisions about 'the companionship, care, custody, and management' " of CC. *Zawilanski*, 317 Mich App at 51. Therefore, we hold that the trial court abused its discretion by granting intervenor's motion for grandparenting time.[2]

VII. MODIFICATION OF PARENTING TIME

Plaintiff's final argument is that the trial court abused its discretion by granting parenting time to defendant by using the incorrect threshold standard of review and failing to make a record of its best interest findings.

"[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 [the] evidence or committed a

[2] Plaintiff argues that the trial court erred by failing to deliver its findings regarding the best-interest factors listed under MCL 722.27b(6) on the record. However, because the trial court abused its discretion in granting intervenor's motion for grandparenting time, we need not address this issue. See *Geering v King*, 320 Mich App 182, 193; 906 NW2d 214 (2017).

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 omitted). "Our Supreme Court . . . distinguishes among three types of findings and assigns standards of review to each." *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011) (quotation marks and citation omitted).

This Court reviews all findings of fact under the "great weight of the evidence" standard. *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017). In general, this Court "should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction . . . [and] review the record in order to determine whether the verdict is so contrary to the great weight of the evidence as to disclose an unwarranted finding . . . ." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994). 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*, 322 Mich App 125, 133-134; 910 NW2d 721 (2017). Additionally, " 'clear legal error' occurs when the trial court chooses, interprets, or applies the law incorrectly." *Diez*, 307 Mich App at 389.

A trial court is permitted to modify its previous orders regarding custody and parenting time "for proper cause shown or because of [a] change in circumstances . . . ." *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010) (quotation marks and citation omitted). Decisions regarding child custody and parenting time begin with the determination of a child's established custodial environment. *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015). An established custodial environment is

> one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

The general standards for analyzing whether proper cause or a change in circumstances justifies a change in custody were articulated by this Court in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). Later, in *Shade*, 291 Mich App at 26-27, this Court stated that the *Vodvarka* standard only applies to a change in parenting time if the modification changes a child's established custodial environment. If the modification of a parenting time order would change the established custodial environment, "the moving party must show by clear and convincing evidence that it is in the child's best interest[s]." *Shade*, 291 Mich App at 23. Conversely, if the proposed change does not affect the established custodial environment, "the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Id*. Further, if the established custodial environment is unaffected, "a more expansive definition of 'proper cause' or 'change of circumstances' is appropriate . . . ." *Id*. at 27-28.

With respect to an established custodial environment, the trial court stated that "[d]efendant mother's motion . . . does not seek to change the established custodial environment

of the minor child." Although not a detailed finding about whether an established custodial environment exists, the court was correct in its assessment. *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010). The record reflects that defendant was incarcerated on July 12, 2016. For approximately two years leading up to defendant's motion to modify parenting time, plaintiff had sole physical custody of CC and provided for all of his physical and emotional needs, including providing him with material necessities and medical care, as well as overseeing decisions related to his schooling and involvement in extracurricular activities. Defendant was unable to provide for any of the aforementioned necessities, or otherwise provide CC with an environment in which he could look to her for "guidance, discipline, the necessities of life, and parental comfort." *Id*. at 85-86 (quotation marks and citation omitted). Therefore, it was relatively undisputed that the established custodial environment existed with plaintiff only at the time this action was filed, and nothing in the relief requested in the motion for parenting time would alter that.

Plaintiff contends that the trial court should have determined that allowing CC to visit defendant in prison would change CC's established custodial environment because seeing defendant in prison would cause CC emotional trauma. However, "[i]f the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Id*. at 86. Because defendant is incarcerated, allowing CC to see defendant in prison for parenting time would not fundamentally alter the fact that his established custodial environment is with plaintiff. Regardless of whether CC sees defendant in prison, the fact remains that he lives with plaintiff and relies on plaintiff for all of the necessities of life. Accordingly, the modification of the parenting time order did not change, or seek to change, the established custodial environment.

Plaintiff also argues that the trial court erred by failing to make a record of its best-interest findings.[3] Plaintiff contends that the trial court was required to explicitly address the best-interest factors listed in MCL 722.23. However, in accordance with this Court's opinion in *Shade*, the trial court was not required to individually address each of the best-interest factors. *Shade*, 291 Mich App at 32. In *Shade*, this Court stated that, although "the trial court did not explicitly address the best interest factors in MCL 722.23," it was not required to "because th[e] modification of parenting time did not result in a change of custody." *Id*. Further, it is clear from the trial court's statements that it considered CC's overall best interests in making its decision. Plaintiff has failed to show that the trial court abused its discretion by granting defendant's motion to modify parenting time.

[3] Plaintiff also argues that the trial court utilized the incorrect threshold standard of review, as it should have used the standard set forth in *Vodvarka*, and not the standard set forth in *Shade*, when analyzing whether there was proper cause or a change of circumstances to justify modifying the parenting time order. But *Shade* controls this inquiry.

We affirm the portions of the trial court's orders in Docket Nos. 343480 and 345018 pertaining to defendant's motion to modify parenting time, reverse the portions of the trial court's orders in Docket Nos. 343480 and 345018 pertaining to intervenor's motion for grandparenting time, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan