STATE OF MICHIGAN

COURT OF APPEALS

EMILY JEAN BRENNER,

Plaintiff-Appellee,

v

DANIEL TED KERKSTRA,

Defendant-Appellant.

UNPUBLISHED
July 23, 2019

No. 346078
Allegan Circuit Court
LC No. 07-042476-DC

Before: SAWYER, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendant-father, Daniel Ted Kerkstra, appeals by leave granted the trial court order awarding him and plaintiff-mother, Emily Jean Brenner, joint legal and physical custody of the parties' minor child. For the reasons set forth in this opinion, we remand to the trial court for proceedings consistent with this opinion.

A. BACKGROUND

The parties were involved in a romantic relationship when the minor child who is the subject of these proceedings was born on February 9, 2006. The parties did not live together and were never married. Approximately one year after the birth of the minor child, the parties ended their relationship and defendant and plaintiff both married other people. A prior court order established that plaintiff had sole legal and physical custody of the child and granted defendant "reasonable parenting time."[1]

This case arose from defendant's motion to change custody as a result of a Children's Protective Services (CPS) investigation regarding plaintiff's care and custody of the child. On

[1] Although defendant testified that he was not aware that plaintiff had sole custody because the parties made joint decisions regarding the child, defendant acknowledged and signed the court order granting plaintiff custody.

February 17, 2017, the Michigan State Police and CPS investigated an allegation that plaintiff's husband at that time, Jacob Proper, possessed materials depicting sexually explicit content of children. While executing a search warrant at Proper and plaintiff's house, Proper admitted to police officers that he posted pictures of minor children online. Proper also admitted that he sexually abused the minor child in this case for approximately two years. Finally, the police officers found visual evidence of Proper sodomizing the family dog, Sugar. The police officers and CPS told plaintiff to not allow Proper to have any contact with the minor child. On March 13, 2017, defendant notified CPS that, on March 8, 2017, he observed Proper at plaintiff's house when the minor child was present. Defendant additionally reported to CPS that the child informed him that Proper picked him up from school after the search had occurred. Following a preliminary hearing, the Family Division of the Allegan Circuit Court removed the child from plaintiff and placed the child in defendant's care and custody.

On December 15, 2017, defendant filed a motion to change custody and requested legal and physical custody of the minor child. Defendant alleged that plaintiff exposed the child to Proper in contravention of a no-contact order. Defendant argued that plaintiff's conduct constituted a substantial change in circumstances and that it was not in the child's best interests to reside with plaintiff. Finally, defendant argued that the child had an established custodial environment with him and that he was able to provide proper care and custody of the child. Defendant also filed a motion for an ex parte order to maintain the "status quo" regarding defendant's primary physical custody of the child and the child's enrollment at Hudsonville. The trial court granted defendant's ex parte order pending the hearing on defendant's motion to change custody. The trial court ordered that plaintiff have parenting time each Tuesday and Thursday from 4:00 p.m. to 7:00 p.m. and that the child remain enrolled in and attend classes at Hudsonville Christian School.

Following a series of hearings on the matter, the trial court granted the parties joint legal and physical custody of the child. This Court granted defendant's application for delayed appeal.

II. ANALYSIS

On appeal, defendant first argues that the trial court clearly erred by changing the child's established custodial environment with defendant without applying the clear and convincing evidence standard. We agree that the trial court committed clear legal error.

Child custody disputes are governed by the Child Custody Act, MCL 722.21 *et seq*. "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); MCL 722.28. This Court reviews the trial court's determinations of questions of law for clear legal error. *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017). "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id*. (quotation marks and citation omitted). In other words, a trial court commits clear legal error if it fails to apply the proper legal framework. *Sulaica v Rometty*, 308 Mich App 568, 583-584; 866 NW2d 838 (2014). This legal error "generally require[s] remand for further consideration under the proper legal framework unless the error is harmless." *Id*. at 585 (quotation marks and citation omitted).

This Court reviews a trial court's findings, including a showing of proper cause, a change of circumstances, or the existence of an established custodial environment, to determine whether the findings were against the great weight of the evidence. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). A trial court's finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Id*. If a trial court fails to make a finding regarding the existence of a custodial environment or the best-interest factors, this Court will remand unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review. *Rittershaus v Rittershaus*, 273 Mich App 462, 471, 475-476; 730 NW2d 262 (2007) (quotation marks and citations omitted).

This Court reviews custody awards for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 474; NW2d 336 (2008).

A trial court may modify or amend a custody determination or a parenting-time order for proper cause shown or because of a change of circumstances. MCL 722.27(1)(c). MCL 722.27(1) provides, in relevant part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
>
> (c) Subject to subsection (3), modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. If a motion for change of custody is filed while a parent is active duty, the court shall not consider a parent's absence due to that active duty status in a best interest of the child determination.

A trial court must first determine whether there exists proper cause or a change of circumstances to modify a custody order. *Corporan*, 282 Mich App at 603. In order for a movant to show proper cause for a modification of a court order, the movant must prove that evidence exists of an appropriate ground for legal action to be taken by the trial court that is relevant to at least one

of the statutory best-interest factors pursuant to MCL 722.23[2] and that has a significant effect on the child's well-being. *Vodvarka v Grasmeyer*, 259 Mich App 499, 511-512; 675 NW2d 847 (2003). In order for a movant to show a change of circumstances that justifies modification of a court order, the movant must prove 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." *Id.* at 513. Removal of a child from a parent's home by

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[2] MCL 722.23 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.
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> (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.
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> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

CPS is sufficient to establish a change of circumstances. *Shann v Shann*, 293 Mich App 302, 306; 809 NW2d 435 (2011). The trial court need not hold an evidentiary hearing to determine whether there exists proper cause or a change of circumstances if the evidence before the trial court is sufficient to satisfy the legal standards. *Vodvarka*, 259 Mich App at 512; see also *Corporan*, 282 Mich App at 605.

A trial court may modify or amend a custody determination or a parenting-time order for proper cause shown or because of a change of circumstances. MCL 722.27(1)(c); *Corporan*, 282 Mich App at 603. In order for a movant to show proper cause for a modification of a court order, the movant must prove that evidence exists of an appropriate ground for legal action to be taken by the trial court that is relevant to at least one of the statutory best-interest factors pursuant to MCL 722.23 and that has a significant effect on the child's well-being. *Vodvarka v Grasmeyer*, 259 Mich App 499, 511-512; 675 NW2d 847 (2003). In order for a movant to show a change of circumstances that justifies modification of a court order, the movant must prove 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." *Id.* at 513. Removal of a child from a parent's home by CPS is sufficient to establish a change of circumstances. *Shann v Shann*, 293 Mich App 302, 306; 809 NW2d 435 (2011).

If the trial court determines that proper cause or a change of circumstances exists, the trial court must determine with which parent the child has an established custodial environment and whether the proposed change would modify the child's established custodial environment. *Corporan*, 282 Mich App at 604 n 2. When a custody order modification changes to whom the child looks for guidance, discipline, the necessities of life, and parental comfort and support, the movant must demonstrate by clear and convincing evidence that the change is in the child's best interests. MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 86, 92; 782 NW2d 480 (2010). When a proposed change to a custody determination does not modify an established custodial environment, the movant must prove by a preponderance of the evidence that the change is in the child's best interests. *Pierron*, 486 Mich at 93.

In this case, we cannot find in the record where the trial court made a specific finding regarding the existence of proper cause or a change of circumstances. Although the trial court indicated that the parties agreed that the sexual abuse allegations against Proper caused this matter to be reviewed, the trial court did not determine whether the sexual abuse allegations constituted proper cause or a change of circumstances. Although the child's removal from plaintiff's care and custody can be sufficient to establish a change of circumstances, see *Shann*, 293 Mich App at 306, the trial court committed a clear legal error by failing to apply the proper legal framework and failing to make a reviewable finding regarding proper cause or a change of circumstances. See *Corporan*, 282 Mich App at 603.

Additionally, the trial court did not make specific findings regarding the child's established custodial environment at the time of the motion hearings. The trial court found that the child had an established custodial environment with defendant since the child's removal from plaintiff's care in March 2017. The trial court also found that the child previously had an established custodial environment with plaintiff. Ultimately, the trial court found that the parties had been providing a "joint-type arrangement." The trial court did not specifically determine whether the child had an established custodial environment with both plaintiff and defendant at

the time of the motion hearings or whether the child had a sole established custodial environment with defendant because the child had not resided with plaintiff since March 2017. Therefore, the trial court committed a clear legal error by failing to make a reviewable finding regarding the existence of an established custodial environment. See *Rittershaus*, 273 Mich App at 471. Based on the lack of findings by the trial court on this issue, we decline to make a determination as to whether an established custodial environment existed with respect to plaintiff, defendant, or both parties.

Finally, the trial court failed to make a specific finding regarding whether defendant's proposed change to the custody arrangements would modify the child's established custodial environment and failed to articulate which standard it applied when considering the best-interest factors pursuant to MCL 722.23. Therefore, the trial court's clear legal errors require remand for further consideration under the proper legal framework. See *Rittershaus*, 273 Mich App at 471. The trial court should first determine whether defendant established proper cause or a change of circumstances to modify the custody order. The trial court should then determine with whom the child had an established custodial environment at the time of the final motion hearing and whether sole legal and physical custody with defendant modified an established custodial environment. If trial court determines that defendant's request will alter an established custodial environment, the trial court should apply the clear-and-convincing-evidence standard. However, if the trial court determines that defendant's proposed change will not modify an established custodial environment, defendant must prove by a preponderance of the evidence that the change is in the child's best interests. See *Pierron*, 486 Mich at 92-93.

Defendant also argues that the trial court abused its discretion by failing to consider all of the best-interest factors and awarding joint legal and physical custody of the minor child. Specifically, defendant argues that the trial court erroneously failed to consider best-interest factor (h). Defendant also challenges the trial court's findings and conclusions with respect to best-interest factors (f), (g), (i), and (j). We address each in turn.

The trial court may only modify a previous judgment or order if the change is in the child's best interests. MCL 722.27(1)(c); *Pierron*, 486 Mich at 86. The trial court must consider each of the 12 best-interest factors pursuant to MCL 722.23 and make specific findings of fact regarding the applicability of each factor before modifying custody or parenting time, even on a temporary basis. *Pierron*, 486 Mich at 91; *Grew v Knox*, 265 Mich App 333, 337; 694 NW2d 772 (2005). If the trial court determines that a factor is irrelevant to the issue before it, the trial court must state that conclusion on the record but need not make substantive findings of fact regarding that factor. *Pierron*, 486 Mich at 91, 93. The trial court need not consider every piece of evidence when making its findings of fact, but the record must be sufficient to facilitate appellate review. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). "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." MCL 722.27a(1); see also *Shade v Wright*, 291 Mich App 17, 29; 805 NW2d 1 (2010).

In this case, the trial court weighed factors (f), (g), and (j) equally between the parties. The trial court found that the child's preference pursuant to factor (i) weighed in favor of joint custody. The trial court did not make any findings regarding factor (h).

Factor (f) refers to a person's fitness as a parent. MCL 722.23(f); *Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994). "To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship." *Id*. at 887. Conduct that is relevant to a parent's moral fitness includes "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id*. at 887 n 6.

In this case, the trial court found that there were no issues regarding the parties' moral fitness. The trial court found that Proper's moral fitness was a concern if he lived in plaintiff's home. The trial court found that plaintiff had not fully accepted and addressed Proper's inappropriate behaviors, which it considered pursuant to factor (*l*). There was no evidence that plaintiff engaged in sexually abusive conduct. Plaintiff's failure to protect the child from sexual abuse within her home and plaintiff's failure to acknowledge and address Proper's sexual abuse of the child could constitute "questionable conduct" relevant to factor (f). See, e.g., *Berger*, 277 Mich App at 714-715. However, the trial court considered plaintiff's behavior and the effect that it could have on her ability to parent pursuant to factor (*l*) and implicitly weighed factor (*l*) in defendant's favor. Therefore, the trial court's finding that plaintiff did not demonstrate specific immoral conduct that affected her ability to parent was not against the great weight of the evidence.

Factor (g) concerns the parties' mental and physical health. MCL 722.23(g). The trial court found that there were no issues regarding the parties' mental and physical health. The trial court found that the parties' behavior put an emotional strain on the minor child, and the trial court considered defendant's protective behaviors and plaintiff's actions to reconcile changes to her life circumstances pursuant to factor (*l*). There was no evidence presented at the motion hearings that either party had a physical disability or a mental health diagnosis. There was no evidence of a physical or mental health condition that would affect either party's ability to parent. Notwithstanding plaintiff's participation in therapy and the trial court's suggestion to plaintiff to continue therapy sessions, the trial court did not find that plaintiff's participation in counseling affected her ability to parent the child. Therefore, the trial court's finding that there were no issues regarding the parties' mental and physical health was not against the great weight of the evidence.

Factor (h) concerns the child's home, school, and community record. MCL 722.23(h). Although several witnesses, including plaintiff and defendant, testified regarding the child's performance at school and his involvement in sports, extracurricular activities, the 4-H program, religious programs, and friend group activities, the trial court did not determine how the custodial arrangements affected the child's schooling, home, and community activities. There were not sufficient comments by the trial court or support from the lower court record to discern the trial court's findings regarding best-interest factor (h) and to facilitate appellate review. See *Rittershaus*, 273 Mich App at 475-476.

Factor (i) addresses the child's reasonable preference. MCL 722.23(i). The trial court interviewed the minor child and indicated that the minor child expressed his definitive preference to return to the previous custody arrangements. The trial court stated that the child was intelligent, articulate, and loved both parties. The trial court found that, because of the child's age of 12, the child's preference had significant weight. The trial court implicitly found that the

child's preference was reasonable on the basis of the child's relationship and bond with the parties, love for the parties, and articulate and definitive expression of his preference. The trial court was aware of Proper's sexual abuse of the child and found that it constituted domestic violence. The trial court considered the sexual abuse pursuant to best-interest factor (k) and implicitly determined that it did not render the child's preference arbitrary or inherently indefensible. See *Pierron*, 486 Mich at 92. Therefore, the trial court's findings were not against the great weight of the evidence.

Factor (j) concerns the parties' willingness and ability to facilitate and encourage a close connection with the other parent. MCL 722.23(j). The trial court found that the parties previously were willing and able to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. Despite the parties' defensive behavior regarding parenting time and information about the child, the trial court implicitly determined that the parties were capable of parenting the child together. The testimony at the motion hearings demonstrated that the parties had some difficulties coordinating the child's activities and changes to the parenting-time schedule. However, these difficulties referred to parenting-time disputes, rather than the parties' ability to facilitate the child's relationship with the other parent. The trial court did not find, and there was no evidence to support the conclusion, that the parties deliberately prevented the other parent from continuing his or her relationship with the child, failed to facilitate the child's relationship with the other parent, or denigrated the other parent in the child's presence. Therefore, the trial court's finding regarding best-interest factor (j) was not against the great weight of the evidence.

In sum, the trial court's findings of fact were not against the great weight of the evidence. "A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). The trial court placed significant weight on the child's preference for a custody arrangement with both parties. Additionally, the trial court's findings, particularly that best-interest factors (f), (g), and (j) weighed equally between the parties, were supported by the evidence on the record. Therefore, the trial court did not abuse its discretion by granting the parties joint legal and physical custody of the minor child. See *Berger*, 277 Mich App at 705, 715.

While we assign no error to the defendant's claims regarding factors (f), (g), (i), and (j), we conclude that the trial court clearly erred by failing to consider best-interest factor (h). The trial court did not make any factual findings regarding best-interest factor (h) (the child's home, school, and community record). Although several witnesses, including plaintiff and defendant, testified regarding the child's performance at school and his involvement in sports, extracurricular activities, the 4-H program, religious programs, and friend group activities, the trial court did not determine how the custodial arrangements affected the child's schooling, home, and community activities. There were not sufficient remarks by the trial court or support from the lower court record to discern the trial court's findings regarding best-interest factor (h) and to facilitate appellate review. Therefore, this error requires reversal. See *Foskett*, 247 Mich App at 12-13; *Rittershaus*, 273 Mich App at 475-476 (holding that the proper remedy for a trial court's failure to make reviewable findings regarding the best-interest factors is to remand for a new child custody hearing); Cf. *Sinicropi v Mazurek*, 273 Mich App 149, 182; 729 NW2d 256 (2006) (holding that, despite the trial court's failure to explicitly state its findings regarding best-

interest factor (h), the trial court's comments regarding the child's academic performance were sufficient to discern its finding regarding factor (h) and that the trial court's error did not require reversal). Accordingly, we additionally remand the matter to the trial court to consider best interest factor (h).

Remanded for proceedings outlined in and consistent with this opinion. We do not retain jurisdiction. No costs are awarded. MCR 7.219(A).

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro