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STATE OF MICHIGAN

COURT OF APPEALS

AMANDA SHUPE, also known as AMANDA DYKHOUSE, Plaintiff-Appellant,	UNPUBLISHED November 12, 2020
v	No. 353186 Kent Circuit Court
JOSEPH SHUPE, Defendant-Appellee.	LC No. 18-001340-DM

Before: SAWYER, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In this post-judgment-divorce matter, plaintiff appeals as of right the trial court's order modifying custody from sole-physical custody with plaintiff to joint-physical custody with both parties. We affirm.

I. BACKGROUND

In August 2018, the parties entered a stipulated judgment of divorce that granted joint-legal custody of the child to both parties and sole-physical custody to plaintiff. In February 2020, defendant filed a motion regarding parenting time because plaintiff had developed significant tardiness issues with transporting the child to preschool and kindergarten. During the hearing on that motion, defendant requested that the child be placed in his care during the school week, in an effort to resolve the tardiness issue. The trial court granted defendant's motion.

The trial court acknowledged that defendant's request to modify parenting time effectively amounted to a request to modify custody. Therefore, the trial court, on its own initiative, ordered an emergency-child-custody hearing. Notably, the trial court did not enter an order changing custody after the initial hearing on defendant's motion. Only after the trial court took testimony from the parties during the emergency-child-custody hearing did the trial court enter an order changing custody.

This appeal followed.

II. ANALYSIS

A. DUE-PROCESS RIGHTS

Plaintiff first argues that the trial court violated her procedural-due-process rights. Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the trial court. *Marik v Marik*, 325 Mich App 353, 358; 925 NW2d 885 (2018). Plaintiff did not raise the issue of due process in the trial court; therefore, this issue is unpreserved.

> Michigan generally follows the "raise or waive" rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a "failure to timely raise an issue waives review of that issue on appeal."
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> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [*Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (citations omitted).]

In raising this unpreserved issue on appeal, plaintiff argues that there is significant caselaw demonstrating that a change of custody cannot be done in a hurry and that there are volumes published detailing the significant burden upon a moving party seeking to change custody. Yet, plaintiff cites none of these cases and does not provide any caselaw in support of her argument that the trial court was prohibited from its actions. An appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims, nor may she give issues cursory treatment with little or no citation of supporting authority. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). "[W]here a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (cleaned up).

"Although this Court need not address an unpreserved issue, it may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Elahham v Al-Jabban*, 319 Mich App 112, 120; 899 NW2d 768 (2017), quoting *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010); see also *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). For purposes of ensuring that plaintiff's constitutional rights were protected in this child-custody proceeding, we choose to overlook plaintiff's failure to

preserve this issue below. Addressing the merits of her claim, we conclude that no violation of plaintiff's procedural-due-process rights occurred.

"Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). "Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213; 761 NW2d 293 (2008). "[P]rocedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner." *Id*. at 213-214.

We find unpersuasive plaintiff's argument that she had no opportunity to be heard by an impartial decision-maker. Notice of the initial hearing was provided on February 21, 2020. Notably, plaintiff responded to defendant's motion regarding parenting time by acknowledging that defendant's request effectively amounted to a request to change custody. The hearing on defendant's motion regarding parenting time was then held a week later, on February 28, 2020. During the hearing, defendant argued that the child was tardy to kindergarten on numerous occasions while in plaintiff's care and that he wanted the child to reside with him during the school week in an effort to resolve the tardiness issue. Plaintiff even admitted that the child was tardy the day before the hearing. The trial court granted defendant's motion and notified the parties that an emergency-child-custody hearing would be held the following week because it acknowledged that the change in parenting time would effectively change custody. Plaintiff was aware of the nature of the proceedings and was afforded the opportunity to present her own evidence during the emergency hearing. There is nothing in the record to support plaintiff's argument that she was not provided adequate notice and an opportunity to be heard by an impartial decision-maker.

B. CUSTODY MODIFICATION

Plaintiff next argues that the trial court erred by modifying custody after the initial hearing without making the required findings on proper cause or change of circumstances, with whom the child had an established custodial environment, and what was in the child's best interests. We find this argument unpersuasive.

"This Court must affirm all custody orders unless the trial court's findings of fact 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28. Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the evidence clearly preponderates in the opposite direction. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. *Berger*, 277 Mich App at 705. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences perversity of will,

a defiance of judgment or the exercise of passion or bias." *Id*. A trial court's decision to whom to award custody is entitled to "the utmost level of deference." *Id*. at 705-706.

Plaintiff's argument is misplaced. Although the trial court granted defendant's motion regarding parenting time, it did not effectively change custody during the initial hearing on defendant's motion. The trial court did not enter an order changing custody after the motion hearing, and it is "well settled that a court only speaks through written judgments and orders." *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009). The trial court's order changing custody came *after* the emergency hearing, which was an evidentiary hearing held to determine whether proper cause or a change of circumstances existed, with whom the child had an established custodial environment, and the child's best interests if proper cause or a change of circumstances was established. "An evidentiary hearing is mandated before custody can be modified, even on a temporary basis. A trial court shall not modify or amend its previous judgments or orders or issue a new order unless there is clear and convincing evidence that it is in the best interests of the child." *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005) (citations omitted). The trial court did not violate this rule because no change of custody took place before the emergency hearing. Moreover, even though the trial court did not enter an order changing custody after the initial hearing, the weekend between the initial hearing and the emergency hearing was a weekend on which defendant was scheduled to have parenting time. In other words, the trial court did not change custody until it made the required findings under *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), as it was required to do, with such findings coming during the emergency hearing. It was only after the emergency hearing that the trial court entered an order modifying custody.

Lastly, plaintiff argues that the trial court erred because clear and convincing evidence was not presented to warrant modification of custody. Her only argument in this regard is that the child's severe tardiness issue while in her care did not provide the requisite amount of evidence to support a change of custody. Plaintiff provides no support for her contention that the child's tardiness to school cannot be used to provide clear and convincing evidence. We deem the issue abandoned and decline to address it. See *Houghton*, 256 Mich App at 339; *Yee*, 251 Mich App at 406.

Affirmed. Defendant, having prevailed in full, may tax costs under MCR 7.219(F).

/s/David H. Sawyer
/s/ Michael J. Kelly
/s/ Brock A. Swartzle