STATE OF MICHIGAN

COURT OF APPEALS

ADRIAN S. WELCH,

Plaintiff-Appellant,

v

RYAN E. GREW,

Defendant-Appellee.

UNPUBLISHED
December 16, 2021

No. 357161
Lapeer Circuit Court
Family Division
LC No. 14-047997-DM

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff-mother and defendant-father have one child together and are divorced. The judgment of divorce granted them joint legal custody, but gave plaintiff sole physical custody; defendant had limited parenting time. A few years after their divorce defendant moved for joint physical custody and equal parenting time. The trial court granted defendant's motion. Plaintiff appeals that decision. We affirm.

I. BACKGROUND

The parties were divorced by a consent judgment in August 2015. Plaintiff was awarded sole physical custody but the parties shared joint legal custody. Defendant was awarded parenting time every weekend and every other Wednesday evening. The parties later stipulated to modify defendant's parenting time to twice a month from Thursday through Sunday. In November 2019, defendant moved for joint physical custody and equal parenting time, with legal custody remaining joint. Defendant argued that plaintiff repeatedly made unfounded accusations that he abused the minor child in an attempt to alienate defendant from the minor child. The trial court referred the matter to the Friend of the Court for an investigation and recommendation.

In August 2020, the Friend of the Court recommended granting defendant's motion, and defendant moved to implement the Friend of the Court's recommendation. Plaintiff opposed implementing the Friend of the Court's recommendation because she did not participate in the Friend of the Court's investigation. While plaintiff and her counsel asserted they had not received notice of the investigation, the Friend of the Court's file showed that letters were sent to both with

no response. Accordingly, the trial court referred defendant's motion to modify physical custody and parenting time to a domestic relations referee for an evidentiary hearing and recommendation.

Following a hearing, the referee recommended granting defendant's motion and the trial court agreed with the referee's recommended order. Plaintiff filed several objections to the referee's findings and recommendation, which the trial court rejected. This appeal followed.

II. ANALYSIS

A. CHANGE OF CUSTODY

Plaintiff first argues that defendant failed to introduce sufficient evidence to justify a change of custody and parenting time. "In a child custody dispute, 'all orders and judgments of the circuit court shall be affirmed on appeal 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.' " *Pennington v Pennington*, 329 Mich App 562, 569-570; 944 NW2d 131 (2019), quoting MCL 722.28. "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id*. at 570.

A trial court may modify a custody order, but before the court may consider a modification, the party moving for the change must demonstrate proper cause or a change of circumstances to justify considering a modification as a threshold matter. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). In this case, the referee found proper cause to consider a modification. "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511. While "[t]here is no hard or fast rule" for what grounds constitute proper cause, "trial courts can look for guidance in the twelve factors developed by the Legislature for determining what is in the child's best interests" in MCL 722.23. *Id*.

"Where there is a joint established custodial environment, neither parent's custody may be disrupted absent clear and convincing evidence." *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008) (quotation marks, citation, and emphasis omitted). Evidence is clear and convincing when it

> produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks, brackets, and citation omitted).]

The party seeking a change of custody bears the burden of persuasion. *Powery*, 278 Mich App at 529. Consequently, defendant had the burden to establish by clear and convincing evidence that a

change of custody was in the minor child's best interests. See *id.*[1] The best-interest factors in MCL 722.23 are:

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

[1] The referee found that the minor child had an established custodial environment with both parties and that modification would not alter the minor child's established custodial environment with plaintiff. Plaintiff does not appear to challenge these findings on appeal.

The referee's finding of proper cause was not against the great weight of the evidence. When asked if she obtained defendant's permission before switching the minor child's school, plaintiff responded: "I did not get permission from [defendant,] as I cannot communicate with [him.]" Plaintiff also permitted the minor child, at the age of seven, to have one of his ears pierced. When asked whether she discussed the matter with defendant beforehand, plaintiff responded: "No. For the record, I don't ask [defendant] for permission on anything, because he will not properly communicate with me." In addition, defendant testified that plaintiff had been taking the minor child to a therapist without telling defendant. The referee found that defendant demonstrated four somewhat-overlapping proper causes to consider a custody modification: (1) plaintiff's inability to abide by the joint legal custody order, (2) plaintiff's failure to communicate effectively with defendant regarding the minor child, (3) plaintiff's unilateral decision-making with respect to the minor child, and (4) plaintiff's behavior that interrupted defendant's relationship with the minor child.

Each of the four proper causes found by the referee "have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka*, 259 Mich App at 511. Moreover, they related to the school record of the minor child, MCL 722.23(h), and 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," MCL 722.23(h) and (j). In other words, plaintiff's refusal to consult defendant on important decisions regarding the minor child despite the parties sharing joint legal custody justified considering a physical custody modification.

The referee, after making specific findings regarding each best-interest factor, found a change of custody to be in the minor child's best interests. Specifically, the referee found factors (a), (c), (d), (f), (g), (i), and (k) not to favor either party and found factors (b), (e), (h), (j), and (*l*) to favor defendant. Regarding factor (b), the referee found that both parties possessed the capacity and disposition to give the minor child love, affection, and guidance, but that plaintiff's inability to take responsibility for her own actions somewhat inhibited her abilities to teach the minor child responsibility and accountability.[2] As for factor (e), the referee found that defendant was slightly favored because of his wife's involvement with the minor child and defendant's facilitation of a relationship between the minor child and defendant's elder daughter. Turning to factor (h), the referee found that this factor slightly favored defendant because, while both parties provide a good home with appropriate care for the minor child, defendant had to remove the minor child from playing basketball because of plaintiff's behavior and plaintiff took the minor child to therapy without consulting defendant.

Regarding factor (j), the referee found that this factor favored defendant because of plaintiff's history of unsubstantiated accusations against defendant that frustrated defendant's relationship with the minor child and plaintiff's failure to even provide defendant with her address

[2] Factor (b) also considers whether and how parents teach their child about their religion. Defendant testified that neither party was religious, and plaintiff provided no contrary testimony. Accordingly, the referee properly excluded consideration of this portion of the factor.

so he could know where the minor child lived when he was with plaintiff.[3] By contrast, the referee found defendant had put the minor child's best interests before his problems with plaintiff. Finally, as for factor (*l*) the referee found two other matters that weighed in favor of defendant. First, that defendant did not further disrupt the minor child's education by bringing a complaint against plaintiff for violating the custody order when she switched the minor child's school without consulting defendant. This showed, according to the referee, that defendant prioritized the minor child's best interests. Second, that plaintiff "has an outright and unapologetic disrespect not only for the Defendant, her minor son's father, but for the Court and for any orders of this Court."

With one exception, the referee's findings were not against the great weight of the evidence. Plaintiff made it clear with her testimony that she did not consult defendant regarding important decisions involving the minor child, such as what school he should attend or whether to undergo therapy. Moreover, plaintiff did so despite acknowledging that she was required to discuss these matters with defendant because the parties share joint legal custody. Further, plaintiff conceded to making three Children's Protective Services reports against defendant that were unsubstantiated, including one of sexual assault.[4] The evidence also supported the conclusion that while plaintiff and defendant were both involved in the minor child's extracurricular activities, plaintiff interfered with this by accusing defendant of being an unfit parent in front of the minor child, his peers, and his peers' parents after a basketball game.

The referee, however, erred by weighing factor (e) in defendant's favor. "It is 'legal error for the trial court to consider . . . acceptability, rather than permanence, of the custodial unit' when making findings under Factor (e)." *Brown v Brown*, 332 Mich App 1, 21; 955 NW2d 515 (2020) (alteration in original), quoting *Fletcher v Fletcher*, 447 Mich 871, 885; 526 NW2d 889 (1994). The referee's discussion of this factor was as follows:

> The Defendant lives with his current wife and has a daughter from a previous relationship. Defendant was remarried in 2018. Defendant's new wife is involved with the minor child, when the minor child is at their home for parenting time. She participates in the daily activities of, with [sic] the minor child. Additionally, the minor child appears to share a good relationship with his half-sister. The Defendant reports a strong family dynamic with his blended family, including his daughter from the previous relationship. Plaintiff appears to live alone with the minor child. Plaintiff does not report anyone living in the home with her and the minor child. Plaintiff provides for the minor child when he is with her

[3] Plaintiff repeatedly alleged that defendant abused the minor child. Children's Protective Services and the police each declined to initiate any proceedings against defendant.

[4] We note that MCL 722.23(j) provides, in part: "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." While an explicit finding on this point would have been helpful, it is clear from the referee's findings that the referee did not believe plaintiff acted reasonably, and, particularly in light of the number of unsubstantiated allegations plaintiff has made, that conclusion was not against the great weight of the evidence.

> and appears to have a reliable babysitter for the minor child. This factor slightly favors the Defendant.

The referee's discussion makes clear that no preference should have been given to defendant with respect to factor (e). It is the *permanency* of the existing or proposed custodial home or homes that is weighed under this factor, not the desirability. Moreover, there is nothing in the record to conclude that defendant's family unit was more permanent than plaintiff's. Accordingly, the referee's finding that factor (e) weighed in favor of defendant was against the great weight of the evidence. Nevertheless, a child's best interests under the statute are "the sum total of" the factors. MCL 722.23. Even with a correct understanding of factor (e), it is clear that the referee's ultimate finding regarding best interests was not against the great weight of the evidence. The salient reasons for the modification were supported by the record, and factor (e) was of little significance to the referee's ultimate decision. Indeed, the referee found that the factor only "slightly favors the Defendant."

For the same reasons supporting the change of custody, the referee's finding that equal parenting time was in the minor child's best interests was not against the great weight of the evidence. Accordingly, the trial court did not err by adopting the referee's recommendations.

B. UNPRESERVED ISSUES

Plaintiff next argues that the Friend of the Court investigator was biased against her, bias impacted the referee's recommendation, and defendant's counsel violated several rules of professional conduct and plaintiff's First Amendment rights. Plaintiff also appears to argue that a fraud was committed upon the court because she was deprived of the opportunity to participate in the Friend of the Court investigation and defendant's counsel abused her power to influence the referee or the trial court. Plaintiff failed to raise any of these issues at the trial court level. Consequently, all of these issues are unpreserved. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Plaintiff additionally argues that the trial judge was biased against her. To preserve a claim of judicial bias, a respondent must make a motion in the trial court to disqualify the judge. See *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). Plaintiff failed to file a motion in the trial court to disqualify the trial judge. Thus, this issue is also unpreserved.

As a general rule, "a failure to timely raise an issue waives review of that issue on appeal." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (quotation marks and citation omitted). This Court, however, has applied the plain error standard to unpreserved claims of error raised in child custody cases. *Demski v Petlick*, 309 Mich App 404, 441; 873 NW2d 596 (2015). Given this, we will review these unpreserved issues for plain error. *Id*.

"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." *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000) (quotation marks omitted), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d

482 (2017) (alteration in original, quotation marks and citation omitted). The appellant bears the burden of persuasion with respect to prejudice. See *Carines*, 460 Mich at 763.

Plaintiff's claims of bias, fraud, and unprofessional conduct are without merit. Plaintiff has not presented any evidence establishing that the Friend of the Court was biased against her. Consequently, the Friend of the Court investigator did not have any bias that could have affected the referee's recommendation. Plaintiff's argument with respect to defendant's counsel is also unsupported by the record. There is no indication that counsel acquired a successful result on defendant's behalf through nefarious or unethical means. Indeed, as discussed earlier, the referee's recommendation was amply supported by the record, in large part by plaintiff's own testimony. Additionally, counsel's cross-examination of plaintiff did not violate plaintiff's rights under the First Amendment because counsel is not a government actor. See US Const, Am I ("*Congress* shall make no law . . . abridging the freedom of speech . . . .") (emphasis added); *Holeton v Livonia*, 328 Mich App 88, 104; 935 NW2d 601 (2019) ("The First Amendment applies to state actors through the Fourteenth Amendment."). Finally, the trial court did not rely on the Friend of the Court investigation so any potential bias from that investigation did not affect the trial court's ultimate custody decision.

Plaintiff additionally argues that the trial court was biased against her; she supports this argument by pointing to the trial court's rulings against her. But "[j]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality." *Kern v Kern-Koskela*, 320 Mich App 212, 231-232; 905 NW2d 453 (2017) (quotation marks and citation omitted). Plaintiff has not met that high bar here. Finally, in light of our conclusion that the referee's recommendation was supported by the record, there is no indication that the trial court "refus[ed] to accurately assess the details in their entirety for a fair ruling" as plaintiff claims; rather, the trial court's decision was based on the record before the referee. Thus, plaintiff's judicial bias argument also fails.

III. CONCLUSION

We affirm the trial court's order changing custody of the minor child for the reasons stated in this opinion. Defendant, as the prevailing party, may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola