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STATE OF MICHIGAN

COURT OF APPEALS

ANNE M. SODDY, also known as ANNE M. CLOCKLIN,

Plaintiff-Appellee,

v

JOHN A. SODDY,

Defendant-Appellant.

UNPUBLISHED
April 29, 2021

No. 355212
Kent Circuit Court
Family Division
LC No. 18-003959-DM

Before: JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order affirming the referee's order regarding custody and parenting time. Previously, plaintiff and defendant shared joint physical and legal custody of their four minor children, NES, EAS, JMS, and ICS. However, under the trial court's latest order, plaintiff was granted primary physical custody and defendant's parenting time was reduced. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 2019, the trial court entered a consent judgment of divorce regarding the parties. The judgment of divorce provided that the parties would each have joint physical and legal custody of all the minor children. The parties were to exercise parenting time on alternating weekends, and each party was to have the minor children for two consecutive days each week.

On September 3, 2019, plaintiff moved the trial court to, in relevant part, modify the parenting time schedule. This motion was referred to the Friend of the Court (FOC). However, on May 1, 2020, before the parenting time motion was resolved by the trial court, plaintiff moved the trial court to modify the custody arrangement. Following two days of testimony and an *in camera* interview of all the children in June 2020, the referee granted plaintiff's motions, awarded plaintiff primary physical custody, and modified the parenting time such that defendant, while maintaining his parenting time every other weekend, only had four hours of parenting time on two weekday evenings. The order also reduced defendant's summer parenting time to three weekends

per month, with no weekday parenting time. Defendant moved the trial court to review the referee's order de novo. The trial court, after reviewing the transcripts of the evidentiary hearing, affirmed the referee's order. Defendant now appeals.

II. STANDARD OF REVIEW

Defendant argues the referee made a number of factual findings that were against the great weight of the evidence and, as a result, her ultimate finding that a change of custody was in the best interests of the minor children was erroneous. We disagree.

"All custody orders must be affirmed on appeal unless the trial court committed a palpable abuse of discretion, made findings against the great weight of the evidence, or made a clear legal error." *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012), citing MCL 722.28. "Under the great weight standard, the trial court's factual determinations will be affirmed unless the evidence clearly preponderates in the other direction." *Butler v Simmons-Butler*, 308 Mich App 195, 200; 863 NW2d 677 (2014). We defer to the trial court's credibility determinations in reviewing factual findings. *Id*.

III. ANALYSIS

Before considering a change of custody, a trial court must find that there has been a change of circumstances or proper cause.[1] *Mitchell*, 296 Mich App at 517. If the court finds there has been a change of circumstances or proper cause, it "still may not modify custody from an established custodial environment[2] unless there is clear and convincing evidence that a modification is in the best interest of the child." *Id*. at 520. The party moving for the change of custody bears the burden of proving the modification is in the best interests of the child, and "the trial court must consider all the statutory best-interest factors set out in MCL 722.23. *Id*. MCL 722.23 provides the following best-interest factors:

> (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.

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[1] Defendant does not challenge on appeal the referee's finding of a change of circumstances and proper cause.

[2] Plaintiff did not contest below or on appeal that the minor children have an established custodial environment with defendant.

> (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.

The trial court must apply each of the statutory factors to each child individually. *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001).

The referee found that factors (a), (b), (c), (f), (g), and (k) did not weigh in favor of either party and that factor (h) weighed in favor of plaintiff. Neither party challenges the referee's findings on these factors on appeal, and we find no error.

Factor (d) considers the "length of time the child has lived in a *stable*, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d) (emphasis added). Defendant argues the referee placed too much emphasis on Marassa Forsyth, defendant's girlfriend, moving into the home in considering this factor. We disagree.

The referee found that factor (d) weighed in favor of plaintiff because, while she had moved homes, she remained in the same neighborhood with the same family unit. By contrast, while defendant continued to live in the marital home, he had introduced Forsyth and her children to the household, and Forsyth had engaged in criminal activity involving the care of her children. The referee acknowledged there were no allegations that Forsyth had abused these minor children, but she found that such activity going on in defendant's home made it unstable. In light of the evidence, the referee's finding that this factor favored plaintiff was not against the great weight of the evidence. *Butler*, 308 Mich App at 200.

Forsyth testified that defendant's children had never met her children when they moved in, and that the home was chaotic for several weeks. Leticia Chaires, a behavior technician that worked with JMS on his autism-spectrum disorder (autism) and attention-deficit/hyperactivity disorder (ADHD), also testified the home was chaotic for some time after Forsyth joined the household in July 2019. Additionally, Forsyth had her children removed from her care around February 2020, and pleaded guilty to fourth-degree child abuse and dispensing a controlled substance for providing Trazadone to her son in May 2020. By contrast, Adam Scott and plaintiff had lived together for almost two years as of the evidentiary hearings, and the minor children, presumably, had about nine months to get used to the idea of their baby sibling, who was born 16 months before the hearings were held. Thus, the record supported the referee's finding that plaintiff's home provided more stability to the minor children.

Factor (e) considers "permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). Defendant argues the referee erred in weighing this factor in favor of plaintiff because the referee improperly considered defendant's daycare arrangement. Defendant further argues that the referee's finding on this factor was based more on the referee's disapproval of defendant living with Forsyth. While the referee erred in considering defendant's daycare arrangement under this factor, the referee's finding was not against the great weight of the evidence.

The referee found that factor (e) favored granting plaintiff physical custody based on the following:

> Both parties state that their current significant other is going to remain in the home. But [defendant] has already shown that in between two hearing[s] when he didn't like what he was hearing in terms of care of the children in the morning[, h]e obtained a daycare provider for a couple of hours in the morning before the children when [sic] to their mother. But he had to wait until he was in the middle of a court hearing to considered that as [ ] appropriate. He states he wants to keep [Forsyth] in his household as part of his future and would like her to be involved with the children more so in the future.

We agree with defendant that the referee's consideration of defendant's daycare arrangements is misplaced, as it has no relevance to the "permanence, *as a family unit*, of the existing or proposed custodial home." MCL 722.23(e) (emphasis added). We cannot conclude that a parent should be penalized for arranging childcare while they work. However, in light of the evidence, the referee's focus on Forsyth and its ultimate conclusion that factor (e) favored plaintiff was not against the great weight of the evidence.

As the referee noted, defendant expressed a desire for Forsyth to be more involved with the children in the future. Indeed, defendant testified that Forsyth, so far, was not responsible for parenting the children, but he wanted that to change going forward. In addition, Forsyth testified that she had lost custody of her children because of her child abuse conviction, but she was working to regain custody. The absence and potential return of Forsyth's children, as well as the proposed change in Forsyth's involvement with the minor children, supported the referee's finding that plaintiff's home offered more permanence. Thus, despite the referee's improper consideration of

defendant's daycare arrangement, the referee's finding on this factor was not against the great weight of the evidence. *Butler*, 308 Mich App at 200.

Factor (i) considers the "reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." Defendant argues the referee committed clear legal error by completely refusing to consider the preferences of the minor children. We disagree.

The referee did not state which parent factor (i) weighed in favor of, instead noting: "They were very clear that they love both of their parents and want to see both of their parents and be with both of their parents. But that's all I'm going to say with regard to their preference." The referee also stated the following at the beginning of her recitation of her findings on the best-interest factors:

> I did interview all four children. They were very fun. They're delightful children. They have strong opinions about how much they love both of their parents. You know, I really liked to bring that out there. This is not about this case really is not about the preference of the children per se. Because they love both of their parents and they want to continue to see both parents how that looks, from a legal standpoint or schedule standpoint, well, that's for the adults to determine.

Contrary to defendant's portrayal of these statements, the referee seems to have considered the children's preferences, but determined they were not dispositive to this case in light of her resolution of the other best-interest factors. Because a "child's preference does not automatically outweigh the other factors," *Treutle v Treutle*, 197 Mich App 690, 694; 495 NW2d 836 (1992), and each factor need not be given equal weight, *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998), the referee did not commit clear legal error in her resolution of factor (i).

Factor (j) considers 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." MCL 722.23(j). Defendant argues the referee erred in finding that factor (j) did not favor either party because the referee ignored the fact that plaintiff had made numerous motions to change parenting time and custody and filed a complaint with Children's Protective Services (CPS) against defendant that was unsubstantiated. We disagree.

The referee found that factor (j) did not weigh in favor of either party because she believed the parties tended to work together. The referee also noted that plaintiff had been providing "great assistance" to defendant by exercising her right of first refusal and "providing the lion share of the parenting" of the minor children. Further, the referee noted that the parties communicated directly and on Our Family Wizard to keep track of the many schedules of the four children. There was very little testimony that related to this factor. Eric Dickerson, a FOC investigator, testified that plaintiff and defendant appeared to have a contentious relationship. Defendant testified that he tried to facilitate the children's relationship with plaintiff by telling them plaintiff loved them and to always tell plaintiff the truth. However, defendant also testified that plaintiff did not always extend him the same courtesy. Specifically, defendant testified that plaintiff sometimes prevents defendant from attending appointments for the children. By contrast, plaintiff testified that she offered, on one occasion, to let defendant take the children to a dentist appointment, but defendant

said he could not take them. This is fairly scant evidence upon which to base a finding on this factor.

We give deference to the trial court's credibility determinations, and therefore we cannot say the referee's finding that factor (j) did not favor either party was against the great weight of the evidence. *Butler*, 308 Mich App at 200. Further, that plaintiff sought changes in parenting time and custody does not necessarily mean she was attempting to interfere with the relationship between defendant and the children. Plaintiff sought fairly minor changes in parenting time and custody that she believed were in the best interests of the children. We conclude that none of these weigh so heavily as to make the referee's finding on factor (j) against the great weight of the evidence.

Factor (*l*) permits a court to consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(*l*). Defendant argues the referee erred by considering the special needs of JMS, plaintiff's frequent use of her right of first refusal, and the COVID-19 pandemic to weigh in plaintiff's favor.

The referee made the following findings regarding factor (*l*):

> I find that there is another factor and that does involve a child with special needs, and it appears that [plaintiff] is much more in tune with the needs of this child. [Defendant] does the best that he can and can be helpful at times but it's clear to me that we have one parent who's been a primary lead and dealing with the special needs of this child as well as the needs of all of the children.
>
> Um, another factor to consider is that because of the Right of First Refusal, and with the circumstance[s] that have happened due to the [COVID-19 pandemic] and the State's Orders for shutdowns and stays at home. Again, this has resulted in [plaintiff] being the primary parent for all of these children, primary caretaker unless it's convent [sic] for [defendant] to have the children.

The referee's finding that plaintiff was more "in tune" with JMS's needs and primarily addressed the needs of all the children was not against the great weight of the evidence. Trudy Weiker-Luke, a board-certified behavior analyst and Chaires supervisor, testified that plaintiff provided more structure to JMS than did defendant. Further, plaintiff was generally the parent that was able to leave work and pick JMS up from school when he was having issues related to his autism or ADHD or the other children were sick. Plaintiff was also the parent generally responsible for discussing medication changes for JMS with his doctor. This is not to say that defendant was wholly "out of tune" with JMS's needs. Indeed, defendant testified about the techniques he used to calm JMS and even described a time when he was able to calm JMS via phone so that JMS could return to his schoolwork without having to leave school. Nevertheless, the referee's findings were not against the great weight of the evidence. *Butler*, 308 Mich App at 200.

In addition, plaintiff and defendant both testified about the daily routine of the minor children on defendant's days with the children. Any day that defendant worked and the children did not have school, they went to plaintiff's home until defendant got out of work. Once the COVID-19 pandemic began and schools were closed, the children went to plaintiff's home for

remote learning when defendant had to work on his days with the children. Plaintiff was able to work from home and make her own schedule while defendant could not, and plaintiff exercised her right of first refusal under the relevant provision in the parties' judgment of divorce which requires both parties to offer the other party parenting time if he or she will be unable to be present for four or more hours during their scheduled parenting time. On the basis of the foregoing, the referee's finding that plaintiff tends to take the lead by exercising her right of first refusal and generally overseeing the children's remote learning during COVID-19 is not against the great weight of the evidence. *Butler*, 308 Mich App at 200.

After making the above factual findings, the referee found that it was in the best interests of the minor children for plaintiff to have primary physical custody, while defendant would receive slightly less parenting time, as described *supra*. In light of the above findings, we conclude the referee's finding regarding the minor children's best interests was not against the great weight of the evidence, and that her ultimate resolution of the issue of custody and parenting time was not an abuse of discretion. *Mitchell*, 296 Mich App at 517. Because the referee did not err, the trial court did not err by adopting the referee's findings and recommendation.

Affirmed.

/s/ Kathleen Jansen
/s/ Amy Ronayne Krause
/s/ Michael F. Gadola