

STATE OF MICHIGAN
COURT OF APPEALS

JESSIE L. MILLER,

Plaintiff/Counterdefendant-Appellant,

v

BENJAMIN J. MILLER,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED

June 17, 2021

No. 354995

Oakland Circuit Court

Family Division

LC No. 2018-864676-DM

Before: REDFORD, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

In this custody dispute, plaintiff/counterdefendant (plaintiff) appeals as of right the circuit court's order granting defendant/counterplaintiff's (defendant) motion to change custody of the parties' minor child, JM, change the parenting time schedule, and modify child support. Plaintiff argues that several of the findings underlying the circuit court's determination regarding JM's best interests were contrary to the great weight of the evidence particularly respecting the best-interest factors set forth in MCL 722.23(c), (d), (h), (j), and (l). We affirm.

I. FACTUAL BACKGROUND

The parties entered a consent judgment of divorced on November 29, 2018, which provided them joint legal and physical custody of their only child, JM, and set a regular parenting time schedule under which defendant had parenting time every other weekend and on one night every other week. The consent judgment of divorce required defendant to pay spousal support and child support and required plaintiff to use \$3,000 of the proceeds from the sale of the marital home to pay for JM's therapy and tutoring, and provide defendant proof of such expenditures.

Disputes arose regarding parenting time, JM's vaccinations, and JM's participation in tutoring and therapy, resulting in the filing of various motions. The circuit court held hearings and entered orders, some of which plaintiff refused to obey. Defendant planned a vacation cruise with JM for his parenting time during JM's 2020 spring break but plaintiff refused to abide by the consent judgment of divorce's terms requiring her cooperation which prompted defendant to seek the court's assistance. The circuit court granted the motion and ordered plaintiff to stop interfering

with defendant's parenting time and sanctioned plaintiff for doing so and violating the consent judgment of divorce. Then in March 2020, plaintiff unilaterally refused to allow defendant to exercise parenting time which prompted defendant to move for a change of custody, modification of parenting time, and modification of child support. After conducting an evidentiary hearing at which the circuit court heard testimony and considered the best-interest factors set forth in MCL 722.23, the circuit court determined that factors (a), (b), (e), (f), (g), and (k) favored neither party, but factors (c), (d), (h), (j), and (l) favored defendant. The circuit court ruled that modification of its previous custody order served JM's best interests and granted defendant's motion to change custody, change the parenting time schedule, and modify child support. This appeal followed.

II. STANDARDS OF REVIEW

"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), citing MCL 722.28. "Specifically, we review under the great-weight-of-the-evidence standard the trial court's determination whether a party demonstrated proper cause or a change of circumstances." *Id.* at 570 (citation omitted). "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.* (citation omitted). "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id.* "An abuse of discretion, for purposes of a child custody determination, exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014) (citation omitted). "Questions of law are reviewed for clear legal error." *Id.* "A trial court commits legal error when it incorrectly chooses, interprets or applies the law." *Id.* (citation omitted).

III. ANALYSIS

Plaintiff argues that the circuit court's determinations of the best-interest factors under MCL 722.23(c), (d), (h), (j), and (l) were against the great weight of the evidence. We disagree.

Trial courts have a "duty to ensure that the resolution of any custody dispute is in the best interests of the child." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). "[A] party seeking to modify an existing child custody order must first establish proper cause or a change of circumstances before the trial court may reopen the custody matter and hold a hearing to assess whether the proposed modification is in the child's best interests." *Pennington*, 329 Mich App at 571 (citation omitted). MCL 722.23 defines the best interests of the child as the sum total of the factors set forth in MCL 722.23(a)-(l). "In child custody cases, the family court must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them." *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007) (citation omitted). "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) (citation omitted). A trial 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.” MCL 722.27(1)(c). “To expedite the resolution of a child custody dispute by prompt and final adjudication, 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.” MCL 722.28.

Plaintiff characterizes the circuit court’s ruling regarding proper cause and a change of circumstances as “questionable” and asserts that it demonstrated the circuit court’s bias against plaintiff. Plaintiff, however, does not argue that the circuit court erred by finding that proper cause or a change of circumstances existed and fails to provide a corresponding analysis that would support such an assertion. Instead, plaintiff argues that the circuit court determined JM’s best interests contrary to the great weight of the evidence. Plaintiff, therefore, has waived any challenge to the circuit court’s ruling regarding proper cause and a change of circumstances because she failed to include it in her statement of questions presented. *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019); MCR 7.212(C)(5). Accordingly, our analysis is limited to the circuit court’s findings regarding JM’s best interests.

MCL 722.23 defines the best-interest factors as follows:

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.

(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. [MCL 722.23.]

The circuit court's "findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties." *MacIntyre v MacIntyre*, 267 Mich App 449, 452; 705 NW2d 144 (2005). "In reviewing the findings, this Court defers to the trial court's determination of credibility." *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008) (quotation marks and citation omitted).

A. MCL 722.23(c)

Plaintiff first argues that, contrary to the great weight of the evidence, the circuit court improperly found in defendant's favor factor (c) which concerns "[t]he 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." MCL 722.23(c). We disagree.

The record reflects that the circuit court found that both parties were willing to provide JM food and clothing. During the evidentiary hearing, plaintiff testified that she earned a total of \$9,000 in 2019, but lacked employment and had not earned income since March 2020. Plaintiff also received \$873 each month in child support. Although plaintiff received spousal support in the amount of \$1,500 each month, plaintiff acknowledged that spousal support payments would end in November 2020. Plaintiff stated that she spent an average of \$450 each month on food and \$300 each month on clothing for JM. The court did not find plaintiff's testimony credible. The evidence indicated that, by November 2020, plaintiff would be spending \$750 each month on food and clothing for JM out of a total of \$873 that plaintiff received in child support. In comparison, defendant testified that his annual salary ranged between \$80,000 and \$90,000. Although the evidence indicated that plaintiff had the capacity to provide food and clothing for JM, the great weight of the evidence supported the circuit court's finding that defendant had a greater capacity to do so given the disparity in the parties' income.

Further, the great weight of the evidence also supported the circuit court's finding that defendant had a greater capacity to provide for JM regarding her medical care. The consent judgment of divorce required plaintiff to enroll JM in therapy and provide proof of enrollment to defendant. The record reflects that, because plaintiff had not done so, defendant filed a motion during April 2019 seeking compliance and also sought the court's intervention to settle the parties' dispute over JM's childhood disease immunization vaccines which defendant sought but to which

plaintiff objected. The circuit court granted defendant's motion in part on May 1, 2019, and ordered plaintiff to enroll JM in therapy. The court set a date for a best-interest evidentiary hearing to determine the vaccination issue. After months of adjournments granted to plaintiff, the circuit court concluded the evidentiary hearing and issued its opinion and order in which it found that plaintiff failed to present evidence to establish her contention that JM risked potential negative medical consequences if vaccinated. Accordingly, the court found that vaccination served JM's best interests, granted defendant's motion, and ordered the parties to consult with JM's treating physician to schedule and administer all state recommended vaccines.

The record reflects that JM had two therapists before she began seeing her current therapist, Dr. Diana Yurk, but the earlier therapy had not been consistent. By the time JM began participating in regular ongoing therapy sessions with Dr. Yurk in March 2020, JM suffered from moderate to severe depression and had engaged in self-harm. For this reason, Dr. Yurk recommended medication for JM. Plaintiff, however, refused to permit JM to take medication to treat her mental health problems. Dr. Yurk, therefore, increased the weekly number of therapy sessions. Based upon this record evidence, the circuit court found that MCL 722.23(c) weighed in defendant's favor. The evidence did not clearly preponderate in the opposite direction. Accordingly, the great weight of the evidence supported the circuit court's factor (c) determination.

B. MCL 722.23(d)

Plaintiff argues next that the circuit court improperly weighed factor (d) in favor of defendant against the great weight of the evidence. We disagree.

Factor (d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). During the change of custody evidentiary hearing, evidence revealed for the first time that JM did not reside in the same house as plaintiff. JM's grandfather and plaintiff both testified that JM had a bedroom in her grandparent's home, but plaintiff resided in a separate guest house on the same property. The record indicates that JM took care of getting up and ready for school and either her grandmother or plaintiff took her to school, but it lacks clarity regarding who provided JM her meals. Plaintiff also revealed that she had plans to move in the near future to a different home but provided the court no details regarding when or where she intended to move, nor how the move might impact JM's schooling, extracurricular activities, therapy, and parenting time with defendant. The record reflects that defendant had a long-term stable relationship with his girlfriend who had an established relationship with JM. Defendant owned and lived with his girlfriend in a three-bedroom house where JM had her own room. Defendant had no plans to move. Based upon the record evidence, the circuit court's finding that MCL 722.23(d) weighed in defendant's favor was not against the great weight of the evidence.

C. MCL 722.23(h)

Plaintiff also asserts that the circuit court erred by finding against the great weight of the evidence that factor (h) weighed in defendant's favor. We disagree.

Factor (h) concerns "[t]he home, school, and community record of the child." MCL 722.23(h). Evidence established that both parents generally had concern for JM's satisfactory

performance in school. The record reflects that the consent judgment of divorce required plaintiff to enroll JM in tutoring and provide proof of enrollment to defendant. Plaintiff failed to do so until the circuit court ordered plaintiff a second time on May 1, 2019, to enroll JM in tutoring. During the child custody evidentiary hearing, defendant testified that he independently enrolled JM in a math tutoring program. Although plaintiff testified that she took JM to tutoring, plaintiff acknowledged that she did not have proof that she had done so. Defendant testified that he took JM to every tutoring session that occurred during his limited parenting time. The record also reflects that plaintiff took JM out of school for medical appointments and kept JM out of school for the entire day. Based upon the record evidence, the circuit court's determination that factor (h) weighed in defendant's favor was not against the great weight of the evidence.

D. MCL 722.23(j)

Plaintiff also contends that the circuit court erred by finding against the great weight of the evidence that factor (j) weighed in defendant's favor. We disagree.

Factor (j) concerns "[t]he 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). The record reflects that plaintiff refused to cooperate with defendant regarding defendant's parenting time in 2018 until the circuit court intervened to enforce defendant's rights. Plaintiff also refused to allow JM to go with defendant during his 2020 spring break parenting time which caused defendant to again seek court intervention to enforce his rights. The circuit court ordered plaintiff to cease and desist from interfering with defendant's parenting time. The record reflects that plaintiff also unilaterally prevented defendant from exercising parenting time for several weeks because of the onset of the COVID-19 pandemic. The circuit court held a hearing and again ordered plaintiff to stop interfering with defendant's parenting time. The record indicates that defendant never prevented plaintiff from exercising her parenting time with JM. Defendant, however, refused to participate in coparenting counseling. The circuit court considered and weighed all of the evidence and determined that MCL 722.23(j) weighed in defendant's favor. The great weight of the evidence supports the circuit court's decision.

E. MCL 722.23(l)

Plaintiff asserts that, contrary to the great weight of the evidence, the circuit court improperly found factor (l) weighed in defendant's favor. We disagree.

Factor (l) concerns "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The record reflects that in relation to factor (l) the trial court considered Dr. Yurk's testimony regarding JM's struggle with depression and low self-esteem and the significant impact that the parties' contentious relationship had on JM. The circuit court found that both parties desired JM's improvement but plaintiff disparaged defendant and discussed adult issues and court proceedings with JM and continued to seek ways to deprive or interfere with defendant's parenting time. The circuit court reflected upon the case history and noted that defendant remained vigilant in seeking court intervention to compel tutoring and therapy for JM, and had he not done so, such things likely would not have occurred. The circuit court also recalled that plaintiff had ignored advice from medical professionals if they did not share her views

on the proper treatment of JM. The court reflected on plaintiff's going from doctor to doctor during the vaccination issue and also delayed getting JM established with a therapist. The record supports the circuit court's analysis.

Plaintiff argues that the circuit court failed to adequately consider aspects of Dr. Yurk's testimony about JM's progress and her desire to be with plaintiff, or that both parties equally contributed to the chaos and combativeness that impacted JM. Although Dr. Yurk testified that JM wanted to spend more time with plaintiff than she did with defendant, she also testified that JM wished to see defendant during the period that plaintiff prevented defendant from exercising parenting time and desired to spend time with both of her parents.

Examination of the record establishes that the great weight of the evidence supports the circuit court's determination that MCL 722.23(*l*) weighed in defendant's favor. The court, therefore, did not err in this regard.

CONCLUSION

In sum, the circuit court's findings regarding the best-interest factors set forth in MCL 722.23(c), (d), (h), (j), and (*l*) were supported by the great weight of the evidence. Accordingly, the circuit did not abuse its discretion when it granted defendant's motion to change custody, change the parenting time schedule, and modify child support.

Affirmed.

/s/ James Robert Redford
/s/ Stephen L. Borrello
/s/ Jonathan Tukel