STATE OF MICHIGAN

COURT OF APPEALS

LAURIE HERSHEY BRADY,

Plaintiff-Appellant,

v

RANDALL LEE BRADY,

Defendant-Appellee.

UNPUBLISHED
September 22, 2015

No. 326396
Kent Circuit Court
Family Division
LC No. 10-002924-DM

Before: BOONSTRA, P.J., and MURPHY and MARKEY, JJ.

PER CURIAM.

Plaintiff Laurie Hershey Brady appeals as of right the trial court's order affirming on de novo review the recommendation of the hearing referee that defendant Randall Lee Brady be awarded sole legal and physical custody of the parties' minor children EB and GB after defendant had moved to change the existing joint custody arrangement. We affirm.

On August 9, 2011, the trial court entered a judgment of divorce ending defendant and plaintiff's marriage. Defendant and plaintiff were granted joint legal and physical custody of the minor children. Plaintiff suffers from epilepsy, and she took Phenobarbital to treat her seizures. Before November 13, 2013, plaintiff at times consumed alcohol while being on the Phenobarbital. Plaintiff's Phenobarbital bottle included a yellow sticker telling her that the medication causes drowsiness. Dr. Timothy Thoits, plaintiff's neurologist, treated her for epilepsy and migraines. Dr. Thoits talked to plaintiff about combining alcohol with anti-epileptic drugs because alcohol consumption while using anti-epileptic drugs results in a deeper sedation than just using the anti-epileptic drugs or alcohol alone.

On November 13, 2013, plaintiff got showered, had coffee, and took the minor children to school. Plaintiff subsequently picked up EB from school early for the purpose of taking her to an orthodontist appointment. Plaintiff did not return EB to her school. After EB and plaintiff returned to plaintiff's home, plaintiff went to sleep around 1:00 or 1:30 p.m. Plaintiff told EB to wake her up at 3:45 p.m., so that she could pick up GB from school. But, EB was unable to wake plaintiff up at 3:45 p.m. EB became upset and called defendant. Defendant went to plaintiff's home and found plaintiff on a couch in her living room. Plaintiff was breathing and appeared to be asleep. Defendant called 911. When the paramedics arrived, plaintiff was responsive to some verbal commands and to painful stimuli. As the paramedics placed plaintiff in the ambulance, plaintiff's eyes were open but occasionally rolled to the back of her head.

Plaintiff's intake assessment at the hospital indicated that at the time she was admitted, she had a serum alcohol level of .084, which equated to a whole blood alcohol level between .064 and .077 percent.

On December 2, 2013, defendant filed a motion to change physical custody. Defendant alleged that plaintiff struggled with alcohol use, inhibiting her ability to parent the minor children, and that she chose to drink alcohol while taking Phenobarbital, resulting in the events that occurred on November 13, 2013. Defendant requested that the trial court award him sole physical custody of the minor children. On January 17, 2014, defendant amended the motion to add an allegation that plaintiff was unwilling to facilitate a relationship between him and the minor children. The same day, defendant filed a motion seeking sole legal custody of the minor children. Defendant raised a series of allegations that plaintiff was not focused on the minor children's needs and that she was incapable of cooperatively parenting with him. The motions to change physical and legal custody were joined and litigated together.

On August 28, 2014, after hearing extensive testimony, the trial court referee entered his recommendation that defendant receive sole physical and legal custody of the minor children and that plaintiff be awarded some parenting time. On September 19, 2014, plaintiff objected to the referee's recommendations. On February 20, 2015, the trial court affirmed the referee's recommendations regarding custody and parenting time. Plaintiff now appeals.

With respect to the appropriate standard of review, the Legislature expressly spoke to the issue by enacting MCL 722.28, which provides:

> 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. [See also *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005).]

"A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008) (citation omitted). Findings regarding the existence of a change of circumstances or proper cause and a child's best interests are reviewed under the great weight of the evidence standard. *Dailey v Kloenhamer*, 291 Mich App 660, 665 n 1; 811 NW2d 501 (2011); *Corporan v Henton*, 282 Mich App 599, 605-609; 766 NW2d 903 (2009). "Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderate[s] in the opposite direction." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (quotation marks and citations omitted; alteration in original).

As an initial matter, plaintiff argues that the trial court erred in affirming the referee's finding that her testimony was not credible. On de novo review, the trial court did not listen to or observe the testimony of witnesses, but merely reviewed the record and transcripts of the testimony that was heard by the referee. The credibility determinations made by the referee are

entitled to deference given his superior position to observe the witnesses. See *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). On our review of the record, we are not prepared to reverse the trial court's decision to the extent that the court gave deference to the referee's credibility findings, and specifically the referee's conclusion that he found "plaintiff not credible" after "observing the witnesses and reviewing testimony."

A child custody award may only be modified after there has been "proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c). Under MCL 722.27(1)(c), "the party seeking a change of custody must first establish proper cause or change of circumstances by a preponderance of evidence." *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009). This determination must be made before "the trial court can consider whether an established custodial environment[1] exists (thus establishing the burden of proof) and conduct a review of the best interest factors." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003).

As part of the referee's recommendations, he found proper cause or a change of circumstances by a preponderance of the evidence on the basis of plaintiff's "serious alcohol problem" and her engagement in parental alienation. Regarding the referee's finding that plaintiff had a serious alcohol problem, there was evidence that plaintiff had a history of alcohol use. Defendant testified that during their marriage, plaintiff's drinking became an increasingly problematic parenting issue. Defendant claimed that he smelled alcohol on two occasions when he returned home after work. Defendant also testified that there was an occasion when he found an empty vodka bottle in a bathroom used by the minor children and plaintiff. Plaintiff acknowledged that there was a time when she moved a Vodka bottle under a sink and that she drank from the bottle. A person who attended the minor children's hockey games testified that on a Saturday morning two or three years before the hearing, he talked with plaintiff, and he smelled hard liquor on her breath. Plaintiff admitted that she sometimes had a few glasses of wine at a time. Plaintiff's son from a previous marriage told hospital staff that plaintiff "drinks wine" and plaintiff's father indicated to staff that plaintiff drank "Vodka sometimes." Plaintiff herself testified that she told hospital personnel that she drank alcohol two or three times a week and that she would drink one to three glasses of wine each time. All this occurred despite Dr. Thoits' testimony that he talked with plaintiff about the fact that alcohol consumption while using anti-epileptic drugs results in a deeper sedation than just using the anti-epileptic drugs alone.

Additionally, when plaintiff was attended to by paramedics on November 13, 2013, she was only responsive to some verbal commands and to painful stimuli. At the hospital, plaintiff's intake assessment indicated that she had a serum alcohol level of .084. Dr. Charles Simpson, admitted by the referee as an expert in alcohol and drug abuse, explained that based on plaintiff's serum alcohol level of .084, she would have had a whole blood alcohol level between .064 and

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[1] In this case, the referee found, and the trial court necessarily adopted the finding, that an established custodial environment existed with both parents. Plaintiff does not challenge that conclusion on appeal.

.077 percent. Dr. Simpson further testified that on the basis of a variety of factors and the impact of metabolism, plaintiff would have had a "whole blood alcohol of between .149 to .195" earlier in the day when she was still at home and not yet asleep. This level is well above the legal blood alcohol limit for operating a vehicle under MCL 257.625(1)(b). Thus, the referee's finding that "plaintiff was significantly drunk" the afternoon of November 13, 2013, was supported by the record. In sum, the trial court's affirmation of the referee's finding that plaintiff had a serious alcohol problem was not against the great weight of the evidence. *Pierron*, 486 Mich at 85.

In regard to whether plaintiff's alcohol problem constituted proper cause or a change of circumstances, we look to the 12 statutory best-interest factors in MCL 722.23 for guidance in determining whether the situation had or could have a significant effect on the children. *Vodvarka*, 259 Mich App at 511-512, 514. MCL 722.23(c) provides that "[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" is a factor to be considered in determining a child's best interests. Here, there was evidence that plaintiff's alcohol problem was relevant to plaintiff's ability to provide care for the minor children. Further, the evidence strongly indicated that plaintiff's alcohol use resulted in EB being deprived of adult supervision. And, if plaintiff became unresponsive in a different set of circumstances, the minor children could have been placed in danger. Thus, there was evidence that plaintiff's alcohol problem had or could have a significant effect on the minor children. The trial court did not err in affirming the referee's finding that proper cause or a change of circumstances existed based on plaintiff's alcohol problem.

Plaintiff complains that, with the exception of the events on November 13, 2013, the testimony by defendant and some others regarding plaintiff's alcohol use concerned alcohol consumption predating the previous custody order and therefore should not have been considered for purposes of proper cause or a change of circumstances. Plaintiff further argues that any comments in the emergency room by family members about her drinking habits did not reflect that she *abused* alcohol, as compared to simply *consuming* alcohol at times. First, as noted above, plaintiff herself testified to informing hospital personnel that she would drink one to three glasses of wine two or three times a week despite her use of Phenobarbital; there is no indication that she was speaking of her drinking patterns only in relation to the period preceding the judgment of divorce. Moreover, we conclude that the events of November 13, 2013, in and of themselves, were significant enough to satisfy the "proper cause" threshold. Plaintiff adamantly contends that the evidence established that "she has not consumed alcohol since at least December of 2013." While we applaud such an accomplishment, and perhaps it will provide a basis for a future custody modification, it does not mean that previously existing circumstances or prior events, such as those which occurred on November 13, 2013, are rendered moot or irrelevant; they remained important for purposes of determining custody.

Regarding the referee's finding that plaintiff engaged in parental alienation, plaintiff acknowledged that on December 3, 2012, she sent defendant an email requesting that defendant have no contact with her and GB in GB's hockey locker room. When the minor children played hockey on a weekend when it was plaintiff's parenting time, defendant was not allowed in GB's locker room to help him get dressed. Defendant testified that he attended the minor children's hockey games even when they occurred during plaintiff's parenting time. Defendant stated that, initially, the minor children did not even say "hi" to him after games held during plaintiff's

parenting time. Subsequently, the minor children began to very briefly say "hi" to defendant before leaving.

Additionally, plaintiff acknowledged that the minor children had to walk up her driveway when defendant dropped them off for plaintiff's parenting time. And, EB said that plaintiff and EB's aunt told her that defendant beat plaintiff and cheated on plaintiff during their marriage. EB did not tell defendant about one of plaintiff's seizures because she was "afraid her mom will get in trouble" and plaintiff always stated that "dad gets her in trouble." EB claimed that plaintiff told her that defendant was "the last person that she should ever have called" during the November 13, 2013 incident. EB expressed "tremendous guilt" because of calling defendant with respect to that incident. Further, defendant testified that after he arrived to help EB and plaintiff on November 13, 2013, EB screamed at herself that plaintiff was going to be mad at her for calling defendant. The trial court's affirmation of the referee's finding that plaintiff engaged in parental alienation was not against the great weight of the evidence. *Pierron*, 486 Mich at 85.[2]

MCL 722.23(j) provides that "[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" is a factor to be considered in determining a child's best interests. Here, the record summarized above indicated that plaintiff's parental alienation affected the relationship between defendant and the minor children by preventing some contact between them. Therefore, parental alienation was relevant to the minor children's best interests under MCL 722.23(j). *Vodvarka*, 259 Mich App at 513-514. Further, there was evidence that plaintiff's parental alienation was having a significant effect on the minor children. *Id.* The trial court's affirmation of the referee's finding that proper cause or a change of circumstances existed based on plaintiff's acts causing parental alienation was not against the great weight of the evidence. *Pierron*, 486 Mich at 85.

Regarding the minor children's best interests, the Child Custody Act, MCL 722.21 *et seq.*, "governs child custody disputes between parents, agencies or third parties." *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). "[C]ustody disputes are to be resolved in the child's best interests" and "[g]enerally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

On appeal, plaintiff does not directly address the referee's individual findings regarding the best-interest factors relative to physical custody, legal custody, and parenting time. Instead, plaintiff largely challenges the referee's findings regarding alcohol use, parental alienation, and credibility because those findings affected many of the referee's specific conclusions concerning the best-interest factors. As discussed above, the trial court's affirmance of the referee's findings regarding plaintiff's alcohol use and parental alienation were not against the great weight of the evidence. And, we defer to trial court's decision to accept the referee's credibility determinations. Nevertheless, we have reviewed the referee's specific findings regarding the

[2] We would note that, as recognized by the referee, defendant's conduct has not always been stellar and helpful to minimizing contention between the parties.

minor children's best interests and conclude that the trial court's affirmation of those findings was not against the great weight of the evidence. *Pierron*, 486 Mich at 85. There was no abuse of discretion in modifying the previous custody award.

Finally, plaintiff argues that the trial court erred when it refused to hear additional live testimony before ruling on the referee's recommendation. However, plaintiff provides no explanation whatsoever regarding how the trial court's denial under MCR 3.215(F)(2)(d) of her request for a new opportunity to present live testimony was erroneous. Thus, plaintiff abandons this issue on appeal. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Affirmed. Having fully prevailed on appeal, defendant is awarded taxable costs pursuant to MCR 7.219.

/s/ Mark T. Boonstra
/s/ William B. Murphy
/s/ Jane E. Markey