STATE OF MICHIGAN

COURT OF APPEALS

LORI MATHESON, also known as LORI ANN SCHMITT, Plaintiff-Appellant, v MICHAEL SCHMITT, Defendant-Appellee.	UNPUBLISHED November 21, 2019 No. 347022 Oakland Circuit Court LC No. 2015-831539-DM

Before: CAMERON, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

In this child custody dispute, plaintiff appeals as of right the trial court's opinion and order, following an evidentiary hearing, in which the trial court (1) ordered the mandatory vaccination of the parties' minor child, (2) ordered the parties to select a new, mutually agreeable pediatrician for the child, and (3) modified defendant's parenting time. We affirm, but remand for the limited purpose of allowing the trial court to confirm what vaccinations are now recommended for the minor child by her pediatrician before the child begins the course of vaccinations.

I. BACKGROUND

This appeal arises from disputes between plaintiff and defendant concerning the scope of defendant's parenting time, the pediatrician for the child, and whether to vaccinate the child. The parties married on June 1, 2013, but separated while plaintiff was pregnant with the child, who was born in 2015. Following arbitration, a judgment of divorce was entered on April 14, 2016. The judgment provided that the parties were to share joint legal custody of the child, but that plaintiff would have primary physical custody of the child. The judgment also provided that defendant would not have overnight parenting time with the child until she reached the age of 13 months, and that defendant's parenting time with the child would gradually increase as she became older.

In February 2017, defendant filed a motion seeking makeup parenting time and requesting that the trial court order that the child be vaccinated, given that plaintiff was refusing

to allow the child to be vaccinated. An extensive evidentiary hearing was held, initially before a referee and then before the trial court. As relevant to this appeal, in December 2018, the trial court ruled (1) it was in the child's best interests to be vaccinated, (2) the parties were to choose a new pediatrician for the child who was agreeable to each of them, and (3) defendant's parenting time with the child should be expanded. This appeal followed.

II. STANDARDS OF REVIEW

As recognized in *Lieberman v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017), this Court is required to affirm custody orders on appeal unless the trial court's factual findings do not accord with the great weight of the evidence, the trial court committed clear error in ruling on a significant issue, or the trial court's ruling was an abuse of discretion. As explained in *Lieberman*:

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Id*. at 77 (citation omitted).]

In child custody proceedings, the trial court abuses its discretion when its decision "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 and quotation marks omitted). " 'A trial court commits clear legal error when it incorrectly chooses, interprets or applies the law.' " *Lieberman*, 319 Mich App at 77, quoting *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

III. MODIFICATION OF PARENTING TIME

Plaintiff first argues that the trial court erred by finding that proper cause or a change of circumstances supported modification of defendant's parenting time, and by applying a preponderance-of-the-evidence standard to find that a modification of parenting time was in the child's best interests. We disagree.

A. RELEVANT LEGAL STANDARDS

In *Luna v Regnier*, 326 Mich App 173, 179-180; 930 NW2d 410 (2018), this Court noted that when deciding a dispute concerning a child's parenting-time schedule, the child's best interests should guide the court's inquiry and ultimate decision. A strong presumption exists that the child's best interests are served by fostering a strong relationship with both parents. *Id.* at 180, citing MCL 722.27a(1). Because this issue originated with defendant's request to modify parenting time, the trial court was first required to determine whether there was proper cause or a change of circumstances to warrant consideration of defendant's request to modify parenting time. MCL 722.27(1)(c).

In addition, when a court considers a parent's request to modify parenting time, the court must determine whether the child has an established custodial environment with one or both parents. *Marik v Marik*, 325 Mich App 353, 360, 367; 925 NW2d 885 (2018). This is because MCL 722.27(1)(c) precludes the trial court from modifying an existing judgment or order impacting parenting time "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." This statutory language is consistent with the legal framework outlined in *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003), in which this Court recognized that, consistent with MCL 722.27(1)(c), a trial court may not modify a custody order without first concluding that a change of circumstances or proper cause exists, and that the child's established custodial environment could not be altered without a showing, by clear and convincing evidence, that it serves the child's best interests. However, in *Shade v Wright*, 291 Mich App 17, 25-26; 805 NW2d 1 (2010), this Court concluded that the definitions of "proper cause" and "change in circumstances" as clarified in *Vodvarka* are not controlling in the context of a case involving the modification of parenting time unless the modification in parenting time will alter the child's established custodial environment. Put simply, "[i]f a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Id*. at 27. As explained in *Marik*, 325 Mich App at 361:

> "The established custodial environment is the environment in which over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." [*Pierron v Pierron* (*Pierron II*), 486 Mich 81, 85-86; 782 NW2d 480 (2010) (quotation marks and citation omitted in original)]. "An established custodial environment may exist in more than one home and can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." [*Pierron v Pierron*, 282 Mich App 222, 244; 765 NW2d 345 (2009) (*Pierron I*), aff'd 486 Mich 81 (2010) (quotation marks and citations omitted in original)]. An important decision affecting a child's welfare does not necessarily mean the established custodial environment has been modified. *Pierron II*, 486 Mich at 86. There is only a change to the established custodial environment if parenting-time adjustments change "whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort . . . ." *Id.*

Conversely, when a child's established custodial environment is not disrupted, a more flexible and expansive definition of "proper cause" or a "change in circumstances" will be employed. *Shade*, 291 Mich App at 27-28. In *Shade*, the child at issue was "growing up[,]" entering high school, and had encountered a changing academic and extracurricular schedule. The Court held that such changes would not meet the *Vodvarka* standard of a change in circumstances, but they did constitute proper cause or a change of circumstances to warrant a modification in parenting time, as long as the child's established custodial environment was not disrupted. *Id*. at 29-30. More recently, in *Marik*, this Court quoted with approval the following portion of this Court's decision in *Kaeb v Kaeb*, 309 Mich App 556, 570-571; 873 NW2d 319 (2015), discussing the impact that normal changes in a child's life may have on parenting time:

> A condition that was in the child's best interests when the child was in elementary school might not be in the child's best interests after he or she reaches high

> school. Even ordinary changes in the parties' behavior, status, or living conditions might justify a trial court in finding that a previously imposed condition is no longer in the child's best interests. We conclude that "proper cause" should be construed according to its ordinary understanding when applied to a request to change a condition on parenting time; that is, a party establishes proper cause to revisit the condition if he or she demonstrates that there is an appropriate ground for taking legal action. [*Marik*, 325 Mich App at 368 (citations omitted in original).]

Once the party seeking modification demonstrates proper cause or a change in circumstances under the governing legal framework, the trial court must then decide if the proposed modification serves the child's best interests. *Lieberman*, 319 Mich App at 83. The trial court undertakes this inquiry by considering "the appropriate best-interest factors." *Id*. First, a court must discern the correct burden of proof. For example, if the child's established custodial environment is not altered, " 'the movant must prove by a preponderance of the evidence that the change is in the best interests of the child.' " *Id*. at 84, quoting *Shade*, 291 Mich App at 23. On the other hand, if the child's established custodial environment will be altered, to the extent a modification in parenting time would be tantamount to a change in custody, *Vodvarka* will apply, and it must be demonstrated, by clear and convincing evidence, that the change in parenting time is in the child's best interests. *Id*. at 83-84. After the correct burden of proof is identified, the court must then weigh the best-interest factors.

> Both the statutory best interest factors in the Child Custody Act [(CCA), MCL 722.21 *et seq*.,], MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a([7]), are relevant to parenting time decisions. *Custody decisions require findings under all of the best interest factors, but parenting time decisions may be made with findings on only the contested issues*. [*Lieberman*, 319 Mich App at 84, quoting *Shade*, 291 Mich App at 31-32 (emphasis and alteration in original).]

B. APPLICATION

1. WAIVER OF OBJECTIONS TO THE MODIFICATION OF PARENTING TIME

Preliminarily, defendant argues that plaintiff effectively waived any objections to the modification in parenting time during her testimony at the evidentiary hearing, and that to allow her to now challenge the trial court's modification of parenting time would violate "the longstanding rule against a party harboring error as an appellate parachute." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 96; 693 NW2d 170 (2005) (citation and quotation marks omitted). Having reviewed the challenged portion of plaintiff's testimony, as well as other pertinent portions of the record, we disagree with defendant's contention.

To the extent that plaintiff's testimony could be viewed as a concession to a modification in parenting time, plaintiff's comments were limited to the referee's recommendation concerning parenting time, which increased defendant's overnight visits with the child from two to four every two weeks. In contrast, the trial court's order increased defendant's parenting time from two nights to five nights every two weeks. Also, plaintiff claimed that the child had an

established custodial environment only with plaintiff, a position she maintains on appeal. Additionally, the thrust of plaintiff's arguments on appeal focus on (1) the trial court's determination that an established custodial environment existed with both parties, (2) whether normal life changes amounted to proper cause or a change of circumstances to support modification of parenting time, and (3) the trial court's decision to apply the *Shad*e legal framework in determining whether a modification of parenting time was warranted. Put simply, to the extent the trial court increased the modification of parenting time beyond what the referee had recommended, plaintiff did not concede these issues in the trial court. Therefore, we reject defendant's argument that plaintiff effectively waived any challenge to the modification of parenting time as ordered by the trial court.

2. ESTABLISHED CUSTODIAL ENVIRONMENT

In the factual context of deciding whether mandatory vaccinations were in the child's best interests, the trial court initially concluded that the child had an established custodial environment with both plaintiff and defendant, and factored this finding into its analysis of parenting time. Specifically, the trial court reasoned that a modification of parenting time would not disrupt the child's established custodial environment.

On appeal, plaintiff first challenges the trial court's use of the legal framework articulated in *Shade*, arguing that because defendant's proposed change in parenting time disrupted the child's established custodial environment with plaintiff, the court should have relied on the *Vodvarka* framework. Plaintiff also asserts that because the child resided with plaintiff most of the time, the child's "established custodial environment existed with [plaintiff] alone." Plaintiff's arguments are not persuasive.

The trial court found that the child had an established custodial environment with both plaintiff and defendant. This finding is supported by the record. Defendant testified that he makes sure to spend all of his allotted parenting time with the child, the child is always happy to see him, and he brings her snacks, a change of clothes, and a pair of shoes. When he and the child are together, they will go to church, visit friends, and he recently took her canoeing. Defendant also testified that he attends all of the child's medical appointments. Defendant stated that the child loves spending time with him, that she is a great eater when she is with him, and she enjoys trying new foods such as peanut butter and honey sandwiches, yogurt, apple sauce, and any meat. Defendant explained that he had been teaching the child her letters, colors, and numbers. Defendant explained that his reason for seeking increased parenting time was so that the child would not have to wait until every other week to see him. According to defendant, he has a flexible work schedule and is able to set his schedule around taking care of the child.

Plaintiff testified that as of June 2017, she was still breastfeeding the child, and did not provide breast milk to defendant because she had done so once before and he had dumped it out. Plaintiff also testified that she uses the technique of redirecting to discipline the child. Plaintiff claimed that she also has a flexible work schedule that she can plan around the child's schedule. To the extent that defendant's motion for additional parenting time sought a 50/50 split of parenting time, plaintiff expressed reservations about such an arrangement, given that the parties could not communicate effectively for the child.

Because there was evidence that the child looked to both parents for "guidance, discipline, the necessities of life, and parental comfort," MCL 722.27(1)(c), the trial court's finding that the child had an established custodial environment with both parents is not against the great weight of the evidence. Consequently, the trial court properly relied on the preponderance-of-the-evidence standard to determine the child's best interests with regard to the proposed modification in parenting time, given that the proposed change—while it would increase the amount of time that the child spent with defendant—would not disrupt her established custodial environment with both parents. That is, she would still look to *both* plaintiff and defendant for guidance, discipline, and to meet her needs. See *Lieberman*, 319 Mich App at 81; *Shade*, 291 Mich App at 27; see also *Marik*, 325 Mich App at 361 (recognizing that an established custodial environment is disrupted only if the modification in parenting time alters "to whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort.") (Quotation marks and citation omitted.). Accordingly, the trial court did not use an inappropriate burden of proof in determining whether to modify parenting time.

3. NORMAL LIFE CHANGES

Plaintiff also argues that the trial court erred by solely relying on "normal life changes" as the foundation for its decision to modify defendant's parenting time. In *Shade*, however, this Court made it clear that under particular circumstances, the fact that a minor child is growing up and has changes in his or her needs and academic and extracurricular schedules may "constitute proper cause or [a] change of circumstances sufficient to modify parenting time[,]" even though such changes may not warrant a change in custody under *Vodvarka*, as long as the child's established custodial environment is not disrupted. *Shade*, 291 Mich at 29. The trial court in this case did not err by finding that the life changes in the child's life warranted a modification of parenting time, given that at the time the parties' divorce judgment was entered, the child was only nine months old and was dependent on plaintiff's breastfeeding for nutrition. This Court has interpreted a change of circumstances in the context of parenting time modifications somewhat broadly. Recently, in *Marik*, this Court held that a defendant's remarriage and the new relationships the minor children were forging with members of their new stepfamily were enough "to meet the initial threshold of a change of circumstances to consider a [parenting time modification] request." *Marik*, 325 Mich App at 369; see also *Kaeb*, 309 Mich App at 570-571 (recognizing that under circumstances in which the defendant sought to remove a condition on parenting time, such action would generally not disrupt the established custodial environment "or alter the frequency or duration of parenting time[,]" and therefore a "lesser, more flexible, understanding of 'proper cause' or 'change in circumstances' should apply[.]").

We acknowledge that the parties' divorce judgment provides for a graduated increase in defendant's parenting time as the child aged.[1] However, the child was an infant when the

[1] Plaintiff cites *Rettig v Rettig*, 322 Mich App 750, 757; 912 NW2d 877 (2018), in support of her implied argument that because the parties agreed to a graduated increase in parenting time for defendant in the judgment of divorce, defendant could not seek a modification of parenting time. In *Rettig*, the defendant argued that the trial court erred by not making a factual finding concerning the minor child's established custodial environment, and this Court rejected that

judgment was entered, she likely was not as socially interactive with defendant at that point, and now she is a more independent preschooler, able to eat solid foods, and is not dependent solely on plaintiff to meet her nutrition needs. Defendant was not precluded from seeking an adjustment in his parenting time as the child's nutritional needs and dependency on her mother changed. Under these circumstances, plaintiff has not established that the trial court's reliance on the *Shade* legal framework, rather than that of *Vodvarka*, amounted to clear legal error. *Lieberman*, 319 Mich App at 77. Plaintiff confines her argument to challenging the trial court's determination that defendant met the threshold under *Shade* to consider a modification of parenting time. Plaintiff does not otherwise challenge the trial court's weighing of the best-interest factors or the court's ultimate determination that a modification in parenting time was in the child's best interests. Accordingly, we affirm the trial court's modification of defendant's parenting time.

IV. VACCINATIONS

Plaintiff next argues that the trial court erred by concluding that vaccinating the child was in her best interests. We disagree.

A. RELEVANT LEGAL STANDARDS

Before addressing plaintiff's arguments, it is first necessary to address the legal framework that the trial court was required to follow when ruling on the issue of the child's vaccinations. Although plaintiff alleges at the outset that the issue whether to vaccinate the child should have been left to her discretion alone, the parties' judgment of divorce expressly provides that the parties share joint legal custody of the child. In *Shulick v Richard*s, 273 Mich App 320, 327; 729 NW2d 533 (2006), this Court, quoting MCL 722.26a(7)(b), the statute addressing joint custody, recognized that "[m]edical and educational decisions are clearly 'important decisions affecting the welfare of . . . children." Accordingly, because the parties share joint legal custody of the child, the question whether to vaccinate the child implicates a significant medical decision. However, the parties could not agree on this issue so it was appropriate to seek judicial intervention. See *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993).

In *Marik*, this Court recognized that where parties share joint legal custody and they cannot agree on a significant decision impacting the child, the responsibility will shift to the trial court to resolve the issue in accordance with the child's best interests. *Marik*, 325 Mich App at 360. The court must first decide, as a threshold matter, if an established custodial environment exists. If the proposed change will alter to whom the child looks to meet the child's needs for guidance, discipline, parental comfort and life's necessities, the proponent of the change is required to demonstrate, by clear and convincing evidence, that the proposed change is in the child's best interests. *Id*. at 361. As discussed earlier, the trial court did not err by holding that the child had an established custodial environment with both plaintiff and defendant. Thus, the trial court correctly followed this legal framework, and it also found that the question whether to

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argument as "nonsensical" because the parties had entered into an agreement regarding the minor child's custody that was the foundation for the parties' judgment of divorce. *Id*. at 752, 757-758.

vaccinate the child did not have any bearing on who she would look to for guidance, parental comfort, discipline and for the provision of the necessities of life. Accordingly, the trial court appropriately adhered to a preponderance-of-the-evidence standard in determining whether the proposed vaccinations were in the child's best interests. Further, the court properly determined that an evaluation of the child's best interests required it to weigh the factors set forth in MCL 722.23. See *Marik*, 325 Mich App at 362.

In determining the child's best interests, the trial court found that the factors set forth in MCL 722.23(b), (c), and (*l*) were particularly relevant. The court also considered the remaining factors in MCL 722.23, but found that they were not relevant to its decision concerning whether vaccinations were in the child's best interests. The court concluded it was in the child's best interests to be vaccinated, finding that vaccination would protect her from a host of potential serious diseases, and the evidence did not establish that any vaccinations would be harmful to the child, or that vaccination was otherwise against the child's best interests. The court noted the lack of evidence from an immunologist or other qualified physician to indicate that the child was, in fact, predisposed to injury or would likely incur an autoimmune disorder as a result of being vaccinated.

B. APPLICATION

1. WHETHER THE CHILD'S PHYSICAL HEALTH CONTRAINDICATES VACCINATION

Initially, we address plaintiff's argument that vaccination of the child was not in her best interests because vaccinations were medically contraindicated.

In support of her argument, plaintiff relies on testimony from the child's pediatrician, Dr. Todd Marcus, who stated that a child's potential predisposition to an adverse reaction from a vaccine can be gleaned from reviewing the child's family medical history. Plaintiff asserts that the child's family's medical history includes ailments such as lupus, rheumatoid arthritis, psoriasis, and other autoimmune disorders, and therefore, the child would be predisposed to developing rheumatoid arthritis from her vaccinations. Dr. Marcus later clarified that he was only aware of the child's alleged predisposition to rheumatoid arthritis because of her family history and that genetic testing had been performed. Dr. Marcus subsequently testified that there is not a specific test that can identify a predisposition to rheumatoid arthritis, and that he had based his earlier opinion on the genetic testing already performed on the child and the child's family history. When the trial court asked Dr. Marcus, "Does a medical test exist" to predict a child's predisposition to injuries arising from vaccines, Dr. Marcus responded that such a test does not exist.

While plaintiff is now claiming that the trial court erroneously determined that vaccination of the child was in her best interests, the evidence presented did not indicate that the child would likely suffer any harm from being vaccinated, or that the benefits of protecting her from disease were outweighed by any potential adverse effects. We acknowledge that plaintiff presented evidence that vaccines can have adverse effects. For example, as relevant to plaintiff's child and her family's medical history, a vaccine-injury table submitted by plaintiff indicated that vaccines that carry the rubella virus, such as the measles, mumps, and rubella (MMR) vaccine, or the measles, mumps, rubella, and varicella (MMRV) vaccine, have a potential adverse effect of

causing chronic arthritis. Similarly, vaccines containing the measles virus have a potential adverse effect of causing idiopathic thrombocytopenic purpura (ITP), a medical condition that plaintiff has. Moreover, the Hepatitis B information sheet distributed by the Centers for Disease Control and Prevention (CDC) also acknowledges that vaccines carry a "remote chance" of causing serious injury or death. Similarly, the diphtheria, tetanus, and pertussis (DTaP) vaccine can potentially cause seizures on a long-term basis, as well as permanent brain damage. Also, the package insert for Recombivax HB, a vaccine to protect against Hepatitis B, contains a laundry list of potential adverse reactions, ranging from fatigue and headache to dysuria and hypotension. Likewise, the product insert form for Engerix B, another vaccine for Hepatitis B, also warns of potential adverse effects such as lymphadenopathy, upper respiratory tract illness, and anorexia. Additionally, the product insert for the MMR vaccine indicates that the vaccine may have an adverse reaction of causing thrombocytopenia, and a variety of other serious ailments, such as encephalitis and encephalopathy.

In sum, the fact that vaccines can potentially cause very serious adverse effects is not in dispute, and the child's family history of autoimmune disorders is also not a point of contention.[2] But the dispositive issues are not whether vaccines can potentially cause adverse effects, or whether the vaccine manufacturing industry and pharmaceutical companies are unduly influencing governmental regulatory agencies. Instead, what is at issue is whether the administration of vaccinations is in the child's best interests, taking into account her physical health. Even accepting as valid and accurate plaintiff's contention that the child bears some predisposition to incurring an autoimmune disorder because of her family history, this attenuated risk, in and of itself, simply does not outweigh the significant benefits that would inure to the child by protecting her from the threat of serious and life-endangering diseases in the population. Put another way, the threat of harm to the child by exposing her to vaccines that could potentially trigger an autoimmune disorder is speculative, and the record does not otherwise demonstrate that the child would be put at risk of harm by receiving vaccinations.

Significantly, both Dr. Teresa Holtrop, M.D., and Dr. Marcus testified that they recommend that children receive the vaccinations suggested by the CDC and the state of Michigan. Notably, Dr. Holtrop, even being familiar with the child's family history of autoimmune disorders, highly recommended that the child be vaccinated. Conversely, Dr. Toni Bark, M.D., plaintiff' expert witness, had not personally evaluated the child and, while familiar with her medical records and her family history, testified generally about *potential* adverse reactions to vaccines and notably did not provide any substantive evidence, aside from possibilities and speculation, that the child would be harmed by the administration of vaccines. In contrast, Dr. Holtrop's testimony established that it was medically necessary for the child to be vaccinated. Specifically, Dr. Holtrop noted that whooping cough is at "epidemic proportions" in Michigan and that it can lead to pneumonia, and even death, for a child. According to Dr. Holtrop, the American Academy of Pediatrics (AAP) recommends that all children be vaccinated, and Dr. Holtrop shared the dire and life-changing situations she has personally

[2] At the evidentiary hearing, plaintiff called several family members as witnesses to establish that the family has a history of autoimmune disorders.

observed when children did not receive vaccinations and suffered from vaccine-preventable diseases. Therefore, while plaintiff presented evidence of (1) her family's history of autoimmune disorders, (2) the serious *potential* risks of vaccines, and (3) the workings of the vaccine manufacturing industry as well as the existence of undue influence pharmaceutical companies may have on the AAP and the CDC, plaintiff did not present evidence of a clear, uncontroverted, and certain link between the administration of a vaccine and the real likelihood and potential of injury to the child. Plaintiff maintains that had Dr. Bark been permitted to testify concerning the medical records of the child and her family, "[Dr. Bark] would have expressly opined [that the child] should not be vaccinated based upon her genetic predisposition." Even if Dr. Bark had shared such an opinion of a potential adverse reaction to the child related to her family's history of autoimmune disorders, this opinion, in and of itself, would essentially have been be grounded in conjecture, not certainty, and therefore would be of limited value in evaluating whether the child was actually likely to suffer injury because of a vaccine to the extent that the potential risk of administering vaccines to her outweighed the established benefits.

In the words of the trial court, plaintiff did not present persuasive evidence establishing that "[the child] will be harmed by any particular vaccination and/or that any particular vaccination is otherwise contrary to [the child's] best interests." Significantly, the trial court afforded plaintiff ample opportunity to secure the services of a qualified immunologist or other qualified physician to (1) review the results of the medical testing that was conducted on the child, (2) to perform additional testing, and (3) confirm that the child *was in fact* predisposed to injury or death if she were vaccinated. Plaintiff did not take advantage of these opportunities. In sum, because the record does not contain evidence establishing that (1) the child would *in fact* likely suffer harm from being vaccinated, and (2) that any alleged risk of harm outweighed the clear benefits to the child of being protected from life-threatening diseases, defendant met his burden of establishing, by a preponderance of the evidence, that vaccination was in the child's best interests.

2. PLAINTIFF'S RELIGIOUS BELIEFS

Plaintiff also argues that the trial court erred by failing to consider her sincere religious objections to vaccinations. More specifically, plaintiff alleges that the trial court "was in no position to weigh the sincerity or judge the acceptability of [plaintiff's] religious beliefs, or reduce those beliefs as being [subordinate] to [defendant's]." We disagree.

In *In re Deng*, 314 Mich App 615, 627; 887 NW2d 445 (2016), this Court recognized that the Public Health Code (PHC), MCL 333.1101 *et seq*., contains a statutory scheme that governs the administration of vaccines in Michigan. While MCL 333.9205, MCL 333.9208(1), and MCL 333.9211(1) place certain requirements on parents to vaccinate their children within certain age periods or by the time a child is enrolled in school, MCL 333.9215(2) also allows a parent to seek an exemption from the vaccine requirements on the basis of "religious convictions or other objection[s] to immunization." Accordingly, under the provisions of the PHC, plaintiff would be able to seek an exemption from vaccines for the child on the basis of her religious beliefs. In this case, however, defendant shares joint legal custody of the child and does not share plaintiff's alleged religious objections to vaccinations. In this context, under the CCA, because the parties

are unable to agree on an important matter impacting the child's welfare, it was appropriate for the trial court to decide the matter in the child's best interests. See *Pierron II*, 486 Mich at 85.

Plaintiff appears to argue that by ordering the child to be vaccinated, the trial court has undermined plaintiff's religious freedom. This Court has recognized the importance of a party's religious freedom, as well as the interplay between that religious freedom and the right to raise one's child in the manner one sees fit. *In re Deng*, 314 Mich App at 622 (recognizing that religious freedom and the right to raise one's child are "fundamental rights" that are instrumental in the pursuit of happiness in a free society). However, while the statutory scheme of the PHC would allow plaintiff to exempt the child from the mandatory vaccination requirements for children on the basis of plaintiff's religious beliefs, the PHC is not controlling here. The trial court was not considering this dispute under the provisions of the PHC, but rather under the provisions of the CCA, which gave the court jurisdiction to address, consider, and decide matters related to the child's legal custody and best interests where the parties with joint legal custody over the child were unable to agree. See MCL 722.23 (setting forth the factors to be considered in evaluating a child's best interests); MCL 722.27(1)(c) and (e) (recognizing the trial court's authority to modify or amend its orders or judgments in a child custody case, or "to [t]ake any other action considered to be necessary in a particular child custody dispute"); *Pierron II*, 486 Mich at 85.[3]

We note, however, that contrary to plaintiff's assertion on appeal, the record indicates that the trial court gave plaintiff great latitude in raising and explaining her religious objections to vaccines. Further, the trial court did not ignore plaintiff's expressed religious beliefs in its evaluation of the child's best interests. In its written ruling, the trial court specifically observed that plaintiff had strong religious objections to the use of vaccines because "some vaccines are cultured in aborted fetal cells" and also contain animal blood, and that plaintiff objected specifically to the MMR, polio, Hepatitis A, and flu vaccines because of her religious beliefs. In addition to considering plaintiff's ample testimony on the subject, in its weighing of the best-interest factors, the trial court duly considered plaintiff's objections to vaccines when considering factor (b) "[t]he capacity and disposition of the parties . . . to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). However, the trial court ultimately did not find that plaintiff's testimony on the subject of her religious objections rendered this factor "more or less favorable to either party." Additionally, the record

[3] In a different factual context, in which the respondent mother in a child protective proceeding objected to the vaccinations of her children, this Court held that her "right to direct the care, custody and control of [her children]" yielded to the state's "legitimate interest in protecting the moral, emotional, mental and physical welfare" of the minor children. *In re Deng*, 314 Mich App at 623 (quotation marks and citation omitted). Because the trial court's authority to order the vaccinations of the minor children stemmed from its statutory authority under the Juvenile Code, MCL 712A.1 *et seq*., and the Juvenile Code did not include any provision that restricted the court's authority to enter a dispositional order concerning vaccines because a parent objected to the vaccinations, this Court affirmed the trial court's order requiring the vaccinations of the children over the respondent's religious objections. *Id*. at 619, 629.

does not support plaintiff's contention that the trial court "weigh[ed] the sincerity or judge[d] the acceptability of [plaintiff's] religious beliefs," or subordinated plaintiff's beliefs to defendant's. Instead, the record shows that the trial court gave serious consideration to such important matters as it weighed the child's best interests, but ultimately determined that plaintiff's religious objections to vaccines did not outweigh its determination that vaccinating the child was in her best interests.

In sum, the trial court did not err by determining that it was within the child's best interests to be vaccinated.

3. REMAND

Although we are affirming the trial court's order requiring that the child be vaccinated, we note that almost a year has passed since the trial court entered its written opinion and order in December 2018, requiring that the child be vaccinated as recommended by the state of Michigan. The child is now four years old. At the time the trial court entered its opinion and order, it noted that the child would require the following vaccinations to become current with what is recommended for her age:

> [The child] would need the following vaccines to become current: three doses of polio, one dose of MMR, two doses of varicella, two doses of Hep A, one dose of HiB, and one dose of prevnar.

To the extent that the trial court ordered the child to receive "the beginning phase of any and all State-recommended vaccinations," including "rotavirus, DTaP, Hib, HepB, polio, MMR, varicella, HepA, the flu, and PCV13[,]" we remand this case to the trial court to allow it to confirm what vaccinations the child now requires at her age. On remand, the trial court is directed to enter an order requiring defendant to produce a letter from the child's current pediatrician, within 21 days of entry of this Court's decision, addressing (1) any vaccinations the child has already received, (2) the dates any vaccinations were administered, and (3) the vaccinations that are recommended for the child as of the date of entry of this Court's opinion. Once the trial court receives such documentation from the child's pediatrician, within 7 days the court shall enter an order directing that the child be vaccinated in conformance with the pediatrician's recommendations, and the trial court's order should further provide that the course of vaccination must begin within 21 days of the trial court's order.

V. SELECTION OF A NEW PEDIATRICIAN

Plaintiff next argues that the trial court erred by ordering the parties to select a new, mutually agreeable pediatrician for the child. We disagree.

A. RELEVANT LEGAL STANDARDS

Plaintiff relies on the following language in the divorce judgment in support of her argument that she has sole authority to select a pediatrician for the child:

> *Plaintiff mother will be the primary parent responsible for* [the child's] *ordinary health care needs*. If [the child] is scheduled for any type of health care

> appointment, Defendant father is to be notified in writing of the appointment at least 48 hours in advanced [sic] of the appointment, and he shall be entitled to participate in the appointment with the health care provider. If an emergency occurs and immediate health care intervention is necessary, then the parent having parenting time shall notify the other parent as soon as the emergency exists. [Emphasis added.]

We disagree with plaintiff's reliance on this provision. The divorce judgment also awarded the parties joint legal custody of the child and further provided that if the parties could not agree on "major policy decisions relating to the *health*, education and welfare of [the child], they will, on notice to the other parent, seek the assistance of a qualified family counselor or mediator."

> The statute governing joint custody, MCL 722.26a, provides, in pertinent part:
>
> (7) As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
>
> * * *
>
> (b) *That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child*. [Emphasis added.]

In *Shulick*, 273 Mich App at 327, this Court, quoting MCL 722.26a(7)(b), recognized that "[m]edical and educational decisions are clearly 'important decisions affecting the welfare of' . . . children." The selection of a pediatrician for the child is a significant decision that affects her welfare as contemplated by MCL 722.26a(7). Therefore, because the parties shared joint legal custody of the child, the selection of a pediatrician was an important matter impacting the child's health and well-being, and the parties were unable to agree on the choice of a pediatrician, the trial court properly intervened to determine whether the selection of a new pediatrician was in the child's best interests. See *Shulick*, 273 Mich App at 329; see also *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 296; 750 NW2d 597 (2008).

B. APPLICATION

Because the parties could not agree on whether Dr. Marcus should continue to treat the child, the trial court weighed the statutory best-interest factors set forth in MCL 722.23. The court concluded that most of the factors were not relevant to this issue, but held that factor (c), addressing the parties' ability to provide the child with medical care, weighed in favor of both parties because the record confirmed that both plaintiff and defendant were regular attendees at the child's medical appointments, they were both capable of seeking medical care for the child, and they were "both invested in the quality of medical care that [the child] receives." Considering factor (h), "[t]he home, school, and community record of the child," the trial court found that this factor did not weigh in favor of either party, because neither one of them lived near Dr. Marcus's office. Weighing factor (*l*), "[a]ny other factors considered by the court to be relevant[,]" the trial court noted the acrimonious relationship between Dr. Marcus and defendant, which included defendant posting negative comments on Dr. Marcus's Facebook page and Dr. Marcus filing a complaint against defendant with Child Protective Services (CPS). Recognizing

the importance of both plaintiff and defendant sharing an "amicable and trustworthy relationship" with the child's pediatrician, the trial court expressed concern regarding the "undue friction" that existed between defendant and Dr. Marcus. The court ultimately concluded that the selection of a new pediatrician would serve the child's best interests. The trial court's decision resulted from a proper exercise of its discretion and is supported by the record.

According to Dr. Marcus, defendant attended the child's medical appointments, but did not inquire about anything, including the issue of immunizing the child. Dr. Marcus also related how defendant had posted negative comments on Dr. Marcus's Facebook in which defendant complained about Dr. Marcus's professionalism and promptness. In addition, Dr. Marcus admitted reporting defendant to CPS after plaintiff showed him a video in which defendant allowed the child to walk barefoot in a parking lot. Dr. Marcus acknowledged that he subsequently examined the child and did not see any physical harm to her from walking in the parking lot.

Defendant testified that plaintiff chose Dr. Marcus as the child's pediatrician without his input, although defendant conceded that he did not suggest any other pediatricians to plaintiff. Defendant described Dr. Marcus as "very unprofessional[,]" with a "violent personality," and complained that he always runs an hour to two hours late to his appointments. Moreover, defendant stated that Dr. Marcus's office is not between either his home or plaintiff's home. Defendant had also reviewed negative postings from other patients on Dr. Marcus's Facebook page.

Conversely, plaintiff testified that she selected Dr. Marcus as the child's pediatrician because he had been the pediatrician for plaintiff's two older children, who had been seeing Dr. Marcus since 2006. Plaintiff acknowledged that she selected Dr. Marcus as the child's pediatrician without defendant's involvement. According to plaintiff, Dr. Marcus's office is about 17 minutes away from plaintiff's home, but it is convenient for her because her sister lives nearby and she can drop her older children off with her sister when she attends the child's medical appointments without them.

Under the circumstances, the trial court's decision to order the parties to select a new, mutually agreeable pediatrician was an appropriate exercise of its discretion. The evidence showed that defendant regularly attended the child's medical appointments, but that defendant and Dr. Marcus, rather than having a productive professional relationship, had one fraught with conflict, anger, and acrimony. Additionally, the record supports the trial court's conclusion that plaintiff initially selected Dr. Marcus without defendant's input and involvement. The trial court's determination that the parties would not be able to work collaboratively with Dr. Marcus to "ensure that [the child's] health and well-being are given the highest priority" is legally sound and grounded in the evidence. Accordingly, we are unable to conclude that the trial court's decision "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[ ]" that it would amount to an abuse of discretion. *Butler*, 308 Mich App at 201 (citation and quotation marks omitted).

VI. EXPERT WITNESS TESTIMONY

In her last issue, plaintiff argues that the trial court erred by restricting the scope of Dr. Bark's expert testimony. We disagree.

A. STANDARD OF REVIEW

This Court reviews the trial court's decision regarding the admissibility of expert testimony under MRE 702 for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). When the trial court chooses a result falling "outside the range of reasonable and principled outcomes[,]" it abuses its discretion. *Sabbagh v Hamilton Psych Servs, PLC*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket Nos. 342150, 343204); slip op at 15-16.

B. RELEVANT LEGAL STANDARDS

MRE 702 provides, in pertinent part:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779, 780; 685 NW2d 391 (2004), our Supreme Court emphasized that the trial court's role as a gatekeeper under MRE 702 necessitates that the trial court confirm that each aspect of a proposed expert witness's testimony is indeed reliable. Noting that the most recent amendment of MRE 702 in January 2004 had incorporated the standards of reliability articulated in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and supplanted the "general acceptance" standard set forth in *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United State*s, 54 App DC 46; 293 F 1013 (1923), the *Gilbert* Court stated, in pertinent part:

> Thus, properly understood, the court's gatekeeper role is the same under *Davis-Frye* and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just "general acceptance" in determining whether expert testimony must be excluded. [*Gilbert*, 470 Mich at 782.]

The trial court's role as a gatekeeper requires it to undertake a "searching inquiry," not limited to the data underlying the expert testimony, "but also of the manner in which the expert interprets and extrapolates from those data." *Id*. The party seeking to admit evidence under MRE 702 must satisfy the preconditions established in the rule of evidence. *Id*. at 789.

The party proffering an expert witness must provide support to indicate that the expert's opinion "has some basis in fact, that it is the result of reliable principles or methods, or that [the proposed expert witness] applied [his or her] methods to the facts of the case in a reliable manner, as required by MRE 702." *Edry*, 486 Mich at 641. While "peer-reviewed, published literature" is not a predicate for meeting the requirements of MRE 702, the absence of supporting literature, particularly when "combined with the lack of any other form of support for [the proposed expert witness's] opinion," will render the proposed opinion both unreliable and inadmissible under MRE 702. *Id*. As the *Edry* Court recognized:

> Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible. [*Edry*, 486 Mich at 642.]

C. PROCEDURE IN THE TRIAL COURT

On the second day of the evidentiary hearing before the trial court, plaintiff called as a witness Dr. Bark, an Illinois physician with a Bachelor's Degree in psychology, a doctorate degree in medicine from Rush College in Chicago, and a Master's Degree in Medical Disaster Management from Boston University. Dr. Bark is board-certified as a general physician and surgeon, and has extensive experience in pediatric medicine, including running a pediatric emergency room and serving as an attending physician in a neonatal intensive care unit. Dr. Bark also has a background in integrative care, homeopathy, nutrition and rubology, and, while in private practice also worked part time in a hospital emergency room. Dr. Bark teaches at the University of Chicago on matters involving alternative care, she has served on the adjunct faculty at Boston University, and she possesses certifications relevant to "the interplay between the environment and exposure to environmental toxins and health[,]" including a Leadership in Environmental and Energy Design (LEED) certification. Dr. Bark was vice-president of the American Institute of Homeopathy, and is also a member of Physicians for Informed Consent.

With regard to publications, Dr. Bark testified that she contributed to a chapter in a book written by a law professor at New York University School of Law, Mary Holland, entitled *Policy Without Reason*, which addresses the flu shot requirement for healthcare workers. Dr. Bark has also coproduced a film, *Bought*, which addresses corruption in regulatory agencies, and she has been interviewed for a film on genetically modified organisms, as well as one addressing vaccine conflict-of-interest issues. Dr. Bark also collaborated with other medical professionals on a paper addressing the review data of Merck, a pharmaceutical company, for the drug Gardasil, its death rates, and its "systemic autoimmune rates." However, Dr. Bark conceded that the paper was not listed on her curriculum vitae (CV). Dr. Bark had lectured on unspecified topics at two different conferences on immunology in the spring of 2017, one in Spokane, Washington, and the other at an unspecified location in Ohio. Dr. Bark had also appeared before various state senate health committees regarding pending legislation seeking to reduce exemptions to vaccine requirements.

Dr. Bark testified that she has a specialty in adversomics, which is a term "coined by Gregory Poland, one of the most famous vaccinologists who works at [the] Mayo Clinic[.]" According to Dr. Bark, it is a field of medicine in which "people . . . study vaccine injury and write about vaccine injury[.]" Dr. Bark elaborated that she has vaccinated "thousands of

children[ ]" in her practice, and further clarified that adversomics "is the field of looking at adverse events to vaccines based on reactions, based on genetic predisposition and epigenetic predisposition[,]" which is something that she does every day in her practice and has been doing for years. Dr. Bark also testified that there are "a lot of conflicts of interest in what the CDC is putting out versus what the reality is, and the literature." When the trial court questioned Dr. Bark about her work in pediatrics, more specifically in the area of adversomics, inquiring what would qualify her to testify as an expert witness in adversomics, Dr. Bark testified that she sees many vaccine-injured adults and children in her practice, she has worked with lawyers in the federal vaccine court, and she has written one peer-reviewed article with other collaborators at the University of British Columbia, but she could not recall the journal in which it was published. The article was written in 2014, but it was not listed on Dr. Bark's CV. The trial court ruled that Dr. Bark's qualifications as an expert witness under MRE 702 would be limited to her personal experience with vaccines in her general pediatric practice.

D. APPLICATION

The trial court did not abuse its discretion by concluding that plaintiff had not met the requirements of MRE 702 to offer Dr. Bark's proposed testimony in the area of adversomics, which addresses the adverse effects of vaccines and vaccine injuries. Initially, Dr. Bark's testimony did not reflect that she was in fact "qualified . . . by knowledge, skill, experience, training or education" to testify regarding adversomics or the broader subject of vaccine injuries and the adverse impacts of vaccines. MRE 702. We acknowledge that Dr. Bark (1) had treated and vaccinated thousands of children in her practice, (2) was interviewed for a film regarding conflict-of-interest issues pertaining to vaccines, (3) collaborated with other medical professionals concerning the physical effects of the drug Gardasil, and (4) had lectured on unspecified topics at immunology conferences in the time period shortly before the evidentiary hearing. While Dr. Bark testified that she possesses a specialty in adversomics, the record does not indicate that plaintiff produced information that would allow the trial court to competently conclude that adversomics, and Dr. Bark's testimony regarding that area of medicine, "is the product of reliable principles and methods[.]" MRE 702. The trial court was also placed in the position of being asked to rule on Dr. Bark's qualifications without being able to discern whether her testimony was "based on sufficient . . . data[.]" MRE 702. Moreover, a review of Dr. Bark's CV, while revealing her extensive educational and professional background in pediatric medicine, and her interest and work with vaccine-related topics, does not likewise indicate that she has been educated in, or worked professionally in, the specific and specialized area of adversomics for which plaintiff sought to qualify her as an expert. Dr. Bark's CV likewise does not otherwise indicate that she possesses specialized knowledge and expertise with regard to the more general subjects of vaccine injuries and the adverse effects of vaccines. The only mention in her CV of vaccines are (1) a documentary series called "Vaccines Revealed" that Dr. Bark was interviewed for, (2) a documentary series called "The Truth of Vaccines" in which Dr. Bark participated as an interviewee, and, (3) a lecture that she gave in February 2012 concerning the ethics of vaccine policies.

Notably, on the basis of a close review of Dr. Bark's testimony during the evidentiary hearing before the trial court, as well as her CV, we are unable to discern exactly what comprises the specialty of adversomics, and what specialized knowledge Dr. Bark could offer the trier of fact in these proceedings. The trial court was obviously concerned about the reliability of Dr.

Bark's proposed testimony in the area of adversomics, vaccine injuries, and the adverse impact of vaccines in a case in which the potential adverse effects of vaccines on the child were hotly contested and formed the crux of the dispute between the parties. As the United States Supreme Court, interpreting FRE 702, the federal counterpart to MRE 702, recognized in *Daubert*, in determining whether scientific knowledge is such that it will assist the trier of fact in understanding or determining a fact in dispute, a trial court must undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can properly be applied to the facts in issue." *Daubert*, 509 US at 592-593. In making this determination, trial courts may consider whether the methodology has been tested, whether the theory at issue has been evaluated by peer review and publication, as well as whether a known or potential rate of error exists. *Id*. at 593-594. While the trial court here did not conduct a *Daubert* hearing, the decision whether to hold this hearing is within the trial court's discretion. *Lenawee Co v Wagley*, 301 Mich App 134, 162; 836 NW2d 193 (2013). The trial court likely did not do so because plaintiff did not even provide defendant with notice of her intention to offer Dr. Bark as an expert in the specialized area of adversomics, but also because the information presented to the court did not demonstrate that a *Daubert* hearing to consider the factors set forth in that case was even warranted. In other words, noting the dearth of supporting literature on the topic of adversomics that plaintiff presented and the lack of any indication in Dr. Bark's CV, or in her evidentiary hearing testimony, that Dr. Bark had worked extensively in this area, the trial court correctly surmised that plaintiff's attempt "to simply point to an expert's experience and background to argue that [Dr. Bark's] opinion is reliable" was not enough to meet the requirements of MRE 702. *Elher v Misra*, 499 Mich 11, 23; 878 NW2d 790 (2016). Accordingly, the trial court's decision to limit Dr. Bark's testimony to her experience vaccinating her own patients and to the area of general pediatrics fell within the range of principled outcomes, and therefore did not amount to an abuse of discretion. See *Edry*, 486 Mich at 639; *Sabbagh*, ___ Mich App at ___; slip op at 15-16.

VII. CONCLUSION

We conclude that the trial court did not err by (1) finding that it was within the minor child's best interests to be vaccinated, and ordering that she be vaccinated in accordance with state recommendations, (2) ordering the parties to select a new, mutually agreeable pediatrician for the child, and (3) modifying defendant's parenting time. Accordingly, we affirm the trial court's order, but remand for further proceedings consistent with our instructions in Section IV(B)(3) of this opinion.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro