STATE OF MICHIGAN

COURT OF APPEALS

LISA A. DOUGLAS, f/k/a LISA A. EATON, Plaintiff-Appellee,	UNPUBLISHED May 25, 2010
v	No. 294177 Midland Circuit Court
RUSSELL E. EATON, Defendant-Appellant.	LC No. 06-001485-DM

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right the order granting plaintiff's petition for modification of custody and awarding plaintiff sole legal and physical custody of the minor children and modifying defendant's parenting time. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were divorced in June 2007. They had two minor children, Cody (d/o/b 3/15/99) and Tyler (d/o/b 10/14/00). The divorce judgment awarded the parties joint legal and physical custody of the minor children, with the children's primary residence being with plaintiff. Defendant was awarded parenting time on alternating week-ends and for one evening each week on the weeks he did not have parenting time on the weekend. On August 14, 2008, defendant filed a petition for change of custody, seeking equal parenting time for the parties, with custody of the minor children alternating each week. Plaintiff filed a response to defendant's petition for change of custody and a counter-petition for a change in parenting time that sought, among other things, to increase plaintiff's parenting time and decrease defendant's parenting time. On April 8, 2009, plaintiff filed an amended petition for modification of custody, seeking sole legal and physical custody of the parties' minor children.

The trial court found that there was proper cause to revisit the custody order and found that there was an established custodial environment with plaintiff, but not with defendant. The trial court considered the statutory best interest factors in MCL 722.23 and found that it was in the children's best interests to award sole legal and physical custody to plaintiff. Defendant was

awarded parenting time on alternating week-ends during the school year, from 6:00 p.m. on Friday to 6:00 p.m. on Sunday. The trial court ordered summer parenting time "according to the Midland County Co-Parenting Plan . . . ." Defendant thereafter filed a motion for reconsideration, which the trial court denied.[1]

II. ANALYSIS

1. STANDARD OF REVIEW

This Court applies three standards of review in child custody cases. See *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). First, the trial court's findings of fact are reviewed under the "'great weight of evidence'" standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* at 877-878, quoting MCL 722.28. A trial court's findings regarding the existence of proper cause or a change in circumstances sufficient to reconsider a custody award and the existence of an established custodial environment, as well as the trial court's findings regarding the best interest factors under MCR 722.23, are reviewed under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003). Second, this Court reviews questions of law for clear legal error that occurs when a trial court incorrectly chooses, interprets, or applies the law. *Berger*, 277 Mich App at 706. Third, discretionary rulings, such as custody decisions, are reviewed for an abuse of discretion. *Fletcher*, 447 Mich at 879; *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006). An abuse of discretion in matters involving child custody exists where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Shulick*, 273 Mich App at 324-325. The overriding concern in custody determinations is the child's best interests. *Fletcher v Fletcher*, 229 Mich App 19, 29; 581 NW2d 11 (1998).

2. PROPER CAUSE/CHANGE OF CIRCUMSTANCES UNDER MCL 722.27(1)(c)

Defendant first argues that there was not proper cause to modify the custody order. A trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka*, 259 Mich App at 508-509. The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). Thus, a party seeking a change in child custody is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change in circumstances. *Vodvarka*, 259 Mich App at 508. If a party fails to do so, the trial court may not hold a child custody hearing. *Id.* In *Vodvarka*, this Court explained the terms "proper cause" and "change of circumstances":

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[1] In its order denying defendant's motion for reconsideration, the trial court clarified that while it eliminated defendant's mid-week parenting time during the school year, defendant's mid-week parenting time on alternating weeks would continue during the summer.

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors.
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> [I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Vodvarka*, 259 Mich App at 512-514 (emphasis in original).]

In this case, defendant himself sought a change in custody, and in his petition for change of custody, he argued that there had been a substantial change of circumstances since the entry of the judgment of divorce. In his petition, defendant articulated numerous specific instances that constituted a change of circumstances, including plaintiff's strict enforcement of the parenting time schedule in the judgment of divorce, plaintiff's violations of the inherent rights of the minor children, plaintiff's refusal to let defendant see the minor children on a particular weekend for a matter of hours per defendant's special request, plaintiff's failure to pick up the children after defendant exercised parenting time with them, problems between the parties regarding one of the minor children's participation on a baseball team that was coached by defendant, and a conflict between the parties that resulted in a scene at the minor children's baseball practice.

The trial court specifically rejected defendant's contention that plaintiff's strict enforcement of the parenting time schedule in the judgment of divorce constituted a change in circumstances. In reviewing the specific instances cited by defendant, the trial court stated that the parties' problems with co-parenting were more properly characterized as proper cause to revisit the custody order, rather than a change of circumstances sufficient to revisit custody:

> The specific instances raised by the Defendant in his petition were also thoroughly discussed at the hearing through testimony by both parties and their witnesses. The situations are clear illustrations of the parties' current inability to co-parent their children in a manner geared toward the best interests of the children. The Court does not feel, however, that the contention between the parties is appropriately categorized as a change of circumstances. Instead, the co-parenting problems should be classified as proper cause by which to revisit the current order. The issues surrounding the parties' inability to co-parent, and the

> instances in which those issues have manifested themselves, are clearly relevant to the parties' willingness and ability to encourage and facilitate a close relationship between the child and the other parent. The facilitation and encouragement of such relationship is one of the twelve best interest factors, and based on the testimony presented, the problems between the parties are having a significant effect on the well-being of the children involved in this case. Therefore, the Court finds proper cause exists to revisit the current custody order. [Footnote omitted.]

It is arguable that defendant has waived his argument that there was not proper cause or change of circumstances sufficient to revisit the custody order by asserting in his petition for change of custody that there was proper cause to revisit the custody issue. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). Even if defendant has not waived his argument regarding the lack of proper cause or change of circumstances, his argument is without merit. Defendant argues that there was not proper cause to revisit the custody issue because the only testimony that the parties' inability to co-parent the children was affecting the children came from plaintiff and plaintiff's witnesses. Defendant's argument in this regard essentially asks this Court to interfere with the factfinder's duty to determine the credibility of witnesses and the weight of the evidence, something which this Court cannot do. MCR 2.613(C); *Berger*, 277 Mich App at 715. As the trial court observed, one of the statutory best interest factors is "[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 trial court's finding that the parties were unable to co-parent and that this affected the parties' ability to facilitate a close relationship between the children and the other parent was based on its determinations regarding the credibility of the witnesses and its weighing of the evidence. The trial court's findings were not against the great weight of the evidence, and the trial court properly found that proper cause existed to revisit the custody order.

2. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant next argues that the trial court erred in ruling that an established custodial environment existed with respect to plaintiff and in ruling that there was no established custodial environment with respect to defendant. As noted above, whether an established custodial environment exists is a question of fact that this Court must affirm unless the trial court's finding is against the great weight of the evidence. *Berger*, 277 Mich App at 706. "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.* The trial court must address whether an established custodial environment exists before it makes a determination regarding the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). "An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger*, 277 Mich App at 706, citing *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance,

discipline, the necessities of life, and parental comfort," MCL 722.27(1)(c), and "the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Baker*, 411 Mich at 579-580. An established custodial environment may exist with both parents where a child looks to both the mother and father for guidance, discipline, and the necessities of life. *Foskett*, 247 Mich App at 8; *Mogle*, 241 Mich App at 197-198.

The trial court found that there was an established custodial environment with plaintiff, but that there was not an established custodial environment with defendant:

> [T]he Court finds that there is an established custodial environment with the Plaintiff in this case. Plaintiff was the children's primary caregiver from their birth, staying home with the children while Defendant worked. This arrangement continued until Defendant's retirement in 2005. At that time, Plaintiff did return to work, but she has continued to be a constant, positive presence in the children's lives. It is clear that the children look to her for guidance, discipline, comfort and the fulfillment of their needs.
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> On the other hand, the relationship the boys have with their father has not been shown to be of the same positive nature as that with their mother. The boys have spent more time with their father since his retirement than they did in the first years of their lives. However, that time has been sporadic and not fostered the same type of relationship with their father as the boys have with their mother. The time Defendant shares with the boys is primarily spent engaging in physical and outdoor activities. It seems that the boys look to their father more as someone to have fun with than someone who provides them guidance in their lives. While it does appear that the boys listen to their father's directives, they seem to do so because they fear his reactions more than they respect his authority as a parent. The Court finds no established custodial environment with Defendant.

The trial court's finding that there was an established custodial environment between the children and plaintiff was not against the great weight of the evidence. There was evidence that the relationship between plaintiff and the children had qualities of security, stability, and permanence. Furthermore, plaintiff's residence had been the children's primary residence since the parties divorced in July 2007, and the children spend the majority of their days and nights with plaintiff. As for defendant, the evidence does not clearly preponderate towards a finding of an established custodial environment. According to defendant, the trial court downplayed defendant's role in the children's lives and ignored credible witnesses that positively described the children's relationship with defendant. It is true that there was testimony that defendant loves his children and that he generally exercised his parenting time with the children, participated with their baseball and school activities, and enjoyed outdoor activities with them, such as hunting, fishing and golfing. Furthermore, there was testimony that defendant guided and disciplined the children. However, there was also evidence that tended to show that the relationship between defendant and the children did not have qualities of security and stability. For example, there was evidence that defendant sometimes became angry when the children were present and that his anger affected the children, there was evidence that defendant made custodial exchanges traumatic, and there was evidence that defendant sometimes did not exercise his parenting time when he was expected to. Furthermore, there was evidence to support the trial

court's finding that defendant was the "fun" parent with whom the boys liked to hang out and have a good time.

To the extent that the trial court's conclusion that there was not an established custodial environment with defendant involved credibility determinations and the possible rejection of evidence presented by defendant, we note that the existence of an established custodial environment is a factual inquiry, and we defer to the trial court's determinations regarding the weight of the evidence and the credibility of witnesses. MCR 2.613(C); *Berger*, 277 Mich App at 715. We find that the evidence does not clearly preponderate against the trial court's findings regarding the existence of an established custodial environment with respect to plaintiff and the lack of an established custodial environment with respect to defendant. The trial court's findings were not against the great weight of the evidence, and the trial court did not err in finding that an established custodial environment existed with plaintiff, but not with defendant.

3. STATUTORY BEST INTEREST FACTORS

Defendant next argues that the trial court's findings with respect to the statutory best interest factors were against the great weight of the evidence. To determine child custody, the trial court must consider the statutory best interest factors in MCL 722.23:

> 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:
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> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
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> (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.
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> (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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

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

The trial court found the parties equal for factors (c) and (f). The trial court found that factors (a), (b), and (h) favored plaintiff, that factor (d) slightly favored plaintiff, and that factors (e), (g), (j) and (k) strongly favored plaintiff. The trial court did not inverview the minor children and therefore did not favor either party under (i). Furthermore, the trial court did not consider any other factor under (*l*).

The trial court found in plaintiff's favor for factor (a). Defendant attacks the trial court's finding regarding this factor on the basis that the trial court disregarded the testimony of unbiased defense witnesses. As the trier of fact, the trial court was in the best position to determine the credibility of witnesses and determine what weight to give the evidence. MCR 2.613(C); *Berger*, 277 Mich App at 715. The trial court apparently found the testimony of plaintiff and her witnesses more credible in this regard than the testimony of defendant and his witnesses. The trial court's finding for factor (a) was not against the great weight of the evidence.

The trial court also found in plaintiff's favor for factor (b). The trial court found the parties' capacity to continue the education and raising of the children as Catholics to be significant regarding this factor and found that defendant was "not consistent with delivering the boys to religious activities during his parenting time." There was evidence that plaintiff led the religious training of the parties' children and evidence regarding defendant's lack of participation and involvement in the children's religious education and even defendant's inhibition of the children's religious training. The trial court's finding regarding this factor was not against the great weight of the evidence.

The trial court found that factor (d) slightly favored plaintiff because of the children's familiarity with plaintiff's home. Defendant argues that the trial court failed to note that the minor children had been spending significant time with defendant in defendant's new home since January 2007. This may be true, but the evidence established that the minor children spent the majority of their days and nights in plaintiff's home and that the environment in plaintiff's home was stable. The trial court did not err in slightly favoring plaintiff under this factor.

The trial court found that factor (e) strongly favored plaintiff. There was evidence that plaintiff, who had not remarried, was in a long-term relationship with a man and that the man resided in plaintiff's home and had a good relationship with the minor children. Defendant had just remarried the very month of the custody trial. Defendant's wife was a woman he had met online. He met her in person for the first time in December 2008 and they spent some time together for about five weeks from March 25, 2009, until they were married on May 3, 2009. The minor children spent some time with defendant's wife during these visits, but she did not

appear to have given a lot of consideration to her role as step-mother to the minor children, as evidenced by her statement that she "never really thought about being their step-mom."

Defendant takes issue with the trial court's conclusion that defendant places little value on his relationships with women. It can be inferred from certain evidence that defendant places little value on his relationships with women. There was evidence that defendant called plaintiff vulgar names, sometimes in the children's presence, and he apparently dated a woman who he met online because she lived near an author of books that one of his sons liked to read. According to defendant, "the only reason [he] wanted to interact with" the woman was to meet this author. Thus, there was evidence to permit the inference to support the trial court's finding that defendant places little value on his relationships with women. Furthermore, given the evidence, and inferences therefrom, regarding the permanence of the parties' respective homes, we conclude that the trial court's finding regarding this factor was not against the great weight of the evidence.

Defendant argues that the trial court erred in strongly favoring plaintiff under factor (g), the mental and physical health of the parties involved. Defendant was disabled from the military. He described the nature of his disability as including injuries to both knees and his right shoulder. He also stated that he ingested gas during Operation Desert Storm and that he had stomach problems and irritable bowel syndrome. Furthermore, defendant testified that he suffered from depression, anxiety, and post-traumatic stress disorder. In contrast, plaintiff does not have any significant physical or mental health issues. The trial court's finding regarding this factor was not against the great weight of the evidence.

Defendant does not advance any meaningful argument that the trial court erred in favoring plaintiff under factor (h). "A party abandons a claim when it fails to make a meaningful argument in support of its position." *Berger*, 277 Mich App at 712.

Defendant argues that the trial court wrongfully strongly favored plaintiff under factor (j). Defendant's argument in this regard is limited to listing ways in which plaintiff attempted to undermine defendant's relationship with the children. We again note that a party waives a claim by failing to make a meaningful argument in support of his position. *Id.* To the extent that this factor depended on credibility determinations, the trial court is in the best position to determine the credibility of witnesses and weigh the evidence, and this Court must give deference to the trial court's superior abilities in this regard. MCR 2.613(C); *Berger*, 277 Mich App at 715.

Defendant also argues that the trial court erred in strongly favoring plaintiff under factor (k), domestic violence. According to defendant, plaintiff was the controlling party, and she was verbally and emotionally abusive. Defendant asserts that even though plaintiff called the police on several occasions during the marriage, no police complaints were ever filed and defendant was never charged with domestic violence. There was evidence that defendant blocked plaintiff's car with his truck at a baseball game because he was angry at her, that he threatened to kill plaintiff's boyfriend, that he was sometimes "volatile," and that plaintiff had sought help from law enforcement on four occasions after the parties were separated because of defendant's conduct. A woman who saw defendant block plaintiff's car in at the baseball game later approached plaintiff and told plaintiff that she worked for a domestic violence and sexual assault shelter and that plaintiff should call if she needed anything. Therefore, even without evidence of

a criminal complaint or that defendant was charged without domestic violence, the trial court's finding regarding this factor was not against the great weight of the evidence.

In sum, the trial court's findings of fact regarding the best interest factors were not against the great weight of the evidence.

4. DUE PROCESS

Defendant finally argues that the trial court violated his due process right to a fair tribunal. According to defendant, the trial court violated his due process rights by failing to hold a hearing to determine the preferences of the minor children, MCR 722.23(i), and by deferring to the report of psychologist Dr. Tracy Allan without taking into consideration any of defendant's witnesses or exhibits in rendering its opinion.

We review de novo issues of constitutional law. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

The Michigan Constitution and the United States Constitution both preclude the government from depriving a person of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). There are two types of due process: procedural due process and substantive due process. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 32-33; 703 NW2d 822 (2005). Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision maker. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213-214; 761 NW2d 293 (2008). Substantive due process is concerned with the arbitrary deprivation of a liberty or property interest. *Id.* at 201.

The trial court's rejection of defendant's witnesses and defendant's own testimony and acceptance of plaintiff's witnesses and evidence did not deprive defendant of his due process rights. Once again, defendant's argument is tantamount to a rejection of the trial court's credibility determinations. As stated previously, this Court defers to the trial court's superior ability to make determinations regarding the credibility of witnesses and the weight of evidence. MCR 2.613(C); *Berger*, 277 Mich App at 715. The trial court's apparent conclusion that plaintiff's evidence was more credible or that defendant's evidence was incredible does not mean that the trial court failed to consider defendant's testimony and other evidence. The finder of fact does not violate a party's due process rights by finding the party's evidence incredible or less credible than evidence presented by the opposing party. Furthermore, the fact that the trial court may not have mentioned certain portions of defendant's evidence does not mean that the trial court failed to consider defendant's evidence. The trial court need not comment on every matter in evidence. *Sinicropi*, 273 Mich App at 180. Defendant's argument in this regard is without merit.

In addition, the trial court did not violate defendant's due process rights by not holding a hearing to determine the custody preferences of the minor children under MCL 722.23(i). Under factor (i), the trial court must consider "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i); *Treutle v*

Treutle, 197 Mich App 690, 694; 495 NW2d 836 (1992). In this case, the minor children were eight and ten years old at the time of trial. This Court has stated that children of six years of age are generally old enough to express a preference. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). The trial court did not interview the minor children to ascertain their preferences.

Defendant cites *Stringer v Vincent*, 161 Mich App 429; 411 NW2d 474 (1987), in support of his contention that the trial court violated his due process rights by failing to consider the reasonable preference of the children. In *Stringer*, which involved the defendant's petition for change of custody, this Court stated: "[t]he trial court's failure to interview the children was itself error requiring reversal." *Id.* at 434. We find *Stringer* to be distinguishable from the instant case, however, because in *Stringer*, the trial court made a custody decision without holding an evidentiary hearing at all, on the basis of the pleadings and a friend of the court report, which the parties had not agreed could be considered as evidence. *Id.* at 432-433. We reversed because of the trial court's failure to hold an evidentiary hearing and consider the best interest factors. *Id.* at 433. In so doing, we stated: "[t]he trial court could not have considered the eleven factors set out in the definition of a child's best interests since it had been presented with no evidence." *Id*. Unlike the facts in *Stringer*, in this case, the trial court held an evidentiary hearing and considered the best interest factors and made findings regarding those factors. Although the trial court did not ascertain the children's preference under factor (i), it found most of the best interest factors favored plaintiff (and that four factors "strongly" favored plaintiff) and that the parties were equal for two factors. Significantly, the trial court did not find in defendant's favor for any of the best interest factors. The trial court's holding of an evidentiary hearing and consideration of the best interest factors in the instant case distinguishes it from *Stringer*. Furthermore, in requiring the trial court to interview the children to determine their preference in *Stringer*, this Court noted that its statements regarding factor (i) were made only "to provide guidance to the trial court on remand." *Id.*

More recently, this Court has held that the trial court's failure to consider the preference of the child under factor (i) does not require reversal if the parties did not ask the trial court to speak to the child regarding his or her preference and the child's preference would not have changed the trial court's ruling. *Sinicropi*, 273 Mich App at 182-183. In *Sinicropi*, we stated:

> [Defendant] also takes issue with the fact that the trial court did not consider the child's preference under factor i (child's preference). The trial court stated that it could not consider the child's preference because none of the parties presented him for an interview. We note that the parties stood mute when the trial court made this statement, and there is no indication in the record that [defendant] wished or requested that the trial court speak to the child regarding his preference. This fact distinguishes the case from *Flaherty v Smith*, 87 Mich App 561, 564-565; 274 NW2d 72 (1978); *Lewis v Lewis*, 73 Mich App 563, 564; 252 NW2d 237 (1977), and *In re Custody of James B*, 66 Mich App 133, 134; 238 NW2d 550 (1975), in which the trial court either declined or refused to interview the children on request. We recognize that "[a] trial court must consider, evaluate, and determine each of the factors contained in [MCL 722.23]" when determining a child's best interests. *Mann v Mann*, 190 Mich App 526, 536; 476 NW2d 439 (1991). Assuming that the child, who was six years old when the custody hearing

> was conducted, was of sufficient age to express a preference, and assuming that the trial court erred in not interviewing the child when neither party apparently wished to have the child appear, reversal is not warranted because had the child expressed a preference, it would not have changed the trial court's ruling, given the court's overall statements and strong feelings regarding what was best for the child . . . . [*Sinicropi*, 273 Mich App at 182-183.]

The facts of the instant case are similar to the facts in *Sinicropi*. In this case, there is no indication that defendant presented the minor children to the court for an interview.[2] Moreover, there is no indication that the trial court declined or refused to interview the children on request. In addition, even if defendant had asked the trial court to speak with the minor children to ascertain their preference, in the present case, like in *Sinicropi*, the trial court's findings regarding the other best interest factors and statements regarding the best interests of the children indicate that the minor children's preference would not have changed the trial court's ruling. In the present case, the trial court did not find any of the best interest factors in favor of plaintiff. Moreover, even if the children had articulated a preference to be in the custody of defendant, the best interest factors need not be given equal weight, *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998), and a child's preference does not automatically outweigh all other best interest factors, *Treutle*, 197 Mich App at 694, which the trial court found primarily in favor of

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[2] There is an indication that defendant wished to have the trial court speak with the minor children regarding their preference even though he did not present them to the trial court for an interview. On the record on the last day of trial, May 28, 2009, the trial court stated that in lieu of closing arguments, it wanted the parties to prepare written proposed findings of fact and conclusions of law. The trial court stated that it would give the parties 14 days to prepare these closing briefs, which would have made them due on June 11, 2009. Thereafter, counsel for plaintiff advised the trial court that school for the minor children was out on June 12 and that plaintiff "would appreciate any speed that you could lend to the decision, especially as it relates to the summer break parenting time." The trial court then stated that it was willing to shorten the timetable to facilitate an earlier decision, but counsel for defendant made comments that indicated that it would be difficult for her to complete the document any earlier than June 11, 2009. The trial court ultimately left the June 11, 2009, deadline intact, and defendant filed his closing brief with the trial court on June 11, 2009. In his closing brief, defendant asserted that "the preference of the children should be determined by this court." Under the facts of this case, such a statement, assuming that it constitutes a request that the trial court speak with the minor children to ascertain their preference, is not a timely request for the trial court to interview the minor children to ascertain their preferences, when there is no evidence that defendant had the children available so that the trial court could speak to them that day, and defendant knew that the children would be out of school on June 12, and knew that the trial court desired to issue its decision before that date. In fact, the trial court issued its order and opinion on June 11, 2009, and defendant's brief on appeal indicates that the trial court actually rendered its opinion before receiving defendant's closing brief, although it is impossible to verify this because there is no time stamp on either the closing brief or the opinion. Significantly, defendant's motion for reconsideration did not include any argument regarding the trial court's failure to ascertain the minor children's preference under MCL 722.23(i).

plaintiff. The trial court did not violate defendant's due process rights by not interviewing the minor children to determine their preference under factor (i).

III. CONCLUSION

In sum, the trial court's findings regarding the existence of proper cause to revisit the custody order were not against the great weight of the evidence. In addition, the trial court's findings regarding the existence of an established custodial environment with respect to plaintiff and defendant and regarding the best interest factors also were not against the great weight of the evidence. Finally, the trial court did not violate defendant's due process rights by making credibility determinations in plaintiff's favor and by not interviewing the minor children to determine their preference.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro