

STATE OF MICHIGAN
COURT OF APPEALS

NEHYA MOSLIMANI,

Plaintiff-Appellee,

v

ALEX MOSLIMANI,

Defendant-Appellant.

UNPUBLISHED
December 16, 2010

No. 296487
Wayne Circuit Court
Family Division
LC No. 08-113666-DM

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Defendant, Alex Moslimani, appeals as of right from the trial court's judgment of divorce. On appeal, Alex Moslimani argues that the trial court's decision to award sole physical and legal custody of the parties' two children to plaintiff, Nehya Moslimani, was against the great weight of the evidence and not in the children's best interest. He also argues that the trial court erred when it denied him an evidentiary hearing on a post-trial motion for a change of custody and that the trial court's property distribution was against the great weight of the evidence. We affirm.

I. BASIC FACTS

This appeal follows a highly contentious, nine-day divorce trial. The parties were married in September 1999. Nehya Moslimani filed a complaint for divorce on May 29, 2008, seeking sole legal and physical custody of the parties' two children—Jacob, born July 15, 2002, and Janel, born July 31, 2003. This was Nehya Moslimani's third complaint for divorce; the parties reconciled after two prior complaints in 2007. Nehya Moslimani obtained personal protection orders (PPOs) when she filed both complaints for divorce in 2007. In May 2007, after the second complaint for divorce, the trial court entered an interim consent order for temporary custody, parenting time, and use of the marital home. The order required the parties to alternate use of the marital home based on the joint-custody parenting schedule, until Alex Moslimani rented or bought a new residence within 60 days. The order also granted a joint PPO between the parties. The parties reconciled before the 60 days elapsed, and the case was dismissed by stipulation. The trial court also entered a similar temporary order after the present complaint for divorce was filed.

Nehya Moslimani alleged that Alex Moslimani verbally abused her throughout the marriage and began physically abusing her after their children were born. She testified that he threatened to kill her, threw objects at her, spit in her face, and pushed her to the ground. She also asserted that he called her vulgar names, sometimes in front of their children. Further, she explained that Alex Moslimani had an extreme temper and would rip his own shirt while angry; Jacob now imitates this behavior. She also explained that he would accuse her of having affairs with other men and called her repeatedly when she was at work or on social engagements. She also made allegations of Alex Moslimani's physically and verbally abusive behavior in her applications for PPOs in 2007. The trial court noted that Nehya Moslimani was "visibly emotional and tearful" during her testimony about Alex Moslimani's anger and outbursts.

Nehya Moslimani testified that she was the primary parent to provide the children with all of the usual necessities, including food, clothing, trips to the doctor, and help with homework. She testified that Alex Moslimani was very angry with her since their separation and often threatened to use the children to "get back at her." She also stated that he would not cooperate with her or act civilly toward her with respect to their parenting time arrangements. Similarly, he would make negative comments about her to the children during his parenting time. Finally, she stated that he would often yell at the children in an angry manner.

Alex Moslimani testified that after the parties' children were born, Nehya Moslimani became upset that she was "no longer the center of attention." He testified that she told him, "I strayed and I started going out and I started meeting guys and they started telling me how beautiful I am and I started to believe that and I started opening up my legs." Further, he explained that he never abused Nehya Moslimani in any way; rather, she slapped, spit at, kicked, and hit him, sometimes in the presence of the children. Alex Moslimani stated that the only time he would have used vulgar language with Nehya Moslimani would be in response to hours of verbal humiliation by her. He stated that it was "constant abuse by her." He further alleged that she would falsely accuse him of hitting her or manufacture false arguments between them with the purpose of leaving the house to meet with another man. Alex Moslimani also stated that Nehya Moslimani had indicated to him that she had connections with "the courts" that would permit her to keep the children; she is currently dating an attorney.

Alex Moslimani expressed concern that Nehya Moslimani was "reckless" with the children and did not always adequately supervise them. He specifically alleged that she did not always put the children in car seats when driving.

In August 2008, Alex Moslimani was diagnosed with mantle cell lymphoma. He underwent a stem-cell transplant and chemotherapy through January 2009. He testified that he is currently cancer-free, physically fit, and that his doctors told him he had made a dramatic recovery. The trial court admitted into evidence a letter from his doctor, which stated that Alex Moslimani's diagnosis would not prevent him from performing normal parenting duties. While Alex Moslimani was undergoing chemotherapy, he had many doctor's appointments and experienced weakness and nausea, but maintained that he was mostly able to continue his parenting duties. When necessary, his family assisted in caring for the children.

Alex Moslimani is currently unemployed, and he has been collecting social security disability payments as a result of his illness. He testified that he is currently able to work and

that he “will be” looking for work. He also stated that he is “going to take it slow” with respect to returning to the work force. He has made inquiries into two specific job possibilities. Finally, he testified, “[I]f I have to be a stay-at-home dad, I will do that.”

A dramatic point of contention between the parties at trial concerned Nehya Moslimani’s pregnancy and miscarriage in August 2007. Nehya Moslimani testified that she was only pregnant for about a month before the miscarriage. No medical records were offered into evidence at trial. She had filed her second complaint for divorce on May 3, 2007. She testified that they reconciled within 60 days of that date. The complaint was dismissed by stipulation on August 15, 2007. Alex Moslimani testified that he did not have sexual intercourse with Nehya Moslimani in May or June 2007. He later testified that he “might have had sex with her” but that he “wore protection.” He is “absolutely positive” that it was not his child. Nehya Moslimani testified that the parties had sexual intercourse in July 2007, at their house. She testified that they had reconciled by that time. She insisted that the child was Alex Moslimani’s.

Both parties presented testimony from multiple witnesses that largely corroborated their own testimony. Nehya Moslimani’s witnesses testified that Alex Moslimani was verbally abusive of Nehya Moslimani and overprotective of the children. The witnesses also testified that Nehya Moslimani did not have an affair. Alex Moslimani’s witnesses testified that he was an attentive father, took care of the house, and “spoiled” Nehya Moslimani. His brother and sister both testified that Nehya Moslimani was not an attentive mother and that Alex Moslimani had to do the bulk of the work around the house. Alex Moslimani’s sister, Latefa Marra, testified that she observed Nehya Moslimani using obscenities toward Alex Moslimani in the children’s presence. Marra also testified that Nehya Moslimani admitted to taking Valium pills. Finally, Marra explained that Nehya Moslimani refused to cooperate with Alex Moslimani with respect to parenting time. The principal of Jacob’s school, Andrea Awada, called as a witness by Alex Moslimani, testified that Alex Moslimani’s other sister, Diana Moslimani, once confronted Nehya Moslimani at the school, calling her vulgar names and throwing a marker at her. According to Awada, Nehya Moslimani remained calm in response.

The trial court referred the case to the Family Assessment, Mediation, and Education Department within the Friend of the Court office. Angela Asteriou performed the evaluation on September 24, 2008, and produced a report on February 5, 2009. Asteriou concluded that she did not recommend joint physical custody because both parties had made accusations of domestic violence. She further concluded that it was not likely that the parents would be able to successfully cooperate in a co-parenting situation. Asteriou also expressed concern about Alex Moslimani’s ongoing health issues. She concluded that Nehya Moslimani should get sole physical custody of the children and that the parties should share legal custody. At trial, Asteriou noted that, because Alex Moslimani agreed to joint custody, this undercut his complaints about Nehya Moslimani’s fitness as a mother. Asteriou also noted that if Alex Moslimani were fully recovered from his illness, she would no longer count it against him.

The parties had the marital home appraised at \$119,000, but the mortgage balance on the home was \$121,000. Alex Moslimani originally purchased the home before the marriage for \$107,000. He purchased a second house prior to the marriage for \$91,000. Its value was appraised at \$105,000 and had no outstanding mortgage. The parties paid off the mortgage for the second house in 2002 by refinancing the marital home. They used the second house

occasionally as a rental property, or for Alex Moslimani's parents. At the time of trial, Alex Moslimani's father and brother lived in the second house.

On October 8, 2009, pending the issuance of the trial court's opinion, Alex Moslimani moved for a change of custody, parenting time, order to show cause, contempt, and other relief. He noted that Child Protective Services (CPS) recently performed an investigation and the children admitted that Nehya Moslimani routinely hit them. The investigation was initiated when Alex Moslimani took the children to the emergency room, complaining that Nehya Moslimani was abusing them. CPS investigated and concluded that there was not a "preponderance of the evidence regarding child abuse or neglect." The injury that precipitated Alex Moslimani's trip to the emergency room was caused "at day camp." The children were unable to say when they had been physically disciplined by Nehya Moslimani, or whether it had ever occurred more than once. Both children indicated that Nehya Moslimani had pulled their hair once or twice in the past. The report concluded, "CPS believes that the children are being subjected to inappropriate and unnecessary questioning by each parent pertaining to activities or conversations held during the other parent's visitation period." The investigation was completed without any services referred or provided by CPS.

The trial court issued a detailed opinion on December 10, 2009. First, the trial court concluded that the children had an established custodial environment with both parents. Next, the trial court noted, "If two parents are unable to cooperate and to agree generally concerning important decisions affecting the welfare of the children, the court has no alternative but to determine which parent shall have sole custody of the children." The trial court then made rulings with respect to each statutory best interest factor found in MCL 722.23. The trial court concluded that factors (a), (c), (d), (f), and (l) favored neither party. Further, the trial court concluded that factor (i)—"[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference"—would not be considered because of the children's ages.

The trial court found that factor (b)—"[t]he 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"—favored Nehya Moslimani. The trial court based its conclusion on the fact that Alex Moslimani was "overly protective" of the children, made unsubstantiated allegations of abuse and neglect by Nehya Moslimani, showed a lack of judgment with respect to putting the children in the middle of confrontations between the parties, and has anger management problems.

The trial court found that factor (e)—"[t]he permanence, as a family unit, of the existing or proposed custodial home or homes"—favored Nehya Moslimani. The trial court noted that Alex Moslimani had been married on two prior occasions. The trial court also noted that Alex Moslimani required the assistance of his family with care of the children while he was sick and that there were concerns with his future health.

The trial court found that factor (g)—"[t]he mental and physical health of the parties involved"—also favored Nehya Moslimani. The trial court noted that Alex Moslimani remained on social security disability from his illness and had provided no testimony regarding the possibility of recurrence of his cancer or other lingering health effects. Finally, the trial court

concluded that Marra's testimony regarding Nehya Moslimani's demeanor and use of Valium was "not credible or substantiated."

The trial court found that factor (h)—"[t]he home, school, and community record of the child"—also favored Nehya Moslimani. The trial court noted that both parents are loving and affectionate but that Alex Moslimani's overprotective behavior is disruptive to the children's education. Further, the trial court noted that Diana Moslimani's behavior toward Nehya Moslimani at the school demonstrated a high level of hostility that Alex Moslimani's family had for Nehya Moslimani. Finally, the trial court cited an incident in which Alex Moslimani refused to sign a permission slip for Jacob to attend counseling with no explanation.

The trial court found that factor (j)—"[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"—also favored Nehya Moslimani. The trial court stated that Alex Moslimani's demeanor on the stand showed extreme hatred and contempt for Nehya Moslimani. The trial court pointed out that there were times he raised his voice and pointed accusingly at Nehya Moslimani. Finally, the trial court explained that Alex Moslimani's testimony lacked credibility because he was extremely negative toward Nehya Moslimani and overly positive toward himself. Further, the trial court noted, "In the process of trying to gain custody he has tried to harm the children's relationship with their mother and exposed them to too much information and questioning."

The trial court found that factor (k)—"[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child"—favored Nehya Moslimani. The trial court noted that Nehya Moslimani's PPO petitions, police reports, and witnesses' testimony corroborated her testimony regarding domestic violence. Alex Moslimani had failed to note any history of violence in prior pleadings between the parties and presented no evidence of any past allegations. The trial court concluded that Alex Moslimani's testimony was not credible and Nehya Moslimani's was.

On the basis of these findings, the trial court concluded that Nehya Moslimani should have sole custody of the children, again noting that joint custody was not a viable option in this case. In its ensuing judgment of divorce, the trial court clarified that Nehya Moslimani had sole legal and physical custody.

With respect to the distribution of the real property, the trial court awarded the marital home to Alex Moslimani, including the mortgage debt. Additionally, the trial court concluded that the parties jointly contributed \$87,106 to the value of the rental property—\$51,569 applied from the refinancing of the marital home plus \$35,537 in expenses and mortgage payments jointly paid above and beyond rental receipts. Accordingly, the trial court concluded, "[I]t would be fair and equitable under the circumstances to award [Alex Moslimani] the real estate and he shall pay [Nehya Moslimani] a portion for her marital share in the amount of \$43,553." Finally, the trial court ordered Alex Moslimani to maintain Nehya Moslimani as beneficiary on one of his life insurance policies until both of the children reach 18 years of age.

Additionally, the trial court addressed Alex Moslimani's argument that, in addition to Nehya Moslimani's uncooperative behavior since the end of the trial, the CPS investigation

warranted a change in custody and parenting time from the interim custody order in place. The trial court concluded that there was nothing in Alex Moslimani's allegations to change the custody determination. Moreover, the trial court noted that the incident highlighted the fact that the parents could not be relied upon to cooperate in a joint parenting situation.

Alex Moslimani now appeals.

II. CUSTODY AWARD

A. STANDARD OF REVIEW

Alex Moslimani argues that the trial court applied the incorrect legal standard for changing an established custodial environment. He also argues that the trial court erred in finding that clear and convincing evidence existed to award sole legal and physical custody to Nehya Moslimani. Further, he argues that the trial court's conclusions were contrary to the great weight of the evidence presented.

"This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue."¹

B. INCORRECT STANDARD

Alex Moslimani argues that the trial court applied the wrong standard of proof for a change of custody. The trial court indicated that because it was an "initial custody matter," the applicable standard was the preponderance of the evidence. Contrary to the trial court's assertion, if an established custodial environment exists, a party seeking a change of custody is required to show by clear and convincing evidence that it is in the child's best interests.² MCL 722.27(1)(c) provides, "The court shall not modify or amend its previous judgments or orders *or issue a new order* so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."³ Any change to an established custodial environment must be supported by clear and convincing evidence. Despite its statement to the contrary, the trial court ultimately concluded that its order was supported by clear and convincing evidence. Thus, its initial erroneous statement of the law had no effect on its ultimate custody order, and Alex Moslimani's argument is without merit.

¹ *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28.

² *Id.* at 710, citing MCL 722.27(1)(c).

³ (Emphasis added.).

C. BEST INTEREST FACTORS

Alex Moslimani next challenges the trial court's findings of fact with respect to each statutory best interest factor. He argues that the trial court's findings were against the great weight of the evidence. When making a determination regarding a child's best interest, a trial court is required to state its factual findings and conclusions with regard to each statutory best interest factor listed in MCL 722.23.⁴ A finding of fact is against the great weight of the evidence only when the evidence clearly preponderates in the opposite direction.⁵ Moreover, the Child Custody Act of 1970 "is intended to promote the best interests of the children, and it is to be liberally construed."⁶

Alex Moslimani makes perfunctory or baseless arguments with respect to a number of the best interest factors that the trial court concluded did not favor either party. He has not offered any cognizable argument that the trial court erred with respect to factors (a), (c), (d), and (l). We will consider his arguments with respect to the other factors in turn. With respect to these factors, the trial court ruled in Nehya Moslimani's favor.

1. FACTOR (b)

Factor (b) concerns "[t]he 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."⁷ The trial court concluded that this factor favored Nehya Moslimani. The trial court noted that Alex Moslimani was overprotective, unable to empathize with the children, and willing to allow his anger toward Nehya Moslimani to affect his relationship with the children.

Alex Moslimani argues that this factor should favor him. He stated, "Being [overprotective] of children is a very positive trait and it is irrational and, therefore, an abuse of discretion for the court to prefer mother's narcissism over [Alex Moslimani's] caution for his children." Alex Moslimani also cites the CPS report, stating that the parties' daughter remembered being hit with a spatula "one time a long time ago." Further, he cited testimony that he works around the house and takes care of the children and that the house was "a mess" after Nehya Moslimani's parenting time.

Notably, Alex Moslimani does not dispute that he is overprotective; he merely argues that this is a "positive trait." The trial court concluded that this trait evidenced an inability to empathize with the children and keep them separated from the issues between the parents. Alex Moslimani does not dispute the facts underlying this finding. With respect to the CPS report,

⁴ *Rittershaus v Rittershaus*, 273 Mich App 462, 472-475; 730 NW2d 262 (2007).

⁵ *Berger*, 277 Mich App at 705.

⁶ *Id.*, citing MCL 722.26(1).

⁷ MCL 722.23(b).

Janel stated that the spatula incident only happened once. The CPS evaluator concluded that there was not a preponderance of evidence regarding abuse and neglect. Finally, the trial court acknowledged the testimony regarding the messy house, and the trial court concluded that this evidence was “inconclusive and not very relevant.” Both parties testified that the other left the house a mess. One neighbor testified that the basement was messy after Nehya Moslimani’s parenting time. Nehya Moslimani presented evidence that Alex Moslimani received a citation for failing to mow the lawn. Importantly, all of this evidence pertained to the post-separation period during which the parties were sharing time in the house and undergoing ongoing conflict. Alex Moslimani has not cited evidence that “clearly preponderates” against the trial court’s finding that this factor favors Nehya Moslimani.

2. FACTOR (e)

Factor (e) concerns “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.”⁸ The trial court concluded that this factor “slightly favors” Nehya Moslimani. The trial court justified its ruling with the fact that Alex Moslimani has been married three times and that there are concerns regarding his future health and whether he might require assistance from his family to care for the children. Alex Moslimani argues that there is no evidence of any danger of the “family unit” deteriorating with either party and argues that the trial court erroneously highlights his previous health concerns as a prospective concern.

Neither party offered any expert testimony regarding the possibility of a recurrence of Alex Moslimani’s cancer, or any other concerns about his health. The trial court noted that although he maintains that he is healthy, he continues to collect disability payments and has not returned to work. The trial court also noted that there is no cure for cancer. Alex Moslimani argues that the trial court erroneously concluded that his health remains a concern.

We note that the dictionary definition of *cancer* includes the phrase, “tending to recur.”⁹ This supports the notion that one occurrence of cancer presents a measurable possibility of a recurrence in the future. Nehya Moslimani has no such known possible health concerns. Further, Alex Moslimani’s statements regarding his own health are subject to the trial court’s credibility determination. We conclude that it was not against the great weight of the evidence for the trial court to conclude that this factor slightly favored Nehya Moslimani.

3. FACTOR (f)

Factor (f) concerns “[t]he moral fitness of the parties involved.”¹⁰ The trial court ruled that this factor favored both parties. Specifically, the trial court ruled that the testimony regarding Nehya Moslimani’s mental health and possible drug use from one of Alex

⁸ MCL 722.23(e).

⁹ *Random House Webster’s College Dictionary* (2000).

¹⁰ MCL 722.23(f).

Moslimani's sisters was biased and not credible. Further, the trial court considered the fact that Alex Moslimani never made any such allegations and never showed any concern about allowing Nehya Moslimani to watch the children during their marriage or during the pending divorce. Alex Moslimani again raises the issue of Nehya Moslimani striking Janel with a spatula. Further, he points to Nehya Moslimani's testimony regarding a 2007 miscarriage and pregnancy, noting that she "changed her testimony" regarding the date of the pregnancy.

It is true that the CPS evaluator warned Nehya Moslimani that certain kinds of physical discipline are not appropriate, although they also did not constitute child abuse, in the evaluator's opinion. Nevertheless, the evaluator was unable to verify conclusively that the children actually received any form of physical discipline more than once or twice in the past, and certainly not with respect to the injury that instigated the investigation. The evaluator also noted that neither child is afraid of either parent and concluded that no further action was required.

Further, Alex Moslimani's attorney asked Nehya Moslimani about the wrong year (2008) with respect to her pregnancy and miscarriage. Nehya Moslimani eventually noticed and corrected the mistake. Alex Moslimani has not provided any reason from which to conclude that the trial court's finding on this factor was against the great weight of the evidence.

4. FACTOR (g)

Factor (g) concerns "[t]he mental and physical health of the parties involved."¹¹ The trial court concluded that this factor favored Nehya Moslimani. The trial court based this ruling on Alex Moslimani's possible future health concerns. Alex Moslimani argues, as under factor (e), that the trial court erroneously concluded that there is a possibility of recurrence of his health problems. He contends that the trial court discriminated against him based on the fact that he had cancer, is older than Nehya Moslimani, and is very protective of the children.

As noted above, the dictionary definition states that cancer has a tendency to recur. Alex Moslimani's testimony that he is currently healthy is unrelated to the trial court's concerns about the possibility of health problems in the future. Further, there is no evidence on the record that the trial court was prejudiced against him. Additionally, the trial court concluded that Alex Moslimani is overprotective of the children, explaining that this is detrimental to their upbringing. Finally, the trial court offered no discussion of Alex Moslimani's age, in a positive or negative light. There is no evidence that preponderates against the trial court's conclusion that this factor favors Nehya Moslimani.

5. FACTOR (h)

Factor (h) concerns "[t]he home, school, and community record of the child."¹² The trial court concluded that this factor favored Nehya Moslimani. The trial court noted that both

¹¹ MCL 722.23(g).

¹² MCL 722.23(h).

parents have been involved in the children's education. The trial court also noted, again, that Alex Moslimani is overprotective and that he often comes to school unannounced to talk to Janel during the school day, characterizing this behavior as "unusual." Further, the trial court noted that Alex Moslimani's sister called Nehya Moslimani vulgar names and threw an object at her at the children's school, demonstrating the level of hostility Alex Moslimani's family had towards Nehya Moslimani. Finally, the trial court noted that Alex Moslimani tore up a permission slip for Jacob to receive counseling during the divorce proceedings.

Alex Moslimani alleges that the trial court "seems to penalize [Alex Moslimani] for having cancer and rewards [Nehya Moslimani] for her inappropriate behavior." He also argues that Nehya Moslimani also used vulgar language with his sister in their exchange at the school, contrary to the trial court's findings. Finally, he argues that the trial court's conclusion regarding the torn permission slip was "contrary to the evidence."

Alex Moslimani's record citation in support of his contention that Nehya Moslimani used vulgar language toward his sister was hearsay testimony by the children's principal and was explicitly stricken from the record. Further, Nehya Moslimani expressly testified that she found the permission slip for their son Jacob's counseling on the table, shredded, after Alex Moslimani's parenting time. There was also evidence that Alex Moslimani is amenable to Jacob receiving counseling. Nevertheless, the evidence supported the trial court's determination that Alex Moslimani had not yet signed the written approval. The trial court's findings were not against the great weight of the evidence.

6. FACTOR (i)

Factor (i) concerns "[t]he reasonable preference of the [children], if the court considers the [children] to be of sufficient age to express preference."¹³ The trial court met with the children and determined that they were not of sufficient age to express a preference and, therefore, did not consider this factor. Alex Moslimani argues, "It is [Alex Moslimani's] belief that the children did express a preference that the court did not like and, as such, the court disregarded same. This honorable panel should order that notes of the meeting with the children be provided to this court for review." Alex Moslimani's allegation is unfounded. He has presented no evidence in support of this allegation. The children were five and six years old when they met with the trial court.

Alex Moslimani cites *Bowers v Bowers* for the proposition that children ages six and nine are not too young to express their preferences as a matter of law.¹⁴ However, in *Bowers*, this Court explained that a trial court could give *some* weight to children's preferences at those ages.¹⁵ This Court went on to state that the trial court would have made an error if it had not

¹³ MCL 722.23(i).

¹⁴ *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991).

¹⁵ *Id.*

interviewed the children at that age.¹⁶ The difference here is that the trial court did interview the children and then determined that their preferences were not sufficient enough to be weighed. Overall, the trial court was not required to consider their preferences if, in its discretion as granted by the statute, it determined that the children were too young to express a preference.

7. FACTOR (j)

Factor (j) concerns “[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the [children] and the other parent or the [children] and the parents.”¹⁷ The trial court found that this factor “slightly favors” Nehya Moslimani. The trial court noted that both parties showed an inability to cooperate with each other. The trial court also noted that Alex Moslimani demonstrated “extreme hatred and contempt” for Nehya Moslimani through his demeanor on the stand, and during the pending divorce. Nehya Moslimani, however, made positive statements about Alex Moslimani at trial.

Alex Moslimani merely states that “it is unknown what evidence the court relied upon in favoring [Nehya Moslimani] on this factor.” The trial court clearly stated the evidence upon which it relied. Alex Moslimani’s argument is without merit.

8. FACTOR (k)

Factor (k) concerns domestic violence.¹⁸ Both parties testified, at length, that the other party was verbally and physically abusive during the marriage. The trial court concluded that Nehya Moslimani’s testimony was credible and that Alex Moslimani’s testimony was not credible on this subject and determined that Alex Moslimani verbally and physically abused Nehya Moslimani during the marriage. Accordingly, the trial court found that this factor favored Nehya Moslimani. The trial court relied upon the fact that Nehya Moslimani’s allegations of abuse were consistent with past allegations in prior complaints for divorce and personal protection order (PPO) applications. The trial court also relied on the parties’ demeanors at trial, as well as the fact that Alex Moslimani had previously denied that there was any abuse in the marriage.

Alex Moslimani primarily recites the testimony and evidence regarding accusations of abuse by both parties. He testified that he felt he was unable to make prior allegations of domestic violence because he felt that in his community—the Arab-American community—it would not be taken seriously and he would be ridiculed. The trial court acknowledged the cross-accusations of domestic violence. Further, it was the trial court’s responsibility to make a credibility determination. This Court will defer to the trial court’s findings based upon its

¹⁶ *Id.* at 56.

¹⁷ MCL 722.23(j).

¹⁸ MCL 722.23(k).

determination of the credibility of witnesses.¹⁹ Alex Moslimani has not presented any evidence that contradicts the trial court's findings. The trial court acknowledged that Alex Moslimani strenuously testified that he was not abusive and that Nehya Moslimani was. Nehya Moslimani testified to the opposite. The trial court was required to make a credibility determination on this issue. There is no basis to conclude that the trial court's determination was against the great weight of the evidence.

Alex Moslimani also argues that the trial court erroneously referred to Nehya Moslimani's PPO applications as evidence of abuse because the same trial court granted the applications, without a hearing. Alex Moslimani fails to understand that the trial court was relying upon Nehya Moslimani's consistent allegations, not on the fact that the PPO was granted.

In conclusion, the trial court's findings with respect to the statutory best interest factors were not against the great weight of the evidence. Moreover, almost all of Alex Moslimani's arguments on appeal merely dispute the trial court's assessment of the evidence presented, including the trial court's credibility determinations, not the legal foundation of the trial court's rulings. The trial court found that none of the factors favored Alex Moslimani. Thus, we conclude that there was clear and convincing evidence in support of the trial court's conclusion that Nehya Moslimani should have sole custody. Accordingly, the trial court did not abuse its discretion in making its custody determination.

III. EVIDENTIARY HEARING

A. STANDARD OF REVIEW

Alex Moslimani argues that the trial court erred when it declined to hold an evidentiary hearing on his post-trial motion to modify custody.

"This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue."²⁰

B. ANALYSIS

A new hearing on a custody determination requires a showing of proper cause or a change in circumstances, by a preponderance of the evidence.²¹ Alex Moslimani argues that the CPS investigator's report constituted proper cause for a new hearing on custody. The trial court concluded that there were no new facts to justify a new hearing, following a nine-day bench trial. As noted above, the CPS report revealed no evidence of abuse or neglect, and only the slightest

¹⁹ *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007).

²⁰ *Berger*, 277 Mich App at 705.

²¹ MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003).

evidence of inappropriate physical discipline sometime in the past. The injury that precipitated the investigation was a playground accident. The trial court concluded that Alex Moslimani had not satisfied the burden of proof required for a new custody hearing. There is no basis for concluding that this was erroneous.

IV. DIVISION OF MARITAL PROPERTY

A. STANDARD OF REVIEW

Alex Moslimani argues that the trial court made an inequitable division of marital property with respect to the parties' two pieces of real estate.

This Court reviews for clear error findings of fact by the trial court underlying the division of property and the existence of a valid agreement.²² A finding is clearly erroneous if the reviewing court is left with a firm and definite conviction that a mistake was made.²³ This Court must decide if the trial court's dispositional ruling was fair and equitable in light of the findings of facts.²⁴ This Court should affirm the trial court's ruling unless this Court is left with the firm conviction that it was inequitable.²⁵

B. LEGAL STANDARDS

The goal of the division of marital property is to reach an equitable distribution in light of all the circumstances.²⁶ An equitable distribution need not be a mathematically equal distribution.²⁷ Factors to be considered when making an equitable distribution of property are the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstances.²⁸

C. APPLYING THE STANDARDS

Alex Moslimani purchased the marital home less than one year prior to the parties' marriage (in 1998), paying \$21,136.73 and financing \$85,600. In 2002, the parties refinanced

²² *Johnson*, 276 Mich App at 10-11.

²³ *Id.*

²⁴ *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999).

²⁵ *Id.*

²⁶ *Berger*, 277 Mich App at 716-717.

²⁷ *Id.* at 717.

²⁸ *Berger*, 277 Mich App at 717; *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996).

the mortgage for \$148,000, using \$51,568.89 of this to pay off the mortgage on the parties' rental property. Further, Alex Moslimani took an additional \$30,549.87 of these funds. The marital home was appraised at \$119,000, and its mortgage balance is currently \$121,000.

Alex Moslimani purchased the rental property in 1995. During the marriage, the parties paid the expenses and mortgage payments for the property that exceeded the rental receipts, which amounted to \$35,537. The property is owned, free and clear, by Alex Moslimani.

The trial court awarded Alex Moslimani both homes. However, the trial court also noted that the equity taken from the marital home to pay off the mortgage on the rental property was marital property, subject to division. It further noted that the amount of equity Alex Moslimani removed from the property was greater than his original down payment. Finally, the trial court concluded that Alex Moslimani should pay Nehya Moslimani half the amount used to pay off the rental property mortgage, and half of the expenses paid on the rental property out of marital property, which totaled \$43,553.

Alex Moslimani's argument with respect to this division of property is difficult to understand. He attempts to argue that the trial court erred when it declined to consider the decline in value in rental property. On the contrary, the trial court noted that the remaining value in the rental property constitutes Alex Moslimani's separate property, comprising his original down payment plus the passive appreciation in value. Moreover, Alex Moslimani completely ignores the trial court's discussion of the expenses and mortgage payments paid out of marital assets on the rental property. He has raised no basis for concluding that the trial court's division of assets was inequitable.

Alex Moslimani next argues that trial court failed to consider the tax considerations when it required him to pay the \$43,553 out of his 401(k). Contrary to Alex Moslimani's characterization, the judgment states that he was only required to pay Nehya Moslimani out of his half of the 401(k), if he did not otherwise pay her within 90 days. Moreover, Alex Moslimani's citations to law on this issue are irrelevant to his argument. His one sentence argument on this issue is without merit.

Finally, Alex Moslimani argues that the trial court erred when it ordered him to maintain Nehya Moslimani as beneficiary on one of his life insurance policies. Again, Alex Moslimani mischaracterizes the trial court's order by omitting the fact that the arrangement is only throughout the children's period of minority. He characterized this as "security for future alimony and child support." No spousal support or child support was awarded in this case. Therefore, Alex Moslimani's argument is inapposite to the facts of this case.

We affirm.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood