STATE OF MICHIGAN

COURT OF APPEALS

BRITNEY CORBIN, Plaintiff-Appellant,	UNPUBLISHED October 13, 2016
v	No. 332049 Clare Circuit Court Family Division
BRENT BOULTON, Defendant-Appellee.	LC No. 2012-900062-DS

Before: RIORDAN, P.J., and METER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting defendant's motion to change custody, awarding defendant sole physical custody of the child, continuing the parties' joint legal custody, and granting parenting time to plaintiff. We affirm.

I. FACTUAL BACKGROUND

This appeal arises out of a motion to change custody filed by defendant in October 2015. An earlier order had awarded plaintiff sole physical custody of the child, while both parties shared joint legal custody. A hearing on defendant's motion was held before a Friend of the Court referee in November 2015. The referee recommended that the trial court grant defendant's motion and award sole physical custody to defendant, joint legal custody to both parties, and liberal parenting time to plaintiff. The referee's recommendation was adopted by the trial court.

Subsequently, plaintiff filed an objection to the referee's findings and recommendation. The trial court held a two-day *de novo* review hearing in January and February 2016. Ultimately, the trial court granted defendant's motion to change custody, finding that the child had an established custodial environment with defendant and that awarding sole physical custody to defendant and joint legal custody to both parties was in the child's best interests.

II. STANDARD OF REVIEW

This Court must affirm all child custody orders and judgments "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Pierron v Pierron* (*Pierron II*), 486 Mich 81, 85; 782 NW2d 480 (2010) (stating same). A trial court's findings of fact are

against the great weight of the evidence if "the evidence clearly preponderates in the opposite direction." *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). "The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. An abuse of discretion exists when 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." *Berger v Berger,* 277 Mich App 700, 705; 747 NW2d 336 (2008) (citation omitted). Questions of law are reviewed for clear legal error, which occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). When considering the evidence, "[w]e defer to the trial court's credibility determinations given its superior position to make these judgments." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff first argues that the trial court's finding that the child had an established custodial environment with defendant—contrary to the referee's previous finding that the child had an established custodial environment with both parties—was against the great weight of the evidence. In particular, she contends that the only proper finding based on the evidence presented was that the child had an established custodial environment with both parents. We disagree.

A party seeking to change a custody order must first establish that there is proper cause or a change in circumstances that justifies doing so. *Brausch v Brausch*, 283 Mich App 339, 354-355; 770 NW2d 77 (2009), citing MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). "[I]f the moving party succeeds in making this threshold showing, the court must then determine if the child has an established custodial environment with one parent or both." *Brausch*, 283 Mich App at 355 n 6. If an established custodial environment exists, the court may not modify a previous order and change the established custodial environment unless there is clear and convincing evidence that it is in the child's best interests. MCL 722.27(1)(c); see also *Pierron*, 486 Mich at 85-86 (stating same). But if the court finds that no established custodial environment exists, or if the proposed change would not change the established custodial environment, the trial court may change custody if the moving party proves by a preponderance of the evidence that the change is in the child's best interests. *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480, 487 (2010); *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001).

Pursuant to MCL 722.27(1)(c),

> [t]he custodial environment of a child is established 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Stated differently,

> [a]n 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 a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

An established custodial environment can exist in more than one home. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). Whether a prior custody order exists, or whether a party was previously granted custody, is irrelevant to determining whether there is an established custodial environment. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

The trial court found that the child had an established custodial environment with defendant. Although it did not explicitly find that an established custodial environment does not exist with plaintiff, the court implicitly did so by stating that "the mother has had infrequent and varied parenting time of short duration."

Much of the testimony that plaintiff identifies on appeal in support of her position was directly disputed by defendant. For example, while plaintiff testified that she was the child's primary caregiver, as evidenced by taking him to doctor appointments, being present during speech therapy sessions, and arranging an autism evaluation, defendant testified that he "was the one that was always there" for in-home therapy appointments, that plaintiff lied when she testified that he only participated in one rehabilitation session, and that the child was not well cared for while in plaintiff's care. The parties also provided different accounts regarding which parent took primary responsibility for the child's education and school enrollment.

Moreover, the parties provided contradictory testimony regarding their respective parenting time. While plaintiff testified that the parties began to exercise equal parenting time in May 2015 after she graduated from her nursing program, defendant testified that the first time that the parties participated in equal parenting time was in September 2015, immediately before he filed the motion to change custody, due to plaintiff's threats that she would "go to the Friend of the Court" and ensure that defendant only had weekend parenting time if the parties did not voluntarily alter their arrangement. Defendant testified that he filed the motion to change custody based on those threats. Plaintiff also testified that she cared for the child between two and four nights per week while she was in school after the parties separated in the winter of 2014, but defendant testified that she only saw the child between one and eight nights per month. Similarly, plaintiff stated that defendant only saw the child one or two days per month during a six-month period when he was working out of town, and that defendant left the child in his mother's care while he was away. To the contrary, defendant explained that he was away only two to three nights per week during that period, as he usually drove back and forth to his work site each day, and that plaintiff only exercised approximately five nights of parenting time per month during that time frame. In sum, defendant estimated that plaintiff only saw the child seven or eight nights per month in the two years before he filed the motion to change custody.

Accordingly, given the conflicting testimony, the trial court's determination regarding the existence of an established custodial environment depended on who the trial court found more

credible. Although the trial court did not explicitly state that it found defendant more credible, this finding is implicit in its conclusion that an established custodial environment existed with defendant. Again, "[w]e defer to the trial court's credibility determinations given its superior position to make these judgments." *Shann*, 293 Mich App at 305. Thus, the trial court's determination that the child had an established custodial environment with defendant, and implied determination that such an environment did not exist with plaintiff, was not against the great weight of the evidence. See MCL 722.28; *Pierron*, 486 Mich at 85.

Plaintiff also contends that the trial court erred by "choosing to apply the 'preponderance of the evidence' standard" when it considered the child's best interests because an established custodial environment existed with both parents. In actuality, the trial court's opinion did not specify which evidentiary standard it applied during its best-interest determination. However, it is clear from the trial court's summary of the law in its opinion that it was aware that defendant was required to prove, by clear and convincing evidence, that a change in custody was in the best interests of the child *if* an established custodial environment existed with plaintiff. Accordingly, given its conclusion that the child had an established custodial environment with defendant, the trial court properly applied the "preponderance of the evidence" standard. See *Pierron*, 486 Mich at 92-93; *Foskett*, 247 Mich App at 6-7.

IV. EXISTENCE OF A TEMPORARY CUSTODY AGREEMENT

Plaintiff argues that the court failed to acknowledge or enforce "the parties' temporary agreement to modify the custody and parenting time order," under which the parties allegedly agreed that plaintiff would "temporarily surrender much of her parenting time to [defendant's] mother during two difficult semesters" of nursing school and then the parties would resume "their previous practice of 50/50 parenting time" once plaintiff completed her nursing program. We disagree.

It is undisputed that the trial court initially awarded physical custody to plaintiff, and this order stood unchallenged for over three years. However, the order was entered while the parties were living together. The parties ultimately stopped residing together near the end of 2013, after which the child primarily resided at defendant's residence along with defendant's mother, with plaintiff exercising varying parenting time, depending on her schedule.

As plaintiff emphasizes in her brief on appeal, she provided testimony from which the court could conclude that the parties entered into a temporary parenting time agreement, which was scheduled to end when she completed the nursing program. However, defendant expressly disputed the existence of such an agreement. Further, contrary to plaintiff's claim on appeal that defendant implicitly "confirmed [the existence of this agreement] by his actions in that he voluntarily resumed the 50/50 schedule when [plaintiff] graduated in May," defendant testified that the parties did not begin an equal parenting time schedule until September 2015, immediately before he filed his motion to change custody, and that this change only occurred as a result of plaintiff's threats.

Given the clear factual dispute in the record, we must defer to the trial court's credibility determinations. See *Shann*, 293 Mich App at 305. Further, there is no direct evidence indicating that plaintiff voluntarily and temporarily *relinquished custody* in order to promote the child's

best interests. Compare, e.g., *Pluta v Pluta*, 165 Mich App 55, 57-78; 418 NW2d 400 (1987); *Theroux v Doerr*, 137 Mich App 147, 149-151; 357 NW2d 327 (1984). On this record, the trial court's failure to recognize the existence of a temporary custody agreement was not against the great weight of the evidence. See MCL 722.28; *Pierron*, 486 Mich at 85.[1]

V. BEST INTERESTS

Plaintiff also claims that the trial court erred in finding that a change in custody was in the child's best interests. We disagree.

When making a custody determination, the trial court must state its findings related to each of the statutory best-interest factors. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005). The trial court found that factors (b), (e), (f), (g), and (j) weighed in favor of neither party, and it either did not consider or found irrelevant factors (i), (k), and (*l*). Plaintiff challenges the trial court's conclusion that factors (a), (c), (d), and (h) weighed in defendant's favor.

As an initial matter, plaintiff contends that the trial court did not make any express credibility determinations and did not call her credibility into question, as demonstrated by the fact that it adopted some of her testimony in its factual findings. Based on this reasoning, she invites this Court to exclusively credit her testimony. Contrary to plaintiff's claims, given the factual disputes in this case, it is clear that the trial court made numerous credibility determinations, to which we defer on appeal. See *Shann*, 293 Mich App at 305. Further, "it is the province of the factfinder to weigh evidence and to believe or disbelieve any testimony." *Gorelick v Dep't of State Highways*, 127 Mich App 324, 333; 339 NW2d 635 (1983).

Regarding plaintiff's factor-specific claims, factor (a) considers the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The court found in defendant's favor on this factor, reasoning that he has been the child's primary caregiver for the past two years. Although there was no direct testimony regarding the extent of the ties between defendant and the child, it was reasonable for the court to infer that this factor weighed in favor of defendant given its explicit finding, and credibility determination, that defendant was the child's primary caregiver. Cf. *Berger*, 277 Mich App at 715 (recognizing that a trial court may make credibility determinations and draw reasonable inferences from the testimony). Thus, the evidence does not clearly preponderate against the trial court's finding on this factor. See *McIntosh*, 282 Mich App at 474.

Factor (c) considers "the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care, . . . and other material needs." MCL 722.23(c). The court found in defendant's favor on this factor, stating again that defendant

[1] Additionally, plaintiff fails to recognize that even though Michigan courts "will enforce temporary change-of-custody agreements, parties cannot conclusively agree regarding child custody." *Thompson v Thompson*, 261 Mich App 353, 359-360; 683 NW2d 250 (2004) (citations omitted).

had been the child's primary caregiver and that defendant has "provided for" the child during the two years that he has been in defendant's care.[2] Despite plaintiff's characterization of defendant's testimony, both parties' testimony confirmed that plaintiff and defendant have provided medical care for the child. Likewise, the record shows that both parents were capable and willing to provide for the child's needs. Thus, we conclude that the evidence clearly preponderates against the trial court's finding on this factor. See *McIntosh*, 282 Mich App at 474. Both parents contributed equally as to this factor.[3]

Factor (d) considers "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). With regard to this factor, the trial court found:

> The father prevails. The child has resided in the father's home since the parties separated in December 2013. The child may be on the autism spectrum, although his symptoms have been managed and improved while in his father's care. The father enrolled the child in preschool and he is doing very well. Stability and continuity are desirable with the father.

The testimony confirmed that the child has lived in a stable environment at the home of defendant and defendant's mother. Plaintiff does not contend that the environment has been unsafe or unsatisfactory and, in fact, expressly testified that "[the child is] in good care when he is there." She also confirmed that the child's autistic symptoms have been managed and improved since therapy was stopped in 2013, meaning that this improvement occurred while the child was primarily in defendant's care, and she expressly testified that defendant manages the child's symptoms. Therefore, the evidence did not clearly preponderate against the court's determination. See *McIntosh*, 282 Mich App at 474.

Factor (h) considers "the home, school, and community record of the child." MCL 722.23(h). The court found that this factor weighed in favor of defendant because "[t]he child was enrolled in preschool by the father and is doing very well. The court notes that the child is very young." Consistent with the trial court's findings, plaintiff confirmed that the child has been succeeding in school, stating, "He does very well. I think [his teacher] stated that he has scored highest in his entire class and [defendant] said that as well to[o] when they had the home visit." When considered in conjunction with the trial court's finding that defendant is the child's primary caregiver, the trial court's conclusion that this factor weighed in favor of defendant was not against the great weight of the evidence. See *McIntosh*, 282 Mich App at 474.

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[2] The trial court's finding regarding defendant's provision for the child appears to include a typographical error, but it is clear that the court intended to state that defendant "has provided for the [child] during the last two years."

[3] However, given the trial court's other findings, this does not affect our conclusion that the trial court properly determined that the change in custody was in the child's best interests.

Lastly, it is clear from the trial court's opinion that it gave significant weight to the fact that the child primarily resided with defendant after the parties separated, and that defendant was the child's primary caregiver during this time. Given these circumstances, and in light of the fact that the court "may consider the relative weight of the factors as appropriate to the circumstances," *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006), the trial court properly concluded that defendant had demonstrated, by a preponderance of the evidence, that a change in custody was in the child's best interests. Thus, the trial court did not abuse its discretion when it awarded defendant sole physical custody. See *Berger,* 277 Mich App at 705.

VI. ATTORNEY FEES

Lastly, plaintiff argues that the trial court erred when it refused to award her attorney fees after defendant's attorney failed to appear at the date and time set for the second day of the *de novo* hearing. We disagree.

A. STANDARD OF REVIEW

"We review a trial court's ruling on a request for attorney fees for an abuse of discretion. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008) (citations omitted).

B. ANALYSIS

"[A]ttorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "Requests for attorney fees in child custody disputes are governed by MCR 3.206(C)." *Diez v Davey*, 307 Mich App 366, 395; 861 NW2d 323 (2014).[4] MCR 3.206(C)(2) states, in relevant part, as follows:

> A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

[4] Plaintiff relies on MCR 2.119(E)(4)(b). However, MCR 2.001 provides, "The rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, *except* where the limited jurisdiction of a court makes a rule inherently inapplicable or *where a rule applicable to a specific court or a specific type of proceeding provides a different procedure*." (Emphasis added.) Further, defendant actually appeared at the hearing as scheduled. Only his attorney was absent.

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

However, there is a "common-law exception to the American rule that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Reed*, 265 Mich App at 164-165 (quotation marks and citation omitted). In order to fulfill the exception, "the attorney fees awarded must have been incurred because of misconduct." *Id*. at 165. "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007).

Plaintiff argues that it is inequitable to require her to incur extra attorney fees based on the failure of defendant's attorney to appear for a scheduled hearing, especially after the trial court stated on the record, earlier that day, that it would award attorney fees. However, even though the court initially determined that an award of attorney fees was appropriate, it reconsidered the matter after defendant's attorney arrived and explained the situation. In its written opinion, the trial court acknowledged that defendant's attorney was present when the hearing was scheduled at the end of the previous hearing, but the court ultimately found that it had not provided written notice confirming the hearing date and time to defendant's attorney, and that defendant's attorney "acted in good faith and made every effort to be present" for the hearing when it was recommenced later that day.

Consistent with the trial court's findings, the record does not show that defendant's attorney "refused" to comply with a court order, or that his actions were "unreasonable." See MCR 3.206(C)(2)(b); *Borowsky*, 273 Mich App at 687. Accordingly, the trial court's decision not to award attorney fees to plaintiff was not outside the range of reasonable and principled outcomes. See *Smith*, 278 Mich App at 207.[5]

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[5] Plaintiff also asserts that "the [t]rial [c]ourt refused to acknowledge the court rules despite the constitutional issues pursuant to MCR 3.215(G)(3)(b) - Interim Effect for Referee's Recommendation for an Order[.]" Other than quoting the court rule and quoting a portion of a hearing transcript (without any citation to the record), she provides no analysis of this argument. Thus, we deem this claim abandoned. See *River Investment Group, LLC v Casab*, 289 Mich App 353, 360; 797 NW2d 1 (2010); *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Nevertheless, even if we were to review this unpreserved issue, our review would be limited to plain error affecting substantial rights. See *Demski v Petlick*, 309 Mich App 404, 426-427; 873 NW2d 596 (2015). Given our conclusion that the interim and final orders properly granted defendant sole physical custody, there is no basis for concluding that plaintiff was prejudiced, even if the trial court did err. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010) (stating that a party is prejudiced when the error affects the outcome of the lower court proceedings). Further, this issue is moot, as there is no meaningful relief that this Court may provide given the fact that the order was an interim order, which has now been

VII. CONCLUSION

Plaintiff has failed to establish that any of her claims on appeal warrant relief.

Affirmed.

/s/ Michael J. Riordan
/s/ Patrick M. Meter
/s/ Donald S. Owens

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replaced by the final order appealed by plaintiff. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).