# STATE OF MICHIGAN

# COURT OF APPEALS

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| AMBER RENEE FARGO,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>December 20, 2016 |
| v | No. 332242<br>Washtenaw Circuit Court |
| ERNEST STEVEN FARGO, III,<br><br>Defendant-Appellee. | LC No. 14-001892-DM |

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Plaintiff Amber Fargo appeals as of right the judgment of divorce awarding defendant Ernest Fargo joint legal custody of their minor children.[1] For the reasons stated in this opinion, we vacate the joint legal custody award and remand for further proceedings consistent with this opinion.

## I. BASIC FACTS

The parties married in 2006 and had two children during the course of the marriage. Amber first filed for divorce in 2012, but later dropped the lawsuit and returned to the marital home after reconciling with Ernest. She filed for divorce again in August 2014. At Amber's request, the trial court entered an ex parte order awarding her temporary custody of the children and awarding Ernest supervised parenting time. Ernest objected to the ex parte order and filed a motion seeking joint legal and physical custody. The trial court entered an order awarding temporary joint physical and legal custody to both parties and referred the matter to the Friend of the Court. Relevant to this appeal, the Friend of the Court recommended that the parties be awarded joint legal custody, but that Amber be awarded sole physical custody. Eventually, the parties stipulated that Amber would receive temporary sole legal custody of the children, but that Ernest could argue in favor of joint legal custody in the future. At trial, Ernest argued that he should be awarded joint legal custody, and, following the presentation of proofs, the trial court awarded sole physical custody to Amber and joint legal custody to both parties. This appeal follows.

[1] For sake of clarity and ease of reference, we will refer to the parties by their first names.

## II. CHILD CUSTODY DECISION

### A. STANDARD OF REVIEW

Amber argues that the trial court erred in awarding the parties joint legal custody. "Under the Child Custody Act, MCL 722.21 *et seq*., 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.28. Under the great-weight-of-evidence standard, "a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderate[s] in the opposite direction." *Pierron*, 486 Mich at 85 (quotation marks and citation omitted; alteration in *Pierron*). "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." *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015) (quotation marks and citation omitted). "Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law." *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013) (quotation marks and citation omitted).

### B. ESTABLISHED CUSTODIAL ENVIRONMENT

Amber first argues that the trial court erred in awarding joint legal custody because it failed to find by clear and convincing evidence that the change to the children's established custodial environment was in the children's best interests. "Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding child custody." *Demski*, 309 Mich App at 445 (quotation marks and citation omitted). MCL 722.27(1)(c) provides in part:

> The 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.

Here, the trial court found that the children's established custodial environment was with their mother. MCL 722.27(1)(c) provides that a trial 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." (Emphasis added). Accordingly, the trial court was statutorily prohibited from issuing a "new order" changing the children's established custodial environment unless there was clear and convincing evidence that such a change was in the children's best interests. See MCL 722.27(1)(c); see also *Pierron*, 486 Mich at 86 (explaining that a trial "court may not 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") (quotation marks and citation omitted). Here, the trial court entered an order awarding joint legal custody to both parties; however, the court made no determination with regard to whether that change would also change the children's established custodial environment. We accordingly remand to the trial court to make such a

determination. If the court finds that an award of joint legal custody will change the established custodial environment, then it may only award joint legal custody after a finding by clear and convincing evidence that it is in the children's best interests for their father to have joint legal custody.

## C. ABILITY TO COOPERATE

Amber next argues that the trial court erred by failing to make specific findings on whether the parties would be able to cooperate on important decisions before it awarded joint legal custody. MCL 722.26a provides in relevant part:

> (1) In custody disputes between parents, the parents shall be advised of joint custody. *At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request.* In other cases joint custody may be considered by the court. *The court shall determine whether joint custody is in the best interest of the child by considering the following factors*:
>
> (a) The factors enumerated in [MCL 722.23].
>
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. [Emphasis added.]

Because Ernest sought joint legal custody, the trial court was required to consider awarding joint legal custody, was required to state its reasons for granting or denying joint legal custody on the record, and was required to consider the best-interest factors and "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1); *Lamkin v Engram*, 295 Mich App 701, 709; 815 NW2d 793 (2012) (" 'Shall' indicates a mandatory provision."). Although the trial court considered the best-interest factors, it failed to consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child" as required by MCL 722.26a(1)(b). Thus, the trial court committed clear legal error by misapplying MCL 722.26a(1). *Sturgis*, 302 Mich App at 710. On remand, the trial court must analyze the considerations outlined in MCL 722.26a(1) and rearticulate and explain its reasons for granting or denying the request for joint legal custody.

## D. BEST INTEREST FINDING

Amber also argues that the trial court's finding that factor (j) of the best-interest factors set forth in MCL 722.23 favored Ernest. When the trial court entered the judgment of divorce, MCL 722.23(j) provided: "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."[2] The record contains ample testimony regarding Amber's efforts to

[2] Factor (j) was subsequently amended by 2016 PA 95 and now provides:

interfere with the children and Ernest's relationship. Specifically, Ernest testified that Amber alienated him from his children, cut him off from the children, and had a plan to take the children to California. He further testified that he could work cooperatively with Amber but that he was worried about her lack of anger management skills. He also testified that baseless Child Protective Services allegations were made against him within days of Amber not getting her way in court hearings. Moreover, both Ernest and the children's paternal grandmother testified about the daughter's change in behavior. Therefore, on this record, we conclude that the trial court's factual determination regarding (j) does not clearly preponderate in the opposite direction. *Pierron*, 486 Mich at 85.[3]

## III. CONCLUSION

Although the trial court did not err in finding that MCL 722.23(j) weighed in favor of Ernest, the trial court clearly erred when it failed to make a determination with regard to whether the award of joint legal custody would change the children's established custodial environment as required by MCL 722.27(1)(c). The court also clearly erred when it failed to determine whether the parties would be able to cooperate and generally agree on important decisions involving the children's welfare as required by MCL 722.26a(1)(b). Accordingly, we vacate the award of joint legal custody and remand for further proceedings consistent with this opinion.

Vacated in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell

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> 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. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent. [MCL 722.23(j).]

However, "[g]enerally, statutory amendments are applied prospectively unless the Legislature expressly or impliedly identified its intention to give the amendment retrospective effect." *Ford Motor Co v Dep't of Treasury*, 313 Mich App 572, 586; 884 NW2d 587 (2015). Accordingly, we only consider the statutory language as it existed when the custody order was entered.

[3] Moreover, contrary to Amber's argument, the trial court did not fail discern how the parent's behavior affected the children. Instead, the trial court's statements merely indicated that both parents engaged in inappropriate behavior.