STATE OF MICHIGAN

COURT OF APPEALS

FRANCINE G. SOLOMON, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 250846 Wayne Circuit Court
BRUCE B. MOORE, Defendant-Appellant.	LC No. 91-153259-DS

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this child custody dispute, defendant appeals as of right from a circuit court order awarding plaintiff sole physical custody of the parties' four minor children. We affirm.

I

Beginning in the early 1990's, the parties, who never married, entered into a series of consent orders regarding the custody, support and parenting time of their children. In April 1999, the parties, who lived in Berkley, Michigan, entered a consent order that afforded them joint legal and physical custody of the children. Defendant was awarded physical custody of the four children from 5:30 p.m. Sundays through 5:30 p.m. Thursdays, and plaintiff was awarded physical custody of the children on Thursdays through Sundays.[1] The April 1999 order further provided that should defendant move to another state, he could have sole custody of the children during their school year.

In January 2001, the parties entered the most recent consent order of record, which provided, concerning the parties' custody periods, that defendant would have custody from 5:30 p.m. on Sundays through 5:30 p.m. on Thursdays. But the January 2001 order also contemplated that nonconflicting provisions of the parties' previous consent orders would remain effective.

[1] Although the consent order provided that the custody times would alternate every other year, the parties arranged that defendant consistently would maintain custody of the children from Sundays through Thursdays.

In August 2001, plaintiff filed a motion for a temporary restraining order (TRO) to prevent defendant's planned relocation to Hawaii with the children. The circuit court granted plaintiff's request pending a hearing on the motion, but the court later dissolved the TRO because it found that the parties' consent orders specifically had envisioned defendant's potential relocation to another state with the children.

In September 2001, plaintiff filed a motion to modify the children's custody arrangement, and in November 2001, defendant filed a motion to restrict plaintiff's parenting time with the children. In the summer of 2002, a referee conducted a hearing regarding the parties' motions, and prepared a recommendation.

Defendant objected to the referee's recommendation, and the circuit court held a custody hearing in July 2003. At the time of the custody hearing, the children had spent nearly two years living in Hawaii with defendant and his mother, while having summer and other occasional visits with plaintiff. The circuit court found that the parties' respective 2001 motions both had alleged changed circumstances that warranted revisitation of the children's custody arrangement, that the children had an established custodial environment in Michigan in the joint physical custody of the parties, and that its evaluation of the children's best interests required that it award plaintiff sole physical custody of the children.

II

Defendant first contends that the circuit court erred by holding the custody hearing without first determining whether proper cause or changed circumstances existed that supported a possible change in the children's custody arrangement. In a child custody dispute, "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." MCL 722.28. The court's factual findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id.*

The Michigan Legislature has provided that in "a child custody dispute . . . submitted to the circuit court as an original action," the court may amend or modify "its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . ." MCL 722.27(1)(c). The party who requests a custody modification bears "the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (emphasis in original), citing *Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996). This Court recently defined a "proper cause" as a ground "relevant to at least one of the twelve statutory best interest factors [contained in MCL 722.23], and . . . of such a magnitude [as] to have a significant effect on the child's well-being." *Vodvarka*, *supra* at 512. And, this Court described that for a party to establish a "change of circumstances," it "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." *Id.* at 513 (emphasis in original).

We reject defendant's suggestion that the circuit court improperly utilized evidence presented during the hearing, which never should have occurred, to bolster its finding that changed circumstances existed to warrant a revisitation of the parties' custody arrangement. The circuit court did not commit error requiring reversal when it delayed announcing its finding that changed circumstances existed until after the custody hearing had concluded.

With respect to plaintiff's allegations of changed circumstances, the circuit court made the following determination:

> [Plaintiff] alleges that there has been a change in circumstances because: (1) . . . defendant has violated the joint custody order by moving the children to Hawaii without telling her or discussing the move with her in advance; (2) . . . defendant has failed to inform her when the children were in Michigan so she could see them; (3) . . . defendant has refused to permit her to have contact with the children in Hawaii; (4) . . . defendant does not personally take care of the children and the children are primarily cared for by their grandmother; and (5) the children prefer to live with [plaintiff]. These allegation [sic] are sufficient to establish a change in circumstances sufficient to result in a change of custody.

The record reflects that by the time the custody hearing began, the circuit court was aware of the parties' specific allegations of changed circumstances. On September 11, 2001, shortly after the circuit court entered an order dissolving plaintiff's TRO prohibiting defendant's departure for Hawaii, plaintiff filed a motion for modification of custody and parenting time. Additionally, at the beginning of the custody hearing, plaintiff's counsel identified several allegedly changed circumstances on which plaintiff relied, specifically that defendant had violated the parties' joint custody order by arbitrarily taking the children to Hawaii, and that defendant subsequently inhibited plaintiff's parenting time and contact with the children. Thus, the existing record supports the circuit court's findings with respect to some of the changed circumstances alleged by plaintiff. Furthermore, defendant's relocation of the children to Hawaii, far from their mother in Michigan, in conjunction with his effort to curtail the children's communications with plaintiff, qualify as materially changed "conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being." *Vodvarka*, *supra* at 513.[2]

We conclude that the circuit court properly determined the existence of changed circumstances before launching into any analysis or consideration of the existence of an

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[2] The circuit court also had knowledge of several changed circumstances alleged by defendant that qualify as proper causes or changed circumstances according to *Vodvarka*, *supra* at 513. In November 2001, defendant filed a motion to restrict parenting time in which he argued the existence of the following changed circumstances: the abysmal condition of plaintiff's house, her neglect in leaving the children alone, her assault of defendant, her altercation with the police in the children's presence, her filing of false sexual abuse charges against defendant and Moore, and her infliction of "emotional abuse on the children during phone conversations," among others. The circuit court accurately summarized these allegations, and found them "sufficient to establish a change in circumstances."

established custodial environment and the children's best interests. Although the circuit court did not issue its findings regarding changed circumstances until the conclusion of the hearing, the court plainly was aware of the parties' various allegations of changed circumstances. The circuit court apparently and properly assumed the veracity of the parties' allegations, which did amount to changed circumstances, before it conducted the custody hearing. *Vodvarka*, *supra* at 512 (observing that a court need not conduct an evidentiary hearing to resolve the initial question whether changed circumstances exist, but instead the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard).

III

Defendant next argues that the circuit court offered incomplete findings and analysis concerning the parties' 1999 and 2001 consent orders, which rendered unsound the court's determination that defendant had illegally removed the children from Michigan to Hawaii. Resolution of this issue requires interpretation of the provisions of the parties' 1999 and 2001 consent orders, which this Court treats as contracts between the parties. *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). "'The primary goal in the construction or interpretation of any contract is to honor the intent of the parties'" as reflected within the contract language. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). When contract language appears clear and unambiguous, the interpretation of its meaning involves a question of law. *UAW-GM Human Resource Ctr*, *supra* at 491; *Massachusetts Indemnity*, *supra* at 268. In child custody matters, this Court reviews for clear legal error the circuit court's disposition of legal questions. MCL 722.28; *Vodvarka*, *supra* at 508.

On April 20, 1999, the circuit court entered a "Consent order modifying all prior orders regarding custody, support and visitation." Concerning custody of the children, the order provided as follows:

> IT IS FURTHER ORDERED that the parties have joint legal custody and joint physical custody of their four minor children . . . until the further order of the court.
>
> * * *
>
> IT IS FURTHER ORDERED that if defendant resides in the same state then the above named children will reside with defendant from Sunday at 5:30 p.m. to Thursday at 5:30 p.m. each week and reside with plaintiff from Thursday at 5:30 p.m. to Sunday at 5:30 p.m. on even numbered years, and reverse times on odd numbered years. If defendant resides outside the State of Michigan, the domicile of the children can be changed to that state and defendant will then have physical custody of said children for the entire school year with plaintiff having physical custody from 2 days after summer recess to 2 days before the school term commences with transportation costs to be equally divided.

The parties agreed to forego any entitlement to support, and the order contained additional provisions regarding uninsured medical expenses and the parties' entitlements to claim the children as income tax exemptions.

On January 22, 2001, the circuit court entered the "Second consent order modifying all prior orders regarding custody, support and visitation," which constitutes the most recent consent order of record that contains provisions concerning custody of the children. This order provides, in relevant part, the following:

> IT IS HEREBY ORDERED that all prior orders heretofore entered in the matter be modified as follows:
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> * * *
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> IT IS FURTHER ORDERED that all four children stay in defendant's custody from 5:30 p.m. Sunday to 5:30 p.m. Thursday each week, or until the further order of the court.
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> IT IS FURTHER ORDERED that all prior orders heretofore entered in this matter which provisions are not in conflict with provisions herein shall remain in full force and effect.

The only other, nonintroductory, paragraph of the order pertains to the parties' authority to claim particular children as tax exemptions.

The language of these orders appears clear and unambiguous. The first substantive sentence of the January 2001, order instructs that its provisions intend to modify all existing orders, a category that includes the April 1999, consent order. The parenting time paragraph of the January 2001, order, the same paragraph that previously had explicitly authorized defendant to have primary physical custody of the children should he move out of state in the April 1999 order, eliminated any reference to such authority. The paragraph instead briefly and plainly provides that defendant shall have physical custody of the children only "from 5:30 p.m. Sunday to 5:30 p.m. Thursday each week." The removal of the out-of-state relocation clause from the parenting time paragraph evidences the parties' intent to modify the April 1999 parenting time paragraph.

Defendant suggests that the last sentence of the January 2001, order, which contemplates the continued viability of "all prior orders . . . which provisions are not in conflict with provisions herein," intends to preserve his authority to relocate with the children outside Michigan. But defendant's argument ignores the clear and unambiguous modification of the parenting time provision by the January 2001, order. The clause of the January 2001, order providing for the continued viability of the April 1999 order envisions only the retention of prior provisions not in conflict with those of the January 2001, consent order. The parenting time paragraph in the January 2001, order unambiguously awards defendant physical custody of the children from 5:30 p.m. Sundays through 5:30 p.m. Thursdays. Because defendant's potential to have primary physical custody of the children in another state cannot be reconciled with his right as stated within the January 2001, order to have physical custody only four days each week, the last clause of the January 2001, order plainly precludes the enforceability of the previous and

conflicting authorization for defendant to move the children out of state. In light of the plain language of the parties' consent orders, we conclude that the circuit court did not commit clear legal error in interpreting the parties' January 2001 agreement as precluding defendant's relocation with the children to Hawaii.

Defendant also suggests that the circuit court failed to take into account that the court's prior order of September 2001 that had authorized defendant to relocate the children to Hawaii. On August 9, 2001, the circuit court entered an order granting plaintiff's petition for a TRO against defendant taking the children to Hawaii:

> IT IS HEREBY ORDERED that the Respondent, his agents, servants, employees, representatives or those acting in concert with him, be restrained and prohibited from removing the minor children of the parties from the State of Michigan.
>
> IT IS FURTHER ORDERED that as the parties have joint physical custody of the minor children of the parties, the Respondent is to relinquish physical possession of the minor children of the parties for Petitioner's regularly scheduled custody time commencing Thursday, August 9, 2001 . . . .

During the brief August 10, 2001, hearing, regarding plaintiff's motion, the court opined that the "prior orders dealing with the situation" expressly permitted defendant's move to Hawaii with the children. Accordingly, on September 6, 2001, the circuit court entered an "Order dismissing motion and terminating temporary restraining order," which provides as follows:

> IT IS HEREBY ORDERED that the motion for temporary restraining order to prevent respondent from leaving the state of Michigan with the minor children of the parties be dismissed and the Temporary Restraining Order dated 8/9/01 is set aside as of 8/10/01.[3]

The language of the September 6, 2001, order plainly reflects that, contrary to what defendant suggests, it did not purport to vest in him the right to take the children to Hawaii, or otherwise to modify the terms of the preexisting custody orders. By its terms, the order merely vacated the emergency TRO that plaintiff had secured in August 2001. Because the September 2001 order has no relevance to the question of the children's proper custody at the time that defendant relocated them to Hawaii, the circuit court did not err by failing to consider the September 2001 order when it analyzed the meanings of the April 1999 and January 2001 consent orders.[4]

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[3] The only subsequent orders that affected custody awarded plaintiff specific periods of parenting time.

[4] In support of the circuit court's finding that defendant knowingly and illegally relocated the children to Hawaii, it noted several facts of record, including that defendant gave plaintiff no notice when he left with the children and did not permit them to bid plaintiff farewell. To the extent that defendant challenges these findings as against the great weight of the evidence, we

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IV

Defendant further asserts that the circuit court mistakenly determined that the children had no established custodial environment in Hawaii in the care of defendant and his mother. According to MCL 722.27(1)(c), which sets forth standards governing whether a child lives in an established custodial environment:

> [t]he 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. 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.

"'In determining whether an established custodial environment exists, it makes no difference whether the environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed.'" *Heltzel v Heltzel*, 248 Mich App 1, 33 n 22; 638 NW2d 123 (2001), quoting *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

Abundant evidence supports the circuit court's finding that, through September 2001, the children had an established custodial environment in Michigan in the joint physical custody of both parents, who provided for their emotional, physical and educational needs and discipline. But because the existence of an established custodial environment may arise even under circumstances that constitute the violation of a court order, the circuit court incorrectly relied on its perceived illegality of defendant's relocation to Hawaii in support of its finding that the children had no established custodial environment there. *Heltzel*, *supra* at 33 n 22.

Nonetheless, ample evidence substantiates the circuit court's determination that neither the children nor plaintiff viewed as a permanent custody arrangement the children's residence in Hawaii with defendant and his mother. After entry of the September 6, 2001, order dismissing plaintiff's motion for a TRO, plaintiff filed a motion seeking the children's return to Michigan and her custody on September 11, 2001. While plaintiff's motion remained pending, she obtained several orders that permitted her specific periods of parenting time. All four children expressed to court-employed psychologist Charles Rooney their fondness of or preference for the cold weather, their brothers and a friend in Michigan, their Berkley school, and their dislike of the hot weather in Hawaii. Plaintiff testified that on several occasions "the children did ask me if they were coming home for good." The children also expressed to the circuit court their preference to live in plaintiff's Michigan home.

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reject this suggestion because the testimony of both plaintiff and defendant concurred that when defendant and the children began their trip to the coast in August 2001, defendant gave no notice of their departure, did not arrange for the children to say farewell to plaintiff, and only called plaintiff from the road after his and the children's departure.

As defendant argues, the circuit court did not expressly recognize his and his mother's efforts to satisfy the children's primary needs between September 2001 and the custody hearing, but the court did correctly find that plaintiff's and the children's views of the children's residence in Hawaii as a temporary arrangement weighed against a finding that the children had an established custodial environment in Hawaii with defendant and defendant's mother. *Vander Molen v Vander Molen*, 164 Mich App 448, 457-458; 418 NW2d 108 (1987) (explaining that to discern whether a child looks naturally to the custodian in a certain environment for discipline, guidance, life's necessities and parental comfort, a court needs to consider the conduct and attitudes of the parents and children). Furthermore, although the ultimate custody hearing on plaintiff's September 6, 2001, motion to change custody did not occur until nearly two years after she filed her motion, this Court has observed that the fact of a pending custody hearing may preclude a finding that the environment in which the children resided pending the hearing qualified as an established custodial environment. *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993) (finding no expectations of permanence in the child's placement because of the upcoming custody trial). Given the pending litigation in this case and the evidence that neither plaintiff nor the children viewed the children's residence in Hawaii as a permanent arrangement for their care, it appears that "at the time of trial there had been no 'appreciable time' (during which) the child[ren] naturally look(ed) to [their] father alone 'for guidance, discipline, the necessities of life and parental comfort' in a stable, settled atmosphere in order that an 'established custodial environment' within the meaning of [MCL 722.27(1)(c)] could exist." *Baker v Baker*, 411 Mich 567, 582; 309 NW2d 532 (1981). Consequently, we cannot conclude that the circuit court found against the clear weight of the evidence that the children did not have an established custodial environment in Hawaii. MCL 722.27(1)(c); MCL 722.28.

Even assuming that the circuit court mistakenly failed to recognize that the children had an established custodial environment in Hawaii, this error would qualify as harmless in this case. When children have an established custodial environment, before making a change in their custody arrangement a court must find by clear and convincing evidence that such a change would serve the children's best interests. MCL 722.27(1)(c). In this case, in which the circuit court ultimately modified the children's established custodial environment, the court expressly and repeatedly acknowledged that it had to find clear and convincing evidence to warrant a change in the children's custody arrangement, and manifestly evaluated the best interest factors under MCL 722.23 pursuant to the clear and convincing standard of proof.

Furthermore, defendant does not raise within his statement of questions presented a specific challenge to the circuit court's evaluation of the best interest factors, or the court's ultimate conclusion that clear and convincing evidence warranted an award to plaintiff of sole physical custody of the children. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000).[5] The circuit court's lengthy evaluation of facts concerning the

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[5] Within defendant's argument concerning his third issue, he asserts in one sentence that the circuit "court has further committed reversible error in the evaluation of the best interest factors." Because defendant offers no relevant facts or authority in support of this claim, he has abandoned appellate review of this proposition. *Lee v Robinson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 252476, issued March 25, 2004), slip op at 4; *Steward v Panek*, 251 Mich App
(continued…)

children's best interests reflects the court's awareness of the detailed testimony presented in this case. Without reanalyzing each best interest factor individually, we observe that in light of the following evidence, the circuit court did not find against the great weight of the evidence that best interest factors (a), (b), (d), (e), (i), (j) and (l) clearly and convincingly favored plaintiff, while the remaining factors favored neither party: (1) until 2001, plaintiff made herself available to care for the children's emotional and physical needs, and arranged for their educations and participation in extracurricular activities, which plaintiff frequently attended; (2) defendant worked two jobs in Hawaii, necessitating that his mother primarily provide for the children's care and custody there; (3) defendant sometimes struck the children to discipline them, took the children to church without consulting plaintiff, and falsely portrayed plaintiff as a neglectful mother; (4) plaintiff's house where the children resided in Michigan currently appears well-tended and is located near the children's school, friends and relatives, all of which the children missed in Hawaii; (5) the children have a close relationship with their half brothers, one of whom still lives with plaintiff and the other of whom lives near plaintiff; (6) the children, aged thirteen, nine and 6-1/2 years at the time of the custody hearing, all expressed that they "consider Michigan their home . . . miss their brothers, their friends and family here," and "strong[ly] desire to live in Michigan and to reside with [plaintiff] during the school year"; (7) defendant (a) in a somewhat devious manner, removed the children from Michigan in violation of the January 2001 consent order and without advising plaintiff of their imminent departure for Hawaii, (b) once in Hawaii, attempted to minimize plaintiff's telephone and email contacts and parenting time opportunities with the children, and (c) failed to share with plaintiff, who had joint legal custody of the children, many significant details of the children's lives in Hawaii; and (8) the young twins had only seven or eight opportunities to visit plaintiff during their approximate two-year stay in Hawaii. To the extent that the circuit court plainly credited plaintiff's testimony in various respects over that of defendant and his witnesses, this Court will not second-guess the court's credibility determinations. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

Because the record supports the circuit court's finding by clear and convincing evidence that the children's best interests required a change in the parties' joint physical custody arrangement, we cannot conclude that the court abused its discretion by ultimately awarding plaintiff sole physical custody of the children. *Vodvarka*, *supra* at 507-508.

V

Defendant additionally avers that the circuit court failed to consider his post-trial offer of newly discovered proof that the state had rejected plaintiff's appeal of the denial of her application for a day care license. We decline to consider this argument because defendant supplies no authority in support of his contention that at the post-trial stage of the proceedings, he had a fundamental right to introduce evidence in support of his position. *Lee v Robinson*, ___

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546, 558; 652 NW2d 232 (2002). Although defendant includes a second sentence arguing that the court "is to be restricted to evaluation of facts that have occurred since the entry of the prior court order," defendant does not present authority for the proposition that a court may not consider past case history in determining the best interests of the children pursuant to MCL 722.23. *Lee*, *supra*, slip op at 4.

Mich App ___; ___ NW2d ___ (Docket No. 252476, issued March 25, 2004), slip op at 4. Defendant also entirely fails to even suggest that the circuit court's refusal to consider his proffered evidence somehow prejudiced him.[6] MCR 2.613(A); MRE 103(a).

VI

Defendant next suggests that the circuit court exceeded the scope of a permissible in camera interview of the children, and improperly relied in its ruling on the impermissible information it obtained during the in camera interview. Whether the circuit court exceeded judicially crafted restrictions on the in camera interview of a child in a custody dispute constitutes a question of law, which this Court considers de novo. *Bloomfield Twp v Oakland Co Clerk*, 253 Mich App 1, 18; 654 NW2d 610 (2002).

In child custody disputes, the circuit court conducts in camera interviews of children old enough to express custody preferences. MCL 722.23(i); *Molloy v Molloy*, 247 Mich App 348, 357; 637 NW2d 803 (2001), affirmed in part, vacated in part 466 Mich 852 (2002).

> This Court has held that "a child's in camera interview during custody proceedings must be limited to a reasonable inquiry into the child's parental preferences," because "when the in camera interview is used for fact finding it invites numerous due process problems." *Molloy*[, *supra* at 351.] But, "the interview should not take place in a vacuum," and "inquiry must be made in order to test the authenticity, the motives, and the consistency of the preference. Often a good interview will result in information that affects other child custody factors." *Id*. at 353. [*Thompson v Thompson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 250504, issued March 23, 2004), slip op at 7.]

During an August 1, 2001, hearing on defendant's motion to amend the circuit court's findings and conclusions, the court disclosed the following information in the course of describing its reasoning for denying defendant's motion:

> [T]here's no question in my mind that [plaintiff] would still prevail for all the reasons I set forth under the individual child custody factors. She prevailed in almost all of them, and the evidence was clearly on her side. It was clear that [defendant] undertook a clear course of conduct to alienate [plaintiff] and her children permanently. [Defendant] hits the children, for only minor and normal mistakes of children. [Defendant] works two jobs and is rarely home, and leaves his mother to care for the needs of these children. *The children are very unhappy in his custody and want to be with their mother and two other brothers. And while this Court did not previously disclose all the things the children said, and I'm not going to disclose all of them now, they did tell me other things, including the fact that when their [sic] and his girlfriend took them on a camping trip,*

[6] The circuit court's lengthy analysis did not take into account the fact that plaintiff's day care license application may or may not have been denied.

> *[defendant] and his girlfriend had sex in the tent with the children in the tent with him*. I mean, his conduct is not good with these children. [Emphasis added.]

A review of this transcript excerpt reveals that, contrary to defendant's suggestion on appeal, the circuit court did not explicitly state that it had learned, during the in camera interview, of defendant's striking of the children and the fact that defendant worked two jobs and often left the children in his mother's care. During plaintiff's custody hearing testimony, she suggested that defendant sometimes hit the children, and the record contained ample evidence that defendant's mother primarily cared for the children while defendant worked two jobs.[7]

The children's expressions of unhappiness in defendant's custody and their desire to live with plaintiff and their brothers in Michigan constitute precisely the type of custody preference that the in camera interview intends to elicit. The only remaining information that the court learned during the in camera interview concerned defendant's act of sexual intercourse with his girlfriend while inside a tent that contained the children. The information arguably has little bearing on the children's parental preference under MCL 722.23(i). But in light of the fact that the circuit court did not rely on or hint that it used the information, regarding defendant having sexual intercourse with his girlfriend while the children were in the tent, within its custody ruling, including its findings regarding the parties' moral fitness, we fail to recognize what prejudice defendant suffered from the court's possession of this knowledge. Because defendant fails to explain with specificity what prejudice this information may have occasioned, we conclude that any impropriety during the court's in camera interview qualifies as harmless. MCR 2.613(A); *Thompson*, *supra*, slip op at 7.

We disagree with defendant's further suggestion that the circuit court improperly imported into its evaluation of best interest factors (d) and (e) the information it learned during the in camera interview of the children. Within the circuit court's analysis of factor (d), the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," the court noted that the children all preferred to live in Berkley because they enjoyed the cold weather in Michigan and disliked the heat and their lack of friends in Hawaii. The custody hearing transcript reflects that Rooney testified to all these facts, which he observed during his evaluation of the children. Therefore, it does not appear that the circuit court conducted secret in camera questioning of the children that it then utilized in evaluating factors beyond the children's preferences. Furthermore, the children's feelings or impressions regarding their competing places of residence in Berkley and Hawaii plainly appear relevant to the question whether they had a stable or satisfactory environment in either location.[8] MRE 401.

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[7] Even assuming that the circuit court gleaned this information from in camera interviews with the children, inquiries regarding the children's care and discipline while in defendant's custody appear appropriately "intended to encourage the children to open up about their parental preference, and to [elicit] a descriptive response to give the trial court a more specific indication of the parental preference of the children." *Thompson*, *supra*, slip op at 7.

[8] Defendant cites no authority in support of the notion that a court evaluating the best interest factors may not consider evidence of record that has some relevance to the children's preferences
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With respect to factor (e), the "permanence, as a family unit, of the existing or proposed custodial home or homes," the circuit court mentioned that the children appeared "close to [their half brother] Dane," said that they "missed their brothers and wanted to be able to see them more often," and expressed that "they missed not seeing their cousins and attending family functions." A review of the custody hearing record shows that (1) plaintiff testified that the children (a) had half brothers in Berkley that they treated as full siblings, and (b) enjoyed regular holiday gatherings with their extended maternal family members; (2) Rooney testified regarding the oldest child's statements that he had spent a lot of time with the children's half brother; and (3) Rooney's written report, which the court admitted into evidence, opined that "[a]ll four boys seem to be missing their friends and familiar habitat in Michigan." Therefore, once again, there appears no danger that the circuit court conducted secret in camera questioning of the children that it then employed to address factors beyond the children's preferences. Furthermore, the nature of the children's relationships with their half siblings and maternal relatives plainly had relevance to the permanence of the proposed family unit in Berkley. MRE 401.

Lastly, we decline to consider defendant's suggestion that the circuit court was biased against him. Defendant at no time raised before the circuit court a challenge to its impartiality, and therefore has waived appellate review of this issue. MCR 2.003(A), (C); *Evans & Luptak v Obolensky*, 194 Mich App 708, 715; 487 NW2d 521 (1992). Furthermore, defendant neglects to set forth any allegation regarding the circuit court's possession of an actual, personal and extrajudicial bias against him or his counsel, but merely relies on the court's ultimate findings of fact and legal conclusions in plaintiff's favor, which rulings alone generally do not support the existence of judicial bias. *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

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when analyzing best interest factors other than factor (i). *Lee*, *supra*, slip op at 4. Defendant cites only *Malloy*, *supra* at 348, which addressed information regarding the children's preferences that the court obtained during an in camera interview.