STATE OF MICHIGAN

COURT OF APPEALS

MELANIE ROWE, Plaintiff-Appellant,	UNPUBLISHED June 16, 2015
v	No. 324874 Wayne Circuit Court Family Division
THOMAS WALLER, Defendant-Appellee.	LC No. 08-155070-DS

Before: STEPHENS, P.J., and BORRELLO and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals as of right an order establishing the elementary school that the parties' child will attend, modifying the parties' parenting time, and referring the issue of child support to the Friend of the Court for an investigation and recommendation. We vacate the order and remand the case to the trial court for a new best interest hearing.

This case arises from a dispute between plaintiff and defendant regarding the elementary school of their son, TW. The parties had joint legal and physical custody of TW. The parties had a parenting time arrangement in which defendant had parenting time every other weekend and on alternating Wednesdays during the school year. The parties had alternating weeks of parenting time during the summer and split parenting time during holidays.

Plaintiff argues that the trial court's findings of fact with regard to whether the change in schools and modification in parenting time would change the established custodial environment were against the great weight of the evidence, the trial court erred when it analyzed the best interests factors under a preponderance of the evidence standard, and the trial court's decision to change the established custodial environment was an abuse of discretion. We disagree. Plaintiff also argues that the trial court erred when it failed to consider the reasonable preferences of the child. We agree.

An issue is preserved for appellate review when it is raised, addressed, and decided in the trial court. *Henderson v Dep't of Treasury*, 307 Mich App 1, 7-8; 858 NW2d 733 (2014). Plaintiff's attorney raised the issue of the proper standard for determining best interests when he argued at the hearing on plaintiff's objection to the order that the court used the wrong standard at the hearing on best interests. Plaintiff brought a motion for rehearing or reconsideration in the trial court, in which she argued that the trial court erred in using the preponderance of the

evidence standard to determine whether the change was in the best interests of the child because the court altered the established custodial environment. The trial court entered an order denying the motion for reconsideration. However, the trial court never addressed the issues on the record. Therefore, the issues regarding whether the trial court changed the established custodial environment and analyzed the best interests of the child under the proper standard are unpreserved for appellate review. See *id*. Plaintiff did not raise the issue whether the trial court improperly failed to consider the reasonable preferences of the child either at the hearing or in her motion for rehearing. Thus, this issue is also unpreserved. See *id.* However, this Court may review the issues because they constitute questions of law that can be decided based on the facts presented in the case. *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009) (stating that this Court may review an unpreserved question of law that can be decided based on the facts presented in the case).

" 'Orders concerning parenting time must be affirmed on appeal unless the trial court's findings 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.' " *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010) (citation omitted). "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Id*. at 21. The trial court abuses its discretion if its 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.' " *Id*. (citation omitted). The trial court clearly errs if it errs in the choice, interpretation, or application of the law. *Id*. This Court reviews de novo issues of law. *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013).

I. ESTABLISHED CUSTODIAL ENVIRONMENT

Parties who share joint legal custody of a child share the authority to make important decisions that affect the welfare of the child. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (*Pierron II*). When the parties cannot agree on an important decision, such as a change in school, the trial court will resolve the issue. *Id*. The trial court must hold an evidentiary hearing and consider the best-interest factors from MCL 722.23. *Pierron v Pierron*, 282 Mich App 222, 247; 765 NW2d 345 (2009) (*Pierron I*), aff'd 486 Mich 81 (2010). The trial court must first determine whether the proposed change in schools would modify the established custodial environment. *Pierron II*, 486 Mich at 85. "The established custodial environment is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.' " *Id*. at 85-86, quoting MCL 722.27(1)(c). An established custodial environment can exist in more than one home. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007).

A modification in parenting time does not automatically give rise to a change in the established custodial environment. *Pierron II*, 486 Mich at 86. Instead, the established custodial environment changes if the modification in parenting time changes the person "whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort." *Id*. When this is the case, the trial court may only modify parenting time if there is clear and convincing evidence that the modification in parenting time is the best interests of the child. *Id*. at 86. In addition, when a modification in parenting time does not amount to a change in

custody, then the trial court does not need to make a finding on all of the best-interest factors, and only needs to make findings of fact on the contested factors. *Shade*, 291 Mich App at 32. Similarly, if a change in schools does not change in the established custodial environment, then the proponent of the change in schools must prove by a preponderance of the evidence that the change is in the best interests of the child based on the best-interests factors in MCL 722.23. *Pierron II*, 486 Mich at 89-90. The trial court must make a factual finding with regard to whether each best-interest factor is applicable in the case. *Id*. at 91. However, the court does not need to make additional findings of fact with regard to irrelevant best-interest factors and can state on the record that the factor is inapplicable. *Id*.

The trial court properly ruled that there was an established custodial environment with both plaintiff and defendant. The trial court properly determined that TW looks to both parents for guidance, discipline, the necessities of life, and parental comfort. Plaintiff testified that TW has a strong relationship with defendant and a very strong relationship with plaintiff. There was also testimony that plaintiff and defendant both provide TW with guidance, and that defendant provides for TW and paid child support. Defendant testified that TW naturally looks to him for the necessities of life and parental comfort. Defendant also believed that TW looks to plaintiff for guidance and discipline. Defendant has a close bond with TW. However, defendant acknowledged that plaintiff also had a good relationship with TW. Defendant disciplines TW by taking electronics away, by taking his allowance away, and by giving him more chores to do. Defendant believed that he had a very strong bond with TW and that his bond with TW was the same as plaintiff's bond with TW. Defendant believed that plaintiff has TW's best interests at heart. This evidence was sufficient for the trial court to find that there is an established custodial environment with both parents because TW looks to both parents for guidance, discipline, the necessities of life, and parental comfort. See *Pierron II*, 486 Mich at 85-86.

The trial court did not abuse its discretion when it ruled that there was no change to the established custodial environment, and its decision was not against the great weight of the evidence. The trial court did not explicitly state that there was no change in the established custodial environment. However, the court ruled that the modification in parenting time would not change the established custodial environment with both parents when the court noted that it could modify parenting time if the modification does not change the established custodial environment and then proceeded to modify parenting time. The court ruled that the change in schools would not modify the established custodial environment with each parent when the court stated that there was an established custodial environment with each parent and analyzed whether the change was in TW's best interests by a preponderance of the evidence.

There was ample evidence presented at the hearing that there was an established custodial environment with defendant in spite of the fact that he only had parenting time on alternate weekends and alternate Wednesdays during the school year. Plaintiff testified that TW has a strong relationship with defendant and that defendant provides TW with guidance. Defendant provides for TW and paid child support. Defendant testified that TW naturally looks to him for the necessities of life, guidance, and parental comfort. Defendant believed that he had a very strong bond with TW and that his bond with TW was the same as plaintiff's bond with TW. There was also evidence that there was an established custodial environment with plaintiff that would not change because of a modification in parenting time. Plaintiff testified that TW has a very strong relationship with her and that she provides TW with guidance. Defendant also

believed that TW looks to plaintiff for guidance and discipline. Defendant acknowledged that plaintiff has a good relationship and a very strong bond with TW. The trial court essentially switched the parenting time arrangement during the school week so that plaintiff would exercise parenting time on alternating weekends and alternate Wednesday overnight visits. The fact that the trial court modified parenting time did not automatically change the established custodial environment. See *Pierron II*, 486 Mich at 86. Plaintiff fails to show why TW will no longer look to her for guidance, discipline, necessities, and parental comfort. Instead, the facts presented at the hearing indicate that TW had an established custodial environment with both parents under the former parenting time arrangement and will continue to have an established custodial environment with both parents even though TW will attend a new school and the parenting time schedule was switched. See *id*.

Plaintiff cites several specific facts from the hearing to support her argument. Plaintiff points out that she takes TW to the doctors and the dentist and that defendant rarely does so. However, defendant testified that he rarely took TW to the doctors and to the dentist because his parenting time was on the weekends. Plaintiff also points out that she was more involved with TW's school because she volunteered at the school and attended parent-teacher conferences. She argues that she enrolled TW in extracurricular activities and that defendant only attended one football game and practice. She also argues that TW was tired at school when he went to school after spending the weekend with defendant, but fails to show how this fact relates to a change in the established custodial environment. Defendant explained that he calls the school regarding parent-teacher conferences and other meetings. Defendant explained that he also talks with TW's teacher at least twice a month because he always sees the teacher or the principal when he picks TW up from school. In addition, plaintiff testified that she or her parents would be able to take TW to school and pick him up from school every day if TW attended the school defendant wished for him to attend, which indicates that she will be able to stay involved in his life even though defendant has parenting time during the week.

Plaintiff also argues in her brief on appeal that defendant had a prior live-in girlfriend. However, there was no evidence presented at the evidentiary hearing regarding defendant's prior girlfriend, and defendant testified that he had lived with his current girlfriend for 2 ½ years before the hearing. See *Pierron I*, 282 Mich App at 247. Plaintiff also argues that defendant had TW retrieve alcohol from the refrigerator for him. Plaintiff fails to explain how this fact contributed to whether there was a change in the established custodial environment. See *Pierron II*, 486 Mich at 86. Therefore, the trial court's determination that there is no change to the established custodial environment was not against the great weight of the evidence and did not constitute an abuse of discretion. See *Shade*, 291 Mich App at 20-21.

II. BEST INTERESTS OF THE CHILD

The trial court also did not err in applying the preponderance of the evidence standard with regard to its best-interest determination. If a change in schools or modification in parenting time does not change the established custodial environment, then the proponent of the change in schools or modification in parenting time must prove by a preponderance of the evidence that the change is in the best interests of the child. *Pierron II*, 486 Mich at 86, 89-90. As discussed above, the trial court did not err when it determined that there is no change in the established custodial environment. Therefore, the trial court used the correct standard in determining

whether the change in schools and modification of parenting time was in the best interests of the child. See *id*.

However, the trial court erred when it failed to consider the reasonable preferences of the child under MCL 722.23(i). MCL 722.23(i) provides that "the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference" is a best-interest factor for the court to consider. This Court has held in the context of a change in custody that " '[o]ne of the . . . factors a trial judge must consider in a custody dispute is the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.' " *Kubicki v Sharpe*, 306 Mich App 525, 545; 858 NW2d 57 (2014) (citation omitted). In *Pierron II*, the Michigan Supreme Court held that the trial court erred when it failed to consider the reasonable preferences of the children even though neither child had attended school in the proposed school district. *Pierron II*, 486 Mich at 92. The Court noted that the children did not need to have actual, firsthand experience with the school in order for their preferences to be considered. *Id*. The Court stated that an analysis on the issue "does not 'require that a child's preference be accompanied by detailed thought or critical analysis.' " *Id*. (citation omitted). Instead, the Court held that a child's preferences will be excluded if they are " 'arbitrary or inherently indefensible.' " *Id*. (citation omitted). A child who is nine years old is able to express a preference in a custody dispute. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991).

The trial court discussed the applicability of each best-interest factor with regard to the change in schools. With regard to MCL 722.23(i), the court stated, "The Court has not heard, has not taken testimony of the child regarding preferences, inasmuch as [TW] has not ever attended the Fisher or the Loon Elementary School in the past. And thus, he would not be able to articulate a preference." TW was nine years old at the time of the hearing.

The trial court erred when it failed to consider TW's reasonable preferences. It is not clear what TW's preference would have been or whether the preference would have been reasonable since the court did not interview TW. TW was old enough to express a preference on the issue since he was nine years old at the time of the hearing. See *Bowers*, 190 Mich App at 55-56. Although TW had not attended either school district at the time of the hearing, TW's preferences on the issue would not have been arbitrary or inherently indefensible solely because he has not attended the schools. See *Pierron II*, 486 Mich at 92; *Pierron I*, 282 Mich App at 259. There is no other indication that TW's preferences on the issue would have been arbitrary or inherently indefensible. See *id*. Therefore, the trial court erred when it failed to interview TW and consider his reasonable preferences with regard to which school he would prefer to attend. See *id*. Remand is necessary for the trial court to interview TW and consider his reasonable preferences in a new best-interest hearing. See *id*; *Kubicki*, 306 Mich App at 544-545 (holding that the trial court's error in failing to consider the reasonable preference of the child in a best-interest hearing required remand for a new best-interest hearing and vacating the trial court's opinion and order). On remand, the trial court should consider up-to-date information. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

Vacated and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Michael F. Gadola