STATE OF MICHIGAN

COURT OF APPEALS

DAVID MCGRAW, Plaintiff-Appellee,	UNPUBLISHED June 21, 2016
v	No. 328994 Oakland Circuit Court
HEIDI MCGRAW, Defendant-Appellant.	LC No. 2014-822828-DC

Before: M. J. KELLY, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion and order modifying custody and parenting time, and granting plaintiff physical custody of the parties' minor child. We affirm the court's custody and parenting-time order, but remand for consideration of defendant's request for attorney fees.

Plaintiff and defendant were married in Ohio in 1994, had their son in 1999, and got divorced in Pennsylvania in 2006. Pursuant to an agreement between the parties, the Pennsylvania court entered an order granting the parties joint legal and physical custody of the child, with primary physical custody to defendant, and setting a parenting-time schedule for plaintiff. At the time, defendant had relocated to Texas and plaintiff lived in Michigan.

The child lived with defendant in Texas until September 2013, when he moved to Michigan to live with plaintiff. Although the parties disagree regarding how long they initially intended for the child to remain in Michigan, they agree that he moved to Michigan for the 2013-2014 school year to avoid bullying at his school in Texas. According to plaintiff, at the end of that school year, the child expressed an interest in staying in Michigan to attend high school the following year. When defendant demanded the child's return to her care, plaintiff filed a petition to modify custody and parenting time.

The court took jurisdiction of the custody matter under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). Following an evidentiary hearing, the court entered an opinion and order awarding joint legal custody, granting physical custody to plaintiff, and adopting the Friend of the Court (FOC) recommendation for parenting time—if the parties failed to agree to a mutually beneficial schedule.

On appeal, defendant first argues that the court erred by failing to award specific parenting time, as requested by both parties, and that, by basing its parenting-time determination on the pleadings and FOC recommendation alone, the court failed to analyze whether the parenting-time schedule was of a frequency, type, and duration to be in the child's best interests. We disagree.

"Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008). 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). This Court must defer to the credibility determinations made by the trial court. *Id*. at 474-475. "An abuse of discretion with regard to a custody issue occurs '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.' " *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012), quoting *Berger*, 277 Mich App at 705. Finally, "[t]he clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

SPECIFIC PARENTING TIME

Pursuant to MCL 722.27a(7), "[p]arenting time shall be granted in specific terms if requested by either party at any time." A motion for specific parenting time need not be in writing if made orally at a hearing or trial. *Pickering v Pickering*, 268 Mich App 1, 6-7; 706 NW2d 835 (2005).

For a parenting-time schedule to be "specific," it should be " '[e]xplicitly set forth; particular; definite.' " *Id*. at 6, quoting *American Heritage Dictionary, Second College Edition* (1982) (alteration in original). Thus, a parenting-time order may contain terms regarding division of the cost of transportation, restrictions on the presence of third persons, and other conditions and requirements. MCL 722.27a(8). A trial court errs, as a matter of law, by failing or refusing to consider ordering a specific parenting-time schedule when properly requested by a party. *Pickering*, 268 Mich App at 7.

In her trial brief and opening statement at the custody hearing, defendant requested that the court enter a parenting-time order in accordance with the parties' divorce decree and original custody order. Then, when asked on direct examination what type of parenting-time schedule she would like the court to order, defendant replied: "I just want to go back to what it was." Further, in her written closing argument, defendant requested the court to award plaintiff "parenting time consistent with their prior divorce decree, including a requirement that each party know the exact whereabouts and contact information for the child and the other party during vacations, and except that the remaining weeks Summer of 2015, after Defendant's ordered six weeks, shall be awarded to Plaintiff[.]" On the other hand, plaintiff requested that the court adopt the FOC recommendation for parenting time. Moreover, in plaintiff counsel's opening statement, she said: "An analysis of the best-interest factors under MCR [sic] 722.23, as well as MCR [sic] 722.26a and 722.27a, will show that it's in [the child's] best interest to remain

here in Michigan with his father to finish out high school with specific parenting time to his mother."

Assuming the oral and written requests made by plaintiff and defendant regarding parenting time amounted to requests for specific parenting time, the court would have clearly erred, as a matter of law, if it had only ordered that the parties arrange a mutually beneficial parenting-time schedule. However, the court ordered that, if the parties could not agree to a parenting-time schedule, it would adopt the schedule previously recommended by the FOC. The parenting-time schedule recommended by the FOC divides holidays, school breaks, and summer breaks between the parties. Thus, the court did not err by failing to award a specific parenting-time schedule, because the schedule recommended by the FOC was "particular" and "definite."

FOC RECOMMENDATION AND FREQUENCY, TYPE, AND DURATION OF PARENTING TIME

"The child's best interests govern a court's decision regarding parenting time." *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010). Further, "parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). The best-interest factors in MCL 722.23, as well as the parenting-time factors listed in MCL 722.27a(6), are relevant to a court's parenting-time determination. *Shade*, 291 Mich App at 31-32. However, consideration of the parenting-time factors is discretionary. MCL 722.27a(6).

An FOC report and recommendation should not be admitted as evidence unless both parties agree to its admission, but "the report may be considered by the trial court as an aid to understanding the issues to be resolved." *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989); see also *Stringer v Vincent*, 161 Mich App 429, 433; 411 NW2d 474 (1987). Under MCR 3.210(C)(6), when an FOC report has been submitted, "the court must give the parties an opportunity to review the report and to file objections before a decision is entered." Defendant did file an objection to the FOC recommendation pursuant to MCR 3.210, alleging that it contained a number of factual and legal inaccuracies and requesting the court to reject the recommendation. It does not appear the court admitted the FOC recommendation into evidence, although it did take judicial notice of the recommendation without objection from defendant. But, contrary to defendant's claim, the court did not base its parenting-time decision on the pleadings and FOC recommendation alone. Although the court adopted the FOC recommendation for parenting time—if the parties failed to agree to a schedule—it conducted an evidentiary hearing and issued an opinion and order with its findings of fact on each of the best-interest factors, as well as its conclusions of law.

From the findings of fact in its opinion and order, it appears that the court did analyze the frequency, type, and duration of parenting time when it adopted the FOC recommendation for parenting time—if the parties failed to agree to a schedule. Because of the geographical distance between plaintiff and defendant, the court's custody decision would largely determine the parenting-time schedule. The court discussed each of the custodial best-interest factors, and without explicitly stating it was doing so, considered some of the parenting-time factors listed at MCL 722.27a(6). For example, the court noted that "despite the geographical distance, both parties were able to maintain continual parenting time – whether he resided in Michigan or in

Texas – with [the child]." See MCL 722.27a(6)(g) ("Whether a parent has frequently failed to exercise reasonable parenting time."); see also MCL 722.27a(6)(f) ("Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order."). Further, the court considered each party's willingness to facilitate a relationship between the child and the other party, and expressed "concerns about Defendant's ability to foster and encourage a relationship with Plaintiff." As a result of the geographical realities in this case and the child's age, it is difficult to imagine a parenting-time schedule much different from that offered in the FOC recommendation. Further, defendant provides no authority that a court must conduct separate analyses of the best-interest factors when making both a custody and parenting-time determination. And because the court did not simply adopt the FOC recommendation, the alleged legal and factual inaccuracies in the FOC recommendation are not of consequence. The court made its own factual findings and legal conclusions.

Next, defendant argues that the court erred by failing to conduct a best-interest analysis in the context of which school the child should attend under *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993). We disagree.

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. "The clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick* 273 Mich App at 323.

Parties who have joint legal custody of a child must agree on "important decisions affecting the welfare of the child." *Lombardo*, 202 Mich App at 159. "However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child." *Pierron v Pierron* (*Pierron II*), 486 Mich 81, 85; 782 NW2d 480 (2010), citing *Lombardo*, 202 Mich App at 159. If a proposed change of schools would modify an established custodial environment, the proponent of the change must prove by clear and convincing evidence that the change would be in the child's best interests. *Pierron II*, 486 Mich at 92-93. If a proposed school district change would not alter an established custodial environment, the proponent of the change need only show that it is in the child's best interests by a preponderance of the evidence. *Id*. at 93. "[U]nder those circumstances, although the trial court must determine whether each of the best-interest factors applies, if a factor does not apply, the trial court need not address it any further." *Id*.

First, this case is distinguishable from *Lombardo* and *Pierron II*. *Lombardo* involved a motion to enroll a child in a program for gifted and talented children. *Lombardo*, 202 Mich App at 152-153. In *Pierron II*, the parties both lived in Grosse Pointe Woods until the defendant relocated to Howell. *Pierron II*, 486 Mich at 84. The plaintiff objected to the defendant's decision to enroll their children in Howell schools. *Id*. The parties shared legal custody, but the children's primary residence was with the defendant. *Id*. In this case, although the court's custody decision largely involved consideration of how the child did in both his Texas and Michigan schools, the hearing was about custody broadly, not just which school district he should attend.

Second, as set forth in *Pierron II*, here, the court considered each of the best-interest factors in MCL 722.23, and concluded by clear and convincing evidence that the child should remain in Michigan with plaintiff. This decision necessarily determined which school district the child should attend, and it is clear that the court considered the child's school performance in both his Michigan and Texas schools when making this determination. For example, the court found that, "[a]side from the bullying [the child] suffered in the Texas school, [the child] has thrived both academically and athletically in both Michigan and Texas schools," and that it was hesitant to remove him from "a situation where he is clearly thriving, and place him into an 'unknown' school situation." Further, the court considered that the child suffered health problems as a result of bullying in Texas, but the problems subsided in Michigan.

And, third, defendant fails to assert how a separate best-interest analysis to determine whether the child should attend school in Texas or in Michigan would have changed the court's determination that he should remain in Michigan with plaintiff. Although she argues that, if the court had conducted a *Lombardo* analysis, the evidence supported her school choice, the court had the evidence when it made its custody and parenting-time determination.

Defendant next argues that the court erred by concluding an established custodial environment existed with plaintiff. We disagree. The existence of an established custodial environment "is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Berger*, 277 Mich App at 706. "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id*.

A court must determine whether an established custodial environment exists before making its best-interest determination. *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015). It cannot modify a previous order or issue a new order that would change an established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). "An 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.

Established custodial environments may exist with both parents, and "[a] custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Berger*, 277 Mich App at 707. However, "[w]here there are repeated changes in physical custody and there is uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

Defendant asserts that an established custodial environment could not have existed with plaintiff because both the child and plaintiff knew his move to Michigan was temporary, and "[f]or the past year, [the child] has lived in limbo." However, the court's finding that an established custodial environment existed with plaintiff was not against the great weight of the evidence. The record supports the court's determination that the child's relationship with plaintiff was of a significant duration, and that he looked to plaintiff for love and guidance.

At the time of trial, the child had lived primarily with plaintiff in Michigan for two years. Although for a portion of that time, he lived with plaintiff under a temporary custody order pending a custody hearing, the child's time with plaintiff has not been marked by repeated changes in physical custody. Further, plaintiff testified that he has a good relationship with the child, and that the child comes to him for advice and guidance. Plaintiff helped the child choose his courses for tenth grade, and has spoken with him about which college he might like to attend and what he will need to do to get there. Also, plaintiff is involved with the child's lacrosse team, and helped him through a difficult time when the child was cut from basketball team tryouts. In addition, plaintiff exercised parenting time consistently with the child throughout the time he lived primarily with defendant. From this testimony, it was not against the great weight of the evidence for the court to conclude that an established custodial environment existed.

Next, defendant argues that the court's factual findings regarding the best-interest factors were against the great weight of the evidence. We disagree.

A court's findings of fact related to each of the best-interest factors are subject to the great weight of the evidence standard. *McIntosh*, 282 Mich App at 475. A trial court's findings of fact are against the great weight of the evidence if "the evidence clearly preponderates in the opposite direction." *Id*. at 474. This Court must defer to the credibility determinations made by the trial court. *Id*. at 474-475.

Child custody is governed by the Child Custody Act, MCL 722.21 *et seq*. *Berger*, 277 Mich App at 705. A court's decision regarding custody should reflect the best interests of the child involved. *Id*. "[A] trial court may modify a custody award only if the moving party first establishes proper cause or a change of circumstances." *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). When the moving party has met this burden, the trial court must determine whether an established custodial environment exists. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). The court cannot modify a previous order or issue a new order that would change an established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c).

Once these threshold determinations have been made, the court must weigh the best-interest factors to make a custody determination. When making a custody determination, the court must state findings of fact and conclusions for each factor, but need not include its consideration of every piece of evidence. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007) (citation omitted). Further, the court may give greater weight to some factors over others when making its determination. *Berger*, 277 Mich App at 712. MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) 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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

In its opinion and order, the court determined that a change in circumstances existed to justify a modification of custody and that established custodial environments existed with both parties. Thus, it would need to find by clear and convincing evidence that a modification of the custody order would be in the child's best interests. Then, the trial court analyzed each of the custodial best-interest factors, and weighed factors (a), (b), (c), (e), (f), (g), and (h) in favor of both parties; factors (d) and (j) in plaintiff's favor; and factor (k) in favor of neither party. Under factor (i), the court indicated it interviewed the child, and considered his preference in making its final determination. For factor (l), the court determined that no other factors needed to be weighed in making its custody determination. On appeal, although unclear from her brief, defendant appears to challenge the court's factual findings regarding factors (a), (b), (d), (e), (h), (j), and (l).

MCL 722.23(a)

Factor (a) involves "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court weighed factor (a) in favor of both parties, and found that the child had clear emotional ties with both plaintiff and defendant. Further, the court found that both parties maintained continual parenting time with defendant despite their geographical distance. It is not clear whether defendant challenges the court's findings under factor (a). Although defendant admits the child's bond with plaintiff, she asserts that she was his primary caregiver for most of his life.

The record supports the trial court's findings regarding factor (a). At the custody hearing, plaintiff testified regarding his relationship with the child. He and the child spend a lot of time together, and the child looks to plaintiff for advice and guidance. Plaintiff helped him choose his courses for tenth grade, and helped him through a difficult time when he was cut from basketball tryouts. Stacy McGraw, plaintiff's wife, also testified that plaintiff exhibits compassion towards the child and provides decision-making support. In addition, plaintiff and defendant both exercised parenting time with the child in accordance with the former parenting time schedule. Although defendant testified that plaintiff failed to adhere to the parenting time she was granted by the court's temporary order, she was exercising parenting time with the child at the time of the hearing. Therefore, the court's findings for factor (a) were not against the great weight of the evidence.

MCL 722.23(b)

Under factor (b), the court considers "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court determined that factor (b) favored both parties, finding that they each could and did provide the child with satisfactory homes. The court also recognized that defendant has a strong bond with the child, and that aside from the bullying, he thrived at his schools in both Michigan and Texas. In her brief on appeal, defendant seemingly argues that the court should have weighed this factor in her favor because, for the majority of the child's life, she provided all of his school and health care needs, while defendant took a "hands off approach."

The record supports the court's finding that both parties possessed the capacity and disposition required by factor (b). Plaintiff testified that the child did well academically in both Texas and Michigan. Although defendant said his grades were lower in Michigan than Texas, this Court defers to the trial court's credibility determinations. *Kessler v Kessler*, 295 Mich App 54, 64; 811 NW2d 39 (2011). Plaintiff also helped the child select his tenth grade courses, and talked with him about colleges he would like to attend and what he needs to do to get there. All of these facts support the court's conclusion that plaintiff, along with defendant, has the capacity to give the child love, affection, and guidance, and to continue his education. Thus, the court's findings for factor (b) were not against the great weight of the evidence.

MCL 722.23(d)

Factor (d) involves "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court weighed this factor in plaintiff's favor. It found that both parties provided the child with appropriate and comfortable homes, but was "hesitant to remove [the child] from a situation where he is clearly thriving, and place him into an 'unknown' school situation." Defendant asserts: "The Friend of the Court would have this Court believe that [the child] has finally found stability while living with his father in South Lyon. Such is not the case – he always had stability with Ms. McGraw."

The FOC's opinion is not at issue here because the court determined that defendant's home was stable, as was plaintiff's. Defendant's argument ignores the court's explicit finding that she, like plaintiff, provided the child with an appropriate and comfortable home. Further, the court's findings were not against the great weight of the evidence. Plaintiff testified that he and Stacy provide the child with stability, and that he supplies the child with medical insurance, clothes, and school supplies. The child performed well academically at both his schools in Texas and Michigan. In addition, the child participated in sports and made friends in both Texas and Michigan. Thus, the record supports the court's findings under factor (d).

MCL 722.23(e)

Under factor (e), the court must consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The court weighed factor (e) in favor of both parties, finding that each provided permanence in their homes, "[e]ven though Defendant lived in to Ohio for about ten months . . . ." Defendant appears to claim that plaintiff's home could not be considered permanent because the child was only supposed to stay with plaintiff temporarily.

The record supports the court's findings under factor (e). At the hearing, defendant testified that she made it clear to both the child and plaintiff that he would only be living in Michigan on a temporary basis, while plaintiff testified that he told defendant they should reconsider custody at the end of the first year if the child was doing well in Michigan and wanted to stay. Again, we defer to the trial court's credibility determinations. *Kessler*, 295 Mich App at 64. Further, the record supports the court's determination that plaintiff's home was permanent for the child. Not only had he been living primarily with plaintiff for two years at the time of trial, but plaintiff also exercised parenting time with him under the parties' original custody order. In fact, defendant testified that the child spent entire summers with plaintiff for the five years before he moved to Michigan. Therefore, the court's findings under MCL 722.23(e) were not against the great weight of the evidence.

MCL 722.23(h)

For factor (h), the court must consider "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court weighed factor (h) in favor of both parties, finding that the child's school record in Texas was both good and bad, and that he did well "academically, athletically, and socially" in Michigan. On appeal, defendant asserts: "[T]he Friend of the Court

would have this Court believe that [the child] has finally found stability while living with his father in South Lyon." Again, the FOC's findings for factor (h) are not of consequence here. The court made its own findings under factor (h). Further, the record supports the court's findings. Testimony by both parties shows that the child was bullied at his school in Texas, and that his grades and attendance suffered as a result. Although defendant testified that the child's grades were better in Texas, before he was bullied, than they are in Michigan, evidence showed that he made the honor roll in ninth grade and had far fewer absences in Michigan. Therefore, the court's findings under factor (h) were not against the great weight of the evidence.

MCL 722.23(j)

Factor (j) involves "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The court weighed factor (j) in plaintiff's favor, finding that both plaintiff and defendant are very good parents who worked together to remove the child from a bad situation, but that the parties' relationship has deteriorated. It stated that defendant accused plaintiff of kidnapping the child, but plaintiff testified that he did not think it was in the child's best interests to return to defendant's care when she had lost her job in Texas and temporarily moved to Ohio. Further, the court noted that plaintiff still encourages a bond between the child and defendant, but defendant "does not seem to share Plaintiff's level of encouragement." It cited both defendant's testimony that if the child was bullied in Texas again, she would not return him to Michigan, and the troubling e-mails she sent to the child. On appeal, defendant asserts that she encouraged parenting time with plaintiff, but plaintiff withheld the child from her contrary to a court order and he refused her calls and e-mails.

Beyond the fact that defendant provides no record citations for her factual claims under this or any other factor, for the conflicts in testimony between plaintiff and defendant, we defer to the trial court's credibility determinations. See *Kessler*, 295 Mich App at 64. The court made it clear, at the hearing, that it would not relitigate old issues regarding defendant's kidnapping claims. Further, the record supports the court's findings. Defendant testified that she would not consider returning the child to Michigan if he returned to her care and something happened at his school in Texas. The court also admitted apparently distasteful e-mails from defendant to the child in August 2014 when it came to light that he was enrolled in ninth grade in Michigan. Thus, the court's findings under factor (j) were not against the great weight of the evidence.

MCL 722.23(l)

Factor (l) allows the trial court to discuss "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The trial court concluded that no other factor needed to be weighed or discussed to make its custody determination. Defendant appears to argue that the court should have considered plaintiff's conduct to keep the child in Michigan under factor (l). She states: "[W]e cannot emphasize enough how the trial court's interim order has rewarded bad faith conduct tantamount to kidnapping and taken this child out of an amazing school district." However, the court indicated at the evidentiary hearing that it would not "relitigate the issue that took place last August 2014," regarding the circumstances that led to the child remaining in Michigan another year. Further, "[w]e defer to the trial court's credibility determinations, and 'the trial court has discretion to accord differing weight to the

best-interest factors.' " *Kessler*, 295 Mich App at 64, quoting *Berger*, 277 Mich App at 705. Thus, the court's findings under factor (l) were not against the great weight of the evidence.

Finally, defendant argues that the trial court should have awarded her attorney fees and costs because of her inability to pay as set forth in MCR 3.206(C). Although defendant claims in her appellate brief that the trial court did not rule on her "motion for attorney fees based on income differential under MCR 3.203 [sic]," defendant filed no such motion. On June 10, 2015, defendant did file a motion seeking attorney fees under MCR 3.206(C), and plaintiff opposed the motion. On June 17, 2015, the trial court entered an order denying the motion "for reasons stated on the record." Defendant, however, has not provided this court with a transcript of that hearing contrary to MCR 7.210(B). See also *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 414; 425 NW2d 797 (1988). And the trial court's order also provided: "Defendant may bring another motion if she so chooses[,]" but defendant did not file another motion. And she did not appeal the trial court's June 17, 2015 order.

However, defendant did request attorney fees in her trial brief and in her written closing argument. In *Smith v Smith*, 278 Mich App 198, 207 n 3; 748 NW2d 258 (2008), this Court determined that a request for attorney fees in a written closing argument following an evidentiary hearing is a proper request for attorney fees under MCL 3.206(C). Thus, defendant raised the issue in the trial court. Although the court failed to address and decide defendant's request for attorney fees, a party should not be punished where it properly raised an issue, but the trial court failed to rule. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Therefore, defendant preserved this issue for appellate review.

"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). MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (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.

Because the trial court failed to address defendant's request for attorney fees, the issue must be remanded to the trial court for consideration.

We affirm the trial court's modification of custody and parenting time, but remand for consideration of defendant's request for attorney fees. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly