STATE OF MICHIGAN

COURT OF APPEALS

TRACY CURTIS BRICKEY,

Plaintiff-Appellant,

v

BRANDY LYNN BRICKEY,

Defendant-Appellee.

UNPUBLISHED
May 20, 2021

No. 355116
Lenawee Circuit Court
Family Division
LC No. 18-044900-DM

Before: BOONSTRA, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant sole legal custody of the minor child, JB, and granting the parties joint physical custody. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties were married in 2005. JB was born during the marriage. JB has special needs, including attention deficit hyperactivity disorder, oppositional defiance disorder, and mild cognitive impairment. In 2018, plaintiff filed a complaint for divorce that sought joint legal and physical custody of JB. Defendant answered and agreed to joint legal custody, but requested sole physical custody. The trial court entered an order at the outset of the litigation granting the parties equal parenting time pending the determination of custody. In September 2018, defendant alleged that plaintiff entered her residence without her permission and refused to leave, and also took and used her cellular phone without her permission to send photographs and text messages to people. Defendant obtained a personal protection order as a result of this incident, and plaintiff was also criminally charged, ultimately pleading guilty to unauthorized access of a computer (i.e., defendant's cellular phone). On October 30, 2019, a consent judgment of divorce was entered that left unresolved the issues of custody and parenting time. Custody hearings were held over four dates from December 2019 to July 2020. By the time of the custody hearings, defendant was living in Southgate, while plaintiff continued residing in the former marital home in Adrian. A central dispute between the parties was whether JB would continue to attend Madison High School (Madison) in Adrian, as plaintiff wanted, or instead transfer to Southgate Anderson High School

(Southgate Anderson), as defendant wanted. At the conclusion of the custody hearings, the trial court determined that JB's established custodial environment was with defendant alone. The trial court then analyzed the best-interest factors set forth in MCL 722.23 and granted sole legal custody of JB to defendant, with the parties having joint physical custody. The trial court ordered that defendant was to have most of the parenting time during the school year, with JB transferring to Southgate Anderson. Plaintiff was to have the bulk of the parenting time during the summer.

This appeal followed.

II. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff argues that the trial court erred by finding that JB's established custodial environment (ECE) was with defendant alone. Although we conclude that an ECE existed with both parents, to the extent the trial court made the finding that an ECE did not exist with plaintiff, we find the error to be harmless.

"Because the existence of a custodial environment is a factual inquiry, the great weight of the evidence standard applies." *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). Under this standard, we will affirm the trial court's findings unless the evidence clearly preponderates in the opposite direction. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). We accord deference to the trial court's superior fact-finding ability and to its credibility determinations. *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008).

MCL 722.27(1)(c) provides, in relevant part:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

This Court has described an established custodial environment as

> 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. [*Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015) (quotation marks, brackets, and citation omitted).]

"An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Id.* at 446 (quotation marks and citation omitted).

In determining the existence of an established custodial environment, "the focus is on the care of the child during the period preceding the custody trial." *Kubicki v Sharpe*, 306 Mich App 525, 540; 858 NW2d 57 (2014). "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. "The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian." *Id*. at 706-707.

"[A] trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). Therefore, although the trial court in this case was making an initial custody determination following the parties' divorce, it was still required to determine whether an ECE existed with one, both, or neither of the parties before issuing a custody order. See *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). If a trial court finds that an ECE exists, it may not issue a custody order that changes the ECE without clear and convincing evidence that it is in the best interest of the child. MCL 722.27(1)(c); *Mogle*, 241 Mich at 197. However, because this was an initial custody determination, neither party was required to show proper cause or change in circumstances to warrant reconsideration of a previous custody decision. *Thompson v Thompson*, 261 Mich App 353, 361-362; 683 NW2d 250 (2004).

The trial court did not explicitly state that it found that an ECE existed with defendant and not with plaintiff, instead saying that "the established custodial environment weighs in favor of" defendant. The trial court then noted that it had considered the parties' testimony at the custody hearings and its *in camera* interview with JB, and that defendant had historically been much more involved in caring for JB than plaintiff. Our review of the record shows that, although defendant was historically the more involved parent, plaintiff became significantly more involved in parenting JT starting in 2016. Further, the parties exercised equal parenting time under a temporary order entered at the outset of this case, with each parent being responsible for school days as well as weekend days. The testimony of both parties revealed that plaintiff was involved in JT's education and extracurricular activities and, although the parties disputed its appropriateness, had provided discipline and guidance to JT for the past several years. To the extent the trial court found that an ECE existed with defendant alone, this finding was against the great weight of the evidence. *Sinicropi*, 273 Mich App at 155. However, any such error was harmless; as discussed later in this opinion, we find that clear and convincing evidence supported the trial court's best-interest determination and ultimate custody decision.

III. BURDEN OF PROOF

Plaintiff also argues that the trial court committed clear legal error when it failed to properly allocate the burden of proof in making its custody determination. We disagree. "In the child custody context, questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014).

Plaintiff's argument is in large part premised on his contention that the trial court erred by failing to find that an ECE existed with both parties and did not explicitly state who bore the burden of proof and the standard of review; but although the trial court did not explicitly state which party had the burden of proof or what evidentiary standard applied, the record does not show any clear error in that regard.

Again, a trial court's custody order that changes an ECE of a child must be supported by clear and convincing evidence that the change is in the child's best interests. *Kessler*, 295 Mich App at 61. "[I]f the trial court determines that an established custodial environment exists with either plaintiff or defendant or both parties, the party seeking to change that established custodial environment must demonstrate that the change is in the best interests of the children by clear and convincing evidence." *Id.* at 62-63. Here, because defendant had requested primary physical custody of JT, she bore the burden of showing that such a change was in JT's best interests by clear and convincing evidence. See *id.*

As discussed later in this opinion, the trial court made detailed factual findings regarding the best-interest factors, and found that several factors favored defendant; these findings are not against the great weight of the evidence. Further, and unlike the trial court in *Kessler*, there is no record evidence that the trial court merely applied a preponderance of the evidence standard or incorrectly allocated the burden of proof. *Kessler*, 295 Mich App at 59. Although the trial court did not explicitly state that the clear and convincing evidence standard applied to defendant's request for sole physical custody, the trial court is presumed to know and understand the applicable law. *In re Archer*, 277 Mich App at 84; *In re Costs & Attorney Fees*, 250 Mich App at 101. The trial court's failure to *mention* the burden of proof being applied or who bore the burden of proof does not by itself establish that the trial court failed to properly *apply* the burden of proof requirements. *Kubicki*, 306 Mich App at 540-541 (a trial court's omission in failing to state findings was harmless error). Plaintiff has not established clear error on this issue.

IV. CUSTODY DETERMINATION

Plaintiff also argues that the trial court's findings on several of the best interest factors of MCL 722.23 were erroneous and led to the trial court's erroneous decision to grant defendant sole physical custody of JB. We disagree.

"Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear [legal] error." *Kubicki*, 306 Mich App at 538. Under the great weight of the evidence standard, we affirm the trial court's findings unless the evidence clearly preponderates in the opposite direction. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). The trial court's credibility determinations are accorded deference. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). We review for an abuse of discretion a trial court's discretionary rulings, including the ultimate determination of custody. *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014). "An abuse of discretion, for purposes of a child custody determination, exists when the result 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.*

MCL 722.23 sets forth twelve factors to be reviewed by the trial court in analyzing the best interests of the child in the context of a custody dispute. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Generally, the trial court must explicitly state its findings regarding each of the best interest factors. *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007). But the trial court is not required to comment on every piece of evidence entered and every argument raised by the parties. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452;

705 NW2d 144 (2005). "The trial court need not necessarily engage in elaborate or ornate discussion because brief, definite, and pertinent findings and conclusions regarding the contested matters are sufficient." *Foskett*, 247 Mich App at 12. "[T]he record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *MacIntyre*, 267 Mich App at 452; see also *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994).

Plaintiff argues that the trial court failed to articulate sufficient factual findings regarding several of the best interest factors. We disagree. Although the trial court's findings were brief, the court addressed each factor, and the record is sufficient to review whether the findings are contrary to the great weight of the evidence.

Plaintiff challenges the trial court's findings regarding the majority of the best-interest factors; we will address each challenged factor in turn.

Factor (b) is the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue the education and raising of the child in his religion or creed, if any. MCL 722.23(b). The trial court found the parties to be equal regarding this factor. Plaintiff argues that he should be favored because he takes JB to church whereas defendant does not, and because defendant wants to change JB's school. We disagree. The evidence does not clearly preponderate against finding that both parties are disposed to give JB love, affection, and guidance. Whether a party attends church is not itself dispositive with respect to whether the party should prevail under factor (b), although a pertinent inquiry is whether a party instills a solid religious foundation in the child. See *Carson v Carson*, 156 Mich App 291, 297-298; 401 NW2d 632 (1986). Defendant's testimony about plaintiff's abuse of her and use of excessive corporal punishment on JB, as well as her testimony that plaintiff was, for the most part, not involved in addressing JB's educational needs, suggest that defendant was, if anything, more of a source of love, affection, and guidance in JB's life. Defendant's testimony reflects that she provides love, affection, and guidance to JB. Defendant has taken a parenting class to learn how to parent a child with JB's special needs, whereas plaintiff did not do so, preferring to rely on corporal punishment, which a behavioral specialist testified is not effective with a child having JB's special needs. See *Harper v Harper*, 199 Mich App 409, 414-415; 502 NW2d 731 (1993) (considering the parties' disciplinary techniques under factor (b)). The trial court's finding that the parties are equal regarding this factor is thus not against the great weight of the evidence. *Mitchell*, 296 Mich App at 519.

Factor (d) is the 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 noted that JB lived with both parties during the marriage, and "it was possibly stable and satisfactory, but since the parties separated, it's—we're unable to continue that." Plaintiff argues that, to the extent the trial court meant to find the parties equal or to favor defendant, the court's finding was against the great weight of the evidence. We disagree. It appears from the trial court's comments that it treated the parties as equal on this factor, given that the court did not state that either party was favored. Plaintiff contends that defendant's home environment is not stable or satisfactory because she smokes cigarettes and has family members who have abused drugs and committed crimes, including a sister who had recently broken into defendant's home; however, these family members do not live with her and JB. The trial court's custody order prohibits JB from being left alone with defendant's father. Defendant testified that she had decreased by 50% her daily usage of cigarettes

by the time of the custody hearings. Plaintiff cites no authority for the proposition that either the conduct of a party's family members who do not live with her or a party's use of cigarettes precludes a finding that the party has a stable and satisfactory home environment. The evidence does not clearly preponderate against a finding that the parties were equal with respect to this factor. *Mitchell*, 296 Mich App at 519.

Factor (e) is "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court stated that plaintiff's daughter from a prior relationship, OB, is graduating from high school and will not be in plaintiff's "home much longer, assuming she'll go off to college. So I do find that permanence would be available with either home." The reasonable implication from the trial court's phrasing is that it found this factor to weigh equally between the parties. Plaintiff argues that this factor should favor him because, while JB does not have a sibling in defendant's home, JB is bonded to OB, who is interested in continuing to live in plaintiff's home while attending Siena Heights University in Adrian. We disagree. Defendant testified that JB and OB were not particularly close. Further, although plaintiff testified that OB was considering attending Siena Heights University while continuing to live with plaintiff, he also testified that OB was considering other colleges as well. It was therefore uncertain whether OB would remain in plaintiff's household while attending college. Overall, the evidence does not clearly preponderate in the opposite direction of the finding that permanence would be available with either home and that the parties were therefore equal with respect to this factor. *Mitchell*, 296 Mich App at 519.

Factor (f) is the moral fitness of the parties. MCL 722.23(f). The trial court stated that "both parties are morally fit, although I do find that the [p]laintiff in this matter has been convicted of a felony and is currently on circuit court probation for an offense where [defendant] is the victim." Plaintiff argues that the trial court erred in finding either that the parties were equal or that defendant was favored on this factor. We disagree. Plaintiff argues that, early in this litigation, defendant damaged his bedroom door, stole items from his bedroom, and made a false police report of domestic violence when plaintiff threw mail into defendant's vehicle. Plaintiff also notes that defendant had sexual relations with a recently released felon in her apartment while JB was in his bedroom in the apartment. Plaintiff raises concerns over defendant's alleged use of alcohol and prescribed opiates. Plaintiff also argues that his felony conviction for illegally accessing defendant's cellular telephone does not reflect his morality.

A party's "questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*." *Fletcher*, 447 Mich at 887. Plaintiff discusses what he considers to be questionable conduct on the part of defendant but does not adequately explain how he thinks this conduct has a significant influence on how defendant will function as a parent. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position." *Seifeddine v Jaber*, 327 Mich App 514, 519-520; 934 NW2d 64 (2019) (citation omitted). In any event, defendant did admit to having a sexual encounter with a felon while JB was in the home, and admitted that she exercised poor judgment. Further, while she spoke to police regarding an incident in which she alleged that defendant threw mail at her, she did not file a police report or pursue the matter further. And the record clearly shows that plaintiff also engaged in "questionable behavior" during the litigation below, including conduct that resulted in criminal charges. The trial court's finding on this factor is not against the great weight of the evidence.

Factor (h) is "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court noted that defendant lives in Southgate, plaintiff lives in Madison Township, and JB was attending school at Madison. The court found that "both parties would be able to provide some stability with regard to home[,] school[,] and community record, although the last school he attended was Madison." Plaintiff challenges the trial court's determination that this factor was equal, arguing that the trial court failed to recognize the stability and progress JB achieved at Madison and that a change of schools could be disruptive to that progress. While there is a risk of disruption whenever a child changes schools, we do not find that the trial court erred in its determination regarding this factor. Defendant's testimony reflects that she has always been closely involved in JB's education and has parented him in a manner appropriate to his special needs. Both parties have supported JB's participation in extracurricular activities, which would be available at either Southgate Anderson or Madison. There was testimony that special education services equivalent to what JB has at Madison would be available at Southgate Anderson, and his existing individualized education plan would carry forward to a new school. Overall, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that the parties were equal with respect to factor (h). *Mitchell*, 296 Mich App at 519.

Factor (i) is "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). "One 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*, 306 Mich App at 545 (quotation marks, ellipsis, and citation omitted). "The child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child." *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992). Disability or infirmity may affect a child's ability to express a reasonable preference. See *Maier v Maier*, 311 Mich App 218, 224-225; 874 NW2d 725 (2015). In this case, the trial court interviewed JB *in camera*. The court stated that it "did interview the minor child and the child was able to express preference, and the [c]ourt has taken that preference into consideration." Plaintiff notes with respect to factor (i) that JB has a cognitive impairment and that the court's interview of JB occurred before defendant's sister broke into defendant's home. But JB's behavioral specialist testified that JB's cognitive impairment was mild. JB was functioning well in high school and in extracurricular activities. There is no basis to question the trial court's determination that JB was able to express a reasonable preference. Nor has plaintiff shown that JB's reasonable preference would have been altered by the incident of defendant's sister breaking into defendant's home. Plaintiff has not shown any error with respect to factor (i). *Mitchell*, 296 Mich App at 519.

Factor (j) is the willingness and ability of each party to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. MCL 722.23(j). The trial court found that this factor favored defendant, and that plaintiff was not willing or able to facilitate and encourage a close and continuing relationship between JB and defendant. The court noted that "these parties should not have any contact." Plaintiff argues that hostility between the parties and his apparent rudeness in this litigation do not reflect an unwillingness to facilitate and encourage a close and continuing relationship between JB and the other parent, that plaintiff has recognized that defendant is a good mother, and that defendant has attempted to undermine plaintiff's discipline of JB. We disagree. There was evidence that plaintiff was unwilling to cooperate with defendant regarding parenting JB. For example, plaintiff signed JB up for additional wrestling programs without defendant's consent, despite her feeling that he was

involved in too many sports programs to the detriment of his education. Plaintiff often resisted or opposed switching weekends for parenting time with defendant to accommodate defendant's vacation plans. Further, plaintiff's contention that defendant undermined plaintiff's discipline of JB was related to plaintiff's spanking of JB, which defendant reasonably viewed as excessive or inappropriate given JB's special needs and the recommendation of his behavioral specialist. The evidence does not clearly preponderate against the trial court's finding that defendant was favored on this factor. *Mitchell*, 296 Mich App at 519.

Factor (k) is "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). With respect to this factor, the trial court noted testimony by defendant that there was domestic violence against her and JB. Earlier in its findings, the trial court had stated that it saw no reason to disbelieve defendant's testimony that she left an abusive, controlling environment and moved to get away from plaintiff, as well as to be closer to her job. The trial court assessed the credibility of the parties during the custody hearings, noting that, throughout the proceedings, plaintiff consistently behaved in a way that reinforced defendant's allegations against him. The court observed plaintiff "bullying, intimidating, [and] besmirching" defendant. When testifying, in lieu of simply answering a question, plaintiff would sometimes make an unnecessary comment denigrating defendant. Plaintiff also made rude statements to opposing counsel and ignored the trial court's direction. Ultimately, the trial court found defendant's testimony, as supported by its observation of plaintiff's behavior, to be more credible than plaintiff's on this issue. It was for the trial court to determine the credibility of the witnesses. *Shann*, 293 Mich App at 305. The trial court's finding on this factor was not against the great weight of the evidence. *Mitchell*, 296 Mich App at 519.

Factor (l) is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The trial court stated that it did not consider any other factors. Plaintiff argues that, under factor (l), the court should have considered the following additional factors: the purported sibling bond between JB and OB; defendant's failure to take JB to some wrestling practices; the parties' alleged agreement on a holiday parenting time schedule and to share legal custody; and the report of a psychologist, Dr. Patricia Muldary, suggesting that the parties share legal and physical custody and be afforded equal parenting time. We disagree.

The alleged bond between JB and OB was already discussed in regard to factor (e); there was conflicting testimony about how bonded JB and OB were, and it was for the trial court to make credibility determinations. *Shann*, 293 Mich App at 305. Issues with JB's wrestling schedule were also discussed. Defendant testified that plaintiff signed JB up for multiple wrestling programs without her consent; defendant took JB to wrestling events for the wrestling programs to which she had agreed. And the trial court was provided with Dr. Muldary's report, and it was for the trial court to determine how much, if any, weight and credibility should be accorded to Dr. Muldary's opinion expressed in that written report. See *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008) (noting that it is for the trial court to determine the weight and credibility to accord to evidence).[1] Notwithstanding Dr. Muldary's opinion, the trial court found that joint

[1] Dr. Muldary did not testify at the custody hearings, but the trial court stated at the outset of the custody hearings that it had Dr. Muldary's written report.

legal custody was impossible given the parties' animosity and inability to cooperate with each other; this finding was amply supported by the record. See MCL 722.26a(1)(b) (in determining whether joint legal custody is in the child's best interest, the court shall consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child"); *Fisher v Fisher*, 118 Mich App 227, 232; 324 NW2d 582 (1982) (for joint legal custody to work, "parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making and discipline—and they must be willing to cooperate with each other in joint decision making"). Finally, although defendant was given more parenting time during the school year, plaintiff was given the majority of parenting time during the summer, as well as ample parenting time for holidays. Therefore, plaintiff has not established any error on the part of the trial court in failing to consider under factor (l) the additional factors suggested by plaintiff. *Mitchell*, 296 Mich App at 519.

Accordingly, we conclude that none of the trial court's findings on the best interest factors were against the great weight of the evidence. *Id*. Therefore, the trial court did not abuse its discretion in making its custody and parenting time decisions. *Butler v Simmons-Butler*, 308 Mich App at 201.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola