If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER ANN JOHNSON also known as JENNIFER ANN BROWN,	UNPUBLISHED August 19, 2021
Plaintiff-Appellant,	
v	No. 355724 Calhoun Circuit Court
DEREK JOHNSON,	LC No. 2018-001005-DM
Defendant-Appellee.	

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

PER CURIAM.

Plaintiff appeals by right the trial court order granting defendant physical custody of the parties' three minor children. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

The parties were married in 2011. Plaintiff filed for divorce in April 2018. Once she was separated from defendant, plaintiff began a relationship with Van Brown, and gave birth to their child in December 2018.[1] The trial court granted plaintiff and defendant's divorce in January 2019. The trial court awarded plaintiff primary physical custody and parenting time to defendant.

On June 21, 2020, a domestic violence incident occurred in which plaintiff alleged that Brown physically assaulted her. During the assault, the children were in their bedrooms, and after the incident, plaintiff took the children to her friend's, Melinda Fletcher, home. Fletcher called the police, and plaintiff told the responding officer, Deputy Justin Shadis, that she did not want to report the incident. Deputy Shadis saw bruises on plaintiff's leg. After Deputy Shadis went with plaintiff to retrieve some of her belongings from her home, plaintiff called her mother, Cheryl Miller, to pick her up. Plaintiff told Miller that Brown had pinned her on the bed, and Miller saw the bruises on plaintiff's legs. Plaintiff expressed suicidal thoughts and told Miller that she did not

[1] Custody of plaintiff and Brown's child is not a part of this appeal.

want to press charges against Brown. Plaintiff stayed with Miller for several weeks until she moved into a new apartment. Plaintiff told Miller that Brown was very controlling. Miller also testified about defendant's love and affection for the children. Plaintiff told Miller that Brown kept plaintiff from showing affection to the children.

Brittany Heard, plaintiff's twin sister, also came to assist plaintiff at Miller's home. According to Heard, plaintiff told Heard she did not know what to do about Brown and that one of Brown's daughters destroyed some of plaintiff's belongings. Heard testified during the evidentiary hearing that since her marriage to Brown, plaintiff had become secretive and isolated. Heard was of the opinion that plaintiff favored her child with Brown over her children with defendant. Heard also testified that the children told her that soon after they moved into plaintiff's new apartment, plaintiff had men, whom the children did not know, stay the night. Plaintiff told Heard that she met with Brown at the beginning of July at a hotel in order to have sex and that plaintiff met a man from her apartment building and had sex with him.

Plaintiff testified that she signed a lease on a new apartment 9 or 10 days after the domestic violence incident. She told the trial court defendant had only recently exercised his summer and Wednesday parenting time and that she no longer wanted to live with Brown. Plaintiff denied having men stay overnight at her apartment and, and stated her children very mistaken if they told anyone that she had two men stay overnight. Plaintiff also denied that she had had sex with her neighbor. Plaintiff denied considering suicide, but she did see a counselor after the domestic violence incident. Plaintiff admitted that she asked the prosecution to dismiss charges against Brown and remove the no-contact provision, which the court did. Plaintiff testified that she blamed herself immediately after the incident, but she later realized that it was not her fault.

The trial court determined that an established custodial environment existed with plaintiff and found that there was clear and convincing evidence that it was in the children's best interests to modify custody. The trial court considered the best-interest factors and found the parties equal under factors (a) and (f). See MCL 722.23. The trial court favored defendant under factors (b), (d), (e), (g), (h), (j), (k), and (*l*). The trial court slightly favored plaintiff under factor(c). Further, the trial court interviewed the two eldest children, found them to be "articulate," and took their preferences into consideration under factor (i). The trial court awarded defendant primary custody. Plaintiff brought this appeal challenging the trial court's findings which led to a change in custody.[2]

II. ANALYSIS

On appeal, plaintiff argues that the trial court abused its discretion and made findings against the great weight of the evidence when it awarded defendant primary custody of the children.

---

[2] On appeal, plaintiff concedes that the trial court did not err in finding that proper cause or changed circumstances existed such that the custodial environment could be changed. See, MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). Rather, plaintiff challenges the factual underpinnings which led to the modification of custody. See, generally, *Foskett v Foskett*, 247 Mich App 1; 634 NW2d 363 (2001).

"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 error." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014). In order to "expedite the resolution of a child custody dispute by prompt and final adjudication, 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 the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. See also *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). This Court will affirm a trial court's findings of fact "unless the evidence clearly preponderates in the other direction." *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidence a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). This Court defers to the trial court's judgments of credibility of the witnesses that appeared before it. *Id*.

A trial court must resolve custody disputes by determining what is in the child's best interests as provided in MCL 722.23. See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The factors under MCL 722.23 are as follows:

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

(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 this case, the trial court did not make findings against the great weight of the evidence when addressing the best-interest factors. See *Kubicki*, 306 Mich App at 538. Plaintiff specifically argues that the trial court erred by incorrectly weighing the evidence for factors (b), (c), (d), (e), (g), (h), (j), and (*l*).

Plaintiff argues that the trial court erred by favoring defendant under factor (b) on the basis of his disposition to provide the children love, affection, and guidance because the trial court had a "grossly inaccurate view of the way domestic violence [a]ffects its victims" when it stated that plaintiff should have noticed that Brown was abusive. Plaintiff argues that she left Brown and "implement[ed] strategies to protect herself and her children." Further, plaintiff argues that plaintiff was the "only parent involved in the children's education and extracurricular activities." However, there was testimony from multiple witnesses that plaintiff was "preoccupied" and "distracted" when she was with the children, while defendant focused his attention on the children when he was with them. The trial court referred to plaintiff's statement to defendant that she wanted him to take one of the minor children if the minor's attitude did not change. Additionally, the trial court noted that it took into consideration the testimony of witnesses regarding how plaintiff's relationship with the children had changed since her marriage to Brown, noting that she had become distracted and was prevented by Brown from showing affection to the children. The trial court also stated that it did not "see how [plaintiff] could give the[children] guidance, when, in fact, she failed to recognize" the toxic environment of her home with Brown.

Plaintiff argues that her ability to quickly identify herself as a victim of abuse and "move on" with her life somehow immunizes her against the trial court's adverse ruling. Though, as defendant argues in his brief: "As a victim of violence, [plaintiff] may have our empathy and compassion. However, exposing the children to the long-term emotional abuse inflicted on her and the children by her husband cannot be ignored in any statutory scheme that places the best interests of children above interests of their parents." As the trial court found, plaintiff subjected herself and her children to an environment which caused one of the children to need counseling and her to be the victim of mental and physical abuse. The record reveals that all of the children were subject to mental abuse at some point by Brown and sometimes plaintiff. Further, plaintiff instructed the children not to tell any relatives or friends anything that went on within the marital home and discouraged her children to have a relationship with family members. Lastly, and contrary to plaintiff's assertions on appeal, following the domestic abuse reported to police plaintiff did not immediately sever her ties with Brown. Hence, from this record we glean no error by the trial court in its findings and holding that factor (b) favored defendant. Accordingly, plaintiff is not entitled to relief on factor (b).

Plaintiff argues next that the trial court should have "heavily" rather than "slightly" favored her under factor (c) because defendant did not take the children to their medical appointments. However, taking the children to medical appointments is only one aspect of factor (c), which also takes into consideration the parties' capacity and disposition to provide the children with food and clothing. See MCL 722.23(c). There was a significant amount of evidence in the record regarding defendant's long work hours. Defendant stated that he continued with his seasonal work because it paid better than other jobs, however it did make him work longer hours, particularly during the paving season.[3] Defendant claimed he worked these hours in order to provide financially for the children, instead of choosing to work a lower-paying job. Plaintiff also testified about her job as a nurse and her income. Defendant also testified about changing the children's medical providers to be closer to his home, indicating his disposition to provide the care.

From this record it is clear that both parents had the capacity to provide for the material needs of the children, and while we concur with the trial court that given plaintiff's past with the children and their medical needs she should have been favored on this factor, we cannot glean evidence from which we could conclude that the trial court erred by not heavily favoring plaintiff. Therefore, the trial court's finding was not against the great weight of the evidence. See *Kubicki*, 306 Mich App at 538. Accordingly, plaintiff is not entitled to relief on factor (c).

Plaintiff argues that the trial court erred by favoring defendant under factors (d) and (e) because it "completely ignored" that plaintiff no longer lived with Brown and there was no evidence that the environment in her new apartment was unfit for the children, while defendant was moving the children from their school, friends, and medical providers. Factor (d) concerns the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d).

Here, plaintiff's argument ignores that fact that once she left the marital home she would be subjecting the children to an entirely new environment. Her argument also ignores the trial court's findings that her marital home was not a satisfactory environment for her or the children. Additionally, defendant testified that he had recently purchased a new home. As such, the children experienced and would experience change regardless of the trial court's decision. Plaintiff properly argues that she "should not be penalized for removing her abuser from her life;" however, at the time of the trial, plaintiff had only been married to Brown for just over one year. In that time frame plaintiff and the children were subjected to domestic violence and other unstable elements of control and emotional unrest. At the time of the hearing, plaintiff told the trial court she was unsure about whether she was filing for divorce or separation, or when that would occur. Additionally, plaintiff's family members testified that she expressed a continued strong attachment to Brown, indicating at one point stating that she could not envision a life without him.

Further, although plaintiff's new apartment appeared to be safe and comfortable, there were concerns about plaintiff introducing new people into the home that made the children uncomfortable. See *Ireland v Smith*, 451 Mich 457, 465 n 9; 547 NW2d 686 (1996). Therefore, it was not unreasonable for the trial court to find that the children had not lived in a stable,

---

[3] Although testimony varied, defendant testified that the pacing season runs from April until the end of November. After that, defendant was working a warehouse job to earn additional income.

satisfactory environment with plaintiff. Whereas plaintiff's life was in a period of transition, defendant had been in a relationship for over one year, and he testified that he waited to introduce the children to his girlfriend until he was sure that their relationship was a long-term one. There were no reported concerns about the environment of defendant's home, and it was not unreasonable for the trial court to find that it was desirable to maintain that environment, even if the physical location was changing. Therefore, the trial court's finding was not against the great weight of the evidence. See *Kubicki*, 306 Mich App at 538.

Factor (e) considers the "permanence, as a family unit, of the existing or proposed custodial home." MCL 722.23(e). Defendant's new relationship and residence change occurred before he had custody of the children, with one upcoming move that would result in him living in a newly purchased home. Plaintiff had a 12-month lease on her apartment, had not filed for divorce at the time of the hearing, and had recently expressed ambivalence about divorcing Brown, indicating instability and lack of permanence. Therefore, the trial court's finding was not against the great weight of the evidence. See *Kubicki*, 306 Mich App at 538. Accordingly, plaintiff is not entitled to relief on factor (d) or (e).

Next, plaintiff relies on *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994), to argue that the trial court erred by favoring defendant under factor (g) because there was no evidence that her mental health affected her parenting ability. Factor (g) involves the mental and physical health of the parents. MCL 722.23(g). The trial court explained that both parties were physically healthy, but that Miller, Heard, and defendant testified about plaintiff's mental health issues and suicidal thoughts. The trial court stated that plaintiff disputed that she was suicidal but acknowledged anxiety issues and postpartum depression, for which she took medication. Miller testified that she was concerned about plaintiff's mental health and preoccupation on herself. Miller and defendant each testified about plaintiff expressing suicidal thoughts, and Heard expressed concern about plaintiff's mental health. This Court defers to the trial court's findings of credibility. See *Berger*, 277 Mich App at 705. Therefore, the trial court's finding was not against the great weight of the evidence. See *Kubicki*, 306 Mich App at 538. Accordingly, plaintiff is not entitled to relief on factor (g).

Plaintiff argues that the trial court erred by favoring defendant under factor (h) on the basis of plaintiff's change in parenting style because defendant was not involved in the children's education or extracurricular activities. The trial court recognized that plaintiff engaged the children through extracurriculars, and the evidence in the record made clear that plaintiff was primarily involved in the children's education and extracurriculars, while defendant was minimally involved and did not know the names of any of the children's teachers. Further, the trial court referred to one of the children's counseling, which plaintiff initiated and coordinated with minimal participation from defendant. Therefore, we agree with plaintiff and find that the record does not support the trial court's finding. However, the error was harmless and does not require reversal when considered with the remaining evidence and all of the other best-interest factors. See *Fletcher*, 447 Mich at 889. ("…upon a finding of error an appellate court should remand the case for reevaluation, *unless the error was harmless*." Emphasis added.)

Next, plaintiff argues that the trial court erred by weighing factor (j) in defendant's favor on the basis of her removal of defendant, Heard, and Miller from the children's Kids Messenger accounts. Plaintiff argues further that she wanted defendant to spend more time with the children

and allowed them to contact him. The trial court stated that there was "no dispute" that plaintiff removed defendant from the children's Messenger app. Further, the trial court also properly referred to defendant's willingness to send videos to plaintiff when she missed the children and acknowledged that there was a dispute about other incidents between plaintiff and defendant during exchanges, again indicating that the trial court carefully considered the evidence and credibility of the witnesses. See *Berger*, 277 Mich App at 705. Therefore, the trial court's finding was not against the great weight of the evidence. See *Kubicki*, 306 Mich App at 538. Accordingly, plaintiff is not entitled to relief on factor (j).

Next, plaintiff argues that the trial court erred by favoring defendant under factor (*l*) because it "mischaracterize[ed] and misunderst[ood]" domestic violence and did not properly consider that defendant had not exercised much of his parenting time. However, the trial court specifically acknowledged that plaintiff took "appropriate action by moving out and finding another residence," but it also was "not convinced" that plaintiff had severed ties to Brown because she met with him following the domestic violence incident. Again, plaintiff seemingly argues that as a victim of domestic abuse, which is undisputed, her past actions with the minor children can only be understood as her being a victim. We do not glean from this record that the trial court failed to find that plaintiff was a victim of domestic abuse. Rather, plaintiff seemingly does not accept the trial court's finding that it was not convinced at the time of the hearing that plaintiff had fully exorcized herself from the toxic home environment she and the children were forced to endure with Brown. We also concur with plaintiff that defendant did not exercise his weekly, summer parenting time before moving to modify custody. However, as the trial court and this Court previously noted, there was ample testimony about defendant's work schedule and desire to financially provide for the family directly interfering with his ability to exercise his parenting time. Additionally, there was testimony from plaintiff's family members that when defendant was with the children, he was fully engaged with the children. This was quite unlike what plaintiff's family members testified to about when she was around her children. Both plaintiff's mother and sister testified that plaintiff was with the children she seemed distant and distracted, focusing on her phone rather than her children. Both also testified that the children seemingly had to cajole plaintiff into giving them attention. Therefore, our review reveals that based on this record, the trial court's finding was not against the great weight of the evidence. See *id*. Accordingly, plaintiff is not entitled to relief on factor (*l*).

Next, plaintiff relies on *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1996), and *Foskett*, 247 Mich App at 11, to argue that the trial court erred by failing to weigh the best-interest factors individually for each child, but instead only relied on information about one of the children. This Court explained in *Foskett*, 247 Mich App at 12, that "appreciation and evaluation of each individual child in light of the statutory best interests factors is crucial to making sound judicial decisions . . . ." However, in this case, the trial court thoroughly discussed each factor and clearly considered each of the children, including referring to defendant's handling one of the children's "temper tantrum"; another of the children's counseling; Brown forcing one of the children to eat all of her food, resulting in her throwing up; and preferences of the two older children. As the trial court explained, there was "voluminous testimony" in this case, and the trial court could not comment on every matter, but multiple witnesses testified about the individual children, and there is no indication that the trial court did not consider that information on the basis of the trial court's thorough explanation of the best-interest factors. As we explained in *Foskett*, "[t]he 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." *Id.* Here, the trial court made more than a sufficient record from which this Court could conduct a proper review. While some of the trial court's findings may appear to be brief to plaintiff, the entirety of the record reveals that the trial court gave each party ample opportunity to present their case and intently listened and then issued its findings and ultimate ruling. That the ruling went against plaintiff is not, by itself, indicative of the trial court failing to make proper findings. Therefore, the trial court's findings were not against the great weight of the evidence, and it did not abuse its discretion by awarding defendant custody. See *Kubicki*, 306 Mich App at 538. Accordingly, plaintiff is not entitled to relief.

Affirmed. No costs are awarded. MCR 7.219.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher