

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KIMBERLY TAYLOR,

Plaintiff-Appellee,

v

TIMOTHY UNGARO,

Defendant-Appellant.

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UNPUBLISHED

June 17, 2021

No. 355930

Calhoun Circuit Court

Family Division

LC No. 2017-001844-DC

Before: GADOLA, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right the order denying his motion to change custody and parenting time of the parties' minor child, AU. Defendant also appeals the circuit court's order denying his motion to require the parties to complete psychological examinations. We affirm.

**I. FACTUAL BACKGROUND**

The parties were divorced in 2015. Two of the parties' three children are now adults, and only their youngest child, AU, is at issue in this appeal. Plaintiff received primary physical custody of the children in the divorce, with defendant taking them for the children's spring break, half of winter break, and half of summer break. Plaintiff was a 100% disabled military veteran and she lived with her husband of two years in a home with the children, her other disabled son, and her two stepchildren. Defendant was an Army lieutenant colonel who was employed at the Pentagon and lived with his wife of five years in Virginia. The circuit court recognized that the parties continued to harbor animosity toward each other, which led to extensive litigation. In April 2020, defendant filed a motion to change custody of AU, and in May 2020, the circuit court ordered the Friend of the Court to investigate the allegations in the ongoing custody dispute. The Friend of the Court investigator filed an extensive report that ultimately determined that plaintiff should maintain custody of AU. The circuit court held evidentiary hearings regarding defendant's motion and found that an established custodial environment existed with plaintiff. The court analyzed each of the best-interest factors under MCL 722.23(3) and found that factors (a) and (c) favored plaintiff, factor (d) slightly favored plaintiff, factors (b) and (j) slightly favored defendant, factor (g) favored defendant, and factors (e), (f), (h), and (k) were equal. The court concluded that the

total balance of the factors favored retaining primary physical custody with plaintiff and that defendant had not shown by clear and convincing evidence that a change in custody was necessary.

## II. ANALYSIS

### A. BEST-INTEREST FACTORS

Defendant argues that the great weight of the evidence showed that all the best-interest factors should have favored defendant, except for factor (a), in which the parties were equal, so the circuit court abused its discretion by denying his motion to modify custody. We disagree.

All orders and judgments regarding custody “shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” MCL 722.28. “Findings of fact, such as the trial court’s findings on the statutory best-interest factors, are reviewed under the ‘great weight of the evidence’ standard.” *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011). Under this standard, “a reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction.” *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (quotation marks and citation omitted). “Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion.” *Dailey*, 291 Mich App at 664. “An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.” *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). Finally, a trial court commits clear legal error when it “incorrectly chooses, interprets, or applies the law . . . .” *Fletcher*, 477 Mich at 881. Upon a finding of error, this Court should remand unless the error was harmless. *Id.* at 882.

The Child Custody Act, MCL 722.21 *et seq.*, governs child custody and parenting-time disputes. Under MCL 722.27(1)(c), the party seeking to modify a child custody or a parenting-time order “must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child’s best interests.” *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). If the movant establishes proper cause or a change of circumstances, the trial court must determine whether the change would be in the best interests of the child. *Id.* at 83. The factors in MCL 722.23 are:

(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.

When resolving a custody dispute, the trial court must consider each factor and explicitly state its findings and conclusions regarding the factor. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). However, the court need not comment on every matter in evidence or declare whether it accepted or rejected every proposition argued. *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981). The record need only be sufficient for the appellate court to determine whether the evidence clearly preponderates against the trial court's findings. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). A court is also not required to give equal weight to all the factors; it may consider the relative weight of the factors as appropriate to the circumstances. *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). A single circumstance may be relevant to and considered in determining more than one factor. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 25; 581 NW2d 11 (1998). A trial court is not required to give dispositive weight to any one factor. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

## 1. LOVE, AFFECTION, AND EMOTIONAL TIES

Defendant argues that factor (a), the love, affection, and other emotional ties existing between the parties involved and the child, should have been equal for both parties. We disagree. AU had lived with plaintiff for his entire life, whereas defendant only saw AU for a few weeks per

year. The Friend of the Court investigation report reflected that AU felt like he had to be on his best behavior around defendant. By comparison, AU's friends, siblings, and extended family all lived in Michigan. Therefore, the evidence supported the circuit court's finding that factor (a) favored plaintiff.

## 2. CAPACITY AND DISPOSITION TO GIVE LOVE, AFFECTION, AND GUIDANCE

Defendant argues that factor (b), the capacity and disposition of the parties involved to give the child love, affection, and guidance, should have strongly favored him, instead of slightly favoring him. We disagree. The circuit court held that this issue came down to which party could provide greater guidance for AU, and it ultimately concluded that the factor slightly favored defendant. AU struggled academically while in plaintiff's care and failed several classes between 2016 and 2018. The Friend of the Court investigation report recognized that plaintiff struggled with providing guidance for AU and her house could be chaotic, with arguments between the children, plaintiff, and her husband. By contrast, defendant testified that he would strictly enforce a schedule with AU to make sure that he was on top of his school work, particularly because he would be the only child in defendant's home. However, plaintiff was also able to provide guidance to AU. Plaintiff testified that she had worked with AU to adjust to online learning, that she had set up counseling for him in the past, and that the parties' middle child, who was a negative influence on AU, no longer lived with her. Meanwhile, both defendant and his wife worked long hours and would leave AU with unstructured time, which AU did not have the maturity to use well. Although the Friend of the Court investigator noted that AU did not seem to fail any classes when he was in defendant's care, he was in defendant's custody only for a few weeks out of the school year, and overall, his grades improved under plaintiff's care to the point that he was no longer failing any classes by the conclusion of the proceedings. The circuit court concluded that AU's fluctuations in his grades could have been attributed to several factors, including his maturity and adjustment to a different school setting during the COVID pandemic. Therefore, the evidence supported the circuit court's conclusion that factor (c) only slightly favored defendant.

## 3. CAPACITY AND DISPOSITION TO PROVIDE FOOD, CLOTHING, AND MEDICAL CARE

Defendant argues that factor (c), the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, and other material needs, should have favored him, rather than plaintiff. We disagree. The circuit court found that although both parties had the capacity to financially provide for AU, plaintiff had provided his primary care throughout his life, while defendant had custody of AU for several weeks out of the year. Plaintiff's testimony reflected that she had a steady income that allowed her to provide for AU and that she took care of his needs, scheduled medical and dental appointments, and enrolled him in extracurricular activities. Therefore, the evidence supported the circuit court's finding that factor (c) slightly favored plaintiff.

## 4. STABLE, SATISFACTORY ENVIRONMENT

Defendant argues that factor (d), the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity, should have favored him, rather than plaintiff. We disagree. Although the Friend of the Court investigation report noted that there were some recurring conflicts in plaintiff's home between the children, plaintiff, and her husband, the report concluded that AU felt at home there. AU was raised in plaintiff's home, and testimony showed that he had good relationships with his siblings, stepfather, and plaintiff, as well as friends and extended family in the area. Although the circuit court recognized that the parties' middle child caused upheaval in the home, he no longer lived with plaintiff. In contrast, although defendant's home was quiet, the Friend of the Court investigation report noted that AU would be isolated and lonely, with no friends or family in the area, and that AU would be left alone with unstructured time because defendant and his wife both worked full-time. Overall, the evidence supported the circuit court's conclusion that factor (d) favored plaintiff.

#### 5. PERMANENCE AS A FAMILY UNIT

Defendant argues that factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes, should have favored him, rather than being equal. We disagree. The evidence showed that both parties were in stable marriages, had stable income, and had homes that they did not intend to leave. Although the Friend of the Court investigation report noted some conflicts between the children, plaintiff, and her husband, there was no indication that their family unit was unstable. Therefore, the evidence supported the circuit court's finding that both homes offered permanent family units for AU.

#### 6. MORAL FITNESS

Defendant argues that factor (f), the moral fitness of the parties involved, should have favored him, rather than being equal. We disagree. The evidence supported the circuit court's finding that factor (f) was equal because there was animosity between both parties. The Friend of the Court investigation report emphasized that the children recognized that both parties were responsible for keeping the negativity going. The Friend of the Court investigation report also emphasized that plaintiff continued to foster animosity toward defendant by repeatedly making degrading posts about defendant online, including one article that prompted defendant to file a defamation claim against her. However, defendant also antagonized plaintiff by refusing to communicate with her and limiting her communications with the children. Although plaintiff was convicted of trespassing during the proceeding, the circuit court recognized that the charge arose out of the animosity between the parties. Plaintiff testified that she drove to Virginia without a court order to pick up their middle child, CU, who was in defendant's custody and called her in distress. She eventually returned the child to defendant, but defendant pressed charges against her for grand larceny, alleging that plaintiff stole a motorcycle jacket and helmet that CU later admitted to taking. Overall, the evidence supported the circuit court's finding that factor (e) was equal.

#### 7. MENTAL AND PHYSICAL HEALTH

Defendant argues that the circuit court correctly found that factor (g), the mental and physical health of the parties, favored him, but argues that it should have been heavily weighted in his favor. We disagree. The evidence supported the circuit court's conclusion that this factor

avored defendant, because there was no question that plaintiff had substantial health issues with her long-term disability, and defendant did not express health concerns. However, a trial court is not required to give dispositive weight to any one factor. *McCain*, 229 Mich App at 131. Therefore, defendant has not shown any error under this factor.

#### 8. HOME, SCHOOL, AND COMMUNITY RECORD

Defendant argues that factor (h), the home, school, and community record of the child, should have favored him, rather than being equal. We disagree.

The Friend of the Court investigator concluded that because of the substantial amount of time that defendant was physically away from AU, AU was less bonded with him and felt like he had to be on his best behavior with defendant. Therefore, the evidence showed that AU was less comfortable in defendant's home than plaintiff's. Although AU's grades fluctuated under plaintiff's care, and generally improved under defendant's care, the circuit court noted that the fluctuation in his grades could be attributable to many factors, including his maturity and the pandemic, and overall, his grades improved steadily over time. Further, plaintiff worked with AU to develop plans to complete his schoolwork and encouraged him to participate in extracurricular activities. Therefore, the evidence supported the circuit court's finding that factor (h) was equal.

#### 9. CHILD'S PREFERENCE

Defendant does not argue that factor (i) regarding the reasonable preference of the child should be weighed in his favor because neither the circuit court nor the Friend of the Court investigator revealed what AU's expressed preference was. Therefore, there was no error regarding this factor.

#### 10. WILLINGNESS TO FACILITATE CONTINUING RELATIONSHIP WITH OTHER PARENT

Defendant agrees that the circuit court correctly found that factor (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, favored defendant, but he argues that the circuit court should have found that it strongly favored defendant. We disagree. The evidence supported the circuit court's finding that factor (j) weighed in favor of defendant. The Friend of the Court investigation report noted that plaintiff used every opportunity to portray defendant in the worst possible light to anyone who would listen, continued to be driven by anger at defendant, and published multiple inappropriate posts and articles about him. However, a trial court is not required to give dispositive weight to any one factor, *McCain*, 229 Mich App at 131, and the evidence did not support weighing this factor strongly in favor of defendant. Plaintiff testified that defendant repeatedly ignored her attempts at communication and prevented her from communicating with CU. Therefore, the great weight of the evidence did not support weighing this factor heavily in favor of defendant.

#### 11. DOMESTIC VIOLENCE

Defendant argues that factor (k), domestic violence, regardless of whether the violence was directed against or witnessed by the child, should have favored him, rather than being equal. We disagree. In March 2020, there was an incident between CU and plaintiff's husband, after which plaintiff's husband was charged with assault against CU and a protective order was put in place between plaintiff's husband and CU. However, plaintiff explained that CU, who had a history of behavioral health issues, was having a "meltdown" and her husband had stepped in to assist her. AU was not present during the incident. The circuit court found that the charges were not plaintiff's husband's fault, and it did not attribute the incident to domestic violence given CU's history. Testimony from plaintiff, her husband, and the responding police officer supported the circuit court's conclusion. Defendant also argues that the fighting in plaintiff's household would make AU feel terrorized, and therefore should be considered domestic violence under MCL 400.1501(d), which defines domestic violence, in part, as "engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." However, there was no evidence in the record to suggest that AU felt terrorized or threatened in plaintiff's house. Therefore, the evidence supported the circuit court's finding that factor (k) was equal.

Overall, the circuit court's findings regarding the best-interest factors were not against the great weight of the evidence. Therefore, the circuit court did not abuse its discretion by denying defendant's motion to modify custody.

## B. PSYCHOLOGICAL EXAMINATIONS

Defendant also argues that the trial court abused its discretion by failing to require psychological evaluations for the parties, their spouses, and AU. We disagree.

A trial court's denial of a motion requesting an expert to submit a report is a discretionary ruling that this Court reviews for an abuse of discretion. *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014); *Nichols v Nichols*, 106 Mich App 584, 588; 308 NW2d 291 (1981). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Keinz*, 290 Mich App at 141.

The circuit court is permitted to allow behavioral scientists to be appointed to submit reports to the court to assist in determining the best interests of a child in a custody dispute. *Nichols*, 106 Mich App at 588. However, the court is not required to do so. In this case, on two separate occasions, the circuit court ordered the parties to participate in counseling and for the counselor to file a report and recommendations with the court. Although the parties participated in counseling, the counselor did not file a report. Regardless, the Friend of the Court investigator interviewed that counselor as well as other mental health providers for the family as part of her investigation. In its denial of defendant's motion for a psychological evaluation, the court noted that the Friend of the Court investigator's report was thorough, and that the concerns that she raised were "not anything unusual or that [did not] occur in other cases." Defendant argues that psychological evaluations were required for the court to determine the extent of AU's problems and the abilities of the parties and their spouses to provide for those needs. However, there is no indication that a psychological evaluation of the parties would reveal any additional information that had not been addressed in the Friend of the Court investigator's thorough report. Therefore,

the circuit court did not abuse its discretion by denying defendant's motion to require psychological evaluations.

Affirmed.

/s/ Michael F. Gadola  
/s/ David H. Sawyer  
/s/ Michael J. Riordan