STATE OF MICHIGAN

COURT OF APPEALS

KRISTI LYNN MASSEY,

Plaintiff-Appellee/Cross-Appellant,

v

VICTOR ARMANDO VERAZAIN,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
December 28, 2021

No. 356015
Genesee Circuit Court
Family Division
LC No. 18-325932-DM

KRISTI LYNN MASSEY,

Plaintiff-Appellee,

v

VICTOR ARMANDO VERAZAIN,

Defendant-Appellant.

No. 356434
Genesee Circuit Court
Family Division
LC No. 18-325932-DM

Before: STEPHENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Defendant, Victor Armando Verazain, appeals by right the trial court's judgment of divorce, which granted sole legal and physical custody of the parties' two children to plaintiff, Kristi Lynn Massey. Plaintiff cross-appeals by right the same judgment, challenging the trial court's child support determination and its assignment to her of the student loan debts she accrued during the marriage. Defendant appeals by leave granted the trial court's subsequent order denying his motion to increase parenting time. We affirm.

I. FACTUAL BACKGROUND

The parties married in December 2009 and had two children together. The younger of the two children had special medical conditions. The younger child was diagnosed on the autism

spectrum, had global developmental delay, hypotonia and a high risk of elopement. The same child was also diagnosed with social communication disorder, speech language delay, and sensory integration disorder. Both children had a gluten allergy and allergies to chicken eggs.

The parties lived together in Connecticut from 2009 to 2014, separated in 2014 when plaintiff moved in with her parents in Michigan, but reconciled in May 2015. The parties separated again in May 2016, and plaintiff again returned to Michigan to live with her parents. The plaintiff retuned to the marital home to pack items for her relocation to Michigan from November 2017 to January 2018; the parties did not reconcile during that three month period. Defendant regularly visited the children and provided financial support throughout the separations.

Plaintiff filed for divorce in August 2018. The trial court's interim order granted sole physical custody to plaintiff, visitation to defendant, and joint legal custody. Defendant obtained an apartment in Genesee County to engage in parenting time. The parties brought numerous disputes to the court during the pendency of the divorce regarding parenting time, extracurricular activities, and therapy for the younger child's medical condition. A guardian ad litem ("GAL") was appointed for the children. The children's GAL initially recommended joint physical custody, but changed her recommendation to sole physical custody to plaintiff in light of the parties' disputes. The GAL faulted both parties for the disputes.

A trial was held. The court was asked to rule on child custody, parenting time, child support, and whether plaintiff's student loans were marital debts. The trial court granted sole legal and physical custody of the children to plaintiff. The court granted sole physical custody to plaintiff after determining that the children had an established custodial environment with her and that sole custody with plaintiff was in the children's best interests. Defendant was granted parenting time every other weekend. The court declined plaintiff's request to retroactively increase defendant's child support above the amount of the interim support order, finding that it would cause a significant hardship to defendant, and imputed a minimum-wage income to plaintiff. The court also determined that plaintiff's student loan debts were separate rather than marital debt.

Following the judgment of divorce, defendant moved to Genesee County full time and moved for increased parenting time. The trial court denied the motion on the basis that defendant's move did not form the basis of a proper cause or change of circumstances to warrant revisiting the children's custody. Both parties now appeal.

II. LEGAL CUSTODY

Defendant argues that the trial court erred in granting plaintiff sole legal custody of the children. We disagree.

This Court must affirm the trial court's custody decisions unless its factual findings were against the great weight of the evidence, it palpably abused its discretion, or it made a clear legal error on a major issue. MCL 722.28. The trial court's factual findings are against the great weight of the evidence only if the evidence clearly preponderates in the opposite direction. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The trial court palpably abuses its discretion when its result so palpably violates fact and logic that its ruling indicates passion or bias instead of reason. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994).

"[T]he Legislature divided the concept of custody into two categories—custody in the sense of the child residing with a parent and custody in the sense of a parent having decision-making authority regarding the welfare of the child." *In re AJR*, 496 Mich 346, 361; 852 NW2d 760 (2014). The difference between physical custody and legal custody is that physical custody concerns where the child resides, while legal custody concerns who has authority to make important decisions affecting the child's welfare. *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013). MCL 722.26a(1) provides:

> At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
>
> (a) The factors enumerated in [MCL 722.23].
>
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

MCL 722.23 provides that, to determine what is in the child's best interests, the trial court must consider the following factors:

> (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.

Defendant argues that it was inappropriate for the trial court to consider the best-interest factors when deciding an issue of legal custody. This contention lacks merit. The Legislature explicitly provided that the trial court should consider the best-interest factors when deciding whether joint legal custody is in a child's best interests. MCL 722.26a(1)(a). Thus, the trial court did not err by including these factors in its analysis.

Defendant argues that for a majority of the best interests factors, the trial court erred by discounting his parental role on the basis that he worked outside the home, and improperly assumed an established custodial environment with plaintiff on this basis. We conclude otherwise, finding that the trial court did not discount the parental role of defendant because he was a working parent; rather, its decision was based on defendant's actual role and presence in the children's physical and psychological environments.

"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." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). It concerns the child's physical and psychological environments and "is marked by security, stability, and permanence." *Id*. A child has an established custodial environment with both parents if the child "looks to both the mother and father for guidance, discipline, the necessities of life, and parental comfort." *Id*. at 707. The court should not discount the parental role of a parent who works outside the home. *Bofysil v Bofysil*, 332 Mich App 232, 244; 956 NW2d 544 (2020).

In this case, the court found that, since at least May 2016, plaintiff had provided for the children's emotional, religious, education, and medical needs, as well as love and guidance. It found that plaintiff had been a stay-at-home parent and home-schooled the children, while defendant's relationship with the children had been "one of distance with visitation since 2016."

The evidence did not clearly preponderate against the trial court's findings. The parties initially separated in 2014, and they were separated from May 2016 until the time of trial, except from November 2017 to January 2018. After January 2018, plaintiff and the children lived with plaintiff's parents. Therefore from May 2016 until the time of trial the children resided in Michigan with their mother for all but 3 months. While in Michigan, plaintiff selected the children's doctors and scheduled therapy appointments. Plaintiff scheduled counseling for the older child when she began having issues. Plaintiff home-schooled the children before the parties' divorce, but agreed to enroll the older child in a public school after defendant filed a motion to have her enrolled there. The children were taken to church on Sundays and Wednesdays by plaintiff until fall 2019 when defendant also took them to religious services. Defendant, as noted

earlier, both visited with and financially supported his children continuously. However, apparently due to the contentious nature of the parties' interactions, the parties did not engage in joint activities with the children.

Defendant compares his case to *Bofysil*, *supra*. In that case, both parents were actively involved in parenting activities in a shared home. In this case, defendant had limited parenting time and parenting responsibilities for years before plaintiff filed for divorce. The evidence did not clearly preponderate against the trial court's finding that, although the children looked to both plaintiff and defendant for love, they primarily looked to plaintiff for guidance and stability.

Defendant argues that the best-interest factors did not favor plaintiff concerning legal custody. In its analysis of the issue, the trial court found factors (a), (f), (g), and (j) were neutral as to both parents. The court found that factors (b), (c), (d), (e), and (h) favored plaintiff. The court found that factors (i) and (k) did not apply. No factors were found to favor defendant. We will look at the factors on which the court made an other than neutral finding ad seriatim.

(B) LOVE, AFFECTION, AND GUIDANCE

We agree with defendant that the trial court clearly erred when it found that factor (b) (love, affection, and guidance) favored plaintiff. The court found that this factor favored plaintiff because she had home-schooled the older child and continued to foster the children's education, including by taking the children to school and preschool, selecting the children's schools, and choosing the children's church. The court found that, "perhaps due to his working and living situation in Chicago, [defendant] has not been as actively involved with the educational and religious training of the children." The court improperly penalized defendant for his role as a working parent. While the court admitted that defendant had the potential to positively impact the children's education and guidance, it was time and distance that affected the quantity of interaction. Another factor, the parties' ability to cooperate, impacted the quality of the interaction. However, this record does not support a finding that defendant had a lesser capacity than plaintiff. Defendant exercised his visitation. He sought temporary housing in Genesee during the pendency of the divorce so that he could be with his children. He eventually relocated to Chicago from Connecticut to further his relationship with the children. In the midst of a cacophonous divorce proceeding, he advocated for the older child to enter public school to advance her educational and social development. We agree the court clearly erred regarding this factor.

(C) CAPACITY AND DISPOSITION TO PROVIDE FOOD, CLOTHING, AND MEDICAL CARE

We also disagree with the trial court's finding that factor (c) (capacity and disposition to provide food, clothing, and medical care) favored plaintiff. The trial court's finding was based on the fact that plaintiff had selected doctors and taken the children to medical appointments since the separations. As a working out of state parent defendant was unable to do so. The record does reflect that since moving to Chicago defendant had been as participatory as his work and distance allowed. On the other hand, the record is unrebutted that defendant provided funds for food, clothing and medical care. The record being devoid of any failure on the part of either parent to provide care as needed within their capacity to do so, the court clearly erred in finding this factor to favor either party.

(D) LENGTH OF TIME IN A STABLE AND SATISFACTORY ENVIRONMENT AND (E) PERMANENCE OF FAMILY UNIT

We reject defendant's argument that factors (d) (length of time in a stable and satisfactory environment) and (e) (permanence of family unit) were not relevant, because MCL 722.23 provides that the trial court *must* consider these factors. The court's finding that plaintiff had a slightly more stable environment was not erroneous when defendant had moved more recently than plaintiff, and the children had lived with plaintiff in the home of plaintiff's parents for an extended period.

(H) HOME, SCHOOL, AND COMMUNITY RECORD

The court did not clearly err by finding that factor (h) (home, school, and community record) favored plaintiff. Plaintiff was immersed in the educational and special needs of the younger child and highly participatory in the education of the older one. We cannot say that the trial court erred in finding this factor favored plaintiff based in part on defendant's resistance to extra-curricular activities. Although defendant indicated that he was less opposed to extracurricular activities after he was awarded more parenting time, he had not allowed the children to engage in those extracurricular activities for an extended period while the case was pending.

(K) DOMESTIC VIOLENCE

Defendant argues that allegations that he committed domestic violence against one of the children were not subject to cross-examination because the allegations did not arise until redirect examination. When considering a child's best interests, the trial court must consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). This Court defers to the trial court's abilities to weigh conflicting evidence and determine the credibility of the witnesses. *Barringer v Barringer*, 191 Mich App 639, 642-643; 479 NW2d 3 (1991). In this case, the trial court found that domestic violence did not apply. Accordingly, the trial court necessarily declined to credit or weigh plaintiff's testimony. Defendant's inability to cross-examine plaintiff concerning this testimony did not affect the court's ultimate decision.

The trial court's error regarding factors (b) and (c) was harmless. If a proposed modification would change the child's established custodial environment, the moving party must show by clear and convincing evidence that the change is in the child's best interests. *Pierron*, 486 Mich at 92. This Court will not reverse or vacate a trial court's order unless doing so appears to this Court to be inconsistent with substantial justice. MCR 2.613(A). When the trial court errs in its findings on one best-interest factor, but other factors favor the parent, the error may be harmless. See *Maier v Maier*, 311 Mich App 218, 227; 874 NW2d 725 (2015).

In this case, the children had an established custodial environment with plaintiff. The remainder of the best-interest factors were neutral, favored plaintiff, or slightly favored plaintiff. Because no factors favored defendant, we conclude that it is not reasonably probable that the trial court would have found that clear and convincing evidence favored altering the children's established custodial environment.

Defendant argues that the parties were generally able to cooperate and agree regarding the children's care. Contrary to defendant's assertion, the record is replete with examples establishing that the parties could not do so.

Joint legal custody is appropriate when, "[w]hile there was certainly evidence presented that the parties harbored some personal animosity and had some difficulty communicating in the past, both parties testified that their communications had recently improved." *Shulick v Richards*, 273 Mich App 320, 326-327; 729 NW2d 533 (2006). The parties' ability to compromise regarding major issues, such as working out a holiday schedule, may also indicate that joint legal custody is appropriate. *Id*. at 327.

In this case, the trial court found that the parties could not effectively communicate, cooperate, or generally agree on important decisions. The parties could not agree about whether to homeschool the children, how to select the children's doctor, or how to communicate. The parties reached an agreement regarding parenting time only to begin disputing it a few weeks later.

However, the clearest evidence that the parties could not cooperate and agree concerned treating the younger child's special needs. Both parents did a disservice to the child by entirely refusing to consent to therapy evaluations if that evaluation was not the specific type that party desired. The parties could not even set aside their differences to obtain therapy for the child that was critical to her care. Although the parties were equally at fault for their communication issues, that did not make the situation less detrimental to the children's well-being. We are not convinced that the evidence clearly preponderated against the trial court's finding that the parties could not generally cooperate and agree regarding important decisions about the children.

Ultimately, the trial court's decision to grant sole legal custody to plaintiff was not a palpable abuse of discretion. The court's decision was not unreasoned and did not appear to result from passion or bias.

III. PARENTING TIME

Defendant argues that the trial court's ruling regarding the parties' parenting-time settlement did not accurately reflect the agreement that the parties placed on the record, because they agreed to alternate school vacations. The record does not support defendant's argument.

This Court must affirm the trial court's parenting-time order "unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010) (quotation marks and citation omitted). This Court interprets judgments entered by agreement of the parties in the same manner as contracts. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). This Court reviews de novo the proper interpretation of an unambiguous contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

The goal of contractual interpretation is to honor the parties' intent and to enforce the contract's plain terms. *Davis v LaFontaine Motors, Inc*, 271 Mich App 68, 73; 719 NW2d 890 (2006). "When a contract incorporates another writing by reference, it becomes part of the contract, and courts must construe the two documents as a whole." *In re Koch Estate*, 322 Mich

App 383, 399; 912 NW2d 205 (2017). Additionally, when a contract defines a term, this Court must afford that term its stated meaning. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999).

In this case, the parties agreed to alternate holidays, and incorporated the Genesee County Friend of the Court Parenting Rights document into their agreement. The statement of Reasonable Parenting Time Rights has different provisions for "Alternate Major Holidays" and "School Vacations." The major holidays are each defined as set times on that day or day. For instance, "Labor Day" is defined as "6:00 p.m. Friday to 6:00 p.m. Monday," and Christmas Eve and Christmas Day are defined as separate holidays. Consistent with this document, at the hearing itself, the trial court explained that the parties would alternate Christmas Eve and Christmas Day. There was no mention of alternating school vacations at the hearing. The trial court did not err by holding that the parties' parenting agreement did not include school vacations.

Defendant also argues that the trial court erred by holding that he did not establish a proper cause or change of circumstances to warrant revisiting the children's parenting time after he moved to Genesee County full time, and that it was unreasonable for the court to condition his summer parenting time on having a paid vacation. The trial court did not err in either respect.

To minimize unwarranted and disruptive changes in children's custody, a trial court may only modify children's custody if the moving party first establishes a proper cause or a change of circumstances. *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). The purpose of this framework is to "erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (quotation marks and citation omitted). A proper cause to modify a child's custody exists if there are "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511. This inquiry may be fact-intensive, but the court need not necessarily conduct an evidentiary hearing to decide the issue. *Corporan*, 282 Mich App at 605.

However, when a proposed parenting-time change does not modify the child's custodial environment, normal life changes may be sufficient to warrant the change. *Shade*, 291 Mich App at 30-31. Under such circumstances, "the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Id*. at 23. A modification in parenting time that changes the parent's time from being equally active in the child's life to having the role of a weekend parent will modify a child's established custodial environment. See *Powery v Wells*, 278 Mich App 526, 530; 752 NW2d 47 (2008).

Under the parties' existing custody order, defendant had parenting time with the children every other weekend and every other major holiday. Defendant moved to increase his parenting time to include three consecutive weeks in the summer and half of the children's holiday school vacations. This modification would have placed the children with defendant almost as often as with plaintiff, which is the near equivalent of joint physical custody. In due time with greater parental cooperation such an arrangement may well be in the children's best interest. In this case, we are not of a definite and firm conviction that the trial court erred in finding that defendant's

proposed modifications would alter the children's established custodial environment by granting defendant essentially equal time with the children as plaintiff.

Next, the trial court found that defendant had not established that a proper cause or change of circumstances warranted revisiting the children's parenting time because defendant's changed employment and availability were normal life changes. During the pendency of the divorce, defendant primarily lived in Chicago and parented the children at an apartment in Grand Blanc. At the time of defendant's parenting-time motion, his Chicago office had closed, and he worked full time from Genesee County. However, defendant was already extensively involved in the children's lives. He already attended the children's medical appointments when he had notice. He attended events in the lives of the children, such as the oldest child's birthday party. At the time of trial, he took the children to extracurricular activities. Although defendant's move undoubtedly changed *his* circumstances, we are not convinced that the trial court made a mistake when it found that defendant's move did not constitute a change in the children's lives.

Defendant argues that it was unreasonable for the trial court to condition his summer parenting time on taking a paid vacation. The trial court did not err by making a week of summer parenting time conditional.

Parenting time must be granted in accordance with the best interests of the child. MCL 722.27a(1). A court may subject parenting time to conditions. MCL 722.27(1)(b). Adopting, revising, or revoking a condition when doing so is consistent with the best interests of the child is within the trial court's authority. *Kaeb v Kaeb*, 309 Mich App 556, 571; 873 NW2d 319 (2015). When doing so alters the frequency or duration of parenting time, the parent must establish a proper cause or change of circumstances sufficient to warrant revisiting parenting time. *Id*. at 570. Again, normal life changes may support revisiting a parenting-time order. *Id*. at 571.

In this case, the children's guardian ad litem testified that allowing defendant parenting time during the children's school breaks would give him the opportunity to take a vacation with the children, which he would not be able to do during his regularly scheduled parenting time. The trial court found that defendant's existing parenting-time order did not allow him to take the children on vacation, which deprived them of the opportunity to create special memories with defendant that could not be created during normal parenting time. Although defendant argues that he should be allowed to have a vacation at home with the children, it was the opportunity to make *special* memories with defendant that was in the children's best interests, not just spending more time with defendant generally. The trial court did not err by conditioning defendant's parenting time on a paid vacation.

IV. CHILD SUPPORT

In her cross-appeal, plaintiff argues that the trial court erred by imputing an income to her because she had not worked for an extended period and the younger child's special needs required full-time care. We are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had an unexercised ability to earn an income.

This Court reviews de novo the interpretation and application of the Michigan Child Support Formula (MCSF). *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

This Court reviews for clear error the trial court's findings of fact in determining the amount of support owed. *Id.* For the purposes of support, the trial court clearly errs if, after reviewing its decision, this Court is definitely and firmly convinced that the trial court made a mistake. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). This Court reviews for an abuse of discretion the trial court's discretionary rulings, including its decision to impute income to a party. *Id.* The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id.*

"It is well settled that children have the right to receive financial support from their parents and that the trial courts may enforce that right by ordering parents to pay child support." *Borowsky*, 273 Mich App at 672-673. The MCSF provides that the trial court may impute income to a parent who has an unexercised ability to earn. 2017 MCSF 2.01(G)(1). Relevant factors include, among other things, a parent's prior employment experience and history, the parent's availability for work, and evidence that the parent is able to earn the imputed income. 2017 MCSF 2.01(G)(2). Before imputing income, the trial court must find that the parent's reduced income reflects a voluntarily unexercised ability to earn, which requires finding that the parent had an actual ability and likelihood of earning the income. *Carlson*, 293 Mich App at 205.

In this case, the court found that plaintiff had a biochemistry degree but had been a stay-at-home parent for most of the marriage. However, she was also capable of working. After balancing plaintiff's ability to work, her education, her lack of employment, and the needs of the children, the court found it was appropriate to impute an income of $20,072 a year, representing 40 hours of minimum-wage work. The court in fact considered the MCSF factors when deciding whether to impute income.

Plaintiff argues that she did not have the actual ability to work because she had not been employed for years and had to take care of the younger child, who had special needs. The court's finding that plaintiff had a voluntary unexercised ability to earn an income was not clearly erroneous.

For the purposes of imputing income when determining child support, the trial court must consider (1) the party's prior employment experience; (2) the party's education level; (3) the party's physical and mental disabilities; (4) the presence of the parties' children in the home and the effect on the party's earnings; (5) availability of employment in the local area; (6) the prevailing wage in the local area; (7) the party's special skills or training; and (8) whether there is any evidence that the individual is able to earn the imputed income. *Carlson*, 293 Mich App at 206. See 2017 MCSF 2.01(G)(2). The trial court may consider a party's motive for voluntarily reducing income. *Clarke v Clarke*, 297 Mich App 172, 186 n 2; 823 NW2d 318 (2012). This Court defers to the trial court's abilities to weigh conflicting evidence and determine the credibility of the witnesses. *Barringer*, 191 Mich App at 642-643.

In this case, plaintiff was not physically or mentally disabled, or prevented from finding a general job. Plaintiff testified that, although she was not employed, she took care of the children's special needs. However, defendant testified that the younger child could have access to special education that included an individualized educational plan and necessary therapies. He preferred additional in-facility therapies because he thought they would be better for the child for a variety

of reasons. In contrast, plaintiff preferred in-home therapy, also on the basis that she thought it would be better for the child.

When weighing this evidence, the trial court may have reasonably concluded that plaintiff was not required to be a full-time stay-at-home parent to properly care for the youngest child, whose needs for education and therapy could be met outside the home. Clearly, this was not plaintiff's preference, but the court could have reasonably decided that this was a matter of choice rather than necessity.

Plaintiff also argues that the trial court erred by declining to order defendant's increased child support to be retroactive to when she filed for divorce. The trial court did not abuse its discretion by deciding not to backdate defendant's child support because he supported the children during the divorce and the parties had already split a considerable part of defendant's 2018 income.

Child support must be based on the needs of the child and the actual resources of each parent. MCL 552.519(3)(a)(*vi*). Generally, a support order that is part of a judgment in a domestic relations case may not be retroactively modified. MCL 552.603(2). However, this does not apply to an ex parte interim support order or a temporary support order. MCL 552.602(3).

During the pendency of this case, the trial court ordered defendant to continue supporting the children in the amount he had supported them before plaintiff filed for divorce, as well as to continue to pay the marital bills. Although defendant made a significant wage, he also had significant expenses, while plaintiff did not have to pay rent or utility bills. Additionally, a large portion of defendant's 2018 income, consisting of a bonus, had been placed in escrow and divided between the parties. It would not have been equitable to backdate defendant's entire 2018 income, as plaintiff sought. Considering that the parties' actual resources during the divorce were not disparate and there is no evidence that defendant's payments did not provide adequate support for the children, we cannot conclude that the trial court abused its discretion by declining to backdate defendant's ultimate child support.

V. STUDENT LOAN DEBT

Plaintiff also argues by cross-appeal, that it was unfair and inequitable to require her to pay her entire student loan debt, part of which was incurred during the marriage. We conclude that the trial court did not clearly err by finding that plaintiff's student loans were separate debt in this case.

When reviewing a judgment of divorce, this Court reviews the trial court's factual findings for clear error, and then determines "whether the dispositive ruling was fair and equitable in light of those facts." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). A finding is clearly erroneous if this court is definitely and firmly convinced that the trial court made a mistake. *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010).

The trial court must determine the property rights of the parties in a judgment of divorce. MCR 3.211(B)(3). The trial court's primary objective in a divorce proceeding is to "arrive at a property settlement that is fair and equitable in light of all the circumstances." *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995). When dividing marital property, the trial court must first determine whether an asset is marital or separate. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Generally, separate assets are those assets that a party

acquired before the marriage. *Cunningham*, 289 Mich App at 201. However, there are occasions where property acquired during the marriage may be separate, such as compensation for one spouse's pain and suffering in a personal injury lawsuit. *Id*. Additionally, assets are not treated as separate if they are comingled with marital assets and then treated as marital property. *Id*. The actions and conduct of the parties most clearly indicate whether property is marital or separate. *Id*. at 209. This Court defers to the trial court's abilities to weigh conflicting evidence to determine the credibility of the witnesses. *Barringer*, 191 Mich App at 642-643.

In this case, at a supplemental hearing, plaintiff indicated that she could establish that $99,776.56 of student loans were taken out after the marriage. There was competing testimony at trial regarding whether the parties treated her graduate student loan debt as marital or separate. Plaintiff testified that defendant encouraged her to take out the maximum amount of student loans, which went to household living expenses. Defendant agreed that plaintiff had taken out student loans during the marriage, that payments were made on one loan, and that one loan was paid off during the marriage. However, defendant denied that the loans were placed in a marital bank account, and he testified that he was unaware of any amount spent on something other than plaintiff's education. Plaintiff testified that she consolidated her premarital loans with her marital loans. Defendant stated that plaintiff had full control over the loans.

Considering that there was evidence from which the trial court could have concluded that the loans were marital or separate, we are not definitely and firmly convinced that the trial court made a mistake. Its ultimate decision was based on credibility and the weight it placed on the conflicting evidence concerning the conduct of the parties, whose actions and conduct did not clearly indicate whether or not the parties treated the loans as marital debt.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien