STATE OF MICHIGAN

COURT OF APPEALS

TIARA NIKOLE DUNCAN,

Plaintiff-Appellee,

v

DAVID MARK O'BRIEN,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 356922
Muskegon Circuit Court
LC No. 19-004243-DM

Before: GADOLA, P.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

In this divorce action, defendant appeals the trial court's judgment of divorce. Defendant argues that the trial court erred by granting plaintiff sole physical custody of the minor child and not granting him an equitable portion of the marital home. We affirm.

I. BACKGROUND

Plaintiff and defendant had a brief romantic relationship that culminated in the birth of their minor child in June 2006. Their relationship ended soon after that. Plaintiff was awarded sole physical custody of the child, and the parties shared joint legal custody. Defendant was also ordered to pay child support. In December 2014 plaintiff purchased a home and defendant moved in with plaintiff and her family in 2016; defendant paid plaintiff rent at that time. Plaintiff and defendant rekindled their romantic relationship shortly afterwards and were married in September 2017.

After plaintiff and defendant were married, defendant made house repairs that turned out to be inadequate. Defendant deposited paychecks that he received into a joint checking account that plaintiff used to pay for some of their household expenses. These payments, however, contributed to less than half of the household expenses before considering the mortgage payments. Although not regularly employed during the marriage, defendant did deposit paychecks that he received into a joint checking account that plaintiff used to pay for some of their household expenses. Defendant and plaintiff began having verbal disputes; plaintiff asked defendant to leave the home. Defendant lived away from the home for at least six months; when he returned, defendant stopped depositing any funds into the joint checking account. Plaintiff eventually filed

for divorce. After filing for divorce, plaintiff discovered text messages between defendant and another woman that indicated a sexual relationship between the two of them.

The trial court conducted a trial and determined that plaintiff would have sole physical custody of the child, the parties would share joint legal custody of the child, and defendant was not entitled to any portion of the house's appreciated value while the parties were married. This appeal followed.

II. ANALYSIS

A. CHILD CUSTODY

First, defendant argues that the trial court erred by awarding plaintiff sole physical custody of the minor child. "In a child custody dispute, '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 evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Pennington v Pennington*, 329 Mich App 562, 569-570; 944 NW2d 131 (2019), quoting MCL 722.28. "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id*. at 570. This Court defers to the trial court's judgment with respect to witness credibility. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

Defendant did not argue in the trial court that the trial court erred by awarding plaintiff sole physical custody without finding a change of circumstance or proper cause to do so. Defendant also failed to argue in the trial court that the trial court erred by failing to articulate the proper standard for determining the child's best interests. Thus, these issues are unpreserved. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). As a general rule, "a failure to timely raise an issue waives review of that issue on appeal." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (quotation marks and citation omitted). This Court, however, has applied the plain error standard to unpreserved claims of error raised in child custody cases. *Demski v Petlick*, 309 Mich App 404, 441; 873 NW2d 596 (2015). Given this, we will review these unpreserved issues for plain error. *Id*.

"To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000) (quotation marks omitted), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d 482 (2017) (alteration in original, quotation marks and citation omitted). The appellant bears the burden of persuasion with respect to prejudice. See *Carines*, 460 Mich at 763.

We address defendant's unpreserved issues first. Defendant argues that the trial court was required to make a finding that there was proper cause or a change in circumstance to change the existing custody arrangement between the parties from before their divorce. The custody arrangement that was ordered before the parties' marriage established that plaintiff would have sole physical custody of the minor child and the parties would share joint legal custody. In the

judgment of divorce, the trial court awarded plaintiff sole physical custody and awarded both parties joint legal custody. Defendant did not present any evidence to suggest that he challenged the preexisting custody order or that it no longer continued to exist during the marriage. Additionally, defendant did not address whether the judgment of divorce presented a change in custody that was different from the custody arrangement before the marriage, and he also did not address whether this alleged error prejudiced his substantial rights and affected the outcome of the proceedings. "An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority." *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015). Consequently, defendant abandoned this argument on appeal. Furthermore, the record does not support that this alleged error caused prejudice requiring reversal.

Defendant next argues that the trial court erred by failing to state the clear and convincing evidence standard during its determination regarding custody of the minor child. Defendant is correct that the trial court did not articulate this standard in its ruling. The trial court, however, determined that an established custodial environment existed with both parties. Accordingly, the trial court could not modify any established custodial environment without finding that such a change was in the child's best interests by clear and convincing evidence. See *Griffin v Griffin*, 323 Mich App 110, 119-120; 916 NW2d 292 (2018). This Court presumes that the trial court knows the law. *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002). Additionally, the trial court did not state that it was relying on a different, incorrect, standard when making that determination. Indeed, defendant argues that the trial court failed to articulate the standard it used, not that it actually used an incorrect standard. Defendant has not established how this error prejudiced him. He also failed to make any argument, from any cited authority, that this error was one requiring reversal. Thus, defendant's argument is abandoned. See *Cheesman*, 311 Mich App at 161. Consequently, the trial court's failure to state that its findings were supported by clear and convincing evidence did not amount to error requiring reversal.

Lastly, defendant argues that the trial court's determinations regarding the best-interest factors were against the great weight of the evidence. "Where there is a joint established custodial environment, neither parent's custody may be disrupted absent clear and convincing evidence." *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008) (quotation marks, citation, and emphasis omitted). Evidence is clear and convincing when it

> produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks, brackets, and citation omitted).]

The best-interest 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.

In this case, the trial court determined that factors (b), (d), (e), (f), and (h) favored plaintiff, and that factors (a), (c), (g), (j), and (k) did not favor either party. As for factor (i), the trial court stated that it had interviewed the minor child, and it took the child's preferences into consideration, but it did not reveal those preferences after discussing with the child that the conversation in chambers was confidential. Additionally, the trial court did not find any other factors relevant to the child custody dispute other than the factors that were already discussed under MCL 722.23.

Defendant does not challenge the trial court's conclusion that factor (h) favored plaintiff. As such, we will not address that factor. Defendant does, however, argue that the trial court erred by concluding that factors (b), (d), (e), and (f) favored plaintiff. We will address each factor in turn.

Regarding factor (b), the trial court considered the testimony that defendant acted more like the minor child's friend than his parent. Testimony from plaintiff, plaintiff's daughter, and plaintiff's mother corroborated that defendant did not appropriately discipline the minor child and would get into verbal altercations with the child. Furthermore, the record evidence presented a contested question regarding whether defendant was checking the minor child's grades and attending the minor child's school for his parent-teacher conferences. Even though there was evidence supporting that defendant loved the minor child, gave affection to the minor child, and would perhaps continue to raise the minor child in his religion or creed, there was also evidence that plaintiff actively disciplined the minor child, attended parent-teacher conferences, was engaged in the minor child's progress in school, and took him to church with her. Thus, the trial court's finding regarding this factor was not against the great weight of the evidence. See *Pennington*, 329 Mich App at 569-570.

The trial court analyzed factors (d) and (e) together and relied on similar evidence in its determination for both factors. The trial court explained that plaintiff was in a stable home that she purchased, whereas defendant had problems regarding housing. Defendant would frequently stay with friends, his parents, or other girlfriends before and during the marriage. Additionally, defendant did not have stable housing secured for his living arrangements after the divorce. Furthermore, plaintiff's daughter resided in the house with plaintiff and the minor child, and testimony established that the minor child had a bond with plaintiff's daughter. Thus, the record evidence demonstrated that the minor child had a stable, satisfactory environment with plaintiff more than defendant, and plaintiff's living arrangements with her daughter presented more permanence of the family unit than defendant's lack of living arrangements did. The trial court's finding regarding these factors was not against the great weight of the evidence. See *id*.

Finally, the trial court considered factor (f). When addressing this factor, the trial court considered evidence of defendant's alcohol consumption and his communication with other women during the marriage. The evidence established that defendant was passing out from his excessive alcohol consumption, sometimes in a park or on a bike trail. The evidence included photos and videos demonstrating that defendant had consumed excessive alcohol. Additionally, it was reported that defendant would sometimes not return home after a night of drinking until the next morning, and he would be passed out in his car. The trial court was also presented with text messages during the marriage between defendant and another woman in which neither were fully clothed. The trial court stated that no issues regarding plaintiff's moral fitness were presented to the court.

Defendant argues that there was no evidence to establish that his actions regarding an extramarital affair were ever witnessed by the minor child or even impacted their relationship. Analysis of factor (f) requires the trial court to consider "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994). Even if defendant is correct that his alleged extramarital affair did not impact his relationship with the minor child, the evidence still demonstrates that defendant was excessively drinking alcohol to the point of passing out. The trial court's decision to weigh defendant's alcohol consumption in its factor (f) analysis was not an abuse of discretion. Thus, the trial court's finding regarding this factor was not against the great weight of the evidence. See *Pennington*, 329 Mich App at 569-570. Accordingly, the trial court

did not err by concluding that granting plaintiff sole physical custody of the child was in the child's best interests.

B. PROPERTY DIVISION

Next, defendant argues that he is entitled to a portion of the house's appreciated value during the time that he was married to plaintiff. In a case involving property distribution, this Court "must first review the trial court's findings of fact under the clearly erroneous standard." *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Id*. at 151-152. Ultimately, the trial court's "ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Id*. at 152. Finally, "questions of law are reviewed de novo." *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

"[T]he trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The parties agree that plaintiff bought this home before the marriage. "Generally . . . each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Id*. at 494. Separate property is subject to distribution only when one of two statutorily created exceptions is met: MCL 552.23 and MCL 552.401. *Reeves*, 226 Mich App at 494.

MCL 552.23(1) provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

Defendant has not argued that the division of property is not suitable to support him. Thus, MCL 552.23(1) is not applicable.

Defendant does, however, argue that MCL 552.401 is applicable. MCL 552.401 provides:

> The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real

estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

"When one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves*, 226 Mich App at 495.

The record establishes that defendant attempted to make house repairs to the sun room and the garage; he also completed the "back splash in the kitchen" as well as some electrical work. But testimony from plaintiff, plaintiff's mother, and a contractor revealed that the work defendant performed was not adequate and either needed to be redone or removed. Although defendant argues that his funds were comingled with plaintiff's payment of the mortgage, defendant does not demonstrate that his actions significantly assisted in the growth of the home's value. Additionally, the testimony provides that defendant's payments into the joint checking account did not continue and only contributed to less than half of the household expenses before considering the mortgage payments. Thus, we are not left with a firm conviction that the trial court's determination not to divide the appreciation of the home was inequitable. See *Sparks*, 440 Mich at 152.

III. CONCLUSION

Affirmed. Plaintiff, as the prevailing party, may tax costs under MCR 7.219.

/s/ Michael F. Gadola
/s/ Brock A. Swartzle
/s/ Thomas C. Cameron