STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN HARRIS,

Plaintiff-Appellee,

v

HUGH HARRIS,

Defendant-Appellant.

UNPUBLISHED
December 18, 2012

No. 310215
Oakland Circuit Court
LC No. 2010-779157-DM

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce entered after the parties' five day divorce trial. We affirm.

I. CUSTODY OF THE MINOR CHILDREN

Defendant contends that the trial court erred in awarding sole legal and physical custody of the parties' minor children, Megan Harris and Ryan Harris, to plaintiff. We disagree.

> This Court must affirm all custody orders unless the trial court's findings of fact 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. Thus, a trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction. This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors. The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. This standard continues to apply to a trial court's custody decision, which is entitled to the utmost level of deference. This Court reviews questions of law for clear legal error that occurs when a trial court incorrectly chooses, interprets, or applies the law. [*Berger v Berger*, 277 Mich App 700, 705-706; 747 NW2d 336 (2008) (citations omitted).]

"[A] trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011) (emphasis in original). "[A] party who seeks to change an established custodial environment of a child is required to show by clear and convincing evidence that the change is in the child's best interests." *Id.*

"Pursuant to MCL 722.26a(1), in custody disputes between parents, the parents shall be advised of joint custody, and, '[a]t 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.'" *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006).[1] MCL 722.26a(1) also provides, in part:

> 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 section 3 [the best interest factors].
>
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. [Footnote omitted.]

A. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant contends that the trial court erred in determining that an established custodial environment existed with only plaintiff. MCL 722.27(1)(c) provides:

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

[1] MCL 722.26a(7) provides:

> (7) As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
>
> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

This Court has stated:

> 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. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

The trial court found that an established custodial environment exists with plaintiff because "the children naturally looked to Plaintiff for guidance, discipline, the necessities of life, and parental comfort." Defendant argues that an established custodial environment also exists with him.

Plaintiff testified that she has been the children's primary caregiver and has emotionally supported the children. She testified that the children go to her with their worries, concerns, and issues, and have said that they do not feel comfortable telling defendant their worries and concerns. She also provides the children emotional support and comfort. Plaintiff believes defendant has not cared for the children, except in a monetary way.

Defendant testified that the children have expressed worries and concerns to him. He testified that, although there was a point during the divorce when their relationship was not good, it had improved. Plaintiff agreed that the situation had improved, but believed it might just be "for show."

Given this conflicting testimony, the trial court apparently found plaintiff was more credible. See *Berger*, 277 Mich App at 705, 708. "[T]he trial court is in the best position to determine the credibility of witnesses." *Id.* at 708. The evidence does not clearly preponderate in the opposite direction and the trial court's finding must be affirmed. See *id.* at 705.

Accordingly, the burden was on defendant to show by clear and convincing evidence that a change of custody was in the children's best interests. See *Kessler*, 295 Mich App at 61; *Berger*, 277 Mich App at 710. The trial court failed to state what standard applied but after considering the best interest factors, it awarded sole legal and physical custody to plaintiff.

B. BEST INTEREST FACTORS

The trial court found that best interest factors (a), (b), (c), (j), and (k) favored plaintiff, the trial court considered factor (i), and the trial court found that the other factors favored neither party. The trial court also found that the parties could not agree on basic issues involving the children given their differences regarding discipline, medical care, and emotional needs. The trial court believed defendant's rigid rules precluded cooperation and found that sole legal custody to plaintiff was in the children's best interests.

1. FACTOR (a)

Factor (a) is "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court found that both parties love the

children and the children love both parties. However, it was concerned about the testimony that Megan believed defendant was emotionally abusive and found both children have a "problematic relationship" with defendant. The trial court found that the children view plaintiff as their caretaker.

Plaintiff believes she has a stronger bond with the children than defendant. Plaintiff gives the children emotional support. She testified that the children do not feel comfortable going to defendant with their concerns or emotions. She also testified that she has been the primary caregiver. Contrarily, defendant believes he has an outstanding relationship with the children. Defendant introduced a photograph of him and Ryan on a motorcycle at a fair during the time when things were very tense and Ryan is hugging defendant. Defendant also testified that his relationship with the children had improved, while plaintiff believed it was just "for show." With regard to the incident involving Megan, defendant testified that Megan said plaintiff told her that defendant emotionally and physically abuses her. It appears that the trial court believed plaintiff's testimony and we must defer to the trial court's credibility determinations. *Berger*, 277 Mich App at 705. Accordingly, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that this factor favored plaintiff. See *id.*

2. FACTOR (b)

Factor (b) is "[t]he 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." MCL 722.23(b). The trial court found that both parties took the children to church and helped with homework. However, the trial court found defendant's "authoritarian approach to parenting" caused conflicts and "negatively impacted his relationship with the children."

There was evidence that both parties participated in church and homework. Plaintiff is concerned with defendant being "dictating and controlling" with the children. She did not believe that taking away Megan's phone when the other phone did not work and Megan was home alone was safe, that breaking Ryan's toy, punishing him for his reaction, and recording his reaction was appropriate punishment, that removing the children's doors was appropriate, or that defendant's lengthy and multiple punishments were appropriate. Plaintiff testified that the children are fearful to express their issues or concerns because defendant will get angry or punish them. Plaintiff, however, also testified that defendant had become less rigid and strict.

Defendant agreed that his parenting style needed work, but also testified that he worked on it and that his rules were from the counselor. He testified that if someone violates a rule, there is a punishment and he has not changed his punishments. He admitted he removed the children's doors, but testified they were broken. He replaced Megan's door after a discussion with the counselor. He admitted he broke Ryan's toy, but testified that he did so because Ryan used it as a weapon and he claimed he did not record his reaction. He testified that he never took away Megan's phone when she did not have access to another phone. Despite defendant's contradictory testimony, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored plaintiff. See *Berger*, 277 Mich App at 705.

3. FACTOR (c)

Factor (c) is "[t]he 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." MCL 722.23(c). The trial court found that the parties had different views regarding the children's medical needs and that this factor favored plaintiff based on defendant's "inflexibility and denial of the children's medical needs."

Plaintiff earns $10.98 an hour and does not receive benefits. Defendant earns approximately $121,000 a year. Defendant has supported the family financially, while plaintiff has been the caretaker.

With regard to Megan, defendant does not deny that she has ulcerative colitis or that she takes medication. He disagrees with plaintiff having all the medication and believes he should also have a supply. Plaintiff believes she should have the medication because Megan is with her the majority of the time and she does not want to run out.

With regard to Ryan, plaintiff testified that he has mild Tourette's syndrome and shows signs of Obsessive Compulsive Disorder (OCD). She also testified that Ryan had a seizure and another "odd spell" at school. Plaintiff was concerned about defendant saying he was getting Ryan a bunk bed because the pediatric neurologist recommended that Ryan not have a bunk bed since he had a grand mal seizure. Defendant testified that Ryan used to have tics, but has not had tics in the previous 12 to 18 months. Defendant agreed that Ryan has Tourette's syndrome. Defendant also agreed that Ryan had an odd spell. Defendant, however, does not believe there are any extra safety precautions for Ryan. He agreed that it was not a good idea for Ryan to have a bunk bed.

Although defendant does not completely deny the children's medical conditions, he appears to be less concerned about their conditions than plaintiff. Plaintiff, however, failed to introduce any medical evidence supporting their illnesses and needs. In general, defendant disagreed with plaintiff labeling the children as "special needs," while plaintiff denied doing so. Although it is unclear what evidence supports the trial court's finding that defendant is inflexible, given the parties' disagreements and defendant's lesser concern, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored plaintiff. See *Berger*, 277 Mich App at 705.

4. FACTOR (d)

Factor (d) is "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court found that the children have lived with both parents since they were born and plaintiff has been the primary caregiver.

There was evidence that plaintiff was the primary caregiver, while defendant worked and provided for the family financially. The trial court did not consider the desirability of maintaining the continuity of living with both parents equally. However, given that the children have lived with both parents, the evidence did not clearly preponderate in the opposite direction

of the trial court's finding that this factor favored neither party. See *Berger*, 277 Mich App at 705.

5. FACTOR (e)

Factor (e) is "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court found that it was in the children's best interest to remain in the family home.

There was evidence that plaintiff intended to remain in the marital home for at least two years. At that time, she would either purchase defendant's portion or move to another house within the school district. Defendant intended to stay at his brother's home until he could afford to purchase another house. The trial court did not consider the permanence of the homes, but found the children should remain in the family home. If anything, this factor seemed to favor plaintiff. However, given the parties' intentions, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored neither party. See *Berger*, 277 Mich App at 705.

6. FACTOR (f)

Factor (f) is "[t]he moral fitness of the parties involved." MCL 722.23(f). The trial court found that both parties appear to be morally fit.

Defendant argues that there was testimony that plaintiff had extramarital relations. Defendant testified that he obtained emails showing plaintiff had an affair. Plaintiff did not testify regarding the affair and, according to defendant, denied the affair. Considering extramarital conduct under this factor would have been legal error unless such conduct reflected on plaintiff's ability to parent. See *Fletcher v Fletcher*, 447 Mich 871, 887-888; 526 NW2d 889 (1994). Moreover, at trial, defendant agreed that both parties are morally fit. Plaintiff testified that defendant was lenient with movie and video game ratings and the children have seen defendant drink and swear. Therefore, this factor could have favored plaintiff. However, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor did not favor either party. See *Berger*, 277 Mich App at 705.

7. FACTOR (g)

Factor (g) is "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court found that neither party testified regarding mental or physical health issues.

Plaintiff testified that she did not have any physical or mental health problems. However, she testified that defendant had health issues, including neck, back, and shoulder pain, and that he takes medication for trouble with sleeping and anxiety or stress. Defendant testified that he has a herniated disk in his neck, but it does not stop him from parenting. Given that there was no evidence that defendant's health issues affect his parenting, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored neither party. See *Berger*, 277 Mich App at 705.

8. FACTOR (h)

Factor (h) is "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court found that both children are good students and involved in sports and other activities.

Both parties testified that the children are doing well in school. The evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor did not favor either party. See *Berger*, 277 Mich App at 705.

9. FACTOR (i)

Factor (i) is "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). The trial court considered factor (i).

10. FACTOR (j)

Factor (j) is "[t]he 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." MCL 722.23(j). The trial court found that defendant admitted he monitored plaintiff's and the children's activities, denying them privacy. The trial court found no evidence to support defendant's claim that plaintiff made it difficult for the children to have parenting time with him.

Plaintiff testified that defendant puts the children in the middle, which was not appropriate. Plaintiff believed defendant takes advantage of the time frame for taking the children to counseling and does not bring the children directly back.

Defendant testified that he facilitates a relationship between plaintiff and the children and tries to only say positive things. He does not believe plaintiff always tries to help his relationship with the children. Defendant does not have a landline, but Ryan has access to defendant's or Megan's cell phone and can call plaintiff any time.

It is unclear how the trial court's findings regarding defendant's monitoring activities relate to this factor. However, given the parties' conflicting testimony and that this Court must defer to the trial court's credibility determinations, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored plaintiff. See *Berger*, 277 Mich App at 705.

11. FACTOR (k)

Factor (k) is "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court found no evidence of domestic violence, but found evidence that defendant had been emotionally and verbally abusive to plaintiff.

Plaintiff testified that defendant swore at her and called her names. Defendant did not recall calling plaintiff names. There was some evidence of domestic violence by both parties

related to the incident involving the personal protection order (PPO). However, given that there was no other evidence of domestic violence by defendant, the evidence clearly preponderated in the opposite direction of the trial court's finding that this factor favored plaintiff. See *Berger*, 277 Mich App at 705. Nonetheless, the trial court could have weighed factor (l) in favor of plaintiff based on the name calling.[2]

12. FACTOR (l)

Factor (l) is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The trial court did not find any other relevant factors. Defendant does not argue that there are any other relevant factors.

C. ABILITY TO COOPERATE AND AGREE

In addition to the best interest factors, the trial court must also consider the parties' ability to cooperate and agree on important decisions affecting the welfare of the children. MCL 722.26a(1)(b). As noted, the trial court found that the parties could not agree on basic issues involving the children given their differences regarding discipline, medical care, and emotional needs. The trial court believed defendant's rigid rules precluded cooperation and found that sole legal custody to plaintiff was in the children's best interests. Defendant contends that the parties cooperate on important decisions affecting the children, including healthcare, religion, daily decisions, bedtimes, and discipline.

As discussed above, there was evidence that the parties do not entirely agree regarding healthcare. It appears the parties do agree regarding religion. There was evidence that plaintiff did not agree with defendant's discipline and parenting style. However, she also testified that defendant had become less rigid and strict, although she believed it was just "for show." Defendant testified that the parties disagree regarding bedtimes, but he is willing to discuss the issue with plaintiff. Thus, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that the parties could not agree on basic issues affecting the children. See *Berger*, 277 Mich App at 705.

Overall, the trial court's findings of fact were not against the great weight of the evidence and the trial court did not abuse its discretion in awarding sole legal and physical custody to plaintiff. See *Berger*, 277 Mich App at 705. Although the trial court failed to articulate and apply the proper standard, the error was harmless. See *Fletcher*, 447 Mich at 882. Applying the clear and convincing evidence standard, defendant would have failed to show that changing the established custodial environment was in the best interests of the children. See *Kessler*, 295 Mich App at 61.

[2] Defendant also admitted that taking Ryan out of plaintiff's arms was emotional abuse.

D. NOTICE

Defendant further argues that plaintiff requested joint legal custody throughout the trial and that he was not given notice that legal custody was an issue. Defendant cites no case law to support his argument that the trial court cannot award sole legal custody despite the parties' preferences. There was no formal agreement between the parties regarding custody.

We note that in *Mann v Mann*, 190 Mich App 526, 538; 476 NW2d 439 (1991), this Court found that the trial court committed clear legal error by awarding sole legal custody to the plaintiff when he did not request a change of legal custody in his motion to change physical custody. This Court found that the trial court deprived the defendant of notice and an opportunity to be heard. *Id.* This case is distinguishable in that, although neither party requested sole legal custody, the parties requested joint legal custody, and, thus, legal custody was at issue. This case also involved an initial custody determination at a divorce trial, rather than a motion to change custody, and, thus, a legal custody determination was necessary.[3] Further, the trial court's "Early Intervention Conference Findings and Summary Order" indicates that custody was at issue. Defendant also testified regarding the best interest factors, suggesting that he knew custody was at issue.[4] Also, plaintiff did request sole legal custody in her written closing argument. Thus, defendant had an opportunity to respond with an argument regarding legal custody in his closing. In his findings of fact and conclusions of law, defendant noted that this was the first time plaintiff requested sole legal custody, but did not argue that he did not have notice.

II. PARENTING TIME

Defendant contends that the trial court's parenting time schedule must be reversed. We disagree.

"Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact 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." *Berger*, 277 Mich App at 716.

MCL 722.27a(1) provides:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

[3] There was a temporary order awarding joint legal and physical custody.

[4] We note, however, that such testimony could have been related to parenting time or physical custody only.

MCL 722.27a(6) provides:

> The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:
>
> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
>
> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
>
> (i) Any other relevant factors.

The trial court ordered that the children have their primary physical residence with plaintiff and parenting time with defendant on alternate weekends from Friday after school to Sunday at 7:00 p.m. and every Wednesday from 5:00 p.m. to 9:00 p.m. Defendant contends that he should have received significantly more parenting time.

As discussed, the trial court's finding that best interest factors (a), (b), (c), and (j) favored plaintiff was not against the great weight of the evidence.[5] See *Berger*, 277 Mich App at 705. With regard to the factors listed in MCL 722.27a(6), factors (a), (c), (d), (f), (h), and (i) may also be relevant. With regard to factor (a), there was evidence that the children have illnesses, the

[5] Although the trial court's findings regarding factor (k) were against the great weight of the evidence, the trial court could have considered the same evidence under factor (l) and found that factor (l) favored plaintiff.

parties have some disagreements regarding their care, and plaintiff primarily cared for the children when they were sick. With regard to factor (c), there was evidence that Megan believed defendant abused her, but this belief may have come from plaintiff. With regard to factor (d), there was evidence of defendant's verbally abusing plaintiff. With regard to factor (f), there was evidence that defendant changed parenting time arrangements on his own, without plaintiff's agreement. Regarding factor (h), there was evidence of defendant's taking Ryan without informing plaintiff where he was during the incident involving the PPO. However, defendant testified that he said he was going to his brother's house. Regarding factor (i), defendant testified about his significant involvement with the children's activities. However, plaintiff testified that she was involved in all the extracurricular activities and doctor appointments and that defendant primarily cared for the children financially. Defendant also testified regarding his flexible schedule, but plaintiff testified that she never saw such flexibility. While the trial court mentioned the incident involving the dog in its statement of the facts, it did not focus on the issue in making its parenting time determination. Accordingly, the trial court's decision to give defendant parenting time every other weekend and Wednesday evenings was not an abuse of discretion. See *Berger*, 277 Mich App at 716.

III. PROPERTY DISTRIBUTION

Defendant contends that the marital property distribution must be reversed. We disagree.

"[T]his Court must first review the trial court's findings of fact for clear error." *Berger*, 277 Mich App at 717.

> The trial court's factual findings are accorded substantial deference. If the trial court's findings of fact are upheld, this Court must decide whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable. [*Id.* at 717-718 (citations omitted).]

This Court has stated:

> The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. Trial courts may consider the following factors in dividing the marital estate: (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. The trial court must consider all relevant factors but "not assign disproportionate weight to any one circumstance." [*Berger*, 277 Mich App at 716-717 (citations omitted).]

The trial court awarded the marital home to plaintiff, with 50 percent of the equity to defendant. Each party was awarded their own vehicle. The parties' cash accounts were divided equally. The marital portions of the parties' pensions were divided equally. The parties' 2011 income tax refund was divided equally. The trial court ordered defendant to pay off the credit card debt that was used for family expenses and to repay the marital funds in the amount of $18,032. The judgment of divorce clarifies that defendant must pay the American Express, US Bank Visa, and the Costco American Express from his share of the accounts, the parties must each pay the remainder of their separate credit cards, and defendant must repay marital funds in the amount of $2,101.30.

Defendant argues that plaintiff received most of the assets, while he received most of the debt. The trial court's order and the judgment of divorce reveal that all assets were divided equally. However, it appears that defendant was required to pay off the credit cards used for marital expenses as well as for, what the trial court found to be, his non-marital expenses.

With regard to the debt the trial court found was non-marital, plaintiff testified regarding defendant's spending on his brother's home and vacations, without her agreement. Defendant argues that it was marital debt because he wanted the children to have a nice place to stay when they were with him. However, since the expenses were not agreed to, it was equitable for the trial court to require defendant to pay for them. See *Berger*, 277 Mich App at 717-718.

Although the order and judgment are somewhat unclear, it appears that defendant was also required to pay off certain credit cards used for marital expenses, while the parties are to pay the remainder of their own credit cards. An analysis of the factors reveals that this was also equitable and the trial court's ruling should be affirmed. See *Berger*, 277 Mich App at 717-718. First, the marriage was long term, during which time plaintiff gave up her career and only recently began working part-time. Second, while defendant contributed financially, plaintiff contributed by caring for the home and children. Third, according to the trial court, both parties are 46 years old. While defendant has a career and earns a significant amount of money, plaintiff must return to school in order to obtain a better paying job. Fourth, the parties are both healthy and physically able to work. Regarding factors five and six, the parties will both have home expenses, while defendant has a much higher paying career. Defendant has the ability to earn much more than plaintiff. Defendant suggested that plaintiff caused the marriage to break down by having an affair, but the trial court believed it was defendant's conduct that led to the breakdown of the marriage.[6] However, there is no evidence that the trial court gave undue weight to this factor. These factors, as well as general principles of equity, suggest that defendant should be responsible for the parties' credit card debt. See *Berger*, 277 Mich App at 717-718.

[6] The trial court did not, however, specify what defendant sought to control. Plaintiff testified regarding defendant's control of the children and parenting time issues.

IV. SPOUSAL SUPPORT

Defendant contends that the trial court's spousal support award constituted an abuse of discretion. We disagree.

The trial court's award of spousal support is reviewed for an abuse of discretion. *Berger*, 277 Mich App at 726.

> "The trial court's factual findings are reviewed for clear error. If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. The trial court's dispositional ruling must be affirmed unless the appellate court is firmly convinced that it was inequitable." [*Id.* at 727 (citations omitted).]

"The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger*, 277 Mich App at 726.

> Among the factors that should be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

The trial court ordered defendant to pay spousal support in the amount of $2,225 a month for six years. The trial court found that spousal support was appropriate because defendant's desire to control the marriage created the conflicts, plaintiff was the primary caregiver, plaintiff only worked part-time, defendant had ability to pay, plaintiff needs to cover daily expenses, there is a great income disparity, and plaintiff needs spousal support to maintain the marital home. Defendant argues that the facts do not support the spousal support award.

The trial court's findings were not clearly erroneous. See *Berger*, 277 Mich App at 727. The trial court did not specify what defendant sought to control. However, plaintiff testified regarding defendant's control of the children and parenting time issues. On the other hand, defendant suggested that plaintiff controlled access to Megan's medication and that she had an affair. There was also evidence that plaintiff was the primary caregiver and only recently began working part-time. Given defendant's income, he has the ability to pay spousal support. There

was also evidence of the income disparity between the parties and that plaintiff needed spousal support to maintain the home and for daily expenses.[7]

With regard to the other factors, the marriage was long term and during that time plaintiff did not work. Plaintiff is able to work, but must acquire more education to obtain a full-time professional position. The parties each received half of the marital property and defendant was responsible for most of the debt. Both parties are 46 years old. The parties are both healthy and physically able to work. The parties previously had the same standard of living and both will be responsible for the children, although plaintiff has sole legal and physical custody and defendant is required to pay more of the extracurricular activity expenses. Both parties contributed to the marital estate.

Defendant argues that he should not be required to pay more than 40 percent of his income on spousal support, child support, and the children's extracurricular activities. However, defendant provides no case law to support this argument and the trial court's ruling was equitable. See *Berger*, 277 Mich App at 727.[8]

Defendant argues that the trial court should not have awarded spousal support for six years, when plaintiff testified it would take her only two to four years to obtain a degree. However, there is no guarantee plaintiff will find employment paying a sufficient amount immediately after obtaining her education. At trial, defendant suggested he was willing to pay for five years.[9] Therefore, the decision to award spousal support for six years was not inequitable. See *Berger*, 277 Mich App at 727.

Plaintiff argues that the amount of spousal support should actually be increased. However, the trial court's ruling must be affirmed unless it was clearly inequitable. See *Berger*, 277 Mich App at 727.

V. ARBITRATION FEE

Defendant contends that the trial court's decision requiring defendant to pay the entire cost of arbitration must be reversed. We disagree.

> [D]omestic-relations arbitration is governed by statute. Issues of statutory construction present questions of law that are reviewed de novo. The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent—the words of the statute. If

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[7] Defendant argues that the trial court should have imputed income to plaintiff. While it is unclear whether the trial court imputed income to plaintiff for the purpose of calculating spousal support, the trial court did impute $10,000 a year to plaintiff for the purpose of calculating child support.

[8] Defendant also agreed that a 70/30 split regarding extracurricular activity expenses is fair.

[9] The trial court found that defendant offered to pay for six years.

> the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and judicial construction is neither permitted nor required. Under the plain-meaning rule, 'courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." [*Johnson v Johnson*, 276 Mich App 1, 7-8; 739 NW2d 877 (2007) (citations omitted).]

"MCL 600.5072 governs domestic relations arbitration . . . ." *Johnson*, 276 Mich App at 8. It provides, in part:

> (1) The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:
>
> (a) Arbitration is voluntary.
>
> (b) Arbitration is binding and the right of appeal is limited.
>
> (c) Arbitration is not recommended for cases involving domestic violence.
>
> (d) Arbitration may not be appropriate in all cases.
>
> (e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.
>
> (f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.
>
> (g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.
>
> (h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.
>
> (i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration. [MCL 600.5072(1).]

The trial court ordered defendant to pay the cost of arbitration. Defendant argues that the statute does not allow the trial court to decide the issue of payment and, because arbitration is voluntary, all aspects must be agreed to by the parties.

The plain language of the statute reveals that the parties must be informed that they may be either solely or jointly responsible for the cost of arbitration. See MCL 600.5072(1)(i). There is nothing restricting the court from determining whether the parties will be solely or jointly responsible. Therefore, the trial court was permitted to require defendant to pay the cost of arbitration.

Plaintiff also cites MCL 552.13(1) and MCR 3.602(M). MCL 552.13(1) permits the court to award costs. Unlike MCR 2.625(1), which allows costs to the prevailing party, MCL 552.13(1) does not limit costs to the prevailing party. Therefore, MCL 552.13(1) may constitute another basis for the trial court to require defendant to pay the cost of arbitration. Contrary to plaintiff's argument, MCR 3.602 does not apply to arbitration under MCL 600.5072. See MCR 3.602(A).

VI. ATTORNEY FEES

Defendant contends that the trial court's award of attorney fees must be reversed. We disagree.

> This Court reviews a trial court's decision to grant or deny attorney fees for an abuse of discretion; the court's findings of fact on which it bases its decision are reviewed for clear error. The trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes. [*Ewald v Ewald*, 292 Mich App 706, 724-725; 810 NW2d 396 (2011) (citations omitted).]

"Under the 'American rule,' attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Reed*, 265 Mich App at 164. "Nevertheless, attorney fees are not recoverable as of right in divorce actions. Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id.* (citations omitted). "A party seeking attorney fees must establish both financial need and the ability of the other party to pay." *Ewald*, 292 Mich App at 724. There is also a "common-law exception to the American rule 'that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation.'" *Reed*, 265 Mich App at 164-165 (citation omitted). Under this exception, "the attorney fees awarded must have been incurred because of misconduct." *Id.* at 165. The party requesting attorney fees must also prove "the amount of the claimed fees and their reasonableness." *Ewald*, 292 Mich App at 725. A trial court must conduct a hearing or find facts regarding the reasonableness of the fees incurred. *Reed*, 265 Mich App at 165.

The trial court ordered defendant to pay $16,000 in attorney fees based on the facts and the income disparity. This amount was the balance of the attorney fees plaintiff owed at the time of trial, although they subsequently increased. The trial court stated:

> [Plaintiff] testified that the fees were caused in large part by Defendant's failure to appear at two meetings, his actions that necessitated her filing several motion [sic] to enforce his compliance with the court's status quo orders in July, August, September and November and her filing a motion to remove him from the marital home and cancelling her credit cards and AOL account and causing an unjustified custody trial after the FOC recommendation in June, 2011.

Although the trial court listed plaintiff's testimony, it never specifically made any findings, other than stating that it was awarding attorney fees "[b]ased on the facts presented and the great disparity in income." Therefore, the trial court never explained what conduct by defendant caused plaintiff to incur attorney fees. As in *Reed*, the trial court failed to find any specific misconduct by defendant that caused plaintiff to incur attorney fees. See *Reed*, 265 Mich App at 165. Even if the trial court made sufficient findings, it did not specify what portion of the fees was the result of defendant's alleged misconduct. See *id.* Therefore, the trial court abused its discretion in awarding attorney fees on this basis. See *id.*

The trial court also awarded attorney fees based on the disparity in income. There was evidence that plaintiff earned $10.98 an hour and worked either 15 hours a week or 17 and a half hours a week, while defendant earned $121,000 a year. This evidence established both plaintiff's financial need and defendant's ability to pay. See *Ewald*, 292 Mich App at 724. See also *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010) ("[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees."). Therefore, the trial court did not abuse its discretion in awarding attorney fees on this basis. See *Ewald*, 292 Mich App at 724. While the trial court failed to find facts regarding the reasonableness of the fees incurred, the amount of the fees was discussed at trial and plaintiff submitted a statement of her fees. See *Reed*, 265 Mich App at 165. Further, defendant does not dispute the reasonableness of the fees.

On appeal, plaintiff argues that this Court should award her appellate attorney fees.

> MCR 3.206(C)(1) provides that "a party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action." MCR 3.206(C)(2) provides that "a party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay." [*Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003).]

In *Gates*, this Court found that the defendant was unable to bear the expense of the appeal and remanded for the trial court to determine an appropriate amount of attorney fees for the appeal. *Id.*

Plaintiff argues that defendant is able to pay the fees and she is not. We note that plaintiff now has the benefit of spousal support and half of the marital assets. We therefore deny the request.

VII. MCR 3.211

Defendant contends that the judgment of divorce must be reversed because it did not contain the required language under MCR 3.211. We disagree.

"Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). This issue was not raised before or addressed by the trial court. Therefore, it is unpreserved. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

MCR 3.211(C) provides:

> A judgment or order awarding custody of a minor must provide that
>
> (1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor,
>
> (2) the person awarded custody must promptly notify the friend of the court in writing when the minor is moved to another address, and
>
> (3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act, MCL 722.31.

However, MCL 722.31(2) (of section 11) provides:

> A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4), permits, the residence change. This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents.

Therefore, MCL 722.31 does not apply if the order grants sole legal custody to one of the parties. See MCL 722.31(2). In this case, the order granted sole legal custody to plaintiff. Therefore, MCL 722.31 does not apply. Accordingly, it was not necessary for the judgment of divorce to contain the language in MCR 3.211(C)(3). Therefore, there was no plain error. See *Rivette*, 278 Mich App at 328.

Affirmed. Plaintiff may tax costs.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood