STATE OF MICHIGAN

COURT OF APPEALS

MEGAN ELIZABETH AGUILAR,

Plaintiff-Appellee,

v

ALBERTO AGUILAR, JR.,

Defendant-Appellant.

UNPUBLISHED
December 19, 2019

No. 347338
Jackson Circuit Court
LC No. 17-000563-DM

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

PER CURIAM.

Defendant appeals as of right the trial court's corrected judgment of divorce.[1] Specifically, defendant contends that the trial court erred in awarding physical custody of the children and the marital home to plaintiff, Megan Elizabeth Aguilar. For the reasons explained in this opinion, we affirm the trial court's custody and parenting-time determination, but reverse the provision that awards the marital home to plaintiff and remand this case to the trial court for additional factual findings.

Defendant and plaintiff were married in 2004. They had two children, DA and AA, during the marriage. Plaintiff filed for divorce in March, 2017. On May 1, 2017, the trial court entered a temporary custody order establishing custody of the children in the event plaintiff or defendant moved out of the marital home. Following a bench trial, the trial court issued a judgment of divorce on May 10, 2018. The judgment ordered the marital home awarded to plaintiff; however, the order did not contain any child custody or parenting-time provisions. Following two additional hearings, the trial court issued the corrected judgment of divorce on November 8, 2018, which ordered joint legal custody of the children, while granting plaintiff physical custody of the children. The trial court also awarded the marital home to plaintiff. This appeal followed.

[1] The original judgment of divorce failed to address the issue of child custody. Only the corrected judgment of divorce is at issue on appeal.

I. CHILD CUSTODY

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

A. PRESERVATION

An issue raised in the trial court and pursued on appeal is preserved even if the trial court failed to address or decide the issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). In the trial court, the parties disputed the best interests of the children and whether a custodial environment existed between the children and plaintiff. The trial court found that a custodial environment existed with plaintiff and that it was in the best interests of the children for plaintiff to have sole physical custody. Thus, these issues are preserved.

Defendant did not argue in the trial court, however, that the trial court erred by amending the temporary custody order 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 burden of proof concerning the children's best interests. Thus, these issues are unpreserved.

B. STANDARD OF REVIEW

This Court applies "three standards of review in custody cases." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "The great weight of the evidence standard applies to all findings of fact. A trial court's findings . . . should be affirmed unless the evidence clearly preponderates in the opposite direction." *Id*. Further, the "abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id*. Additionally, this Court reviews questions of law for "clear legal error." *Id*. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id*. Finally, "[i]ssues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006).

Unpreserved issues are reviewed for plain error. *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014). "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, citation and quotation marks omitted). The appellant bears the burden of persuasion with respect to prejudice. See *Carines*, 460 Mich at 763 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.") (quotation marks and citation omitted).

C. ANALYSIS

1. MODIFICATION OF THE CHILD CUSTODY ORDER

Defendant argues that the trial court erred when it awarded physical custody of the children to plaintiff without first finding proper cause or a change of circumstances. We disagree.

According to MCL 722.27(1)(c), a trial court may "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . ." In addition, "[t]he court shall not modify or amend its previous judgment or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c).

At the outset, we do not believe that the trial court amended the May 1, 2017 temporary custody order. In the temporary order, the parties shared joint legal and physical custody of the children as long as they lived together in the same residence. The temporary order, however, stated that if the parties were to separate, plaintiff would have physical custody of the children and defendant would have parenting time on alternating weekends from Thursday after school until Sunday evening and every Tuesday after school until 8:00 p.m.; the trial court used identical language in the corrected judgment of divorce. Because the language in the corrected judgment of divorce was identical to that in the temporary order, the corrected judgment of divorce did not in any way "modify or amend" the "the established custodial environment of a child," but rather continued the existing environment. It was completely foreseeable and reasonable to believe, throughout the proceedings, that if the parties did not exercise their authority to stop living together prior to final judgment, they would do so thereafter, demonstrating that the corrected judgment of divorce did not work an amendment to the established custodial environment. The fact that following the entry of the corrected judgment the parties chose to cease living together is irrelevant to this analysis. The identical language of the temporary order permitted the parties to cease living together at any time of their choosing; that they chose to do so after the entry of the corrected judgment of divorce did not change the "established custodial environment" which had always afforded them that right. In other words, it was not the corrected judgment of divorce which modified the "the established custodial environment of a child" but rather the exercise of a right by a party, a right which had existed beginning with the temporary order, which caused them to cease living together. Those circumstances simply do not fall under MCL 722.27(1)(c). Accordingly, the trial court was not required to make preliminary findings regarding proper cause or change of circumstances pursuant to MCL 722.27(1)(c).

Moreover, as acknowledged by defendant, this Court has determined that a threshold finding of proper cause or change of circumstances is not necessary before a trial court issues its first custody order even if a temporary custody order is already in place. See *Thompson v Thompson*, 261 Mich App 353, 361-362; 683 NW2d 250 (2004). "By definition, a temporary custody agreement is only a *temporary* order pending further proceedings." *Id*. at 357; see also *id*. at 359 ("The trial court's custody award resulting from trial was the original custody award

and not a modification or amendment of an existing custody award."). Specifically, this Court explained:

> The first sentence of MCL 722.27(1)(c) only refers to when a party is attempting to "[m]odify or amend," while the second sentence mandates that the trial court not "modify or amend its previous judgments or orders *or issue a new order* so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." (Emphasis added.) In light of the clear intention of the Legislature, the first sentence of the MCL 722.27(1)(c) does not apply [to] the trial court's initial or "new" custody order in this matter. The trial court's award of custody was not a modification or amendment; it was a new order that is only subject to the limitation provided in the second sentence of MCL 722.27(1)(c). As such, the requirement to show proper cause or change of circumstances does not apply to the trial court's initial award of custody in the present case. [*Id*. at 361-362 (first alteration in original).]

See also *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011).

On appeal, defendant acknowledges this Court's holding in *Thompson*, but argues that the Court misread the plain language of MCL 722.27(1)(c). Specifically, defendant argues that MCL 722.27(1)(c) does not distinguish between temporary and final orders. Nonetheless, *Thompson*, a published opinion decided by this Court after November 1, 1990, is binding precedent on subsequent panels of this Court. See MCR 7.215(J)(1). The May 1, 2017 temporary custody order was, as its title indicated, a temporary order. Accordingly, the corrected judgment of divorce did not amend or modify the temporary order. Rather, the corrected judgment of divorce was an entirely new order. As a result, defendant's argument is without merit, and the trial court did not err in failing to consider proper cause or change of circumstances before issuing the corrected judgment of divorce. See *Thompson*, 261 Mich App at 361-362. And for the reasons previously stated, the corrected judgment of divorce did not in any event modify or amend an "established custodial environment of a child."

2. CUSTODIAL ENVIRONMENT

Next, defendant argues that the trial court erred by concluding that the established custodial environment existed with plaintiff. We disagree.

"[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*, 295 Mich App at 61. That sentence refers to a custody determination not exempted under MCL 722.27(1)(c), in this case, the temporary order. Although we have already found that the temporary order was not relevant to establishing a custodial environment, in entering the corrected judgment of divorce, the trial court nevertheless was required to determine whether an established custodial environment existed outside the strictures of the temporary custody order.

MCL 722.27(1)(c) states, in pertinent part, that:

> 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.

According to this Court,

> [a]n 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 v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

In this case, the trial court concluded that the children's established custodial environment existed with plaintiff. The trial court explained that it considered the age of the children, the physical environment, and the inclination of the custodian and the children as to the permanency of the relationship. The trial court stated that the testimony established that plaintiff was the primary caretaker of the children before the divorce was filed. She took maternity leave when they were born, she provided for their daily care, and she took them to doctor appointments. In contrast, defendant only became more active in their lives after plaintiff filed for divorce. The trial court concluded that the children were still young and would be looking for a parent to provide care on a regular basis.

Defendant has not shown that the trial court's conclusion was against the great weight of the evidence. See *Phillips*, 241 Mich App at 20. The trial court considered the testimony, the ages of the children, and permanence of the physical environment. Plaintiff testified that she was the primary caretaker of the children since they were born. She took them to medical appointments, attended their school conferences and all of DA's individual education program (IEP) meetings, brought them to church, volunteered at their church program, and went to their sporting events. On the other hand, the evidence showed that defendant became more involved in the children's lives after the divorce proceedings began. Defendant stated that he was involved with the children's daily lives, but he admitted that he took several solo vacations and trips without the rest of the family during the marriage. He also had difficulty naming any of the children's doctors, teachers, or coaches. Furthermore, he failed to attend any IEP meetings. Considering the testimony offered at trial, the trial court's conclusion that the established custodial environment existed with plaintiff was not against the great weight of the evidence. See *id*.

3. BEST INTERESTS

Defendant argues that the trial court's findings were against the great weight of the evidence in determining that it was in the children's best interests to award plaintiff primary physical custody. We disagree.

In making a custody determination, a trial court is required to evaluate the best interests of the children under the 12 statutorily enumerated factors listed in MCL 722.23.[2] *Kessler*, 295 Mich App at 63.

In this case, the trial court determined that factors (a), (c), (e), and (g) favored both parties, and that factors (f), (j), and (k) did not favor either party. The trial court concluded that

---

[2] According to MCL 722.23, the child's best interests are based on consideration of 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. 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.

factors (b), (d), and (h)[3] favored plaintiff. In regard to factor (i), the trial court stated that it had interviewed the children and taken their preferences into consideration, but it did not reveal those preferences. Finally, the trial court did not consider factor (*l*). On appeal, defendant specifically contends that the trial court erred in its findings regarding factors (b), (d), (h), (i), (j), and (*l*).

The trial court relied on similar evidence in its determination of factors (b), (d), and (h). The trial court explained that plaintiff was the most involved in the children's early education. She made the education decisions, she was involved in the IEP meetings, and she attended parenting-teacher conferences. In contrast, defendant did several activities, such as vacations and football tailgates, on his own. He seemed to be uninformed regarding the children's activities. Specifically, the trial court voiced concern that defendant was unaware of the IEP process, which involved testing, meetings, diagnosis, and medication. Nonetheless, the trial court acknowledged that defendant became more active and involved in the children's lives after the divorce was filed.

These findings were not against the great weight of the evidence. See *Phillips*, 241 Mich App at 20. Similar to the evidence regarding the established custodial environment, the testimony showed that plaintiff was the primary caregiver of the children. She was the most involved in their daily activities and care. In contrast, defendant stated that he took the kids to school and picked them up. He also stated that the parties shared responsibility for driving the children to their sporting events. He cooked them meals. Defendant also stated that he read the bible with the children and prayed with them several times a day. But defendant also acknowledged that he took several trips without the children during the marriage, and he appeared to be uninformed regarding the children's teachers, doctors, and activities. He did not attend any of the IEP meetings and he only began attending church in the summer of 2017. Considering the testimony, the trial court's determination that factors (b), (d), and (h) favored plaintiff on the basis of defendant's involvement in the daily lives of the children before the divorce was filed was not against the great weight of the evidence. See *id.*

Moreover, defendant's argument that the trial court erred in considering facts for more than one factor or "double-weighted" the factors is without merit. Although the trial court did consider similar facts for more than one factor, this Court has acknowledged that the factors have some natural overlap. See *Fletcher v Fletcher*, 229 Mich App 19, 24-25; 581 NW2d 11 (1998) (holding that because "the factors have some natural overlap" the trial court can consider the same evidence for multiple best-interests factors). Moreover, it is unnecessary for all the factors to be given equal weight. See *Riemer v Johnson*, 311 Mich App 632, 645-646; 876 NW2d 279 (2015) (stating that the trial court may assign different weights to the various best-interest factors).

In regard to factor (i), defendant argues that the trial court's *in camera* interviews with the children were not recorded and, therefore, constituted a due-process violation. MCL

[3] Defendant argues that the trial court's conclusion regarding factor (h) was unclear; however, we believe that the trial court implicitly found that this factor favored plaintiff.

722.23(i) states that the trial court must take the preference of the child into account if it decides that the child is old enough to express a preference. "As a general rule, a trial court must state on the record whether children were able to express a reasonable preference and whether their preferences were considered by the court, but need not violate their confidence by disclosing their choices." *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), aff'd in part and rev'd in part on other grounds by 447 Mich 871 (1994). This Court has acknowledged that *in camera* interviews used for fact-finding "invite[] numerous due process problems." *Molloy v Molloy*, 247 Mich App 348, 351; 637 NW2d 803 (2001), aff'd in part and vacated in part on other grounds by 466 Mich 852 (2002).

Despite this Court's concern with unrecorded *in camera* interviews, there is no requirement for *in camera* interviews to be recorded. Indeed, the Michigan Supreme Court specifically vacated the section of this Court's opinion in *Molloy*, 247 Mich App at 363, that held that all future *in camera* interviews with children in custody cases be recorded. *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002). The Supreme Court explained that it was unable to determine that the Michigan Constitution mandated such a requirement. *Id*. As a result, the trial court here did not err by failing to record the *in camera* interviews with the children. See *id*.[4]

The trial court's conclusion that factor (j) did not favor either party appeared to be based on the fact that the parties were still living together and drawing the children into their disputes. However, the trial court opined that the parties' ability to work together would improve once they were separated. This finding was not against the great weight of the evidence. See *Phillips*, 241 Mich App at 20. Each party accused the other of berating him or her in front of the children and involving the children in their disputes. Each also accused the other of interfering with the other's parenting time with the children. Considering the parties' testimony, the trial court's conclusion that neither party was facilitating a close parent-child relationship with the other was not against the great weight of the evidence. See *id*.

Finally, defendant argues that the trial court erred in failing to make any credibility determinations or considering factor (*l*). Although the trial court did not specifically state its credibility determinations, such findings are not required, and in any event are implicit in the trial court's findings as to the other factors. For example, the trial court appeared to find plaintiff's testimony that she was the primary caretaker of the children credible. Moreover, the trial court appeared to accept both parties' accusations regarding domestic violence. Furthermore, the trial court did not find any other facts relevant to its custody determination; therefore, an analysis of factor (*l*) was unnecessary. This did not constitute error. See *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000) (stating that the trial court is not

[4] We note that our Supreme Court's recent decision in *In re Ferranti*, ___ Mich ___; ___ NW2d ___ (2019) (Docket No. 157907); slip op at 24-28, holding that a trial judge violates a parent's due process rights when it holds an *in camera* interview with a child is limited to child protection proceedings. Because this case addresses child *custody*, not child protection, *In re Ferranti* is inapplicable to the *in camera* interview in this case.

required to comment on every matter in evidence or make a determination regarding every argued proposition in a child custody case).

4. BURDEN OF PROOF

Defendant argues that we cannot review the trial court's child custody order because the trial court failed to articulate the proper burden of proof concerning the children's best interests. We disagree.

Defendant argues that the trial court erred in failing to state the applicable burden of proof. Defendant is correct that the trial court did not articulate a burden of proof in its ruling; however, the trial court determined that the established custodial environment existed with plaintiff. Therefore, the trial court could not modify any established custodial environment without finding that such a change was in the children's best interests by clear and convincing evidence. See *Griffin v Griffin*, 323 Mich App 110, 119-120; 916 NW2d 292 (2018). Maintaining the established custodial environment, however, only required a preponderance of the evidence, the normal burden of proof in a civil case. See *id*. We presume that the trial court knows the law, see *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001), and thus absent the demonstration of some error, we also presume that it properly allocated the burden of proof. Moreover, because the trial court awarded physical custody of the children to plaintiff, it thereby maintained the established custodial environment on the basis of its analysis of the best-interest factors. Accordingly, we are able to review the trial court's decision because, by finding that the custodial environment existed with plaintiff, the evidentiary burden of proof the trial court was required to apply—a preponderance of the evidence—was clear. The trial court's failure to explicitly state the applicable burden of proof on the record in this case did not amount to error requiring reversal. Furthermore, defendant failed to make any argument on appeal supported by court rule, statute, or caselaw that this error by the trial court was an error requiring reversal. Accordingly, the argument is abandoned. See *MOSES Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.").

Because the trial court's findings regarding the children's established custodial environment and the statutory best-interest factors were not against the great weight of the evidence, the trial court did not abuse its discretion in awarding primary physical custody of the children to plaintiff and providing parenting time to defendant. See *Phillips*, 241 Mich App at 20. Thus, we affirm the custody and parenting-time provisions of the corrected judgment of divorce.

II. PROPERTY DISTRIBUTION

Defendant argues that the trial court erred in awarding plaintiff the marital home without considering the necessary property distribution factors. We agree.

A. PRESERVATION

An issue raised in the trial court and pursued on appeal is preserved even if the trial court failed to address or decide the issue. *Peterman*, 446 Mich at 183. Both parties requested the

marital home in the divorce. The trial court awarded the marital home to plaintiff. Thus, the issue is preserved.

B. STANDARD OF REVIEW

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. "[Q]uestions of law are reviewed de novo." *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

C. ANALYSIS

Pursuant to MCR 3.211(B)(3), a judgment of divorce must include a determination of the property rights of the parties. Generally, marital assets are divided between the parties while each party retains his or her separate assets. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). "In dividing marital assets, the goal is to reach an equitable division in light of all the circumstances." *Id*. at 188. The Michigan Supreme Court explained that a trial court should consider the following factors to reach an equitable distribution of the marital estate:

> (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks*, 440 Mich at 159-160.]

In this case, the trial court did not consider or make any findings of fact as to the *Sparks* factors. In its ruling regarding the marital home, the trial court stated that it was awarding the marital home to plaintiff to maintain the children's established custodial environment and continuity. At trial, the parties appeared to agree that defendant used 401(k) funds to purchase the home before the parties were married. Both parties, however, contributed to the mortgage payments and improvements made on the home. It is unclear whether the trial court considered any of this information or any of the other *Sparks* factors in making its determination. A trial court's distribution of the marital estate is strongly related to its factual findings. See *Sparks*, 440 Mich at 162 n 31. Because the trial court did not make a record showing that it considered any of the *Sparks* factors in awarding plaintiff the marital home, we remand this case to the trial court for further factual findings regarding the relevant property-division factors. See *McNamara*, 249 Mich App at 186 (stating that in a case in which "any of these factors are relevant to the value of the property or to the needs of the parties, the trial court must make specific findings of fact regarding those factors").

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ David H. Sawyer
/s/ Michael J. Riordan