# STATE OF MICHIGAN

# COURT OF APPEALS

ALYSSA MARLENE COLE,

Plaintiff-Appellee,

v

CLAIR DONALD COLE II,

Defendant-Appellant.

UNPUBLISHED
May 14, 2020

No. 351382
Sanilac Circuit Court
Family Division
LC No. 19-038067-DM

Before: JANSEN, P.J., and METER and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgement of divorce entered by the trial court. The trial court granted the parties joint legal custody of their three minor children, EC, CC, and DC, and granted sole primary custody to plaintiff. We affirm.

## I. FACTUAL BACKGROUND

The parties were married in 2011 and have three children. On February 19, 2019, plaintiff filed a complaint for divorce, and sought joint legal custody and sole legal custody of the three minor children. The trial court referred this matter to the Friend of the Court for a determination of several issues, including custody and parenting time. After an evidentiary hearing, the referee concluded that the children had an established custodial environment with plaintiff. The referee recommended the parties share joint legal custody, and that it was in the best interests of the minor children that plaintiff have sole physical custody.

Defendant filed a timely objection to the referee's recommendation and requested a de novo hearing. Defendant argued, in relevant part, that the referee erroneously concluded that the best-interests factors weighed in favor of plaintiff, and that the referee had failed to obtain the reasonable preferences of EC and CC as prescribed in MCL 722.23(*i*). The trial court held a de novo reviewing hearing where it adopted the referee's recommendations as its own. Subsequently, the trial court entered the judgment of divorce which granted the parties joint legal custody and plaintiff sole physical custody of the minor children. This appeal followed.

## II. STANDARD OF REVIEW

In child-custody disputes, "all orders and judgements of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or clear legal error on a major issue." MCL 722.28; *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011). Under the great weight of the evidence standard, this Court will affirm the trial court's determination unless "the evidence clearly preponderates in the other direction." *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). "In reviewing the findings, this Court defers to the trial court's determination of credibility." *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

"A trial court's discretionary rulings, such as the court's determination on the issue of custody, are reviewed for an abuse of discretion." *Id*. "In child custody cases, an abuse of discretion occurs if the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Maier v Maier*, 311 Mich App 218, 221; 874 NW2d 725 (2015) (quotation marks and citations omitted). Questions of law in child custody cases are reviewed for clear legal error. *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014). "A trial court commits clear error when it incorrectly chooses, interprets, or applies the law." *Id*.

## III. ANALYSIS

### A. REASONABLE PREFERENCES

Defendant first argues on appeal that the trial court committed clear legal error by failing to obtain the reasonable preferences of EC and CC as proscribed in MCL 722.23(*i*). We agree, but conclude that defendant is not entitled to relief because it is not apparent that the reasonable preferences of EC and CC would have altered the trial court's custody determination.

The trial court makes custody determinations on the basis of the minor children's best interests. MCL 722.25(1). One of the factors that a trial court must consider in a child custody dispute 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*); *Maier*, 311 Mich App at 224. "A child over the age of six is presumed to be capable of forming a reasonable preference." *Id*. At the time of de novo hearing, EC was 10 years old and CC was 6 years old. Therefore, EC and CC were both presumptively old enough to express a preference.

It is undisputed that the trial court did not interview EC or CC regarding their reasonable preferences. There is also no evidence that the parties requested that the trial court ascertain the reasonable preferences of EC or CC. Regardless, the trial court has an affirmative duty to consider a child's preferences, regardless of whether the parties request that the child be interviewed. *Kubicki v Sharpe*, 306 Mich App 525, 544-545; 858 NW2d 57 (2014) (concluding that the trial court's failure to interview a child of suitable age and maturity was an error requiring reversal). This is because the trial court " 'must consider, evaluate, and determine each of the factors contained in [MCL 722.23]' when determining a child's best interests." *Sinicropi*, 273 Mich App at 182, quoting *Mann v Mann*, 190 Mich App 526, 536; 476 NW2d 439 (1991). Therefore, we

conclude that the trial court committed clear legal error by failing to consider the reasonable preferences of EC and CC.

Generally, when a trial court fails to consider a child's preference under MCL 722.23(*i*), this Court "must vacate the circuit court's order and remand for a new custody hearing." *Kubicki*, 306 Mich App at 545. However, reversal is not required if, based on the particular facts of the case, the child's preferences would not have changed the trial court's custody ruling. *Sinicropi*, 273 Mich App at 182-183. Here, the trial court determined that the established custodial environment was with plaintiff. The trial court also found that the best-interests factors weighed in favor of plaintiff, or that the parties were equal.

The trial court's custody determination focused on the fact that plaintiff was the primary caregiver of the children and could provide a more stable environment for the children's daily care because defendant's work schedule caused him to be unable to provide the children with daily care. Despite defendant's assertion that EC and CC would have expressed concern about plaintiff's boyfriend, David Theut, and his children, plaintiff's affairs, and their living conditions, the record indicates that the children were happy and provided for at both plaintiff's and defendant's homes. Therefore, even if EC and CC had been interviewed, it is not apparent that their reasonable preferences would have altered the trial court's custody determination. We conclude that defendant is thus not entitled to relief.

## B. BEST-INTERESTS DETERMINATION

Next, defendant argues that the trial court's findings regarding best-interest Factors (b), (d), and (e) were against the great weight of the evidence. We disagree.

All custody disputes are to be resolved in the best interests of the children and a trial court generally determines the best interests of the children by weighing the twelve factors outlined in MCL 722.23; *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). "A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors." *Id*. "A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi*, 273 Mich App at 184.

The best interest factors enumerated 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 a preference.

(j) The willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic Violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

The trial court must consider these factors and explicitly state its findings and conclusions regarding each factor on the record; failure to do so constitutes reversible error. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007).

As a preliminary matter, defendant does not contest the trial court's determination that the children had an established custodial environment with plaintiff. *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015) (noting that a trial court must determine where the children have an established custodial environment prior to addressing the best-interests factors.) Rather, defendant first argues that the trial court erred in concluding that Factor (b) weighed in favor of plaintiff. We disagree.

MCL 722.23(b) considers "[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." "This factor deals with the capacity and disposition of the parties, not whether each party has in fact had the opportunity to demonstrate that capacity and disposition." *Demski*, 309 Mich App at 447-448. The trial court found that this factor favored plaintiff because while "[b]oth parties have the capacity and disposition to provide the children with love and affection. [Plaintiff] has been the primary care provider for the children and has been more involved in the children's day to day care due to [defendant's] employment and long work hours."

Defendant argues that the trial court erroneously considered his past inability to provide love and guidance for the children because of his long work hours out of state, and failed to consider that he obtained employment in Michigan and cared for the children during this proceeding. We disagree. The evidence established that defendant's current work schedule in Michigan required him to leave the house between 4:00 a.m. and 4:30 a.m. and not return until

7:00 p.m. or 7:30 p.m. Defendant explained that he intended to rely on babysitters, family, and daycare to care for the children while he was at work. Comparatively, the evidence established that plaintiff had been the minor children's sole caregiver since their respective births, and planned to continue to care for them full time. Although defendant moved back to Michigan from California and had spent three weekends per month with his children, plaintiff had been the primary caregiver for the children and was involved with the children's schooling and medical needs. Indeed, defendant was unable to name the children's teachers or doctors, and had never attended a parent-teacher conference. Thus, we conclude that it was not against the great weight of the evidence for the trial court to conclude that Factor (b) favored plaintiff.

Defendant next challenges the trial court's finding that Factor (d) weighed in favor of plaintiff. MCL 722.23(d) considers "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The trial court found that this factor favored plaintiff because

> [plaintiff] and the three children have been residing with [plaintiff's boyfriend, Theut] since about March 1, 2019. [Theut's] three children also reside in the home. [Plaintiff] has been 'officially dating' [Theut] since March of 2019. [Plaintiff] and the children were living with [defendant's father, Clair Cole] in his home in Port Sanilac until February 28, 2019. [Plaintiff] testified that [defendant] came back to Michigan and removed all of her possessions from the home and placed them outside. She then vacated the home and moved her [sic] and the children in with [Theut]. There are concerns about the stability of [plaintiff's] housing situation. If [Theut] decides to make her move out she presumably would have no housing. There is no evidence that the housing itself or [Theut] and his children create any kind of an unstable environment for the children. Ideally [plaintiff] will obtain her own housing for herself and the children.
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> [Defendant] is currently living in [Cole's] home in Port Sanilac. [Cole] is not currently living in the home due to being in a care facility. This appears to be a stable, satisfactory home in terms of the structure. [Defendant's] current work schedule is from 7:00a.m. until 5:30p.m. on Mondays through Friday. In addition to his work hours he is currently working outside of Novi, Michigan which adds additional two plus hours of commuting time each day. [Defendant's] work hours and the location of his employment provide him very little time to spend with his children during the week.

The record indicates that defendant had never cared for the children for longer than a weekend, and when given the opportunity to do so, was unable to balance the children's needs with his job. In March 2019, DC went to stay with defendant in California and was expected to stay there until April 16, 2019. Defendant sent DC back to plaintiff two weeks early because he was unable to care for DC while he was at work, despite his mother's assistance. While plaintiff's long-term plan was uncertain, the children have always been in her care and she was able to provide them with a stable and satisfactory environment. Again, we conclude that it was not against the great weight of the evidence for the trial court to find that Factor (d) favored plaintiff.

Finally, defendant argues that the trial court's finding that the parties were equal regarding Factor (e) was against the great weight of the evidence. MCL 722.23(e) considers "[t]he

permanence, as a family unit, of the existing or proposed custodial home or homes." When evaluating factor (e), the court may consider "frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions." *Ireland v Smith*, 451 Mich 457, 465 n 9; 547 NW2d 686 (1996). The trial court should focus on the child's prospects for a stable family environment, not the acceptability of the home. *Id*. at 464.

The trial court based its finding that plaintiff and defendant were equal with regard to Factor (e) on the basis that "[t]here was no evidence presented indicating that the children would be at risk of separation from either custodial home." The record indicated that the ability of both plaintiff and defendant to maintain a stable custodial home was questionable. Defendant has held numerous jobs since 2010 that have required him to move, and he was merely staying at Cole's house. Plaintiff was also merely staying at Theut's house, was unemployed, had been financially dependent on defendant since 2010, and indicated that if she had to move out of Theut's home and was unable to obtain employment, she would likely move to California to stay with her parents. However, the children were familiar with, happy, and provided for in both plaintiff's and defendant's homes. We conclude that it was not against the great weight of the evidence for the trial court to find the parties equal with respect to Factor (e).

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Thomas C. Cameron