

STATE OF MICHIGAN
COURT OF APPEALS

MONA ELKONY,

Plaintiff-Appellee,

v

ABDALLAH ABOUOUF,

Defendant-Appellant.

UNPUBLISHED

December 10, 2020

No. 352810

Ingham Circuit Court

Family Division

LC No. 18-002913-DM

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

PER CURIAM.

Defendant, Abdallah Abououf, appeals as of right the judgment of divorce entered by the trial court. The trial court granted plaintiff, Mona Elkony, physical and legal custody of their son and awarded defendant supervised parenting time on Saturdays from noon until 3:00 p.m. We affirm.

I. FACTUAL BACKGROUND

The parties entered into an arranged marriage in Egypt in September 2012. Plaintiff joined defendant in the United States in March 2014. According to plaintiff, defendant began abusing her within a month of her arrival in the United States and the domestic violence continued throughout the marriage. After one incident of domestic violence in February 2017 plaintiff obtained a personal protection order (PPO) and stayed in a shelter for approximately one month. She eventually withdrew the PPO after defendant told her that he was suicidal and he agreed to engage in family counseling.

From April to September 2017 the parties participated in individual and joint counseling, but the counseling was unsuccessful and plaintiff eventually met with a divorce attorney in September 2018. On September 14, 2018, plaintiff filed a complaint for divorce and sought physical and legal custody of the child. She also filed ex parte motions for custody, exclusive use of the marital home, and to restrain the dissipation of assets. The trial court entered ex parte orders with respect to all three motions the same day. In relevant part, the trial court restrained defendant from approaching or entering the marital home and gave plaintiff sole physical and legal custody

of the child.¹ The trial court referred the matter to the Friend of the Court (FOC) for a determination of custody, parenting time, and support. Defendant filed objections to the ex parte order for exclusive use of the marital home and to the ex parte order for custody, and defendant also requested a hearing.

At the hearing, the trial court stated that it could not modify the ex parte orders until the FOC made a recommendation regarding custody and parenting time. The FOC investigator eventually concluded that the child had an established custodial environment with plaintiff. The investigator recommended that plaintiff have sole legal and physical custody of the child and that defendant have parenting time between the hours of noon and 3:00 p.m. on Saturdays. Defendant was homeless and living in his car at the time and did not have appropriate housing for overnight parenting time. The trial court entered an order on October 24, 2018, adopting the FOC's recommendations as the temporary order of the court.

Defendant objected to the FOC investigator's recommendation and requested a hearing. He also moved to vacate the trial court's temporary order, and filed a motion for parenting time, alleging that plaintiff was refusing to allow him to have unsupervised parenting time. The trial court ordered that defendant have three hours of unsupervised parenting time each Saturday from noon to 3:00 p.m., and that defendant arrange for a third party to facilitate the parenting time exchanges.

In March 2019, plaintiff and defendant entered into a stipulated agreement regarding custody of the child. The trial court entered an order adopting the agreement. The order provided, in relevant part, that plaintiff would have physical custody of the child, and that she would have sole legal custody until the PPO against defendant terminated, after which the parties would have joint legal custody. The order gave defendant parenting time on alternating weekends on a "stepped-up" basis that, over time, would lead to an increase in parenting time for defendant.

At the pretrial hearing on March 28, 2019, plaintiff stated that defendant continued to harass her, that he had been charged with domestic violence, and that he had been arrested for a parole violation. Defendant argued that a trial was not necessary on the issues of custody and parenting time because the issues had been resolved by the parties' stipulated agreement that the trial court already had adopted. The trial court, however, noted that no evidentiary hearing had been held and determined that a trial was necessary so it could make a custody determination on the basis of the best-interest factors. After a lengthy trial lasting six days over the course of eight months, the trial court entered the judgment of divorce which granted plaintiff sole legal and physical custody of the child and awarded defendant supervised parenting time every other Saturday from noon until 3:00 p.m. This appeal followed.

II. STANDARD OF REVIEW

In child custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28;

¹ Plaintiff subsequently obtained a PPO against defendant on September 27, 2018.

Dailey v Kloenhamer, 291 Mich App 660, 664; 811 NW2d 501 (2011) (quoting MCL 722.28). 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.* "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). 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 legal error when it incorrectly chooses, interprets, or applies the law." *Id.*

III. ANALYSIS

A. DUE PROCESS

Defendant argues that he was denied his right to due process when the trial court entered ex parte orders at the commencement of the divorce action. We disagree.

Defendant did not raise his due-process argument in the trial court, rendering it unpreserved.² *Loutts v Loutts*, 298 Mich App 21, 23; 826 NW2d 152 (2012). 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).

"Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). Due process is violated when the "breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." *Id.* (citation omitted).

Both the United States Constitution and the Michigan Constitution "preclude the government from depriving a person of life, liberty, or property without due process of law."

² All other issues in this case were properly preserved for our review.

Hinky Dinky Supermarket, Inc v Dep't of Community Health, 261 Mich App. 604, 605; 683 NW2d 759 (2004), citing US Const, Am XIV; Const 1963, art 1, § 17. Due process is a flexible concept that calls for such procedural safeguards as the situation demands. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993); *Mathews v Eldridge*, 424 US 319, 332, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976). Due process generally requires nothing more than notice of the nature of the proceedings and an opportunity to be heard in a meaningful manner. *Cummings v Wayne Co*, 210 Mich App. 249, 253; 533 NW2d 13 (1995). In *Bonner v City of Brighton*, 495 Mich 209, 238-239; 848 NW2d 380 (2014) (quotation marks and citations omitted), our Supreme Court explained:

The essence of due process is the requirement that “a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.” All that is necessary, then, is that the procedures at issue be tailored to “the capacities and circumstances of those who are to be heard” to ensure that they are given a meaningful opportunity to present their case, which must generally occur before they are permanently deprived of the significant interest at stake. [Citations omitted; alteration in original.]

Defendant’s due process argument is difficult to ascertain and, because he fails to actually provide any legal authority establishing how his right to due process was violated, we could consider the argument abandoned.³ See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015) (“An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant’s claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority.”). Nevertheless, a fair reading of defendant’s brief raises the issue of whether his right to procedural due process was violated at the trial court level. Defendant challenges only the process that the trial court used when making its decision. Therefore, we conclude that defendant’s due process argument is limited to a claim of a violation of procedural due process, not whether the trial court violated his right to due process by failing to adequately consider the facts of this case before entering its child custody order. See *In re JK*, 468 Mich at 210 (establishing that due process can be violated in child custody cases if the trial court only considers best-interest factors).

Under MCR 3.207(B), “[p]ending the entry of a temporary order, the court may enter an ex parte order if the court is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued.” The trial court granted plaintiff’s motions for ex parte orders, and subsequently held a hearing on defendant’s objections to the ex parte orders for exclusive use of the marital home and the ex parte order for custody. Defendant had notice and an opportunity to be heard after the ex parte orders were issued. He received all that due process requires. Defendant contends, nonetheless, that after the ex parte motions were filed and orders granted he was at such a significant legal disadvantage that it violated due process. There is nothing in the record, however, to support defendant’s argument that the allegations in the ex parte motions biased the trial court against defendant or that the trial court found defendant to be a “bad man” before defendant “was ever able to get in front of the

³ Indeed, defendant fails to provide any authority regarding what due process in this case requires.

judge.” The trial court made best-interest findings after a lengthy trial and supported its findings with facts. Consequently, the trial court proceedings did not deprive defendant of his right to due process.

B. BEST INTERESTS

Defendant argues that the trial court abused its discretion by holding a trial to consider the best interests of the child with respect to custody and parenting time, and by making determinations that were not consistent with the parties’ prior stipulated agreement and the March 15, 2019 order that incorporated the parties’ agreement. We disagree that the trial court abused its discretion.

A trial court “cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child.” *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). The stipulation provided that plaintiff would have physical and legal custody of the child, and that defendant would have joint legal custody after the PPO expired. The stipulation also included a phased approach to parenting time that would periodically give defendant more parenting time with the child. But the stipulation did not shed any light on what disposition would be in the child’s best interests. Furthermore, the stipulation did not establish the facts of the case and the trial court had not previously considered the issue of custody after an evidentiary hearing. Indeed, the trial court had never considered the issue of custody outside the context of a temporary order. Under these circumstances, the trial court properly found that it was not required to uphold the stipulation of the parties and that it was required to make a custody and parenting time decision based on the evidence and on consideration of the child’s best interests following a trial. Consequently, the trial court did not err by holding a trial to determine the child’s best interests.⁴

C. BEST-INTEREST FACTORS

Defendant argues that the trial court’s factual findings with respect to factors (a), (b), (c), and (e) of MCL 722.23 were against the great weight of the evidence. We disagree.

When making an initial custody determination, the trial court is required to evaluate the factors in MCL 722.23 and state its conclusions as to each factor to determine the child’s best interests. Trial courts have a “duty to ensure that the resolution of any custody dispute is in the best interests of the child.” *Harvey v Harvey*, 470 Mich 186, 191-192; 680 NW2d 835 (2004). MCL 722.23 defines the “best interests of the child” as “the sum total of the” factors set forth in MCL 722.23(a) to (l). “In child custody cases, the family court must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them.” *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007). See also *Thompson v*

⁴ We find it curious that defendant argues on one hand that the trial court’s procedures in this case were so deficient as to violate his right to due process, while on the other hand arguing that the trial court should have held fewer proceedings to determine the child’s best interests. It would be difficult indeed for both arguments to be correct. We need not reconcile that logical dichotomy here, however, because, as stated earlier, the trial court did not violate defendant’s right to due process and it properly held a trial to determine the child’s best interests.

Thompson, 261 Mich App 353, 356-357; 683 NW2d 250 (2004) (noting that a party is entitled to a hearing and the trial court must make best-interest findings after a temporary custody order). Additionally, “[t]he trial court may not ‘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.’ ” *Thompson*, 261 Mich App at 362, quoting MCL 722.27(1)(c). Finally, “[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.

As a preliminary matter, defendant does not contest the trial court’s determination that the child had an established custodial environment with plaintiff. See *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015) (noting that a trial court must determine if the children have an established custodial environment prior to addressing the best-interest factors). Rather, defendant argues that the trial court erred by concluding that factors (a) and (b) favored plaintiff and that factors (c) and (e) favored neither party. He argues that if the trial court had properly weighed these factors in favor of defendant, it would have granted joint legal custody to defendant and at least the parenting time agreed to in the stipulated agreement.

Factor (a) considers the “love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a). Plaintiff was a stay-at-home mother prior to the divorce action and was the child’s primary caregiver. The trial court’s finding that the child was well-bonded to plaintiff was supported by the evidence. The trial court also found that defendant’s bond with the child had been affected by reduced parenting time because of criminal investigations, a domestic violence charge, and PPO violations. The trial court also found that the emotional ties between defendant and the child had been adversely affected given the child’s report to Dr. Stephen Guertin, who examined the child at the request of Children’s Protective Services (CPS), that defendant injured the child’s bottom using his finger, a toy, and his penis. Dr. Guertin opined that based on these statements from the child, as well as pictures he reviewed of injuries the child sustained, the child was in danger. The pictures of the child’s injuries that Dr. Guertin reviewed showed that the child’s ear was repeatedly pulled to the extent that part of the earlobe “popped off.” Injuries to the child’s ear were consistent with plaintiff’s reports that defendant often pulled the child’s ear. Defendant minimizes the effect of his behavior on his parenting time and blamed his minimal parenting time on his alleged lack of participation in this litigation and on the “trial court’s actions . . . due to the PPO.” But there was ample evidence that defendant’s behavior resulted in the minimal parenting time. Defendant also minimizes the child’s description of abusive behavior, arguing that CPS did not find that a preponderance of the evidence support the allegations of sexual abuse, as demonstrated by the fact that no criminal charges were filed. But Dr. Guertin’s testimony about how defendant potentially abused the child cannot be ignored. The trial court’s finding that this factor favored plaintiff was not against the great weight of the evidence.

Factor (b) considers the “capacity and disposition of the parties involved to give the children 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). In relevant part, the trial court found as follows:

The Plaintiff has been the primary care provider and responsible for supporting the child’s early schooling which occurs at the Islamic Center. Plaintiff asserts that Defendants [sic] beliefs are extreme and unhealthy for the child which

includes killing non-Muslims. Defendant's lists of demands to preserve the marriage, domestic violence, and his persistent stalking behavior support this assertion.

The Court finds that the minor child's ear suffered injury and bruising. Dr. Stephen Guertin testified that such an injury has a "high degree of specificity for abuse." The Court finds it more likely than not that the Defendant caused this injury while providing discipline.

Defendant contends that the trial court's "analysis on this factor is largely reliant on the same CPS report that was not able to find anything definitive." But the trial court never mentioned the CPS report. Rather, the trial court referred to Dr. Guertin's testimony in finding that it could *not* find by a preponderance of the evidence that the child's injury to his back was a result of abuse or that the child was sexually abused by defendant. But the trial court also relied on Dr. Guertin's testimony that an ear injury such as the child suffered has a high degree of specificity for abuse in finding it more likely than not that defendant caused the injury while providing discipline. This finding is further supported by plaintiff's testimony that she had previously observed defendant pull on or twist the child's ear as a form of punishment. Defendant also contends that the trial court's finding that defendant's religious beliefs are extreme and unhealthy were based on nothing more than plaintiff's testimony, which he describes as an attempt to attach "something sinister" to defendant's Muslim faith. The trial court, however, merely cited plaintiff's testimony that defendant believed that all non-Muslims should be killed as an example of defendant's extreme and unhealthy beliefs. The trial court apparently found plaintiff's testimony to be credible and we must defer to the trial court's credibility determinations. See *Sinicropi*, 273 Mich App at 155. There is nothing in the trial court's findings that suggests that defendant "got punished for being a radical Muslim." Both parents were involved with the child in his faith. The trial court's finding that this factor strongly favored plaintiff was not against the great weight of the evidence.

Factor (c) considers 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." MCL 722.23(c). The trial court found as follows:

The ability of both parents to provide financially for the child appears to be poor. Plaintiff remains unemployed and Defendant lost his job. They are both educated but do not seem capable to providing for the child. Plaintiff has been reliant on the shelter. It is unknown how Defendant is providing for himself. This factor weighs in neither parties [sic] favor.

Defendant argues that the trial court's finding that this factor weighed in favor of neither party is against the great weight of the evidence because defendant regained employment after the trial concluded, but before the trial court issued its opinion. The trial court, however, properly considered this factor on the basis of evidence presented at trial. See *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003) ("When determining the propriety of the denial of defendant's motion, we must limit our review to the evidence presented to the trial court at the time defendant's motion was decided."). Under these circumstances, the trial court's finding that factor (c) favored neither party was not against the great weight of the evidence.

Factor (e) considers the “permanence, as a family unit, of the existing or proposed custodial home or homes.” MCL 722.23(e). The trial court found that “[w]hile the Defendant mentioned seeking a second wife, neither party has any new relationships. This factor does not favor either party.” Defendant argues that he “had noted that he was starting to see someone during the divorce proceeding.” But defendant does not provide any reference to the record to provide factual support for the claim. A claim fails when a party presents it “as a mere conclusory statement without citation to the record.” *Ewald v Ewald*, 292 Mich App 706, 726; 810 NW2d 396 (2011). There is nothing in the record to suggest that the trial court “dismiss[ed] a relationship” as defendant contends. Further, this factor considers the *permanence, as a family unit*, of the home. Even assuming that the record established that defendant “was starting to see someone,” a dating relationship in its beginning stages is not the type of permanent family unit contemplated by factor (e). The trial court had to consider the evidence as presented during the trial. See *Pena*, 255 Mich App at 313 n 4. The trial court’s finding that this factor did not weigh in either party’s favor was not against the great weight of the evidence.

Consequently, the premise of defendant’s argument that a “correct” finding in his favor with respect to factors (a), (b), (c), and (e) would have resulted in the trial court’s awarding joint legal custody fails. Considering that the trial court found that five factors favored plaintiff, while six of the factors were either neutral or inapplicable, the trial court did not commit reversible error in determining that plaintiff established by clear and convincing evidence that it was in the child’s best interests that she should be granted legal and primary physical custody.

IV. PARENTING TIME

Defendant argues that the trial court abused its discretion in determining parenting time. He argues that the trial court failed to consider the parenting time factors listed in MCL 722.27a(7). We disagree.

MCL 722.27a(7) provides as follows:

(7) 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 did not expressly state which of the factors, if any, it considered when determining an appropriate parenting time schedule. But the plain language of MCL 722.27a(7) suggests that the trial court is not ultimately required to consider any of the factors set forth in the statute. Indeed, the statute merely states that the trial court *may* consider the parenting time factors set forth under MCL 722.27a(7), not that it *must* consider those factors. See *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) (stating that the term “may” is considered permissive, while the term “shall” is considered mandatory). Defendant has not cited to any legal authority to the contrary and, therefore, we consider any argument that MCL 722.27a(7) required the trial court to consider those factors abandoned. See *Cheesman*, 311 Mich App at 161. Thus, the trial court was not required to make express findings regarding the factors set forth under MCL 722.27a(7). Accordingly, defendant's argument in this respect fails.

Defendant also argues that *if* the trial court had considered the parenting time factors, it would have decided that “the most important factors were (c), (d), and (i).” But it is apparent from the trial court's findings that the trial court did consider each of these factors.

When considering factor (c)—the reasonable likelihood of abuse or neglect of the child during parenting time—the trial court specifically found as follows:

The Court finds by clear and convincing evidence that parenting time with Defendant that is unsupervised would endanger the child's physical, mental and emotional health. Defendant lacks any respect for the Plaintiff and his lack of respect is shown to the child through his treatment of the child's mother. The Court is clearly convinced that the minor child is likely to be physically abused while in Defendant's care. The Defendant has used physical discipline which injured and bruised the child's ear. While the Court initially discounted the evidence presented pre-trial, Dr. Guertin testified that such injuries are a specific indicator of abuse. This indication places the child's other injuries, the redness to his ribs and the objective findings to the child's rugal folds, in a different light. While the evidence was inconclusive in these instances, they raise additional concerns when examining parenting time. The severe redness after returning from the father's parenting time does indicate a level of neglect.

Further, it appears that the trial court did consider factor (d)—the reasonable likelihood of abuse of a parent resulting from the exercise of parenting time—when it ordered that the supervisor provide transportation for the child. The record provided ample evidence that defendant frequently failed to comply with the temporary orders requiring that defendant arrange for a third party to transport the child to and from parenting time and that defendant not be present at parenting time exchanges, as well as evidence that defendant violated the PPO more than once. Additionally, as stated earlier, the trial court expressed concerns regarding the child’s safety while in defendant’s care.

Defendant argues that under factor (i), the trial court should have considered the parties’ stipulated agreement regarding parenting time. Defendant does not elaborate on this argument, but by the time of the pretrial hearing plaintiff was no longer in agreement with the terms of the agreement because, she argued, circumstances had changed since the agreement was reached in February 2019. At the time of the trial, the parties clearly were not in agreement on parenting time. Consequently, defendant has failed to demonstrate that the trial court’s award of parenting time was an abuse of discretion.

V. CONCLUSION

For the reasons stated in this opinion, the trial court’s child custody order is affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ James Robert Redford

/s/ Michael J. Riordan

/s/ Jonathan Tukel