

STATE OF MICHIGAN
COURT OF APPEALS

RYAN JAMES RASMUSSEN,

Plaintiff/Counter-Defendant-
Appellee,

v

DEBORAH SUSAN CASAMATTA,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
December 20, 2007

No. 276038
Washtenaw Circuit Court
LC No. 05-000390-DM

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. Relevant to this appeal, defendant challenges the trial court's decision to award plaintiff sole legal custody and primary physical custody of the parties' child, Sophia Casamatta (born June 23, 2005). Defendant also challenges the trial court's determination of child support and its decision to award plaintiff attorney fees of \$3,000. Because defendant has not established any basis for relief with respect to the trial court's: custody decision, denial of a new trial, decision not to apply MCL 722.31, determination of child support, and award of attorney fees to plaintiff, we affirm.

On appeal, defendant primarily challenges the trial court's custody decision. This Court applies three standards of review in child custody disputes. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994).

The clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law. Findings of fact are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. [*Foskett v Foskett*, 247 Mich App 1, 4-5, 634 NW2d 363 (2001) (citations and footnotes omitted).]

Initially, we reject defendant's argument that the trial court failed to make sufficient findings of fact in support of its determination that an established custodial environment did not exist with either party.

In deciding custody disputes, a trial court must first determine whether an established custodial environment exists. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). Brief, definite, and pertinent findings on contested matters are sufficient, MCR 2.517(A)(2), and a court is not required to comment on every matter in evidence or every argument made by the parties, *Fletcher, supra* at 883; *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). Here, while the trial court did not make findings on each criterion in MCL 722.27(1)(c), it stated the statutory criteria and facts material to its determination that an established custodial environment did not exist. As a whole, the court's findings are sufficient for appellate review. Further, giving deference to the trial court's ability to judge the credibility of the witnesses, *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998), defendant has not established that the trial court's finding that an established custodial environment did not exist with either party is against the great weight of the evidence.

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. [MCL 722.27(1)(c).]

Under this statute, an established custodial environment is one "in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

We agree that this case is distinguishable from *Curless v Curless*, 137 Mich App 673; 357 NW2d 921 (1984), because the child in this case, having been born during the divorce proceedings, was too young to understand what was transpiring between the parties or even who might be providing her necessities of life. But there is evidence to support the trial court's finding that plaintiff actively pursued a relationship with his child, although this was made difficult by his residency in Virginia and conflict with defendant. The evidence supports a reasonable inference that the instability that existed during the divorce proceedings precluded either party from establishing a custodial environment with their young child that, in at least a psychological sense, was marked by qualities of security, stability, and permanence. *Baker, supra* at 579-580. The evidence that the child was temporarily living with defendant in her daycare provider's home at the time of trial could only add to the instability of the custodial situation. The evidence does not clearly preponderate against the trial court's finding that there was no established custodial environment with either party. *Foskett, supra* at 5.

Furthermore, even if the trial court erred in finding that an established custodial environment did not exist, the error was harmless. The significance of an established custodial environment is that it governs the standard of proof to be applied to decisions changing a child's custody. If an established custodial environment exists, a trial court must apply a clear and convincing evidence standard, as opposed to a preponderance of the evidence standard, before changing custody. *Baker, supra* at 579; see also MCL 722.27(1)(c). Here, notwithstanding the trial court's statement that it could apply a preponderance of the evidence standard, it explained that its custody decision was actually supported by clear and convincing evidence. Thus, any error in the trial court's determination that an established custodial environment did not exist was

harmless and remand for reevaluation of the custody decision is unnecessary. See *Ireland v Smith*, 451 Mich 457, 468-469; 547 NW2d 686 (1996); *Fletcher, supra*, 447 Mich at 889.

With regard to the trial court's actual custody decision, we review the trial court's findings of fact with respect to the best interest factors in MCL 722.23 under the great weight of the evidence standard and its application of law for clear legal error. *Foskett, supra* at 4-5. The court's ultimate custody decision is reviewed for an abuse of discretion. *Id.* at 5. The court's resolution of the statutory best interest factors need not be given equal weight. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). As this Court stated in *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995), "[t]he process of reviewing these wrenching decisions is not, at bottom, a problem of quantitative analysis; our duty is finally to analyze the quality of the evidence adduced to determine whether a party's burden of proof is met."

Defendant challenges the trial court's findings with respect to best interest factors (b), (c), (d), (e), (f), (g), (j), and (k) of MCL 722.23. To the extent that defendant argues that the trial court failed to address particular matters in evidence, we point out that a court is not required to comment on every matter in evidence or every argument raised by the parties. *Fletcher, supra*, 447 Mich at 883; *Bowers, supra* at 328. Additionally, to the extent that defendant relies on her own testimony to establish error, the record reveals that the trial court found that defendant was not a credible witness, particularly with respect to the disputed issue concerning which party was the aggressor of domestic violence in the home. We give deference to the trial court's resolution of credibility issues. *Fletcher, supra*, 229 Mich App at 25; see also MCR 2.613(C). Additionally, there is no support in the record for defendant's suggestion that the trial court was biased against her. A trial court is charged with the responsibility of determining the credibility of witnesses, and judicial remarks that are critical, disapproving of, or hostile toward parties or their cases ordinarily do not establish bias. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Defendant has not overcome the heavy presumption of judicial impartiality. *Id.* at 497.

With respect to factor (b), "[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), we disagree with defendant's claim that the trial court's evaluation of this factor is inconsistent with its evaluation of factor (a). Factor (b) goes beyond existing emotional bonds by requiring the trial court to project a parent's capacity and disposition to provide love, affection, and guidance in the future. The trial court reasonably looked beyond the parties' past interactions with the child to project their capacity and disposition to provide for the child's needs. Its finding that factor (b) favored plaintiff is not against the great weight of the evidence.

With respect to factor (c), the evidence that plaintiff, unlike defendant, had a history of stable employment and income supports the trial court's finding that plaintiff had the superior capacity and disposition to provide for the child's material needs. Defendant has not established that the trial court's ruling on this factor is against the great weight of the evidence.

There is a degree of overlap between factors (d) and (e). *Ireland, supra* at 465. Factor (d) is the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). This factor "calls for a factual inquiry

(how long has the child been in stable, satisfactory environment?) and then states a value ('the desirability of maintaining continuity')." *Ireland, supra* at 465 n 8. Factor (e) is "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). "Taken literally, factor e appears to direct an inquiry into the extent to which a 'home' will serve as a permanent 'family unit.'" *Id.* at 465. The acceptability of the home is not pertinent to this factor. *Fletcher, supra*, 447 Mich at 885. The focus of factor (e) is on the child's prospects for a stable family environment. *Ireland, supra* at 465.

The stability of a child's home can be undermined in various ways. This might include 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. Of course, every situation needs to be examined individually. [*Id.* at 465 n 9.]

With regard to the trial court's finding that factor (d) did not favor either party, we agree with defendant that the trial court did not comment on evidence that the child lived with her during the 15 months preceding the trial. The focus of the court's finding that the child was not in a stable, satisfactory environment was on the first six months of the child's life when plaintiff was visiting her in the marital home. The trial court arguably erred to the extent that it failed to consider the child's circumstances at the time of trial. It is clear from the court's earlier findings, however, that the court recognized that defendant had spent 15 months with the child. Further, defendant's own testimony indicated that the child's environment had changed shortly before trial, inasmuch as she and the child were temporarily staying in the daycare provider's home, and the trial court's findings with respect to factor (e) clearly reflect the court's awareness of defendant's plan to move to her father's home in Ohio after the trial.

Considered as a whole, any error by the trial court in applying factor (d) was harmless in light of the undisputed evidence that the child's environment had changed shortly before trial and would be changing again after the trial, regardless of which parent was awarded custody. It is apparent that the court would have reached the same result regarding the instability of the child's environment, even if it considered her current circumstances in its evaluation of factor (d).

With respect to factor (e), defendant's claim that the trial court improperly reopened the proofs when considering this factor is not properly before us because it lacks citation to supporting authority. A party may not leave it to this Court to search for authority to sustain or reject a position. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). We note, however, that it is not improper for a trial court to interrogate witnesses, even after both parties have rested. *People v Betts*, 155 Mich App 478, 480-483; 400 NW2d 650 (1986); see also MRE 614(b); *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996). Therefore, to the extent that the trial court attempted to elicit an assurance from plaintiff that he would rent or purchase a home if the child was placed with him so that he could have control over the child's physical environment, we find no error.

Although it appears that the trial court went beyond the scope of factor (e) by considering the acceptability of defendant's proposal to stay in her father's home and, in particular, the evidence regarding his past domestic violence with defendant's mother, the trial court also expressed reservations about plaintiff's situation. It did not find that either party had established

a proposed home that would serve as a permanent “family unit,” but rather that plaintiff was staying with a woman whom the court knew little about and that defendant’s stay in her father’s home would be temporary. The distinction ultimately drawn by the trial court with regard to the child’s prospects for a stable family environment under factor (e) arose from plaintiff’s superior ability to control the child’s physical environment by taking financial responsibility for securing a home. Overall, we are not persuaded that the trial court would not have reached a different decision, even if it had not considered the acceptability of defendant’s proposed home when evaluating factor (e). Therefore, any error in applying factor (e) was harmless. *Ireland, supra* at 468.

Factor (f) is the “moral fitness of the parties involved.” MCL 722.23(f). Like other factors, the moral fitness must relate to parental fitness. *Fletcher, supra*, 447 Mich at 886-887. The type of morally questionable conduct relevant to this factor includes “verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors” *Id.* at 887 n 6. Contrary to defendant’s argument on appeal, the trial court specifically addressed the moral fitness factor, weighing it in favor of plaintiff after commenting on evidence regarding both parties. Because defendant has failed to recognize and address the full basis of the trial court’s decision, we decline to consider this issue further. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

The trial court found that factor (g), the “mental and physical health of the parties involved,” MCL 722.23(g), highly favored plaintiff, because defendant’s past conduct demonstrated problems with her emotional health. Therefore, we reject defendant’s claim that the trial court’s concern was based on the psychological test results. Further, defendant has not established that the trial court’s decision is against the great weight of the evidence.

We also are not persuaded that the trial court’s findings that factor (j), which concerns each party’s willingness and ability to foster a parent-child relationship with the other party, favored plaintiff is against the great weight of the evidence. Further, the trial court’s decision to weigh factor (k), domestic violence, in favor of plaintiff rested largely on its assessment of the witnesses’ credibility. Overall, while domestic violence on the part of either party is not excusable, giving appropriate deference to the trial court’s finding that defendant was the aggressor and very confrontational during the marriage, it cannot be said that the trial court’s finding that factor (k) favored plaintiff is against the great weight of the evidence.

In sum, even if we were to conclude that the trial court erred in its application of factors (d) and (e), we would not reverse because we are satisfied that the trial court would have reached the same decision that clear and convincing evidence existed to award custody of the child to plaintiff. Further, defendant has not established that the trial court’s custody decision was an abuse of discretion. *Foskett, supra* at 5.

Regarding defendant’s claim that the trial court violated the automatic stay rule in MCR 2.614(A)(1), we shall assume for purposes of our review that the rule applied to the trial court’s prejudgment order that provided for a transfer of custody on October 14, 2006. Consistent with *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004), and *Loyd v Loyd*, 182 Mich App 769, 782; 452 NW2d 910 (1990), however, we conclude that this issue is moot given the amount of time that has passed beyond the 21-day period of the potential stay.

Next, defendant challenges the trial court's denial of her motion for new trial under MCR 2.611, which was based on procedural irregularities. In general, we review a trial court's decision on a motion for a new trial for an abuse of discretion. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004); see also *Foskett, supra* at 5 (discretionary rulings in child custody cases are reviewed for an abuse of discretion). However, defendant has done little to address the basis of the trial court's decision or to support her claim of procedural irregularities with citations to the record and supporting authority. This Court is not required to search the record for factual support for a party's claim, *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004), and an issue may be deemed abandoned where a party fails to cite supporting legal authority, *Prince, supra* at 197. Although this Court may overlook preservation requirements, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), our review is generally limited to the record presented to the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

To extent that defendant raised the alleged procedural irregularities below in her amended motion for a new trial, we are not persuaded that the trial court abused its discretion in denying defendant's motion. The trial court has broad discretion in matters of trial conduct, including the presentation of evidence and arguments. MRE 611; *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971). With regard to the testimony of expert witnesses, defendant has failed to show that she raised this specific issue in her motion for a new trial or that it was considered by the trial court. Further, defendant has not cited any factual support for her argument in the trial record. Defendant's only citations to the record relate to the matter raised by plaintiff's counsel's regarding witness fees. Furthermore, defendant's claim regarding counsel's conduct does not justify a new trial. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 682-683; 630 NW2d 356 (2001).

Defendant's next claim regarding the trial court's failure to apply MCL 722.31(4) is not properly before us because it was not presented to or decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Regardless, defendant has not established that the trial court was required to apply MCL 722.31(4).

We review issues of statutory interpretation de novo as a question of law. *Spires v Bergman*, 276 Mich App 432, 436; ___ NW2d ___ (2007), lv pending; *Brown v Loveman*, 260 Mich App 576, 582; 680 NW2d 432 (2004). MCL 722.31 was intended to codify, with some modification, the common-law test previously applied by this Court to determine if a child's domicile should be changed. *Spires, supra* at 436. The statute provides, in part:

(1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

(2) 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.

(3) This section does not apply if, at the time of the commencement of the action in which the custody order is issued, the child's 2 residences were more than 100 miles apart. . . . [MCL 722.31.]

This statute applies in all cases in which one parent wishes to change the legal residence of a child whose custody is governed by a court order. *Spires, supra* at 436. "[T]he Legislature intended that a parent who shares joint legal or physical custody may petition the court to relocate a minor." *Brown, supra* at 589. The statute does not apply if one parent is granted sole legal custody in the order governing custody. MCL 722.31(2); *Sehlke v VanDerMaas*, 268 Mich App 262, 265; 707 NW2d 603 (2005), rev'd in part on other grounds 474 Mich 1053 (2005). Further, the statute does not apply if, "at the time of the commencement of the action in which the custody order is issued, the child's 2 residences were more than 100 miles apart." MCL 722.23(3). A separate inquiry is made utilizing the best-interest factors in MCL 722.23 if the matter involves a change in custody. See *Brown, supra* at 585.

The first inquiry under MCL 722.31 is to determine if the child's custody was governed by an order and, if so, the terms of the order. Defendant does not identify any particular order that she claims constitutes a custody order for purposes of MCL 722.31. Although the lower court record contains several orders governing temporary parenting time, those orders are silent with respect to legal custody issues.

The Child Custody Act, MCL 722.21 *et seq.*, does not use "parenting time" and "custody" synonymously. See MCL 722.27(1) (trial court in custody dispute may award custody to one or more parties and grant reasonable parenting time); MCL 722.26a(7) ("joint custody" defined as a relationship in which the "child shall reside alternatively for specific periods with each of the parents" or parents share decision-making authority on important issues). Parenting time is granted in accordance with the child's best interests under MCL 722.27a. See *Brown, supra* at 595.

"In construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render any part of a statute surplusage or nugatory." *Thompson, supra* at 361 n 2. The primary goal of statutory construction is to ascertain and give effect to the legislative intent. *Id.* at 361 n 2. Because MCL 722.31 plainly requires a child subject to a custody order, and the record contains only parenting time orders, we conclude that MCL 722.31 does not apply. Therefore, we reject defendant's claim that the trial court was required to render a change-of-domicile decision under MCL 722.31.

Next, defendant argues that the trial court erroneously deviated from the formula prescribed by the Michigan Child Support Formula (MCSF) when it imputed income to her without explaining its deviation pursuant to MCL 552.605(2). A deviation will be found where a trial court does not follow the MCSF when imputing income. *Ghidotti v Barber*, 459 Mich 189, 198-200; 586 NW2d 883 (1998). The standards for imputing income are set forth in 2004 MCSF 2.10. *Stallworth v Stallworth*, 275 Mich App 282, 285; 738 NW2d 264 (2007). Because defendant does not argue that the trial court misapplied § 2.10, however, we find no basis for her claim that the trial court was required to apply the deviation standards in MCL 552.605(2).

Next, defendant argues that the trial court abused its discretion by awarding plaintiff \$3,000 in attorney fees. Attorney fees in a domestic relations case are governed by statute, MCL 552.13, and court rule, MCR 3.206(C). See *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The trial court awarded plaintiff attorney fees of \$3,000 because of defendant's violations of court orders pertaining to the marital home and possessions in that home. Because defendant does not address the basis for the trial court's decision to award attorney fees, appellate relief is not warranted. *Roberts & Son Contracting, Inc, supra* at 113.

Next, defendant argues that the parenting time awarded to her in the divorce judgment is not feasible because plaintiff moved from Virginia to Florida after the judgment was entered. If a parent believes that proper cause or change of circumstances merits a change in parenting time, the parent may move for modification of parenting time in the trial court. MCL 722.27(1)(c); *Brown, supra* at 595; *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999). Indeed, the record reflects that defendant moved for a modification of parenting time while this appeal was pending. The instant appeal does not involve any postjudgment order modifying parenting time, but rather is an appeal as of right from the final divorce judgment. See MCR 7.203(A)(1) and 7.202(6)(i). Our review is limited to the record presented to the trial court. *Amorello, supra* at 330. Because defendant's challenge to the parenting time schedule is based on circumstances arising after the judgment, we conclude that it is not properly before us and decline to address it.

Finally, defendant seeks actual attorney fees and costs incurred in prosecuting this appeal. Because this issue was not presented in the statement of questions presented, we could decline to address it. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). In any event, based on the cursory argument presented, we are not persuaded that defendant has established any basis for the requested relief. But plaintiff, as the prevailing party on appeal, may tax costs under MCR 7.219(A).

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh