

STATE OF MICHIGAN
COURT OF APPEALS

RICK I. BAXTER,

Plaintiff/Counter-Defendant-
Appellant,

v

JULIENA BAXTER, a/k/a WEIXI BAXTER,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
October 13, 2015

No. 327195
Jackson Circuit Court
LC No. 14-001272-DM

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Appellant Rick Baxter appeals as of right the judgment of divorce, raising issues related to physical custody, parenting time, and child support. For the reasons explained in this opinion, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

The parties married in 2012. They have one child together, who was born in 2012. Appellant filed an action for separate maintenance in May of 2014, and appellee filed a counter complaint for divorce shortly thereafter. Following a bench trial, the trial court entered a judgment of divorce which divided the parties' property and resolved issues relating to custody and child support. Specifically, the trial court's order granted the parties joint legal custody while appellee was given sole physical custody of the child and appellant was given parenting time on alternate weekends, Tuesday evenings, some holidays and school break times. In terms of child support, the trial court determined appellant's income to be \$65,000 and ordered that appellee should be awarded child support based on this figure.

Appellant now appeals as of right. On appeal, appellant challenges the trial court's custody and parenting time determination based on the assertion that the trial court applied an incorrect legal standard and made factual findings against the great weight of the evidence. Appellant also maintains that the trial court abused its discretion by denying his motion for a new trial, by failing to strike appellee's testimony about sexual abuse in their marriage, and by excluding evidence that appellant "passed" a polygraph examination. Finally, appellant maintains that the trial court erred by concluding that appellant's income was \$65,000 for child support purposes.

I. CUSTODY AND PARENTING TIME

In regard to child custody and parenting time, all orders and judgments of the circuit court are to be affirmed unless the court made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. MCL 722.28; *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). Under the great weight of the evidence standard, “a reviewing court should not substitute its judgment on questions of fact unless the factual determination ‘clearly preponderate[s] in the opposite direction.’ ” *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). “The trial court’s discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion.” *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). “An abuse of discretion exists when the trial court’s decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.” *Id.* Clear legal error occurs when a trial court incorrectly chooses, interprets, or applies the law. *Id.* at 706.

In challenging the trial court’s child custody and parenting time award on appeal, appellant first maintains that the trial court’s findings regarding the child’s established custodial environment were against the great weight of the evidence and that, as a result of these factual errors, the trial court applied an inappropriate legal standard to the custody determination when it concluded that appellant had the burden of proving, by clear and convincing evidence, that a change in custody was in the child’s best interests.

Whether an established custodial environment exists is a question of a fact and a “threshold determination” a trial court must consider before addressing a minor child’s best interests. *Pierron v Pierron*, 282 Mich App 222, 244; 765 NW2d 345 (2009) (citation and quotation marks omitted); *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). If “an established custodial environment exists, then the circuit court ‘shall 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.’ ” *Pierron*, 282 Mich App at 244-245, quoting MCL 722.27(1)(c). An established custodial environment can exist with both parents, and the existence of a temporary custody order is not dispositive. *Berger*, 277 Mich App at 707. Rather, “[t]he 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.” MCL 722.27(1)(c). In other words, as explained by this Court, an established custodial environment is

one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

Here, the trial court concluded that the child had an established custodial environment solely with appellee, and the testimony at trial supported the trial court’s finding that appellee was, and continues to be, the person who provides most of the care and comfort for the minor child. For example, appellee testified that she was primarily responsible for the child’s care from the time of his birth, including such activities as dressing him, bathing him, providing him with

healthy meals, playing with the child, taking him to school, etc. Additionally, appellee testified that the minor child went to her for nurturing and for comfort when he was crying, and that the minor child would not go to appellant for comfort. Appellee was critical of the care appellant provided in relation to simple matters such as changing diapers and providing healthy foods for the child. Appellee further testified that the child was not happy to go with appellant during his parenting time and that, when a temporary order entered that increased appellant's parenting time to a 50/50 split, the child began to experience separation anxiety upon leaving appellee. The child's daycare worker confirmed that the minor child was not as excited when appellant picked him up from daycare as he was when appellee picked him up. While appellant presented some contradicting evidence, the credibility of witnesses and the weight to afford the evidence were questions for the trial court. See *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008). Given the evidence presented, and affording due deference to the trial court's ability to judge credibility, the trial court's finding of an established custodial environment with appellee was not against the great weight of the evidence. See MCL 722.28; *Berger*, 277 Mich App at 705. Consequently, contrary to appellant's argument, the trial court did not commit clear legal error by holding that appellant had the burden of showing by clear and convincing evidence that a change from the established custodial environment with appellee to joint physical custody would be in the best interests of the minor child. See *Pierron*, 282 Mich App at 244-245.

Next, appellant contends that the trial court's factual findings regarding the best interests factors were against the great weight of the evidence and that its ultimate award of custody and parenting time was an abuse of discretion. Regarding the minor child's best interests, under the Child Custody Act, MCL 722.21 *et seq.*, "custody disputes are to be resolved in the child's best interests" and "[g]enerally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in [MCL 722.23]." *Eldred v Ziny*, 246 Mich App 142, 148, 150; 631 NW2d 748 (2001). MCL 722.23 provides:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.
- (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.

In regard to the best-interest factors, the trial court found that factors (a), (b), (d), (f) and (k) favored appellee, that factor (e) favored appellant, and that factors (c), (g), (i), and (j) were equal. The trial court also found that factors (h) and (l) were not applicable.

Appellant's specific arguments on appeal regarding the best interests factors are not particularly organized or well-developed. Although appellant does not identify which individual factors he is challenging, it appears that his arguments relate to factors (c), (d), (f), and (g). More specifically, apparently in relation to the trial court's findings under factor (c), it appears that there is some evidence that appellant feels the trial court failed to consider or to adequately consider when evaluating the best interests factors. For example, appellee maintains that the trial court failed to consider evidence that was critical of appellee's parenting, such as appellant's testimony that appellee would leave the room when the minor child had a shot or had his blood drawn and that appellee locked herself in a room and refused to breastfeed the child on several occasions. However, the trial court did consider some of that testimony in the context of factor (c). And, in any event, when analyzing the best-interest factors, a trial court's "findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties." *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). The trial court provided detailed analysis of the evidence supporting its findings, and we see nothing in the evidence that appellant claims that the trial court failed to explicitly consider that would render the trial court's findings regarding factor (c) against the great weight of the evidence. See MCL 722.28.

Appellant also challenges the trial court's characterization of appellee as a "stay at home mother" which the trial court made in relation to factor (d), but this finding was supported by testimony that appellee stayed at home for at least a year with the minor child and that, more generally, she performed the majority of the household and childrearing responsibilities. Appellant also acknowledged in his own testimony that the parties had an "arrangement" in which appellee "was a stay [at] home mom." On this record, the trial court's findings regarding factor (d) were not against the great weight of the evidence. MCL 722.28.

Relating to the trial court's findings under factor (f), appellant argues that the trial court erred by considering his extramarital affair as well as appellee's allegations of sexual abuse and appellant's treatment of her "like a slave" in the home. Initially, we agree that, because there is no evidence that appellant's extramarital affair had a significant influence on how he functioned within the parent-child relationship, it should not have been considered by the trial court when evaluating appellant's moral fitness under factor (f). See *Fletcher*, 447 Mich at 886-887. Nonetheless, any consideration of appellant's affair was harmless given the trial court's other reasons for concluding factor (f) favored appellee. That is, the trial court did not find that factor (f) favored appellee based solely on the testimony that appellant had an extramarital relationship. As detailed by the trial court, the evidence also showed that appellant treated appellee poorly, particularly after her caesarean section by, for example, requiring her to clean the home and care for the minor child as well as appellant's children from another marriage. Appellee testified that this resulted in her stitches opening and her having to return to the hospital. Appellee also described sexual abuse in her marriage, testifying, for example, that appellant forced her into sex "all the time." Appellee testified that appellant told her "[y]ou are willing to do it or I'm gonna force you into it, I'm gonna [rape] you." Appellee testified that appellant forced her to have sex 2-1/2 weeks after the minor child's birth. She also explained that appellant forced her to sign a "sex contract" requiring her to have sex with him one time every three days. Although appellant denied any allegations of sexual abuse or mistreatment of appellee, the credibility of the parties' respective testimony was a question for the trial court, *Wright*, 279 Mich App at 299, and the trial court concluded that appellee was credible, noting that her testimony regarding these subjects was "very compelling." Appellant's treatment of appellee after the birth of the minor child and the sex contract reflected poorly on appellant's moral fitness, and his treatment of appellee was a relevant factor for the trial court to consider when evaluating the child's best interests. See *Diez v Davey*, 307 Mich App 366, 394; 861 NW2d 323 (2014). Consequently, the trial court's finding that best-interest factor (f) favored appellee was not against the great weight of the evidence. MCL 722.28.

Regarding the parties' health, which is considered under factor (g), appellant argues that the trial court "greatly minimized Mrs. Baxter's admissions of depression and depressive behaviors." Although appellant raised concerns regarding appellee's mental health and her ability to care for the child in light of these issues, the trial court reasonably determined that such concerns could not be considered "legitimate" coming from appellant given that he acquiesced when appellee took the minor child with her when they separated, he initially exercised parenting time only on alternating weekends, and he turned down additional parenting time when it was offered. In other words, appellant's concerns regarding appellee's mental health in relation to her ability to parent appear disingenuous given his own demonstrated willingness to leave the minor child in her care. Again, credibility is a question for the trial court, *Wright*, 279 Mich App at 299, and the trial court's factual conclusions are not against the great weight of the evidence. Consequently, the trial court's finding that best-interest factor (g) was equal was not against the great weight of the evidence. MCL 722.28.

In sum, having reviewed the trial court's findings with respect to each factor, we conclude that the trial court's findings regarding the best interests factors were not against the great weight of the evidence. MCL 722.28. And, ultimately, the trial court did not abuse its discretion by awarding joint legal custody to the parties and sole physical custody to appellee. As noted, an established custodial environment existed only with appellee and appellant had to

provide clear and convincing evidence to warrant a change to the custody arrangement. Given the trial court's findings regarding the child's best interests, we can discern no abuse of discretion in the trial court's ultimate custody decision.

On appeal, appellant also argues that the trial court abused its discretion in the amount of parenting time awarded to appellant because the trial court provided no guidance regarding how reduced parenting time would "promote a strong relationship between him and [the minor child]." However, the trial court properly addressed the best-interest factors in MCL 722.23 and the factors listed in MCL 722.27a(6) when it determined the minor child's best interests in regard to parenting time. See *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010). Appellant does not challenge any of the trial court's findings regarding the factors listed in MCL 722.27a(6) and his challenge to those factors in MCL 722.23 are without merit for the reasons discussed *supra*. Given the trial court's determinations regarding the child's best interest, we see no abuse of discretion in the trial court's decision to award appellant parenting time on alternating weekends and every Tuesday night, as well as some holiday and school break time.

II. MOTION FOR A NEW TRIAL & POLYGRAPH EVIDENCE

Appellant also argues that appellee's testimony about his sexual abuse of her was a surprise to him, and that the trial court erred by denying his motion for a new trial based on his surprise. In the alternative, appellant maintains that appellee's testimony on the sexual abuse should have been stricken from the record based on its surprise to appellant. Appellant also argues that, following appellee's testimony, the trial court should have considered the results of a polygraph examination taken by appellant.

"A trial court's decision to grant or deny a motion for a new trial under MCR 2.611 is reviewed for an abuse of discretion." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). A trial court's findings of fact when addressing a motion for a new trial are reviewed for clear error. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002). A trial court's evidentiary decisions are reviewed for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005).

MCR 2.611(A)(1) provides in relevant part that: "[a] new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons: . . . (h) A ground listed in MCR 2.612 warranting a new trial." See also *Elazier v Detroit Non-Profit Hous Corp*, 158 Mich App 247, 249; 404 NW2d 233 (1987). In relevant part, MCR 2.612(C)(1) provides that "[o]n motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds: (a) Mistake, inadvertence, surprise, or excusable neglect." In other words, surprise testimony may constitute a ground for a new trial. See *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 727; 333 NW2d 341 (1983).

In this case, appellant alleges surprise at the testimony offered by appellee in terms of the sexual abuse she claimed to have suffered during their marriage. However, from the record, it is clear that this evidence was not actually a surprise to appellant. Appellant testified during the bench trial that, before trial, his own mother told him that appellee alleged that he sexually assaulted her. Appellant also acknowledged that one of his coworkers drafted a sex contract for

appellee to sign. Appellant testified that he saw the contract and said that it indicated that appellee could keep the horse owned by appellee and appellant if she had “sex every so often.” Because of appellant’s testimony that he had heard of appellee’s allegations of sexual abuse and knew of the sex contract, the trial court’s finding that appellant was not surprised by appellee’s testimony is not clearly erroneous. *Bynum*, 467 Mich at 283. And, indeed, given that appellant was not in fact surprised by this testimony, it is challenging to see how admission of this evidence could have materially affected his substantial rights. See MCR 2.611(A)(1). Appellant claims on appeal that he did not have an opportunity to prepare a defense to these allegations; but, in actuality, if appellant’s counsel was unprepared to respond to this testimony, it was because appellant was less than candid with his attorney about the existence of important contentions in the parties’ marriage. Cf. *Intl Union, United Auto, Aerospace & Agr Implement Workers of Am v Dorsey*, 474 Mich 1097; 711 NW2d 79 (2006). Moreover, appellant in fact had an opportunity to respond to appellee’s allegations at trial, including an opportunity to cross-examine appellee and an opportunity to recall appellant to the stand in an attempt to refute appellee’s testimony. See *Great Am Ins Co v Mich Consol Gas Co*, 13 Mich App 410, 424; 164 NW2d 575 (1968). In these circumstances, given that appellant was not surprised by appellee’s testimony, the trial court did not abuse its discretion in denying appellant’s motion for a new trial based on surprise.

Appellant also argues that the trial court erred by refusing to strike appellee’s testimony from the record because it was a surprise to him. Given that the trial court concluded the appellee’s testimony was not a surprise, we fail to see how the trial court abused its discretion by refusing to strike the testimony on this basis. And, in any event, appellant provides no legal authority in his brief for the position that surprise testimony should be stricken by a trial court under the circumstances presented. This issue is abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Appellant further argues that the trial court abused its discretion by refusing to admit the results of his polygraph test concerning appellee’s allegations of sexual abuse when it denied his motion for a new trial. It is a bright-line rule in Michigan that the results of polygraph examinations are inadmissible as evidence, at either criminal or civil trials. See *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Appellant is correct that polygraph results may be admitted in very limited circumstances in criminal proceedings in connection with a motion for a new trial or a motion to suppress evidence. See *Barbara*, 400 Mich at 411-415; *People v McKinney*, 137 Mich App 110, 114-116; 357 NW2d 825 (1984).¹ But, those circumstances do not apply here. That is, this was

¹ Defendant also cites to MCL 776.21(5), which provides that a defendant alleged to have committed certain criminal sexual offenses shall be given a polygraph examination or lie detector test if requested by the defendant. We fail to see what relevance this provision has to this divorce action given that this provision appears in the Code of Criminal Procedure, MCL 760.1 *et seq*, and it entitles a criminal “defendant” to a polygraph. See generally MCL 776.21(5); *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003). In any event, while the statute entitles a defendant to a polygraph, it says nothing about the admissibility of polygraph

not a case where appellant offered a polygraph test to bolster the testimony of a *new* witness offered to support a motion for a new trial on the basis of newly discovered evidence as was the case in *Barbara*, 400 Mich at 411-414. This was also not a case where, in a motion outside of the trial itself, appellant moved the trial court to suppress evidence before it was offered at trial as was the case in *McKinney*, 137 Mich App at 114-116. Rather, because appellant had already testified at trial regarding the issue of sexual abuse in his marriage, his own polygraph test on this issue was plainly immaterial and should not have been considered. See *Barbara*, 400 Mich at 411 (“[D]efendant's own test is immaterial since he had already testified at trial and the jury rejected his testimony.”). Consequently, the general rule that polygraph tests may not be used by Michigan courts applies in this case, *id.* at 364, and the trial court did not abuse its discretion by refusing to consider appellant’s polygraph as evidence when it addressed appellant’s motion for a new trial.

III. CHILD SUPPORT

Finally, appellant argues that the trial court erred by finding that his income for child support purposes was \$65,000 annually.

Generally, child support orders, including orders modifying child support, are reviewed for an abuse of discretion. However, whether the trial court properly applied the MCSF [Michigan Child Support Formula] presents a question of law that we review *de novo*. On the other hand, factual findings underlying the trial court’s decisions are reviewed for clear error. [*Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012) (internal citations omitted).]

In this case, it is clear that the trial court found that appellant had income as of March 2015 of \$65,000 based on appellee’s testimony that appellant indicated in a 2012 visa application that his yearly income was \$65,000 and that appellant paid for personal expenses through Driven Motors, a business of which appellant was 1/3 owner. However, it is undisputed that appellant had wound up his involvement with the Driven Motors’ operations, and there was no indication that Driven Motors continued to pay for appellant’s personal expenses at the time the trial court issued its opinion in 2015. Rather, in 2013, appellant started working for Baxter Machine at a wage of \$40,000 annually. The record indicates that appellant’s income under the MCSF was higher than \$40,000 annually because he also received additional “income” from Baxter Machine in the form of “perks,” including, for example, a company car and cellular telephone, as well as employer contributions to his retirement accounts. See 2013 MCSF 2.01(D); 2013 MCSF 2.01(C)(8). Although these items are properly included in appellant’s income under the MCSF, nothing in the record specified how much income appellant received from Baxter Machine in the form of perks and retirement contributions. Instead, the record is clear that the trial court’s finding that appellant had income as of March 2015 of \$65,000 was based on circumstances that no longer existed. Accordingly, the trial court clearly erred by finding that appellant had an income of \$65,000. We reverse the trial court’s finding that appellant’s income was \$65,000, and remand to the trial court for recalculation of his income consistent with this

examinations at trial and it remains the rule that polygraphs are not admissible evidence. See *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985).

opinion. The trial court may take additional testimony on this issue, and may make additional findings, as necessary to calculate appellant's income under the MCSF. See MCR 7.216(A)(5); *Brown v Brown*, 453 Mich 946; 557 NW2d 307 (1996).

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra