

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MOHAMMED ALI AL-AWADHI,

Plaintiff/Counterdefendant-  
Appellee,

v

MELISSA SUE AL-AWADHI,

Defendant/Counterplaintiff-  
Appellant.

UNPUBLISHED  
January 27, 2015

No. 322727  
Washtenaw Circuit Court  
LC No. 13-001205-DM

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Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a trial on the issues of custody and parenting time, the circuit court awarded the parties in this divorce action joint legal custody of their son, SA, and accepted a parenting time schedule which would allow the plaintiff-father, Mohammed Al-Awadhi, increased visitation periods as the child grows older. Defendant-mother Melissa Sue Al-Awadhi challenges both of these awards. In rendering its decision, the circuit court failed to describe on the record the child's established custodial environment, thereby bypassing important threshold considerations. The court also failed to adequately address and elucidate its findings with regard to the various statutory best-interest factors affecting its custody and parenting time decisions. These omissions render appellate review impossible. We therefore vacate the custody and parenting time awards within the divorce judgment and remand for further proceedings consistent with this opinion.

**I. BACKGROUND**

The parties were married for approximately six years and had one child together, SA. After agreeing on various property and support provisions of their divorce judgment, the parties proceeded to trial on custody and parenting time issues alone. Plaintiff-father agreed that physical custody should remain with the child's mother, leaving only legal custody at issue.

The evidence at trial established that five-year-old SA has an autism spectrum disorder and requires intensive educational assistance. He attends speech therapy twice a week. SA does not respond to traditional discipline methods, requiring patient guidance to correct behavioral issues. SA also suffers from a blood disorder (for which he visits a hematologist) and sleep

apnea. By the age of three, SA had undergone surgery to remove his tonsils and adenoids and to place tubes in his ears. Given his health issues, SA has frequent medical appointments.

The parties agree that SA's special needs require special care and plaintiff conceded that defendant-mother has primarily provided that care throughout the child's life. The parties disagreed whether plaintiff could also serve as an adequate caregiver. The concern over plaintiff's parenting ability was heightened because plaintiff no longer lives locally and would not be able to rely on defendant's assistance during parenting time. During the parties' marriage, plaintiff attended medical school in Michigan. Following their separation, plaintiff began his medical residency in Pennsylvania. Since 2013, he has seen SA for only short visits while in Michigan.

The defendant-mother's brother (the child's uncle), Joseph Wucker, testified at the trial, both complimenting and criticizing both parties. Wucker indicated that he loved both parties and was saddened by the divorce. He further stated that both parties were "not taking the child's best needs into concern" and had both taken actions to hurt one another. Wucker's goal was to ensure that the parties did not pull SA "in either direction" and "look at the child as not a pawn." Wucker testified that plaintiff-father had necessarily been absent from the home and family life to further his career, but admitted that plaintiff lacked the patience to handle SA's special needs. Wucker described how plaintiff-father had tried to exercise weekend parenting time with the child in Michigan, but became overwhelmed and asked the mother or Wucker to retrieve the child. Ultimately, Wucker believed that SA currently needed his mother more as she was his caretaker, but would need his father more as he grew older.

Rather than allowing the attorneys to call the parents to the stand and engage in the usual direct and cross-examination format, the court asked the parties to take a few minutes to write down the answers to a list of questions. Specifically, the court asked the parties to describe the day of SA's birth, what "makes you happy about your son," the parent's two best qualities, and a happy and a sad story from their childhoods.

After the court's directive, plaintiff-father testified that defendant-mother had "cut [him] off from [SA's] life since [he] moved to Pennsylvania." He indicated that he tried to secure a residency in Michigan to stay close to his son, but was not accepted in any of those programs. Despite that he had to leave the state to finish his education and provide for his child, plaintiff-father claimed defendant-mother treated him like he abandoned his son. In relation to defendant-mother's abuse allegations, plaintiff-father denied the claims and noted that she had no proof.

Defendant-mother painted a different picture of marital and family life. Defendant described the various therapy, doctor, and school appointments necessary for SA. She claimed that plaintiff had not participated in SA's many appointments despite the benefit his medical education would provide. Since plaintiff-father moved to Pennsylvania, defendant had attempted to arrange Skype conversations between father and son, but plaintiff refused. Telephone conversations were difficult because plaintiff could not always understand the speech-delayed child. Defendant further described that it was difficult for her to remain on friendly terms with her ex-husband because she claimed that plaintiff had stolen money from her bank account, egged her car, and slashed her tires.

At the conclusion of the parties' responses to the court's questions, defendant-mother's counsel interjected that "there are a couple statutory factors that weren't covered by my client's testimony" and requested the opportunity to conduct direct examination. The court permitted this line of questioning but indicated, "remember not on best interests; we're just on parenting time." Counsel then defined the factors she would like to address with her client:

MCL 722.27a, factor 6(a), (b), (d), (e) and (g), the reasonable likelihood of abuse or neglect of the child during parenting time. The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time, the inconvenience to and burdensome impact or effect on the child of travelling for purposes of parenting time, whether a parent has frequently failed to exercise reasonable parenting time, the threatened or actual detention of the child with the intent to retain or conceal the child from the other parent. So, all of the questions that I was going to ask my client at this time relate directly to those particular factors.

When questioned by her attorney regarding SA's discipline, defendant described how the child "just shuts down" if you yell at him. Defendant testified that she worked with SA's therapist to develop disciplinary methods that work with the child's needs. She described plaintiff-father as a "hitter" who did not understand the effect of name-calling on a child. Defendant indicated that the child's Islamic religious education is very important to her. Plaintiff, on the other hand, played no part in either SA's religious or academic education.

Defendant testified that plaintiff uses a drug called "Khat" that is like an amphetamine. She accused plaintiff of calling her names in front of the children and of threatening to "chop me up and feed me to the kids" if she cheated on him. Defendant described an incident when plaintiff "threw . . . hot scalding soup in [her] face." On another occasion, defendant claimed that plaintiff pushed her into a door and hit her several times, causing several cuts and bruises. Ultimately, defendant requested that plaintiff initially be given only supervised parenting time and that her brother act as the intermediary.

Plaintiff's counsel did not cross-examine defendant-mother and called his own client to the stand. Plaintiff asserted that it has been difficult for him to travel back to Michigan from Pennsylvania as he usually works six days a week and it is a ten-hour trip one way. Plaintiff indicated that he had returned four times to visit his son. Plaintiff testified that on one occasion, he arrived for a visit at the marital home and found that defendant had summoned the police. Plaintiff denied drug use and cited a prior negative drug test during the proceedings. Plaintiff testified that his request for one month of summer parenting time would not interfere too greatly with the child's therapy schedule and indicated that as the visitation durations increased, he would arrange for replacement services wherever he was living. Plaintiff further stated his intent to bring his mother from Yemen during his parenting time sessions to provide childcare while he worked.

In closing argument, plaintiff's counsel argued that the established custodial environment was joint legal custody and that defendant would have to establish by clear and convincing evidence that a change to sole legal custody was warranted. Plaintiff conceded that defendant-mother did a good job dealing with SA's significant issues, but noted that defendant needed to trust that plaintiff would also act in the child's best interests. Plaintiff agreed to a few visits

supervised by Wucker, but then asked that unsupervised visits at his home in Pennsylvania be allowed.

Defendant's counsel responded that where domestic violence mars the parents' relationship, the ability to safely coparent a child is limited. Defendant conceded that plaintiff needs to be a part of SA's life. Given plaintiff's "anger management issues," however, defendant had legitimate concerns for her child's wellbeing during extended parenting time in another state. Defendant's counsel clarified that she found plaintiff capable of learning how to manage SA's needs but should be required to prove his capabilities before gaining extended unsupervised visits. Defendant's counsel also indicated that the mother's concerns would likely decrease as time passed and SA became more verbal and able to advocate for himself.

The circuit court awarded joint legal custody at the conclusion of the hearing. In relation to defendant's domestic-abuse allegations, the court "ma[d]e no finding that you are a domestic violence abuser; not on this evidence." Rather, the court saw "that there are cultural differences." The court also perceived "two very fine parents that love [the child] deeply." In granting joint legal custody, the court noted: "This is a child of special needs. He has medical concerns. Having a father who's a physician can only help in contributing to the thought process about decisions that . . . need to be made." In the event the parties could not agree on issues, they could come back to court for resolution of particular issues, the court emphasized. Joint legal custody was in the child's best interest, the court deemed, "because we've got parents who are educated, we've got parents who understand, perhaps from different perspectives slightly, medical needs, and that's important." Acknowledging defendant's desire that plaintiff "become more of a father," the court noted "the first step is to allow him to have access" to the child and access to information to play a role in decision-making for the child. The court then requested that the parties meet with defendant's brother and try to agree on a parenting time schedule. The court indicated its agreement with plaintiff that the child should spend some blocks of time in Pennsylvania with his father, however.

The parties were not able to resolve their differences with Wucker's assistance. As a result, plaintiff-father filed a motion for entry of a judgment awarding joint legal custody and implementing his desired parenting time schedule. Specifically, plaintiff-father sought:

1. In 2014, [SA] will stay with his mother and plaintiff and defendant will work toward building trust and the relationship between father and mother.
2. In 2015, [SA] will come to Pennsylvania for one month during the summer time. Plaintiff will contact defendant to tell her what month he will be able to take [SA].
3. In 2016, [SA] will come to Pennsylvania for one month during the summer time. Plaintiff will contact defendant to tell her what month he will be able to take [SA].
4. In 2017 and future years (2018, 2019 etc.)[,], [SA] will spend the summer time (three months)[,], Christmas break and the spring break time with

plaintiff in any state he is located in (Pennsylvania, Michigan or other state where plaintiff resides at the time[[]]).

Defendant-mother opposed the proposed judgment. She objected to plaintiff's proposed parenting time schedule and requested a court ruling on its propriety. Given the child's young age and special needs, defendant argued that it would be more aligned with SA's best interests to award gradually increasing parenting time in Michigan "so that the minor child can become accustomed to spending extended periods of time with his father and so that Plaintiff can learn the parenting skills necessary to care for the minor child." Plaintiff's suggested schedule, in defendant's estimation, "would make a dramatic change to the established custodial environment," but plaintiff failed to show by clear and convincing evidence that such a change was in SA's best interests. Defendant noted that a court must consider the factors of MCL 722.27a in setting a parenting time schedule, and the court had yet to do so. Defendant further sought reconsideration of the legal custody issue, arguing that the court failed to consider and make specific findings in relation to the statutory best interest factors of MCL 722.23. Defendant also contended that the court should have ruled under MCL 722.26 that the parties would not be able to agree on major decisions regarding the child and awarded sole legal custody to her.

At the hearing on the judgment-entry motion, plaintiff characterized the mother's opposition as essentially seeking reconsideration of the court's substantive rulings. Defendant disagreed, noting that the court had not entered a ruling on parenting time and instead instructed the parties to attempt a settlement. The court specifically indicated that the parties would return to court if they could not reach a resolution, defendant argued. Defendant did request, however, that the court reconsider its decision to award the parties joint legal custody.

The circuit court concluded that the proposed judgment accurately reflected his rulings after trial. The court made no mention of defendant's request to reconsider the legal custody issue. In relation to parenting time, the court ruled:

I think I will sign the judgment, parenting time is something that will continue until the last child turns 18, that we're always looking at, so I think we need to have a decision rendered, I'll sign the judgment of divorce, and I have the instinct that it won't be the last time that the Court will see these parties.

This appeal followed.

## II. JOINT LEGAL CUSTODY

Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. A clear legal error occurs when the circuit court "incorrectly chooses, interprets, or applies the law . . . ." De novo review applies to underlying issues of statutory interpretation. [*Kubicki v Sharpe*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 317614, issued August 28, 2014), slip op at 7-8 (citations omitted).]

The first step in any custody decision is determining the established custodial environment of the child. This determination is necessary because the court must understand whether its decision will change that established custodial environment and therefore whether the proponent must show “either proper cause or a change in circumstances” warranting the change. See *Dailey v Kloenhamer*, 291 Mich App 660, 666-667; 811 NW2d 501 (2011).

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(c).]

It is clear on this record that the child had an established custodial environment with his mother, at least with regard to physical custody. Although not using this terminology, plaintiff conceded this fact throughout the proceedings, admitting that defendant was the child’s primary caregiver and admitting that he had very little contact since his move to Pennsylvania. In relation to *legal* custody, the record tends to support that defendant also made all decisions regarding the child between the separation and the court’s ruling. However, the circuit court gave no consideration to this issue before awarding the parties joint legal custody. This was the court’s first clear legal error that must be remedied on remand. And if awarding the parties joint legal custody would alter the child’s established custodial environment, the court must insist on plaintiff showing proper cause or a change in circumstances establishing that an alteration in legal custody is in SA’s best interests.

The circuit court also failed to adequately consider and make specific findings on the record in relation to the various factors affecting its joint legal custody decision. “ ‘Joint custody’ means, in part, that the parents will share decision-making authority for the important decisions affecting the welfare of the child.” *Shulick v Richards*, 273 Mich App 320, 327; 729 NW2d 533 (2006). In regard to joint custody, MCL 722.26a(1) provides:

(1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and *shall state on the record the reasons for granting or denying a request*. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in [MCL 722.23.]

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. [Emphasis added.]<sup>[1]</sup>

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<sup>1</sup> MCL 722.26a(7)(b) expressly includes legal custody, not just physical custody, within the statute’s purview.

The circuit court stated general reasons supporting its decision to award joint legal custody. However, the court made no effort to tie those reasons to the best interest factors of MCL 722.23 as required by MCL 722.26a(1)(a). Moreover, the court never addressed whether the parents would be able to cooperate and agree regarding important decisions as required by MCL 722.26a(1)(b). These failures leave a hole in the record preventing this Court's review. We must therefore vacate that portion of the divorce judgment awarding the parties joint legal custody. On remand, the circuit court must analyze on the record those considerations outlined in the statutes before entering a considered legal custody determination. Absent such detailed consideration, this Court would again be left unable to review the circuit court's decision.

### III. PARENTING TIME

A circuit court's parenting time orders must also be affirmed on appeal absent factual findings against the great weight of the evidence or the commission of "a palpable abuse of discretion or a clear legal error on a major issue." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). The court must determine the child's established custodial environment before making a parenting time decision as well. *Id.* at 85-86. Where the proposed parenting time adjustment would alter the established custodial environment, the proponent must present clear and convincing evidence that the change is in the child's best interests. *Id.* at 86.

MCL 722.27a governs the award of parenting time. It mandates that parenting time "be granted in accordance with *the best interests of the child*." MCL 722.27a(1) (emphasis added). In this regard, the parents enjoy a presumption that it is in the child's best interests "to have a strong relationship with both of his or her parents." *Id.* As long as this presumption is not disproved, the court must award parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." *Id.* In fact, "[a] child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a(3).

When considering a party's parenting time request, the court "may consider" various factors outlined in MCL 722.27a(6):

(a) The existence of any special circumstances or needs of the child.

\* \* \*

(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. . . .

(i) Any other relevant factors.

Although the best interests of the child are the foundation for a parenting time decision, the court need not consider each factor in MCL 722.23 before ruling. Rather, the court may limit its MCL 722.23 best interest review to “findings on only the contested issues.” *Shade v Wright*, 291 Mich App 17, 31-32; 805 NW2d 1 (2010).

Even with the more limited review required in parenting time disputes, the circuit court failed to meet its burden. As noted, the court never considered the child’s established custodial environment, whether the parenting time decision would alter that environment, and if so, whether a change was warranted. The circuit court failed to make findings concerning several contested issues, including the parties’ capacity and disposition to facilitate the child’s academic and religious education, the burden of interstate parenting time on this special needs child, the reasonableness of plaintiff’s plan to exercise parenting time in accordance with the court order, and plaintiff’s history of infrequent and prematurely quitted parenting time sessions. Moreover, the court tied none of its findings to any best interest factor in MCL 722.23. The court exhibited a misunderstanding of the law by informing defendant’s counsel that the best interest factors were irrelevant to the parenting time decision. Accordingly, we must vacate the parenting time award in the divorce judgment and remand for further consideration of that issue.

In relation to all issues on remand, we note that “the trial court ‘should consider up-to-date information’ and ‘any other changes in circumstances arising since the trial court’s original custody order.’ ” *Kessler v Kessler*, 295 Mich App 54, 62-63; 811 NW2d 39 (2011), quoting *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). The best interests of a child are always evolving and cannot be considered as if suspended at the time of the last hearing.

We vacate in part and remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Douglas B. Shapiro  
/s/ Elizabeth L. Gleicher  
/s/ Amy Ronayne Krause

**Court of Appeals, State of Michigan**

**ORDER**

Mohammed Ali Al-Awadhi v Melissa Sue Al-Awadhi

Douglas B. Shapiro  
Presiding Judge

Docket No. 322727

Elizabeth L. Gleicher

LC No. 13-001205-DM

Amy Ronayne Krause  
Judges

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Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand the case to the trial court to consider on the record the child's established custodial environment and the effect of the judgment on that environment, and to elucidate its findings that the legal custody and parenting time decisions are in the child's best interests. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

**JAN 27 2015**

Date

Chief Clerk