

STATE OF MICHIGAN
COURT OF APPEALS

SHEILA HARVEY a/k/a SHEILA ROSS,

Plaintiff-Appellee/Cross-Appellant,

v

HARRY LOUIS HARVEY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

June 14, 2005

No. 258938

Oakland Circuit Court

Family Division

LC No. 00-632479-DM

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right and plaintiff cross-appeals as of right an order awarding joint custody of the parties' two minor children. We affirm.

Defendant first argues that the trial court erred in failing to make a determination at the outset of the custody hearing regarding the time periods the hearing would address and the applicable burden of proof. However, defendant does not provide authority that requires the trial court make these findings. An appellant may not merely announce his position and leave it to this Court to discern and rationalize a basis for his claims, nor may he give issues cursory treatment with little or no citation to supporting authority. MCR 7.212(C)(7); *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). Therefore, we consider these issues abandoned. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).¹

¹ Moreover, defendant has not shown that "a miscarriage of justice will result from a failure to pass on" the issues raised. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Specifically, the trial court allowed defendant to present all evidence of past events. Further, the question whether there exists an established custodial environment is properly determined after the hearing as the trial court is required to make specific findings of fact on the issue. See *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

Defendant next argues that the trial court failed to consider the results of a 2001 psychological evaluation. However, the record reflects the trial court considered the 2001 psychological evaluation, though found it marginally relevant because it was “remote in time.” It is within the discretion of the trial court to determine the weight to give the evidence presented. *Fletcher v Fletcher*, 447 Mich 871, 889-890; 526 NW2d 889 (1994). At the time the 2001 evaluation was conducted, the parties had been recently separated, the children were at a different stage of growth, and plaintiff testified that she was still recovering from a closed head injury. We cannot conclude that the trial court’s decision to give the psychologist’s evaluation little weight is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Paulson v Paulson*, 254 Mich App 568, 575; 657 NW2d 599 (2002).

Defendant last argues that the trial court erred in determining that no custodial environment existed.

Three standards of review are applicable in custody cases. Findings of fact, such as the existence of an established custodial environment, are reviewed under the great weight of the evidence standard, and this Court will uphold the trial court’s findings unless the evidence clearly preponderates in the opposite direction. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). The Court reviews for clear error the trial court’s choice, interpretation, or application of the existing law in child custody matters. *Foskett v Foskett*, 247 Mich App 1, 12; 634 NW2d 363 (2001). The abuse of discretion standard applies to the trial court’s discretionary rulings, such as to whom custody is granted. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child’s best interest. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). The trial court must make a specific finding regarding the existence of a custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

A custodial environment 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); *Mogle, supra* at 197.]

An established custodial environment is one of significant duration “in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.” *Mogle, supra*, quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). When determining whether a custodial environment exists, it makes no difference whether the environment was established as a result of a temporary or permanent custody order, in violation of a custody order, in the absence of a custody order, or pursuant to an order which was later reversed. *Hayes v Hayes*, 209 Mich App 385, 388-389; 532 NW2d 190 (1995). The court’s concern is whether a custodial environment exists, not the reasons the custodial environment was established. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992). An established

custodial environment can exist in more than one home. *Mogle, supra* at 197-198. Repeated changes in physical custody and uncertainty created by an upcoming custody trial destroy a previously established custodial environment and preclude the establishment of a new one. *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993).

The record indicates that the children resided with plaintiff and defendant from their birth until the initiation of divorce proceedings, with the exception of defendant's absence for nine months in 1994 for a military deployment and in 1997 and 1998 for approximately eighteen total months when defendant lived in Florida. After the initiation of divorce proceedings, in March 2000, the trial court ordered defendant to leave the marital home and awarded temporary joint legal custody with the children continuing to reside with plaintiff. Defendant exercised parenting time every other weekend and two evenings every week. In October 2002, the trial court awarded defendant sole legal and physical custody, and plaintiff exercised parenting time one evening a week, on alternate weekends, and additional time on school breaks. Since the end of June 2004, the children have resided with plaintiff and defendant appears to have exercised parenting time under the 2000 temporary custody orders.² Based on this and other evidence presented, the trial court made the following findings:

The record in this proceeding evidences that an established custodial environment for the minor children does not exist with one parent over the other. The minor children have looked to both parents for love, guidance, discipline[,] the necessities of life and parental comfort. Bearing on this issue is the uncontested fact that prior to the entry of the FOC's Order Defendant moved to South Korea and Florida on two separate occasions. Thus, during these periods, the minor children did not have Defendant to look to for guidance, discipline, and parental comfort. Subsequent to the entry of the FOC's Order, the minor children lived with the Defendant. The testimony did reveal that while the minor children were in Defendant's custody they sometimes looked to Plaintiff for guidance and parental comfort. However, discipline and necessities of life were supplied to the minor children by the Defendant during this time. The Court finds these competing contributions by the parties to weigh equally and thus offset each other.

B. Burden of Proof

As is [sic] this case where no established custodial environment exists, a change in custody may be made by showing by a preponderance of the evidence that a proposed custodial arrangement would be in the best interests of the child.

While we agree with the trial court's finding that the "established custodial environment for the minor children does not exist with one parent over the other," we disagree that this

² In June 2004, the Supreme Court affirmed, albeit for different reasons, this Court's opinion vacating the trial court's October 2002 order. *Harvey v Harvey*, 470 Mich 186, 680 NW2d 835 (2004).

finding supports the conclusion that “no established custodial environment exists.” Rather, we conclude the trial court’s findings clearly indicate the establishment of a custodial environment in both parties. The trial court specifically stated that the evidence indicated that the children looked to *both parents* for love, guidance, discipline, the necessities of life and parental comfort. Defendant has not been absent from the children’s lives since 1998 and was their primary caretaker from October 2002 to June 2004. While defendant retained sole custody of the children during this period, plaintiff continued to be a daily presence in the children’s lives through her participation in their education and extracurricular activities, in addition to her regularly scheduled parenting time. Plaintiff kept a close eye on the children’s progress at school and helped them meet high academic standards. The children would frequently telephone plaintiff for advice regarding various medical or other problems they encountered while living with defendant. If the children initially informed defendant of a problem, then defendant would follow up with doctors or seek another appropriate remedy. Defendant ensured that the children’s homework was done and that their needs were met on a daily basis. Both parents provided various means of financial support.

We recognize that the children’s relationship with the parties has been marked with several custody changes since the divorce proceeding began in 2000, which could potentially create uncertainty, destroy a previously established custodial environment, and preclude the establishment of a new one. See *Bowers, supra*. However, the preponderance of the evidence indicates instead, however, that throughout this time the children continued to look to both parents for guidance, discipline, the necessities of life, and parental comfort, and that, most importantly, this tendency was not affected by the custody changes. The findings in the trial court’s order further support our conclusion. Evidence that each party retained a strong relationship with the children should not have “offset each other” and thus destroyed the existence of any custodial environment, but instead should have resulted in a finding of a custodial environment with both parties. We, therefore, hold that the great weight of the evidence supports an established custodial environment in both parents. See MCL 722.27(1)(c); *Jack, supra* at 671 (finding a custodial environment in both parties where the children looked to both parties for guidance, discipline, the necessities of life, and parental comfort). Accordingly, neither plaintiff’s nor defendant’s established custodial environment may be disrupted unless it is proven by clear and convincing evidence that a change is in the children’s best interests. See *Brown, supra* at 598 n 7; *Foskett, supra* at 8.

Although, in light in the above, the trial court improperly applied a preponderance of the evidence standard to its evaluation of any change in custody, the trial court’s order did not disrupt the established custodial environment of either parent. Here, each party requested sole custody, and the trial court’s order awarding joint physical and legal custody, with primary residence with plaintiff, was consistent with the ongoing custodial arrangements. Had the trial court applied the higher clear and convincing evidence standard in determining change of custody, the result would necessarily have been the same. Therefore, any error resulting from the trial court finding “no established custodial environment exists” is harmless, because the trial court’s order did not change the established custodial environment of either parent.

On cross-appeal, plaintiff first argues that the trial court’s finding that the best interests of the child factors (a), (b), (c), (d), (h), (j), and (k) favored neither party were against the great weight of the evidence. We disagree. Custody disputes are to be resolved in the child’s best

interest. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The trial court determines the best interests of the child by evaluating the best interest factors of MCL 722.23.³ The finder of fact must state its specific findings and conclusions under each best interest factor. *Foskett*, *supra* at 9. However, the court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *LaFleche v Ybarra*, 242 Mich App

³ Those factors are:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express 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. [MCL 722.23.]

692, 700; 619 NW2d 738 (2000). In reviewing the findings, this Court should defer to the factfinder's determination of credibility. *Mogle, supra* at 201.

The trial court found that the best interests of the child factors (a), (b), (c), (d), (h), (j), and (k) favored neither party. Factor (a) requires an examination of “[t]he love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a); *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). The trial court found that both parents have love, affection, and emotional ties with the children. The trial court noted that plaintiff demonstrated this by enrolling the children in extracurricular activities, but that neither parent allows the children to engage in activities until homework is completed. The trial court discounted defendant's heavy reliance on the 2001 psychological evaluation and the psychologist's 2001 observations of plaintiff to support his argument that plaintiff is controlling and manipulative and that plaintiff puts her own needs above the children's needs, concluding that this evidence is “remote in time and will not be given much weight.” Although the children tend to notify plaintiff first when a problem arises, the children also share with defendant and defendant immediately tends to their needs. Defendant has not been separated from the children since he returned from Florida in 1998. The record indicates that the children have strong bonds with both parents and that both parents express their love and affection for the children on a daily basis. The evidence does not clearly preponderate against the trial court's finding that this factor favors neither party.

Factor (b) addresses “[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); *Fletcher, supra* at 26. The trial court found that both parties attended church, there were no religious conflicts, and the children were good students with above average learning capabilities. The court noted that there were some “unimpressive examples” of how defendant sometimes treated the children, but found this to be a difference in the discipline and guidance techniques employed by each parent, which it determined to be equal. Defendant testified that he employs religion as a part of his daily life although he had not taken the children to church in approximately six months. Plaintiff testified that she attends church with the children regularly. Although plaintiff appears to have higher academic standards than defendant and employs a more hands-on approach to her children's education by her presence in school and on field trips, the evidence indicated that defendant for the most part was likewise diligent with his oversight of the children's education. Plaintiff utilizes a similar hands-on approach in her parenting style by providing hygiene care packages and extra clothing for at least one of the children to keep at school. Although the record indicates that plaintiff may be more in-tune with the development of her daughters than defendant, the evidence does not clearly preponderate against the trial court's finding that defendant has a similar capacity and disposition to guide his daughters in this manner.

Factor (c) looks at “[t]he 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); *Fletcher, supra* at 27. The trial court found that this factor favors neither party, and the record supports this finding. Throughout the parties' marriage, defendant has provided the primary means of financial support for plaintiff and the children. At the time of the hearing, defendant testified that he was unemployed because he was preparing for certification as an automotive service

technician, but that he receives approximately \$32,000 a year in military retirement benefits and maintains \$280,000 in savings. Plaintiff was the children's primary caretaker throughout the majority of the marriage and is currently employed part-time as an attorney. While the children often inform plaintiff first of a medical problem they have encountered, both parties have an equal capacity and disposition to address these needs once identified. The trial court's finding regarding factor (c) is not against the great weight of the evidence.

The trial court determined that factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," favored neither party because the children have lived in stable, satisfactory environments with both parents at specific times of their lives. MCL 722.23(d); *Fletcher, supra* at 28. The record indicated that the children have generally resided with both parents until the initiation of the divorce proceeding, with the exception of defendant's military deployment to Korea in 1994 and his two temporary separations from plaintiff in 1997 and 1998 when defendant resided in Florida. Since these proceedings began, the children initially lived with plaintiff, but then resided with defendant for almost two years as a result of the first custody hearing. Since June 2004, however, the children have lived with plaintiff. Because the children have experienced little continuity in at least the last five years and the record indicates that both parents are capable of providing stable and satisfactory environments, we conclude that the trial court's finding that factor (d) favors neither party is not against the great weight of the evidence.

Factor (h) evaluates "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court found that this factor favored neither party, noting that the children perform well in school and both parents attend parent-teacher conferences. The trial court indicated that Chanel's teacher, testified that, at times while in defendant's custody, Chanel was not dressed properly for school. The teacher, however, never brought this to defendant's attention. The trial court concluded that this testimony did not impugn defendant's parental judgment. The record establishes that, while Chanel on occasion did not have the proper attire for recess during winter, she had been provided with the appropriate winter attire. Additionally, the record indicates that the children have been involved in extracurricular community activities such as dance, gymnastics, and cheerleading primarily at plaintiff's insistence. Defendant has participated minimally in these activities, perhaps due in part to plaintiff excluding him, but defendant has enrolled the children in day camps, and testified that he reads with the children and takes them to the park, the library, and on various vacations. The evidence does not clearly preponderate against the trial court's finding on this factor.

Factor (j) considers "[t]he 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." MCL 722.23(j); *Fletcher, supra*. The trial court found that both parents exhibit communication problems with each other to the potential detriment of the children, but that they are willing and have the ability to facilitate a close relationship between the children and the other parent. The record indicates that both parties exhibit behaviors and attitudes that at times impede and at times foster the children's relationship with the other parent. We conclude that the evidence supports the trial court's finding on this factor.

Factor (k) requires the court to examine "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court recognized that plaintiff claimed several instances of domestic violence and that plaintiff

obtained a personal protection order against defendant, but that defendant testified that plaintiff was the assaulting party on each of these occasions and that he was never arrested when the police were called. The trial court concluded that this factor favored neither party because, notwithstanding this evidence, any domestic violence that occurred was remote in time. The record indicates that the parties provided conflicting testimony regarding the instances of domestic violence, each party claiming that the other party was the aggressor or had committed the violent act. This Court defers to the trial court regarding matters of credibility and what weight to give the evidence. *Fletcher, supra* at 889-890; *Mogle, supra* at 201. The evidence does not clearly preponderate against the trial court's finding that factor (k) favored neither party. Consequently, we uphold the trial court's factual findings regarding each of the best interest factors.

Plaintiff also argues on cross-appeal that the trial court should have awarded her sole legal and physical custody of the children. We disagree. As previously mentioned, the trial court improperly applied a preponderance of the evidence standard to its evaluation of any change in custody because it had determined that no custodial environment existed. Consequently, plaintiff must have proved by clear and convincing evidence that awarding her sole custody is in the children's best interests. Plaintiff has not met this burden.

The record indicates that the trial court did not abuse its discretion when it determined that plaintiff failed to prove by a preponderance of the evidence that awarding her sole custody was in the children's best interests, and therefore, plaintiff could not have met the higher clear and convincing evidence standard which this Court has determined is applicable. First, as previously mentioned, the trial court properly found the parties equal on the best interest factors, with the possible exception of the preference of the children. Second, although the parties each requested sole custody, the court awarded joint custody. Pursuant to MCL 722.26a, the court must make its decision regarding whether joint custody is in the best interest of the child by considering (1) the best interests of the child factors of MCL 722.23 and (2) whether "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." See *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999). Consideration of the best interest factors favors joint and not sole custody.

Regarding the second element of § 722.26a(1), the trial court noted under interest factor (j) that both parents exhibit communication problems with each other, but specifically concluded that the parties appear willing and able to facilitate and encourage the children's relationship with the other parent. This finding was not in error. A court has no alternative but to award sole custody when two equally capable parents are unable to agree concerning important decisions affecting the welfare of their children. *Fisher v Fisher*, 118 Mich App 227, 233; 324 NW2d 582 (1982). Such important decisions precluding a joint custody award include conflicting religious beliefs and the effect of those beliefs on basic child-rearing preferences. *Id.* On the other hand, where the parties experience trouble cooperating regarding such issues as custody times and personal disputes, a joint custody award is not precluded. *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987). In this latter situation, the parties' ability to cooperate is only one factor for the court to consider in its decision to award joint custody. *Id.*; see MCL 722.26a(1).

The evidence in this matter indicates that the parties experience difficulty communicating and sharing information. Defendant tends to not accept plaintiff's phone calls and both parties are reluctant to disclose information to the other regarding their children's activities. This

trouble seems to be a result of personal disputes between the parties and not necessarily pertaining to the welfare of the children. See *Fisher, supra*; *Nielsen, supra*. The evidence indicates that the parties generally agree regarding basic child-rearing issues as education, religion, and medical care. The parties at times have disagreed regarding such issues as the degree to which the children should participate in extracurricular activities, although both parents agree that education comes first, and the appropriate time for one of their developing children to begin wearing supportive garments. However, the parties have also been able to cooperate and coordinate the children's participation in activities and their developing needs, and there is no reason to conclude that they cannot continue to do so in the future. Consequently, the trial court did not abuse its discretion in awarding joint custody. Because plaintiff could not meet the lower preponderance of the evidence burden of proof regarding sole custody, plaintiff could not have proven the same by the higher standard of clear and convincing evidence. See *Fisher, supra*.

Plaintiff's final argument is that the trial court's custody award should have set forth a particular parenting time schedule. MCL 722.24(1) places an affirmative obligation on the trial court to determine parenting time in accordance with the best interests of the children and the child custody act. See *Harvey v Harvey*, 470 Mich 186, 189; 680 NW2d 835 (2004). However, whether a custody award includes a provision for parenting time is within the discretion of the trial court. MCL 722.27(1). The trial court may conduct a proceeding regarding parenting time in the future, or it may refer the matter to a friend of the court referee or an arbitrator upon agreement of the parties. See MCL 722.27a(4); *Harvey II, supra* at 189-190. Because there is no requirement that the trial court determine parenting time at the same time it makes a custody determination, and plaintiff has cited no such authority, no clear legal error occurred.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio