

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT HUNTER and LORIE HUNTER,

Plaintiffs-Appellees,

v

TAMMY JO HUNTER,

Defendant-Appellant,

and

JEFFREY HUNTER,

Defendant.

UNPUBLISHED

March 20, 2008

No. 279862

Oakland Circuit Court

LC No. 2006-721234-DC

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

In this custody action, the trial court found the biological mother, Tammy Jo Hunter, to be an unfit parent and awarded legal and physical custody of her four children to the children's paternal uncle and his wife. Defendant appeals, and we affirm the trial court's custody determination, but vacate the award of attorney fees.¹

I. Unfit Parent

Defendant says that the trial court improperly determined that she is an unfit parent and, thus, not entitled to the biological parent presumption. Generally, in a custody dispute between a parent and a third party, our courts presume that awarding custody to the parent is in the child's best interests. MCL 722.25(1). However, when an established custodial environment exists with the third party, the third party is entitled to the established custodial environment presumption,

¹ Child custody orders must be affirmed on appeal unless the trial court's findings are against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999).

which favors the custodial parent. MCL 722.27(1)(c). In *Heltzel v Heltzel*, 248 Mich App 1, 23-24; 638 NW2d 123 (2001), this Court held that when the parental presumption conflicts with the established custodial environment presumption, the parental presumption outweighs the established custodial environment presumption, unless there is a showing of parental unfitness. In other words, “when a parent’s conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child, the reasoning and holding of *Heltzel* do not govern.” *Mason v Simmons*, 267 Mich App 188, 206; 704 NW2d 104 (2005). Upon a showing of unfitness, the burden of proof shifts to the parent to prove by a preponderance of the evidence that it is in the child’s best interests to remove the child from the established custodial environment and award custody to the parent. *Id.* at 207.

Here, defendant argues that the trial court erred by finding that she is an unfit parent. However, defendant’s analysis is based on a faulty interpretation of *Mason, supra*. According to defendant, the *Mason* panel held that a parent is unfit “if he/she neglects or abandons their child at a ‘critical time’ in their life ‘for an extended period.’ ” Contrary to defendant’s assertion, the Court in *Mason* did not define unfitness only as neglect or abandonment for an extended period at a critical time in the child’s life. Rather, this Court held that a parent is not entitled to the parental presumption “when the parent’s conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child.” *Mason, supra* at 206. Therefore, a parent is unfit when his or her conduct is inconsistent with the protected parental interest *or* the parent has neglected or abandoned the child.

We affirm the trial court’s holding that defendant’s drug habit, incarceration, and abandonment of the children is conduct sufficiently inconsistent with the protected parental interest. See *Id.* at 206. The trial court specifically ruled that defendant is an unfit parent based on her past drug addiction, the fact that defendant did not provide a home for her children for years because of her drug addiction and incarceration, and her current inability to provide a stable and secure home for the children. Defendant abandoned the children for an extended period of time, from November 2002 to July 2005. Defendant’s abandonment of the children was a direct result of her drug use and her decision to commit crimes. Also, the children bonded with plaintiffs for the last five years and parent/child relationships exist between plaintiffs and the children. Defendant allowed these relationships to grow by continuing to make poor choices that kept her from participating in her children’s lives. Defendant’s past conduct is clearly inconsistent with the protected parental interest because defendant completely neglected her children for nearly three years while she put her own interests above her obligation to her children. Therefore, the trial court correctly held that defendant is an unfit parent under *Mason, supra* at 206-207. See also *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

We reject defendant’s argument that her fitness should be judge based on her current lifestyle, not her past actions. In *Mason, supra* at 205, this Court judged the defendant’s fitness based on his past conduct, even though there was no current reason why the defendant could not be a good parent. In so ruling, this Court approved the trial court’s use of a totality of the circumstances test to judge fitness. *Id.* Here, the trial court found defendant unfit on the basis of defendant’s *past* actions and her *current* inability to provide a stable and secure home. The trial court, therefore, properly looked at all the circumstances, past and present, and decided that defendant is not a fit parent. Moreover, judging fitness based solely on a parent’s current

lifestyle or asserted readiness to parent would be incredibly shortsighted, particularly in a case, as here, where a *parent is a recovering drug addict, with a history of relapse*.

Defendant also avers, incorrectly, that the trial court's finding that she cannot provide a stable and secure home for her children was against the great weight of the evidence. Defendant contends that the trial court's finding was based on its "personal theory that [defendant] would be unable to support her children without the financial assistance of [her boyfriend]." Contrary to defendant's contention, the trial court did not base its finding on a "personal theory." Rather, defendant's testimony reveals that she currently earns \$10.50 an hour, she does not own a car, and would not be able to afford the house in which she currently lives without her boyfriend's financial assistance. The fact that defendant may receive a job promotion and raise within six months is speculative and, therefore, does not have any bearing on defendant's current ability to provide a secure and stable home for her four children. A finding of fact is not against the great weight of the evidence, and must be sustained, unless the evidence clearly preponderates in the opposite direction. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). Here, the evidence clearly supports the trial court's finding that defendant cannot currently provide a stable and secure home for the children by herself.

Response to the Dissent

Although we find no error in the trial court's finding that defendant is an unfit mother, we appreciate our dissenting colleague's concerns regarding the statutory criteria for determining when a non-custodial parent is unfit and therefore not entitled to the presumption that parental custody is in the children's best interests. However, we do not agree with the dissent that the Juvenile Code's statutory grounds for terminating parental rights, MCL 712A.19b(3), should be utilized in custody disputes between a non-custodial parent and a non-parent with an established custodial environment. The dissent's reasoning ignores the fact that here, the non-custodial parent caused this very custody dispute by her serious misconduct and further caused an established custodial environment to be created with relatives by her continued misconduct and absence from the children. Moreover, the non-custodial mother here was afforded due process and had she proved that it would have been in the children's best interests to grant her custody, she would now have custody of the children. And, the trial court conducted a thorough best interests analysis. For all these reasons, we respectfully disagree with and reject the dissent's analysis.

II. Established Custodial Environment

Defendant maintains that the trial court committed clear legal error in ruling that an established custodial environment exists in plaintiffs' home because the court did not rely on *Vander Molen v Vander Molen*, 164 Mich App 448; 418 NW2d 108 (1987) and *Curless v Curless*, 137 Mich App 673; 357 NW2d 921 (1984). Defendant further argues that the trial court's factual findings on the custodial environment issue are against the great weight of the evidence.

Defendant misapprehends the holdings in *Vander Molen* and *Curless* and the two cases are readily distinguishable from this case. In *Vander Molen*, an established custodial environment did not exist with the mother because, "there was no appreciable time during which the [children] looked to their mother *alone* for guidance, discipline, the necessities of life and

parental comfort.” *Vander Molen, supra* at 458 (emphasis in original). In *Curless*, no established custodial environment existed because the children had not lived in a stable environment from the time the divorce proceedings began, even though the mother had temporary custody of the children. *Curless, supra* at 676.

We agree that the trial court is required to consider the inclination of the custodian and the child regarding the permanency of the relationship. MCL 722.27(1)(c). However, this Court did not hold in *Vander Molen* or *Curless* that the children’s feelings automatically defeat a finding of an established custodial environment. Rather, in both cases, the Court examined the totality of the children’s living situations. *Vander Molen, supra* at 457-458; *Curless, supra* at 677. Here, the trial court also examined the totality of the children’s living situation, and the evidence supports the trial court’s finding that an established custodial environment exists with plaintiffs. While defendant presented testimony that she has visited the children since 2005 and that she and the children’s father intended that the children’s placement with plaintiffs would be temporary, this does not outweigh the overwhelming evidence that a custodial environment exists with plaintiffs. For years, the children looked solely to plaintiffs for their life necessities, guidance, discipline and comfort. See *Vander Molen, supra* at 458. The facts here are also distinguishable from the situation in *Curless* because defendant does not spend significant time with the children. At the time of trial, defendant’s parenting time consisted of two weekends per month. Even if defendant and the children at first considered the custody arrangement to be temporary, that view necessarily changed after five years. Because defendant’s argument with regard to *Vander Molen* and *Curless* is without merit, and because the evidence strongly supports the trial court’s finding that an established custodial environment exists with plaintiffs, the trial court did not commit clear legal error, and its factual findings regarding the custodial environment are not against the great weight of the evidence.

III. Public Policy

Defendant also claims that the trial court’s custody award violates Michigan’s policy that encourages parents to voluntarily relinquish custody when they are in difficult circumstances, but returns the children to parents when the circumstances are resolved. To support her argument, defendant cites *Straub v Straub*, 209 Mich App 77, 81; 530 NW2d 125 (1995). In *Straub*, the mother voluntarily relinquished custody to the child’s grandparents, with the understanding that she would regain custody when she was able to provide a stable home. *Id.* at 79. Though the parties measured equally on all of the statutory best interest factors, this Court also considered the mother’s voluntary relinquishment of custody as an additional factor. *Id.* at 80-81. The Court ruled that the public policy of returning a child to a parent after voluntary relinquishment of custody “tips an otherwise equal scale in [the mother’s] favor.” *Id.* at 81.

The facts and reasoning of *Straub* do not apply here, particularly because the trial court did not find the parties to be equal on all of the best interest factors. Indeed, even if the trial court applied the policy, it would not “tip the scale” in defendant’s favor. Contrary to defendant’s position, the general policy in favor of returning children to parents who transfer custody does not *mandate* the restoration of custody as soon as a parent is willing to assume custody. Rather, “[a]bove all, custody disputes are to be resolved in the child’s best interests, according to the factors set forth in MCL 722.23.” *Mason, supra* at 195-196. Regardless, the application of the policy would not have affected the outcome here.

IV. Great Weight of Evidence: Best Interest Factors

Defendant also says that the trial court's factual findings on all of the statutory best interest factors, MCL 722.23, are against the great weight of the evidence. "To determine the best interests of children in custody cases, the trial court must consider the . . . factors of § 3 of the Child Custody Act," and "consider and explicitly state its findings and conclusions with respect to each of these factors." *Bowers v Bowers*, 190 Mich App 51, 54-55; 475 NW2d 394 (1991). 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 692, 700; 619 NW2d 738 (2000). In reviewing the findings, this Court should defer to the fact-finder's determination of credibility. *Mogle, supra* at 201. The twelve factors contained in § 3 of the Child Custody Act, MCL 722.23, 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.

Defendant disputes the trial court's findings of fact on all of the factors. Factor (a), MCL 722.23(a), requires the trial court to evaluate the love, affection, and other emotional ties existing between the parties and the child. The trial court found the parties equal on this factor because both parties are "closely bonded with the children." Defendant argues that the trial court's finding was against the great weight of the evidence because, other than their own testimony, plaintiffs did not present any evidence showing their emotional ties to the children. In contrast, defendant argues, she presented nine witnesses who testified about the strong emotional ties between her and the children. As defendant admits, plaintiffs testified that they have strong emotional ties to the children, and love them like their own. They also have a demonstrated commitment to the children because they raised them for several years. Clearly, the trial court deemed plaintiffs' testimony credible, and this Court must defer to the trial court's credibility determinations. See *Mogle, supra* at 201. The quantity of defendant's witnesses does not automatically negate plaintiffs' credible testimony. Consequently, the trial court's finding was not against the great weight of the evidence.

Defendant also argues that the trial court erred by finding that factor (b), MCL 722.23(b), the capacity of the parties to give the child love, affection, guidance and religion, favors plaintiffs. With respect to factor (b), the trial court found:

[Plaintiffs] have been the primary caretakers over the past five years. In 2002 and 2003, Defendant Mother was addicted to drugs and participated in criminal activity. She was incarcerated from August 2004 to April 2005. During this time, Plaintiffs provided the children with stability and guidance. Defendant Mother argued that Plaintiffs' "changed" the children's religion. Both parties testified that they belong to Christian faiths. Plaintiffs took the children to the church they had always attended. Given the young ages of the children in 2002, there was no evidence that a change in religion caused them any distress or confusion. Defendant Mother presently takes them to her church in Indiana when she has parenting time.

Defendant avers that the trial court should have considered testimony that defendant lovingly attends to the children's needs when they are in her care, and evidence of defendant's completion of two parenting classes. Nothing suggests that the trial court failed to consider this evidence, only that the trial court declined to comment on it in its opinion. The trial court is not required to comment on every matter in evidence. *LaFleche, supra* at 700. Defendant also claims that plaintiffs failed to present "any solid evidence" on this factor. Plaintiffs testified that they love the children as their own, and they discipline and guide the children on a daily basis. Plaintiffs also testified that they take the children to church at least once a week. Each party presented evidence to support a finding in their favor, and the evidence does not clearly preponderate in the opposite direction of the trial court findings. Therefore, the factual findings are not against the great weight of the evidence. See *Mogle, supra* at 196.

MCL 722.23(c) instructs the trial court to inquire into the parties' capacity and disposition to provide the child with food, clothing, medical care and material needs. Defendant argues that the trial court erred by failing to consider defendant's boyfriend's financial contributions to their household. The trial court found that plaintiffs have provided the children with food, clothing, shelter, educational and medical support with little or no contribution from the children's parents. The trial court also found that defendant would have difficulty supporting

the children without her boyfriend's assistance. Based on plaintiffs' demonstrated ability to provide for the children, and defendant's relative inability, the trial court awarded this factor to plaintiffs.

It is undisputed that plaintiffs have successfully provided for the children's material needs for the past five years. It is also undisputed that plaintiffs' combined income is approximately five times that of defendant's, \$110,000 to \$22,000, respectively. Defendant admitted that she does not own a car and she could not afford to lease the house she lives in without her boyfriend's assistance. Clearly the evidence preponderates in the direction of the trial court's finding; strictly by the numbers, plaintiffs have a greater capacity to financially provide for the children, and have demonstrated their willingness to do so by providing for the children for the past five years. Also, it would have been illogical for the trial court to consider defendant's boyfriend's financial wherewithal. The factor specifically requires the trial court to evaluate the "capacity and disposition of the *parties involved* to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c) (emphasis added). Defendant's boyfriend is not a party to this lawsuit, and the trial court did not clearly err by failing to consider a non-party's income.

Defendant argues that the trial court erred by weighing her drug use and cohabitation heavily against her, in making its findings for factor (d), MCL 722.23(d), the length of time the children have resided in a stable and satisfactory environment. The trial court found that the children have resided with plaintiffs since 2002, and are thriving in plaintiffs' stable home. The trial court noted that defendant has lived at her home for only six months, and has worked at the Dollar Tree for less than a year. Consequently, the trial court found that although defendant has made progress, she remains unable to care for the children on her own. Upon review of the record, it is apparent that the children have lived in a stable and satisfactory environment for five years with plaintiff. They have no such record at defendant's comparatively unstable home. Thus, the trial court's findings on this factor are not against the great weight of the evidence.

With respect to factor (e), MCL 722.23(e), the family unit permanence in the existing or proposed custodial home, defendant argues her unmarried status unduly influenced the trial court's findings on this factor. The trial court found that plaintiffs' family unit consists of themselves and the children. The trial court further found that plaintiffs have been married for 22 years, have stable employment and an established home. With regard to defendant, the trial court found that her proposed family unit would consist of defendant, her boyfriend and the children. The trial court noted that defendant and her boyfriend are cohabitating and have plans to marry but expressed concern about whether they will continue their relationship in the future. It is very clear that the trial court's findings on this factor are not against the great weight of the evidence, as the evidence clearly preponderates in plaintiffs' favor. See *Mogle, supra* at 196. The children have lived, as a family unit, with plaintiffs for five years. This evidence alone shows plaintiffs' family unit is more permanent than that of defendant. Also, it is unquestionable that plaintiffs' 22-year marriage is more permanent than defendant's two-year relationship with her boyfriend. Based on the evidence presented, the trial court did not err by awarding this factor to plaintiffs.

Defendant contends that the trial court erred by overemphasizing defendant's past immoral behavior, and failing to consider defendant's current behavior, when it decided that

factor (f), MCL 722.23(f), the moral fitness of the parties favored plaintiffs. The trial court cited defendant's drug addiction and criminal activity, and found that the children suffered as a result of their parents' actions. The trial court also found that although defendant argued that she was a good parent even when she was addicted to drugs, "[i]n reality she has always put her own needs ahead of those of her children." The trial court acknowledged that plaintiffs, while not perfect, did their best to provide for the children, and there was no evidence that they are morally unfit.

Immoral conduct is only relevant if it has a significant impact on a person's ability to parent. *Fletcher, supra* at 886-887. "The question under factor f is not 'who is the morally superior adult;' the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Id.* at 887. Here, defendant's conduct demonstrates her moral unfitness to parent. Her drug addiction and imprisonment directly affected her ability to parent; she was forced to relinquish custody of her children due to her behavior. Plaintiffs, on the other hand, are relatively morally fit. There is no evidence of plaintiffs engaging in immoral conduct that significantly impacts their ability to parent. Moreover, defendant's argument that the trial court should have only considered her current behavior when evaluating her moral fitness is meritless. There is no requirement that the trial court limit its inquiry to conduct occurring in the near past. Rather, to evaluate the children's best interests, it is necessary for the trial court to consider all actions that are relevant to a party's ability to parent. For these reasons, the trial court's finding is not against the great weight of the evidence. See *Mogle, supra* at 196.

Defendant also argues that the trial court erred by finding that factor (g) favored plaintiffs, the mental and physical health of the parties involved. MCL 722.23(g). For this factor, the trial court acknowledged Lorie's depression and anger issues but found that she is "adequately and appropriately addressing her mental health issues through medical care and medication." Neither party raised any concerns about Robert's mental health. Regarding defendant, the trial court found, based on the court psychologist's report, that she has not, "adequately addressed the underlying issues which caused her drug use and criminality. Her recovery is not complete." Defendant maintains that Lorie's current mental health problems outweigh defendant's past drug addiction. Again, this factor hinged on the trial court's assessment of the credibility of the testimony and other evidence admitted. Obviously, the trial court deemed credible Lorie's testimony about her mental health, and the court psychologist's evaluation of defendant's mental health. There is nothing in the record to suggest that the trial court incorrectly assessed the credibility of the evidence in making its factual findings. Therefore, we defer to the trial court's credibility determinations, and affirm the trial court's factual findings for this factor. See *Mogle, supra* at 201.

With respect to factor (h), MCL 722.23(h), the home, school and community record of the child, defendant argues that the trial court should have found the parties equal on this factor. The trial court found that this factor favors plaintiffs because the children have lived with plaintiffs since 2002, and have attended school and participated in activities for five years in Farmington Hills, where plaintiffs live. The trial court rebutted defendant's allegation that the children have a poor home life with plaintiffs, stating:

Clearly the pending custody litigation has negatively impacted the children. Over the past two years they have been subjected to interviews by two different GAL's,

two psychological experts, the Friend of the Court and the Court. The occasional acting out behavior is quite likely attributable to this ongoing conflict.

Defendant alleges that the trial court's findings are, "severely wrong, as GAL Ray has not visited the children since 2003 and the Friend of the Court has never interviewed the children." Although it is true that GAL Ray has not interviewed the children since 2003, and the Friend of the Court did not interview the children, the trial court's minor factual mistake is immaterial. The trial court's point was that the children have been through significant distress because of this custody dispute, and it is natural for them to act out. When the incorrect factual statements are removed, the point remains the same. Furthermore, the record supports the trial court's other findings regarding the children's home, school and community record. The children have resided with plaintiffs in Farmington Hills where they attended school and participate in activities, for the past five years. The evidence does not support defendant's claim that the children have a "poor home record" with plaintiffs. While some evidence shows that plaintiffs used corporal punishment, the instances of corporal punishment do not outweigh the substantial evidence that the children have enjoyed a stable, loving home life with plaintiffs over the past five years. Upon review of the entire record, it is clear that the evidence clearly preponderates in the direction of the trial court's finding in favor of plaintiffs on this factor. See *Mogle, supra* at 196.

For factor (i), MCL 722.23(i), defendant argues that the trial court erred by failing to make a finding. Factor (i) takes into consideration "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). The trial court indicated that it considered the children's preferences in making its determination. The trial court need not violate a child's confidence by revealing his or her preference on the record. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 458; 705 NW2d 144 (2005). Accordingly, the trial court did not err when it refused to put the children's preferences on the record and state which party the factor favored.

Defendant challenges the trial court findings on factor (j), MCL 722.23(j), the willingness and ability of the parties to facilitate and encourage a close and continuing parent/child relationship, on the basis that the trial court ignored evidence that plaintiffs have tried to inhibit defendant's relationship with her children. Defendant also argues that the trial court erred by considering plaintiffs' lack of standing to request parenting time, when making its determination on this factor. The trial court found that factor (j) favors plaintiffs because plaintiffs permit defendant to exercise her parenting time, even though relations between the parties are strained. The trial court noted that defendant testified that she would allow plaintiffs to visit the children, if she was granted custody, but concluded that would be unlikely given the level of animosity between the parties. The trial court also noted that plaintiffs do not have legal standing to request parenting time, if custody is returned to defendant.

After reviewing the record, we hold that the trial court's factual findings on this factor are against the great weight of the evidence, and the trial court should have concluded that the parties are equal for this factor. Although plaintiffs do "permit" defendant to have parenting time with her children, plaintiffs are under court order to do so. As such, plaintiffs allowing defendant to exercise her parenting time is not necessarily an indication of their willingness and ability to facilitate the children's relationship with their mother. From the testimony defendant presented from her two adult children and her sister, it can be inferred that plaintiffs are actually

not willing to facilitate relationships between the children and other family members. Plaintiffs regularly block family members' phone calls and emails, and have refused to let the children's extended family visit them. In addition, plaintiffs presented no evidence that defendant has ever tried to inhibit their relationship with the children. In response to defendant's argument that the trial court improperly considered the fact that plaintiffs do not have standing to seek parenting time, the trial court did express doubt that defendant would facilitate a relationship between plaintiffs and the children, if she regained custody. This Court must defer to the trial court's credibility assessment. See *Mogle, supra* at 201. Even so, the trial court's doubt does not outweigh the evidence of plaintiffs' unwillingness to facilitate the children's familial relationships. Because the evidence clearly preponderates in the opposite direction of the trial court's finding, we conclude that the trial court should have found the parties equal for factor (j). See *id.* at 196.

With respect to factor (k), MCL 722.23(k), the domestic violence factor, defendant argues that the trial court erred by finding the parties equal on this factor, rather than in her favor. The trial court acknowledged plaintiffs' use of corporal punishment but found that it did not constitute domestic violence. We agree with the trial court that plaintiffs' use of corporal punishment does not constitute domestic violence. There is no evidence that the children were injured, physically or psychologically, by the corporal punishment. Because there also is no evidence of domestic violence in defendant's home, the trial court's finding that the parties are equal on this factor was not against the great weight of the evidence.

Defendant's last argument is that, in rendering its findings for factor (l), MCL 722.23(l), the trial court erred by failing to consider the children's bond with their older siblings. In *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995), this Court recognized the importance of keeping siblings together and opined:

The sibling bond and the potentially detrimental effects of physically severing that bond should be seriously considered in custody cases where the children likely have already experienced serious disruption in their lives as well as a sense of deep personal loss.

The *Wiechmann* panel also observed in a footnote that the consideration of the sibling bond is appropriate under several of the factors listed in MCL 722.23. *Id.* at 440 n 2. However, the *Wiechmann* decision does not *require* a trial court to consider the sibling bond. Although a trial court may consider the sibling bond, neither *Wiechmann* nor the best interests statute oblige a trial court to consider a child's sibling bond or bonds, when making a custody decision. *Id.*; MCL 722.23. In addition, *Wiechmann* is inapplicable because, here, the adult siblings do not reside with defendant. Thus, the trial court did not err by not applying *Wiechmann*.

For the reasons stated, we affirm the trial court's findings on all of the statutory best interest factors, except factor (j). For factor (j), we hold that the trial court's findings were against the great weight of the evidence, and find that the parties were equal on this factor. This conclusion does not, however, affect the trial court's ultimate custody determination. The effect of holding that the parties are equal for factor (j), is to neutralize the factor, such that neither party gains an advantage. Also, because the trial court's findings on all the other statutory best interests factors are supported by the evidence, we conclude that the trial court's ultimate custody determination was within the range of principled outcomes and not an abuse of

discretion. See *MacIntyre, supra* at 451 (this Court reviews the trial court’s ultimate custody determination for an abuse of discretion); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (an abuse of discretion occurs when the trial court’s decision is outside the range of principled outcomes).

V. Attorney Fees

Defendant also claims that the trial court abused its discretion by awarding plaintiffs attorney fees.² The record reflects that the trial court relied on a common-law exception to award the fees. The exception authorizes an award of attorney fees when a party’s unreasonable conduct forced the requesting party to incur the fees. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 895 (2005). Here, the trial court found that defendant’s legal position regarding the issue of established custodial environment was unreasonable.

While defendant’s position on this issue was unsound, it was not unreasonable for her to attempt to prove that an established custodial environment did not exist. In essence, the trial court punished defendant for not conceding the custodial environment issue. The trial court’s decision on the custodial environment issue affected the way the case was litigated; by finding that a custodial environment exists with plaintiffs, plaintiffs were afforded the custodial environment presumption, which shifted the burden of proof to defendant. It was not unreasonable for defendant to attempt to deprive plaintiffs of the custodial environment presumption; had she been successful, the burden of proof would have been on plaintiffs, thereby increasing the likelihood that defendant would regain custody. See MCL 722.25(1).

Furthermore, defendant was entitled to a de novo hearing on all the issues decided by the referee, including the custodial environment issue. MCR 3.215(E)(4). Defendant litigated the custodial environment issue before the trial court without incident, and nothing in the record suggests defendant unnecessarily protracted the hearing on this issue. In addition, plaintiffs presented no evidence that defendant caused them to incur legal fees beyond what would normally be expected in a custody suit. Whether an established custodial environment exists is an issue in every custody suit; plaintiffs, therefore, by initiating the custody suit, should be expected to pay to litigate the custodial environment issue. See e.g., *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995) (the first step in considering a custody issue is to determine whether an established custodial environment exists). Because defendant chose to challenge the custodial environment issue for legally strategic reasons, and there is no evidence that defendant caused plaintiffs to incur attorney fees beyond what is normally expected in a

² We review a trial court’s grant or denial of attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 895 (2005). Any findings of fact the trial court used to support its award are reviewed for clear error, but questions of law are reviewed de novo. *Id.* Under the “American rule,” attorney fees are generally not recoverable. *Reed, supra* at 164. A trial court may impose an attorney fees award, however, if expressly authorized by statute, court rule, common-law exception, or contract. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002).

custody suit, the trial court's decision to award plaintiffs attorney fees is outside the range of reasonable and principled outcomes. See *Maldonado, supra* at 388.

The trial court further erred by not holding a hearing or making factual findings on the reasonableness of the fees. "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed, supra* at 166. Indeed, the only evidence presented regarding attorney fees was Lorie's testimony that she and Robert incurred \$20,000 in legal fees, and received a bill for \$600 from the guardian ad litem. Further, plaintiffs submitted no evidence regarding the amount of attorney fees they actually incurred as a result of defendant's alleged misconduct. The trial court appears to have awarded attorney fees solely on the basis on what it perceived to be fair, which is impermissible.³

VI. Due Process

Defendant argues that the court violated her due process rights when it held the de novo hearing after only one day of notice. However, defendant waived this issue by failing to object to the hearing, and she explicitly assented to the trial court's decision to hold the hearing the next day. Indeed, defendant complained to the trial court that a de novo hearing had not been scheduled, the trial court then scheduled the hearing for the next day, and defendant's counsel replied, "Thank you." Error requiring reversal must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Thus, a party cannot request a certain action of the trial court and then argue on appeal that the resultant action was error. *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006). Because defendant asked the trial court to schedule the hearing immediately, the error, if any, was made by defendant, not the trial court, and defendant cannot argue on appeal that the trial court's resultant action was error. *Czymbor's Timber, supra* at 556; *Lewis, supra* at 210.

Alternatively, defendant argues that her due process rights were violated because the trial court did not hold the de novo hearing in a timely manner. MCR 3.215(F)(1) provides, "a judicial hearing must be held within 21 days after the written objection is filed, unless the time is extended by the court for good cause." Defendant filed objections to the referee's recommendations on January 4, 2007. On that same day, defendant sent plaintiffs a notice for a de novo hearing, to be held on February 26, 2007. At the February 26, 2007, hearing, plaintiffs were not prepared to go forward with the hearing, due to a tardy filing by the court psychologist. Consequently, the trial court adjourned the hearing. The trial court then scheduled the de novo hearing for May 29, 2007. At the May 29, 2007, hearing, the judge recused himself from the case. The case was then transferred, and two weeks later, the new judge held a hearing to ascertain the status of the case, and scheduled the de novo hearing for the following day.

³ We note, however, that defendant's argument that the trial court awarded attorney fees before plaintiffs prevailed is meritless, as it is wholly unsupported by the record. The trial court awarded plaintiffs attorney fees in the same opinion and order in which it rendered its custody decision.

Although defendant waited five months for a de novo hearing, her due process rights were not violated. First, defendant failed to explain why the initial de novo hearing was scheduled for February 26, 2007, well outside the 21-day period mandated by the court rule. Also, it is not apparent from the record that the delay was attributable to the trial court. An appellant cannot merely announce her position and leave it to this Court to discover and rationalize the basis for her claims. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637; 650 NW2d 424 (2003). Because defendant did not substantiate her argument with factual references to the record, we consider her argument abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

After the trial court commenced the de novo hearing, the trial court then extended the time by adjourning the hearing for good cause: plaintiffs were unprepared due to an untimely filing by the court psychologist. See MCR 3.215(F)(1). The time was again extended for good cause, i.e., no arbiter, when the judge recused himself from the case. See *id.* Defendant then received her de novo hearing as soon as the new judge could schedule it. It is apparent that the hearing was twice rescheduled for good cause. Defendant also fails to show, or even argue, that the delay substantially affected her rights. Therefore, defendant is not entitled to relief for this alleged unpreserved constitutional error. See *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

Defendant also claims that her due process rights were violated because, in her opinion, the trial court was not an impartial decision maker. Defendant claims that the trial court's "irritation" with defense counsel when she expressed doubt about whether she could produce a witness on Monday morning evidences the trial court's lack of impartiality. The trial court stated:

I would like to finish on Monday . . . Well, counsel – you asked for a hearing, I'm giving you a hearing. I have cleared my docket. I have moved other cases, I have other people who also have custody issues who are waiting until we finish this trial, so I can only accommodate you so far . . . but you need to get your witnesses here and we need to wrap it up.

Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 599; 673 NW2d 111 (2003). A showing of actual bias is not necessary to disqualify a judge where "experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable." *Id.*, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). Our Supreme Court noted such situations include: (1) where the judge has a pecuniary interest in the outcome; (2) where the judge has been the subject of personal abuse or criticism from the party before him; (3) where the judge is enmeshed in other matters involving the complaining party; or (4) where the judge might have prejudged the case because of having previously acted as an accuser, fact-finder, or initial decision maker. *Id.* at 599-600.

Defendant has not shown, or even argued, that this case presents a situation where disqualification is necessary. See *Van Buren Charter Twp, supra* at 599-600. Nothing in the record suggests that the judge had a pecuniary interest in the outcome, was a victim of personal abuse or criticism from one of the parties, was enmeshed in other matters involving the

complaining party or previously acted as an accuser, fact-finder, or initial decision maker. See *id.* Rather, the record reflects that the trial court was not displaying a lack of impartiality, but merely impatience with defendant's inability to timely produce witnesses.

VII. Hearing Testimony

Defendant claims that the trial court abused its discretion by allowing the children's former guardian ad litem to testify when plaintiffs did not file a witness list. This Court reviews the trial court's decision regarding whether a witness may testify after a party has failed to file its witness list for an abuse of discretion. *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). MCR 2.401(I) provides, in part, "no later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown. *Id.* Court rules are construed in the same manner as statutes. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001). The plain language of the court rule is examined, and if unambiguous, this Court enforces the meaning plainly expressed, without further construction or interpretation. *Id.* Under the plain language rule, "courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Johnson v Johnson*, 276 Mich App 1, 8; 739 NW2d 877 (2007), quoting *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

The court rule allows a court to prohibit a witness who is not listed on a witness list from testifying. See MCR 2.401(B)(2)(a). However, courts are not required to exclude witnesses who are not listed on a witness list. See *id.* The court rule states that a court "may" prohibit such witnesses from testifying. *Id.* Under the plain language rule, the term "may" is permissive, and indicates that the court has discretion. *Johnson, supra* at 8. The trial court acted in accordance with the court rule. Its decision is within the principled range of outcomes, and no abuse of discretion occurred. *Maldonado, supra* at 388.

VIII. Child Support

Defendant further argues that the trial court erred when it did not factor in plaintiffs' income when it calculated defendant's child support obligation. This Court reviews a trial court's ultimate decision to award child support for an abuse of discretion. *Peterson v Peterson*, 272 Mich App 511, 515; 727 NW2d 393 (2006). "Whether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law." *Id.* at 516.

The trial court must follow the formula in the Michigan Child Support Formula Manual ("2004 MCSF manual") to set child support unless the result would be unjust or inappropriate. MCL 552.519(3)(a)(vi); MCL 552.605(2); *Burba v Burba (After Remand)*, 461 Mich 637, 645-647; 610 NW2d 873 (2000); *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225-226; 663 NW2d 481 (2003). Section 4.01(A) of the Michigan Child Support Formula requires both parents to pay child support when a child is in the physical custody of a third party. 2004 MCSF manual, p 41. When the parents do not live in the same household as the children, the parents' child support obligation is calculated in the following manner:

Step 1: Determine each parent's and the total family net income.

Step 2: Calculate each parent's support obligation separately by using a custodian income of zero. Apportion the ordinary medical expense amount based on each parent's share of the total family income.

Step 3: Add a parent's base support obligation, respective share of ordinary medical, and child care expenses to determine that parent's support obligation. [§ 4.01(C), 2004 MCSF manual, p 41.]

Here, the trial court calculated defendant's support obligation using the formula set out above. Accordingly, the trial court set plaintiffs' income at zero. See § 4.01(C), 2004 MCSF manual, p 41. Though defendant claims that § 4.01(C) should not apply in situations where the custodians file for custody, she has not provided any legal support for her proposition. Moreover, setting a custodian's income at zero is not unjust, even when a custodian files for custody. The state's overarching concern in custody matters is the best interests of the child. See *Mason, supra* at 195-196. If awarding custody to a third party furthers the child's best interests, the third party should not be penalized by receiving less child support from the child's parents, for filing for custody to protect the child's best interest. The trial court calculated the child support according to the Michigan Child Support Formula, and the award does not appear to be unjust; therefore, no error occurred and defendant is not entitled to relief.

Affirmed in part, reversed in part and remanded for the trial court to vacate the award of attorney fees. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Stephen L. Borrello