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APPELLEE'S SUPPLEMENTAL APPENDIX

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STATE OF MICHIGAN

COURT OF APPEALS

PAULA RAE WILLIAMSON DEBOE, Plaintiff-Appellee/Cross-Appellant, v SCOTT FRANKLIN DEBOE, Defendant-Appellant/Cross-Appellee.	UNPUBLISHED September 18, 2003 No. 246083 Jackson Circuit Court LC No. 02-001873-DM

PAULA RAE WILLIAMSON DEBOE, Plaintiff-Appellant, v SCOTT FRANKLIN DEBOE, Defendant-Appellee.	 No. 246410 Jackson Circuit Court LC No. 02-001873-DM

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In Docket No. 246083, defendant appeals as of right from a judgment of divorce, raising several issues with respect to the trial court's decision awarding plaintiff physical custody of the parties' two children, and also challenging its division of certain marital property. Plaintiff has filed a cross-appeal, raising issues concerning the amount of court-ordered child support and the parenting time awarded to defendant. In Docket No. 246410, plaintiff appeals by leave granted from an order supplementing the divorce judgment with regard to defendant's child care obligation. We affirm in part, reverse in part, and remand.

I

Defendant contests the trial court's custody decision, arguing that the court improperly relied upon information that was not presented as evidence, that it improperly determined that no established custodial environment existed, and that it therefore applied the wrong evidentiary standard when awarding plaintiff physical custody. "All custody orders must be affirmed on

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appeal unless the trial court's findings were 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), citing MCL 722.28.

We agree that the trial court committed a clear legal error when it relied on information that was not part of the record. "The trial court's ultimate findings relative to custody must be based upon competent evidence adduced at the hearing." *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989), citing *Nichols v Nichols*, 106 Mich App 584, 591; 308 NW2d 291 (1981). See also *Shelters v Shelters*, 115 Mich App 63, 67; 320 NW2d 292 (1982), where this Court held that the findings of a trial court in a custody matter must be based upon competent evidence adduced at the custody hearing. While a trial court may consider information, such as a friend of the court report, which is not admitted as evidence, it may consider the information only as background. *Id.*; *Duperon, supra* at 79. The ultimate findings must be based upon competent evidence of record. *Id.*

In denying defendant's request for joint physical custody, the trial court stated:

> My primary concern is establishing a stable and consistent routine for the children. I am concerned that with the young ages of these children, 2 and 5 years old, that they should have a clear, stable environment. *It is my understanding from reading and other cases, that most child development experts recommend that younger children should have a primary caregiver. For example, the publications of the Jackson County Association for Infant Mental Health recommends that for children ages 19 to 36 months, there should be more than 1 bi-weekly overnight only in exceptional situations. The suggestions of the Jackson County Association for Infant Mental Health are drawn from information from the Michigan Children's Charter. Of course, the current schedule already exceeds those guidelines, but the father's proposed* [joint custody] *schedule would be exceeding it even more. Regular, frequent contact is encouraged but extended time is discouraged. Although I believe some extended time for vacations is appropriate, I do not find that it is in a 2-year-old's best interest to establish a schedule where they alternate so frequently.* Although I attempted in the property division aspects of this case to divide the marital property almost equally, my role as the judge is not to try and divide the children equally even if both parents are good parents. The best interests of the children prevail over a parent's desire to have 50% of their child's time.
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> * * *
>
> It is a closer question with a 5-year-old, but that would create another issue of splitting the children. I find that is contrary to their best interests. As I stated on the record, if these children were 10 and 13, I would view this case differently, but at this time, for the reasons stated above, I find it is in the children's best interest that there be primary physical custody with the mother and joint legal custody. [Emphasis added.]

It is apparent that the focal point of the trial court's custody decision was its perception that young children such as those involved in this case (ages two and five) need a stable

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environment, which cannot be attained by joint custody and the frequent changes involved with such a situation. Moreover, this understanding was derived "from reading and other cases," in particular two specific documents not introduced into evidence, which indicate that young children should have one primary care giver.

From a review of the court's oral ruling and written opinion, it appears that the trial court's ultimate conclusion that plaintiff have physical custody of the children was based not on its findings under factors (a) and (b), but instead on its "primary concern" as to the age of the children and the effect a joint physical custody schedule and environment would have on young children. We therefore conclude that the court's ultimate custody decision was not based on competent evidence adduced at trial, as the evidence the court relied upon for its findings as to the impact joint custody has on young children was not a part of the record. This prevented defendant from rebutting or otherwise challenging these studies, and the court's belief that they were accurate. Plaintiff's inability to challenge this material precluded him from addressing what turned out to be the primary concern of the court. Moreover, as noted, the ages of the children were of great significance to the trial court, so much so that it indicated that it may have reached another result if the children were older. In *Berman v Berman*, 84 Mich App 740, 745; 270 NW2d 680 (1978), this Court recognized that, while the age of a child may be considered when determining custody, age itself cannot control a decision. The trial court's ruling suggests that joint physical custody would never be appropriate where children are very young, a generalization that is not supported by any evidence in this record. It was a clear legal error for the trial court to decide the issue of joint physical custody based on information that was not part of the record. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).[1]

We further conclude that the trial court's factual finding, that no established custodial environment existed, is against the great weight of the evidence. Whether an established custodial environment exists is a question of fact for the trial court. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). MCL 722.27(1)(c) provides, in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
>
> (c) . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. 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.

[1] This is not to say that the trial court's concerns were incorrect. Rather, they were improper because they were based on evidence that neither party introduced into evidence.

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> The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered. [Emphasis added.]

An established custodial environment can exist with both parents and in more than one home. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000), citing *Duperon*, *supra* at 80. In *Jack*, the record established that *the children* looked to both parents to provide them with "guidance, discipline, the necessities of life, and parental comfort." *Id.* at 671. Thus, an established custodial environment existed with both parents. *Id.* "[T]he fact that the children's primary residence remained in [the] defendant's home after the parties separated did not extinguish the custodial environment that existed with [the] plaintiff." *Id.*

In *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001), this Court held that the trial court erred by failing to find an established custodial environment with both parents. In *Foskett*, the trial court reached its determination that no custodial environment existed after noting that *the children* looked to both their mother and father, with the same frequency, for guidance, discipline, and the necessities of life. *Id.* at 7-8. This Court stated:

> Because the existence of a custodial environment is a factual inquiry, the great weight of the evidence standard applies. The appropriate inquiry, therefore, is whether the evidence on which the trial court determined that neither parent established a custodial environment "clearly preponderates in the opposite direction." . . . thus rendering the trial court's ultimate decision regarding custody an abuse of discretion. [*Id.* at 8 (citations omitted).]

The Court held that a finding of no established custodial environment was against the great weight of the evidence which, in turn, rendered the custody decision an abuse of discretion. *Id.* This Court emphasized that, where an established custodial environment exists, any change in custody may occur only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child. *Id.* at 6. It also noted that "[t]his higher standard [] applies when there is an established custodial environment with both parents." *Id.*, citing *Jack*, *supra* at 668.

In this case, the trial court made two errors in determining that no established custodial environment existed. First, in its oral opinion, the court noted that although "this case has not been pending too long," it still did not "think that since custody has been an issue for I thought most of this case, that is an established custodial environment." The court also opined that *neither party* could look at the situation existing under the temporary order as permanent. The court's reliance on the fact that custody was an issue was in error. Although we have held that a court can consider the upheaval involved in repeated changes of physical custody which precede a final decision, see *Hayes*, *supra* at 388, citing *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993), there was no evidence cited by the trial court that the *children* experienced any upheaval or uncertainty because of the pending divorce. Although the parents may have been uncertain about the final resolution, "the focus is on the circumstances surrounding the care of the children in the time preceding trial. . ." *Hayes*, *supra* at 388.

Second, the evidence clearly preponderated in favor of a finding that an established custodial environment existed with both parents. *Jack*, *supra*. The evidence revealed that

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plaintiff worked part time after the birth of the parties' first child and continued to work part time until November 2001. After that, she worked full time. While plaintiff testified that she was the primary caregiver for the children and while, pursuant to a temporary order, she had physical custody, defendant had the children every other weekend, every Tuesday for an overnight visit, and every other Thursday evening. He also watched the children for periods when plaintiff was traveling on business. Before defendant moved out of the marital home, which occurred after plaintiff filed for divorce, he routinely woke the children, fed them, got them ready for school, and transported them to school after plaintiff left for work. Importantly, it is undisputed that this practice continued after defendant moved out of the house. It stopped only after plaintiff moved for exclusive use of the marital home and a temporary order of parenting time was entered. Plaintiff acknowledged defendant's participation in the children's morning routine before and after the separation. The evidence also revealed that, before the parties separated, defendant played with the children while plaintiff prepared the evening meal. A former day-care provider testified that defendant dropped off and picked up the parties' older child when she was enrolled in day care. The provider often saw both defendant and plaintiff outside playing with his children in the evenings. She testified that both parties were wonderful parents and had a wonderful bond with the children. At the time of trial, both parties had relocated to separate residences in Kalamazoo and were providing for the children. Plaintiff admitted that, when she relocated from Jackson to Kalamazoo, defendant also moved to Kalamazoo to be near the children.

Defendant testified that, in his apartment, the children have their own bedroom, beds, toys, and videos. During his parenting time, defendant works with the older child on school work. He was in contact with her Kindergarten teacher through email, and he prepared meals for the children. The testimony also revealed that plaintiff provided daily care for the children, took the children to church, and volunteered at day care.

Given the facts elicited, the trial court erred in determining that no established custodial environment existed. Indeed, the trial court made no reference to any of these facts, all of which addresses the environment of the children, both physically and psychologically. *Bowers, supra* at 325. The evidence indicated that the children looked to both parents, over an appreciable time, for guidance, discipline, the necessities of life, and parental comfort. The trial court's erroneous factual finding to the contrary resulted in the custody decision being made without the appropriate evidentiary standard being applied, i.e., clear and convincing evidence. The custody decision was therefore an abuse of discretion. *Foskett, supra* at 8.

On remand, the trial court shall reconsider the custody issue on the basis of the evidence that was properly presented to it and apply the appropriate evidentiary standard when deciding the issue of joint custody. It should also consider up-to-date information. *Greer v Alexander*, 248 Mich App 259, 266-267; 639 NW2d 39 (2001).

II

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Defendant also argues that the trial court's factual findings with respect to several of the best interest factors[2] are against the great weight of the evidence. Although reversal is already required as to custody, we address this issue as it will almost certainly arise in remand.

Defendant first contends that best interest factors (a) and (b) were improperly found to favor plaintiff. MCL 722.23(a) requires the court to consider the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(b) instructs courts to consider the "capacity and disposition of the parties involved to give the child love, affection, and to continue the education and raising of the child in his or her religion or creed, if any." Regarding these factors, the trial court stated:

> In this case, the parties have both worked during the time they had young children although the mother for several years worked part-time. Based on her part-time employment and the more time that she has spent in nurturing the children when they were young and they are now only 2 and 5 years old, I find that the mother has shown a greater capacity and disposition to give the children, love, affection, and guidance, and as a result of that there are probably stronger emotional ties between the children and her. I do not question that the father has the capacity and disposition to give the children love and affection and that there may also be strong ties between the children and the father. However, I do believe the mother prevails on factors (a) and (b).

With respect to factor (a), the testimony showed that both parents were bonded with the children. However, there was also testimony that plaintiff spent more time with the children in their infancy. Defendant's mother testified that plaintiff provided more care for the children when they were infants. The youngest child was only two years old at the time of the custody hearing. Plaintiff further testified that she loved the children "immensely." And, there was testimony that, while defendant's emotional ties to the children were strengthened after the divorce proceedings began, plaintiff's emotional ties were continual from the time of birth. Defendant obviously participated in the care of his children and even relocated to Kalamazoo to be near them. However, the trial court weighed the evidence, heard the testimony, and its decision is entitled to deference with respect to credibility determinations and preferences under the statutory factors. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). In *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 28; 581 NW2d 11 (1998), this Court acknowledged that trial courts are in a superior position to make accurate decisions concerning custody. "Although not infallible, trial court's are more experienced and better situated to weigh evidence and assess credibility." *Id.* Here, the trial court's determination that factor (a) favored plaintiff is not against the clear weight of the evidence.

With respect to factor (b), there was comparable evidence concerning the parties' capacity for love and affection. However, there was disputed evidence with respect to defendant's involvement in the day care or schooling of the children. Moreover, the evidence

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[2] MCL 722.26a requires a trial court to consider the best interest factors when deciding an issue of joint custody.

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was clear that plaintiff initiated and maintained the children's religious education. While the parties were married, she joined a church and requested that defendant attend with her and the children. After moving to Kalamazoo, plaintiff continued to attend church with the children. There was no evidence that defendant took any initiative to take the children to church or to maintain their religious education. Giving deference to the trial court's superior vantage point with respect to credibility and weighing the evidence, it cannot be said that its conclusion with respect to factor (b) is against the great weight of the evidence. *Fletcher, supra* at 28; *Thames, supra* at 305.

Defendant also argues that the trial court erred in weighing factors (d) and (j) equally to both parties. MCL 722.23(d) assesses the length of time that the children have lived in a stable, satisfactory environment and the desirability of maintaining that stability. The trial court's finding of equality on this factor is not against the great weight of the evidence. Plaintiff lived in the marital home with the children until she moved to Kalamazoo in August 2000. Plaintiff testified that she consulted defendant about the move and that it improved the quality of life for her and the children. While defendant disputes that he was consulted about the move, there was no showing of instability with respect to the children's living situation. They moved once with their mother. Defendant also moved. Both parties obtained apartments and established appropriate living arrangements. Neither party favored the other with respect to stability of a home during the pendency of the divorce.

Finally, MCL 722.23(j) assesses the willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. In arguing that this factor favored him, defendant ignores significant evidence. Plaintiff testified that defendant was not consistent and that he tried to manipulate or change arrangements after agreeing to them. Defendant admitted that he tried to change visiting arrangements to his advantage. He also admitted that he asked the parties' five-year-old child to participate in deciding whether to see plaintiff on one occasion. In addition, the testimony revealed that, when defendant sought additional parenting time, plaintiff offered him an extra evening during the week. Plaintiff acknowledged that defendant loved the children. She testified that she was not trying to restrict his access to the children and that she would try to be flexible. She sometimes allowed defendant to stay with the children when she traveled on business. The evidence simply does not support defendant's claim that plaintiff was unwilling to foster a relationship between himself and the children. The trial court's refusal to find that factor (j) favored defendant is not against the great weight of the evidence.

III

Defendant next challenges the trial court's decision to include in the marital estate the appreciation in the value of a rental house that he inherited before the parties married. In reviewing a trial court's property division in a divorce case, this Court reviews the trial court's findings of fact under the clearly erroneous standard. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003).

The trial court's finding of fact, that the appreciation of the value of the rental property was a marital asset, is not clearly erroneous. Where a non-owner spouse contributes to the acquisition, improvement, or accumulation of property, the separate asset may be invaded during a property division. *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003). See also

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Dart v Dart, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999), wherein the Court recognized that "in certain situations, a spouse's separate assets, or the appreciation in their value during the marriage may be included in the marital estate." For example, where one spouse actively manages an asset during the marriage, the marital estate includes the appreciation in value of the asset. *Id.*, citing *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997). In *Hanaway v Hanaway*, 208 Mich App 278, 292-294; 527 NW2d 792 (1995), this Court determined that the increased value of the husband's interest in his family company necessarily reflected his investment of time and effort, which investment was facilitated by the wife's long-term commitment to the home and children.

In this case, the appreciation of the property at issue was not purely passive. Defendant actively managed the rental property and made improvements to it. Plaintiff's contributions during the marriage, including watching the children while he made improvements, enabled defendant to maintain and improve the property. The appreciation in the value of the property that occurred between the beginning and the end of the marriage was part of the marital estate to be divided. *Reeves, supra* at 496.

IV

Defendant additionally challenges the trial court's division of plaintiff's 401K plan. He argues that the division effectively required him to pay $1,250 toward plaintiff's attorney fees even though the trial court ruled that no attorney fees would be awarded. Regardless of any facial merit that argument may have, the judgment, as entered by the trial court and signed by the parties, incorporated a specific agreement between the parties with respect to the 401K plan. Property settlement provisions that are incorporated in a divorce judgment are typically final and cannot be modified. *Quade v Quade (On Remand)*, 238 Mich App 222, 226; 604 NW2d 778 (1999). "Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiations and agreement of the parties." *Id.*; see also *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). In this case, defendant never objected when the trial court announced the manner in which it planned to value and divide plaintiff's 401K plan. More importantly, the parties subsequently entered into an agreement with respect to the division of plaintiff's 401K plan. The agreement was merged into the judgment of divorce. We uphold the parties' agreement with respect to the retirement fund. *Id.*

V

On cross-appeal in Docket No. 246083, plaintiff argues that the trial court abused its discretion when it ordered defendant to pay child support in an amount that is fifteen percent less than the child support guidelines formula amount. Although this issue may be moot if the court's custody decision is modified on remand, we nevertheless review the issue in the event plaintiff retains primary custody.

A party appealing a child support order bears the burden of showing a clear abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). A trial court may

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deviate from the support guidelines formula if it articulates the amount of support under the formula guidelines, how the ordered support deviates from the guidelines, and the reasons for the deviation. MCL 552.16; MCL 552.605(a), (b) and (d).[3] The criteria for deviating from the formula is mandatory. *Burba v Burba (After Remand)*, 461 Mich 637; 610 NW2d 873 (2000). In its written opinion, the trial court specifically indicated that its support order would deviate from the formula amount by fifteen percent. The court indicated that it felt the child support formula amount would be unjust or inappropriate in this case because defendant had significant parenting time and would be providing more meals for the children than some parents who benefit from the shared economic responsibility calculation. The trial court found an inequity in requiring defendant to pay the unadjusted guideline amount that is usually charged to non-custodial parents who see their children infrequently or every other weekend only. The guidelines amount was clearly set forth in the judgment and the amount of the deviation was reiterated. Because the mandatory criteria were set forth in writing by the trial court, we reject plaintiff's argument that the trial court failed to follow MCL 552.605 when deviating from the formula guidelines.

We further reject plaintiff's alternative argument that the reasons for deviation were improper or inappropriate. First, plaintiff's argument may be deemed abandoned because no authority is cited to support the position advocated. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). More importantly, however, plaintiff bears the burden of showing that the support order was a clear abuse of discretion. *Kosch, supra.* "An abuse of discretion occurs if the results of the trial court's decision are so grossly violative of fact and logic that they evidence 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 559 (2002). Plaintiff has not met her burden. The trial court's reasons for adjusting the formula amount were not grossly violative of fact or logic based on the circumstances presented.

VI

Plaintiff also argues on cross appeal that the trial court erred when it ordered parenting time in excess of that set forth in the temporary order. We disagree.

Plaintiff first argues that the parties agreed to the amount of parenting time set forth in the temporary order and, therefore, the trial court was restricted by the parenting time schedule in the temporary order. This argument is unsupported by the record. Parenting time was a contested issue from the beginning of the divorce proceedings. Defendant objected to the temporary order and requested additional parenting time. He later moved for additional parenting time. At trial, he requested joint physical custody and informed the trial court that parenting time was a contested issue. In her trial brief, plaintiff recognized that parenting time was a contested issue to be decided by the trial court. MCR 2.507(H) indicates that an agreement is binding if made in open court or in writing. There was no such agreement in this case. We note that the temporary

[3] MCL 552.605(c) is inapplicable to this case. It requires that the trial court set forth the "value of property or other support awarded instead of the payment of child support, if applicable."

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order itself was effective only "until further order of the court." The final judgment was a further order of the court, which rendered the temporary order ineffective.

Plaintiff next argues that the excess parenting time that was ordered was an abuse of discretion. "The controlling factor in determining visitation rights is the best interests of the child." *Thames*, *supra* at 305-306. MCL 722.27(1)(a) provides:

> Parenting time shall be granted in accordance with the best interest of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

In this case, the trial court retained the parenting time schedule set forth in the temporary order and included specific other terms that gave defendant some additional parenting time during the summer, alternate spring breaks, and plaintiff's business trips. The record does not support plaintiff's contention that the trial court was confused or that the order was ambiguous and subject to interpretation. "All custody orders must be affirmed on appeal unless the trial court's findings were 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*, *supra*. Plaintiff has not demonstrated any abuse of discretion in the limited, additional parenting time ordered.

VII

Finally, in Docket No. 246410, plaintiff argues that the successor trial judge improperly signed an order supplementing the divorce judgment without a hearing or stipulation, and further, that the supplemental order improperly altered the child support award. Neither argument has any merit.

MCR 2.602 does not require a trial court to hold a hearing or obtain a stipulation from the parties when an order is submitted under the "seven-day rule" of MCR 2.602(B)(3). The supplemental order at issue here was the product of a hearing held on December 31, 2002, and was submitted under MCR 2.602(B)(3).

In addition, the supplemental order did not alter, amend or change the judgment of divorce with respect to the child support amount. The supplemental order changed the child care amount that defendant was required to pay for the minor children. The change, in turn, altered defendant's bimonthly combined obligation. The supplemental order noted the changes and indicated how the new bimonthly amount was calculated. The supplemental order did nothing more than that which was contemplated by the parties and the trial court at the December 31, 2002, hearing. It did not affect the child support formula amount, the deviation in the formula amount, and the reasons for the deviation. Further, it did not eliminate the trial court's previous compliance with MCL 552.605.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

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STATE OF MICHIGAN

COURT OF APPEALS

RYAN DARROLL EARL,

Plaintiff-Appellant,

v

HEATHER JOY EARL,

Defendant-Appellee.

UNPUBLISHED
November 15, 2007

No. 276049
Ottawa Circuit Court
LC No. 05-052825-DM

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right a divorce judgment entered following a bench trial. The judgment awarded defendant sole physical custody of the parties two minor children, Royston (d/o/b 7/24/1997) and Olivia (d/o/b 11/2/2000). Plaintiff also challenges the property distribution set forth in the divorce judgment. We affirm in part and remand.

All child custody orders must be affirmed on appeal unless the trial court's findings were 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). The first step in considering a custody issue is to determine whether an established custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Whether an established custodial environment exists determines the burden of proof the trial court must apply in its custody decision. *Id.* If no established custodial environment exists, custody is determined by a preponderance of evidence standard. *Id.* If an established custodial environment exists, it must be established by clear and convincing evidence that a change in custody is in the best interests of the child. MCL 722.27(1)(c).

Plaintiff argues on appeal that the trial court erred when it applied the wrong evidentiary standard in deciding whether a modification of the custodial environment was warranted. We agree. A trial court commits clear legal error when it errs in its choice, interpretation, or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). The trial court correctly recited the burden of proof applicable when a custodial environment exists and the burden of proof applicable when a custodial environment does not exist. The trial court then decided that an established custodial environment existed with both parties because the parties shared physical custody of the children during the divorce proceedings. However, instead of applying the clear and convincing evidence standard, as is required when a custodial environment exists, the trial court applied the preponderance of the

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evidence standard. It specifically found "by a preponderance of the evidence that the children's best interest require that their mother be their primary care provider . . . ." Because the trial court committed clear legal error, reversal and remand for application of the correct burden of proof is necessary. *Mixon, supra* at 162.

In light of the need to remand for application of the correct standard, we do not address plaintiff's arguments addressed to the court's findings, except to observe that we find no error in the court's consideration of the children's relationship with their half-brother, Kody, in deciding what custodial arrangement was in their best interests. *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). Further, the court should interview Royston and Olivia in camera on remand and consider their reasonable preference. MCL 722.23(i).

On appeal, plaintiff also argues that the property distribution was inequitable. Plaintiff raised this issue in his motion for relief from judgment and reconsideration; therefore our review is for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

Plaintiff first argues that he was precluded from presenting evidence, in the form of an appraisal, as to the value of the marital home. We disagree. The trial court properly denied plaintiff post-judgment relief on this issue and instead enforced the parties' settlement agreement and stipulated order regarding the property division. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Plaintiff agreed to the settlement and a stipulated order was entered regarding the amount he was to receive in equity from the house. An adjustment was to be made only if an appraisal was required in conjunction with the refinancing of the home and the appraisal differed from the value agreed on by the parties. There is no evidence in the record that an appraisal was required for refinancing. Therefore, plaintiff is not entitled to relief.

Plaintiff also asserts that trial court abused its discretion by failing to consider his contributions to the marital estate during the divorce proceedings. Although plaintiff raised the issue at various times, it was not preserved for separate adjudication or mediation in the parties' settlement. The court did not err in refusing to consider the issue after the agreement was placed on the record.

Affirmed in part and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Helene N. White
/s/ Michael J. Talbot

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STATE OF MICHIGAN

COURT OF APPEALS

LENORE KAGEN, a.k.a. LENORE GAURINO, Plaintiff-Appellee, v RICHARD J. KAGEN, Defendant-Appellant.	UNPUBLISHED December 18, 2014 No. 318459 Oakland Circuit Court LC No. 2010-779424-DM

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Following the parties' divorce, defendant Richard Kagen discovered that plaintiff Lenore Kagen had discontinued their children's vaccinations several years earlier. The pair could not agree on whether the children's vaccinations should be updated and brought their dispute before the Oakland Circuit Court. The circuit court failed to describe the applicable burden of proof and made no consideration of any statutory best interest factor in deciding the matter as required by *Pierron v Pierron*, 486 Mich 81, 91; 782 NW2d 480 (2010), and *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993). The court also abused its discretion in excluding from evidence government-issued statements about the safety, potential risks, and benefits of childhood vaccinations. We therefore vacate the circuit court's June 27, 2013 opinion and order rejecting Mr. Kagen's bid to vaccinate the children and remand for a continued hearing.

I. BACKGROUND

Mr. and Mrs. Kagen were divorced in 2012, and were awarded joint legal and physical custody of their two daughters. Pursuant to the divorce judgment, neither party was permitted to make major medical decisions relating to the children without consulting the other.

Mrs. Kagen discontinued the vaccinations of the couple's daughters when they were three and five years old, long before the couple's divorce. Mrs. Kagen asserted that she maintains religious objections to employing vaccinations that contain poisonous ingredients. She further contended that Mr. Kagen previously shared her concerns and joined her decision to forego further inoculations. Mr. Kagen, on the other hand, claimed that he was blindsided by his ex-wife's religious reformation and was completely unaware of the cessation of vaccinations until five years later.

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Over Mrs. Kagen's objections, Mr. Kagen secured four vaccinations for their eldest daughter in February 2013. Mrs. Kagen then filed a motion in the circuit court to prevent any further unilateral action on Mr. Kagen's part, and Mr. Kagen filed a countermotion to update both children's vaccinations. The circuit court conducted a brief evidentiary hearing at which both parties testified. Mrs. Kagen reiterated that Mr. Kagen had joined her decision and she therefore filed documents with both the school and pediatrician indicating her intent to waive vaccinations for the children. Mr. Kagen testified that Mrs. Kagen never discussed with him any plan to stop vaccinating the children, and expressed his desire to have the children immunized.

After excluding the only expert evidence offered at the hearing—four statements from government agencies regarding the benefits of vaccination proffered by Mr. Kagen—the court denied Mr. Kagen's motion to vaccinate the children. The court credited Mrs. Kagen's testimony that the parties had previously agreed not to vaccinate the children. The circuit court concluded that Mr. Kagen failed to present sufficient evidence that a change in this course of conduct was in the children's best interests.

II. ADEQUACY OF CIRCUIT COURT PROCEEDING

Mr. Kagen now challenges the circuit court's resolution of this dispute between joint legal custodians. We must affirm all judgments entered under the Child Custody Act, MCL 722.21 *et seq.*, "'unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.'" *Pierron*, 486 Mich at 85, quoting MCL 722.28. Here, however, the circuit court failed in its duty to properly analyze the parental disagreement under the strictures of the Child Custody Act.

> The Child Custody Act "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." MCL 722.26(1). The act provides that when parents share joint legal custody—as the parties do here—"the parents shall share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b). However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child. [*Lombardo*, 202 Mich App at 159]; see also MCL 722.25(1). [*Pierron*, 486 Mich at 85.]

Although not cited as such in the circuit court, the evidentiary hearing conducted on June 14, 2013, was essentially a *Lombardo* hearing. In *Lombardo*, 202 Mich App at 157-158, this Court described the judicial process of resolving disputes regarding "important decisions affecting the welfare of the child" between the child's joint custodians. The Supreme Court clarified a court's role in such circumstances in *Pierron*.

Before the court considers the substance of the dispute, it must determine "whether the proposed change would modify the established custodial environment" of the children. *Pierron*, 486 Mich at 85. If it would, the moving party bears a heightened burden of proving by clear and convincing evidence that the change is in the children's best interests. *Id.* at 86. If not, the moving party need only establish by a preponderance of the evidence that the proposed change serves the children's best interests. *Id.* at 89-90. The decision to vaccinate the children in no

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way affects their established custodial environment; the decision has no bearing on who the children "look[] to . . . for guidance, discipline, the necessities of life, and parental comfort." *Id.* at 86 (quotation marks and citation omitted). Accordingly, Mr. Kagen needed to establish by the lesser preponderance of the evidence standard that vaccinating the children was in their best interests.

The court must then resolve the underlying dispute. As stated in *Lombardo*:

> [J]oint custody in this state by definition means that the parents share the decision-making authority with respect to the important decisions affecting the welfare of the child, and where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child. [*Lombardo*, 202 Mich App at 159.]

"The controlling consideration" must be "the best interests of the children." *Id.* at 159-160; see also *Pierron*, 486 Mich at 91. In this regard,

> The court should not relinquish its authority to determine the best interests of the child to the primary physical custodian. Accordingly, we conclude that a trial court must determine the best interests of the child in resolving disputes concerning "important decisions affecting the welfare of the child" that arise between joint custodial parents. [*Lombardo*, 202 Mich App at 160.]

In determining the best interests of the child, the court "must consider, evaluate, and determine each of the" best interest factors of MCL 722.23. *Lombardo*, 202 Mich App at 160. In *Pierron*, 486 Mich at 91, quoting *Parent v Parent*, 282 Mich App 152, 157; 762 NW2d 553 (2009), the Supreme Court clarified that the trial court must "'make explicit factual findings with regard to the *applicability* of each factor'" when the decision will not affect the children's established custodial environment. (Emphasis in original.) If a factor is relevant to the decision, the court must "make substantive factual findings" on the record; if not, the court need not reach the substance of that matter. *Pierron*, 486 Mich at 91.

Here, the circuit court made absolutely no finding required by *Lombardo* or *Pierron*. The court failed to consider whether the vaccination decision would change the children's custodial environment (in fact, it would not). The court did not mention the burden of proof that it applied. Accordingly, we cannot know whether the court utilized the preponderance of the evidence standard as required or incorrectly applied the stricter clear and convincing evidence standard. The circuit court never cited MCL 722.23 or considered the best interest factors as required.

Given these failures, we are unable to review the circuit court's best-interest analysis. Accordingly, we vacate the circuit court's June 27, 2013 opinion and order and remand for a continued hearing. At the hearing, the court must declare that its decision will not affect the children's custodial environment and therefore apply the preponderance of the evidence standard. The court must then consider and expressly state whether each best interest factor of MCL 722.23 is relevant in this case, and then must analyze on the record the substance of any

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relevant best interest factors. We will retain jurisdiction and consider the propriety of the circuit court's decision after an adequate record is made.

III. ADMISSIBILITY OF GOVERNMENT REPORTS

Mr. Kagen also challenges the circuit court's exclusion of his proffered evidence at the hearing. This evidence included statements and summaries of scientific studies regarding the safety, benefits, and risks of childhood inoculations. These statements were issued by the Center for Disease Control, National Institute of Health, Food and Drug Administration, and Michigan Department of Community Health. The circuit court excluded this evidence, finding that it fit within no exception to the hearsay rule.

We review for an abuse of discretion a circuit court's evidentiary rulings. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). "Whether a rule of evidence . . . precludes admissibility" is a legal question subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The circuit court correctly concluded that the proffered evidence was hearsay. Hearsay is a statement made by a declarant outside of the courtroom that is "offered in evidence to prove the truth of the matter asserted." MRE 801. The authors of the documents presented by Mr. Kagen were not present in the courtroom. Mr. Kagen offered the evidence to prove the truth of the matter asserted—that childhood vaccinations are beneficial and safe while deciding not to immunize your child is a dangerous decision that can result in disease and death. As hearsay, this evidence was not admissible unless Mr. Kagen established it fell within an exception to the hearsay rule. MRE 802.

Mr. Kagen relied upon MRE 803(24), the catch-all exception to the hearsay rule, which provides:

> Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

In *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003), the Supreme Court held that this catch-all exception "may be used to admit statements that are similar to, but not admissible under, the categorical hearsay exceptions." However, "the requirements of the exceptions are stringent and will rarely be met, alleviating concerns that the residual exceptions will 'swallow' the categorical exceptions through overuse." *Id.* at 289. "To be admitted under MRE 803(24), a

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hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission." *Id.* at 290.

In relation to the first factor, the Supreme Court advised that "courts should consider all factors that add to or detract from the statement's reliability." *Id.* at 292. To meet the second factor, the evidence must be relevant to "'[a] fact that is significant or essential to the issue or matter at hand.'" *Id.*, quoting *Black's Law Dictionary* (7th ed).

The circuit court excluded the evidence on the third factor, adjudging that Mr. Kagen should have presented the testimony of his children's pediatrician on the topic. As described in *Katt*, 468 Mich at 293:

> The third requirement is that the proffered statement be the most probative evidence reasonably available to prove its point. It essentially creates a "best evidence" requirement. This is a high bar and will effectively limit use of the residual exception to exceptional circumstances. For instance, nonhearsay evidence on a material fact will nearly always have more probative value than hearsay statements, because nonhearsay derives from firsthand knowledge. Thus, the residual exception normally will not be available if there is nonhearsay evidence on point. [Quotation marks and citation omitted.]

Finally, under the fourth factor, a court may refuse to admit evidence that satisfies the first three prongs "if the court determines that the purpose of the rules and the interests of justice will not be well served by the statement's admission." *Id.*

The circuit court abused its discretion in excluding Mr. Kagen's proffered evidence based on the "best evidence" requirement of MRE 803(24). The court contended that the best evidence about the safety and necessity of childhood vaccinations would have come from the children's pediatrician. The pediatrician's live testimony would be nonhearsay derived from firsthand knowledge. However, as noted by Mr. Kagen, the children's pediatrician is a general practioner and likely does not possess detailed personal knowledge on the safety, effectiveness, and potential risks of immunizations. The four reports proffered by Mr. Kagen were prepared by experts in the field of child immunizations and were based on scientific study. The fact that the reports were otherwise hearsay does not render them less worthy of belief. And, as noted by Mr. Kagen, it would impose an unreasonable burden to expect him to present the testimony of the government agents who compiled or prepared the reports.

Moreover, the evidence was reliable. *Katt*, 468 Mich at 291 n 11, instructed that we may employ the nonexhaustive list of reliability factors accompanying the federal rules, including consideration of "[w]hether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it." Federal Rules of Evidence Manual (Matthew Bender & Co Inc, 2002), § 807.02(4). All four reports are official (formal) statements by government agencies. The presentation of this information in a public forum and as part of the authors' official duties suggests "that the declarant would have been likely to consider the accuracy of the statement

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when making it." *Id.* As noted in Grant, *The Trustworthiness Standard for the Public Records and Report Hearsay Exception*, 12 Western State U L Rev 53, 56 (1984), "The principal basis for the presumption of trustworthiness of public records is the assumption that public officials will properly perform their duties with accuracy and fidelity. Officials have the duty to make accurate statements, and this special duty will usually suffice as a motive to incite the officer to its fulfillment."

The proffered materials are also highly relevant to a material point, as acknowledged by the circuit court. The focus of the hearing was the parties' disagreement on childhood vaccinations. Mr. Kagen believed such vaccinations to be safe, necessary and in the children's best interests while Mrs. Kagen thought they are poisonous, unnecessary and contrary to the children's best interests. The opinions of these particular government agencies would certainly assist the fact finder in resolving whether the best interests of the children would be served by vaccination against disease.

The circuit court made no discussion in relation to the final factor. However, the interests of justice seem to support admission of Mr. Kagen's evidence. This is a custody matter; it would be cost prohibitive to require Mr. Kagen to present high-paid experts to testify regarding the benefits and safety of vaccinations. It does not unduly burden Mrs. Kagen's ability to present her side of the dispute; there are a plethora of studies regarding vaccination ingredients and side effects that she could present as well, assuming that the studies likewise meet the requirements of MRE 803(24).

Ultimately, the circuit court's best-interest analysis will be assisted by this evidence, which admissible under an exception to the hearsay rule. Accordingly, the circuit court abused its discretion in excluding Mr. Kagen's proffered government reports.

IV. JUDICIAL NOTICE

Mr. Kagen further challenges the circuit court's failure to take judicial notice that vaccinations save millions of lives worldwide and have been deemed safe.

> Pursuant to MRE 201(b), for a trial court to take judicial notice of a fact, it "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." [*Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009).]

As Mr. Kagen's own evidence supports, there is an ongoing international debate regarding the risks and benefits of childhood vaccinations. This simply is not the type of fact over which a court may take judicial notice.

V. FINDING REGARDING PARTIES' AGREEMENT

Mr. Kagen also contends that the circuit court clearly erred in finding that he and Mrs. Kagen had reached an agreement not to vaccinate their children and that he was forever bound by any such agreement. In relation to the existence of an agreement, the parties presented

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conflicting evidence and we must defer to the circuit court's assessment of the witnesses' credibility. *Ambs v Kalamazo Co Rd Comm'n*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

The circuit court's decision to bind Mr. Kagen to his prior agreement is part and parcel of its failure to adequately consider the best interests of the children. Whether the parties had previously agreed on a course of preventive medical treatment for their children is certainly relevant. However, Mr. Kagen's reasons for changing his mind are equally important as they pertain to the children's welfare. On remand, the circuit court should consider these factors as relevant to the best-interest analysis.

We vacate the circuit court's opinion and order and remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

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Court of Appeals, State of Michigan

ORDER

Lenore Kagen v Richard J Kagen

Docket No. 318459

LC No. 2010-779424-DN

Peter D. O'Connell
Presiding Judge

Stephen L. Borrello

Elizabeth L. Gleicher
Judges

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, the circuit court must conduct a continued evidentiary hearing and issue detailed factual findings regarding the children's best interests. The proceedings on remand are limited to this issue.

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

DEC 18 2014
Date

Chief Clerk

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STATE OF MICHIGAN

COURT OF APPEALS

DUSTIN LEE LYONS, Plaintiff-Appellant,	UNPUBLISHED March 22, 2011
v	No. 298058 Gladwin Circuit Court
JESSICA LEE COTTRELL, Defendant-Appellee.	LC No. 2009-004709-DS

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order awarding plaintiff and defendant joint legal custody and defendant sole physical custody of the parties' two children. Because the trial court's finding that the children did not have an established custodial environment with plaintiff was against the great weight of the evidence, we reverse and remand.

The trial court held that an established custodial environment did not exist with either party. In making this determination, it divided its custodial environment analysis into two time periods: (1) from June 2008 to July 2009, the period before plaintiff's incarceration when plaintiff, defendant, and the children primarily[1] resided in one household and (2) from July 2009 to the time of trial, the period after plaintiff's incarceration when plaintiff and the children lived together and defendant lived in Detroit. The trial court found an established custodial environment existed with defendant before plaintiff's incarceration. It further found that this established custodial environment was extinguished after plaintiff's incarceration. It concluded that an established custodial environment never existed with plaintiff. Consequently, the trial court used the preponderance of the evidence standard to determine custody of the two children.

On appeal, plaintiff argues that the trial court erred in finding that the children did not have an established custodial environment with him. We agree.

[1] Defendant moved from the house, where she and plaintiff lived with the children into an apartment in August or September 2008, and then moved back into the house in February 2009.

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We review a trial court's findings regarding the existence of an established custodial environment under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.* at 706.

An established custodial environment exists 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).]

"An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger*, 277 Mich App at 706. If an established custodial environment exists with one parent or with both parents, a trial court may not change the custodial environment unless there is clear and convincing evidence that a change in the custodial environment is in the child's best interests. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 601-602; 770 NW2d 403 (2009). However, if no established custodial environment exists, the trial court may change custody or enter a custody order if a preponderance of the evidence establishes that the change serves the child's best interests. *Pierron v Pierron*, 282 Mich App 222, 245; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010).

After hearing testimony from the parties, the trial court stated its findings regarding time period (1):

> Just because a couple is living together that have kids between themselves, doesn't mean that automatically that's an established custodial environment.
>
> The testimony was rather, if not exclusively on the point, that during that tenure it was the mother that took care of the running, so to speak, that goes with raising children. Making the medical appointments, meeting the medical appointments, taking care of child care, meeting the child care commitment, all of those sorts of things.

Regarding time period (2), the trial court stated:

> [T]here is some merit in that once he got out of jail on July thirtieth that the primary circumstances were such that the established custodial environment was with the father. But this is just because of time and distance and lack of transportation. It isn't because of any kind of default on the mother's behalf.

Contrary to the trial court's statement regarding time period (1), we note that the testimony was not "exclusively on [] point" that defendant ran the household before plaintiff was incarcerated. Rather, defendant's own testimony was that both she and plaintiff provided the "day-to-day care" for the children during this period. In addition, plaintiff testified that he primarily took care of the children. He explained that he gave them baths, cooked them dinner,

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took them to the doctor, did their laundry, bought them clothes, and played with them. And during the August-February separation period, plaintiff testified that the children lived with him four to five days a week. Further, defendant said that during this period of separation, she would have the children every other day during the week and every other weekend.

Based on the parties' testimony regarding time period (1), we find the trial court's finding that an established custodial environment existed with defendant, but not with plaintiff, to be against the great weight of the evidence. *Berger*, 277 Mich App at 706. The evidence established that plaintiff consistently participated in providing the care, discipline, love, guidance, and attention that the children required during the period before his incarceration. *Id.*

Regarding time period (2), the testimony showed that plaintiff lived with the children and his mother in Rhodes, Michigan, and Bentley, Michigan,[2] and defendant lived in Detroit. Plaintiff testified that he had no problems raising the children in defendant's absence. He continued to cook for them, do their laundry, and get them ready for school. He introduced documents indicating that the oldest child, whom he had enrolled in a wrestling program, was performing above average in school. He and the children participated in school and outdoor recreational activities together, including four-wheeling, fishing, raising farm animals, building snowmen, and snowmobiling. Plaintiff testified that he took the children to get their vaccinations, took the youngest child to get a biopsy on his leg, and took the oldest child to get his tonsils checked. Plaintiff's mother testified that plaintiff was a good parent who provided the children food and clothes, and made sure they got up for school. During this period, defendant saw the children much less frequently than plaintiff. She exercised parenting time one weekend in October 2009, one week around Christmas, and one weekend in both January and February 2010.

In making its findings regarding time period (2), we conclude that the trial court improperly concerned itself with the reasons behind the custodial environment. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992) ("In determining whether a custodial environment exists, the court's concern is not with the reasons behind the custodial environment, but with the existence of such an environment."). Here, without taking into consideration the reasons behind the custodial environment, the evidence shows that after he was released from incarceration, plaintiff provided the care, discipline, love, guidance, and attention that the children required. Accordingly, a custodial environment existed with plaintiff. *Berger*, 277 Mich App at 706.

In sum, we conclude that at the time of trial in this case the evidence established that a custodial environment existed with plaintiff. Except during his period of incarceration, a time period during which the children were primarily cared for by plaintiff's mother, plaintiff

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[2] We note that when plaintiff went to jail, the children, with defendant's permission, went to live with plaintiff's mother. Plaintiff's mother testified that they had no intent to change the current living arrangement.

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consistently provided the care, discipline, love, guidance, and attention that the children required. *Berger*, 277 Mich App at 706.

Because an established custodial environment existed with plaintiff at the time of trial, the trial court could only change the custodial environment if there was clear and convincing evidence that such a change was in the children's best interest. MCL 722.27(1)(c); *In re AP*, 283 Mich App at 601. The trial court's use of the preponderance of the evidence standard, appropriate only where there is no established custodial environment, *Pierron*, 282 Mich App at 245, was clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

Next, plaintiff argues that the trial court erred in its findings on factors (c) and (f) of the best interests factors, MCL 722.23. We disagree.

We review a trial court's findings regarding each best interest factor under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). The trial court's findings should be affirmed unless the evidence preponderates in the opposite direction. *Berger*, 277 Mich App at 705.

Factor (c) concerns "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care[.]" MCL 722.23(c). We find no merit to plaintiff's argument that, because at the time of trial he received more money in unemployment benefits than defendant earned in income, the trial court erred in finding the parties equal on factor (c). Regarding factor (c), this Court has stated:

> Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity* and *disposition* to provide for the children's material and medical needs. Thus, this factor looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income. [*Berger*, 277 Mich App at 712 (emphasis in original).]

Although plaintiff "earned" more money than defendant at the time of trial, it was the parties' future capacity to provide for the children's needs that mattered. Plaintiff's unemployment benefits, which he relies on to support his argument, were set to expire a few months after trial. On the other hand, defendant had one semester left until she received her bachelor's degree, which would allow her to work full time. Given the uncertainty surrounding plaintiff's future income and an expected increase in defendant's income, along with the trial court's finding that neither party would let the children go without anything they needed, the court's finding that factor (c) favored neither party was not against the great weight of the evidence.

Factor (f) concerns "[t]he moral fitness of the parties involved." MCL 722.23(f). Plaintiff argues that the trial court's finding that factor (f) favored defendant was against the great weight of the evidence because the court failed to explain how his criminal history influenced his ability to parent. In *Fletcher*, 447 Mich at 886-887, our Supreme Court stated:

> Factor (f) (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that

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> relationship. Thus, 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. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*. [Emphasis in original.]

It went on to explain that "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors" "represents the type of morally questionable conduct relevant to one's moral fitness as a parent." *Id.* at 887 n 6. Because our Supreme Court has specifically stated that the offenses in defendant's criminal past, which were primarily drinking and driving offenses, are relevant to a parent's moral fitness, the relationship between the offenses and plaintiff's moral fitness cannot be questioned. Accordingly, the trial court did not err in failing to explain how plaintiff's criminal past impact his moral fitness, and its finding that factor (f) favored defendant was not against the great weight of the evidence.

Because the trial court used the wrong standard in deciding plaintiff's custody request, we reverse the trial court's order and remand for a new decision in which the trial court utilizes the clear and convincing standard.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Talbot

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STATE OF MICHIGAN

COURT OF APPEALS

CHAD S. MAXAM,

Plaintiff-Appellee,

v

CRYSTAL A. NIEMI, f/k/a CRYSTAL A. SNYDER,

Defendant-Appellant.

UNPUBLISHED
March 26, 2009

No. 280827
Van Buren Circuit Court
LC No. 02-049876-DC

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

In this child-custody dispute, defendant appeals by leave granted from the trial court order modifying parenting time from week on/week off to defendant having custody every other weekend and a no contact order between the child and defendant's current husband. We reverse and remand. This case has been decided without oral argument pursuant to MCR 7.214(E).

A custody decision is a discretionary ruling that is reviewed under an abuse of discretion standard. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). This Court will not reverse a custody order on appeal unless the trial court made findings of fact against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court committed clear legal error on a major issue. *Id*. at 877-881; *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008); *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). Clear legal errors occur when the trial court incorrectly chooses, interprets, or applies the law. *Powery*, *supra*.

Defendant argues the trial court abused its discretion when it affirmed the referee's decision to modify the established custodial environment based up a preponderance of the evidence.

The trial court may modify or amend a prior parenting time order only for proper cause shown or because of a change of circumstances. The party seeking the change in parenting time must prove the change in circumstances by a preponderance of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003); *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999). If a change of circumstances is proven, the trial court must then determine if there is an established custodial environment. If there is, the party seeking to modify the custody order must demonstrate the change is in the child's best interest by

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clear and convincing evidence. MCL 722.27(1)(c), MCL 722.23; *Powery*, *supra* at 528; *Foskett v Foskett*, 247 Mich App 1, 5-6; 634 NW2d 363 (2001); *LaFleche v Ybarra*, 242 Mich App 692, 695-696; 619 NW2d 738 (2000).

In the instant case, plaintiff established by a preponderance of the evidence that there had been a change in circumstances warranting modification of parenting time. *Vodvarka*, *supra*; *Terry*, *supra*. Plaintiff discovered in April 2006 that defendant's long-term boyfriend (now husband) was a registered sex offender. Defendant had knowledge of her husband's criminal background for many years but never informed plaintiff of this information. Dr. Lemmen, a forensic psychiatrist, testified the husband was at a moderate risk to re-offend. Lemmen stated a CSC sub-specialist would be most qualified to make a risk of recidivism determination. Dr. Brooks interviewed defendant but was neither a forensic psychiatrist, nor a CSC sub-specialist. While defendant's mother spoke in favor of the husband's relationship with the child, and child protective services found no evidence to substantiate allegations of sexual abuse by him, his juvenile CSC record is extreme. Further, although he has not sexually re-offended as an adult, he recently admitted to embezzling money from his former place of employment and frequented topless bars, both of which Lemmen testified are red flags for recidivism. The trial court's decision to place more weight on Lemmen's testimony was not against the great weight of the evidence. *Powery*, *supra* at 527; *Mauro*, *supra* at 4. Accordingly, plaintiff demonstrated by a preponderance of the evidence that there was a change in circumstances warranting modification of parenting time. *Vodvarka*, *supra*; *Terry*, *supra*.

Next, the referee determined, and neither party disputes, there was an established custodial environment prior to the instant action. Plaintiff's requested modification from week on/week off to defendant having custody every other weekend (and no contact between the child and defendant's husband) would result in a change in the established custodial environment. Because of this, plaintiff was required to demonstrate the change is in the child's best interest by clear and convincing evidence. MCL 722.27(1)(c), MCL 722.23; *Powery, supra*; *Foskett, supra*; *LaFleche, supra*.

It is not clear on the record whether the referee in fact applied the correct burden of proof (clear and convincing evidence) in the determination of whether to modify the existing custodial environment. The referee noted the appropriate burden, with case citation, in the initial recommendation and order. However, he mistakenly stated the "preponderance of the evidence" standard in the second recommendation following remand, and did so without case citation. Similarly, the trial court failed to indicate which standard it applied when accepting the referee's recommendations. Rather, it just found the referee's recommendations were appropriate and in the child's best interests. The failure to definitively use the correct burden of proof constitutes clear legal error. *Powery*, *supra*. On remand, the referee and trial court must review the record and determine whether plaintiff proved modification of the custody order was in the child's best interest by clear and convincing evidence.

Furthermore, we also find the trial court erred by failing to consider the best interest factors required by MCL 722.23. Neither the referee nor the trial court referenced the statutory best interest factors in their orders. Rather, the referee recounted the findings of fact and the referee and trial court both summarily stated the custody modification was in the child's best interest because it was neither reasonable to expect, nor possible to ensure compliance, with defendant staying away from her husband every other week. Because there was no reference on

the record by either the referee in his recommendations and order, or by the trial court in its order, to the best interest factors, a remand for such findings is required. *Rivette v Rose-Molina*, 278 Mich App 327, 329-333; 750 NW2d 603 (2008). A mere statement by the trial court that the referee's findings were in the best interests of the child is not a sufficient review of the best interest factors.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis

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STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE L. PARKYN,

Plaintiff-Appellee,

v

CHRISTOPHER J. PARKYN,

Defendant-Appellant.

UNPUBLISHED
February 17, 2005

No. 256800
Oakland Circuit Court
LC No. 2001-656666-DM

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce awarding physical custody of the parties' two minor children to plaintiff. We affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

Defendant first contends that the trial court erred in utilizing a preponderance of the evidence standard in making its custody ruling when the trial court made a factual determination that a joint custodial environment essentially existed with both parties. A trial court's interpretation or application of existing law is reviewed by this Court for clear error. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). This Court reviews findings of fact by the trial court under the great weight of the evidence standard. A trial court's factual findings will be sustained unless "'the evidence clearly preponderates in the opposite direction.'" *Id.* at 5 (citation omitted). Discretionary rulings by the trial court, such as the determination on the issue of custody, are reviewed by this Court for an abuse of discretion. *Id.*

MCL 722.27(1)(c) states that the circuit court:

> [S]hall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. 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.

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It is well recognized that "[a]n established custodial environment can exist in more than one home." *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000), citing *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989). This Court has previously opined that an underlying custody order is "irrelevant" in the determination of whether a custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). "In determining whether an established custodial environment exists, it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed." *Id.* The principal concern is not "the reasons behind the custodial environment, but . . . the existence of such an environment." *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

The trial court's determination that an established custodial environment did not exist is internally inconsistent with its statement that both parties met the criteria established by MCL 722.27(1)(c). In *Foskett*, we addressed a very similar scenario. In that case, as in the instant one, the trial court found that the children looked to both the mother and the father equally for guidance, discipline and the necessities of life, yet despite that finding did not conclude that an established custodial environment existed in either household. *Foskett, supra* at 8. We then concluded that, in light of the trial court's correct factual finding as to who the children looked to for support and guidance, an established custodial environment existed in both homes. *Id.* Thus, we concluded that the trial court erred in failing to find an established environment and in applying the incorrect burden of proof. *Id.* See, also, *Jack, supra* at 671.

In this case, the trial court employed the wrong burden of proof by applying the preponderance of the evidence standard and was, instead, required to demonstrate that a change of custody was justified by the stricter burden of proof of clear and convincing evidence. MCL 722.27; *Jack, supra*. This is because of its finding, which is supported by the evidence, that the children looked to both parents for comfort, guidance and support. This factual finding necessitated a conclusion that there was an established custodial environment with both parents. *Id.*

Defendant also asserts that the trial court erred in its factual findings and the weight accorded to four of the statutory best interest factors, specifically MCL 722.23 (e), (f), (h) and (j). To ascertain the best interests of the children in custody disputes, a trial court is required to consider all of the factors found within MCL 722.23(a) through (l). A trial court is required to consider and state its findings and conclusion on each of these factors. *Foskett, supra* at 9, citing *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991). It is well recognized that "the statutory best interest factors need not be given equal weight. Neither a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors." *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998) (emphasis omitted).

Factor (e) focuses upon "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court's stated basis for ruling in favor of plaintiff on this factor was that "the children have strong bonds to Plaintiff's extended family who watch the children while Plaintiff is working." Factor (e) "exclusively concerns whether the family unit will remain intact," *Fletcher v Fletcher*, 200 Mich App 505, 517; 504 NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871, 884-885 (1994), and deals primarily with the "child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465;

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547 NW2d 686 (1996). This Court has determined the stability of a child's home is subject to being undermined by "frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions." *Id.* at 465 n 9. In this case, the trial court stated with respect to factor (e) that "the children have strong bonds to plaintiff's extended family who watch the children while plaintiff is working." We are uncertain from this statement whether the trial court simply concluded that the children's close relationship with plaintiff's extended family would add to the permanence of that relationship to a greater extent if physical custody was with plaintiff, or whether it improperly considered plaintiff's child care situation. See *Ireland*, *supra*. We therefore instruct the trial court on remand to clarify its ruling under factor (e).

Defendant next asserts that the trial court's factual finding that the parties were equal on factor (f) is in error and should have favored defendant. Defendant contends that the overwhelming evidence indicated plaintiff's repeated misrepresentations of defendant's behavior and ability to parent the children demonstrated plaintiff's lack of moral fitness. Factor (f) relates to an individual's fitness as a parent. In order to evaluate parental fitness, a trial court is required to look at the parent-child relationship and the effect that the alleged conduct will have upon that relationship:

> [T]he 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. . . . [Q]uestionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function as a parent. [*Fletcher*, 447 Mich at 887 (emphasis omitted).]

While defendant asserts that plaintiff's dishonesty and purposeful misrepresentation of defendant's conduct impacts plaintiff's ability to function as a parent and promote a good relationship between defendant and the minor children, that issue was adequately addressed by the trial court in conjunction with factor (j), which was determined to be weighed in favor of defendant. As this issue was adequately addressed by the trial court, with reference to statutory factor (j), we cannot conclude that the trial court's factual finding on this factor is against the great weight of the evidence.

Defendant also asserts that the trial court erred in determining the parties to be equal on MCL 722.23(h), based on the trial court's failure to articulate concerns raised by defendant concerning inappropriate behavior exhibited by the parties' son in his school program. MCL 722.23(h) requires a court to consider "[t]he home, school, and community record of the child." While defendant noted an incident of aggression and a separate incident of inappropriate behavior by the child in school during the divorce proceedings, no evidence was presented by defendant that the parties had failed to address these incidents or that they were of a continuing nature. All reports presented to the court indicated that the minor children were performing adequately academically and socially, and that the incidents reported pertaining to the son's inappropriate behaviors at school had not been recurring or escalating. Despite the recognition

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of isolated events of problematic behavior by the parties' son in school, the majority of the evidence presented indicated the parties' children were bright and well-functioning in their daily environments. The trial court's ruling of equality on this factor is not against the great weight of the evidence.[1]

Finally, defendant asserts that the trial court did not adequately weigh factor (j) and the demonstrated inability and unwillingness of the plaintiff to promote a "close and continuing parent-child relationship between the child and the other parent . . . ." MCL 722.23(j). Defendant takes issue with the trial court's determination that plaintiff "has told the minor son negative things about Defendant" and "has exaggerated certain concerns . . . in an attempt to make Defendant appear in a poor light" with the trial court's statement of hope regarding a future change in "Plaintiff's attitude." The mere assertion by the trial court that it hoped plaintiff would recognize the error of her prior conduct and realize the importance of the children's relationship with defendant is neither contradictory to nor inconsistent with the trial court's determination in favor of defendant on this factor. A review of the lower court record substantiates the trial court's factual determination that defendant is favored on factor (j). As the trial court is not required to give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances, *McCain*, *supra* at 130-131, this Court cannot determine the trial court erred regarding the weight it attributed to this factor.

We affirm the trial court's decision with respect to best interest factors (f), (h) and (j), vacate its finding on factor (e), and reverse the trial court's ultimate custody decision because it was based upon the incorrect burden of proof. We therefore remand to the trial court for reevaluation of its custody award based on the existence of a joint custodial environment and the appropriate burden of proof, that being clear and convincing evidence. The trial court should also consider any new evidence relevant to the statutory best interest factors that has arisen since entry of the judgment of divorce. *Shelters v Shelters*, 115 Mich App 63, 68; 320 NW2d 292 (1982). We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens

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[1] We reject defendant's criticism of the trial court relative to factor (i). The record demonstrates that the court interviewed the children to determine their preference, and although it did not reveal their statements, it noted that it had "considered their input." The court then specifically indicated that "factors (e) and (i) are especially important to the case at bar." As defendant notes, there is no requirement that the trial court memorialize its interview in any particular way, *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002), and there is no indication in the record that the trial court went beyond the children's preference during the interview process. *Thompson v Thompson*, 261 Mich App 353, 365-366; 683 NW2d 250 (2004).

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STATE OF MICHIGAN

COURT OF APPEALS

EDWARD T. RAYS,

Plaintiff-Appellee,

v

KATHRYN R. ROCHELEAU,

Defendant-Appellant.

UNPUBLISHED
August 10, 2006

No. 267789
Wayne Circuit Court
Family Division
LC No. 92-213308-DM

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion to modify custody and child support. In a child custody case, we review the trial court's findings of fact for whether they are against the great weight of the evidence, we review discretionary rulings such as the ultimate custody decision for an abuse of discretion, and we review the trial court's legal findings for clear error. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). We affirm in part, reverse in part, and remand.

As an initial matter, a party seeking a change in custody of a minor child must establish either "proper cause" or "a change of circumstances" before the trial court may consider the issue. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). "In order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*., 513 (emphasis in original). The *Vodvarka* Court emphasized that, over time, there will always be changes. *Id*. Therefore, the movant must show more than normal life changes and that those changes "have had or will almost certainly have an effect on the child." *Id*., 513-514. The determination would rest on the facts of the case and be guided by the statutory best interest factors. *Id*., 514.

Defendant first argues that the trial court erred in finding a change in circumstances. The trial court determined that a change in circumstances occurred when the minor child moved into plaintiff's home in May 2005. We agree with the trial court. Defendant had physical custody of the minor child from June 1993 until May 2005, and plaintiff had visitation. At the time of the move, the minor child's older siblings had all moved out of defendant's residence, and one of them was also living with plaintiff. Although secondary to the interests of an individual child, the courts favor keeping siblings together. *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d

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363 (2001). The minor child refused to express a preference between parents for fear of hurting their feelings, but she told the trial court that she and defendant had clashing personalities, that she did not need to be in defendant's home, and that she enjoyed being with her siblings. For the trial court to conclude under these facts that the minor child's change of residence constituted a significant change of circumstances is not against the great weight of the evidence.

Defendant next contends that the trial court improperly determined that an established custodial environment existed with both parties. We disagree.

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. MCL 722.27(1)(c). The age of the child, the physical environment, and the inclination of the custodian and the child regarding the permanency of the relationship shall also be considered. *Foskett, supra* at 5. If a child looks to both parents to provide guidance, discipline, the necessities of life, and parental comfort, an established custodial environment may exist with both parents. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000).

At the time of the hearing, the minor child was 14 years old. Defendant had physical custody of the minor child for 12 years, from June 1993 until May 2005. Both parents have homes near the minor child's high school. The trial court found that both parties' homes were stable and sufficient. Defendant enforced rules regarding makeup, clothes, and Internet and cell phone usage, and took the minor child on a trip to Philadelphia after the child moved in with plaintiff. Plaintiff took the minor child to and from school every day and helped her with her homework during May 2005. Before moving in with her father in May 2005, the minor child visited him every other weekend and for six weeks in the summers. Plaintiff provided the minor child's medical insurance and paid child support. The parties shared joint legal custody and mutually agreed to send the minor child to Northville High School using plaintiff's address, even though defendant's address would place her in Plymouth-Canton schools. The evidence supports the conclusion that both parties provided guidance, discipline, the necessities of life, and parental comfort. Therefore, the trial court's finding that an established custodial environment existed with both parties was not against the great weight of the evidence.

Defendant claims that the trial court failed to make specific findings of fact and that the trial court record is insufficient for this Court to review its application of law to the facts. The trial court found that both parties were "sources of guidance, discipline, and the necessities of life." Therefore, the trial court made the required finding regarding an established custodial environment. See *Jack*, *supra* at 670. The trial court is not required to elaborate any further, and its finding is supported by the facts.

Defendant alleges that the trial court failed to advise her that she had a right to an attorney, to receive and exchange discovery, and to call witnesses. She further alleges that the trial court did not advise her that the hearing would be to determine the best interest of the child. However, defendant presents no support for her argument that the trial court was required to advise parties of any of these things when they elect to proceed in propria persona after they had been represented by counsel throughout prior proceedings. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then

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search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Failure to properly address the merits of this assertion constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004). Moreover, defendant admits that she was able to acquire and read before the hearing copies of the materials relevant to the best interest factors that the trial court relied on. Therefore, we do not see that she was prejudiced in any event.

Defendant contends that the trial court applied the wrong burden of proof because it incorrectly determined that an established custodial environment existed with both parties. We decline to consider this argument because the same burden of proof would apply regardless of whether an established custodial environment existed with both parties or solely with defendant.

Defendant also argues that the trial court applied the incorrect burden of proof after determining that an established custodial environment existed. We agree. If an established custodial environment exists, the movant must prove by clear and convincing evidence that the requested change is in the children's best interests. MCL 722.27(1)(c); *Brown v Loveman*, 260 Mich App 576, 585; 680 NW2d 432 (2004). Otherwise, the movant's burden is a preponderance of the evidence that the requested change is in the children's best interests. *LaFleche v Ybarra*, 242 Mich App 692; 619 NW2d 738 (2000). Here, after correctly finding that a change of circumstances occurred and that an established custodial environment existed, the trial court incorrectly applied the preponderance of the evidence standard. Application of the wrong evidentiary standard constitutes an abuse of discretion regarding the ultimate determination of custody and requires us to remand. *Foskett, supra* at 8, 13.

The trial court's error requires us to vacate its custody award and remand the matter for reevaluation using the proper standard of proof. On remand, the trial court's reevaluation must include consideration of "up-to-date information" and "any other changes in circumstances arising since the trial court's original custody order." *Fletcher v Fletcher*, 447 Mich 871, 888-889; 526 NW2d 889 (1994). "Although not infallible, trial courts are more experienced and better situated to weigh evidence and assess credibility." *Id.*, 889. Because the trial court would be required to reassess them anyway, we decline to consider defendant's contention that the trial court's findings on the statutory best interest factors were against the great weight of the evidence. We direct the trial court to address the parenting time issue on remand as well.

We affirm the trial court's findings that there was a change in circumstances and that there was an established custodial environment with both parents. We vacate the trial court's custody order and remand for reevaluation thereof on the basis of up-to-date information under the proper burden of proof, clear and convincing evidence. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Jessica R. Cooper
/s/ Stephen L. Borrello

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STATE OF MICHIGAN

COURT OF APPEALS

DAVID ALLEN RILEY, Plaintiff-Appellee,	UNPUBLISHED December 1, 2000
v	No. 224314 Shiawassee Circuit Court
NANCY KAYE DOWNS, Defendant-Appellant.	LC No. 86-005158-DM

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from an order awarding plaintiff primary physical custody of the parties' son, David. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Defendant first contends that the trial court erred in determining that an established custodial environment did not exist with defendant and, therefore, applied the wrong standard of proof to plaintiff's petition for a change of custody. We agree.

Modifications to a custody order involving a minor child are governed by MCL 722.27(1)(c); MSA 25.312(7)(1)(c), which provides, in pertinent part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. 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.

Generally, "the first step in considering a petition to change custody is to determine whether an established custodial environment exists; it is only then that the court can determine what burden of proof must be applied." *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). The existence of a previous custody order is irrelevant to the determination of an established custodial environment. *Id*. at 388. Instead, the trial court considers "the

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circumstances surrounding the care of the children in the time preceding trial." *Id*. The existence of an established custodial environment is a question of fact for the trial court, *id*. at 387-388, which is reviewed under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

In this case, the trial court found that defendant had established a custodial environment with David. However, the court held that the custodial environment had been destroyed because the relationship between David and defendant had deteriorated during the two or three years preceding the motion for change of custody. Because we believe this factual finding is against the great weight of the evidence, we find that the trial court committed error requiring reversal.

Defendant maintained physical custody of David from the time he was two years old until after his fourteenth birthday, when the trial court entered its order changing custody. Other than periodic visitation with plaintiff, David was in defendant's daily care for more than twelve years. Uncontested evidence established that, each day, defendant woke David and helped him get ready for school. Although defendant worked full-time since 1992, she routinely dropped David off at her parents' home for breakfast and a ride to school. After defendant and David arrived home at 4:30 p.m. on school days, they ate dinner together and defendant helped him with his homework.

Defendant regularly took David to medical and dental appointments, drove him to and from athletic practices, and attended every home and away game in which David participated. Moreover, defendant attended every open house and parent-teacher conference at David's school, volunteered as a room mother from kindergarten through fifth grade, helped with numerous field trips, athletic events and class projects. She was also a member of the parent teacher organization for his elementary school, was vice-president of the parent teacher organization for his middle school, and was a den mother for his cub scout troop from first to fifth grade.

Defendant also took responsibility for day-to-day discipline, requiring David to complete household chores and finish his homework before watching television or talking on the telephone. Also, defendant set rules in the household with regard to David being at home alone with other teenagers and with regard to the time he was expected home after evening events. Evidence also showed that David shared problems with defendant and she counseled him on issues such as drugs, violence and sex. Thus, according to the uncontested evidence, defendant provided David's daily parental care, discipline and attention for more than twelve years, in a secure and stable home.

Nevertheless, the trial court found that a change occurred in the home within the two or three years preceding the motion for change of custody, such that the established custodial environment was destroyed. In light of the proofs presented at the custody hearing, we believe the trial court's conclusion that the relationship between David and defendant had changed in recent years was factually accurate. Evidence showed that the two argued more as David entered adolescence and that defendant had to impose rules regarding his behavior that were less flexible than those instituted at plaintiff's house. However, this change was an insufficient reason for the trial court to find that the established custodial relationship with defendant had been destroyed.

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Evidence showed that David's relationship with defendant was strained because of age, gender differences, increased discipline, and David's desire to spend more time with his father in a less-restricted environment. Yet under MCL 722.27(1)(c); MSA 25.312(7)(1)(c), the child's "inclination" is not the sole factor which determines the existence of an established custodial environment. Rather, the trial court must consider "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." *Id*. David's growing pains do not negate the fact that, over many years, his established home was with defendant. The great weight of the evidence showed that defendant provided David's daily guidance, discipline, necessities of life, and parental comfort in a permanent and stable home.

Further, the trial court must consider "the inclination *of the custodian and the child* as to the permanency of the relationship," when determining whether an established custodial environment exists. MCL 722.27(1)(c); MSA 25.312(7)(1)(c), (emphasis added). Our review of the record reveals that defendant's inclination as the child's custodian was that the custodial arrangement would continue indefinitely. The purpose of MCL 722.27(1)(c); MSA 25.312(7)(1)(c) is "to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid v Aaasulewski*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). We decline to hold that an established custodial environment is extinguished whenever a child expresses a preference to spend more time with a non-custodial parent, notwithstanding a long-established living situation. As much as any child might prefer otherwise from time to time, rules, daily guidance, discipline and consistent parenting are what foster the security, stability and permanence of a home environment. As such, it was against the great weight of the evidence for the trial court to find that the established custodial environment with defendant had been destroyed, simply based on the child's preference, because the evidence clearly preponderates in the opposite direction. *Fletcher, supra*, 447 Mich 877-878.

If an established custodial environment exists, a trial court may order a change of custody only when clear and convincing evidence demonstrates that such a change would be in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). It is well settled that a "trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). As set forth above, the trial court erroneously held that the established custodial environment existing with defendant had been destroyed. Accordingly, the trial court committed a clear legal error by ruling that plaintiff's standard of proof was a preponderance of the evidence. *Id*.

Defendant next contends that the trial court made erroneous findings of fact with regard to the best interest factors contained in MCL 722.23; MSA 25.312(3). The trial court determined that factors a and i favored plaintiff, while factors b, c, d, e, f, g, h, and j favored both parties equally. Defendant challenges the trial court's findings with regard to factors a, b, d, e, f and i. A trial court's findings of fact regarding the best interest factors are reviewed under the great weight of the evidence standard. *Hilliard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998).

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The first of the best interest factors to be considered concerns the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a); MSA 25.312(3)(a). The trial court found that this factor weighed in favor of plaintiff because he and David had grown closer, while David and defendant often argued. We conclude that this factual finding was not against the great weight of the evidence. Testimony revealed that plaintiff and David had a close, loving relationship, that they enjoyed spending time together and that David expressed an interest in living with plaintiff. While David still shows affection for defendant, and defendant's devotion to her son is evident by her participation in his daily activities, the evidence did demonstrate some strain on their relationship. Therefore, the trial court's conclusion that this factor favored plaintiff was not against the great weight of the evidence.

As for factor 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," MCL 722.23(b); MSA 25.312(3)(b), the trial court found the parties equal. The trial court's decision was based on its factual findings that plaintiff made an effort to visit David regularly and that plaintiff supported David's educational well-being. While the trial court admitted that plaintiff should do more to encourage David to attend church, the court also noted that David occasionally missed services while living with defendant. We believe that the trial court's finding of equality on this factor was against the great weight of the evidence.

In terms of guidance, the evidence presented at trial indicated that plaintiff did not discipline David and was less restrictive of his behavior. Also, plaintiff allowed David to stay home alone during the summer, without supervision, while plaintiff worked 9 ½-hour days as a truck driver. Further, plaintiff testified that he did not take David to church. In contrast, while living with defendant during the summer, David went to his maternal grandparents' house in the morning and studied the Bible, worked on a computer and helped with the family business. Defendant was responsible for discipline and, on a daily basis, supervised David's homework and chores and restricted telephone and television use. Further, defendant set rules regarding when David should be home from evening events and prohibiting him from being at home alone with other teenagers. Moreover, defendant testified that she took David to church every week when he was with her, except when special events or vacations interfered.

In terms of education, the evidence showed that defendant asked plaintiff to enroll David in a five-day preparation course for the MEAP test, because the course occurred during plaintiff's summer parenting time. Plaintiff did enroll David in the course, but then allowed David to skip the final two days of the class. Plaintiff testified that he talked to David about his grades and that he considered them unacceptable. However, he also admitted that he did not study with David, never checked his homework, and was not aware of any school problems until he saw David's report cards. Plaintiff went to some parent-teacher conferences while David was in elementary school, but did not do so in recent years and was unable to name David's teachers or the courses in which David was struggling.

In contrast, defendant checked David's assignment sheets each day, helped him with homework and helped him study for tests. Defendant was familiar with David's grades and courses, was in regular contact with his teachers, and actively participated at his school. Thus, evidence showed that defendant played an active role in David's behavioral, religious and

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academic training and that plaintiff was uninvolved in David's academic progress and did not encourage him to attend church. For these reasons, we believe that the trial court's finding that the parties were equal on factor b was against the great weight of the evidence. Instead, the trial court should have found that this factor favored defendant.

The trial court also weighed the parties equally on factor d, the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d); MSA 25.312(3)(d). The trial court's finding on this factor was apparently influenced by its determination that an established custodial environment existed with neither parent. We believe that the trial court's finding of equality on this factor was against the great weight of the evidence.

As noted above, David lived with defendant for twelve years. Defendant remarried in 1995, has lived in the same home since early 1996, and has lived in the same school district for all of David's school years. In addition, defendant testified that David gets along well with her current husband. Defendant has worked for the same employer since 1995 and had one other employer before that. And, as discussed above, the disagreements between defendant and David concerning various rules did not create an unstable home environment.

Plaintiff's time with David was limited by the custody arrangement in the divorce judgment. However, the environment plaintiff established for David was less stable and less satisfactory than that provided by defendant. As noted above, plaintiff allowed David to stay home alone during the summer, with no structured activities and no supervision. Plaintiff has lived in his current home only since April 1999, and, although he has worked for the same company for three years, he worked for five other companies since 1991. In terms of personal relationships, plaintiff lived with more than one woman, without the benefit of marriage, while exercising parenting time with David. Plaintiff's personal relationships are clearly less stable than defendant's marriage. Based on this evidence, the trial court's finding that the parties were equal on factor d was against the great weight of the evidence. Defendant created a long-term, stable home for David. Compared to plaintiff's home environment, with his various female companions, frequent changes in employment and lack of daily supervision while David is in the home, the evidence clearly preponderated in defendant's favor.

With regard to factor e, the "permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e); MSA 25.312(3)(e), the trial court again found the parties equal. The trial court stated that, although defendant was married and plaintiff was single, it was uncertain whether those living situations would continue in the future. Further, the trial court found that both parties owned permanent homes in David's school district and that both parties had relatives close by.

We believe the trial court's finding of equality on this factor was against the great weight of the evidence. First, there was no evidence that defendant's marriage was unsound and no evidence that plaintiff planned to marry in the near future. Therefore, the trial court's conclusion that the two family units were equally stable was unsupported, especially since plaintiff had numerous female companions that were in and out of plaintiff's house during his scheduled visits with David. In terms of nearby family members, evidence showed that defendant's parents were actively involved in David's life and that they spent time with him every day, while there was no

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evidence that plaintiff's parents spent any time with David. In light of this evidence, the trial court should have found that the evidence preponderated in favor of defendant on factor e.

The trial court also found the parties equal on factor f, the "moral fitness of the parties involved," MCL 722.23(f); MSA 25.312(3)(f). Defendant argues that the trial court's factual findings with regard to this factor were erroneous because of plaintiff's history of extramarital relationships, including his practice of having live-in girlfriends while exercising visitation time with David, and because plaintiff's extramarital affairs caused the breakup of the parties' marriage. While the trial court found that plaintiff exercised poor judgment by having women stay overnight at his house when David was visiting, the trial court found that David was not harmed by the activities. Factor f "relates to the parent-child relationship and the effect that the conduct at issue may have on that relationship." *Hilliard, supra,*. 231 Mich App at 323-324. The trial court's finding that David was not adversely affected by plaintiff's behavior was not against the great weight of the evidence. No testimony showed that David was harmed by plaintiff's behavior or that the activities interfered with plaintiff's ability to be an effective parent. Further, the only other evidence regarding moral fitness was defendant's testimony that plaintiff allowed David to be at home alone with girls, but plaintiff denied allowing such behavior. In light of this, it was not against the great weight of the evidence for the trial court to conclude that the parties were equally morally fit within the meaning of MCL 722.23(f); MSA 25.312(3)(f).

Also, contrary to defendant's argument on appeal, the trial court was not permitted to consider the fact that the marriage between plaintiff and defendant ended because of plaintiff's extramarital affairs, as "extramarital conduct, in and of itself, may not be relevant to factor f." *Fletcher, supra*, 447 Mich at 887. However, the trial court was permitted to consider plaintiff's choice to allow women to spend the night in his home, to the extent it affected his ability to raise David. *Id*.

The final statutory factor defendant challenges on appeal is factor i, the reasonable preference of the child. The trial court found that this factor favored plaintiff because David expressed a preference for living with plaintiff, and further found that David was old enough and mature enough to express a preference. The trial court also found that David had expressed his preference for a sufficient length of time and the preference was sufficiently strong so that the factor should be weighed more heavily than the others.

It is undisputed that David expressed a desire to live with plaintiff. Therefore, we cannot conclude that the trial court's finding was against the great weight of the evidence. Although defendant contends that the trial court gave undue weight to this factor in its decision to change custody, a trial court is not required to give the best interest factors equal weight. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). Given the current posture of this case, we decline to address whether too much weight was accorded to factor i, as the trial court must reassess this issue when it reconsiders whether clear and convincing evidence demonstrates that a change of custody is truly in David's best interests.

In summary, defendant challenged the trial court's findings of fact with regard to best interest factors a, b, d, e, f and i. We find that the trial court's findings with regard to factors a, f and i were supported by the evidence. However, we find that the trial court's findings with

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regard to factors b, d and e were against the great weight of the evidence. Instead, we believe that those factors should have weighed in defendant's favor.

Finally, defendant contends the trial court abused its discretion by failing to award her an increase in child support. Modification of a child support order is a matter within the sound discretion of the trial court. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999); *Good v Armstrong*, 218 Mich App 1, 4; 554 NW2d 14 (1996). The burden is on the party appealing a child support order to show that the trial court clearly abused its discretion. *Kosch, supra* 233 Mich App 350; *Good, supra* 218 Mich App at 4. Defendant has not shown that the trial court's failure to increase her amount of child support during the pendency of her motion was a clear abuse of discretion. We also note that defendant did not raise before the trial court the argument that she should receive increased support for the limited period between the time of filing and the time the motion was decided. Defendant's motion was filed in response to plaintiff's petition for a change of custody, and was filed with the assumption that custody would remain with her. Under these circumstances, the trial court did not abuse its discretion by failing to grant defendant support during the time her motion was pending.

Because the trial court made findings of fact against the great weight of the evidence regarding the statutory best interest factors and applied the wrong standard of proof in deciding that a change in custody was in David's best interests, the trial court's order constituted error requiring reversal. We reverse the trial court's finding that no established custodial environment existed with defendant, as the evidence clearly preponderates in the other direction. We also reverse the trial court's findings of fact with respect to statutory best interest factors b, d and e, and affirm the findings of fact regarding factors a, f and i. Finally, we remand for reconsideration of the change of custody motion under the proper standard of proof, clear and convincing evidence.

Affirmed in part, reversed in part, and remanded. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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STATE OF MICHIGAN

COURT OF APPEALS

CASEY L. SHIMEL, Plaintiff-Appellee,	UNPUBLISHED February 23, 2016
v	No. 329144 Presque Isle Circuit Court Family Division
JENNIFER L. MCKINLEY f/k/a JENNIFER L. SHIMEL, Defendant-Appellant.	LC No. 10-083507-DM

Before: O'CONNELL, P.J., and OWENS and BECKERING, JJ.

PER CURIAM.

Defendant, Jennifer McKinley, appeals as of right the order that determined the parties' minor child, MS, would attend school at the Onaway Public Schools and reside primarily with plaintiff, Casey Shimel, during the school year, with defendant receiving parenting time on alternate weekends, alternate holidays, and for seven weeks during the summer. Because the order failed to appreciate that this shift in parenting time altered the child's established custodial environment, we reverse the order and remand for further proceedings.

I. FACTUAL BACKGROUND

Plaintiff and defendant were divorced on October 10, 2011. The parties' judgment of divorce provided for joint legal and physical custody of MS, with alternate parenting time every three days. Both parties were originally residing in Rogers City, Michigan. At some point after the initial custody action, defendant moved to Gaylord. In April 2013, defendant moved for a change in parenting time. Defendant's request stated that the child had been enrolled in Gaylord Public Schools and asked the court to modify the parenting-time schedule during the school year to allow the child to reside with her. In response, plaintiff filed a motion to change custody. On July 1, 2013, the trial court entered an interim order regarding parenting time and modified the parenting-time schedule such that the parties had alternating weeks of parenting time. The parties withdrew their respective motions. During the next school year, the child attended two different preschools, depending on which parent she was staying with at the time.

This present action began after the parties were unable to agree on which school MS should attend for kindergarten in the fall of 2015. The parties agreed that the child should attend

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one school, rather than attending different schools like she did in preschool, but disagreed about which school that should be. On May 13, 2015, plaintiff moved the trial court to modify parenting time and to decide which school the child would attend. Plaintiff wished for MS to attend school at the Onaway Public Schools, where his other daughter and MS's sister, LS, attended and to reside primarily with him during the school year. Defendant wished for MS to attend school in Gaylord, initially requesting MS attend the Gaylord Community Schools and later requesting that she attend Otsego Christian Schools, and reside primarily with her during the school year.

A two-day hearing was held on July 21, 2015 and August 17, 2015. Plaintiff presented testimony that, on the weeks MS resided with him during the 2014/2015 school year, she attended a preschool program at Onaway Public Schools. Colleen Janeczek, MS's teacher at Onaway Public Schools, testified that MS had done well in her class and that, if she attended kindergarten there, she would have a class size of about 22 students.

Defendant had enrolled MS in preschool at Otsego Christian Schools during the weeks that MS resided with her for the last two school years. James Huber, the Otsego Christian Schools administrator, testified that MS had performed well in both her years and that she would have a class size of about 11 students if she attended kindergarten at Otsego Christian Schools. Defendant's father, Matthew McKinley, testified that he had provided and would continue to provide the financial assistance needed for MS to attend Otsego Christian Schools. Defendant testified that she preferred Otsego Christian School because of its small class size and faith-based environment.

In a ruling given from the bench, the trial court recognized that the parties shared joint legal and physical custody of MS. It also determined that MS had an established custodial environment with both plaintiff and defendant. The court reflected on the fact that MS had been attending multiple schools, depending on which parent she stayed with, and acknowledged that such an arrangement could not continue. Thus, the court had to select a school for MS to attend. The court explained that it "ha[d] to review the best interests [of the child] in accordance with the statute"—meaning MCL 722.23. After reviewing some, but not all, of the best interest factors, the court determined that MS would attend Onaway Public Schools and that this "necessitates a change not in custody but in parenting time." The court then modified the parties' parenting-time schedule, granting parenting time to defendant on alternating weekends from Friday evening until Monday morning. In addition, the court ordered defendant to have parenting time on what it described as some of the "extra days" off that occur during the school year. With regard to summer parenting time, the court granted defendant seven weeks—one three-week visit plus a four-week visit—of parenting time during the summer months. The parties were to alternate holidays. At all other times, MS was to reside with plaintiff. The trial court did not comment on whether this change would alter the child's established custodial

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environment, nor did it articulate the standard (preponderance or clear and convincing evidence) it used in making its decision.[1]

II. STANDARD OF REVIEW

Three standards of review are applied in custody cases. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "The great weight of the evidence standard applies to all findings of fact." *Id.* A finding of fact is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (citation and quotation marks omitted). "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Phillips*, 241 Mich App at 20. For child custody matters, this Court has adopted the definition of "abuse of discretion" that was first articulated in the Supreme Court case of *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959). *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). Pursuant to that definition, a court's action constitutes "abuse of discretion" when it is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Id.* at 324 (citation omitted). "Questions of law are reviewed for clear legal error" which exists in cases where "[a] trial court . . . incorrectly chooses, interprets, or applies the law." *Phillips*, 241 Mich App at 20.

III. ANALYSIS

We begin our analysis by examining the issue that brought the parties before the trial court in the first instance: where should MS attend school? The parties shared joint legal custody of MS. When parents share joint legal custody, the Child Custody Act provides that they " 'shall share decision-making authority as to the important decisions affecting the welfare of the child.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.26a(7)(b). "However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child." *Id.*, citing *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993). See also *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 296; 750 NW2d 597 (2008).

The first consideration for a court contemplating an important decision that affects the welfare of the child is "whether the proposed change would modify the established custodial environment." *Pierron*, 486 Mich at 85. An established custodial environment "is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.' " *Id.* at 85-86, quoting MCL 722.27(1)(c).

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[1] However, it appears that the court utilized the preponderance of the evidence standard because, after reviewing the best-interest factors, it stated that "on balance," the factors favored plaintiff. As will be discussed below, the preponderance standard is to be used when the change would not alter the child's established custodial environment.

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In *Pierron*, our Supreme Court recognized that a trial court's decision about which school a child should attend could require changes in parenting-time orders. See *id.* at 86 ("an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules . . ."). Changing parenting time, however, "does not necessarily mean that the [child's] established custodial environment will have been modified." *Id.* "If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Id.* In such a case, the party proposing the change in schools must prove, by a preponderance of the evidence, that the change is in the best interest of the child, using the best-interest factors set forth in MCL 722.23. *Id.* at 89-90. However, if the child's established custodial environment would change, a heightened standard applies. *Id.* at 86. In that case, "[t]he court may not change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id.* (citation and quotation marks omitted).

Here, defendant argues that the trial court's decision results in a change in the child's established custodial environment. We agree. Before the parties moved the trial court to decide which school MS should attend, MS spent an equal amount of time with each parent, as plaintiff and defendant had alternating weeks of parenting time. The trial court's decision about which school MS should attend drastically altered the amount of time MS would spend with defendant. Instead of equal time with both parents, MS would only spend alternate weekends with defendant during the school year, with seven weeks of parenting time during the summer. Thus, for a vast majority of the year, defendant would be relegated to being not just a "weekend-only" parent, but an every-other-weekend only parent. This drastic shift in parenting time amounts to a change in the child's established custodial environment. *Powery v Wells*, 278 Mich App 526, 528, 530; 752 NW2d 47 (2008) (holding that where the parties' previous parenting-time schedule afforded them a "roughly equal amount of parenting time," the trial court's modification of parenting time, which "relegated [one of the parents] to the role of a 'weekend parent'" modified the child's established custodial environment). See also *Brown v Loveman*, 260 Mich App 576, 596-597; 680 NW2d 432 (2004); Cf. *Gagnon v Glowacki*, 295 Mich App 557, 573; 815 NW2d 141 (2012) (finding no change in the child's established custodial environment where the defendant kept his midweek parenting time under the amended parenting-time order, and thus was not reduced to the role of a "weekend-only" parent).

In the case at bar, the trial court did not account for the fact that its ruling amounted to a change in the established custodial environment, nor is it apparent that the court utilized the clear and convincing evidence standard. This was error requiring reversal. See *Pierron*, 486 Mich at 86 (describing the appropriate standard to employ when the choice of school and resultant adjustment to the parenting-time schedule modifies the child's established custodial environment). Accordingly, we remand for the trial court to determine if plaintiff, as the party seeking to change MS's school, established, by clear and convincing evidence, that the change—and resultant modification of parenting time—was in the child's best interest, utilizing the factors

set forth in MCL 722.23.[2] In making this determination, the court can consider up-to-date information and any relevant changes in circumstances. *Fletcher*, 447 Mich at 889.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Donald S. Owens
/s/ Jane M. Beckering

[2] In this regard, we agree with defendant's contention that the trial court's findings on some of the factors in its August 17, 2015 opinion were unclear. On remand, we encourage the court to specify which party is favored under the particular factors.

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