STATE OF MICHIGAN

COURT OF APPEALS

GREGORY JOHN MILNE,

Plaintiff-Appellee,

v

JOANA RISTA MILNE, also known as JOANA RISTA,

Defendant-Appellant.

UNPUBLISHED
September 23, 2021

No. 355862
Washtenaw Circuit Court
LC No. 17-002314-DP

Before: CAMERON, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

In this child custody dispute, defendant Joana Rista Milne appeals the trial court's December 8, 2020 decision, which awarded joint legal custody, set parenting time, and ordered child support for the two children that she shares with plaintiff Gregory John Milne. We affirm in part and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The parties met in 2005 and began a romantic relationship. In 2012, the parties had a religious ceremony to recognize their union, but they intentionally did not obtain or file a marriage license. The parties were not legally married, but held themselves out to be married and had two children together. Plaintiff refused to sign either child's birth certificate.

In September 2017, defendant traveled to her native Albania with the children without plaintiff's knowledge or permission. Plaintiff filed a petition to establish paternity over the children and to correct the minor children's birth certificates. Plaintiff also moved the trial court to order defendant to return the children to Michigan and to award him sole legal and physical custody. After a default was entered against her, defendant returned to Michigan with the children in February 2018. The trial court entered an interim order granting the parties joint legal custody and a week on/week off parenting time schedule that included a right-of-first refusal. Following an evidentiary hearing, the trial court awarded the parties joint legal custody and awarded each party "week on/week off" parenting time. Defendant was awarded child support. This appeal followed.

II. CUSTODY

A. STANDARDS OF REVIEW

"All custody orders must be affirmed on appeal unless the [trial] court's findings were against the great weight of the evidence, the [trial] court committed a palpable abuse of discretion, or the [trial] court made a clear legal error on a major issue." *Lieberman v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017) (quotation marks and citations omitted). A finding is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Id.* at 77 (citation omitted). An abuse of discretion occurs when a trial court's decision "is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013) (quotation marks and citations omitted). "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Lieberman*, 319 Mich App at 77 (citation omitted). We defer to the trial court concerning issues of credibility. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

B. ANALYSIS

1. ESTABLISHED CUSTODIAL ENVIRONMENT/BEST-INTEREST FACTORS

Defendant argues on appeal that the trial court's December 2020 order changes the established custodial environment. "Before making a custody determination, the trial court must determine whether the child has an established custodial environment with one or both parents." *Bofysil v Bofysil*, 332 Mich App 232, 242; 956 NW2d 544 (2020). An established custodial environment is one 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." 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. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

"It is possible for a custodial environment to be established in more than one home." *Pennington v Pennington*, 329 Mich App 562, 578; 944 NW2d 131 (2019).

In this case, the trial court concluded that an established custodial environment existed with both parties as of December 2020. However, the trial court found that, prior to defendant and the children returning from Albania, defendant "provided nearly all day-to-day care for both children[] while Plaintiff worked full time to financially support the family." Consequently, the trial court determined that it was required to consider the best-interest factors in MCL 722.23. See *Bofysil*, 332 Mich App at 243 ("If a proposed change would modify the child's established custodial

environment, the proponent must demonstrate by clear and convincing evidence that the proposed change is in the child's best interests."). The best-interest factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

Defendant does not challenge the trial court's findings that neither party was favored with respect to a number of the best-interest factors. Defendant only challenges the trial court's findings with respect to factors (b), (c), and (j).

With respect to factor (b), defendant argues that the trial court erred by finding that this factor did not favor either party because plaintiff "readily mocks, insults, and disparages"

defendant's religious beliefs. The record establishes that both parties have strong religious beliefs and that the parties never reached an agreement concerning the children's religion. That said, plaintiff has been dismissive of defendant's religion and has made inappropriate and offensive remarks regarding the Catholic church. But defendant also demonstrated a lack of respect for plaintiff's religious beliefs when she secretly had the children baptized in the Catholic church even though she knew that plaintiff wanted the children to be raised in the Protestant church. Despite their different belief systems, both parties indicated during the 2020 evidentiary hearing that they supported the children attending religious events at the other party's church. Thus, the trial court's determination that this factor did not favor either party was not against the great weight of the evidence.

With respect to factor (c), "[t]he capacity and disposition of the parties involved to provide the child[ren] with food, clothing, medical care or other remedial care," defendant argues that the trial court improperly focused on plaintiff's "finances instead of his actual, demonstrated efforts to provide for his children." The record supports that defendant failed to actively pursue her education in the years before she entered into her "religious union" with plaintiff and that she had not been employed at any relevant time. Plaintiff supported defendant and the children during their relationship. Defendant's "church family" helped support defendant and the children after they returned from Albania, and defendant did not intend to obtain employment until after the children entered school. Importantly, while plaintiff had an arrearage of nearly $10,000 in child support, he also had an engineering degree and full-time employment. Although factor (c) "looks to the future," as opposed 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, we fail to see how plaintiff's earning capacity would not be relevant, especially when considering defendant's lack of stable income at any relevant time and her lack of feasible plans for the future.

Additionally, although defendant argues that plaintiff is not interested in the children's "actual care," defendant testified at the January 2020 hearing that both she and plaintiff scheduled medical appointments for the children. Indeed, plaintiff took the children to a dentist and a chiropractor over the course of the proceeding and demonstrated concern regarding the children's weight and nutrition. While it is clear that the parties have different philosophies concerning the children's healthcare and eating practices, record evidence supports that both parties are concerned about the children's health. Thus, the trial court's finding that factor (c) weighed "slightly" in favor of plaintiff was not against the great weight of the evidence.

Defendant next argues the trial court's conclusion that factor (j) did not favor either party was improper. MCL 722.23(j) requires trial courts to consider the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent[.]" When considering this factor, the trial court cannot "consider negatively . . . any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent." MCL 722.23(j).

The record supports that plaintiff subjected defendant to emotional, verbal, and financial abuse during their relationship. Additionally, plaintiff's desire for control, limited ability to be introspective, and continued denigration of defendant was noted throughout most of the proceeding. Even so, the record supports that defendant demonstrated an inability or unwillingness to foster the children's relationship with plaintiff. Indeed, defendant failed to take plaintiff into

consideration when offering the right-of-first-refusal during the proceeding, and the parties' interactions with each other in the presence of the children resulted in the children experiencing emotional difficulties. As noted by Dr. Richard Wooten "the actions of both parties contributed to ongoing tensions" and "serve[d] to foster anxiety [and confusion] in the children[.]" This behavior undoubtedly impacted the children's relationship and ability to bond with the parties.

While defendant contends that she took the children to Albania to escape plaintiff's verbal abuse, the record does not support that defendant exhausted her options before taking the drastic step of leaving the country. As noted by the trial court, if defendant's sole goal was to avoid plaintiff, she could have relocated to a different part of the United States[1] or to a country that honored the 1980 Hague Convention on the Civil Aspects of International Child Abduction, 22 USC 9001 *et seq*. Moreover, as noted by the trial court, defendant secretly obtained passports for the children and then took the children out of the country. Defendant did not request plaintiff's permission or the permission of the trial court.

The record also supports that defendant's return to the United States was not motivated by her desire to foster the children's relationship with plaintiff. Defendant returned to the United States only after plaintiff filed the petition, after the trial court ordered her to return the children to Michigan, and after her attempt to have the matter removed to federal court failed. Moreover, the record supports that defendant speaks to the children almost exclusively in Italian and Albanian despite the fact that plaintiff does not speak either language and contrary to his expressed concerns that he is unable to effectively communicate with the children. Therefore, the record supports that "the parties are either unable or unwilling to empathize with" each other, thereby resulting in an inability to "encourage a close and continuing parent-child relationship[.]"

2. JOINT LEGAL CUSTODY

Next, defendant argues that awarding joint legal custody was improper because the parties cannot cooperate or agree on important matters. When considering whether to award joint custody, the trial court "shall determine whether joint custody is in the best interest of the child" by addressing the statutory best-interest factors in MCL 722.23 and whether "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b). "If *two equally capable parents* whose . . . relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children." *Bofysil*, 332 Mich App at 249 (emphasis added; quotation marks and citation omitted).

In this case, the trial court considered the best-interest factors and the facts and circumstances of this case. The trial court made it clear that there was no perfect solution regarding custody because neither party was an ideal parent. Specifically, the trial court found that both parties are "emotionally ignorant," had made the children's lives "untenable," and were "deficient

[1] Defendant has sisters who live in California and Texas. Defendant testified that she is "close to [her] sisters[.]"

as parents." Because "[n]either party, alone, [could] . . . meet the needs of the minor children," the trial court awarded joint legal custody.

We conclude that the trial court did not abuse its discretion by awarding joint legal custody. Although the Friend of the Court and a referee recommended that defendant be awarded sole legal custody, the trial court acknowledged that "Dr. Wooten recommended joint legal custody for the parties." The court also reiterated that defendant had already removed the children from the country without seeking the permission of plaintiff or the trial court, thereby supporting that joint legal custody was in the children's best interests so that they could foster a relationship with both parents. While it is apparent that the parties did not get along, "[a]bove all, custody disputes are to be resolved in the child[ren]'s best interests." See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Defendant does not explain how joint legal custody would be harmful or disruptive to the children. Cf. *Fisher v Fisher*, 118 Mich App 227, 233-234; 324 NW2d 582 (1982) (declining "to disturb the trial court's denial of joint custody" where "an award of joint custody would . . . be injurious to the children"). Indeed, in March 2018, the trial court entered an interim order, which provided that the parties would share joint legal custody, and there is no indication that the children were harmed or disrupted in the 33 months between the entry of the interim order and the final order. Instead, any issues resulted from the parties' interactions with one another during exchanges of the children. Therefore, we conclude that the trial court did not abuse its discretion by awarding joint legal custody.

III. CHILD SUPPORT AWARD

Defendant next challenges the trial court's award of child support. "[W]e review a trial court's discretionary rulings, such as the decision to impute income to a party, for an abuse of discretion." *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). "Whether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law." *Peterson v Peterson*, 272 Mich App 511, 516; 727 NW2d 393 (2006).

Defendant first argues that the trial court improperly imputed income to her given that she was not employed at any relevant time. To determine the appropriate amount of child support, a trial court must comply with the Michigan Child Support Formula (MCSF) Manual or provide reasons for failing to do so. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). The first step in determining a child support award is to determine each parent's net income by considering all sources of income. *Id*. This calculation is not limited to a parent's actual income as it can include imputed income based on "the parent's unexercised ability to pay when supported by adequate fact-finding that the parent has an actual ability and likelihood of earning the imputed income." *Id*. at 284-285. The imputed amount "should be sufficient to bring that parent's income up to the level it would have been if the parent had not reduced or waived income." 2017 MCSF 2.01(G)(1).

The MCSF directs a court to consider certain "relevant factors both to determine whether the parent in question has an actual ability to earn and a reasonable likelihood of earning the potential income." 2017 MCSF 2.01(G)(2). These factors are:

> (a) Prior employment experience and history, including reasons for any termination or changes in employment.
>
> (b) Educational level and any special skills or training.
>
> (c) Physical and mental disabilities that may affect a parent's ability to obtain or maintain gainful employment.
>
> (d) Availability for work (exclude periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.).
>
> (e) Availability of opportunities to work in the local geographical area.
>
> (f) The prevailing wage rates and number of hours of available work in the local geographical area.
>
> (g) Diligence exercised in seeking appropriate employment.
>
> (h) Evidence that the parent in question is able to earn the imputed income.
>
> (i) Personal history, including present marital status, present means of support, criminal record, ability to drive, and access to transportation, etc.
>
> (j) The presence of the parties' children in the parent's home and its impact on that parent's earnings.
>
> (k) Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification. [2017 MCSF 2.01(G)(2).]

"These factors generally ensure that adequate fact-finding supports the conclusion that the parent to whom income is imputed has an actual ability and likelihood of earning the imputed income." *Clarke v Clarke*, 297 Mich App 172, 184; 823 NW2d 318 (2012) (quotation marks and citations omitted).

In this case, the trial court failed to expressly consider the factors outlined in 2017 MCSF 2.01(G)(2) when imputing income to defendant. Although the trial court found that defendant has "a work history and ability to earn,"[2] the trial court also found that there was "conflicting information/testimony on whether or not Defendant actually has a degree." The trial court further

[2] Defendant was trained as a nurse in Italy but is not able to work as a nurse in the United States without further training. Defendant also speaks Italian, Albanian, and English, which she believed would enable her to work as an interpreter in the medical field.

found that defendant did not "seem to have a plan for finishing her degree in the future." Nonetheless, the trial court imputed defendant "full-time minimum wage and set[] her gross income at $19,656."

Thus, it appears that the trial court improperly inferred that, because defendant could work at some level, she could work full-time and earn minimum wage. Imputing income on the basis of such assumptions without examining the parent's "actual ability to earn and a reasonable likelihood of earning the potential income" is a violation of law and does not comply with the MCSF. See 2017 MCSF 2.01(G)(4). Additionally, in imputing income to defendant, the trial court completely ignored the cost of childcare during defendant's parenting time. See 2017 MCSF 2.01(G)(3) ("Imputation of potential income should account for the additional costs associated with earning the potential income such as child care and taxes that a parent would pay on the imputed income."). Given the inadequacy of the trial court's analysis, we cannot be certain of the trial court's reasoning. Accordingly, we remand for further consideration of the child support award. To the extent that defendant argues that the trial court improperly "used" plaintiff's "2018 W-2 income of $193,000" when calculating child support, that issue also should be addressed on remand.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher