STATE OF MICHIGAN

COURT OF APPEALS

SHELLEY ROZMIAREK, Plaintiff-Appellee,	UNPUBLISHED July 19, 2018
v	No. 339976 Monroe Circuit Court Family Division
JOSEPH ROZMIAREK, Defendant-Appellant.	LC No. 13-036428-DM

Before: GLEICHER, P.J., and BOONSTRA and TUKEL, JJ.

PER CURIAM.

Defendant appeals as of right an order denying his motion to change custody of the parties' minor child, GR. We affirm.

I. ADMISSIBILITY OF HEARSAY STATEMENT

Defendant first argues that the trial court erred in ruling that GR's hearsay statements disclosing alleged sexual abuse of her by plaintiff's boyfriend ("the boyfriend") failed to qualify for admission under the excited utterance exception to the hearsay rule. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). "Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently. The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998) (citations omitted). Questions of law underlying evidentiary rulings are reviewed de novo. *Elher*, 499 Mich at 21.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible except as provided by the rules of evidence. MRE 802. The excited utterance exception to the hearsay rule is contained in MRE 803(2), which allows the admission of a hearsay statement if (1) it relates "to a startling event or condition" and (2) was "made while

the declarant was under the stress of excitement caused by the event or condition." See also *People v Straight*, 430 Mich 418, 423-424; 424 NW2d 257 (1988). "The focus of MRE 803(2), given a startling event, is whether the declarant spoke while still under the stress caused by the startling event." *Id*. at 425. The excited utterance exception "allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." *Smith*, 456 Mich at 550 (quotation marks and citation omitted). The time that passes between the startling event and the statement is an important factor to consider, but it is not dispositive. *Id*. at 551.

> [T]here is no express time limit for excited utterances. Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum. The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. [*Id*. at 551-552 (quotation marks and citation omitted).]

In *Straight*, 430 Mich at 425-426, our Supreme Court held that a four-year-old child's hearsay statements regarding a sexual assault did not fall within the excited utterance exception:

> Few could quarrel with the conclusion that a sexual assault is a startling event. The difficulty in this case arises because the statements at issue were made approximately one month after the alleged assault, immediately after a medical examination of the child's pelvic area, and after repeated questioning by her parents. Under these circumstances, it simply cannot be concluded that the statements were made "while the declarant was under the stress of excitement *caused by the event or condition*." Certainly the declarant was under stress, but one cannot safely say that this stress resulted from the alleged assault rather than from a combination of the medical examination and repeated questioning. [*Id*. at 425-426.]

In *Smith*, 456 Mich at 552, our Supreme Court held that a 16-year-old declarant was still under the overwhelming influence of a sexual assault when he disclosed the assault in a hearsay statement to his mother 10 hours after the assault had occurred. The Court described a series of "extraordinary" actions taken by the declarant in the 10-hour time period reflecting "a continuing level of stress arising from the assault that precluded any possibility of fabrication." *Id*. at 552-553; see also *People v Green*, 313 Mich App 526, 535-537; 884 NW2d 838 (2015) (upholding the admission as excited utterances of hearsay statements disclosing sexual contact where each of the statements was made within minutes or hours of the defendant leaving the declarant's apartment and where the declarant was very upset and crying while making the statements).

Here, defendant testified that at around 7:00 p.m. on January 19, 2017, GR made statements indicating that she had been sexually abused by the boyfriend. According to defendant, GR seemed distraught, restless, and upset, and she looked like something was weighing on her mind. When defendant asked GR what was on her mind, GR made the statements disclosing the alleged sexual abuse by the boyfriend. There is no indication of when the alleged abuse occurred. Defendant testified that GR had been staying with him for three days when she made the statements. On the date that GR made the statements and on the day before,

defendant had spent the day out of the house working while GR spent the day with defendant's mother. Defendant did not know what his mother and GR had done while he was at work on those dates.

The trial court's determination that GR's hearsay statements were not subject to the excited utterance exception fell within the range of principled outcomes. To be sure, a sexual assault constitutes a startling event. See *Straight*, 430 Mich at 426. The record does not establish, however, that GR remained under the stress or sway of excitement caused by the alleged sexual abuse at the time she made the statements. The record affords no factual basis for determining when the alleged sexual abuse occurred. It is thus impossible to ascertain or consider the amount of time that elapsed between the alleged acts of sexual abuse and GR's hearsay statements. GR had been staying with defendant for three days at the time of the disclosure, so any alleged abuse had occurred at least several days before the statements were made. Also, defendant admittedly did not know what GR and defendant's mother had done during the day while defendant was at work away from home the day that the hearsay statements were made, or on the immediately preceding day. Unlike in *Smith*, the record is devoid of evidence establishing a continuing level of stress arising from the alleged sexual abuse. There is no evidence of any physical factors, such as shock, unconsciousness, or pain, which prolonged a period of stress caused by a startling event. Overall, no basis exists to conclude that GR was still under the stress of excitement caused by the boyfriend's alleged sexual abuse when she made the hearsay statements. The trial court thus did not abuse its discretion in ruling that GR's hearsay statements failed to qualify for admission under the excited utterance exception.[1]

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[1] The dissent opines that GR's out-of-court statement to defendant "should have been admitted for a different purpose," namely to establish the impact the statements had on plaintiff and defendant. We disagree, for several reasons.

First, defendant, the proponent of the evidence, never suggested at the trial court to admit the statement for this other purpose. Whether defendant "should" have offered to admit it under a different theory from the one he espoused at the trial court is not before us. Indeed, the dissent sua sponte is raising this issue, as defendant does not even suggest in his brief on appeal that the evidence was admissible for any purpose other than as an excited utterance to prove the truth of the matter asserted, i.e. that GR was sexually abused by plaintiff's boyfriend.

Second, the evidence at issue was a statement GR made to defendant. Plaintiff was not present when the statement was made and therefore did not hear it; thus, for the dissent to suggest that the statement could be used to show how *plaintiff* reacted to hearing the statement is misguided. Moreover, plaintiff *was* questioned extensively about how she first heard of the sexual assault allegation (she learned through an e-mail from defendant) and what she did when confronted with the allegation. Indeed, the record reveals that defense counsel asked plaintiff about her level of concern after getting the e-mail, whether she believed the allegation, why she thought the allegation was false, why she could not "take [the allegation] seriously," and about her interactions with CPS and the police who investigated the allegation as well. Thus, there was ample evidence in the record to show plaintiff's reaction to the sexual assault allegation without resorting to an invalid evidentiary theory.

II. TRIAL COURT'S DECISION TO DENY MOTION TO CHANGE CUSTODY

Defendant next argues that the trial court erred in denying defendant's motion to change custody. We disagree.

"Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014). Under the great weight of the evidence standard, the trial court's findings are affirmed unless the evidence clearly preponderates in the opposite direction. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). The trial court's credibility determinations are accorded deference give its superior position to make such determinations. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Clear legal error exists when the trial court errs in choosing, interpreting, or applying the law. *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013).

Custody disputes are to be determined on the basis of the best interests of the child, as measured by the 12 factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Generally, the trial court must explicitly state its findings and

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Third, if we were to review whether the trial court erred when it failed to admit GR's statement to defendant to show the effect it had on defendant, our review would be for plain error affecting substantial rights because defendant never sought the evidence's admission under this alternate avenue. See *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006) (stating that appellate review of unpreserved issues is for plain error); *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997) (stating that an objection on one ground is insufficient to preserve appellate attack on another ground). Assuming the statement was admissible for a purpose other than that offered by defendant and not to prove the truth of the matter asserted, any such alternative basis was not "plain" or "obvious," and thus its exclusion could not constitute plain error. See *Rivette v Rose-Molina*, 278 Mich App 327, 328-329; 750 NW2d 603 (2008) (stating that to reverse under plain error standard, error must be clear or obvious and affect a substantial right). In fact, the trial court told defense counsel that if GR's statements were not admissible substantively, counsel was free to pursue other avenues of admission, including as an exception to hearsay or as "not hearsay," for which "there are specific rules of evidence along those lines." It was not incumbent on the trial court to identify a particular theory for defendant on which the evidence could have been admissible. Moreover, any "error" did not affect the outcome of the proceedings, see *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008) (stating that for an error to affect a substantial right, it has to affect the outcome of the proceedings); it is clear that, although the trial court did not consider the statement substantively to show that abuse occurred, there was ample other evidence to show what the parties did, i.e. how they reacted, after the allegation of sexual assault was made. Accordingly, there is no basis for reversing the trial court's ruling or to sua sponte require that the court admit the statement for a purpose that neither party requested.

conclusions regarding each factor. *Rivette v Rose-Molina*, 278 Mich App 327, 330; 750 NW2d 603 (2008). However, the court is not required to comment on every piece of evidence entered and every argument raised. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). A single circumstance can be considered in determining more than one child custody factor. *Fletcher v Fletcher*, 229 Mich App 19, 24-25; 581 NW2d 11 (1998). "A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). "[T]he record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *MacIntyre*, 267 Mich App at 452. Furthermore, if a modification of custody would change the child's established custodial environment, the moving party must demonstrate that the change is in the child's best interests by clear and convincing evidence. MCL 722.27(1)(c); *Hunter v Hunter*, 484 Mich 247, 259; 771 NW2d 694 (2009).

Notably, defendant does not challenge the trial court's determination that an established custodial environment exists with both parties. Defendant also does not dispute that his motion to modify custody, which requested that defendant be awarded primary physical custody of GR, would alter the established custodial environment, thereby requiring him to demonstrate that the change is in GR's best interests by clear and convincing evidence. See *Hunter*, 484 Mich at 259. "The 'clear and convincing evidence' standard is the 'most demanding standard applied in civil cases.' " *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Clear and convincing evidence is defined as the type of proof which

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. Evidence may be uncontroverted, and yet not be "clear and convincing." Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [*Id.* (quotation marks, citations, and ellipses omitted).]

Defendant initially contends that the trial court erred when it ruled that there was no lawful evidence that the boyfriend sexually assaulted GR. Defendant notes that Child Protective Services ("CPS") and the police investigated this allegation, that CPS substantiated the claim under its internal standards, and that GR was taken to a doctor because her genital area was hurting and red. As discussed, however, the trial court did not err in excluding GR's statements as inadmissible hearsay. Defendant cites no authority establishing that CPS's substantiation of a sexual assault claim under its internal agency standards, by itself, constitutes admissible evidence in court that the alleged sexual assault occurred. Police testimony indicated that, barring new information coming forward, the boyfriend would not be prosecuted for the alleged sexual assault due to lack of evidence. Defendant's testimony about the incident in which GR was taken to a doctor because her genital area was hurting and red indicated that this occurred about six weeks before GR's alleged disclosure of abuse to defendant. The doctor informed defendant about what was causing the redness, and defendant did not contact the police or CPS about the

redness.[2] Defendant's testimony regarding this incident does not demonstrate that the redness and pain in GR's genital area six weeks earlier resulted from sexual abuse, let alone that the boyfriend was the perpetrator of any such abuse. Overall, defendant fails to establish that the trial court erred in concluding that there was no admissible evidence that the boyfriend sexually assaulted GR.

On a related note, defendant asserts that the trial court has exposed GR to harm by setting aside its order barring the boyfriend from having any contact with GR. This assertion is premised on the assumption that the boyfriend sexually abused GR, and as explained above, the trial court did not err in finding that there was no admissible evidence of such abuse. In any event, the trial court also alluded to the possibility that CPS might intervene if GR is again exposed to the boyfriend, and the CPS worker testified that a new CPS case could be opened if the boyfriend has contact with GR. Defendant's claim that the trial court has exposed GR to harm is unsupported.

Next, defendant challenges the trial court's findings regarding six of the statutory best interest factors.[3] Defendant first challenges the finding that the parties are equal with respect to factor (b), which concerns the parties' capacity and disposition to provide the child with love, affection, and guidance, and to continue the education and raising of the child in her religion. MCL 722.23(b). Defendant contends that he should prevail on this factor because he wants to put GR in preschool whereas he claims that plaintiff has refused to do so. Defendant's argument mischaracterizes the evidence. The testimony from the evidentiary hearing reflects that both parties wish to enroll GR in preschool and that both parties have evaluated various preschools, but that the parties have different preferences regarding which preschool GR should attend and have thus far been unable to reach an agreement on the matter. Defendant's argument fails to establish that the trial court's finding on this factor was against the great weight of the evidence.

Defendant next argues that the trial court erred in treating the parties as equal with respect to factor (c), which concerns the parties' capacity and disposition to provide the child with food, clothing, medical care, and other material needs. MCL 722.23(c). Defendant claims that he should prevail on this factor because he is more willing to attend to GR's medical care. Defendant contends that plaintiff has refused to coparent by selecting a dentist and a foot care specialist and that she has refused to consider or address the boyfriend's alleged sexual abuse of GR. Again, defendant's argument is premised in part on his assumption that sexual abuse occurred, even though no admissible evidence supports that assumption. Although plaintiff

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[2] Although the doctor told defendant what was causing the redness, no evidence was presented at the evidentiary hearing regarding what the doctor said.

[3] The dissent maintains that the trial court impermissibly "limited its review of the best interest factors to events occurring since the last custody order." Importantly, defendant did not raise this particular argument on appeal. Indeed, there is nothing to show that the trial court self-imposed any type of temporal limitation. Instead, the record shows that the trial court weighed and considered all of the admissible evidence that the parties submitted at the evidentiary hearing.

believed that GR may have been coached to make a false allegation of sexual abuse, plaintiff wanted GR to undergo counseling regarding the matter. Defendant testified that plaintiff never responded to emails and text messages about selecting a dentist and a foot specialist, but he acknowledged that GR has now seen a dentist and a foot specialist selected by defendant. Although defendant appears to have attended more of GR's medical appointments given his greater job flexibility, plaintiff testified that she has attended all of GR's medical appointments that were held during plaintiff's parenting time, except for an appointment that she claims defendant failed to inform her about. The parties presented conflicting testimony regarding whether defendant always notifies plaintiff of medical appointments that he has scheduled for GR. Plaintiff testified that she wanted to obtain a second opinion about the treatment of GR's hemangioma but that defendant would not agree to it. Overall, the evidence does not clearly preponderate against the trial court's finding that the parties are equal with respect to this factor.

Defendant next challenges the trial court's finding regarding factor (d), which concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). Defendant claims that he should prevail on this factor because his home is stable whereas plaintiff owns a home with the boyfriend and is financially dependent on him. But the record is devoid of evidence that plaintiff's ownership of a home with the boyfriend and her financial dependence on him have affected the stability of the home environment in which GR lives with plaintiff. As the trial court noted, it appears that GR's separate living environment with each of her parents is stable. The evidence does not clearly preponderate against the trial court's finding that the parties are equal on this factor.[4]

Defendant argues that the trial court erred in treating the parties as equal under factor (g),[5] which pertains to the parties' mental and physical health. MCL 722.23(g). Defendant

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[4] The dissent claims that the trial court failed to consider that one of GR's older sisters had been removed from plaintiff's custody when it evaluated this best-interest factor. But we discern no error in the trial court failing to acknowledge this fact in this context, when defendant never argued at the trial court, or at this Court, that this fact was pertinent to this factor. If a court need not comment on every piece of evidence entered and every argument raised, *MacIntyre*, 267 Mich App at 452, then *a fortiori*, it need not comment on arguments never raised. Moreover, even if this fact is explicitly considered, we do not believe that the totality of the evidence clearly preponderates against the trial court's ultimate finding that the factor was equal with respect to both parties.

Further, contrary to the dissent's claim that the trial court failed to acknowledge that plaintiff was living in a home purchased by her boyfriend and that the boyfriend paid a large portion of the household bills, the court did acknowledge this fact. The court found, however, that irrespective of this "economically co-dependent" relationship, there was no evidence that there "is instability right there" or that GR "has been negatively affected by that." The dissent opines that plaintiff "could be forced to relocate at any time" under this arrangement, but there was no evidence to show that this is anything other than speculation.

[5] While the dissent posits that the trial court erred with respect to best-interest factor (f), which deals with the moral fitness of the parties, MCL 722.23(k), we decline to sua sponte address this

asserts that plaintiff's mental health must be questioned because he claims that she is unreasonable in coparenting and because she has supposedly failed to acknowledge GR's sexual assault allegations. There is no evidence that plaintiff faces any mental health challenges. The fact that the parties have disagreed on certain educational and medical issues in coparenting GR does not establish that plaintiff has any mental health issues. Plaintiff has not failed to acknowledge GR's sexual assault allegations—indeed, she has urged GR to undergo counseling. The trial court's finding that the parties are equal on this factor is not against the great weight of the evidence.

Next, defendant notes that the trial court made no finding on factor (h), which concerns the child's home, school, and community record. MCL 722.23(h). The trial court noted that there was no school record given GR's age but that school would become an issue in the future if the parties could not reach an agreement on schooling issues. Defendant contends that this factor should favor him because he claims that plaintiff will not cooperate in enrolling GR in preschool. Again, the testimony at the evidentiary hearing established that plaintiff wishes to enroll GR in preschool and has evaluated various preschools but that the parties disagree on which preschool GR should attend and have not yet reached an agreement on the matter. Hence, defendant has not established that he was entitled to a finding in his favor on this factor.

Defendant next challenges the trial court's finding that the parties are equal on factor (j), which concerns the willingness and ability of each parent "to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent." MCL 722.23(j). Defendant claims that plaintiff does not communicate with defendant and that plaintiff has allowed GR to call the boyfriend, "Daddy Matt." Defendant testified that plaintiff responds to fewer than 10% of defendant's emails and text messages. Defendant estimated that 98% of his emails and text messages to plaintiff pertain to coparenting. However, plaintiff testified that she responds to defendant's emails and text messages that pertain to coparenting of GR but does not respond to other emails from defendant that are instigating or antagonizing. According to plaintiff, approximately 30% of defendant's emails and text messages to plaintiff are about coparenting, whereas the other 70% are about his feelings toward plaintiff. Plaintiff acknowledged that GR has called the boyfriend, "Daddy Matt." Plaintiff testified that when GR was young, she called the boyfriend "daddy" a couple times; plaintiff then told GR that defendant was her "daddy," but GR said that the boyfriend was her "daddy too." Plaintiff responded to GR that she could call the boyfriend "Daddy Matt" but that defendant was her dad. In other words, plaintiff was attempting to explain to GR that defendant was her dad and that, as a compromise, GR could call the boyfriend, "Daddy Matt." The trial court has now ordered the parties to discourage GR from using any parental titles in addressing third parties. The evidence does not clearly preponderate against the trial court's finding that the parties are equal on this factor.

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factor because defendant on appeal does not challenge the trial court's treatment of that factor. See *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1993) (stating that the appellants' failure to argue an issue in their brief on appeal results in abandonment of the issue). Moreover, defendant argued at the trial court that this factor should favor neither party.

After discussing the above best interest factors, defendant claims that he prevails on six of the statutory best interest factors and that plaintiff has prevailed on none.[6] As explained above, however, defendant's arguments challenging the trial court's findings on the best interest factors are unavailing. Defendant has failed to establish any errors in the trial court's determinations that the parties are equal with respect to the six statutory best interest factors that defendant challenges. Accordingly, defendant has not shown by clear and convincing evidence, see *Hunter*, 484 Mich at 259, that a change in custody was in GR's best interests.

Defendant also argues that because the parties have been unable to agree on certain issues concerning medical care and education for GR, the trial court was obligated to award sole custody to one parent, and defendant argues that he should then be the custodial parent. Defendant cites *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982), in which this Court stated:

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing – including health care, religion, education, day to day decision making and discipline – and they must be willing to cooperate with each other in joint decision making. If two equally capable parents whose marriage 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. [Citation omitted.]

In determining whether joint custody is appropriate, however, the parties' ability to cooperate is but one consideration; the statutory best interest factors are also relevant to this determination. See MCL 722.26a(1); *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006); *Nielsen v Nielsen*, 163 Mich App 430, 434; 415 NW2d 6 (1987). The trial court here found the parties equal with respect to all of the relevant statutory best interest factors. Further, although the parties have had disagreements concerning preschool and medical issues, the trial court urged the parties to consider using a parenting coordinator, which was available through the Friend of the Court. Defendant fails to address whether the parties have followed through on the trial court's suggestion to explore this means of resolving their differences. The present record does not establish that the parties' differences are incapable of being resolved. Finally, given that the trial court did not clearly err in finding the parties equal with respect to the relevant best interest factors, defendant's claim that any award of sole custody must be in his favor is unavailing.

Affirmed.

/s/ Mark T. Boonstra
/s/ Jonathan Tukel

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[6] The dissent claims that the trial court erred when it failed to consider factor (k), which deals with domestic violence. MCL 722.23(k). But once again, defendant has not raised this issue on appeal, so it is not properly before us. See *Froling*, 203 Mich App at 373.

S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

SHELLEY ROZMIAREK, Plaintiff-Appellee,	UNPUBLISHED July 19, 2018
v	No. 339976 Monroe Circuit Court Family Division
JOSEPH ROZMIAREK, Defendant-Appellant.	LC No. 13-036428-DM

Before: GLEICHER, P.J., and BOONSTRA and TUKEL, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

Shelley and Joseph Rozmiarek have battled over custody of their young daughter, GR, since their 2014 divorce. In this latest installment, Joseph attempted to secure physical custody of GR on an 80-20 split based on a CPS-substantiated claim of sexual abuse against Shelley's live-in boyfriend, Matt Dickerson. The circuit court refused to consider any evidence regarding GR's description of the sexual abuse, ignored or inadequately considered relative factors affecting the best interests of the child, and denied Joseph's motion to amend the custody order. The court went a step further and lifted its temporary order precluding contact between GR and Dickerson. The court did not meet its duty to protect the child and ensure that her custody arrangement serves her best interest. Accordingly, I would vacate the circuit court's orders and remand for further consideration.

I. BACKGROUND

Shelley and Joseph were married one month before GR was born in March 2013. Their marriage was short; their divorce was final on July 1, 2014. The judgment of divorce granted Shelley full physical custody of GR, but three months later, the parties consented to equally shared custody on a rotating week basis. *Rozmiarek v Rozmiarek*, unpublished per curiam opinion of the Court of Appeals, issued July 26, 2016 (Docket No. 330980), p 1.

Approximately two weeks before entering the consent order, Shelley drove while under the influence of morphine and physically assaulted her oldest daughter, who was then 17. Child Protective Services substantiated a case against Shelley and removed GR from Shelley's home for a short time. Shelley eventually pleaded no contest to a misdemeanor child abuse charge, was sentenced to one year of probation, and was court ordered to perform three days of

community service, undergo a psychological evaluation, and complete a 26-week domestic violence program. *Id*. at 1-2.

Joseph filed motions seeking full or increased custody of GR on April 9 and October 7, 2015. In addition to Shelley's substance use and abuse of her 17-year-old daughter, Joseph relied on Shelley's failure to attend GR's medical appointments and to give her prescribed allergy medications, her decisions to smoke and keep a pet despite GR's severe allergies, allowing GR to ride in a boat without a life jacket, and exposing the child to a new paramour—Matt Dickerson—in violation of the divorce judgment's background check and waiting period requirements. *Id*. The circuit court denied Joseph's motions, refusing even to find proper cause or a change in circumstances as Joseph was aware of many of these issues before consenting to the 50-50 custody arrangement. *Id*. at 2-3.

Joseph appealed the circuit court's second order rejecting his bid for custody. In a 2-1 split decision, this Court affirmed. In doing so, the majority noted that Shelley's "altercation" with her teenage daughter occurred before entry of the consent custody order and held that the evidence did not clearly preponderate against the circuit court's conclusion that the facts did not rise to a sufficient level to overlook the motion's timing. *Id*. at 5-6.

The dissent reasoned that the criminal charges levied against Shelley and her no-contest plea "constituted an escalation of the issue that existed when the court entered the last custody order." *Rozmiarek v Rozmiarek*, unpublished opinion of the Court of Appeals, issued July 26, 2016 (Docket No. 330980) (JANSEN, J., dissenting), p 2. The dissent further reasoned that "the incident of child abuse" against Shelley's older daughter "increases the risk that GR will be subjected to abuse" in the future, a change in circumstances warranting a new look at the custody arrangement. *Id*. at 3.

Matters did not improve thereafter. On July 28, 2016, Shelley failed to bring GR to an appointment with a specialist to address her hemangioma. Joseph complained that Shelley responded to only approximately 10% of his messages regarding GR and failed to communicate during parenting time transfers regarding important medical information. Joseph suspected that Shelley was not regularly giving GR her medications. Shelley brought Dickerson to GR's doctor appointments, asserting that she was afraid to be alone with Joseph. And the pair could not agree on preschool or daycare arrangements for GR.

On January 23, 2017, Joseph filed another motion to change custody, alleging that four days earlier GR told him that Dickerson had touched inside her "pee pee." Joseph had taken GR to the emergency room for examination and the hospital contacted CPS. After interviewing GR and reviewing the medical records, CPS substantiated the sexual abuse claim. *The court precluded the CPS investigator's testimony regarding GR's statements about the abuse.* CPS instructed Shelley to remove Dickerson from her home and to prevent all contact between Dickerson and her child. Shelley complied, but continued her romantic relationship with Dickerson when GR was not in her custody. CPS placed Dickerson on the central registry for child abuse and neglect and warned Shelley that although it was closing the matter, a new CPS action could be initiated if Dickerson was found in GR's presence. The prosecutor, however, declined to bring criminal charges against Dickerson.

Shelley believed that Joseph coached GR to accuse Dickerson of sexual abuse and requested counseling for the child to find the root of the allegations. Although she requested counseling, Shelley delayed in agreeing to a therapist. As a result, GR had only visited Dr. Kenneth Cunningham four times leading up to the evidentiary hearing. *The court also precluded Dr. Cunningham from testifying about GR's statements regarding the abuse.*

Joseph testified at the evidentiary hearing that GR told him, "Daddy, Matt touches my pee pee," "inside my pee pee," and mimed digital-vaginal penetration. Joseph described that GR was distraught and upset when she made this revelation. About six weeks earlier, Joseph asserted, GR had complained about discomfort in her vaginal area and he took her to the pediatrician. At that time, GR's vaginal area was "fire engine red." Ultimately, the court indicated that *it would not consider GR's statements to Joseph* because they were hearsay and did not fall within the proffered exception to the hearsay rule—excited utterance.

At the close of the hearing, the circuit court again denied Joseph's motion to amend the custody arrangement. The court agreed that the substantiated sexual abuse allegations provided a change of circumstances or proper cause to reconsider the child's best interests. However, the court found that the parents remained equal under the best-interest factors of MCL 722.23 and therefore maintained the equal parenting time arrangement.

II. CHILD'S OUT-OF-COURT STATEMENTS

I discern no error in the circuit court's preclusion of statements made by GR to the CPS investigator and Dr. Cunningham. Although highly relevant to the matter at hand, no hearsay exception applies to permit the admission of GR's out-of-court statements to these individuals. I am troubled, however, by the exclusion of Joseph's testimony describing his young daughter's revelation of the abuse against her. I agree with the majority that GR's statements to her father do not fall within the hearsay exception for excited utterances and therefore could not be admitted for the truth of the matter asserted. However, the statements should have been admitted for a different purpose—to establish the impact the statements, whether true or not, had on her parents.

An out-of-court statement is only considered hearsay if it is "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Out-of-court statements are admissible if used for other purposes. "An out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted, does not constitute hearsay under MRE 801(c)." *People v Gaines*, 306 Mich App 289, 306-307; 856 NW2d 222 (2014). See also *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998) (the defendant's negative comments regarding the plaintiff were admissible "to show effect . . . on the parties' children"); *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994) (statement admitted to explain that it induced the defendant to take certain actions).

The content of GR's statement, whether true or not, led Joseph to take her to the emergency room and triggered the CPS investigation. Shelley, on the other hand, did not believe GR's statement when she learned of it, and instead assumed that Joseph had coached her. As a result, she continued dating Dickerson even after CPS required him to move out of their shared home. Knowing what GR said was necessary to gauge the propriety of Joseph's and Shelley's

reactions. The circuit court disregarded the substance of GR's accusation and therefore made no consideration of Joseph's and Shelley's response in assessing whether alteration of the custodial arrangement would be in GR's best interests. This failure leaves a hole in the record that the circuit court should fill before any appellate court takes up the matter.

III. BEST INTEREST ANALYSIS

The circuit court also did not give adequate consideration to the statutory best interest factors of MCL 722.23. When reconsidering an award of custody, a court must evaluate each of the statutory best interest factors and explicitly state its findings and conclusions on the record. *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1992). It is appropriate for the court to determine that certain factors are not relevant to the dispute before it, as long as the court places that finding on the record. *Pierron v Pierron*, 486 Mich 81, 91; 782 NW2d 480 (2010). We review the circuit court's factual findings, including its finding that certain factors are irrelevant, under the great weight of the evidence standard and may only overrule the lower court's findings when the evidence "clearly preponderates in the opposite direction." *Id*. at 85 (quotation marks, citation, and alteration omitted).

The circuit court incorrectly limited its review of the best interest factors to events occurring since the last custody order. In doing so, the court conflated the temporal requirement related to the establishment of a change in circumstances to modify a custody order with the analysis of whether a change in the custodial arrangement would be in the child's best interests. While a change in circumstances must exist since the entry of the last custody order in order to modify that custody order, no such time requirement exists for evaluating a proper cause or the best-interest factors. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 514-515; 675 NW2d 847 (2003). Indeed, limiting the evaluation of the best-interest factors to the time since the previous custody order would not promote the child's best interest.

As a result of the circuit court's self-imposed temporal limitation on its best-interest analysis, the court ignored important facts impacting the child. For example, the circuit court found the parties equal under MCL 722.23(d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," and (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." The court failed to consider that one of GR's elder sisters had been removed from their mother's custody due to child abuse and therefore was no longer part of GR's family unit. Also directly impacting the stability of GR's home life with Shelley is the fact that CPS briefly removed GR from Shelley's care during its prior investigation into the child abuse allegations. Although this occurred prior to the court's last custody order, it was still a factor weighing against Shelley in considering the child's best interests.

The court further failed to take into account highly relevant information that arose after the last custody order. In considering the permanence of the family unit, the court did not acknowledge that Shelley was living in a home purchased by Dickerson and that Dickerson still paid a large share of the household bills. When the circuit court lifted its temporary injunction against Dickerson, CPS had not rescinded its warning that it would resuscitate its intervention if Shelley allowed Dickerson contact with GR. The record evidence supports that Shelley and her

children could be forced to relocate at any time, another strike against Shelley in relation to factor (e).

The circuit court also erroneously determined to "make[] no finding" regarding the moral fitness of the parties. MCL 722.23(f) was highly relevant in this matter. The court avoided its duty to assess the credibility of the witnesses, to find whether Joseph coached GR to lie or whether Shelley unreasonably disregarded GR's accusation as it conflicted with her romantic interests. Additionally, Shelley's prior substance use and physical abuse against another child should come into play in weighing the moral fitness of the parties, yet the circuit court ignored this evidence.

On a related note, the circuit court omitted any reference to Shelley's abuse of her 17-year-old daughter when weighing MCL 722.23(k), "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Shelley pleaded no contest to the assault charges against her, essentially conceding that she had committed an act of domestic violence. If GR's accusation of sexual abuse is believed, Shelley would have continued a pattern of domestic violence, this time by failing to protect her child from her boyfriend. In any event, this factor was not irrelevant to the consideration before the court.

Ultimately, however, the issue comes down to credibility—an assessment of the parties' motives and the reasonableness of their actions. This Court is not equipped to evaluate these factors in the first instance. Accordingly, I would remand to the circuit court for further consideration of the best interest factors, taking into account the effect on the parties of GR's description of the abuse and the entire record of evidence impacting the custody decision.

/s/ Elizabeth L. Gleicher