STATE OF MICHIGAN

COURT OF APPEALS

JAMIE LEE HATFIELD,

Plaintiff-Appellee,

v

JESSE ALLAN FARMAN,

Defendant-Appellant.

UNPUBLISHED
April 23, 2020

No. 350243
Kalamazoo Circuit Court
LC No. 2005-007272-DS

Before: CAVANAGH, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Defendant, Jesse Allan Farman, appeals as of right the trial court's order awarding plaintiff, Jamie Lee Hatfield, sole legal and physical custody of the parties' two children, JF and RF. For the reasons set forth below, we hold that the trial court erred by failing to adequately discuss the statutory best-interest factors when making its custody determinations. Although this claim of error is moot with respect to JF, who has since attained the age of 18 years, it is not with respect to RF. The trial court also erred when it imputed income to defendant for purposes of determining child support without discussing the relevant factors in the Michigan Child Support Formula (MCSF) Manual. However, defendant has not shown that the trial court erred when it made its concurrent parenting-time decision, and the record does not support defendant's arguments that the trial court was biased against him, or that he was denied due process. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

I. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant first argues that the trial court erred by failing to make specific findings concerning the existence of an established custodial environment for each child indivdually, particularly JF. Because defendant did not argue below that the trial court was required to consider the custodial environment of each child separately, or that it erred by failing to do so, this issue is unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Therefore, we review this issue for plain error affecting defendant's substantial rights. *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain,

i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999). The third requirement generally necessitates a showing of prejudice, i.e., that the error affected the outcome of the trial court proceedings. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

Preliminarily, defendant's challenge to the trial court's finding that JF had an established custodial environment only with plaintiff is moot. "An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *Mich Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). When resolving a custody dispute, a trial court must first determine whether a child has an established custodial environment with either parent. *Pierron v Pierron*, 282 Mich App 222, 243-244; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010). However, MCL 722.27(1)(a) provides that in a child custody dispute, a court may "[a]ward the custody of the child to 1 or more of the parties involved . . . *until the child reaches 18 years of age*" (emphasis added). JF recently attained the age of 18 years. Thus, even if the trial court failed to provide a sufficient explanation for why it found that JF's established custodial environment existed only with plaintiff, we cannot grant any relief. Because this issue is moot with respect to JF, we do not address it further. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014) ("We generally do not address moot questions or declare legal principles that have no practical effect in a case.").

It is unclear whether defendant is also challenging the adequacy of the trial court's findings that RF had an established custodial environment solely with plaintiff. To the extent he raises this issue, we find no error.

MCL 722.27(1)(c) provides, in pertinent part:

> 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.

Under MCR 2.517(A)(1), the trial court is required to "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." "The court may state the findings and conclusions on the record or include them in a written opinion." MCR 2.517(A)(3). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts." MCR 2.517(A)(2).

In the instant case, the trial court agreed that defendant had a "wonderful bond" with both children and that it was clear that he loved them. However, the court found that "the responsibility of the day to day life and struggles has fallen on [plaintiff] year after year after year since 2015." The court stated that defendant was not there for plaintiff and the children, and the court noted that helping out included helping with both finances and "emotional stuff." The court found that while the children may have had an established custodial environment with defendant for a period of time when the parties were previously together, they had looked solely to plaintiff since 2015,

particularly JF, who considered plaintiff "to be his rock." The trial court announced its agreement with the findings and conclusions reached by the referee, who found that

> the established custodial environment, for both children, is with the mother. The children have resided with her for a significant period of time; their relationship is marked with stability, structure, security, and permanence. The mother provides their daily health needs and ensures that [JF] is receiving necessary services . . . . The mother attends to routine medical and dental appointments. The mother attends parent teacher conferences and school activities.

The trial court's findings and conclusions concerning the children's custodial environment were sufficient to satisfy MCR 2.517(A)(2). Contrary to defendant's argument on appeal, the referee and the trial court discussed specific facts relevant to a determination of an established custodial environment for both children. Accordingly, defendant is not entitled to relief with respect to this issue.

II. BEST INTERESTS

Defendant argues that the trial court erred in several respects in its decisions to award plaintiff sole legal and physical custody of JF and RF, including by failing to properly analyze the statutory best-interest factors in MCL 722.23. With respect to JF, defendant's claims of error are moot because the child has attained the age of 18. However, we agree that the trial court erred by awarding plaintiff sole legal and physical custody of RF without discussing the best-interest factors.

The parties, who were never married, were living together when plaintiff gave birth to RF in 2010. Defendant acknowledged his paternity of RF under the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., thereby giving custody of RF to plaintiff pursuant to MCL 722.1006.[1] This grant of custody includes legal custody. *Sims v Verbrugge*, 322 Mich App 205, 211; 911 NW2d 233 (2017). However, this statutory grant of custody to plaintiff was without prejudice to a later determination of defendant's custodial rights and could not, by itself, "affect the rights of either parent in a proceeding to seek a court order for custody or parenting time." MCL 722.1006. Defendant is correct that, when making this initial custody determination, the trial court was required to evaluate the factors in MCL 722.23 and state its conclusions on each factor to determine the child's best interests. Trial courts have a "duty to ensure that the resolution of *any* custody dispute is in the best interests of the child." *Harvey v Harvey*, 470 Mich 186, 191-192; 680 NW2d

[1] MCL 722.1006 provides:

> After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.

835 (2004) (emphasis added). MCL 722.23 defines the "best interests of the child" as "the sum total of the" factors set forth in MCL 722.23(a)-(l). "In child custody cases, the family court must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them." *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007). See also *Thompson v Thompson*, 261 Mich App 353, 356-357; 683 NW2d 250, 256 (2004) (a party is entitled to a hearing and the trial court must make best-interest findings after a temporary custody order.) "The trial court may not '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.' " *Thompson*, 261 Mich at 362, quoting, MCL 722.27(1)(c).

In this case, the trial court agreed with the referee and found that RF had an established custodial environment solely with plaintiff. Thus, the next inquiry should have been whether defendant could demonstrate by clear and convincing evidence that a change of this established custodial environment would be in RF's best interests or whether plaintiff had shown by a preponderance of the evidence that she should be awarded custody. *Pierron*, 282 Mich App at 248. In its recommended order, the referee discussed the best-interest factors in MCL 722.23 and determined that it was in the best interests of both children to award plaintiff sole physical and legal custody. The referee also discussed the parenting-time factors in MCL 722.27a. After the de novo hearing, however, the trial court discussed only the parenting-time factors. With respect to the referee's findings, the court stated only, "I find that [the referee] had it absolutely succinct from the same evidence I heard and I heard a whole new trial over again." A trial court's failure to explicitly articulate its findings of the best-interest factors may not require reversal if "such a finding can easily and clearly be drawn from the trial court's . . .opinion." *Powery v Wells*, 278 Mich App 526, 530; 752 NW2d 47 (2008). Moreover, the trial court was not required to make "any independent findings concerning the child's best interests" before approving the recommendation of the referee as long as the record shows that the referee considered the child's best interests. *Rivette v Rose-Molina*, 278 Mich App 327, 330; 750 NW2d 603 (2008). In this case, however, the trial court's brief statement is insufficient to determine whether the court was adopting the referee's findings and rationale concerning parenting time, best interests, or both.

Generally, when a trial court does not make best-interest findings, "the proper remedy is reversal and a remand for a new child-custody hearing." *Id*. However, unlike in *Rivette*, *id*. at 330-331, the referee did make best-interest findings here. The trial court's statement concerning its agreement with the referee's findings is ambiguous, but the court clearly adopted at least part of the referee's analysis. Under the circumstances, we remand to permit the trial court to clarify its rationale for its custody determination regarding RF consistent with this opinion.

III. PARENTING TIME

Defendant also argues that the trial court erred by failing to separately consider the parenting-time factors listed in MCL 722.27a with respect to each child. The record discloses that both the referee and the trial court discussed each of the parenting-time factors. Defendant has presented no support for the proposition that the trial court was required to address each factor separately for each child. In addition, defendant does not explain how an individualized consideration of the parenting-time factors would have likely resulted in a different outcome. Because of defendant's failure to cite authority in support of his position, and his failure to

adequately brief the merits of this alleged error, we decline to consider this issue. *Shade v Wright*, 291 Mich App 17, 33; 805 NW2d 1 (2010).

IV. JUDICIAL BIAS

Defendant next argues that the trial court's decisions at the de novo hearing indicate that the court was biased against him. Because defendant did not raise this issue in an appropriate motion or objection in the trial court, the issue is unpreserved. *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44, 56 n 2; 539 NW2d 382 (1995). Therefore, we review this issue for plain error affecting defendant's substantial rights. *Hogg*, 307 Mich App at 406.

In *Kern v Kern-Koskela*, 320 Mich App 212, 232; 905 NW2d 453 (2017), this Court explained:

> Due process requires that an unbiased and impartial decision-maker hear and decide a case. However, a trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption. Grounds for disqualification are set forth in MCR 2.003(C)[.]
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> Under MCR 2.003(C)(1)(a), a judge must be disqualified from hearing a case in which he or she cannot act impartially or is biased against a party. Judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality. In fact, a trial judge's remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias. Under MCR 2.003(C)(1)(b), the test for determining whether there is an appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. [Quotation marks and citations omitted.]

We perceive no actual bias or prejudice in this case. Although defendant complains that the trial court referred to him as "unemployed," "homeless," and "an addict," these characterizations were a fair assessment of the evidence presented. Defendant was unemployed and he was a recovering addict who had previously relapsed and was still in active methadone treatment. He was not technically homeless, but he was living in his mother's basement. To the extent the trial court mischaracterized defendant's living situation, this does not rise to the level of actual bias.

Defendant also maintains that the trial court was biased against him because the court cut short and interrupted his testimony in order to hear testimony from one of plaintiff's witnesses. With respect to the latter, the trial court asked defendant if he objected to halting his testimony in order to let JF's psychiatrist testify and defendant replied, "No." The fact that the trial court asked for defendant's consent refutes any suggestion that the court was biased against him. Moreover,

because defendant gave his consent to this procedure, defendant affirmatively waived any claim of error in this regard. *People v Fetterley*, 229 Mich.App 511, 520; 583 NW2d 199 (1998).

In addition, with respect to defendant's claims of error, a trial court is obligated to control the trial proceedings, and the court has wide latitude to exercise its discretion in performing that obligation. See *People v Conley*, 270 Mich App 301, 305, 715 NW2d 377 (2006). A trial court also has the inherent authority to control its own docket. See *Baynesan v Wayne State Univ*, 316 Mich App 643, 651; 894 NW2d 102 (2016). Defendant complains that the trial court asked him to complete his own testimony because the court noted that it was concerned with time. However, defendant continued to testify at length. The record does not support defendant's claim that he was rushed.

Defendant also argues that he was not permitted to introduce a video of his interactions with his children. When he initially attempted to introduce the video, which he had not previously furnished to plaintiff, the trial court noted that it planned to finish the case by the end of the day, and that if the court had time it would get back to it. At the end of defendant's testimony, the court asked whether defendant had introduced any other exhibits, and defendant agained mentioned the DVD. Defendant then stated that he wanted the court to view it "if we have time at the end." It appears the court did not do so. While the trial court may not have allowed defendant to introduce this evidence, the record does not support a finding that the court was biased against defendant. *Kern*, 320 Mich App at 232. To the contrary, we are satisfied from our review of the record that the court provided defendant, who was representing himself at this point, significant leeway in presenting his case while also adhering to its responsibility to control the proceedings by ensuring that defendant did not stray too far from the relevant issues. Defendant has not met the heavy burden of demonstrating that the trial court was actually biased against him.

V. DUE PROCESS

Defendant also argues that he was denied due process. We again disagree. The record discloses that defendant was provided with the fundamental requirements of due process, i.e., notice and an opportunity to be heard. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213-214, 761 NW2d 293 (2008). As discussed earlier, defendant was able to testify at length even after the trial court requested that he not waste time. Defendant was also able to present other witnesses, question plaintiff, and cross-examine witnesses. Defendant's complaint that he was rushed is not supported by the record.

Defendant also argues that he was "subtly" denied due process because of the length of time between the initial referee findings and the de novo hearing. However, because defendant fails to cite any support for this position, we decline to address it. *Shade*, 291 Mich App at 33.

VI. CHILD SUPPORT

Defendant also argues that the trial court erred when it imputed income to him for purposes of determining child support without reviewing the factors listed in the MCSF Manual. We agree.

The child support formula "shall be based upon the needs of the child and the actual resources of each parent." MCL 552.519(3)(a)(*vi*). "In applying this mandate, cases have

broadened the limits of 'actual resources' to include certain payers' unexercised ability to pay." *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998). However, if the trial court wishes to impute income to a parent because of what it believes is an unexercised ability to pay, it must make specific findings of fact on a number of factors "such as employment history, education and skills, available work opportunities, diligence in trying to find work, the defendant's personal history, assets, health and physical ability, and availability for work." *Id*. at 198-199. These factors are recited in the MCSF Manual. *Id*. at 189.

The MCSF Manual also precludes the inclusion of means-tested income when determining income. See 2017 MCSF 2.04(A). In *Ghidotti*, our Supreme Court reversed this Court's affirmance of a trial court's decision to impute income to the defendant, who received means-tested benefits, "based on the finding of the Calhoun Friend of the Court's investigation that she 'suffered from no condition or restriction that would preclude her from obtaining gainful employment.' " *Id*. at 197-198 (quotation marks and citation omitted). The Court held that the trial court's imputation of income to a parent who receives means-tested income was a deviation from the MCSF and that the trial court failed to follow the statutory procedures for making such a deviation. *Id*. at 204.[2]

The instant case requires a similar result. Defendant has a Bridge card, which is a type of means-tested benefit. Neither the referee's recommendation nor the trial court's decision contain any of the specific findings necessary when determining whether to impute income to a party for a deviation from the MCSF provisions disallowing the imputation of income to a person receiving means-tested benefits. The trial court did not follow the holding in *Ghidotti* that such imputation is improper unless the court determines why following the formula "would be unjust or inappropriate." *Ghidotti*, 459 Mich at 204. The referee discussed defendant's depression and his intentions to finish school and become self-employed as a financial planner. The referee also noted that there was no evidence that defendant was unable to work. The trial court stated only that it thought that the child support order is accurate and that it "[did not] see any reason dad can't get a

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[2] We note that *Ghidotti* relied on language in an earlier version of the MCSF Manual and language from an earlier version of MCL 722.717(3). MCL 722.717(3) now refers to "the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650." MCL 552.605(2) sets forth substantially identical language to that relied on in *Ghidotti*. It provides that a court may deviate from the formula if the court determines from the facts of the case that application of the formula would be unjust or inappropriate and sets forth in writing or on the record the following:

> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

minimum wage job." We agree with defendant that these findings are inadequate. In addition, defendant presents a meritorious argument that the trial court appeared to treat the evidence of defendant's bouts of severe depression inconsistently, relying on them when assessing the parenting-time factors, but minimizing them when determining that the state of defendant's mental health did not prevent him from working. Accordingly, we reverse the trial court's child support order and remand for further proceedings.

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

/s/ Mark J. Cavanagh
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher