STATE OF MICHIGAN

COURT OF APPEALS

JACQUELYN MARIE CARPENTER,

Plaintiff-Appellee,

v

XAVIER DEMOND HARRIS,

Defendant-Appellant.

UNPUBLISHED
October 14, 2021

No. 356342
Mecosta Circuit Court
Family Division
LC No. 2019-024906-DP

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Defendant, Xavier Demond Harris, appeals by right the trial court's order granting the parties joint legal custody of their minor child, but granting primary physical custody to plaintiff, Jacquelyn Marie Carpenter. We affirm.

I. FACTS

The parties' child was born in Michigan in 2014. At the time the child was born, defendant lived in Florida. In December 2014, plaintiff and the child joined defendant in Florida and lived there until February 2015. During part of that time, defendant was working in North Dakota. In February 2015, plaintiff and the child returned to Michigan and stayed with plaintiff's mother. In April 2015, plaintiff and the child again joined defendant in Florida and lived there until June 2017.

In June 2017, plaintiff and the child returned to Michigan, and the parties agreed that they would alternate physical custody of the child every few months. The child lived with plaintiff in Michigan until August 2017, then lived with defendant in Florida from August 2017 until December 30, 2017. During that time, the parties decided to end their relationship. The child lived with plaintiff in Michigan from December 30, 2017 until May 26, 2018, lived with defendant in Florida from May 26, 2018 to September 4, 2018, then returned to live with plaintiff in Michigan until from September 4, 2018 to December 16, 2018.

On December 16, 2018, plaintiff and the child met defendant at the Detroit airport. While at the airport, defendant presented plaintiff with an agreement that he urged her to sign. Plaintiff

testified that she believed that the agreement was an authorization to enable defendant to proceed through the airport with the child. The agreement, however, suggested that plaintiff was transferring custody of the child to defendant, that plaintiff relinquished the right to schedule future visits with the child, that the child would remain in Florida, that all visits with the child would take place in Florida, that defendant was not responsible for child support, and that the agreement would be enforceable under Florida law.

In March 2019, plaintiff initiated this action in the Mecosta Circuit Court seeking determination of paternity, custody, parenting time, and support for the child. On April 1, 2019, plaintiff arrived in Florida to pick up the child, but discovered that defendant was not at the airport. Defendant told her that he would not relinquish the child until she signed a document agreeing that he was the child's custodial parent. On April 3, 2019, plaintiff filed an ex parte motion in the Mecosta Circuit Court seeking return of the child. On April 4, 2019, the trial court ordered defendant to immediately return the child to plaintiff. Plaintiff returned to Florida and defendant relinquished the child to her on April 11, 2019.

Defendant thereafter moved to dismiss the custody action in Michigan, contending that the custody of the child was more properly determined in Florida. Among other assertions, defendant argued that Michigan was not a convenient forum for the determination of the child's custody. The trial court denied defendant's motion, determining that it had jurisdiction over the child and rejecting defendant's contention that Michigan was not a convenient forum.

While the case was pending before the trial court, the child lived with plaintiff in Michigan from April 2019 until June 2020, visited defendant from June 2020 to August 2020, and lived with plaintiff from August 2020 until the trial court's decision in January 2021. After extensive hearings, the trial court determined that the child had an established custodial environment with plaintiff, granted plaintiff primary physical custody of the child during the school year, granted defendant parenting time during the child's vacations from school, and granted the parties joint legal custody of the child. Defendant now appeals.

II. DISCUSSION

A. STANDARD OF REVIEW

Section 8 of the Child Custody Act of 1970, MCL 722.28, provides that "all orders and judgments of the circuit court shall be affirmed on appeal 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." "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Pennington v Pennington*, 329 Mich App 562, 570; 944 NW2d 131 (2019). To whom custody is awarded is a discretionary ruling that should be affirmed absent an abuse of the trial court's discretion. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994). In a child custody case, a trial court has not abused its discretion if its decision was not "so palpably and grossly violative of fact and logic that it evidences a

perversity of will, a defiance of judgment, or the exercise of passion or bias."[1] *Id*. at 879-880; *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014).

Absent a factual dispute, this Court reviews de novo whether the trial court had jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. *Veneskey v Sulier*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 355471); slip op at 2. The trial court's decision to exercise its jurisdiction under the UCCJEA is a discretionary one that we review for an abuse of discretion. *Id*.

B. INCONVENIENT FORUM

Defendant contends that the trial court erred by exercising jurisdiction over the child because Michigan was an inconvenient forum, and Florida was a more appropriate forum. We disagree.

A custody proceeding involving Michigan and a party outside of this state is governed by the UCCJEA. *Hernandez v Mayoral-Martinez*, 329 Mich App 206, 210; 942 NW2d 80 (2019). Under the UCCJEA, the initial custody decision regarding the child must take place in the child's home state, unless the home state declines to exercise jurisdiction because another state is a more appropriate forum. *Foster v Wolkowitz*, 486 Mich 356, 359; 785 NW2d 59 (2010). Section 201 of the UCCJEA, MCL 722.1201, provides:

> (1) Except as otherwise provided in section 204 [MCL 722.1204], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 207 or 208 [MCL 722.1207 or 722.1208], and the court finds both of the following:

[1] Although an abuse of discretion in non-custody cases is defined as a decision "outside the range of reasonable and principled outcomes," in child custody cases an abuse of discretion retains its historic definition of "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." *Kostreva v Kostreva*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket Nos. 352029 and 353316); slip op at 2 n 1.

(*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have significant connection with this state other than mere physical presence.

(*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.

(d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.

MCL 722.1201(1)(a) thus provides that a Michigan court has jurisdiction if Michigan is the child's home state, or was the child's home state within six months of the commencement of the proceedings. *Hernandez*, 329 Mich at 210. When the child has no home state under the UCCJEA, or the child's home state has declined to exercise jurisdiction on the basis that Michigan is a more appropriate forum, the trial court must consider whether Michigan has jurisdiction over the child based on "significant connections," as set forth in MCL 722.1201(1)(b). *Veneskey*, ___ Mich App at ___; slip op at 3. If in that circumstance the trial court finds both that the child and at least one parent, or a person acting as parent, have significant connections with Michigan, other than mere physical presence, and substantial evidence is available in Michigan concerning the child's care, protection, training, and relationships, the trial court has jurisdiction to make an initial child custody determination. MCL 722.1201(b). But even when a Michigan court has jurisdiction under the UCCJEA, the trial court may decline to exercise that jurisdiction if the trial court determines that the court presents an inconvenient forum for the custody determination, and that another state is a more appropriate forum. MCL 722.1207(1); see *Venesky*, ___ Mich App at ___; slip op at 4-5. We review the trial court's determination regarding the convenience of the forum for an abuse of discretion. *Id*. at ___; slip op at 4.

In this case, the parties do not dispute that the trial court had jurisdiction to decide the custody of the child. The trial court correctly determined that the child had no home state because neither Michigan nor Florida met the requirements of a home state under MCL 722.1201(1)(a), but that Michigan nonetheless had jurisdiction based on significant connections under MCL 722.1201(1)(b). Defendant asserts, however, that the trial court abused its discretion by exercising its jurisdiction to determine the child's custody in this case, and that the trial court instead should have determined that Michigan was an inconvenient forum for determining the child's custody and that Florida was a more appropriate forum, and therefore should have declined to exercise jurisdiction to make the child custody determination under MCL 722.1207(1).

MCL 722.1207 provides, in relevant part:

(1) A court of this state that has jurisdiction under this act to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon the motion of a party, the court's own motion, or the request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including all of the following:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.

(b) The length of time the child has resided outside this state.

(c) The distance between the court in this state and the court in the state that would assume jurisdiction.

(d) The parties' relative financial circumstances.

(e) An agreement by the parties as to which state should assume jurisdiction.

(f) The nature and location of the evidence required to resolve the pending litigation, including the child's testimony.

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.

(h) The familiarity of the court of each state with the facts and issues of the pending litigation. [MCL 722.1207(1), (2).]

Under MCL 722.1207(2), before a Michigan trial court determines whether it is an inconvenient forum, it must consider whether it is appropriate for a court of another state to exercise jurisdiction. In doing so, the trial court must permit the parties to submit information and must consider "all relevant factors," including the factors itemized under MCL 722.1207(2). The record in this case indicates that in keeping with MCL 722.1207(2), the trial court permitted the parties to submit information, and that the parties did so. The trial court then considered the information submitted, as well as the relevant statutory factors. With respect to factor (a), the trial court found that no evidence of domestic violence had been presented. With respect to factor (b), the trial court found that at that time the child had resided for more time in Florida than in Michigan. With respect to factors (c) and (d), the trial court found that there was a great distance between Michigan and Florida for either parent to travel, but that defendant's significantly higher income made him financially better able to travel than plaintiff.

With respect to factor (e), the trial court found that the parties had no agreement about custody, parenting time, visitation, support, or paternity. The trial court observed that although it appeared that plaintiff signed the agreement that defendant had presented to her on December 16,

2018,[2] and that the agreement identified Florida law as determinative, plaintiff had been pressured to sign the agreement and had signed it only under great stress or duress, rendering the agreement unenforceable. The trial court also found the agreement unenforceable because it provided that defendant had no child support obligation at that time or in the "foreseeable future."

With respect to factor (f), the nature and location of the evidence, the trial court determined that the parties' witnesses were located in both Michigan and Florida, but that witnesses would be allowed to testify remotely if necessary. With respect to factors (g) and (h), the trial court considered that it was able to hear the case expeditiously and was familiar with the facts of the case, and that there was no reason to conclude that the same was not true of Florida. The trial court concluded that because most factors were equal, with a slight advantage to Michigan, Florida was not a more appropriate forum and Michigan was not an inconvenient forum. Consequently, the trial court did not decline to exercise its jurisdiction to determine paternity, custody, parenting time, and support with respect to the child.

Defendant argues, however, that the trial court should have determined that factors (c) and (d) favored Florida because plaintiff was the party who chose to move to Michigan from Florida. Those factors, however, required the trial court to consider "[t]he distance between the court in this state and the court in the state that would assume jurisdiction" and "the parties' relative financial circumstances." MCL 722.1207(2)(c) and (d). The statute does not require the trial court to penalize plaintiff for returning to Michigan. Here, the record demonstrates that defendant was self-employed, was able to work from home, and made more money than plaintiff. By contrast, plaintiff was a dental hygienist who received only 28 hours of vacation a year and could not work remotely. The court did not err by weighing these factors in favor of Michigan as a forum.

Defendant also argues that the parties' jurisdiction agreement was enforceable and weighed in favor of Florida as a forum under factor (e). But although the parties signed an agreement in December 2018 that indicated that agreements concerning the child would be governed by Florida law, the parties dispute whether plaintiff read the agreement, whether defendant misrepresented it to her, and whether plaintiff was rushed or stressed by trying to get the child onto a plane when the agreement was presented. The trial court determined that the agreement was unenforceable because it was signed under either duress or stress, and the record supports that finding.

Defendant further argues that the nature and location of the evidence did not favor Michigan as a convenient forum. Both parties offered a number of people in their respective locations who could testify about the child's well-being. The trial court found that plaintiff offered more specific witnesses with knowledge of the child and noted that defendant's witnesses could testify remotely, and the record supports this finding.

In sum, the trial court considered the statutory factors and determined that the convenience of Michigan and Florida as forums was roughly equal, with a slight advantage to Michigan as the more convenient forum. We also observe that although the statute requires the trial court to consider the statutory factors before determining whether Michigan was an inconvenient forum,

[2] Plaintiff does not dispute that she also signed an agreement that defendant sent her on December 8, 2018, which she believed also related to defendant transporting the child.

the trial court was not required by the statute to give the factors any particular weight. We thus conclude, as did the trial court, that consideration of the factors did not reveal Michigan to be an inconvenient forum, nor did it reveal Florida to be a more appropriate forum. The trial court therefore did not abuse its discretion by exercising its jurisdiction over the child in this case.

C. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant next contends that the trial court erred when it found that the child had an established custodial environment with plaintiff. We disagree.

The paramount purpose of the Child Custody Act, MCL 722.21, *et seq*., is to provide "a stable environment for children that is free of unwarranted custody changes. . . ." *Lieberman v Orr*, 319 Mich App 68, 78; 900 NW2d 130 (2017) (quotation marks and citation omitted). To achieve this purpose, the Child Custody Act authorizes a trial court to award custody and parenting time in a child custody dispute. *Id*. In doing so, the trial court is "required to look into the circumstances of the case and determine whether an established custodial environment exists." *In re AP*, 283 Mich App 574, 601; 770 NW2d 403 (2009). If an established custodial environment exists for the child, the trial court may not change that established custodial environment unless clear and convincing evidence establishes that the custody change is in the child's best interests. MCL 722.27(1)(c); *Griffin v Griffin*, 323 Mich App 110, 119; 916 NW2d 292 (2018). If no established custodial environment exists for the child, the trial court may change custody if it finds by a preponderance of the evidence that a change of custody is in the child's best interests. *Id*.

An established custodial environment is demonstrated "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); *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010). "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, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence. *Sulaica v Rometty*, 308 Mich App 568, 584-585; 866 NW2d 838 (2014).

Whether an established custodial environment exists is a question of fact. *Pennington*, 329 Mich App at 577-578. Unless the evidence clearly preponderates in the opposite direction, we will affirm the trial court's finding regarding the existence of an established custodial environment. *Id*. In this case, the trial court found that the child had an established custodial environment with plaintiff. This determination is supported by the record. Plaintiff and defendant alternated custody of the child approximately every few months from September 2017 to April 2019. After defendant refused to return the child to plaintiff as the parties had agreed, the trial court ordered defendant to return the child to plaintiff on April 4, 2019. Thereafter, the child consistently lived with plaintiff, except when defendant exercised parenting time with the child from June 13, 2020 to August 15, 2020. The child then returned to plaintiff's home where she continued to live at the time of the custody determination in January 2021.

The trial court determined that plaintiff was the child's primary caregiver and the child primarily looked to plaintiff for care and guidance, considering that the child lived with plaintiff

for nearly two years before the custody determination, and that defendant parented the child only two months during that same period. Because the evidence does not clearly preponderate in the opposite direction, we affirm the trial court's finding that the child had an established custodial environment with plaintiff.

D. BEST INTERESTS OF THE CHILD

Defendant also contends that the trial court failed properly to consider and weigh the statutory factors for determining the child's best interests. We disagree.

When an established custodial environment exists for the child with one parent but not the other, the noncustodial parent bears the burden of persuasion and must show by clear and convincing evidence that changing the established custodial environment is in the child's best interests. *In re AP*, 283 Mich App at 601. Under MCL 722.23, to determine the child's best interests, the trial court must evaluate and explicitly state its findings and conclusions for the following factors:

> (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.]

In this case, the trial court evaluated the evidence relevant to the best-interests factors and found that the parties were equal on most factors, except that factor (b) favored plaintiff slightly, and factor (h) favored plaintiff. The trial court found under factor (i) that the child was too young to state a preference, and found under factor (*l*), other factors, that the child needed continuity and stability, and needed to attend school at a consistent location.

Defendant contends that in considering factor (b), the trial court erred by finding that plaintiff was slightly favored concerning her capacity and disposition to provide the child with love, affection, guidance, and religious education, because the trial court unfairly focused upon plaintiff's role as the child's stay-at-home parent while defendant worked outside the home. The record does not support defendant's argument, however. The record indicates that the referee initially assessed this factor in favor of plaintiff because plaintiff had been the child's primary caregiver from the time she was born until the parties separated, and from 2019 until the custody decision. The trial court disagreed with this assessment, finding that the factor only "slightly" favored plaintiff because defendant had "shown an exemplary ability to care for the child." Ample testimony supported the trial court's finding that both parties were good parents, with several witnesses testifying about the parties' extensive involvement in the child's upbringing. We are not convinced that the trial court's finding was against the great weight of the evidence, nor that the trial court placed undue emphasis upon the parties' initial roles within the household.

Defendant also contends that the trial court should have found under factor (c) that the ability of the parties to provide the child with material needs favored him because plaintiff failed to provide the child with health insurance. The record, however, indicates that plaintiff sought to provide the child with medical insurance and that the child would be covered by plaintiff's insurance in the future. Plaintiff also testified that defendant providing the child with health care coverage only in Florida and failed to provide plaintiff with the child's health insurance card. Finally, there was no evidence that plaintiff failed to pay for the child's health expenses, and the record indicates that the child had a doctor and a dentist in Michigan. We are not convinced that the evidence clearly preponderated in the opposite direction from the trial court's decision.

Defendant also argues that the trial court's finding under factor (h) that the child's home, school, and community record favored plaintiff, was at odds with its ruling that the child was too young to express a preference. Defendant has abandoned this issue, however, by merely announcing his position without supporting it. See *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009).

Defendant also contends that the trial court erred by failing to ask the child's preferences under factor (i). We disagree. The trial court is required to determine the child's preference if the

child is old enough to express a preference. *Kubicki v Sharpe*, 306 Mich App 525, 545; 858 NW2d 57 (2014). Although it is presumed that a child over the age of six is capable of forming a reasonable preference, that presumption does not establish that every child over the age of six has the capacity to form a preference. *Maier v Maier*, 311 Mich App 218, 224-225; 874 NW2d 725 (2015). In this case, at the time the trial court determined the child's best interests in January 2021, the child was six years old. Because the child was not *over* the age of six, she was not presumed capable of forming a reasonable preference, and defendant did not provide evidence regarding the child's capacity to form a preference. Defendant thus has not demonstrated that the evidence clearly preponderated against the trial court's finding.

Defendant next contends that the trial court should have found under factor (j) that defendant was more willing to facilitate a relationship between the child and plaintiff because plaintiff prevented him from seeing the child after April 2019. The record does not support defendant's argument. We observe that the April 2019 ex parte order resulted from defendant's failure to return the child to plaintiff for her regularly scheduled parenting time. We also observe that defendant demanded that plaintiff sign an agreement, to her detriment and the child's, in which defendant would obtain virtually all rights to the child. Although there were some later disputes between the parties regarding defendant's parenting time, we are not convinced that the evidence clearly preponderates against the trial court's finding that both parties were equally willing to facilitate the child's relationship with the other parent.

Defendant also argues that the trial court erred by failing to weigh the child's school attendance in his favor as an "other factor" under section (*l*) because he was willing to enroll the child in private school. Defendant also argues that the trial court erred by failing to evaluate each school option to determine the child's best interests. We note that a trial court is not required to comment on each piece of evidence or argument presented by a party. See *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). Here, the trial court was not required to explicitly consider and reject defendant's proposed schooling options. Moreover, the trial court's finding that the child's need for stability favored her continuing at her current school suggests that the trial court considered the other schooling options proposed and rejected them in favor of maintaining the child's environment. We conclude that the evidence did not clearly preponderate against the trial court's finding that this factor favored plaintiff, and that the trial court's findings regarding the best interests of the child overall were not against the great weight of the evidence.

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola