

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTIN TRAVIS,

Plaintiff-Appellant,

v

ERIC CHRISTOPHER JACOBS,

Defendant-Appellee.

UNPUBLISHED

January 13, 2022

No. 357940

Oakland Circuit Court

Family Division

LC No. 2016-844244-DS

Before: BOONSTRA, P.J., and CAVANAGH and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s opinion and order denying her motion for a change of domicile and granting defendant’s motion for a change of custody in this child-custody action. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case concerns a custody dispute between plaintiff and defendant related to their minor child, KSJ, and the trial court’s decision to deny plaintiff’s request to change domicile to Houghton Lake, Michigan, award defendant primary physical custody of KSJ, and alter the parties’ parenting-time schedule. Plaintiff and defendant were in an “on and off” relationship for approximately six years, having broken up in approximately 2017, during which time the parties lived together in three different homes, various hotels, and had stints of homelessness. Plaintiff has two sons, CR and CN, from a previous marriage, and defendant had a son, K, from a previous relationship.

In July 2016, plaintiff filed a complaint for child support from defendant. In October 2016, a consent judgment of support was entered. The consent judgment awarded plaintiff sole physical custody of KSJ, awarded defendant parenting time on an alternating schedule, addressed parenting time for holidays and summer breaks, and ordered defendant to pay child support to plaintiff. Throughout 2017 and 2018, defendant failed to make child-support payments, apparently because he lost his job. Then, in January 2019, defendant moved to enforce the parenting time as outlined in the consent judgment. Defendant also sought makeup parenting time, and to modify the

parenting-time schedule. According to defendant, in June 2018, plaintiff began “randomly” denying his parenting time and, as of the January 2019 motion, had refused his parenting time since Thanksgiving 2018. The trial court subsequently granted defendant’s motion, in part, altering the parenting-time schedule by granting defendant parenting time every weekend, and ordering KSJ and the parties to attend counseling.

In May 2020, defendant once again moved to enforce the parenting-time order, explaining that although he “enjoyed parenting time without incident” after the trial court altered the parenting-time schedule, plaintiff began “ ‘testing the water’ ” during the summer of 2019 by once again sporadically denying defendant parenting time. This culminated in another complete denial of defendant’s parenting time as of Thanksgiving 2019. Defendant also asserted that plaintiff had moved without notifying him of her new address. In July 2020, the trial court slightly altered defendant’s parenting time schedule, once again required the parties to attend counseling, indicated that the parties were to have “no contact” with one another except in emergencies, and stated that neither party could move more than 100 miles from where KSJ resided with a parent when the complaint was filed, without a court order. In September 2020, defendant filed an emergency motion for change of custody, asserting that plaintiff had been evicted from a residence and had moved into a shelter without notifying defendant of either fact. Defendant also expressed concern that KSJ would become homeless and stated that he could provide a suitable home for her. Plaintiff responded, indicating the move to the shelter was temporary and that she had informed defendant of her eviction and move. Plaintiff also denied that defendant had a suitable home for KSJ, indicating that he lived in a rental home with his then-married girlfriend, Sarah Riutta,¹ and could not provide for KSJ as he was behind on child-support payments.

In addition, plaintiff moved for a change of domicile. Plaintiff sought to move to Houghton Lake, where she had been approved for housing assistance for an apartment. Plaintiff’s motion, in addition to describing the apartment she sought to move into, also asserted that defendant had gone nine months without seeing KSJ and proposed a new parenting-time schedule. Defendant responded, rejecting plaintiff’s suggested parenting-time adjustments because her proposed move was 2½ hours away from defendant, and asserting that he did not voluntarily go nine months without seeing KSJ. Rather, according to defendant, plaintiff consistently denied him parenting time.

The case was referred to the Friend of the Court for investigation. Friend of the Court counselor Rodney Yeacker submitted a report and recommendation to the trial court, which recommended denying plaintiff’s request for a change of domicile but not changing “the current custody.” Yeacker recommended, however, that if a change of domicile was granted, defendant “should maintain physical custody.” After a motion by defendant to adopt Yeacker’s report, and

¹ Testimony indicated that although still married at the time of the evidentiary hearing, Riutta and her husband were in the process of filing for divorce. We are unaware of whether the divorce was finalized.

prehearing briefs from both parties, an evidentiary hearing was held at which plaintiff, defendant, Riutta, and plaintiff's father, James Presley, testified.

The trial court issued a written opinion and order on April 22, 2021. But before it did so, motions were filed by both parties related to parenting-time exchanges. And on April 6, 2021, the trial court entered a temporary order regarding parenting-time exchanges. The April 6, 2021 order indicated that it was brought "before Referee Kate Weaver" on March 24, 2021, and that the parties "reached an agreement and placed it on the record[.]"² The April 6, 2021 order provided drop-off times and locations with respect to parenting-time exchanges. Relevant to this appeal, the order stated: "Plaintiff[,] Christin Travis, is found in contempt for violating the current parenting time orders, however, any penalties are held in abeyance at this time." The trial court's April 22, 2021 opinion and order denied plaintiff's motion to change domicile, granted defendant's motion for change of custody, and outlined plaintiff's parenting time with KSJ. Plaintiff unsuccessfully moved for reconsideration. This appeal followed.

II. CHANGE OF DOMICILE

Plaintiff argues that the trial court erred in denying her motion to change domicile because its findings with respect to certain factors under MCL 722.31(4) were unsupported. Plaintiff also argues that the trial court was biased against her when deciding this motion. We disagree.

A. STANDARD OF REVIEW

"This Court reviews a trial court's decision regarding a motion for change of domicile for an abuse of discretion and a trial court's findings regarding the factors set forth in MCL 722.31(4) under the 'great weight of the evidence' standard." *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013) (citation omitted). "In the context of a child custody dispute, an abuse of discretion is found only in extreme cases wherein the trial court's decision is so palpably and grossly violative of fact and logic that it evidences the exercise of passion or bias or a perversity of will." *McRoberts v Ferguson*, 322 Mich App 125, 133-134; 910 NW2d 721 (2017). Under the great-weight-of-the-evidence standard, "the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction." *Wardell v Hincka*, 297 Mich App 127, 133; 822 NW2d 278 (2012) (quotation marks and citation omitted). "In the child custody context, questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014).

This Court reviews claims of judicial bias de novo. See *Kern v Kern-Koskela*, 320 Mich App 212, 231; 905 NW2d 453 (2017).

B. ANALYSIS

² According to plaintiff's appellate counsel, the court reporter informed his office that no hearing was held on March 24, 2021.

In *Rains*, this Court explained the process by which a trial court must decide a motion for change of domicile:

A motion for a change of domicile essentially requires a four-step approach. First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4), the so-called [*D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976)] factors, support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence. [*Rains*, 301 Mich App at 325.]

Our Legislature codified the *D'Onofrio* factors, set forth in MCL 722.31(4), as follows:

Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

First, plaintiff asserts that the trial court improperly found that the move to Houghton Lake would not improve the quality of life for KSJ and plaintiff, the consideration under factor (a) of MCL 722.31(4). Plaintiff argues that the proposed move was from “an unstable housing situation,” apparently referring to the fact that Riutta was still married while she and defendant dated and lived together, to “a dramatically more stable situation,” referring to her move to Houghton Lake. Plaintiff also references the fact that her move to Houghton Lake was approved by the Wayne Circuit Court with respect to plaintiff and her two other children.

Regarding whether the proposed change could improve the lives of KSJ and plaintiff, the trial court noted plaintiff’s testimony that the move was designed to provide KSJ and plaintiff’s other two minor children with more stability because she “now has her own apartment and a new job there.” Noting the specifics of plaintiff’s new apartment and job, the trial court stated, however, that since the evidentiary hearing,³ plaintiff’s employment “has already changed again, with her new work hours resulting in frustrating the current parenting time exchange schedule.” The trial court also found that there was “no testimony regarding the quality of the school district in Houghton Lake or how it compare[d] to [KSJ’s] current school.” Additionally, the trial court found that there was “no other testimony how this proposed move would improve the minor child’s life.”

The preponderance of the evidence supported the trial court’s findings regarding factor (a) of MCL 722.31(4), and plaintiff’s arguments to the contrary are unpersuasive. The fact that Riutta was still married at the time of the evidentiary hearing did not render defendant’s housing situation unstable. To the contrary, testimony established that Riutta’s divorce would be finalized shortly after the evidentiary hearing. Additionally, Riutta testified that “the goal” was for her and defendant to get married. There was also testimony regarding the salaries of defendant and Riutta, who earned approximately \$73,000 and \$350,000 per year, respectively. Defendant and Riutta also testified that they were purchasing a large, five bedroom, 3½ bathroom home in a “very safe” neighborhood together. On the other hand, testimony established that plaintiff’s housing and employment situations were unstable. True, plaintiff testified that she had acquired low-income housing in Houghton Lake that was sufficient for herself and her children, and that it was in a beautiful area. But there was also testimony that she had moved several times—by defendant’s count, 13—between 2016 and the evidentiary hearing, including to a shelter, and had lived with several different people. Plaintiff herself conceded that she had difficulty retaining a permanent residence and had moved approximately 11 or 12 times. Testimony also showed that plaintiff’s employment situation, which would have a dramatic effect on her ability to maintain the Houghton Lake apartment, was unstable. Indeed, as of the evidentiary hearing, plaintiff already had two jobs

³ This part of the trial court’s April 22, 2021 opinion and order references information that occurred after the evidentiary hearing. Plaintiff, on March 8, 2021, moved to change the pick-up and drop-off times and locations for parenting time because her “new job require[d] her to work until [5:00 p.m.] on Friday[s].” “[A] circuit judge may take judicial notice of the files and records of the court in which [s]he sits.” *Knowlton v Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959). Thus, it was not improper for the trial court to consider the fact that plaintiff’s employment situation had changed since the hearing, especially since the information came from plaintiff’s own filing.

since she moved to Houghton Lake. And as the trial court recognized, plaintiff's new job that she started after the evidentiary hearing led to new hours that frustrated the parenting-time schedule.

Additionally, although plaintiff testified that she enrolled KSJ in school and that KSJ was "doing well" there, plaintiff presented no evidence of how the move to Houghton Lake would improve KSJ's education. Nor did plaintiff explain how the long distance from defendant, which required several hours of driving one direction, would improve KSJ's quality of life. To the contrary, the long distance would require KSJ to spend a good portion of her time driving back and forth between her parents' homes, a concern shared by the trial court at the end of the evidentiary hearing. Accordingly, the trial court did not improperly conclude that the proposed move to Houghton Lake would not improve the quality of life for KSJ and plaintiff.

Second, plaintiff argues that the trial court incorrectly found that the proposed move to Houghton Lake was inspired by a desire to defeat or frustrate defendant's parenting-time schedule, a consideration under factor (b) of MCL 722.31(4). Plaintiff asserts, however, that she intended to continue the parenting-time schedule and did so, with one exception. We disagree.

Regarding the degree to which each parent complied with and utilized parenting time, and whether the proposed move was inspired by a desire to defeat or frustrate the parenting time schedule, the trial court found that defendant utilized his parenting time "when he gets it." The trial court also found that plaintiff had "already moved to her proposed new location," noting that it was a 2½-hour drive from defendant's home. Additionally, the trial court noted that plaintiff "was already aware that the court was not in favor of this move when" Yeacker issued his recommendation that the request to change domicile be denied and, if plaintiff moved, to change physical custody to defendant. The trial court also noted plaintiff's testimony "that she unilaterally went ahead with the move to Houghton Lake because she lost her previous home and had nowhere to go." And the trial court noted its warning to plaintiff "on the record that she needed to consider moving back because otherwise she was subjecting the minor child to a life of travel and the negative impact that would have on such a young child." The trial court asserted that, "[i]nstead of putting [KSJ's] needs before her own," plaintiff continued frustrating the exchange schedule, including by proposing a parenting time schedule that would "hav[e] the minor child in the car until 9:00 p.m." Moreover, the trial court found that plaintiff "continue[d] to unilaterally withhold" defendant's parenting time, even after repeated admonishments.

The trial court's findings regarding factor (b) of MCL 722.31(4) were supported by a preponderance of the evidence. As the trial court found, the evidence demonstrated that plaintiff unilaterally withheld parenting time from defendant. Defendant testified that plaintiff "[c]onstantly" withheld his parenting time, often giving "[v]arious reasons" for her denials, including that she did not want KSJ to be around Riutta or simply that plaintiff "just didn't [sic] want [KSJ] to go" or even that KSJ did not want to go. And when asked whether he thought that plaintiff's move to Houghton Lake created a "transportation barrier," defendant stated: "Absolutely. I believe it was the first thing said was what's going to happen the first time there is a big snow storm and we found out." As plaintiff acknowledged, she canceled defendant's parenting time the weekend before the evidentiary hearing because of a snow advisory. Although plaintiff acknowledged that she looked for low-income housing in her "previous area," but that there was a "two[-]year wait list," plaintiff did not define the "previous area." Nor did she explain why there were no other suitable areas closer to defendant's residence that would not completely

frustrate the parenting-time schedule. Further, although plaintiff claims that she intended to honor the parenting-time schedule and did so with one exception, the evidence suggests otherwise. As the trial court noted, shortly after the evidentiary hearing, plaintiff already tried to alter the parenting-time schedule because of new work hours. And evidence showed that, throughout this case, plaintiff took steps to prevent defendant from exercising his parenting time. Accordingly, the trial court's findings regarding factor (b) were supported by a preponderance of the evidence.

Third, plaintiff argues the trial court abused its discretion when it found that plaintiff unilaterally withheld parenting time from defendant, a finding that demonstrated bias against plaintiff. Plaintiff relies on the trial court's comments at the evidentiary hearing in which it stated that defendant's parenting time was "his time," and only he could dictate how it, and if, it happened. Plaintiff asserts that the trial court effectively engaged in hostile cross-examination and that its statements suggest that it "harbored bias" against plaintiff "in its consideration of the remaining evidence." We disagree.

"A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). Statements made by a trial judge that are "critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias." *In re MKK*, 286 Mich App 546, 567; 781 NW2d 132 (2009). Moreover, a trial judge's ruling against a party does not establish bias or prejudice, even if the ruling is erroneous. *Id.* at 566.

Plaintiff challenges statements made by the trial court regarding plaintiff's decision to cancel defendant's parenting time because of a snow advisory. The driving arrangement when plaintiff moved to Houghton Lake alternated between meeting in Clarkston one week, and Flint the other week. On direct examination, plaintiff indicated that she ensured defendant got his parenting time as ordered. Plaintiff indicated defendant missed parenting time the weekend of February 5, 2021, "[b]ecause of the weather." Yet on cross-examination, plaintiff affirmed that defendant did not get his parenting time that weekend because she canceled it because "[a]ll the schools were shut down Friday" and there was a snow advisory. Plaintiff agreed, however, to give defendant makeup days for those he missed. Plaintiff denied being aware that the snow advisory ended at 4:00 p.m. that Friday, and denied that she gave defendant his parenting time on Saturday and Sunday. When asked why defendant was not given his parenting time on Saturday, plaintiff stated: "He has that block of time with her, the two days. If I were to take her on Saturday he already missed out on Friday. Why not add those two days to the two days he's going to have the following weekend to make four[?]" At this point, the trial court interjected and the following exchange, which plaintiff challenges on appeal, occurred:

Trial Court: It's his time. He gets to use his time unless he says I can't – like you can't use it because of the weather and then you guys can make it up. Like it's his time.

Plaintiff: Okay. I didn't—

Trial Court: He could have driven up there. But you don't pick his time. When it's his time, you don't pick his time.

Plaintiff: No, I didn't mean that.

Trial Court: Okay.

Plaintiff: I didn't mean that.

Trial Court: Going forward.

After the trial court's interjection, plaintiff, on redirect examination, acknowledged that defendant could have driven to Houghton Lake to pick up KSJ, but denied that he offered to do so. Plaintiff denied feeling safe driving KSJ that weekend.

Nothing about the trial court's statements to plaintiff was extraordinary or hostile. As defendant notes, plaintiff acknowledged that she unilaterally canceled a weekend of defendant's parenting time. The trial court's statements that plaintiff now challenges on appeal simply informed plaintiff that she could not unilaterally cancel defendant's parenting time and indicated only defendant could decide whether to exercise it. And the fact the trial court's statements were critical of plaintiff's conduct—related to events within the judicial proceedings—is not sufficient to establish bias. *In re MKK*, 286 Mich App at 566-567. Plaintiff's conclusory assertion that the trial court's statements suggest that it "harbored bias" against plaintiff "in its consideration of the remaining evidence," without further support, is insufficient to satisfy the "heavy burden" she bore to overcome the presumption of judicial impartiality. *In re Susser Estate*, 254 Mich App at 237. And in any event, the trial court's finding that plaintiff unilaterally withheld parenting time from defendant was supported by a preponderance of the evidence. As noted earlier, plaintiff admitted that she unilaterally canceled defendant's parenting time the weekend before the evidentiary hearing because of the weather.

Accordingly, because the trial court's findings regarding the change-of-domicile factors challenged by plaintiff were supported by the evidence and the record did not show judicial bias, the trial court did not abuse its discretion in denying plaintiff's motion for a change of domicile.

III. CHANGE OF CUSTODY

Plaintiff argues that the trial court's findings regarding several of the best-interest factors were against the great weight of the evidence and that no change of custody was warranted. We disagree.

A. STANDARD OF REVIEW

As stated in *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003):

[This Court] appl[ies] three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for

clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [Quotation marks and citations omitted.]

B. ANALYSIS

MCL 722.23 states:

As used in this act, “best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

Plaintiff challenges the trial court's findings regarding factors (a), (b), (c), (d), (e), (g), (h), and (j). Plaintiff notes that she does not object to the trial court's findings regarding factors (f), (i), and (k). Plaintiff's brief on appeal does not reference factor (l), the catchall provision.

The trial court found that factor (a) favored both parties equally. The trial court found that the testimony demonstrated "both parties love and care for" KSJ and KSJ "loves and cares for them." The trial court also found KSJ was "emotionally bonded to both parties." Plaintiff argues that the trial court should have found that the "love, affection, and other emotional ties" that existed between KSJ and plaintiff were "of a higher quality" than those between KSJ and defendant.

The trial court's findings regarding factor (a) were not against the great weight of the evidence. Plaintiff testified that she had a close relationship with KSJ, describing it as "a tight net." Plaintiff also indicated that KSJ had a close relationship with plaintiff's two other children. Moreover, plaintiff testified that she and KSJ expressed love and affection for one another with "[h]ugs, kisses, [and] cuddles," and that they were "verbal" and "very affectionate." Additionally, plaintiff described the various toys KSJ enjoyed playing with, as well as different activities they engaged in together, including "dance parties" and playing board games. Presley's testimony supported plaintiff's position, asserting that plaintiff had a "[v]ery strong bond" with her children and that plaintiff and KSJ were "so tight together" Defendant, on the other hand, testified he had a "great relationship" with KSJ and felt the two were bonded. Defendant showed affection to KSJ by giving her hugs, "shoulder rides down the stairs every single time I go down them," and "a lot of I love you's back and forth." Defendant indicated he provided KSJ comfort if she was upset or not feeling well, mostly in the form of "cuddles" Defendant also discussed the activities he and KSJ did together. Defendant stated he and KSJ went on "[a] lot of walks," "ice fishing, [and] sledding." Defendant also noted that Riutta had "a cabin on Lake Pleasant in Anika," and KSJ "love[d] going there for weekends and spending time in the boat and the water and all that." Riutta's testimony supported defendant's position. Riutta indicated that when KSJ was present for defendant's parenting time, defendant took care of KSJ. Further, Riutta described KSJ's behavior during parenting time, stating that when she is present "for the exchange," KSJ is "quiet in the car and tired until she gets to the home. Her energy level goes to [sic] from quiet and tired to happy once she has entered into the home." Thus, the testimony supported the trial court's finding that factor (a) favored both parents equally.

The trial court found that factor (b) favored both parties equally, and indicated that the testimony demonstrated that both parents "show[ed] a capacity and disposition for providing love, affection, and guidance to the minor child." Plaintiff asserts the trial court should have found that factor (b) weighed in her favor. Plaintiff, in conclusory fashion, asserts that although defendant was "somewhat involved in" KSJ's education, she was "more involved."

Assuming that educational involvement is properly considered under factor (b), the trial court's findings regarding factor (b) were not against the great weight of the evidence. Plaintiff acknowledged that she enrolled KSJ in school, a process in which defendant was not involved. Plaintiff indicated that KSJ was "doing well" in school and that plaintiff communicated with KSJ's teachers "almost daily." Plaintiff was unaware of whether defendant communicated with KSJ's teachers. Defendant testified, however, that he was "[r]ecently . . . able to get involved with" KSJ's education. Defendant indicated that he communicated with her teacher, noting he had a "parent/teacher conference with" KSJ's teacher, Makayla Meyers, "last semester." Defendant also

expressed a willingness to “do whatever [he could] to facilitate [KSJ’s] happiness” and schooling, including hiring tutors. Testimony also showed that the schools near the home defendant and Riutta were purchasing were “award winning . . .” Thus, the trial court’s finding that factor (b) favored the parties equally was not against the great weight of the evidence.

The trial court found that factor (c) favored defendant, noting that defendant was employed and “financially and otherwise able to provide [KSJ] with food, clothing, and medical care.” The trial court found that plaintiff, on the other hand, had “not maintained stable employment or housing.” Plaintiff argues that although defendant was financially able to provide for KSJ, he did not have the disposition to do so as demonstrated by his failure to make child-support payments or meaningfully participate in her medical or dental care, therapy, or school enrollment.

The trial court’s findings regarding factor (c) were not against the great weight of the evidence. Defendant testified that he worked for General Motors, acknowledged earning approximately \$73,000 a year, and indicated that he was moving into a new house with Riutta that had a bedroom for KSJ. Thus, the trial court’s finding that he was employed and could provide for KSJ was not against the great weight of the evidence. We also note that Riutta testified that her annual income was \$350,000 a year, and that she and defendant planned to get married. And although defendant testified that he was behind on child-support payments, he indicated that it was because he took off three months of work to focus on this case, and that he was back at work and would have “no problem paying the balance” of what he owed in child support. Defendant also acknowledged a previous time when he was behind on child-support payments, noting that, as plaintiff mentioned, he was “off of work in a labor dispute for over a year.” Defendant testified, however, that he had paid the over \$12,000 in arrearages that he owed from the time he was off work.

Additionally, plaintiff’s assertion that defendant did not meaningfully participate in KSJ’s medical or dental care, therapy, or school enrollment, is not supported by the record. Defendant acknowledged having taken KSJ to doctor appointments, but denied taking her to dental appointments. Even so, defendant stated doing so was “not a problem” because KSJ’s dentist was within two to five minutes of defendant’s home. Defendant also acknowledged that he was involved with, and had enrolled in, therapy for KSJ. Defendant noted that the trial court had “asked [him] to” enroll KSJ in counseling in February 2019. Defendant denied delaying enrolling KSJ in therapy until July 2020, indicating that although he setup an appointment for KSJ to attend, plaintiff “didn’t show up when she was supposed to and changed the dates.” Defendant explained that he set up the therapy appointments in Flint because it was “close to where” plaintiff lived. And although plaintiff testified that she took KSJ to doctor and dental appointments, and defendant did not attend those appointments, that makes sense given the parenting-time schedules in effect throughout the majority of this case—plaintiff had parenting time with KSJ on weekdays, when doctor and dental appointments were likely to occur. Additionally, plaintiff acknowledged that defendant would “[m]aybe” take KSJ to the doctor if she was sick. Therefore, the trial’s court findings regarding factor (c) were not against the great weight of the evidence and plaintiff’s arguments to the contrary are unpersuasive.

The trial court found that factors (d) and (e) favored defendant. Under factor (d), the trial court found that KSJ had “frequently changed homes” because of plaintiff’s “relocations and instability.” The trial court concluded that “[t]he need for a consistent living arrangement ha[d]

become more evident and critical.” The trial court noted defendant’s “intention to remain in his current living arrangement with his girlfriend and they intend to purchase a larger home nearby.” Under factor (e), the trial court noted defendant’s testimony that he “plan[ned] to continue in his current relationship though they plan to change homes when their current lease ends.” The trial court found that defendant intended to “maintain consistency in their home with the minor child living there as a stable family unit.” Regarding plaintiff, the trial court found, however, that her life “lack[ed] stability and consistency,” noting she “move[d] from one temporary arrangement to another” and intended to raise KSJ “on her own when she can find her own home.” Plaintiff argues the trial court improperly found that factors (d) and (e) favored defendant because the trial court (1) noted the frequency with which plaintiff moved without also noting defendant’s frequent residence changes; and (2) credited defendant’s intention to continue residing with Riutta without noting that she was still married, a finding that would have undermined the trial court’s finding that defendant’s environment was stable.

The trial court’s findings regarding factors (d) and (e) were not against the great weight of the evidence. The evidence, including plaintiff’s own testimony, established that plaintiff had moved over 10 times between 2016 and the evidentiary hearing, while living with several different people during that span. Plaintiff asserts that the trial court failed to consider the fact that although she moved frequently, so did defendant. True, defendant indicated that he and plaintiff lived together, including in three homes and various hotel rooms, and had stints of homelessness. But the testimony established that defendant now had a relatively stable home environment. Defendant had been in a relationship with Riutta for at least 10 months, and, according to Riutta, the “goal” was for the two to get married. Defendant and Riutta rented a decent-sized home and intended to move into a much larger home that was only a short distance from their rental home. Plaintiff takes issue with the fact that the trial court did not fully acknowledge that Riutta was married at the time of the evidentiary hearing, which plaintiff claims meant that defendant’s living situation was unstable. But as noted, defendant and Riutta both testified that Riutta was in the process of getting divorced from her husband, and the two had been separated for approximately 16 months as of the evidentiary hearing. And again, Riutta indicated the “goal” for her and defendant was a lasting marriage. Accordingly, the trial court’s findings regarding factors (d) and (e) were not against the great weight of the evidence.

The trial court found that, under factor (g), both parties denied any medical conditions affecting their parenting ability. The trial court also found, however, that plaintiff was recently “involved with CPS due to her poor judgment and continue[d] to show emotional instability and poor decision[-]making while failing to engage in offered services.” Plaintiff argues that the trial court abused its discretion by finding that this factor favored defendant because no evidence was presented regarding either party’s mental or physical health.

The trial court’s findings regarding factor (g) were not against the great weight of the evidence. Yeacker’s report indicated that plaintiff “became involved with Protective Services,” noting that plaintiff “was an identified parent in the finding of preponderance by Protective Services.” In that same section of his report, Yeacker indicated that plaintiff failed to comply with

the orders to attend counseling, including when she went through a period of homelessness.⁴ The testimony at the evidentiary hearing also supported a finding that plaintiff was emotionally unstable and made poor decisions. Notably, plaintiff repeatedly denied defendant parenting time, contrary to court orders, and made several unsubstantiated CPS referrals, which appeared to be made for the purpose of negatively affecting defendant in this case. The trial court's findings regarding factor (g) were not against the great weight of the evidence.

The trial court found that factor (h) favored both parties equally. The trial court concluded that both parties were involved in parenting, noting plaintiff was "largely responsible for any activities during the week," while defendant "facilitated weekend activities." Plaintiff argues that the trial court abused its discretion when it determined that KSJ's "good" school record was "equally attributable" to the "efforts of a weekend custodian" (defendant) as it was to "those of the school-week custodian" (plaintiff).

The trial court's findings regarding factor (h) were not against the great weight of the evidence. As Yeacker noted in his report, the record is limited regarding this factor because of KSJ's age. Even so, plaintiff's parenting time occurred during the week, while defendant's parenting time occurred over the weekends. Thus, the trial court's findings that plaintiff facilitated weekday activities, while defendant facilitated weekend activities, was not against the great weight of the evidence. Plaintiff contends this factor should have favored her, seemingly arguing that because she had physical custody of KSJ during the school week, her efforts in KSJ's education were greater than any efforts defendant expended over the weekend to help KSJ with school work. But the testimony presented did not demonstrate this either way. There was no testimony about what steps either party took to assist KSJ with school, and both parties indicated they communicated with KSJ's teachers. If anything, the trial court could have found that this factor favored defendant, as he explicitly stated that he would do whatever he could to facilitate KSJ's schooling, including hiring tutors. Thus, the trial court's finding that factor (h) favored both parties equally was not against the great weight of the evidence.

Regarding factor (j), the trial court concluded that defendant was willing and able to facilitate and encourage a relationship between KSJ and plaintiff, but plaintiff could not do the same with respect to KSJ and defendant. The trial court noted that the parties had "periods of reasonable agreement and periods of relative hostility." The trial court found that defendant was willing to "hold off on a change of custody" if plaintiff "show[ed] compliance in treatment" and could "maintain housing and communication," and "even voiced a willingness to give her weekend time." The trial court concluded with respect to plaintiff, however, that she "continually [made] unfounded allegations" about defendant "to police and CPS," and had "periods of making negative and derogatory comments about" defendant, "even in the presence of" KSJ. The trial court also noted that, as part of the CPS investigation, "it was reported that she at times interfere[d] with the child-father relationship." And the trial court found that plaintiff "consistently show[ed] a lack of cooperation" with defendant "and following the court's orders, which has caused significant strain" for KSJ. Plaintiff appears to assert that the trial court should have found this factor favored

⁴ As will be discussed in further detail later, Yeacker's Friend of the Court report was properly admitted in evidence at the evidentiary hearing.

both parties equally. Plaintiff “incorporate[s] by reference[.]” her argument that the trial court’s statements to plaintiff regarding her withholding of parenting time demonstrated bias against plaintiff.

The trial court’s findings regarding factor (j) were not against the great weight of the evidence. As stated earlier, plaintiff failed to establish that the trial court’s statements to her regarding withholding parenting time from defendant demonstrated bias against her. And in any event, the trial court’s findings are supported by testimony from the evidentiary hearing. Again, the evidence demonstrated plaintiff unilaterally withheld parenting time from defendant, and involved herself in telephone conversations between defendant and KSJ, seemingly attempting to interfere with the conversations and undermine defendant’s relationship with KSJ. Defendant did not believe plaintiff would encourage a close relationship, and telephone calls, between defendant and KSJ. Thus, the trial court’s findings regarding factor (j) were not against the great weight of the evidence.

Accordingly, none of the trial court’s findings regarding the best-interest factors were against the great weight of the evidence.

IV. JUDICIAL NOTICE

Plaintiff argues that the trial court erred when it took judicial notice of its April 6, 2021 order, which found plaintiff in contempt of court for violating court orders related to parenting time. We disagree.

Judicial notice is discretionary and this Court reviews a trial court’s decision whether to take judicial notice for an abuse of discretion. *Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009), citing MRE 201(c).

To take judicial notice of a fact, the fact “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” MRE 201(b). A court may take judicial notice “at any stage of the proceeding,” MRE 201(e), and “whether requested or not,” MRE 201(c). “[A] circuit judge may take judicial notice of the files and records of the court in which [s]he sits.” *Knowlton*, 355 Mich at 452; see also *In re Marxhausen’s Estate*, 247 Mich 192, 199; 225 NW 632 (1929), citing *Wilkinson v Conaty*, 65 Mich 614; 32 NW 841 (1887) (“[A] probate court takes judicial notice of its own files.”). And in any event, documents in the lower court record in this case or others are within this Court’s purview under principles of judicial notice, on the basis of the “one court of justice” concept in Michigan’s Constitution. See Const 1963, art 6, § 1; *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972).

In its findings regarding modification of parenting time, the trial court, under factor (i) of MCL 722.27a(7), consideration of “[a]ny other relevant factors” for purposes of modifying parenting time, the trial court noted the April 6, 2021 order and finding of contempt with respect to plaintiff. Specifically, the trial court stated:

- (i) Any other relevant factors.

In the recent Order dated [April 6, 2021], Plaintiff Mother was found in contempt for violating the current parenting time orders. The court held any penalties in abeyance. Prior to that, Plaintiff Mother ignored the court's orders to attend counseling and to notify the Friend of the Court and Defendant Father of any address changes. Also, there was evidence presented of Plaintiff Mother lying to Defendant Father and testimony that Plaintiff Mother encourages the minor child to lie to Defendant Father.

The fact that plaintiff was held in contempt for violating parenting time orders was a fact of which the trial court could take judicial notice, and it did not abuse its discretion in doing so. To take judicial notice of the fact plaintiff was held in contempt for violating parenting time orders, the trial court referenced the April 6, 2021 order it had entered approximately two weeks before issuing its April 22, 2021 opinion and order. The parties "reached an agreement" that led to entry of the April 6, 2021 order. And because Judge Gorcyca could take judicial notice of the files and records of the court in which she sat—including the April 6, 2021 order that she entered herself—she did not abuse her discretion in referencing the April 6, 2021 order in her April 22, 2021 opinion and order. *Knowlton*, 355 Mich at 452.

Plaintiff summarily argues that by taking judicial notice of the April 6, 2021 order and finding of contempt, the trial court undermined her due-process rights. We disagree. It was not "fundamentally [un]fair" for the trial court to take judicial notice of the fact that plaintiff was recently found in contempt of court for violating previous parenting time orders when fashioning the parenting time order at issue. See *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

V. HEARSAY – FRIEND OF THE COURT REPORT AND RECOMMENDATION

Plaintiff argues that the trial court erred by admitting Yeacker's report because it constitutes hearsay and no hearsay exceptions apply. Because she stipulated to admission of the Friend of the Court report, we disagree and conclude plaintiff has waived the issue.

"A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citation omitted). "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Id.* at 588 (quotation marks and citation omitted).

After defendant testified at the evidentiary hearing, defendant's attorney, Rebecca Ehrenberg, stated that she subpoenaed Yeacker to testify, but he had not "appeared today." Ehrenberg stated Yeacker's failure to appear "won't be an issue if opposing counsel will stipulate to enter the FOC recommendation[.]" Plaintiff's attorney, Shantelle Richie, stated: "I don't object." Thereafter, Ehrenberg asked to admit the Friend of the Court report and recommendation as defendant's Exhibit G. The trial court admitted the Friend of the Court report and recommendation. Because plaintiff stipulated to admission of the Friend of the Court report and recommendation, plaintiff cannot now argue on appeal that admission of the report was erroneous. See *id.* Accordingly, plaintiff has waived her argument that the trial court abused its discretion in admitting Yeacker's report and recommendation. See *Duperon v Duperon*, 175 Mich App 77, 79;

437 NW2d 318 (1989) (holding that a report from the Friend of the Court “is not admissible as evidence unless both parties agree to admit it in evidence.”).

Plaintiff further argues that admission of the Friend of the Court report had a substantial effect on this case because “of how deeply [the] report factored into the [trial] court’s ruling.” Plaintiff notes that the trial court “explicitly adopted the report’s recommendations” that plaintiff’s request for a change of domicile be denied and, alternatively, if she moved, that primary physical custody be awarded to defendant. In other words, plaintiff argues that admission of the Friend of the Court report was prejudicial. We need not address this argument, given our previous conclusion that the Friend of the Court report was properly admitted in the first instance. Regardless, the argument is meritless.

It is true that the trial court reached the same conclusion as that recommended by Yeacker’s report and recommendation. But the trial court did so on the basis of properly received evidence that supported denying plaintiff’s motion for change of domicile and awarding defendant primary physical custody. See *Truitt v Truitt*, 172 Mich App 38, 42-43; 431 NW2d 454 (1988). Each of the findings that plaintiff challenges as similar, or identical, to the Friend of the Court’s findings was supported by testimony at the evidentiary hearing. For instance, plaintiff’s challenge to the finding that she made continuous, unfounded allegations against defendant was supported by defendant’s testimony that CPS investigations initiated by plaintiff were found meritless. Plaintiff also challenges the trial court’s findings that KSJ frequently moved “due to relocations and instability,” thus making it even more important for her to have a “consistent living arrangement,” and the fact that plaintiff “move[d] from one temporary arrangement to anywhere . . .” Again, these findings were supported by testimony from the evidentiary hearing, most critically defendant’s testimony that plaintiff had moved at least 13 times between the October 2016 consent judgment and the hearing, including living in a homeless shelter. Thus, regardless of the findings in the Friend of the Court report and recommendation, the trial court’s findings in its April 22, 2021 opinion and order were supported by properly received evidence, i.e., testimony at the evidentiary hearing. See *id.* Accordingly, the trial court did not abuse its discretion in admitting and considering Yeacker’s report and recommendation.

VI. MODIFICATION OF PARENTING TIME

Plaintiff argues that the trial court’s findings regarding factors (e) and (i) of the best-interest factors related to parenting time were against the great weight of the evidence. We disagree.

A discretionary ruling such as a parenting-time decision is reviewed for an abuse of discretion. See *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012).

“The child’s best interests govern a court’s decision regarding parenting time.” *Luna v Regnier*, 326 Mich App 173, 179; 930 NW2d 410 (2018) (quotation marks and citation omitted). “‘It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents.’” *Id.* at 180, quoting MCL 722.27a(1). “Therefore, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship . . .” *Id.* (quotation marks and citation omitted).

The factors in MCL 722.27a(7) are:

- (a) The existence of any special circumstances or needs of the child.
- (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
- (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
- (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
- (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
- (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
- (g) Whether a parent has frequently failed to exercise reasonable parenting time.
- (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
- (i) Any other relevant factors.

After analyzing the best-interest factors relating to parenting time, the trial court found that it was in KSJ's best interest to have "weekend parenting time with" plaintiff "on every weekend during school and alternating week-long parenting time during summer breaks." Plaintiff challenges the trial court's findings regarding factors (e) and (i) of the best-interest factors related to parenting time. Plaintiff does not challenge the trial court's findings regarding factors (a), (b), (c), (d), (f), (g), and (h).

Concerning factor (e), plaintiff argues that the trial court abused its discretion when it considered the distance between the parties for purposes of determining the parenting-time schedule, asserting "the same distance would have to be traversed regardless of which parent has which days." The trial court found that KSJ would have to travel from White Lake to Houghton Lake—an approximately 2½-hour drive one way—twice a week to have parenting time with both parents.

Plaintiff contends that the trial court inappropriately considered the distance between the parties for purposes of determining the parenting-time schedule. Plaintiff's contention is contrary to the plain language of factor (e), under which the trial court must consider the inconvenience to, and burdensome impact or effect on, *the child* of traveling for purposes of parenting time. A 2½-hour drive would undoubtedly be inconvenient to, and have a burdensome impact or effect on, a child of KSJ's age. Indeed, at the end of the evidentiary hearing, the trial court expressed concerns

that the 2½-hour drive meant KSJ would “spend all of her weekends without her friends” Thus, the trial court did not improperly consider the distance KSJ would have to travel for purposes of parenting time.

Concerning factor (i), plaintiff incorporates her arguments “under [her] Third and Fourth Arguments,” asserting that to the extent the trial court abused its discretion by considering the April 6, 2021 order, “it was an abuse of the court’s discretion to make a finding based thereon under this factor.” In its analysis of factor (i), the trial court, relying on the April 6, 2021 order, noted that plaintiff was found in contempt for violating the then-current parenting time orders, and that the trial court held any penalties in abeyance.

Plaintiff now asserts that any reliance on the April 6, 2021 order was an abuse of discretion. However, as we concluded earlier, the trial court’s taking of judicial notice of the April 6, 2021 order was not improper. The trial court also indicated that, before the April 6, 2021 order was entered, plaintiff ignored orders to attend counseling and notify the Friend of the Court and defendant of any address changes. This finding was supported by the evidence. Indeed, defendant testified that plaintiff almost never notified him of her moves, including her move to Houghton Lake. Moreover, the trial court also considered the fact that plaintiff lied to defendant, and encouraged KSJ to lie to defendant. This was established by defendant’s testimony. And as discussed earlier, the evidence demonstrated that plaintiff did in fact violate past parenting-time orders by denying defendant parenting time. Thus, the trial court did not abuse its discretion when it relied on the April 6, 2021 order.

VII. CONCLUSION

There were no errors warranting relief. We affirm.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael J. Riordan