STATE OF MICHIGAN

COURT OF APPEALS

THOMAS DWAYNE JACKSON, Plaintiff-Appellant,	UNPUBLISHED December 18, 2012
v	No. 312234 Oakland Circuit Court
CHERIE LYNETTE JACKSON, Defendant-Appellee.	LC No. 2004-702201-DM

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying him custody of the parties' minor children and suspending his parenting time. Solely because of the failure to interview the minor children or make a finding regarding why an interview was not warranted, we reverse and remand for further proceedings consistent with this opinion.

I. REFEREE HEARING AND RECOMMENDATION

The referee in this case recommended that defendant be given sole physical custody of the children, and giving plaintiff parenting time on alternative weekends. The trial court ultimately adopted the referee's recommendations. Plaintiff first argues that (1) the referee did not comply with MCL 552.505(1)(g), (2) the referee's recommendation was not supported by the evidence and was against the great weight of the evidence, (3) the referee refused to admit plaintiff's evidence and witness testimony, and (4) the referee set different requirements for the parties regarding the admission of evidence.

"Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Plaintiff's argument that the referee did not comply with MCL 552.505(1)(g) and investigate was not raised before the trial court, and is accordingly unpreserved. Plaintiff's arguments that the referee's recommendation was not supported by the evidence and was against the great weight of the evidence were raised before and decided by the trial court. Therefore, they are preserved. Plaintiff's arguments that the referee refused to admit his evidence and witness testimony were raised before and decided by the trial court, which allowed plaintiff to present his witnesses, but refused to admit his evidence. Therefore, they are preserved. Plaintiff's argument that the referee set different requirements

regarding the admission of evidence was not raised before or addressed by the trial court. Therefore, it is unpreserved.

"Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). With respect to preserved issues, a trial court's factual findings are reviewed under the great weight of the evidence standard, *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008)., and a trial court's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007).

Plaintiff has previously appealed issues arising from this case. *Jackson v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2012 (Docket No. 306692). In his first appeal, plaintiff argued that the referee "(a) did not follow the Michigan Court Rules and relevant statutes, (b) was biased, (c) erred in refusing to hear testimony from plaintiff's witnesses, and (d) improperly made findings of fact based on defendant's unproven allegations." *Id*. at 1. This Court found that plaintiff's objections to the referee's recommendation and behavior were without merit and found no apparent errors at the referee hearing. *Id.* at 2.

"The law of the case doctrine provides that a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case where the facts remain materially the same." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010) (citation and quotations omitted). Whether the referee complied with MCL 552.505(1)(g) is a question of law and the facts of the referee hearing have not changed between plaintiff's first appeal and the present appeal. Therefore, because the question whether the referee complied with Michigan statutes was decided in the prior appeal, we are bound by the law of the case, and cannot decide this issue differently in this appeal. *Id*.

Plaintiff's arguments that the referee's recommendation was not supported by the evidence, that the referee refused to admit plaintiff's evidence and witness testimony, and that the referee set different requirements for the parties regarding the admission of evidence all raise questions of fact, not law. Although these issues were previously decided in plaintiff's prior appeal, the law of the case doctrine only applies to questions of law, not fact. *Shade*, 291 Mich App at 21. In the prior appeal, this Court held that plaintiff's objections to the referee's recommendation were meritless because the trial court allowed plaintiff to call his additional witnesses. *Jackson*, unpub op at 2, 3. We see no reason to depart from this Court's prior conclusion. Plaintiff was allowed to call his witnesses on March 24, 2010, the trial court addressed the factors to which plaintiff objected to on March 24, 2010, and the trial court addressed all the best-interest factors on July 26, 2012, issuing its own opinion. As this Court previously stated, "any alleged errors in the referee proceedings do not necessarily render the trial court's determination erroneous." *Jackson*, unpub op at 2. Similarly, even if the referee set different requirements for the parties regarding the admission of evidence and did not admit plaintiff's evidence, plaintiff was given an opportunity to present evidence on March 24, 2010, and July 26, 2012. Accordingly, we detect no error with respect to the referee's recommendation.

II. ADOPTION OF REFEREE RECOMMENDATION, TEMPORARY CHANGE OF CUSTODY, AND LIMITED HEARING

Next, plaintiff argues that the trial court erred in adopting the referee's recommendation without an evidentiary hearing or consideration of the best-interest factors, and erred in limiting the hearing to the contested factors. Because these issues of law were previously decided by this Court in plaintiff's prior appeal, the law of the case doctrine prevents us from reaching a different result in the present appeal.

The interpretation and application of court rules and statutes are questions of law that this Court reviews de novo. *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012). In his first appeal, plaintiff argued "that the trial court erred in adopting the referee recommendation on an interim basis without first conducting a full de novo hearing." *Jackson*, unpub op at 3. This Court disagreed and concluded that even if there was an error, the issue was moot. *Id.* at 3-4. This Court held that Michigan Court Rules did not support plaintiff's argument that the trial court erred. *Id.* at 4. Plaintiff also argued "that the trial court erred in holding a limited hearing instead of a de novo hearing." *Id.* at 8. This Court found that "even though the trial court limited its hearing to evidence relating to plaintiff's objections to the referee recommendation, this is still considered a de novo hearing." *Id.* This Court also concluded that plaintiff agreed to limit the hearing. *Id.*

As discussed, "[t]he law of the case doctrine provides that a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case where the facts remain materially the same." *Shade*, 291 Mich App at 21 (citations and quotations omitted). Whether the trial court erred in adopting the referee's recommendation and conducted a proper de novo hearing involve the interpretation of a statute and court rule, which are questions of law. See *Neville*, 295 Mich App at 466. Accordingly, because the questions whether the trial court erred in adopting the referee's recommendation and in limiting the hearing were decided in the prior appeal, we cannot decide these issues differently. See *id.*

III. CUSTODY OF THE MINOR CHILDREN

> This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. Thus, a trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction. This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors. The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision is 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. This standard continues to apply to a trial court's custody decision, which is entitled to the utmost level of deference. This Court reviews questions of law for clear legal error that occurs when a trial

court incorrectly chooses, interprets, or applies the law. [*Berger*, 277 Mich App at 705-706 (citations omitted).]

A. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

"A trial court may only consider a change of custody if the movant establishes proper cause or a change in circumstances." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Before the first appeal, the trial court did not find proper cause or change of circumstances. This Court's decision in plaintiff's prior appeal explained the proper cause or change of circumstances threshold, but did not indicate whether either existed. *Jackson*, unpub op at 5. Further, this Court only remanded for a determination regarding an established custodial environment and the best-interest factors. *Id.* at 9. On remand, plaintiff failed to argue that there was no proper cause or change of circumstances and the trial court did not make any finding with regard to proper cause or change of circumstances. In the instant appeal, plaintiff argues that custody was modified on February 10, 2010, without a finding of proper cause or change of circumstances. Plaintiff then states that only the best-interest factors were addressed at the July 26, 2012, hearing. Plaintiff, however, makes no specific argument regarding proper cause or change of circumstances.

Plaintiff initially filed a motion to change custody, and at the referee hearing, plaintiff's attorney argued there was a change of circumstances based on defendant's new husband being violent and controlling. "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) (citations and quotations omitted). Therefore, plaintiff is precluded from arguing there was no change of circumstances.

Nonetheless, there was likely proper cause for the trial court to consider a change of custody.

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best[-]interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best[-]interest factors. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003).]

> [T]o establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id.* at 513-514.]

In plaintiff's motion to change custody, he claimed that defendant continued to use poor judgment in making decisions concerning the children. Plaintiff testified that his motion was based on defendant's husband, Marvin Matlock, being inappropriate with the children and being violent toward his own children. However, there did not appear to be evidence to support these allegations. In defendant's motion to change parenting time, which also requested full custody, she claimed that there was continuing violence, week to week parenting time was no longer working. Moreover, Matlock testified that he was attacked by plaintiff and had to obtain a PPO. This evidence is relevant to best interest factor (k), MCL 722.23(k), regarding domestic violence, and would have a significant effect on the well-being of the children. See *Vodvarka*, 259 Mich App at 512. Thus, there was proper cause for the trial court to consider a change of custody. See *Shann*, 293 Mich App at 305.

B. BURDEN OF PROOF

"Once a party has met the initial burden of showing a change in circumstances or proper cause to revisit the custody order, the next step is for the circuit court to determine the applicable burden of proof for the custody hearing." *Dailey v Kloenhamer*, 291 Mich App 660, 666-667; 811 NW2d 501 (2011). If an established custodial environment exists with both parents, the trial court cannot modify custody unless there is clear and convincing evidence that modification is in the children's best interests. *Id.* at 667. On remand, the trial court found that an established custodial environment existed with both parties, but did not state what burden of proof applied. Plaintiff does not dispute that there was an established custodial environment with both plaintiff and defendant; accordingly, to change custody, there must have been clear and convincing evidence that changing custody was in the children's best interests. See *id.*

C. BEST-INTEREST FACTORS

Plaintiff objects to both the referee's and the trial court's findings regarding the best-interest factors and the trial court's ultimate decision denying him custody. We agree with plaintiff that the trial court erred with respect to factor (i) only, and that remand with regard to factor (i) is proper. However, remand is not proper with regard to any other best interest factor.

1. FACTOR (a)

Factor (a) addresses "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court found that there was testimony that both parties love the children and the children love both parties, and that this factor therefore weighed equally in favor of both plaintiff and defendant.

Plaintiff argues that there was no evidence to support the referee's and the trial court's findings and this factor favored him. Plaintiff argues that defendant tried to eliminate plaintiff from the children's lives and supported the trial court's decision to suspend parenting time. However, even if true, neither of these facts relates to "[t]he love, affection, and other emotional ties existing between the parties involved and the child[ren]." MCL 722.23(a). Both parties testified that they gave the children love and affection. There was also evidence that the children were affectionate with plaintiff, but plaintiff testified that one of the children hugged and kissed him "a little too much." The evidence did not clearly preponderate in the opposite direction of

the trial court's conclusion that factor (a) weighed equally in favor of plaintiff and defendant. See *Berger*, 277 Mich App at 705.

2. FACTOR (b)

Factor (b) addresses "[t]he 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." MCL 722.23(b). The trial court found that both parties have the capacity and disposition to provide love and affection, and that both parties testified they were involved in the children's education and school activities. The trial court also found that plaintiff testified that he was the primary school contact for a period of time and has taken the children to political activities, church, and community projects. The trial court concluded that factor (b) favored neither plaintiff nor defendant.

Plaintiff's arguments regarding this factor focus on alleged errors by the referee. However, the trial court's finding that this factor favored neither party was not against the great weight of the evidence. See *Berger*, 277 Mich App at 705. Both parties testified that they gave the children love, affection, and guidance. Defendant testified that she provides school supplies for the children. Defendant's testimony suggested she attended Trinity's parent-teacher conference. Matlock also suggested defendant was involved with the children's homework when he testified that they do the children's homework together. Plaintiff testified that he was the children's primary contact for school issues and that he took the children to political events, church events, and community projects. Accordingly, the evidence does not clearly preponderate in the opposite direction of the trial court's conclusion that factor (b) favored neither plaintiff nor defendant. See *id.*

3. FACTOR (c)

Factor (c) addresses "[t]he 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." MCL 722.23(c). Defendant testified that she took the children to most doctor appointments, provided for their needs when they were with her, did not receive child support, and provided health insurance for the children since 2008. Plaintiff testified he provided for the children with unemployment compensation and by working on the side. Plaintiff also testified that both parties took the children to the doctor. The trial court concluded that factor (c) favored defendant.

Plaintiff argues that factor (c) favors the parties equally because he provided primary financial support for the children until he became unemployed and then defendant met the children's financial needs when they were with her. Defendant testified that she provided the children food, clothing, and medical care and took the children to most doctor appointments. She also testified that plaintiff provided for the children when they were with him. Plaintiff testified that he provided clothing for the children. He testified that he was employed until 2008, and from 2008 to 2009 he provided for the children with unemployment compensation and side work. He testified that at some point, defendant's insurance became primary. He testified that the children's medical care was both parties' responsibility and he took the children to doctor appointments when they were with him. Although there was conflicting testimony, this Court

defers to the trial court's credibility determinations. *Berger*, 277 Mich App at 705. Given defendant's testimony and that the children were covered by defendant's insurance, the evidence did not clearly preponderate in the opposite direction from the trial court's conclusion that factor (c) favored defendant. See *id.*

4. FACTOR (d)

Factor (d) addresses "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). Defendant testified that the children went back and forth between plaintiff and defendant from 2005 to 2009. Defendant also testified that she remarried in 2008, was married at the time of the custody determination, and continues to live with her husband and the two children. Plaintiff testified that he provided a stable environment until 2009 and always owned his own home, but that changed when defendant remarried and he then wanted the children with him all the time. The trial court concluded that factor (d) favored neither party.

Plaintiff objects to the trial court's conclusion that factor (d) favored neither party, and argues that it favored him. Plaintiff argues that defendant's environment changed significantly after she married her husband after knowing him for three months, kicked her oldest daughter out of the house, and moved. Defendant testified that they had a set parenting time schedule from 2005 to 2009. She testified that she was married in 2008 and is still married. She also testified that the children were in the same school as in 2009. Plaintiff testified that their alternating parenting time schedule worked for 10 years without issue until defendant's situation changed. He also testified that he provided the children a stable environment and home from the time they were born until he was laid off, and then he lived with his mother for six months before he again obtained his own home. Plaintiff wanted custody when things were "getting out of hand." Plaintiff testified that the children's school changed after the trial court's decision, but he had intended to keep them in the same school. Given the alternating parenting time from 2005 to 2009 and that both parties' environments experienced some changes, the evidence does not clearly preponderate in the opposite direction from the trial court's conclusion with regard to factor (d). See *Berger*, 277 Mich App at 705.

5. FACTOR (e)

Factor (e) addresses "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court found that defendant lived with her husband and the children, and plaintiff stated that he is able to provide a "conducive, consistent environment." The trial court concluded that this factor favored neither party.

The trial court's finding that this factor favored neither party was not against the great weight of the evidence. See *Berger*, 277 Mich App at 705. Defendant testified that Matlock was still her husband and the children would remain in the same school as in 2009. Plaintiff testified that he provided a "conducive" and "consistent" environment. Therefore, the evidence did not clearly preponderate in the opposite direction from the trial court's conclusion with regard to factor (e). See *id.*

6. FACTOR (f)

Factor (f) addresses "[t]he moral fitness of the parties involved." MCL 722.23(f). The trial court concluded that this factor did not apply.

Plaintiff argues that defendant's marriage within three months of meeting her husband relates to this factor. Plaintiff argues that the referee would not allow him to present evidence that would have supported his position that this factor favored him. The referee found that plaintiff did not offer any evidence that Matlock was violent; plaintiff's only evidence was Matlock's ex-wife's statement that she obtained a PPO against him. Plaintiff apparently tried to admit the same evidence at the hearings before the trial court, but the trial court did not allow it. Plaintiff testified that defendant was immoral because she married her husband within three months of their meeting, they lived with her three daughters, her husband was violent and could not see his own children. Plaintiff testified that he always had his children's best interests at heart. As the referee found, the mere existence of a PPO does not establish that Matlock was violent. Plaintiff does not explain what other evidence, if any, he would have introduced with regard to factor (f). Moreover, despite plaintiff's testimony, this Court defers to the trial court's credibility determinations. See *Berger*, 277 Mich App at 705. Accordingly, it was not against the great weight of the evidence for the trial court to find that this factor did not apply. See *id.*

7. FACTOR (g)

Factor (g) addresses "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court found that this factor did not apply.

Plaintiff argues that the referee's finding that this factor was equal was not supported by the testimony, was biased, and that the referee misdiagnosed him in addressing this factor. However, plaintiff does not dispute the trial court's finding that this factor did not apply. Both parties testified that they did not have any physical or mental health issues. Accordingly, the evidence did not clearly preponderate in the opposite direction. See *Berger*, 277 Mich App at 705.

8. FACTOR (h)

Factor (h) addresses "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court found that the children have attended the same school system since 2009 and will continue to attend the same school system. The trial court found that this factor favored neither party.

Plaintiff argues that there was no evidence to support the referee's and the trial court's findings that this factor favored the parties equally and no investigation was done. Defendant testified that the children are in the same school as in 2009. However, plaintiff testified that the children's school changed after the court's decision from Southfield schools to Detroit schools, and he had intended to keep them in Southfield schools. Even if the children's school changed, this fact does not relate to the children's school record. See MCL 722.23(h). Accordingly, the trial court erred with respect to factor (h). However, the trial court's error was harmless. See *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994). At the referee hearing, plaintiff testified that Trinity is doing well in school, but Tommie got a D in math. At the July 26, 2012,

hearing, neither party testified regarding how the children were doing in school when custody was changed.[1] Accordingly, the evidence did not clearly preponderate in the opposite direction of the trial court's finding that this factor favored neither party. See *Berger*, 277 Mich App at 705.

9. FACTOR (i)

Factor (i) addresses "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). The trial court did not interview the children. Plaintiff argues that the trial court's failure to interview the children is reversible error. We agree.

"One of the . . . factors a trial judge must consider in a custody dispute is the 'reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.'" *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991) (citation omitted). In *Bowers*, this Court stated:

> Children of six, and definitely of nine, years of age are old enough to have their preferences given some weight in a custody dispute, especially where there was a prior custody arrangement. The trial court's failure to interview the children was error requiring reversal. Where the trial court has failed to analyze the issue of child custody in accord with the mandates of [MCL 722.23] and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing. On remand, the trial judge is to consider the preferences of the children when deciding the custody issue. [*Id.* at 55-56 (citations omitted).]

At the time of the trial court's first determination, the children were 11 and six years old. At the time of the order on remand, the children were 13 and eight years old. Thus, the children were old enough to have their preferences considered. See *Id.* Accordingly, the trial court's failure to interview them and consider their preferences was error requiring reversal. See *id.* at 56. We therefore reverse and remand to the trial court with regard to factor (i), with instructions that the trial court interview the children to determine the "reasonable preference[s] of the child[ren]." *Id*. at 55 (citations and quotations omitted).

10. FACTOR (j)

Factor (j) addresses "[t]he 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." MCL 722.23(j). Defendant testified that she tried to create peace with plaintiff, but had to go to court when things got out of control. Defendant also testified that the children have been "thriving" in the past two years because plaintiff could not question them about adult information or about defendant and her husband. Defendant testified that plaintiff continues to drive past their home. Plaintiff testified that he was concerned about defendant

[1] Defendant, however, testified that currently the children were on the honor roll.

marrying her husband within three months of meeting him and believed the custody issues began when defendant remarried. The trial court found particularly important that plaintiff went to the children's school to tell them he would not see them and then went to try to give them a note, and he admitted that this was not appropriate. The trial court also found that plaintiff tried to interfere with the relationship between defendant, her husband, and the children based on the incident in which plaintiff took one of the children to the hospital. The trial court concluded that factor (j) favored defendant.

Plaintiff argues that the referee's and the trial court's findings on this factor were biased. Plaintiff also argues that this factor actually favored him because there was evidence that the children were not allowed to call plaintiff at defendant's home and defendant made it difficult for the children to participate in activities involving plaintiff. Plaintiff further argues that defendant did not produce any evidence to support her allegations. Plaintiff argues that his going to the children's school was after custody was changed. Plaintiff argues that defendant made the children write statements to use against plaintiff.

The trial court's findings regarding plaintiff driving by defendant's home, plaintiff's concern about defendant getting married, and plaintiff going to the children's school do not appear to relate to "[t]he 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." MCL 722.23(j). However, the trial court's error was harmless. See *Fletcher*, 447 Mich at 882. The trial court's other findings are supported by the evidence. Defendant testified that she and her husband tried to make the custody arrangement work with plaintiff, until it went out of control. Defendant testified that there was a major difference with the children since plaintiff could not have adult conversations with them. Plaintiff's mother also took one of the children to the hospital because of an odor. However, plaintiff testified that he never alleged that Matlock sexually abused the children. Plaintiff also testified that he always allowed the children to call defendant, he kept a relationship between the children and defendant's family, and he did not impede them from having a relationship with defendant. Plaintiff disagreed that he had adult conversations with the children. Plaintiff tried to facilitate a relationship with Matlock, but there was animosity. Plaintiff wanted to facilitate a relationship between the children and Matlock. Plaintiff also testified that he is not allowed to contact the children while they are at defendant's house. He also testified about an incident in which one of the children was not able to participate in a program at her school involving him because defendant brought her late. Plaintiff testified that defendant and Matlock did not try to facilitate a relationship between him and his children. There was also evidence that defendant did not put plaintiff on the children's emergency contact form. Defendant testified that she wrote "please don't change" on the card because one time plaintiff removed Matlock's name. Despite plaintiff's contrary testimony, the evidence did not clearly preponderate in the opposite direction of the trial court's conclusion with regard to factor (j). See *Berger*, 277 Mich App at 705.

11. FACTOR (k)

Factor (k) is "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court found no evidence of domestic violence.

Plaintiff argues that he had evidence, which was not admitted, that defendant's husband was not permitted to see his own children due to domestic abuse and this factor therefore favored plaintiff. At the referee hearing, plaintiff testified that his motion was based on Matlock being inappropriate and Matlock's previous violence toward his own children. Matlock testified that he was not aware of a PPO against him that was extended. The referee indicated that plaintiff presented no evidence of violence, only Matlock's ex-wife's statement. Plaintiff apparently tried to admit the same evidence at the hearings before the trial court, but it was not allowed on March 24, 2010 or on July 26, 2012. As the referee found, the PPO was not necessarily evidence of domestic violence. At the July 26, 2012, hearing, plaintiff testified that there was no domestic violence. He also testified that Matlock had violent behavior. Defendant testified that there was no domestic violence in her home. Despite plaintiff's testimony, the evidence does not clearly preponderate in the opposite direction that there was no evidence of domestic violence. See *Berger*, 277 Mich App at 705.

12. FACTOR (l)

Factor (l) addresses "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The trial court found that plaintiff "lacks an understanding of the harm his behavior causes his daughters." The trial court encouraged plaintiff to work with a therapist "so that he can have a healthy, safe relationship with his daughters," and found that he will not "accept any responsibility for the deterioration of his relationship with them." The trial court concluded that it was not in the children's best interests for plaintiff to go to their school or discuss defendant and her husband.

Plaintiff argues that this factor was based on the referee's opinion and allegations. Plaintiff argues there was evidence that defendant desired "to promote a chaotic environment," and the referee did not mention those facts. Plaintiff also argues that the trial court's findings regarding this factor are against the great weight of the evidence. He argues that there was no evidence that he attacked defendant or her family and friends. He argues that the trial court's finding that he lacks an understanding of the harm his behavior causes was unfounded and there was no evidence that he would not accept responsibility. He also argues that there was no evidence that his relationship with the children was not healthy or safe. He contends that a different outcome would have resulted if certain testimony was permitted at the referee hearing and the hearing on March 24, 2010.

Contrary to the trial court's finding that plaintiff "lacks an understanding of the harm his behavior causes his daughters," plaintiff admitted that going to the children's school and writing a letter were not appropriate. There was also no specific testimony regarding whether plaintiff accepted responsibility for the deterioration of his relationship with the children. Further, the trial court's finding that plaintiff's visits to the children's school were not in the children's best interests was not against the great weight of the evidence. See *Berger*, 277 Mich App at 705. Plaintiff lists several additional facts, but the trial court apparently found these were not relevant. Also, the trial court did not find that plaintiff attacked defendant or her family and friends. Plaintiff also fails to specify what other testimony he would have offered. Accordingly, the evidence does not clearly preponderate in the opposite direction of the trial court's findings regarding this factor. See *id.*

IV. SUSPENSION OF PARENTING TIME

Plaintiff contends that the trial court erred or abused its discretion in suspending his parenting time.

"Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger*, 277 Mich App at 716. The same analysis applies to the trial court's parenting time decision as its custody decision.

> [W]hen considering an important decision affecting the welfare of the child, the trial court must first determine whether the proposed change would modify the established custodial environment of that child. In making this determination, it is the child's standpoint, rather than that of the parents, that is controlling. If the proposed change would modify the established custodial environment of the child, then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests. Under such circumstances, the trial court must consider all the best-interest factors because a case in which the proposed change would modify the custodial environment is essentially a change-of-custody case. [*Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010).]

As explained above, the trial court found that an established custodial environment existed with both parties. Suspending plaintiff's parenting time constituted a change in the established custodial environment. The burden was, therefore, on defendant to establish, by clear and convincing evidence, that the change was in the children's best interests. See *Pierron*, 486 Mich at 92. The trial court was required to consider all the best-interest factors. *Id.* For the reasons discussed above, the trial court's failure to interview the children was error requiring reversal.[2]

V. JUDICIAL BIAS

Finally, plaintiff contends that the trial judge exhibited bias against him based on several comments made on March 24, 2010, and July 26, 2012. We disagree.

Plaintiff did not bring a motion to disqualify the judge in the trial court. Therefore, he has failed to preserve this issue for appeal. See *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette*, 278 Mich App at 328.

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[2] We note that, despite this Court's previous ruling that removing plaintiff from the children's lives was not the proper remedy for his inappropriate behavior, *Jackson*, unpub op at 7, the trial court again placed emphasis on plaintiff's conduct in going to the children's school.

> A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption. A showing of prejudice usually requires that the source of the bias be in events or information outside the judicial proceeding. Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous. Further, while personal animus toward a party requires disqualification, . . . [a] generalized hostility toward a class of claimants does not present disqualifying bias. Further, 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. [*In re MKK*, 286 Mich App 546, 566-567; 781 NW2d 132 (2009) (citations omitted).]

In the prior appeal, plaintiff also claimed that the trial judge was biased. *Jackson*, unpub op at 7. This Court found that "[n]one of the trial judge's remarks appear to be from extrajudicial sources or rise to the level of a high degree of favoritism or antagonism." *Id.* at 8. "We review a trial court's factual findings regarding a motion for disqualification for an abuse of discretion and its application of the facts to the law de novo." *In re MKK*, 286 Mich App at 564. Even if the law of the case doctrine does not apply, plaintiff has failed to overcome the presumption of impartiality based on the trial judge's statements at the March 24, 2010, hearing. See *id.* at 566. Plaintiff claims that the trial judge's statement that plaintiff needed to do some soul searching was biased. Although this comment was critical of plaintiff's conduct, it does not establish bias. See *id.* at 567. Plaintiff also asserts that the trial judge's statement that she did not know what plaintiff was capable of was biased. Again, although this comment was critical of or hostile to plaintiff, it does not establish bias. See *id.*

Plaintiff also failed to overcome the presumption of impartiality based on the trial judge's statements and rulings at the July 26, 2012, hearing. See *In re MKK*, 286 Mich App at 566. Plaintiff first claims that the trial court compared plaintiff going to his children's school to her husband coming to her work. Although this comment was critical of plaintiff's conduct, it does not establish bias. See *id.* at 567. Next, plaintiff claims the trial court advocated for defendant. Again, the exchange cited by plaintiff shows that the trial judge was critical of plaintiff's conduct, but does not establish bias. See *id.* Plaintiff claims the trial court refused to accept his answer and tried to get plaintiff to answer in a way that satisfied her opinion. However, there is no evidence to support this assertion. Plaintiff also claims that the judge set different requirements for the parties regarding the admission of evidence. It appears that the trial court did allow defendant to admit a letter on March 24, 2010, while it excluded exhibits offered by plaintiff on July 26, 2012. However, even if the trial court made erroneous rulings against plaintiff, this, without more, does not establish bias. See *id.* at 566. Plaintiff claims the trial court made a statement about defendant having to miss work. Even if such comment was hostile to plaintiff, it does not establish bias. See *id.* at 567. Plaintiff claims the trial court limited his testimony, but did not limit defendant's testimony. Even if the trial court's decision to limit plaintiff's testimony was erroneous, it does not establish bias. See *id.* at 566. Plaintiff also claims that the trial judge's statement telling him to follow the court rules shows bias. Again, comments critical of or hostile to plaintiff do not establish bias. See *id.* at 567. Plaintiff claims the trial court advocated for defendant by trying to make plaintiff's testimony fit her decision. However, there is no evidence to support this claim. Plaintiff also claims that the trial judge's statement that defendant moved on showed bias. Even if this statement was hostile to plaintiff, it

does not establish bias. See *id.* Overall, plaintiff has failed to establish that the trial court had a bias that originated outside the judicial proceedings, *id.* at 566, or "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester Elks*, 228 Mich App 20, 40; 577 NW2d 163 (1998).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray