STATE OF MICHIGAN

COURT OF APPEALS

SANDRA M. DUGGAN, Plaintiff-Appellant,	UNPUBLISHED July 2, 2013
v	No. 312501 Clare Circuit Court
PHILIP R. DUGGAN, Defendant-Appellee.	LC No. 10-900200-DM

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

In this child-custody case, plaintiff, Sandra M. Duggan, appeals as of right from the circuit court's order granting defendant, Philip R. Duggan, sole physical custody of the parties' minor children. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The two minor children were born in 1997 and 2002 and grew up with plaintiff and defendant in Harrison, Michigan. Plaintiff filed for divorce in May 2010. During the divorce proceedings, the children began living with plaintiff in Midland, Michigan. In January 2011, the circuit court entered a judgment of divorce, which provided that the parties would have joint legal and physical custody of the children.

On April 14, 2011, defendant moved the circuit court for sole physical custody of the children. Alleging a substantial change in circumstances after the divorce, defendant asserted that plaintiff was maintaining a relationship and allowing the children to have contact with her significant other, Robert Riffert, who had previously committed sexual offenses against minors and was recently charged with second-degree criminal sexual conduct involving a young girl. Plaintiff responded by denying the existence of a substantial change in circumstances and by moving the circuit court for sole physical custody. In June 2011, the Friend of the Court referee denied both parties' motions but ordered Riffert to have no unsupervised contact with the minor children until further court order.

The parties contested the referee's decision in the circuit court, which held a de novo hearing on July 21, 2011. On December 21, the court issued an oral opinion from the bench. With respect to a finding of proper cause, the court opined that "the unsupervised contact with Mr. Riffert put the children's mental and physical health in danger." The court found that the

children had an established custodial environment with both parents and then conducted a best-interest analysis. Ultimately, the court declined to change custody but expressly directed that Riffert was not allowed to have any contact with the children. The court warned plaintiff that it would issue an ex parte order changing custody if it discovered that plaintiff violated the directive.[1]

On May 4, 2012, defendant moved the court for entry of an ex parte order changing custody on the basis that he had received evidence that plaintiff permitted Riffert to have contact with the children at her home on March 7, 2012. Without first holding a hearing, the court issued the ex parte order on May 9, 2012, granting defendant sole physical custody of the children.

On May 17, 2012, plaintiff objected to the court's ex parte order and requested that the court hold a new custody hearing and set aside the order on the ground that it was invalid. Plaintiff also filed an emergency ex parte motion for relief from the court's ex parte order. On May 24, 2012, the court referred plaintiff's objection to the "Friend of the Court pursuant to MCR 3.207(B)(5)" and denied plaintiff's emergency motion for relief pending the Friend of the Court's determination. A hearing before the Friend of the Court was scheduled for June 12, 2012, but the hearing was continued to June 21, 2012, at the parties' request. The Friend of the Court conducted the hearing on June 21, 2012, and July 10, 2012. On July 11, 2012, plaintiff moved the circuit court to amend the no-contact order involving Riffert on the ground that she and Riffert were planning to marry.[2] The Friend of the Court referee then issued a recommendation on July 17, 2012, to grant sole physical custody to defendant. Plaintiff objected to the recommendation and moved the circuit court for a de novo hearing.

The circuit court held a second de novo hearing in August 2012. The court did not expressly find a change of circumstances or proper cause; however, it determined that the children did not have an established custodial environment with either parent, weighed the best-interest factors, and found by clear and convincing evidence that granting sole physical custody of the children to defendant was in the children's best interests. The court again ordered that Riffert was not to have any contact with the children.

II. ANALYSIS

On appeal, plaintiff argues that the circuit court erred by granting defendant sole physical custody of the children, raising the following arguments in support of her contention: (1) defendant failed to prove proper cause or a change of circumstances to change child custody, (2) the court erred by finding that the children did not have an established custodial environment with plaintiff, (3) the court's findings regarding several of the statutory best-interest factors were

[1] The court did not issue a corresponding written order reflecting its oral opinion until March 22, 2012.

[2] Plaintiff later withdrew the motion on July 30, 2012.

against the great weight of the evidence, (4) the court abused its discretion by granting defendant sole physical custody of the children, and (5) the circuit court's ex parte order was invalid.

A. STANDARD OF REVIEW

"Pursuant to MCL 722.28, [t]his 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." *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009) (citation omitted). Under the great-weight-of-the-evidence standard, we will sustain the trial court's findings unless the evidence clearly preponderates in the opposite direction. *Wardell v Hincka*, 297 Mich App 127, 133; 822 NW2d 278 (2012). We review for an abuse of discretion the trial court's discretionary rulings, such as to whom custody is awarded. *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011). "In child custody cases, '[a]n 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.'"[3] *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010), quoting *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Finally, clear legal error occurs when "a court incorrectly chooses, interprets, or applies the law. . . . [W]e review de novo a trial court's resolution of issues of law, including the interpretation of statutes and court rules." *Brausch*, 283 Mich App at 347; see also *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

B. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Under MCL 722.27(1)(c) of the Child Custody Act, MCL 722.21 *et seq.*, the first step toward modifying or amending a custody award is to show by a preponderance of the evidence either proper cause or a change of circumstances. *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). To show proper cause, the movant must prove "the existence of an appropriate ground for legal action to be taken by the trial court" that is "relevant to at least one of the twelve statutory best interest factors" and "of such magnitude to have a significant effect on the child's well-being." *Vodvarka*, 259 Mich App at 512. To show 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." *Id.* at 513 (emphasis in original). But not just any change will suffice; "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. If a party seeking to

[3] This definition of abuse of discretion still applies in child-custody determinations despite the existence of a revised definition for an abuse of discretion, i.e., a decision falling outside the range of principled outcomes, as articulated by the Supreme Court in *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006).

change custody does not establish proper cause or a change in circumstances, the trial court is precluded from holding a child-custody hearing to revisit an otherwise valid prior custody decision and reconsider the statutory best-interest factors. *Id.* at 508-509.

In this case, the circuit court did not specifically find a change of circumstances or proper cause. However, we conclude that the circuit court implicitly found that there was proper cause. When addressing proper cause after the first de novo hearing, the court specifically found that "the unsupervised contact with Mr. Riffert put the children's mental and physical health in danger." The court opined that it was "an unreasonable risk" to "allow the children to reside in the same home or spend any overnights that included Mr. Riffert." Further, the court found that Riffert could not be trusted to be with the children. For this reason, the court conditioned the denial of the parties' initial requests to change custody on plaintiff's compliance with the court's directive not to permit any contact between the children and Riffert. It was clear that continued contact between Riffert and the children would change the court's opinion regarding the children's best interests.

Moreover, the record illustrates that proper cause was shown at the time of defendant's motion for an ex parte order and during the de novo hearings. The affidavit from Mark McClellan showed that plaintiff permitted Riffert to have contact with the children in her home after the no-contact directive. There was evidence that Riffert publically exposed himself in the 1990s, engaged in sexual conduct with his ex-wife's 15-year-old sister, and attempted to drug and sexually molest his ex-wife's other sister when she was about 13 years old. In addition, Riffert was charged with criminal sexual conduct involving a seven-year-old girl in 2010. A Children's Protective Services (CPS) investigator from Midland County's Department of Human Services (DHS) office testified that DHS had determined that Riffert could pose a threat of sexual abuse to the children. The evidence illustrated that plaintiff and Riffert began a relationship before plaintiff and defendant's divorce was finalized. There was evidence that plaintiff permitted Riffert to have contact with the children, including in her home and on the telephone, between December 2011 and March 2012 in violation of the court's directive that plaintiff not permit any contact between Riffert and the children. Indeed, plaintiff initially lied to conceal the contact before she admitted violating the court's directive. Plaintiff acknowledged that she felt guilty for violating the court's directive.[4] Moreover, Riffert and plaintiff wrote a

[4] We reject plaintiff's assertion that there was not a change of circumstances because the March 7, 2012, contact between Riffert and the children occurred before the trial court issued its March 22, 2012, written order prohibiting such contact. Plaintiff is correct that courts speak through their written orders, not their oral statements. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). However, this legal principle did not mitigate plaintiff's decisions to permit the children to have contact with an admitted child molester, to do so after the trial court explicitly directed her not to, to initially lie to conceal the contact, and to continue her relationship with Riffert. As will be discussed further in this opinion, the trial court had the authority to issue and did not err by issuing both the ex parte order and its final custody order granting physical custody to defendant on the basis of the changed circumstances.

check to defendant in April 2012 from a joint bank account that only contained one home address, indicating that plaintiff and Riffert were living together. Finally, there was testimony that plaintiff and Riffert were engaged several weeks before the second de novo hearing.

A preponderance of the evidence demonstrated that plaintiff's facilitation and concealment of the children's exposure to an admitted child molester in violation of the court's explicit directive was a ground that "could have a significant effect on the [children's lives] to the extent that a reevaluation of the [children's] custodial situation should be undertaken," *Vodvarka*, 259 Mich App at 511; furthermore, the ground is relevant to best-interest factors (d) and (e) (the stability, permanence, and suitableness of plaintiff's home), (f) (plaintiff's moral fitness), and (*l*) (any other factor the court considers relevant, i.e., plaintiff's ongoing relationship and exposure of the children to a child molester), MCL 722.23(d), (e), (f), and (*l*).

Accordingly, defendant demonstrated proper cause under MCL 722.27(1)(c), permitting the circuit court to reconsider custody and the statutory best-interest factors.

C. ESTABLISHED CUSTODIAL ENVIRONMENT

Once a movant has sustained the burden of proving by a preponderance of the evidence either proper cause or a change in circumstances, the trial court then considers whether an established custodial environment exists. *Vodvarka*, 259 Mich App at 509; see also *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). "Whether a custodial environment exists is a question of fact, which the trial court must address before ruling on the child's best interests." *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). "Where no established custodial environment exists, the trial court may change custody if it finds, by a preponderance of the evidence, that the change would be in the child's best interests." *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000), citing *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991). "However, where an established custodial environment does exist, a court is not to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id.* (citations omitted).

A custodial environment is established if

> over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

"An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger*, 277 Mich App at 706. "It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Id.* "An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Id.* at 707. However, there may be situations where a

child does not have an established custodial environment with either parent; for example, "where there are repeated changes in physical custody and uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded." *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993), citing *Baker v Baker*, 411 Mich 567, 580-582; 309 NW2d 532 (1981).

In this case, the trial court concluded after the second de novo hearing that the children did not have an established custodial environment with either parent. The record evidence shows that the children grew up with both parents in Harrison. It is undisputed that, during the divorce proceedings, the children went to live with plaintiff in Midland for 18 months and that plaintiff primarily provided for the children during that period of time. After the ex parte order, the children returned to their prior home in Harrison and lived with defendant, and defendant primarily provided for the children since that time. The children had their living arrangements upset twice during these proceedings, and the parties admitted that the children were confused about where they would live in the future. There was evidence that the children were apparently living out of their suitcases after they returned to defendant's home. These repeated changes to the children's living arrangements were sufficient to destroy any established custodial environment that the children may have had with either parent. Cf. *id.*

Accordingly, we conclude that the circuit court's finding that the children did not have an established custodial environment with either parent was not against to the great weight of the evidence.[5]

D. BEST-INTEREST FACTORS

Trial courts resolve custody disputes in a child's best interests, as measured by the factors set forth in MCL 722.23. *LaFleche*, 242 Mich App at 700. The best-interest factors are as follows:

> (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.

[5] We note that even if the children had an established custodial environment with plaintiff to require a showing by clear and convincing evidence that a change to their custodial environment was in their best interests, the circuit court explicitly made its findings by clear and convincing evidence, not by a preponderance of the evidence. By using the heightened standard when it found that the custody change was in the children's best interests, any error committed by the circuit court regarding the establishment of a custodial environment would have been harmless. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994) (stating that an error in adjudication of a child-custody dispute does not require remand where the error is harmless). But, in any event, the preponderance of the evidence was the appropriate standard.

(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.

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

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

"Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor . . . ." *LaFleche*, 242 Mich App at 700. "These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties. However, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005).

Plaintiff disputes the circuit court's findings regarding nine of the best-interest factors.

Regarding factor (a), the court found that the parties' daughter had an equally close and loving relationship with both parties, while noting that their son had a closer relationship with plaintiff. Although plaintiff contends that her daughter was closer to her than to defendant, defendant testified that he had a close relationship with his daughter. Sheriff Wilson testified that the parties' daughter appeared to be having a good time with defendant during the Florida trip in April 2012. Accordingly, the court's finding was not against the great weight of the evidence.

Regarding factor (b), the court found that the parties were neutral. On appeal, plaintiff asserts that the evidence illustrated that she was the "driving force" behind the provision of guidance to the children, particularly with respect to their health, education, and extracurricular activities. Although plaintiff emphasizes that her daughter experienced weight problems after entering defendant's care and that she assisted her with her self-image issues, the court observed the parties' daughter and found that her weight was normal and appropriate. The parties admitted that their son became depressed after the custody change and that he had a physical altercation with defendant on one occasion. There is some record evidence establishing that plaintiff attended more of the children's educational and extracurricular activities than defendant. And defendant admitted that he missed some activities due to his work responsibilities. However, the record also established that plaintiff worked until 7:00 p.m. on most nights and was unavailable for the children during those times; she had used Riffert to care for the children during an emergency. Moreover, there was evidence that defendant enrolled the children in school and assisted his daughter in her homework after the children returned to his care. The court's finding that defendant was not responsible for his daughter's car accident was reasonable given the child's age, maturity, and familiarity with the road in question. In short, there was evidence in favor of and against each parent on this issue. Therefore, we cannot conclude that the court's finding on this factor was against the great weight of the evidence.

With respect to factors (d) and (e), the circuit court considered these factors together and found that they favored defendant. The court noted that defendant's home was more permanent, stable, and satisfactory than plaintiff's home because (1) the children resided in the family home in Harrison for most of their lives, except the 18 months they stayed with plaintiff; (2) the children have friends and family support in Harrison; and (3) plaintiff's home lacked stability because plaintiff intended to pursue a relationship with Riffert. Record evidence supports these findings. Permanence and stability are the primary concerns contained in factors (d) and (e). *Ireland v Smith*, 451 Mich 457, 464-465; 547 NW2d 686 (1996). Plaintiff's ownership of a home does not mean that the home environment was stable and satisfactory. The children spent the majority of their lives in the Harrison home, and many of their friends and family remained in Harrison. Also, plaintiff had pursued a relationship with an admitted child molester, and the court made the credibility determination that this relationship had not ended despite plaintiff's assurances. Therefore, the court had ample grounds in finding that placement with plaintiff was neither stable nor satisfactory.

Concerning factor (f), plaintiff argues that the court erroneously weighed this factor in defendant's favor by considering plaintiff's adultery. The court in this case noted that plaintiff's modeled conduct essentially normalized adultery to her son, as he continued to blame defendant for the divorce. Factor (f) does not evaluate which parent is morally superior but rather examines the "parent-child relationship and the effect that the conduct at issue will have on that relationship." *Berger*, 277 Mich App at 712. Questionable conduct, including adultery, is relevant in weighing this factor, but only if it "is of a type of conduct that necessarily has a significant influence on how one will function *as a parent*." *Id.* at 712 (emphasis in original). The son's continued blame of defendant for the divorce in spite of the adultery does not necessarily mean that somehow plaintiff had taught her son that such conduct was acceptable; other factors that he may have been privy to could have impacted his assignment of responsibility. However, the court also noted that plaintiff essentially taught her son to be deceitful by attempting to conceal Riffert's ongoing contact with the children. Plaintiff's deceit

concerning Riffert arguably sends the message that such behavior is acceptable when it is to your advantage. Closely related is plaintiff's violation of the trial court's directive that plaintiff not permit contact between Riffert and the children. Her own acknowledged guilt tends to show that such behavior can send the wrong message to a child, particularly one caught up in a bitter custody dispute. Furthermore, the court noted plaintiff's interference with defendant's relationship with the children, which had some bearing on her capacity to properly parent the children. Although this factor is close, we cannot conclude that the court's finding was against the great weight of the evidence. See generally *Schilleman v Schilleman*, 61 Mich App 446, 449; 232 NW2d 737 (1975) ("Being a close question, the trial court's decision obviously was not against the great weight of the evidence.").

Regarding factor (h), plaintiff contends that the court erred by not weighing this factor in her favor where the schools in Midland are superior to the schools in Harrison. It was undisputed that both children's grades suffered after switching schools. The parties' son had substantially superior academic opportunities in Midland schools, and the children had fewer extracurricular activities in Harrison than in Midland. However, the educational advantages provided by the Midland schools do not make the Harrison schools so deficient as to deprive the children of a satisfactory educational experience. In addition, the decline in the children's school performance can be attributed to many factors, particularly the change in custody, given that the variable impacting the performance cannot be disentangled. Further, the children's school record is only one portion of this factor; a court must also consider the home and community record. The evidence established that the children grew up and spent most of their lives in Harrison. And they had several family members and friends in the Harrison community. When considering the children's school record with their home and community record as well, the court's finding on this factor was not against the great weight of the evidence.

Concerning the children's preference under factor (i), the court found both children to be of sufficient age and maturity to express a preference on custody and stated that it would consider those preferences. Although plaintiff assumes that this factor weighed in her favor, the court did not state the results of its in-camera interviews of the children. The court was free to decline to do so in order to protect the children's confidences. See *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988) ("[A]lthough the confidence of the children need not be revealed, the court must state on the record whether the children were able to express a reasonable preference, and whether this preference was considered by the court in arriving at its determination."). Thus, we find no error concerning this factor.

Regarding factor (j), the court found that this factor weighed in defendant's favor because, after the custody change to defendant, plaintiff made baseless child-neglect complaints to DHS, expressed to the children that defendant had bribed the court and was responsible for her daughter's accident, and sent over 4,000 text messages and telephone calls to the children in the following two months. The only finding that was arguably against the great weight of the evidence is the court's finding concerning the 4,000 text messages and telephone contacts. Although plaintiff acknowledged the number of contacts, she denied that they contained negative information about defendant. Plaintiff also claimed that 70 percent of these contacts were initiated by the children and that she was simply attempting to maintain her existing relationship with them before the custody change. Defendant did not rebut this testimony at the hearing. Although defendant testified that the children appeared unhappy after some of these contacts,

defendant offered no proof that these emotional changes directly resulted from plaintiff's actions. Thus, the court's finding that plaintiff intended to micromanage her children's lives through these contacts was speculative. Nevertheless, the court's finding that plaintiff intentionally interfered with defendant's relationship with the children was not against the great weight of the evidence given the other evidence of record. Specifically, plaintiff admitted that she brought the DHS complaints that were ultimately unsubstantiated. Although plaintiff denied that she intentionally expressed her opinions to her son, the court reasonably deduced from the testimony that she was undermining defendant's standing as a parent with her children; testimony established that the parties' son parroted verbatim plaintiff's opinions that defendant bribed the court and was responsible for his daughter's accident. Moreover, plaintiff admitted that the children could have been present when she expressed her opinions, although she did not believe so. In light of this evidence, the court's finding on this factor was not against the great weight of the evidence.

Finally, regarding factor (*l*), plaintiff contends that the court erroneously weighed this factor in defendant's favor. The court first found that the children had superior family support in Harrison. Plaintiff does not contest this finding on appeal. Rather, plaintiff takes issue with the court's additional finding that plaintiff was going to have an ongoing relationship with Riffert, who posed a threat to the children and would have ongoing access to them. The court weighed plaintiff's credibility and found that she was not being honest about her contention that she had permanently separated from Riffert. We will not disturb the court's credibility assessment. See *MacIntyre*, 267 Mich App at 459. Further, as the court noted, plaintiff asked the court a few weeks before the hearing to lift the no-contact order because she and Riffert were going to get married. Moreover, Riffert and plaintiff still had a joint bank account, and plaintiff intentionally disregarded the court's oral directive by allowing contact between Riffert and the children. Although plaintiff presented evidence to illustrate that Riffert was not a threat to the children, the court's finding that Riffert remained a threat to the children was supported by the evidence. Specifically, there was evidence presented that Riffert engaged in sexual misconduct with minors on multiple occasions, including his admission of molesting his ex-wife's teenage sister and evidence that a seven-year old girl alleged in 2010 that Riffert molested her, resulting in criminal sexual conduct charges against him. Also, the court found unpersuasive the testimony of plaintiff's expert, clinical psychologist Matthew Rosenberg, because he did not state that Riffert presented no risk to children and Riffert failed to disclose some pertinent facts to Rosenberg, such as molestation of his ex-wife's other sister when she was 14 years old by attempting to drug her.

Accordingly, we conclude that none of the circuit court's findings regarding the best-interest factors were against the great weight of the evidence.

E. CUSTODY DETERMINATION

Plaintiff contends that the trial court abused its discretion by awarding defendant sole physical custody of the children because the court's decision was based on speculation that plaintiff and Riffert would reunite at a later date. Plaintiff insists that the record illustrates that she willingly sacrificed her relationship with Riffert in order to preserve her custody rights. The court's custody decision is "entitled to the utmost level of deference." *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006). As previously discussed, the court's finding that

plaintiff was going to have an ongoing relationship with Riffert was not against the great weight of the evidence. Although plaintiff argues that this was baseless speculation, the court did not find credible plaintiff's testimony that she had changed her mind and had permanently separated from Riffert. Again, we will not disturb the court's credibility assessment of plaintiff. See *MacIntyre*, 267 Mich App at 459. Moreover, there was record evidence to support the court's finding that plaintiff was going to have an ongoing relationship with Riffert, such as her intentional disregard of the court's directive, plaintiff and Riffert's plan to marry just weeks before the second de novo hearing, and their use of a joint bank account.

The circuit court's analysis of the best-interest factors illustrates that defendant had more factors in his favor. Specifically, factors (d), (e), (j), and (*l*) favored defendant. The court placed considerable weight on factor (*l*) because of plaintiff's ongoing relationship with Riffert, who posed a threat to the children as a sexual predator. See generally *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006) (stating that a court is not required to give each factor equal weight but, rather, may apportion weight as appropriate under the circumstances). Factors (a) and (f) favored defendant with respect to the parties' son but were neutral with respect to the parties' daughter. Of the remaining factors, factors (b), (c), (g), and (h) were neutral; factor (k) was not applicable; and the preferences of the children were considered by the court but not disclosed. The court did not find that any of the factors favored plaintiff.

Given the circumstances of this case, the circuit court's decision to grant defendant sole physical custody of the minor children was not "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias'"; therefore, it was not an abuse of discretion. *Shade*, 291 Mich App at 21, quoting *Berger*, 277 Mich App at 705.

F. EX PARTE ORDER CHANGING CUSTODY

Plaintiff's final argument is that the circuit court's ex parte custody order was invalid because the court did not first hold a hearing.

In *Pluta v Pluta*, 165 Mich App 55, 60; 418 NW2d 400 (1987), we held that a trial court should not "be allowed to circumvent and frustrate the purpose of the law by issuing an ex parte order changing custody without any notice to the custodial parent or a hearing on the issue whether clear and convincing evidence was presented that a change of custody was in the child's best interest." In *Mann v Mann*, 190 Mich App 526, 532-533; 476 NW2d 439 (1991), we reaffirmed this holding of *Pluta* and held that a hearing must be conducted when determining whether a temporary change of physical custody is appropriate or necessary. We have since adhered to the same principle regarding the necessity for a hearing. See, e.g., *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005) ("An evidentiary hearing is mandated before custody can be modified, even on a temporary basis."); *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999) ("A hearing is required before custody can be changed on even a temporary basis.").

Nevertheless, we recognized in *Mann* that

> situations might arise in which an immediate change of custody is necessary or compelled for the best interests of the child pending a hearing with regard to a motion for a permanent change of custody. Such a determination, however, can only be made after the court has considered facts established by admissible evidence—whether by affidavits, live testimony, documents, or otherwise. [*Mann*, 190 Mich App at 533 (internal citations omitted).]

Thus, MCR 3.207 provides that a circuit court has the authority to issue ex parte orders regarding child custody matters. See MCR 3.207(A) and (B). MCR 3.207(B)(1) states that "[p]ending the entry of a temporary order, the court may enter an ex parte order if the court is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued." Thus, MCR 3.207(B) essentially permits a trial court in a domestic-relations matter to issue an ex parte order regarding child custody if the court is satisfied that there is a threat of imminent harm. MCR 3.207(B)(5) provides that an ex parte order regarding custody must include the following notice provisions:

> "1. You may file a written objection to this order or a motion to modify or rescind this order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve a true copy of the objection or motion on the friend of the court and the party who obtained the order.
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> "2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.
>
> "3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing. Even if an objection is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."

When the circuit court in this case issued the ex parte order and handled plaintiff's objections to both the ex parte order and the recommendation from the Friend of the Court concerning plaintiff's objection, the court acted consistently with the evidentiary, notice, and hearing requirements of MCR 3.207. Specifically, the court issued the ex parte order upon consideration of the affidavit from Mark McClellan, who attested that plaintiff permitted Riffert to have contact with the children in her home. The ex parte order contained all of the notice requirements of MCR 3.207(B)(5). After plaintiff timely objected on May 17 to the court's ex parte order and requested a hearing, the court on May 24 referred the objection to the "Friend of the Court pursuant to MCR 3.207(B)(5)." A hearing before the Friend of the Court was scheduled but then continued to June 21 at the parties' request. The Friend of the Court conducted the hearing on June 21 and July 10. On July 17, the referee issued the recommendation to grant sole physical custody to defendant. Plaintiff objected to the

recommendation and moved the circuit court for a de novo hearing, which the court held in August.

Finally, even if we were to conclude that the circuit court erred by issuing the ex parte order, plaintiff would not be entitled to relief from the court's final custody order. In *Mann*, we concluded that the trial court erred by issuing a temporary order changing physical custody solely on the basis of a recommendation from the Friend of the Court and without holding a hearing; nevertheless, we held that "[o]ur conclusion that the trial court committed clear legal error [did] not . . . compel us to reverse the court's final order changing custody, because a hearing de novo was eventually held." *Mann*, 190 Mich App at 530, 533. As in *Mann*, the circuit court here held a de novo hearing before issuing its final order granting physical custody of the children to defendant. And as previously discussed, plaintiff has failed to demonstrate error requiring reversal stemming from this hearing.

Accordingly, plaintiff has not demonstrated entitlement to relief on the basis of an invalid ex parte order.

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell