STATE OF MICHIGAN

COURT OF APPEALS

HOLLY KUBICKI, Plaintiff-Appellant, v DALE SHARPE, JR., Defendant-Appellee.	FOR PUBLICATION August 28, 2014 9:00 a.m. No. 317614 Wayne Circuit Court LC No. 05-551010-DS

Before: GLEICHER, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

This child custody dispute requires us to construe a provision of the Child Custody Act intended to safeguard the custodial rights of a parent called to active military duty. Holly Kubicki, an active duty member of the United States Army, contends that by placing her son in the temporary custody of his father, the circuit court deprived her of the statute's protection. Because the father filed his change of custody motion before the mother was called to active duty, we find the relevant statutory language inapplicable. Nevertheless, we must vacate the custody order and remand for a new evidentiary hearing, as the court failed to consider the child's wishes.

I. UNDERLYING FACTS AND PROCEEDINGS

DLS was born in 2002 to plaintiff Holly Westmoreland (now Kubicki) and defendant Dale Sharpe, Jr. The parties never married. Holly and Dale briefly lived together with the child.[1] In 2005, they consented to a judgment awarding Holly sole legal and physical custody and granting Dale "reasonable parenting time[.]"

In 2006, Dale moved for a change of custody. He asserted that Holly had established a co-guardianship of the minor child with her sister and brother-in-law, and that due to Holly's living arrangement, the child "does not have his own bedroom or bed." Holly retorted that she obtained the guardianship so that the child would have health insurance, maintaining that Dale, whose child support payments were substantially in arrears, had consented to it. She denied that

[1] For the sake of clarity and ease of reference, we refer to the parties by their first names.

her son lacked an appropriate place to sleep. The circuit court terminated the guardianship and ordered that Holly and Dale share joint legal custody, with Holly having primary physical custody.

Dale again moved to modify DLS's custody in November 2012.[2] He averred that Holly planned to join the United States military, which "will either require physical displacement of the minor son and complete disruption of the established custodial environments with both parents, or he will be left in the custody of his step-father."[3] According to the motion, DLS expressed a preference to live with his father "if his mother is absent." Dale requested an order stating that when Holly "is in training or deployed outside southeastern Michigan in the U.S. military, [Dale] will have primary physical custody." A referee ascertained that Holly had enlisted in the Army and would start basic training in January 2012. Holly intended to leave the child with her husband, Daniel Kubicki, during basic training. If subsequently stationed more than 100 miles from her home, Holly planned to file a motion for change of domicile and to allow Dale expanded parenting time. The referee determined that Dale failed to establish grounds warranting a custody review.

Dale objected to the referee's recommendation and the circuit court scheduled a hearing for January 11, 2013. Before the hearing was held, Holly filed a motion for change of domicile. She asserted that after completing 12 weeks of basic training she would be deployed more than 100 miles away, and that "it would be in the best interests of the child to remain primarily in her family's care and custody during active duty deployment." Holly explained that her "Army-retired husband and their two children" would live in on-base housing, and that Kubicki would "assume most housekeeping and child care responsibilities."[4]

It is unclear whether the circuit court conducted the hearing scheduled for January 2013.[5] In an order dated January 11, 2013, the circuit court expanded Dale's parenting time and called for "the step-parent" to "have parenting time during the balance of the month." The court did not

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[2] Dale had also sought modification of the custody order in 2010, after DLS ran away from Holly's home in the middle of the night. That request was denied.

[3] Dale's motion raised other custodial issues which are not pertinent to our resolution of this case.

[4] Daniel Kubicki has custody of a child born to an earlier relationship. He and Holly also have a child together.

[5] This Court has struggled to obtain the entire circuit court record in this case. The record initially produced was woefully incomplete. This Court's subsequent record requests have yielded only portions of the missing record items. The circuit court's disorganized and inefficient approach to its basic record-keeping obligation has unnecessarily delayed and complicated our review. We remind the circuit court that the court rules require production of a complete record, "except for those things omitted by written stipulation of the parties." MCR 7.210(G). No such stipulation was filed. In the future, the circuit court is advised to produce the entire record when requested to do so by this Court.

address Dale's objections to the referee's recommendation, and instead scheduled a single hearing concerning the custody and domicile motions. In April 2013, Dale filed a motion seeking modification of the January 11, 2013 order. He alleged that he only recently learned that approximately two years earlier, Kubicki was arrested and charged with domestic violence after shooting Holly's dog. According to Dale's motion, Kubicki ultimately pleaded guilty to "killing an animal" and was sentenced to two years' probation. The motion further averred that while in Kubicki's care, the child had been tardy from school on nine occasions, "wears dirty clothes," and that Kubicki did not help the child with his homework.

On May 3, 2013, the circuit court entered an order awarding Dale "temporary custody," with Holly granted weekend parenting time upon her return from basic training. The order concluded: "This order shall remain in force and effect until there is a decision on [Holly's] motion for change of domicile."

At the outset of the June evidentiary hearing, the circuit court characterized the issue presented as involving Holly's change of domicile. The court acknowledged awareness of the pertinent language of MCL 722.27(1)(c) concerning active military duty. Regarding Dale's motion to change custody the circuit court stated:

> One of the other things that we talked about is whether this is a motion for change of custody and whether the [c]ourt has to look at all the best interests factors in making a determination on this matter. We will be moving forward with mother's [m]otion for [c]hange of [d]omicile, and the [c]ourt will be looking at the factors that are involved with that, and then based on the facts the [c]ourt will have to make the determination of whether I have to apply the best interests factors to that.

Holly testified that she enlisted in the Army on January 2, 2013, completed basic training, and deployed to Fort Riley, Kansas in May 2013. She described her job as a cook required her to work from 4:00 a.m. until 1:30 p.m. Holly secured a four-bedroom house on the base located in a community designated for families. She contemplated that Kubicki would care for the children during the morning, pack their lunches, and walk them to school. She would assume parenting responsibilities in the afternoon.

The focus of the hearing then turned to Kubicki's 2011 arrest. Holly recounted that on the day of his arrest, she and Kubicki had a "big fight" about her 12-pound miniature Doberman pinscher. The dog had bitten Kubicki and the children on many occasions, and Kubicki insisted that she get rid of it. The argument escalated. Kubicki took Holly's identification and a cable modem. Holly responded by telling Kubicki that she had hidden something of his. The two then fought over a phone charger, which broke. Kubicki threw the pinscher across the kitchen, and the two moved their dispute outside. While Kubicki choked the dog, Holly bit his wrist. Although Holly claimed in a written statement that Kubicki had pulled her hair she recanted at the hearing, asserting that he merely "pulled" his fingers through it. When she stopped biting him, she kicked Kubicki's dog. He retrieved a pistol from the home, held the miniature pinscher in the air by the collar, and shot it in the head at point-blank range.

Holly told the police that she tried to leave the home with the children, but Kubicki forbade her from leaving with his son. After she called 911, she and the children fled the scene. The police arrested Kubicki and seized two pistols and eight rifles from the home.

The prosecutor charged Kubicki with killing an animal, a four-year felony under MCL 750.50b, and use of a firearm in the commission of a felony in violation of MCL 750.227b. Kubicki pleaded guilty to killing an animal in exchange for dismissal of the felony-firearm charge. The court sentenced him to a two-year term of probation during which he was ordered to complete an anger management program and a residential treatment program for post-traumatic stress disorder (PTSD) offered by the Veterans Administration. Holly admitted that Kubicki had never entered the residential treatment program, insisting that he did not suffer from PTSD.

Kubicki explained that he served for six-and-a-half years in the Army, and was medically discharged after a roadside bomb explosion fractured several bones in his cervical spine. The Army considers him 30% disabled and able to work. Kubicki admitted to killing the dog, but expressed his belief that he had acted "in self defense from a dog that bit me[.]" Contrary to his wife's testimony, Kubicki conceded that he suffered from PTSD and that he had been treated for this disorder on approximately five occasions before the dog incident. Kubicki acknowledged that his plea agreement required him to obtain residential treatment for PTSD, but claimed he had not been permitted to enroll because the VA program had no room for him. He claimed that he successfully completed the anger management class. Despite having been diagnosed with "major depressive disorder" by the VA, Kubicki denied suffering from this condition and admitted that he did not take his prescribed antidepressant medication.

The circuit court engaged in the following dialogue with Kubicki:

> *The Court*: . . . [D]o you have something from [the] VA Hospital or can you provide the [c]ourt with anything showing that you have completed your treatment for [PTSD] and you're no longer considered to have that condition?
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> *Kubicki*: I'm sure I can get with Dr. Smith or something on that, your Honor.
>
> *The Court*: You do understand that that's the essence of this case, right?
>
> *Kubicki*: Yes, your Honor.
>
> *The Court*: You do understand that, right?
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> *Kubicki*: I do now, your Honor.
>
> *The Court*: You understand that the reason we're here is that [Dale] is worried about the safety of his son in your care and custody because of your [PTSD], you do understand that, right?
>
> *Kubicki*: Yes, your Honor.

Dale testified that he works full-time as a diesel technician, is married, and has no other children. He shared his concern that Kubicki would act impulsively due to the PTSD, and expressed dismay at the prospect of not being able to see his son regularly.

At the close of the evidentiary hearing, the circuit court first stated:

> [T]here is a statute that says the [c]ourt cannot change custody when one parent is in the active military. What the [c]ourt can do is order a temporary placement of the child with the other parent if I feel it's appropriate based on clear and convincing evidence which is a fairly high standard of proof. So the [c]ourt has to be convinced based on that standard that it would be better that it's in [DLS's] best interests that he stay with his father if I were to make that ruling.

The court then observed that its most recent custody order only temporarily changed custody, continuing:

> And I want to state for the record that that order really should have said temporary -- that there is a temporary placement with father, that the parenting time -- that he's the primary placement of the child for parenting time purposes, it's not actually a change of custody.
>
> I don't know if I said that as clearly as I could have, but even though the order says temporary custody of the minor child is transferred to [Dale], it's really that the parenting time was changed to allow the child to be at dad's primarily while mom was at her basic training, because this [c]ourt doesn't have the authority to enter a custody change under these circumstances.

The court opined that, "from the [c]ourt's point of view, this case hinges on whether Mr. Kubicki has received sufficient treatment for the [c]ourt to be comfortable that [DLS] should continue to be living with his mother." The court explained that it lacked sufficient evidence regarding Kubicki's recovery from his PTSD, and directed him to provide documentation regarding the current status of his PTSD within two weeks.

In a subsequent order the court reiterated:

> Daniel Kubicki shall procure and provide to the parties and the court, through [Holly's] counsel, a report by a medical professional or any other information on his diagnosis, treatment plan, and/or medical discharge regarding [PTSD] and Major Depressive Disorder. This must be done by 28 June 2013 or the [c]ourt will decide without this information.

In July 2013, the circuit court issued a written "Opinion and Order Modifying Parenting Time[.]" After summarizing the evidence produced during the hearing, the circuit court found that Kubicki had not "sought or obtained any additional treatment for his [PTSD]" since completing required anger management therapy. The court continued: "He did not provide the [c]ourt with a psychological evaluation nor did he ever attend an in-patient program for [h]is [PTSD]."

The circuit court prefaced its legal conclusions with the statement that: "Due to [Holly's] active military duty this [c]ourt cannot consider a change of custody. . . . Therefore, [the] [c]ourt will treat [Dale's] motion as a motion for [c]hange of [p]arenting [t]ime." The court found that Kubicki's proposed status as DLS's primary caregiver, his "mental health diagnosis, his failure to complete treatment, and his conviction for willfully killing the family dog" yielded a change of circumstances sufficient to reevaluate custody. The court continued:

> To consider a change of parenting time i[n] this instance amounts to a request to change the child's placement to [Dale's] home. MCL 227.27[(1)](c) states:
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> > . . . [when] a parent is in active military duty . . . the Court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child.
>
> The [c]ourt must determine if a temporary change of placement is in the child's best interest. [Dale] must show this by clear and convincing evidence.
>
> Since [Holly] has asked for a change in domicile to the state of Kansas, this [c]ourt finds that it is appropriate to apply the 12 best interest factors, since a change of placement to [Dale's] home amounts to a change of the child's established custody environment.

The court proceeded to the statutory best interests factors,[6] finding that factors a, b, c, e, h, and j favored the parties equally. Factor d, the court determined, "slightly" favored Dale,

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[6] MCL 722.23 provides the statutory best interest factors "to be considered, evaluated, and determined by the court." These factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
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> (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.

while factors f, g, k, and *l* favored Dale. In regard to factor i, the preference of the child, the court stated, "The parties did not want the [c]ourt to interview the child. Therefore, his preference has not been considered by the [c]ourt."

The court then turned to the *D'Onofrio*[7] factors, observing that Holly was required to show by a preponderance of the evidence that a change of domicile would serve the child's best interest. Although the court found that the move to on-base housing "has the capacity to improve the quality of life for [Holly's] family" and that Holly would likely comply with Dale's increased parenting time, the court apparently determined that Holly had not demonstrated by an evidentiary preponderance that a change of domicile was warranted. The court found that Dale "has met his burden of proof by clear and convincing evidence that a temporary change of placement is in the child's best interest." The court ordered that the parties continue to share joint custody, with Dale having "temporary physical placement of the child until further order of the [c]ourt." Holly now appeals.

II. ANALYSIS

A.

Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A clear legal error occurs when the circuit court "incorrectly chooses, interprets, or

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> (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.
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> (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.

[7] *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976), aff'd 144 NJ Super 352; 365 A2d 716 (1976). The *D'Onofrio* factors have been codified in MCL 722.31(4). *Rittershaus v Rittershaus*, 273 Mich App 462, 469-470; 730 NW2d 262 (2007).

applies the law . . . ." *Id.* at 881. De novo review applies to underlying issues of statutory interpretation. *People v Smith-Anthony*, 296 Mich App 413, 416; 821 NW2d 172 (2012).

B.

Holly first challenges the circuit court's interpretation of the "active duty" provision of the Child Custody Act, MCL 722.27(1)(c). We agree with Holly that the circuit court misconstrued the statute. The circuit court's flawed legal analysis does not yield a victory for Holly, however, as under the circumstances presented, the statute plainly permitted a custodial change.

We begin by examining the pertinent language of MCL 722.27(1)(c):

> If a motion for change of custody is filed during the time a parent is on active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child.

When interpreting a statute, we must discern and give effect to the Legislature's intent. We accomplish this task by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written. *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 591; 766 NW2d 675 (2009).

The circuit court declared that "[d]ue to [Holly's] active military duty this [c]ourt cannot consider a change of custody." Contrary to this conclusion, the limitation on custodial changes stated in MCL 722.27(1)(c) applies only "[i]f a motion for change of custody is *filed* during the time a parent is in active military duty . . . ." (Emphasis added). Dale brought his change of custody motion in November 2012, approximately two months before Holly enlisted in the Army. Because Dale sought the child's custody prior to Holly's enlistment, the statute did not foreclose a custodial change. Thus, the circuit court incorrectly concluded that Holly's intervening deployment deprived it of authority to change DLS's custody. Consequently, the circuit court need not have disguised its order by characterizing it as "modifying parenting time," when in reality the order changed the child's custody. Given the timing of Dale's motion, the text of MCL 722.27(1)(c) erected no barrier to this result.

Despite inaccurately styling its order as merely impacting parenting time, the circuit court employed the analysis required for a custodial change. As prescribed in *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003), the court first considered whether Dale had established a change of circumstances or proper cause for a custodial change under MCL 722.27(1)(c). The court determined that Kubicki's enhanced role in the child's life fulfilled this

standard, and Holly has not challenged this finding. The circuit court's consideration of the *Vodvarka* threshold signaled its awareness that custody rather than parenting time was at stake.[8]

The next step in a court's custody analysis requires a determination of the appropriate burden of proof. The child's established custodial environment governs this decision. A court may not modify or amend a previous judgment or issue a new custody order that changes a child's established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). 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." *Id.* Whether an established custodial environment exists is a question of fact to which the great weight of the evidence standard applies. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). In evaluating this issue, the focus is on the care of the child during the time period preceding the custody trial. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

The circuit court failed to articulate any findings specifically identifying DLS's established custodial environment. Nevertheless, the court required Dale to prove the child's best interests "by clear and convincing evidence." Thus, the court implicitly found that the child's established custodial environment lay either with Holly or with both parents. Because the court held Dale to the highest standard of proof applicable to custody proceedings, its omission qualifies as harmless error. On remand, we instruct the court to explicitly state its established custodial environment finding and to support it with reference to pertinent facts.[9]

After finding grounds for a custodial evaluation, the circuit court made findings and rendered conclusions regarding the 12 best-interest factors set forth in MCL 722.23. By proceeding in this fashion, the court analyzed the evidence in the manner applicable to custody challenges. We discuss the court's best-interest analysis later in this opinion. For now, it suffices that we discern no *statutory* basis arising from Holly's deployment to disturb the court's finding that a temporary change in custody would serve DLS's best interests.

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[8] The statutory requirement for a threshold finding of proper cause or a change of circumstances does not necessarily control a case involving modification of parenting time "absent a conclusion that a change in parenting time will result in a change in an established custodial environment." *Shade v Wright*, 291 Mich App 17, 25-27; 805 NW2d 1 (2010). Here, the court failed to clearly elucidate a finding regarding the child's established custodial environment.

[9] The circuit court's "temporary" custodial order may have precipitated a change in the child's established custodial environment. The determination remains intrinsically factual. The existence of the order, standing alone, does not establish a custodial environment. See *Baker v Baker*, 411 Mich 567; 309 NW2d 532 (1981).

C.

Holly next contends that several of the circuit court's best-interest findings contravened the great weight of the evidence. But for factors f and i, we find the court's factual findings well supported by the evidence.

We begin by reviewing the context of the court's best-interest analysis. After deciding that MCL 722.27(1)(c) precluded it from entertaining Dale's motion to change DLS's custody, the circuit court considered Holly's request for a change of domicile. The court's formulation of the relevant domicile inquiry for the most part comported with the procedure set forth in *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013):

> 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) . . . 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.

The best-interest analysis called for in domicile motions is identical to that required for motions to change a child's custody. In both circumstances, the touchstone is the child's best interest. In reviewing Holly's best-interest arguments, we remain mindful that "a trial court's findings on each factor should be affirmed unless the evidence 'clearly preponderates in the opposite direction.' " *Fletcher*, 447 Mich at 879, quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959).

Holly first insists that the circuit court erred by finding that factor d, concerning "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," slightly favored Dale. The circuit court premised its decision on the facts that "[t]he child has lived his entire life in this area, has attended the same school, has extended family in the area and has thrived here." Holly argues that the court would have found differently had it acknowledged that the child's current stable living environment included her two other children. The circuit court's measurement of this factor as weighing only slightly in Dale's favor suggests a close call, and that DLS's relationship with step- and half- brothers played a part in the court's evaluation. The court's findings of fact specifically mention the other two children. "[T]he trial court's failure to address the myriad facts pertaining to a factor does not suggest that the relevant among them were overlooked." *Id.* at 883-884. Accordingly, we find no reason to disturb the circuit court's conclusion.

Holly next contends that the circuit court's findings concerning factor e, which addresses "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." Factor e requires a court to "weigh all the facts" bearing on which parent likely can "best provide" the child "the benefits of a custodial home that is marked by permanence, as a family unit." *Ireland v Smith*, 451 Mich 457, 466; 547 NW2d 686 (1996). The circuit court found that this factor favored both parties equally, stating that DLS "has lived most of his life with [Holly] and firs[t,] her extended family, and then with her husband and their [two] children. [Dale]'s family has also been a stable family unit." Holly asserts that the court should have given greater weight to the fact that in Dale's custody, DLS would no longer live with her other two children. We find no error. The stability of DLS's living arrangement is at the core of factors d and e. While DLS would be separated from his brothers if Dale was granted custody, moving to Kansas would result in a similar environmental disruption. The great weight of the evidence supports the neutrality of factor e.

Holly also criticizes the circuit court's finding that factor f, which addresses the moral fitness of the parties, favored Dale. The court's brief explanation for this finding provided: "The main concern to the [c]ourt in this factor is [Kubicki's] mental health issues and his felony conviction arising out of a dispute with [Holly]." Holly correctly points out that this factor concerns the *parties'* "moral fitness." Further, it focuses on moral "fitness *as a parent.*" *Fletcher*, 447 Mich at 887 (emphasis in original). In *Fletcher*, the Supreme Court instructed that when evaluating this factor,

> courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. [*Id.* (emphasis in original).]

Kubicki's conduct and mental health may be considered under other best interest factors. On remand, the court must confine itself to an evaluation of the moral fitness of Holly and Dale as parents.

We discern a second error that mandates remand for a new best-interest hearing. The circuit court legally and harmfully erred by failing to consider the child's wishes when it made its best-interest determination. In regard to factor i, the court stated, "The parties did not want the [c]ourt to interview the child. Therefore, his preference has not been considered by the [c]ourt." Regardless whether the parties wished for an interview, the court was affirmatively required to consider the child's preference. "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) (quotation marks and citation omitted). "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." *Id*. at 55-56. At the time of the evidentiary hearing, the child was 10 years old, and as such, was "definitely . . . old enough to have [his] preference[] given some weight . . . ." *Id*. "The trial court's failure to interview the child[] was error requiring reversal." *Id*. at 56. Because the circuit court did not consider DLS's preference, we must vacate the circuit court's order, and remand for a new custody hearing. On remand, the

court may continue the child's placement with his father if the court again concludes that clear and convincing evidence of the child's best interest supports that placement. In making this determination the court must reevaluate the child's established custodial environment, and must also reanalyze the best-interest factors. In resolving both issues, the court should consider all up-to-date information brought to its attention.

We vacate the circuit court's opinion and order and remand for a new custody hearing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause