STATE OF MICHIGAN

COURT OF APPEALS

DAWN PATTON, Plaintiff-Appellee,	UNPUBLISHED March 18, 2014
v	No. 317983 Oakland Circuit Court Family Division
DAVID PATTON, Defendant-Appellant.	LC No. 2009-758610-DM

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant-father appeals from the trial court order awarding plaintiff-mother sole legal custody and primary physical custody of the parties' 16-year-old minor child, CP (the child). For the reasons set forth below, we affirm.

Mother and father entered into a consent judgment of divorce on April 2, 2010 under which the parties had joint legal and physical custody of their three minor children and equal parenting time, with each having seven days and overnights in each 14-day period. On January 11, 2013, father filed a motion for sole physical custody of the child and to modify parenting time. By this time, two of the parties' children had reached the age of majority and were thus outside the court's jurisdiction. On February 8, 2013, mother filed a supplemental response to father's motion and a request for sole physical custody of CP and modification of parenting time. After an evidentiary hearing, the trial court granted mother sole legal custody and primary physical custody of the child. The court also significantly altered the parenting time arrangement. The court ordered father to receive one therapeutic parenting time session a week. The sessions would increase to two times a week and, upon completion, father would receive parenting time every other weekend. Father was also granted parenting time on one evening each week for dinner.

I. APPOINTMENT AND CONDUCT OF THE LAWYER-GUARDIAN AD LITEM

Father first argues that it was unclear whether the trial court appointed a guardian ad litem (GAL) or a lawyer-guardian ad litem (LGAL) for the child and that the trial court committed clear legal error by (1) appointing a GAL for the child after the first full day of the custody hearing, (2) allowing the GAL to interview the parties without their attorneys present, (3) allowing the GAL to appear at only part of the trial and ask questions of some of the

witnesses, but not present a case, (4) allowing the GAL to submit reports to the court without giving copies to the parties, and (5) allowing the GAL to attend the in camera interview of the child.

We review these unpreserved issues for plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Father argues that there are discrepancies regarding whether Keri Middleditch, the court-appointed guardian, was a GAL or LGAL and that she exceeded the boundaries of what a GAL is permitted to do. The terms "GAL" and "LGAL" are both defined by the Child Custody Act (CCA), MCL 722.21 *et seq*. "'Guardian ad litem' means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney." MCL 722.22(f). "'Lawyer-guardian ad litem' means an attorney appointed under section 4. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in section 4 [MCL 722.24]." MCL 722.22(g).

At the first day of the evidentiary hearing, the trial court stated that it was "appointing a guardian ad litem for the child." The court stated that it believed the child needed "an independent person that represents her." Based on the appointing order, Middleditch is an attorney, as her P-number is provided. However, the order is inconsistent regarding whether a GAL or LGAL was appointed. Part one of the order indicates that the court found that a GAL should be appointed. Part two indicates that Middleditch was appointed as a LGAL. Part seven indicates that the LGAL must comply with MCL 712A.17d or MCL 722.24, which relate to the requirements and obligations of a LGAL. Given that the trial court stated that Middleditch would "represent" the child, Middleditch is an attorney, and the order indicates that the LGAL must comply with MCL 712A.17d and MCL 722.24, we conclude that Middleditch was appointed as a LGAL.

MCL 722.24 provides, in relevant part:

> (2) If, at any time in the proceeding, the court determines that the child's best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child. A lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in section 17d of chapter XIIA of 1939 PA 288, MCL 712A.17d. All provisions of section 17d of chapter XIIA of 1939 PA 288, MCL 712A.17d, apply to a lawyer-guardian ad litem appointed under this act.
>
> (3) In a proceeding in which a lawyer-guardian ad litem represents a child, he or she may file a written report and recommendation. The court may read the report and recommendation. The court shall not, however, admit the report and recommendation into evidence unless all parties stipulate the admission. The parties may make use of the report and recommendation for purposes of a settlement conference.

MCL 712A.17d[1] provides:

(1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

(a) The obligations of the attorney-client privilege.

(b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.

(d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:

(*i*) Before the pretrial hearing.

(*ii*) Before the initial disposition, if held more than 91 days after the petition has been authorized.

(*iii*) Before a dispositional review hearing.

(*iv*) Before a permanency planning hearing.

(*v*) Before a post-termination review hearing.

(*vi*) At least once during the pendency of a supplemental petition.

(*vii*) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.

[1] Although MCL 712A.17d involves matters related to child protection proceedings, MCL 722.24(2) explicitly provides that this statute applies to a LGAL appointed under the CCA.

(e) The court may allow alternative means of contact with the child if good cause is shown on the record.

(f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(h) To attend all hearings and substitute representation for the child only with court approval.

(i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.

(j) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

(k) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through consultation with the child's parent, foster care provider, guardian, and caseworker.

(*l*) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

(m) To participate in training in early childhood, child, and adolescent development.

(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the

child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable.

Father argues that the trial court committed clear legal error by appointing the LGAL after the first full day of the custody hearing thereby allowing the LGAL to attend only part of the hearing and allowing the LGAL to ask questions of witnesses without presenting a case. MCL 722.24(2) provides that "[i]f, at any time in the proceeding, the court determines that the child's best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child." Accordingly, the trial court could appoint the LGAL at any time during the proceedings and did not err by appointing the LGAL after the first day of the hearing. Nor did the trial court err by allowing the LGAL to ask questions of the witnesses. MCL 712A.17d(1)(b) permits the LGAL to have "full and active participation in all aspects of the litigation." Although calling witnesses on behalf of the child is listed under the powers and duties of the LGAL, there is no support for father's suggestion that the LGAL was required to present a case in order to question the witnesses called by the parties. MCL 712A.17d(1)(g). Thus, father has failed to establish plain error affecting his substantial rights.

Father next contends that it was clear legal error for the LGAL to interview the parties without their attorneys present. MCL 712A.17d(1)(c) allows the LGAL to interview family members and the parties in this case were the child's parents. Thus, the LGAL was allowed to interview them. With regard to the presence of the attorneys, the statute does not indicate whether the parties' attorneys must be allowed to attend the interview with the LGAL. Nonetheless, there is no evidence in the record that the parties were prohibited from having their attorneys present at the interview. Thus, father has again failed to establish plain error affecting his substantial rights.

Father further argues that the trial court erred by allowing the LGAL to submit reports to the court without giving copies to the parties until after the trial court's opinion and order was entered. MCL 722.24(3) allows the LGAL to file a written report and recommendation which the court may read. Thus, it was not error for the LGAL to submit reports. The statute prohibits the court from admitting the report and recommendation into evidence "unless all parties stipulate the admission." MCL 722.24(3). The LGAL's reports were not admitted into evidence and the record does not reveal when the reports were provided to the parties. Nonetheless, the statute does not indicate whether and when the report must be provided to the parties. The statute only indicates that the parties may use the report and recommendation "for purposes of a settlement conference." MCL 722.24(3). Accordingly, father has failed to establish a plain error affecting his substantial rights.

Finally, father contends that the trial court erred by allowing the LGAL to attend the in camera interview of the child. There is no evidence in the record that the LGAL attended the in camera interview. Assuming, arguendo, that the LGAL did attend, there was no plain error. In rendering a custody determination, a trial court may consider "[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). We have explained:

> An in camera interview is an ex parte communication that occurs off the record in a judge's chambers and in the absence of the other interested parties and their attorneys. Generally, such ex parte communications are not permitted except as provided by law. In most circumstances, the in camera interview, or review, is reserved for purposes of determining whether certain evidence or testimony is admissible during the proceedings.
>
> The Child Custody Act (CCA), MCL 722.21 *et seq.*, permits the use of in camera interviews, but for a different reason: When the court makes its best interests determination, it is well settled that it may interview the children in camera limited to determining their parental preferences. And, although the judge is limited in his or her line of questioning, the rules of evidence do not apply. The purpose behind this practice is to reduce the emotional trauma felt by a child required to testify in open court or in front of his or her parents, and to relieve the child of having to openly choose sides.
>
> A court's concern for a child's well-being in a custody proceeding, however, must not outweigh considerations of fundamental fairness in proceedings that affect parental rights. While questioning in an in camera interview does not constitute a due process violation as long as the interview is limited to the child's parental preferences, it is not difficult to see how the use of an in camera interview for fact-finding presents multiple due process problems: Should questions or answers arise concerning disputed facts unrelated to the child's preference, there is no opportunity for the opposing party to cross-examine or impeach the witness, or to present contradictory evidence; nor is there created an appellate record that would permit a party to challenge the evidence underlying a court's decision. And, as this Court has noted, even an interview limited appropriately in its scope, will result in information that affects other child custody factors. . . . Nonetheless, this Court has concluded that due process, in the context of custody disputes, permits in camera interviews of children for the limited purpose of determining their parental preference. [*In re HRC*, 286 Mich App 444, 451-452; 781 NW2d 105 (2009) (citations and internal quotation marks omitted).]

There is no law expressly indicating whether a LGAL is permitted to attend the in camera interview of the child. However, the LGAL represents the child, MCL 722.24; MCL 712A.17d(1), and, thus, should be permitted to attend the interview to represent the child's interests. MCL 712A.17d(1)(b) provides that the LGAL shall "be entitled to full and active participation in all aspects of the litigation." Moreover, the purpose of the in camera interview is to prevent the child from having to choose sides in front of his or her parents. *In re HRC*, 286 Mich App at 452. Given this purpose, the fact that the LGAL is appointed to represent the child, and that the LGAL has the obligations of attorney-client privilege, MCL 712A.17d(1)(a), there is no error in allowing the LGAL to attend the in camera interview. Given the role and obligations

of the LGAL, the child should generally not be affected by the presence of the LGAL in giving his or her preferences to the court.

Accordingly, father has not established plain error affecting substantial rights regarding the appointment and conduct of the LGAL.

II. ESTABLISHED CUSTODIAL ENVIRONMENT

Father next argues that the trial court erred by finding that an established custodial environment did not exist with him.

"The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment . . . should be affirmed unless the evidence clearly preponderates in the opposite direction." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (citation and internal quotation marks omitted).

> Once the trial court determines there is proper cause or a change of circumstances to permit the matter to be revisited, the trial court still may not modify custody from an established custodial environment unless there is clear and convincing evidence that a modification is in the best interest of the child. Thus, if the trial court determines that an established custodial environment exists, the moving party has the burden of proving by clear and convincing evidence that the proposed modification is in the best interests of the children. [*Mitchell v Mitchell*, 296 Mich App 513, 520; 823 NW2d 153 (2012) (citations omitted).]

"If the proposed change does not change the custodial environment, however, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010).

> The custodial environment of a child 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. 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. [*Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

The trial court found that an established custodial environment existed only with mother, writing:

> Based on the evidence that was presented by both parties, this court finds that there is an established custodial environment with Mother. The testimony revealed that although Father disciplines [the child], his methods are somewhat

> controlling and his anger management issues do not create an environment in which [the child] can naturally look to Father for guidance and parental comfort.

The trial court's finding that an established custodial environment did not exist with father was against the great weight of the evidence. Since the parties' divorce, the child was in father's physical custody half of the time. There was testimony that father has financially supported the child her entire life, provided a physical home, care, discipline, love, guidance, and attention. Father is involved in the child's education and still resides in the parties' marital home. While father's anger issues and contentious relationship with mother have created some instability in his relationship with the child, we find that such instability is insufficient, on the basis of the existing record, to support the court's finding that the child did not have an established custodial environment with father. Accordingly, the trial court's finding was against the great weight of the evidence. *Corporan*, 282 Mich App at 605.

Because a custodial environment existed with father, mother was required to show, by clear and convincing evidence, that her proposed change in the child's custody arrangement was in the child's best interests. *Mitchell*, 296 Mich App at 520. While the trial court did not explicitly state which burden of proof applied, its finding that an established custodial environment existed only with mother strongly implies that it evaluated mother's motion under a preponderance of the evidence standard. See *Shade*, 291 Mich App at 23. Application of that standard was a clear legal error. *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011). "[U]pon a finding of error an appellate court should remand the case for reevaluation, unless the error was harmless." *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). As discussed below, mother demonstrated, by clear and convincing evidence, that the change in the child's custody arrangement was in her best interest. Thus, the trial court's finding that an established custodial environment did not exist with father and the resulting application of the incorrect burden of proof were harmless and, therefore, do not require reversal. *Id.*

III. BEST-INTEREST FACTORS

Father argues that the trial court erred in its best-interest analysis. "Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the 'great weight of the evidence' standard." *Dailey*, 291 Mich App at 664.

MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in her 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 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.

The trial court found that factors (a), (c), (g), and (h) weighed equally between the parties, factors (b), (d), (f), (j), (k), and (l) favored mother, and factor (e) favored neither party. Father challenges the court's findings on factors (b), (c), (d), (e), (f), (h), (j), (k), and (l) as against the great weight of the evidence.

A. FACTOR (B)

Finding that factor (b) favored plaintiff, the trial court wrote:

Mother testified that she does all kinds of things with [the child], including shopping, walking the dog, and other activities. She also testified that she supervises as much as possible and has agreements with [the child]'s boyfriend's mother that the two will be supervised. [The child] attends Rochester Hills Christian School, where her grandmother, Defendant Father's mother, is the principal. The testimony showed that Mother was also very involved with the children's school until the parties began having marital difficulties. In fact, she was asked by the school staff in where [sic] Father's mother is a principal, to stop coaching the sports teams because she was "immoral." The testimony revealed that Mother also continues to attend church.

> The parties also testified that Father does discipline [the child], but his tactics are extreme and highly controlling. Father does have the capacity to continue raising [the child] in her religion, as he takes [the child] to church. Father is actively involved in [the child]'s school. However, his involvement coupled with the involvement of the principal, the children's grandmother, has led to a physical confrontation and the mishandling [of] one of the older children's expulsion. This factor is credited to Mother.

Mother testified that she engages in activities with and supervises the child. She also testified that she coached the child's school athletic team until she was asked to step down by the principal, father's mother. Nonetheless, father's mother testified that mother still attends the child's school activities. Both mother and father testified that they would continue the child's involvement with the church. While father is also involved with the child's schooling, he also engaged in a physical altercation at the school and verbally berated mother in the presence of children at the school. Both parents discipline the child. However, while father's discipline tactics are occasionally punitive and controlling, mother testified that she discusses disciplinary issues with the child and does not rule with an iron fist. Thus, the trial court's finding that factor (b) favored mother was not against the great weight of the evidence.

B. FACTOR (C)

Finding that factor (c) weighed equally in favor of both parties, the trial court wrote:

> This factor is credited to both parties. Mother is gainfully employed as a client service specialist with a health management firm. Father is a financial advisor. Father provides health insurance for [the child] and Mother takes [the child] to her medical appointments. Both parties are capable of providing [the child] with the food and care that she requires.

Father argues that this factor favored him because mother testified that she recently filed for bankruptcy. She, however, is employed, earns $30,000 a year, and has a 401(k) account. She also testified that she believes she can provide a financially stable home for the children. While father is also employed, he has been behind on his alimony payments because his income fluctuates and he lost his job and had to start over. He also testified that mother's income is higher than his with the support payments. Accordingly, the trial court's finding that factor (c) weighed equally between the parties was not against the great weight of the evidence.

C. FACTOR (D)

Finding that factor (d) favored mother, the trial court wrote:

> This factor is credited to Mother. Although Father remains in the former marital residence, Father's aggressive behaviors and physical altercations with [the child]'s brother and extreme hostility towards Mother have created an unstable environment with Father. The testimony revealed that he has been unable to control his temper on multiple occasions. The testimony revealed that he has displayed aggressive and hostile behavior that has resulted in his arrest and several instances where the police have intervened. Father admits he is angry

about things that occurred during the marriage, but his actions and even his demeanor displayed in court reveal that his anger issues would preclude him from providing a stable environment for [the child].

The child did spend equal time with the parties under the consent judgment of divorce. However, her environment with father was not stable and satisfactory. Father testified that his relationship with the child was estranged, although he believed it was caused by mother. Mother admitted calling father names, but denied that it was in front of the children, an assertion disputed by father. There was substantial evidence of father's greater hostility and anger. He sent letters calling mother vulgar names. He also got into several altercations at the child's school. According to mother, he also berated her at the school in front of the children and when she would pick the children up from his house. Moreover, mother testified that she provided the child a stable home where she felt safe and comfortable. Thus, the trial court's finding that factor (d) favored mother was not against the great weight of the evidence.

D. FACTOR (E)

Finding that factor (e) weighed in favor of neither party, the trial court wrote:

> Neither party gets credit for this factor. While Father remains in the marital home and the parties' son [] lived with Father, there has since been an estrangement between [the son] and Father due to the physical altercation between the two at [the son]'s school. It is not clear what permanence of the family unit will remain at Father's home given the volatile relationship he has with [the child]'s brother. Likewise, there was testimony that Mother was involved with a man who has a history of drinking convictions. The testimony revealed that he spent the night at the home on at least one occasion. She has since terminated the relationship, which leaves the permanence of the family unit unclear.

The trial court's findings were supported by the parties' testimony. There was no testimony regarding either party's intent regarding their homes and there was uncertainty regarding the permanence of both parties' homes given the evidence that the parties' son moved out of father's home and mother ended her romantic relationship. Thus, the trial court's finding that factor (e) favored neither party was not against the great weight of the evidence.

E. FACTOR (F)

Finding that factor (f) favored mother, the trial court wrote:

> This factor is credited to mother. Although the parties have been divorced for over three years, Father continues to be very angry about Mother's alleged behaviors during the marriage. However, these best interest factors evaluate the parties' fitness *as a parent*. Mother did testify to allowing her boyfriend to spend the night on one occasion, which is the only verified incident since the marriage ended. However, Father's behavior continues to call into question his moral fitness. Mother admitted evidence of text messages in which Father used vile, offensive, and racist language directed at Mother. Father addressed letters to

> Mother's home where the children reside calling her offensive names and sent letters to third parties, including the children's *dentist*, describing her alleged misdeeds against Father. Mother testified that Father still continues to call her derogatory names in the presence of the children during parenting time exchanges.

Father argues that factor (f) favored him because mother had several affairs, she lied to the court, and father's language does not relate to morality. Our Supreme Court has stated:

> Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent.* To evaluate parental fitness, 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. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent.*
>
> Extramarital relations are not necessarily a reliable indicator of how one will function within the parent-child relationship. While such conduct certainly has a bearing on one's spousal fitness, it need not be probative of how one will interact with or raise a child. Because of its limited probative value and the significant potential for prejudicially ascribing disproportionate weight to that fact, extramarital conduct, in and of itself, may not be relevant to factor f. To the extent that one's marital misconduct actually does have an identifiable adverse effect on a particular person's ability or disposition to raise a child, those parental shortcomings often may be reflected in other relevant statutory factors. [*Fletcher*, 447 Mich at 886-887 (emphasis in original).]

There was evidence that mother's affairs were known to the children and that they affected the child at school. Thus, they related to her moral fitness as a parent. However, the affairs occurred several years before the instant custody case. With regard to more recent events, mother admitted that she stayed at her boyfriend's house once when the children were at her home. The trial court considered that incident and that it only occurred on a single occasion. Mother also testified that she was only 10 minutes from home and that her son was almost 18-years old at the time. Mother initially told the court that she never left the children alone overnight, but claimed she did not recall the incident at the time. Even if mother lied to the court, her dishonesty does not relate to fitness as a parent. The trial court was also free to believe her testimony that she merely forgot about the incident and we defer to the trial court's credibility determinations. *Berger*, 277 Mich App at 707.

There was evidence that father used offensive and racist language against mother. Father's language relates to moral fitness because he used such language in front of the children. Father was also involved in altercations with and in front of the children. Thus, the trial court's finding that factor (f) favored mother was not against the great weight of the evidence.

F. FACTOR (H)

Finding that factor (h) weighed equally between the parties, the trial court wrote:

> This factor is credited to both parties. [The child] has attended the same Christian school where her grandmother is principal for years. In fact, testimony from Karen Patton, the paternal grandmother, revealed that [the child] is doing much better after the parties were divorced and she seems happier now. Both parties support [the child] continuing her education at this school. Father remains active at the school and testimony revealed that Mother was very active at the school before staff at the school where the paternal grandmother is principal forced her to quit some of her volunteering.

Father argues that factor (h) favored him because mother did not participate in the school because she was outcast as a result of her affairs and that father stepped up to pay for their son's tutoring and intervened to prevent him from being expelled. According to father, while at school, the child had to face the men with whom mother had affairs. Father testified that the child had issues with nerves, but it is unclear if this was related to the issues at school. According to mother, the child received A's and B's. Both parties testified that she was a "good kid." Father testified that he would continue the child's involvement at the church. However, contrary to the trial court's finding, there was no evidence that mother would continue the child's involvement at the school. Nonetheless, this does not relate to the child's school "record." MCL 722.23(h).

There was no evidence that mother stopped participating because she was an outcast, as father contends. Rather, Mother testified that she was asked to stop working at the concession stand because of the affairs. The child's paternal grandmother testified that mother was asked to stop coaching because she was "immoral," but that mother still attends activities at the school. Nonetheless, this does not relate to the child's school "record." MCL 722.23(h).

Father testified he paid for tutoring; however, mother testified she was not informed that a tutor was being paid. Father also claims he intervened to prevent their son from being expelled. However, father also engaged in a physical altercation with the son, at the school, that played a role in the initiation of those disciplinary proceedings. Further, the schooling of the parties' other children is only tangentially related to CP's "school record." Given the child's good grades, the trial court's finding that factor (h) weighed equally between the parties was not against the great weight of the evidence.

G. FACTOR (J)

Finding that factor (j) favored mother, the trial court wrote:

> This factor is credited to Mother. Father admitted that he takes [the child]'s phone away from her while she is with him and she is only permitted to communicate with Mother through his cell phone. This court finds that the venomous and aggressive treatment of Mother that has been in the presence of the children as well as letters addressed to the home in which the children live reveal Father's intention to hinder a relationship between [the child] and Mother.

> Furthermore, Father testified that he was given money by his parents to hire a private investigator to follow Mother. Clearly, Father has also involved his parents in his efforts to damage the relationship the children have with their Mother.

Father argues that this factor favored both parties because both parties had issues with the other, father had reason to be concerned about mother's behavior, and mother lied to the court when she initially failed to admit that on one occasion she left the children alone at night.

The record contains overwhelming evidence that father's behavior did not encourage a relationship between mother and the child, despite his testimony to the contrary. By contrast, mother merely tells the children that father should not be calling her names. Accordingly, the trial court's finding that factor (j) favored mother was not against the great weight of the evidence.

H. FACTOR (K)

Finding that factor (k) favored mother, the trial court wrote:

> This factor is credited to Mother. Although there is no testimony that Father physically assaulted Mother, there is testimony that he got into a physical altercation with his son. The testimony conflicted on who was the aggressor.

Father argues that this factor favored both parties because he committed no domestic violence and mother admitted that the police report stated that their son was the aggressor. However, it is undisputed that father and his son had a physical altercation and, under MCL 722.23(k), it is irrelevant which party was the aggressor. Thus, the trial court's finding that factor (k) favored mother was not against the great weight of the evidence.

I. FACTOR (L)

The trial court found that father's anger was unresolved and needed attention. Father argues that the trial court improperly focused on father's anger issues, while failing to address mother's immorality or misrepresentation to the court. As discussed, mother's affairs were not recent. Although the trial court should have considered the affairs under factor (f), it was free to give them less weight than more recent events. With regard to the alleged misrepresentation, mother claimed she forgot about the incident when she initially testified and the trial court was free to believe her explanation. See *Berger*, 277 Mich App at 707.

Moreover, the trial court did not err by considering father's anger, which is relevant to the child's best interest and supported by the record.[2] Although the trial court had previously

[2] Father argues, broadly, that the trial court committed clear legal error by focusing on his anger issues while ignoring mother's infidelity and dishonesty with the court. The trial court mentioned father's anger or aggression in factors (d), (f), (g), (j), and (l). As noted, "the factors have some natural overlap." *Fletcher*, 229 Mich App at 25. Moreover, father's anger was

considered father's anger, in factor (l) it noted the need for "immediate attention." Moreover, this Court has noted that "the factors have some natural overlap." *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998).

J. CUSTODY DETERMINATION

Employing the correct burden of proof, our review of the record reveals that mother established, by clear and convincing evidence, that the change in CP's custody arrangement was in her best interests. *Mitchell*, 296 Mich App at 520. The trial court's findings that the factors (b), (d), (f), (j), (k) and (l) favored mother were not against the great weight of the evidence. Factors (a), (c), (g), and (h) properly favored both parties equally. Factor (e) properly favored neither party and no factors favored father. Given that the majority of factors weighed in mother's favor, coupled with the court's discretion to accord differing weight to the best-interest factors, *Rains v Rains*, 301 Mich App 313, 329; 836 NW2d 709 (2013), the trial court did not abuse its discretion by awarding plaintiff sole legal custody and primary physical custody of the child. Its failure to apply the correct burden of proof was harmless. See *Fletcher*, 447 Mich at 889.

IV. DUE PROCESS

Lastly, father argues that the trial court violated his due process rights by misusing its ability to question witnesses. We review these unpreserved claims for plain error affecting substantial rights. *Rivette*, 278 Mich App at 328.

MRE 614(b) provides that the trial court "may interrogate witnesses, whether called by itself or by a party." "As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality, we believe that a trial court is free to ask questions of witnesses that assist in the search for truth." *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996).

Father's claims that the court improperly interrupted his attorney do not fall under MRE 614(b) because they do not relate to the questioning of a witness. Father takes issue with the trial court interrupting his attorney's opening statement by asking counsel where the parties' son was and what he was doing. Father has failed to show how this question violated his due process rights. Moreover, the court also interrupted plaintiff's counsel's opening statement, and, thus, the court's interruptions did not indicate partiality. *Davis*, 216 Mich App at 52. Lastly, with

relevant to these factors which involve stability (factor (d)), moral fitness (factor (f)), mental health (factor (g)), father's willingness to encourage a relationship with mother (factor (j)), and any other relevant factor (factor (l)). Thus, it was not clear legal error for the trial court to consider father's anger in addressing these factors. Moreover, there was also evidence to support the trial court's findings and, as discussed, the trial court's findings on these factors were not against the great weight of the evidence. Further, we defer to the trial court's "determination regarding the relative weight to assign testimony as appropriate under the circumstances." *Berger*, 277 Mich App at 715.

regard to father's claim that the court inappropriately questioned witness, he does not refer us to any specific instance of error and our review of the record does not reveal that the court questioned witnesses in a manner that was inappropriate, gave the appearance of partially, or was not merely in search of the facts. *Id*.

Father also appears to argue that the trial court improperly interrupted his counsel and issued inappropriate comments from the bench.

While "a trial court is entitled to control the proceedings in its courtroom, it is not entitled to do so at the expense of a defendant's constitutional rights." *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). A trial judge may deny a defendant "a fair trial by repeatedly interjecting improper and []partial comments and questions." *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). "The test is whether the judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case." *Id*. at 405 (quotation marks, emphasis, and citations omitted).

Father does not point to, nor does the record reveal, any instances of improper comment by the trial court. Deprivation of due-process rights on the basis of a trial court's comments generally arises in a criminal context, due to the trial court's ability to influence the jury. See *id*. Because the instant custody decision was rendered by the court, there was no chance that the challenged comments could arouse suspicion in the mind of a jury. *Id*. The trial court also interrupted plaintiff's counsel. Lastly, because determinations of witness credibility in custody cases are reserved for the trial court, *Rains*, 301 Mich App at 329, any comments relating to witness credibility could not have deprived defendant of his due-process rights.

Finally, father broadly asserts that the trial court violated his due-process rights by overruling his attorney's hearsay objections. Father does not cite a specific example, and a review of the evidentiary hearing transcripts reveals only two hearsay objections made by father's counsel that the court overruled. On both occasions, counsel objected to plaintiff's attorney asking a witness whether they had spoken to an individual regarding a particular matter. As the trial court noted, plaintiff's counsel merely asked whether those conversations took place and was not inquiring into the content of those conversations; therefore, the witnesses' statements were not offered for the truth of the matter asserted and did not constitute inadmissible hearsay. MRE 801(c). Accordingly, the trial court did not abuse its discretion by overruling father's counsel's objections. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). Further, father has not alleged how the admission of the challenged testimony deprived him of due process or entitles him to reversal.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro