STATE OF MICHIGAN

COURT OF APPEALS

KARTER LANDON,

Plaintiff-Appellant,

V

CARLA SHELTON,

Defendant-Appellee.

UNPUBLISHED
December 21, 2010

No. 297064
Genesee Circuit Court
Family Division
LC No. 07-278940-DP

Before: MARKEY, P.J., AND WILDER AND STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the circuit court that adopted the recommendation of the referee, which granted defendant sole legal and physical custody of their son, Noah. We vacate and remand.

I. CHILD CUSTODY

Plaintiff argues that the trial court erred when it adopted the referee's recommendation, which granted sole legal and physical custody to defendant. We agree. All custody orders must be affirmed on appeal unless the trial court's findings 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. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). A trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child should be affirmed unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. *Id.* "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The Child Custody Act of 1970, MCL 722.21 *et seq*., governs child custody disputes between parents, agencies, or third parties. *Berger*, 277 Mich App at 705. The purpose of the Act is to promote the best interests of children. *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). However, before the best interest of a child is examined, a court must determine whether an established custodial environment exists. *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009).

A. ESTABLISHED CUSTODIAL ENVIRONMENT

An established custodial environment exists 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).]

In other words, "[a]n 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*, 277 Mich App at 706.

Here, the trial court found that an established custodial environment existed solely with defendant:

> The child has lived with Defendant his entire life.
>
> For the approximately 2 and ½ years that the parties cohabitated, the child lived with both parents. Both before and after the parties cohabitated, Plaintiff has spent a liberal amount of time with the child. This includes both overnights and caring for the child while Defendant worked and went to school at night. Plaintiff has made it clear that he is always available for the child and has sought custody from the inception of this litigation.
>
> However, based upon the circumstances of this case, where the child has always resided with Defendant and that he looks to her for daily guidance, discipline, the necessities of life and parental comfort, the Court finds that an established custodial environment exists with her.

This finding, however, is against the great weight of evidence. The court seemed to have made a conclusion that, simply because the child has resided with defendant, it necessarily meant that an established custodial environment existed *solely* with defendant. This fact is clearly relevant in determining if an established custodial environment existed with respect to defendant, but it does not preclude a finding that a custodial environment existed with plaintiff as well. An established custodial environment can exist with more than one home, *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007), and with more than one parent, *Berger*, 277 Mich App at 707.

Noah was born on February 21, 2001. At the time, plaintiff and defendant maintained separate residences and they continued to do so until May 2005, when Noah was four years old. Defendant's assertion that Noah spent only a couple of overnights with plaintiff during this time is not supported by the record. When defendant testified regarding overnights, she clarified that those were the number of overnights that plaintiff had with Noah *without defendant being present* – not the total number of overnights plaintiff had with Noah. Both parties have testified

that they frequently spent the night at each other's home. Thus, the fact that plaintiff only had a couple overnights alone with Noah during this time period is not outcome determinative.

The parties presented vastly different testimony as to the amount of contact between plaintiff and his son. Plaintiff testified that, during this time period, he had Noah virtually every day while defendant worked Defendant testified that Noah was at daycare this entire time, unless Noah was sick. , defendant testified that it was only in the case of illness that Noah would be with plaintiff during the day. However, when questioned about specifics, defendant conceded that Noah only was at daycare for the first one and one-half years of his life, with plaintiff caring for Noah after this time. Thus, even by defendant's own testimony, it appears that from the time that Noah was one and one-half years old until he was four years old, he was with plaintiff during the day while defendant worked. This view is further supported from the testimony of plaintiff's neighbor, who saw plaintiff with Noah "all the time" at plaintiff's residence during the day (and had never seen defendant before these proceedings) and by the nearby Subway restaurant manager, who saw plaintiff and Noah dine at the restaurant three to five times every week starting in approximately 2002. Additionally, there was family videotape admitted into evidence that showed a young Noah crawling, walking, counting, etc. inside plaintiff's house with defendant not present. All of this evidence considered together makes it very clear that regardless of how many sole overnights plaintiff had with Noah, after Noah was one and one-half years old, plaintiff was a regular presence in Noah's life and provided for Noah's needs.

The trial court, in its conclusion that an established custodial environment existed only with defendant, appeared to have ignored the time where the parties lived together. In May 2005, plaintiff and defendant moved into a house together in Grand Blanc, Michigan. According to plaintiff, nothing changed regarding the amount of time he spent with Noah after the move. Noah would still, for the most part, be with plaintiff during the day, while defendant was away at work. Additionally, defendant attended school at night for two nights a week from 2003 until 2007. When defendant was gone, it is undisputed that plaintiff cared and provided for Noah, as well as defendant's other child from another relationship, Taylor, when Taylor was around.[1] Plaintiff's caring for Noah continued until January 2008, when defendant moved out of the house and moved back with her parents, taking Noah and Taylor with her. Thus, from when Noah was one and one-half years old up until nearly seven years old, plaintiff's presence in Noah's life was continuous.

Shortly after defendant moved out, a temporary custody order was entered, which allowed for plaintiff to have parenting time on alternating weekends and every Wednesday evening. In addition to this time, plaintiff, with the consent of the school and the circuit court, frequently visited with Noah at lunchtime at school. This parenting-time schedule was continued after the trial court entered its order granting full legal and physical custody to defendant. Accordingly, since January 2008 until the time of the trial court's opinion in March 2010, plaintiff has had a much-reduced time with Noah.

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[1] Taylor began regularly living with plaintiff and defendant in 2006.

Thus, when viewing all of the evidence, we conclude that the evidence preponderates in the opposite direction from the trial court's finding that an established custodial environment existed solely with defendant. There should be little doubt that an established custodial environment existed, at a minimum, with plaintiff prior to January 2008. Plaintiff's constant presence, caring, and providing, from when Noah was one and one-half years old until he was nearly seven years old, was profound. Plaintiff's reduced parenting time since January 2008 is relevant because a custodial environment can be established through a custody order, temporary or not. *Berger*, 277 Mich App at 707. But custody orders, by themselves, do not establish a custodial environment. *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). And "[t]he existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian." *Berger*, 277 Mich App at 706-707. The key is to examine the relationship the child has with each parent. *Bowers*, 198 Mich App at 325. There was no evidence presented that Noah did not continue to look to plaintiff for "guidance, discipline, the necessities of life, and parental comfort" after defendant moved out of the Grand Blanc house. In fact, Noah expressed that he missed his father and his room in the Grand Blanc house.

The evidence clearly preponderates that plaintiff's reduced parenting time with Noah did not destroy the established custodial environment that existed before January 2008. Plaintiff continued to care and provide for Noah, albeit in a necessarily reduced capacity. In short, the five and one-half years of constant presence was not negated simply because plaintiff had reduced time with Noah for the last two years. Accordingly, the trial court's finding that no established custodial environment existed with plaintiff was against the great weight of evidence. Rather, the record demonstrates that there was an established joint custodial environment in this case. Consequently, as explained below, the trial court was not permitted to alter the custody arrangement absent clear and convincing evidence.

B. BEST-INTEREST FACTORS

When there is a joint established custodial environment, neither parent's custody may be disrupted absent clear and convincing evidence. *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008). Here, even though the trial court found that an established custodial environment only existed with defendant, the court noted that, regardless of any established custodial environment, the best-interest factors favored vesting sole custody with defendant by a clear and convincing standard. We disagree.

> The best-interest factors to be evaluated are:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material

needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(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.]

The court found that factor (a) favored neither party, and plaintiff does not argue against it.

The trial court found that factor (b) favored defendant. The court found that both parties "have equal capacity and disposition to provide the child with love and affection." However, the court had concerns for both parents with respect to their ability to provide guidance to Noah. The court had concerns regarding defendant's "proclivities towards an active social life" and plaintiff's overbearing means of providing guidance. The court, in the end, was more concerned with plaintiff's behavior and concluded that the factor favored defendant. Given that the court seemingly only slightly favored defendant in this factor, this finding was not against the great weight of evidence. The court identified concerns with each party and ultimately found that its concerns for plaintiff slightly outweighed its concerns for defendant. The record supports the court's concerns, and while we may not necessarily agree with how the court balanced the concerns, the evidence does not clearly preponderate in the opposite direction. Accordingly, the court's finding for this factor should not be disturbed.

The trial court found that factor (c) favored defendant. Factor (c) addresses the parties' capacity and disposition to provide food, clothing, medical care, and other material needs to the child. The court found that plaintiff has completely failed to support Noah in the environment he spends most of his time – with his mother. In support, the court noted that plaintiff has made

only a single child support payment of $224.77 and is in arrears in excess of $15,000. Given plaintiff's reluctance or inability to pay the child support payments, the court's finding was not against the great weight of evidence and should not be disturbed.

The court found that factor (d), which measures the length of time the child has spent in a stable, satisfactory environment, favored plaintiff. However, this finding was "tempered" by the court's concerns with the means that plaintiff collected evidence for the custody proceedings. Plaintiff does not dispute the ultimate finding but does take exception to this "tempering." We agree. How plaintiff collected evidence is not relevant to this factor, which only measures the "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." Thus, the court's finding, favoring plaintiff, should not be disturbed.

Plaintiff does not dispute the trial court's finding for factor (e), which favored plaintiff.

The trial court found the parties equal under moral fitness factor (f). This finding, however, is against the great weight of evidence. The court noted its concern regarding defendant's alcohol abuse and lifestyle choices and plaintiff's obsessive behavior. However,

> [f]actor 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.* [*Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994) (emphasis in original).]

While the trial court's concerns are valid, only the concern regarding defendant's drinking and lifestyle choices directly affects a parent's ability to function as a parent. On the other hand, the overzealousness that plaintiff has for collecting evidence to be used in this custody proceeding does not affect his ability to function as a parent. The court tried to create a link when it stated that plaintiff's behavior "impacts parenting because of its extensive impact on defendant's life, of which the child is a part." However, as the *Fletcher* Court noted, the only concern is how this conduct influences how that person acts as a parent. Because there was no evidence introduced that showed how plaintiff's fervor in collecting evidence affected his ability to function as a parent, the court's findings were against the great weight of evidence. Additionally, the court's conclusory finding, that *defendant's* parenting was affected by *plaintiff's* actions, was not supported by the evidence.

Factor (g) deals with the physical and mental health of the parties. The trial court compared defendant's immaturity and alcohol abuse with plaintiff's obsessive behavior. The court, while acknowledging that there was no expert psychological or psychiatric evidence, was more concerned with plaintiff's mental health and found this factor in favor of defendant. The court relied on two examples of how plaintiff's obsessive behavior affected his ability to parent. First, the court noted that plaintiff was visiting Noah nearly every day at lunchtime at school. The court feared that such visits were unhealthy for the child's normal psychological

development. However, without any expert testimony expressing this concern, the trial judge ventured into impermissible speculation. See *Adams v Adams*, 100 Mich App 1, 14; 298 NW2d 871 (1980). Second, the trial court took issue with plaintiff coaxing Noah to run on a treadmill by paying him a penny a minute. The court went out of its way to note that there is nothing wrong with a parent paying attention to nutrition, exercise, lifestyle and general health, especially when a child is overweight, as is the case here. However, the court objected to plaintiff's means, finding that plaintiff had an excessive focus, which "is unhealthy to a child's self-esteem and psychological well-being." Assuming arguendo that plaintiff has an obsessive personality that manifests as having an "excessive focus," we find no evidence showing how this behavior was worse for Noah than defendant's alcoholic and partying behavior.

Furthermore, defendant had a history of not being around the home based, in part, on a desire to be away partying and drinking. She would often come home drunk, and when she did come home, it was sometimes after sunrise the following day. Additionally, defendant was a smoker, who smoked constantly inside the car in the presence of Noah. Although not required to note every fact when it makes its findings, *Fletcher*, 447 Mich at 883-884, the court omitted defendant's dependence on smoking. This dependence has an adverse affect on Noah through the constant exposure to the second-hand smoke. Aside from the known health risks with such exposure, there was evidence introduced that Noah suffers from chronic nosebleeds and should not be exposed to such smoking. Accordingly, when considering the physical and mental health of the parties with respect to how their respective health impacts their ability to function as parents, the court's finding, that defendant was favored on this factor, was against the great weight of evidence. Instead, the evidence showed, at a minimum, that the parties were equal on this factor or, more likely, that the factor favored plaintiff.

Related to factor (h), the home, school, and community record of the child, the court found the parties equal. The court specifically found that Noah was performing about the same both academically and behaviorally regardless of the time period or which parent was in the household. Part of the difficulty in assessing this factor is that the grading system changed when Noah entered third grade in the Clio school district. In third grade, he started getting traditional letter grades (A, B, C, D, E), as opposed to the more amorphous grades from the Grand Blanc school district:

> S: Consistently completes tasks with accuracy. Applies previously learned concepts. Independent learner.
>
> EP: Meets grade level criteria. Solves problems with occasional assistance. Usually completes tasks with accuracy.
>
> BP: Becoming aware of grade level criteria. Benefits from monitoring and help.
>
> AC: difficulty with grade level criteria. Consistently needs monitoring and help.

Accordingly, the court's finding that each party was equal was not against the great weight of evidence and should not be disturbed.

Related to factor (i), the reasonable preference of the child, the court interviewed Noah but found that it did not receive useful information. Without any record of the interview, there is

nothing to question this finding.

Factor (j) addresses the willingness and ability to facilitate and encourage a parent-child relationship with the other parent. The Court found that plaintiff's behavior in monitoring defendant's behavior, lifestyle and activities was indicative of an unwillingness to facilitate a relationship between the child and defendant. While there was also evidence that defendant took certain actions to avoid Noah's contact with his father, this Court cannot say that the trial court's finding that plaintiff's spying was more detrimental to the parent child relationship than defendant's behavior was against the great weight of the evidence. Consequently, the trial court did not err in determining that this factor favored defendant.

Factor (k) addresses domestic violence. The court found this factor essentially equal and not significant in the overall analysis. Both parties alleged instances of domestic abuse, so the court's finding is not against the great weight of evidence and should not be disturbed.

Factor (l) allows a court to consider any other factor it deems relevant in determining the best interests of the child. Here, the court found that Noah being with Taylor, his half-sister, benefited Noah. Accordingly, the court found this factor to weigh in favor of defendant, with whom Taylor resided. Since it generally is in the best interest to keep siblings together, *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001), this finding is not against the great weight of evidence.

The trial court then evaluated these best-interest factors and decided that the evidence showed, not only by a preponderance of the evidence, but by a clear and convincing standard, that Noah's best interests resided with defendant having sole legal and physical custody. Given our determination that many of the court's findings related to the best-interest factors were against the great of evidence, a remand is necessary. Regardless of how plaintiff acted towards defendant in the pursuit of this custody case, it is apparent that the evidence does not favor defendant by a clear and convincing standard. While the trial court was free to evaluate and weigh plaintiff's obsessive behavior, it could only do so with respect to his ability to function as a parent. *Fletcher*, 447 Mich at 886-887. The court impermissibly ventured into other areas of analyses. Accordingly, we remand to the circuit court so it can reevaluate and weigh the factors consistent with this analysis.

C. CUSTODY CONCLUSION

In sum, the trial court's finding that an established custodial environment existed solely with defendant was against the great weight of evidence, when the evidence showed that there was an established joint custodial environment. Additionally, the court's finding, that the evidence showed by a clear and convincing standard that the best-interest factors favored defendant was against the great weight of evidence. On remand, the court is to reevaluate these aspects consistent with the provided analysis.

II. REFEREE BIAS

Plaintiff argues that the referee's bias denied him his right to due process. We disagree because the de novo circuit court trial cured any bias at the referee hearing. Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *In re Williams*, 286

Mich App 253, 274; 779 NW2d 286 (2009).

A fundamental component of procedural due process is the right to a fair and impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). One way to prove that a decision maker was not impartial is to demonstrate actual bias. *Hughes v Almena Twp*, 284 Mich App 50, 70; 771 NW2d 453 (2009).

Here, at the conclusion of the December 18, 2008, referee hearing, the recording equipment stayed on after the parties left. Referee Odette participated in a conversation with another referee that was recorded:

> *REFEREE ODETTE:* But, anyways, yeah, this one is – is just so disciplined, Barney [the plaintiff's attorney]. It was transferred to Judge Newblatt –
>
> *REFEREE KRELLWITZ:* Oh.
>
> *REFEREE ODETTE:* And he made a big stink about he wanted me to keep the case. And so now it – and he's – we're still on his case.
>
> *REFEREE KRELLWITZ:* I – I heard him doing – doing shit with the transcript, somebody was –
>
> *REFEREE ODETTE:* Ohhhh, oh, my God. On and on and on –
>
> *REFEREE KRELLWITZ:* You got your decision made already, don't you?
>
> *REFEREE ODETTE:* Uh-huh.
>
> *REFEREE KRELLWITZ:* Before –
>
> *REFEREE ODETTE:* Yeah. Why he is doing – and if he can't tell that from – from –
>
> *REFEREE KRELLWITZ:* Body language?
>
> *REFEREE ODETTE:* – from me and my what I, you know, how I rule, and – he's a totally [sic] idiot or he doesn't care. He just wants to –
>
> *REFEREE KRELLWITZ:* Get –
>
> *REFEREE ODETTE:* – and you know it's kind of sad because at one – one of the hearings he – he's getting paid by the – the – his mother, this guy is a weirdo.
>
> *REFEREE KRELLWITZ:* Uh-huh.
>
> *REFEREE ODETTE:* And he – he from – I – I – I – I didn't argue – I should have allowed it into evidence just 'cause I was so disgusted by it, but he has been audio and videotaping this woman, who wasn't his wife, that – for the

past two years, you know. I mean, she didn't know. She'd come home – if you came home drunk, he – and – and – what the DVD started like that. Hey, what's you know, and her – him almost in a really kind of mean, teasing way, getting her to act drunker and drunker on the film. And then he'd – he spliced them all together and made a DVD that they wanted to put into evidence, and we started it and it was so humiliate – and she was – he was saying why do – asking her to take her clothes off, or why you acting different now that I got the camera on, huh? She's you know, just really mean and – and Lisa was like, enough, you know, I've got to object to this. This is the night I – and he made a big old deal about, you know, I still want to mark it, excluded evidence because, you know, he thinks he's right in every objection and I – and – and – and he kept –

REFEREE KRELLWITZ: Bringing it –

REFEREE ODETTE: – bringing in stuff. I said everything this guy has done in the past two years –

REFEREE KRELLWITZ: Yeah –

REFEREE ODETTE: – has been done in preparation for this litigation –

REFEREE KRELLWITZ: Yeah.

REFEREE ODETTE: So as far as I'm concerned, none of it is admissible. Well, you know, on and he – this guy is such a devious little prick. I just – I can't believe how much he has done to this woman. [R V, pp 167-169.]

We are convinced that plaintiff successfully demonstrated that Referee Odette held actual bias against plaintiff. Referee Odette called plaintiff a "devious little prick" and a "weirdo" and also talked disparagingly about plaintiff's attorney. And perhaps just as troubling is the fact that Referee Odette had made a decision as of this date, before the conclusion of all the proofs. The existence of the referee's bias was plain and, at the time, affected plaintiff's right to due process, a substantial right. This bias manifested itself in the referee's findings where she found that none of the 12 best-interest factors favored plaintiff. This is striking since our review of the evidence showed that plaintiff should have been favored on at least four of the factors. Accordingly, plaintiff successfully showed that he was denied his right to due process at the referee hearing.

However, the referee hearing was not the culmination of the custody proceedings. After the hearing, the circuit court held a de novo trial. Plaintiff does not argue that the circuit court judge was biased. Instead, plaintiff only argues that because the referee hearing was biased, the circuit court hearing, which relied on evidence and transcripts from the hearing, was tainted also. Plaintiff cites no authority standing for the proposition that a tainted referee hearing automatically results in the subsequent de novo circuit court trial being tainted as well. Plaintiff seems to argue that the rulings of the referee affected what evidence the circuit court could consider. This argument would be more persuasive if it were not for the fact that the circuit court *did* admit evidence that was excluded from the referee hearing. Accordingly, even though plaintiff's substantial rights were affected *at the time* by the referee's bias, plaintiff ultimately

suffered no prejudice because the circuit court held a de novo trial. Moreover, plaintiff *requested* the de novo trial, in part, as a remedy for the referee bias. Plaintiff cannot now object to the remedy that he specifically requested. See *Grant v AAA Mich/Wisc, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006) ("A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal.").

III. DELAY IN PROCEEDINGS

Plaintiff argues that the extraordinary delay in the custody hearing unfairly prejudiced him. We disagree. This unpreserved issue is reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCR 3.210(C)(1) provides that "[w]hen the custody of a minor is contested, a hearing on the matter must be held within 56 days." Here, in January 2008, the circuit court referred the matter to the referee for hearings. Over the course of the next 16 months, the referee held six different half-day[2] hearing sessions spaced months apart: March 6, 2008; May 2, 2008; June 13, 2008; September 19, 2008; December 18, 2008; and May 1, 2009. The actual time covered by these sessions was approximately 16.5 hours.

Plaintiff repeatedly requested to have either full days of hearings scheduled or back-to-back days scheduled, or a combination of both. Plaintiff made no less than ten such requests to the circuit court and the referee, spanning from April 2008 through February 2009. Given the vast amount of time between these sessions, the requests seemingly were rebuffed.

Even though this delay is repugnant on its face, practically, the only way that plaintiff would be prejudiced by this delay would be if, because of the temporary parenting-time order that existed during this period, an established custodial environment was created with defendant or, conversely, if an established custodial environment with plaintiff was destroyed. The trial court's opinion regarding the established custodial environment did not explicitly reference this period, but it did reference how the child had lived with defendant his entire life. Regardless of the trial court's opinion though, we concluded in Part I.A., *supra*, that the trial court's finding of an established custodial environment existing solely with defendant was against the great weight of evidence. Accordingly, we cannot conclude that plaintiff suffered any prejudice from the lengthy delay, and this claim fails. Additionally, because the court rule does not prescribe any sanction or remedy for failing to adhere to the 56-day limit, this Court has previously decided not to impose one. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991).

IV. CHILD SUPPORT – IMPUTED INCOME

Plaintiff argues that it was erroneous to impute any income to plaintiff. We agree that a remand is necessary. A trial court's decision to impute income in a child support proceeding is reviewed for an abuse of discretion. *Stallworth v Stallworth*, 275 Mich App 282, 286-287; 738

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[2] The term "half-day" is used loosely – most of the sessions went from a little before 9:00 a.m. until a little before noon and one session lasted a little more than two hours.

NW2d 264 (2007).

When determining child support obligations, "a trial court must presumptively follow the Michigan Child Support Formula." *Id.* at 284. According to the 2008 Michigan Child Support Formula Manual, "When a parent is voluntarily unemployed, or has an unexercised ability to earn, income includes the *potential* income that a parent could earn, subject to that parent's actual ability." 2008 MCSF 2.01(G) (emphasis in original). Section 2.01(G)(1) further provides, "The amount of potential income imputed should be sufficient to bring that parent's income up to the level it would have been if the parent had not voluntarily reduced or waived income." Thus, it is clear that income is to be imputed only when a parent has somehow voluntarily lowered his actual income or voluntarily is not earning what he could. See *Rohloff v Rohloff*, 161 Mich App 766, 770, 776; 411 NW2d 484 (1987).

Here, the Friend of the Court ("FOC") made an initial determination regarding child support on April 23, 2008. In that report, the FOC noted that plaintiff "failed to provide income tax returns"; thus, the FOC simply imputed a monthly income to plaintiff of $4,316.67, equating to a yearly income of $51,800. Plaintiff objected to this, explaining that he did not have adequate time to submit the requested tax returns to the FOC. The trial court, without explicitly ruling on the appropriateness of imputing income, ordered the FOC, and the referee, to reevaluate the matter with the provided income tax returns. On May 21, 2008, the FOC submitted an addendum to its report. The FOC noted the following:

> [Plaintiff] is self-employed as a Landlord/Property Manager. He provided the Friend of the Court with his 2007 income tax returns. According to his tax return, he had a loss of income for 2007. Therefore, his income will be imputed based on the Michigan Occupational Wage Information guidelines for a Property and Real Estate manager ($51,800.00 annually).

In addition to the recommendations[3] using this imputed annual income of $51,800, the FOC provided recommendations with plaintiff's income imputed at full-time minimum wage, $14,929.20 annually, and left it to the court to determine which recommendation to use. Thus, the FOC provided six different recommendations: the three custody scenarios with plaintiff's annual income imputed to be $51,800 and the three custody scenarios with plaintiff's annual income imputed to be $14,929.20.

The referee provided no analysis or discussion regarding her decision on child support. The referee's recommendation simply stated, "Plaintiff shall pay child support as ordered in the attached Uniform Child Support Order." The attached Uniform Child Support Order cited a $611 monthly child support obligation, which was derived from using the $51,800 annual

[3] Because the child's custody was not determined yet, the FOC provided recommendations for the different custody scenarios: joint custody, custody with plaintiff, and custody with defendant.

imputed income, but the order did not provide any explanation regarding why imputing any income was appropriate, let alone why an income of $51,800 was favored over one of $14,929.20.

The circuit court did not address child support during its two-day de novo trial. Furthermore, the circuit court did not reference child support in its opinion,[4] instead simply stating that it was agreeing with the referee's (child custody) recommendation.

We question the validity of imputing income to a party when the only apparent reason is that the person is not making what the FOC guidelines state they could or should be making. This is an insufficient ground. Our Supreme Court has stated that "any imputation of income [must be] based on an actual ability and likelihood of earning the imputed income." *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998); see 2008 MCSF 2.01(G)(2)(h). There were no findings issued determining that plaintiff (1) voluntarily was not earning what he could and (2) that he had an actual ability and likelihood of earning the imputed income. Thus, the trial court abused its discretion when it adopted the referee's recommendation, when neither the referee nor the trial judge enunciated why it was proper to impute an annual income of $51,800 to plaintiff when the FOC's only rationale for imputing income was that plaintiff's tax return showed a net loss of income.

On remand, we remind the trial court that plaintiff's income is not necessarily entirely defined by his individual income tax returns. As 2008 MCSF 2.01(C)(2) indicates, income includes "[e]arnings generated from business, partnership, contract, self-employment, or other similar arrangement, or from rentals." Additionally, 2008 MCSF 2.01(C)(2)(a) provides, "Income (or losses) from a corporation should be carefully examined to determine the extent to which they were historically passed on to the parent or used merely as a tax strategy." Thus, since plaintiff is the sole shareholder and officer of three corporations, the financials for all of these entities should be carefully examined in addition to plaintiff's individual tax returns. Furthermore, on remand, given the bias exhibited by the referee, the trial court should either make this determination on its own or assign this to a different referee. See *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).

V. CONCLUSION

Because the trial court's findings regarding an established custodial environment and the best-interest factors were against the great weight of evidence, we vacate the trial court's order adopting the referee's recommendation and remand. Additionally, on remand, the court is to properly determine the income of plaintiff and only impute income if it determines that plaintiff, through his own actions, is not earning what he could.

Vacated and remanded for further proceedings consistent with this opinion.

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[4] In fact, the introduction in the opinion starts, "Before the Court are the issues of custody and parenting time . . . ."

We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs. MCR 7.219(f).

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens