STATE OF MICHIGAN

COURT OF APPEALS

HENRY GERALD GROMADZKI,

Plaintiff-Appellant,

v

VERONICA MICHELLE GROMADZKI,

Defendant-Appellee.

UNPUBLISHED
June 27, 2024

No. 363525
Wayne Circuit Court
LC No. 21-105900-DM

Before: MURRAY, P.J., and RIORDAN and D. H. SAWYER*, JJ.

PER CURIAM.

Plaintiff Henry Gromadzki appeals as of right the trial court's judgment of divorce from defendant Veronica Gromadzki. On appeal, plaintiff raises various claims of error regarding property division, spousal support, child support, child custody, and attorney fees. We affirm.[1]

I. FACTS

On June 17, 2021, plaintiff filed his complaint for divorce against defendant. In his complaint, plaintiff sought dissolution of the 13-year marriage and joint custody of the parties' three daughters, who were born in 2006, 2008, and 2012, respectively.

At the June 2022 bench trial, plaintiff testified that he currently is employed as a "construction gas planner" for DTE Energy, although he previously held other occupations with that company. Plaintiff is not guaranteed any overtime hours, but he often requests overtime when it is available to increase his income. Plaintiff explained that before the divorce proceedings, he deposited his bi-weekly "base pay" of about $2,200 into the parties' joint bank account to be used for certain household expenses such as the mortgage, and his overtime pay would be used for other expenses such as his car payment and cellular-phone bill. Plaintiff stopped depositing money into the joint account in November 2021. After November 2021, defendant was personally responsible

[1] Defendant is not represented by appellate counsel, nor has she filed a brief on appeal.

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

for the gas and electric bill and the cable bill, while plaintiff was personally responsible for the water bill.

Plaintiff testified that the two older daughters currently participate in travel soccer and have been doing so for several years; that he was as involved with his daughters as he reasonably could be in light of his full-time job; and that defendant "did a majority of the school stuff with the girls" because she was a stay-at-home mother. Plaintiff thought that he had "a pretty good relationship" with his daughters. Plaintiff said that he currently is, and always was, responsible for the two older daughters' transportation needs for travel soccer, although defendant occasionally helps with transportation when necessary. Plaintiff added that he always attends those soccer games unless there is a conflict between two games, and that defendant does not attend the soccer games. Plaintiff is financially responsible for the soccer activities.

Plaintiff acknowledged that he received a "DUI" in 2010 and another "DUI" in 2016. As a result of the second offense, plaintiff had his license suspended. Plaintiff said that he currently drinks about twice a week in moderation, and he stopped drinking to intoxication in 2016.

Plaintiff's W-2 for 2018 indicated that he earned about $126,000, the W-2 for 2019 indicated that he earned about $131,000, the W-2 for 2020 indicated that he earned about $130,000, and the W-2 for 2021 indicated that he earned about $144,000. Plaintiff explained that his earnings in 2021 were substantially higher than in the previous few years because he had to work extra overtime to prevent the marital home from being foreclosed. According to plaintiff, defendant enrolled the parties into a "COVID relief" program offered by the mortgage company without his knowledge, which resulted in six missed monthly mortgage payments. When plaintiff learned about the missed mortgage payments after those six months, he worked additional overtime to become current on the mortgage.[2] Plaintiff indicated that he worked less overtime in 2022.

When questioned about his tax return from 2017, plaintiff testified that defendant was responsible for preparing and filing it. Plaintiff said that he did not review the tax returns prepared and filed by defendant. When questioned by the trial court about the details of a claimed $12,129 given to charity in 2019, plaintiff was unable to explain it.[3]

Plaintiff testified, on the basis of bank records, that defendant had removed about $9,700 from the parties' joint account in October and November 2021. Plaintiff was unaware that defendant intended to do so and had no knowledge about how the money was spent or directed.

Defendant testified that she mostly was a stay-at-home mother during the marriage, with a few miscellaneous side jobs such as tutoring. Beginning in November 2020, defendant worked for Rock Central, a mortgage institution related to Rocket Mortgage, for a salary of about $50,000.

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[2] While plaintiff testified on direct examination that he paid for the delinquent mortgage payments from his personal bank account, on cross examination, plaintiff acknowledged that $4,321.40 was paid from the parties' joint account.

[3] Defendant, on the other hand, testified that plaintiff "wasn't oblivious to the tax returns" because he "weighed in from time to time."

In 2021, however, defendant only earned about $43,000 because she missed multiple days of work without "PTO," i.e., paid time off. Defendant explained that she recently was diagnosed with cancer, for which she was currently receiving treatment. Defendant hoped to receive long-term disability assistance.

Defendant testified that she is primarily responsible for purchasing food and other household items such as clothing. When asked about her personal bank account, defendant explained that she received a $20,000 disability payment and a $20,000 annuity from the death of her mother, and that she recently transferred about $8,700 from the parties' joint account to her personal account. The $8,700 transfer essentially depleted the joint account. Defendant testified that she transferred the money to her personal account because plaintiff stopped contributing to the parties' joint account, and she needed the money to pay household bills. Defendant acknowledged that she directed the parties' 2018 and 2019 respective tax returns to be deposited into her personal account, but bank records showed that she promptly transferred most of that money into the parties' joint account.

With regard to the delinquent mortgage issue, defendant testified that the parties were two payments behind on the mortgage for years, and that she enrolled the parties, without plaintiff's knowledge, in the COVID-relief program so that those two missed payments would not appear on plaintiff's credit report. Defendant explained that all of the money required to become current on the mortgage was left in the parties' joint account, and that her intent was to become current on the mortgage when the program expired. Defendant testified that she actually used the money in the parties' joint account to become current on the mortgage, and that plaintiff falsely testified that he became current on the mortgage "on his own."

Defendant testified that she has an excellent relationship with her daughters and that she is responsible for their various extracurricular activities, with the exception of soccer. She opined that plaintiff has an "okay" relationship with the middle daughter but a subpar relationship with the oldest and youngest daughters. According to defendant, she was often involved with the daughters' soccer activities before the divorce proceedings, but as the parties' relationship deteriorated, she stopped being involved because soccer was plaintiff's "thing." Defendant added that plaintiff is not involved with any of the daughters' other activities.

Defendant testified that during the previous year, when plaintiff was living in the basement, he frequently was drinking an excessive amount of alcohol. Defendant said that plaintiff's drinking was "exhausting" because he would often make hurtful statements when intoxicated, such as the time when he told one of the daughters that she looked like a "run-away slave."[4] Defendant also said that she witnessed plaintiff drink alcohol during soccer games and that one of the daughters "sign[ed] his AA slip" for one or more of his court-ordered Alcoholics Anonymous meetings after his second drunk-driving conviction.

[4] The daughters are biracial, as plaintiff is white while defendant is black. Defendant later testified that plaintiff would occasionally make such statements when sober, such as yelling "you fucking Black c_ _t" at another driver. In addition, according to defendant, plaintiff regularly told her that she "speak[s] ghetto."

Michael Rose, a clinical therapist, testified that he treated plaintiff to assist him with reunification with his oldest daughter. Rose spoke positively about plaintiff and expressed his belief that plaintiff was a good father.

Robert Dingeldey testified that he met plaintiff through soccer activities a few years earlier because they each had a daughter on the same team. He testified that plaintiff attended every soccer game except one, which plaintiff missed because another of his daughters had a soccer game at the same time. Dingeldey said that plaintiff was a good father and that the two men had become friends, so he was familiar with plaintiff personally. Dingeldey explained that plaintiff's oldest daughter once questioned him during a soccer trip about whether plaintiff had been drinking that morning, and Dingeldey said that he had not. Dingeldey's ex-wife was an alcoholic, and Dingeldey did not believe that plaintiff was an alcoholic. Dingeldey did not observe signs of problematic drinking exhibited by plaintiff. Dingeldey estimated that defendant attends one or two soccer games a year.

On August 5, 2022, the trial court delivered its opinion from the bench, finding as follows. With regard to child custody, the daughters had an established custodial environment with both parties, so the standard of clear and convincing evidence was warranted for modifying the custody arrangement.[5] The trial court addressed the 12 best-interests factors under MCL 722.23 and found that factor (a) (love and affection between the parties and the child) favored defendant because the testimony indicated that plaintiff had less of a relationship with the youngest daughter, plaintiff inappropriately criticized the appearance and presentation of the middle daughter, and the oldest daughter wrote an essay in September 2021 indicating that plaintiff had a negative influence in her life; factor (b) (capacity and disposition of the parties to give the child love, affection, and guidance) favored defendant because "[t]his factor is closely tied to Factor A and the same issues identified"; factor (c) (capacity and disposition of the parties to provide the child with material needs) favored plaintiff because he has a superior income history compared to defendant; factors (d) (length of time the child has lived in a stable environment) and (e) (permanence of the family unit) were neutral; factor (f) (moral fitness of the parties) favored defendant because plaintiff did not credibly testify that "he has responsibly addressed [his alcohol] issue," and plaintiff made "racially inappropriate" statements; factors (g) (mental and physical health of the parties) and (h) (home, school, and community record of the child) were neutral; factor (i) (reasonable preference of the child) was considered by the trial court because it "met with each child, separately"; and factors (j) (willingness to facilitate a continuing relationship between the child and other parent) and (k) (domestic violence) were neutral. The trial court thus awarded sole physical custody to defendant, with plaintiff receiving parenting time on most weekends, as well as certain other times. In addition, the trial court ordered that child support would be calculated "using the three year average of Plaintiff's income, as reflected in his W-2s and using the short-term disability pay of the Defendant."

[5] The trial court noted that the children's Guardian Ad Litem recommended joint legal custody and sole physical custody for defendant, with plaintiff receiving parenting time.

With regard to division of the marital estate, the trial court ordered that each party would receive a one-half equity interest in the marital home; that plaintiff did not prove that defendant "siphoned" off $65,000 in marital assets into her personal account, so each party would be awarded their respective bank accounts in their own names; that plaintiff would have sole responsibility for four credit-card debts totaling about $8,300, and that defendant would have sole responsibility for nine credit-card debts totaling at least $8,800.[6] The trial court also ruled that each party would receive the vehicle currently in his or her respective possession, the Ford F-150 for plaintiff and the Ford Explorer for defendant, along with any accompanying vehicle debt. With regard to spousal support, the trial court found that "[t]he length of marriage, the contribution of the parties and, specifically, the mother's present compromised health situation and general principles of equity, all favor rehabilitative spousal support in the amount of $1,800.00 per month for a two year period." Finally, with regard to attorney fees, the trial court ruled that plaintiff would pay defendant $16,000 under MCR 3.206(D)(2)(a) because "the testimony credibly established that the discrepancy in the parties income, coupled with the Defendant's compromised ability to work at this point, in light of her cancer diagnosis, meets this Court Rule standard."

On October 5, 2022, the trial court entered its order in accordance with its opinion from the bench. This appeal follows.

II. MARITAL ASSETS

Plaintiff argues that the trial court erred by finding that the bank account in defendant's name was her separate property and by awarding defendant a Ford Explorer. According to plaintiff, both of those assets were marital property. Plaintiff also argues that the trial court failed to consider the fact that defendant repeatedly misled him during the marriage with regard to various financial issues and, as a result, the division of marital property was inequitable. We disagree.

"This Court reviews a property distribution in a divorce case by first reviewing the trial court's factual findings for clear error, and then determining whether the dispositional ruling was fair and equitable in light of the facts." *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Butler v Simmons-Butler*, 308 Mich App 195, 208; 863 NW2d 677 (2014). "The dispositional ruling is discretionary and will be affirmed unless this Court is left with a firm conviction that the division was inequitable." *Id*.

"In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate." *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). "Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage." *Id*. at 201. "While income earned by one spouse during the duration of the marriage is generally presumed to be marital property, there are

[6] The trial court noted that certain cards were opened by defendant in plaintiff's name without his knowledge, but that "no evidence was presented that Defendant lived lavishly on these cards and credibly testified that she used the cards for household and children expenses."

occasions when property earned or acquired during the marriage may be deemed separate property." *Id*. (internal citation omitted). "For example, an inheritance received by one spouse during the marriage and kept separate from marital property is separate property." *Id*. "Similarly, proceeds received by one spouse in a personal injury lawsuit meant to compensate for pain and suffering, as opposed to lost wages, are generally considered separate property." *Id*. "The mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital." *Id*. at 201-202.

Plaintiff primarily argues that the trial court clearly erred by finding that the bank account in defendant's name, which he claims contained over $60,000 at the time of trial, was her separate property. We disagree.

As noted, the trial court specifically found that plaintiff did not prove that defendant "siphoned" off $65,000 in marital assets into her personal account. This finding is supported by the record. Defendant testified that her personal account reflected a recent $20,000 disability payment and a $20,000 annuity from the death of her mother. Both of these sources of income presumptively are separate property. See *id*. at 201 (explaining that money for pain and suffering, as well as an inheritance, presumptively are separate property). Plaintiff did not show that either of these sources of income should be considered marital property subject to division, particularly where defendant maintained the money in her personal account. Moreover, while plaintiff observes that defendant directed that two of the parties' respective income-tax returns be deposited into her personal account, defendant explained that she promptly transferred those returns into the parties' joint account. In addition, while defendant transferred about $8,700 or $9,700 from the parties' joint account to her personal account in October and November 2021, she testified that she used that money for household expenses. Finally, there is no evidence regarding the remaining money in her personal account. In sum, plaintiff has not shown that any of the money in defendant's personal account, much less all of the money in that account, should be considered marital property. Thus, the trial court did not clearly err or abuse its discretion by finding that the bank account in defendant's name was her separate property.

Plaintiff also argues that the trial court erred by awarding defendant the Ford Explorer because that vehicle was marital property subject to division. This argument misses the mark. In divorce cases, it is commonplace for a trial court to specifically apportion certain items of personal property in such a manner, even when that property was obtained during the marriage and presumptively is marital property. Here, the trial court awarded plaintiff the Ford F-150 that he regularly used for driving, as well as the accompanying debt for the F-150. By the same measure, the trial court awarded defendant the Ford Explorer that she regularly used for driving, as well as the accompanying debt for the Explorer. No clear error or abuse of discretion occurred.

Plaintiff next argues that defendant has "unclean hands" because she enrolled the parties in a COVID-relief program for mortgage payments during the marriage without informing him that she was doing so. According to plaintiff, defendant used the delay to "enrich[] herself from the funds Plaintiff-Appellant was providing to her for the purpose of paying the mortgage." We agree with plaintiff that, if defendant diverted the money earmarked for mortgage payments from the parties' joint account to her personal account, the trial court should have considered that fact against her in its equitable division of property. See *Sands v Sands*, 442 Mich 30, 33; 497 NW2d 493 (1993). However, the trial court specifically found that plaintiff failed to show that defendant

improperly diverted money from the parties' joint account into her personal account, and defendant testified that the money earmarked for mortgage payments was left untouched in the parties' joint account for the duration of the grace period allowed by the COVID-relief program. And, while plaintiff suggested during his testimony that he individually was responsible for the delinquent mortgage payments from his personal account, the bank records showed that at least $4,300 was transferred from the parties' joint account as a bulk mortgage payment. We cannot conclude on the record before us that the trial court clearly erred or abused its discretion by failing to determine that defendant engaged in inequitable conduct in this regard.

Finally, plaintiff argues that the trial court erred by ordering that he is responsible for the Capital One credit-card debt of about $3,900, as he was unaware that defendant had even opened that card. We disagree. The trial court, in its opinion from the bench, acknowledged that defendant opened that card, as well as at least one other card, without plaintiff's knowledge, but it specifically found that "no evidence was presented that Defendant lived lavishly on these cards and credibly testified that she used the cards for household and children expenses." As the trial court's finding was supported by the trial testimony, that debt presumptively was marital property. See ICLE, Michigan Family Law (2017), § 15.37, p 921 ("In general, debts are treated as negative assets in valuing an overall property award and courts typically allocate them according to the same equitable principles that govern property division in general."). Further, the trial court divided the various credit-card debts relatively equally between the parties, with plaintiff being responsible for about $8,300, and defendant being responsible for nine credit-card debts totaling at least $8,800. While the testimony was not clear regarding the details of those debts, it does appear, as the trial court indicated, that most of the debts were incurred for common household purposes. Thus, under these circumstances, the trial court did not clearly err or otherwise abuse its discretion by apportioning the Capital One debt to plaintiff, where defendant was responsible for other credit-card debts of a similar nature.

Accordingly, we affirm the trial court's property division.

III. SPOUSAL SUPPORT

Plaintiff argues that the trial court erred by awarding spousal support to defendant. According to plaintiff, neither party should have been awarded spousal support. We disagree.

"It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion." *Loutts v Loutts*, 298 Mich App 21, 25; 826 NW2d 152 (2012). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id*. at 26 (quotation marks and citation omitted). "We review for clear error the trial court's factual findings regarding spousal support." *Id*.

"The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). The trial court should consider the following factors when addressing an award of spousal support:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded

> to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson*, 256 Mich App at 631.]

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003).

In this case, after stating its findings on the record regarding the spousal-support factors, the trial court awarded defendant "modifiable rehabilitative spousal support" in the amount of $1,800 per month for 24 months.[7] The trial court did not abuse its discretion doing so.[8]

The evidence shows plaintiff was employed full-time during the marriage and had earned over $100,000 in each of the few years preceding the divorce. In contrast, defendant was mostly a stay-at-home mother during the marriage, which adversely affected her ability to enter the job market. At the time of the divorce, defendant had a salary of about $50,000, which was significantly less than plaintiff's annual income. The two-year award of spousal support was reasonably limited to assisting defendant with establishing herself in the workforce and, while it is undoubtedly burdensome for plaintiff, it is a burden for the relatively short period of two years. Moreover, while plaintiff observes that he has a bi-weekly income of about $2,200, which appears to suggest that the spousal-support award is unrealistic from his perspective, that figure does not include overtime. The evidence indicates that plaintiff was capable, and actually did, receive substantial amounts of overtime that makes him able to pay the spousal-support award. Given these facts, as well as the fact that defendant was receiving cancer treatment at the time of trial with a consequently impaired ability to work, the trial court did not abuse its discretion by awarding her $1,800 in monthly spousal support for two years.

Therefore, we affirm the trial court's award of spousal support.

IV. CHILD CUSTODY

Plaintiff argues that the trial court erred by awarding defendant sole physical custody of the parties' daughters. We disagree.

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[7] Rehabilitative spousal support is intended to allow a party "to assimilate into the workforce and establish economic self-sufficiency." *Friend v Friend*, 486 Mich 1035, 1035 (2010).

[8] Plaintiff does not specifically challenge the trial court's consideration of the spousal-support factors. Instead, he argues that any award of spousal support is inequitable because he "was left 'holding the bag' and ordered to pay $1,800 per month over two years in spousal support ($43,200), and $16,000 in attorney fees, and approximately $1,979 per month in child support, on an approximately $2,140.78 bi-weekly salary."

> We apply three standards of review in custody cases. 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 and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004) (quotation marks and citation omitted).]

"Custody disputes are to be resolved in the child's best interests, and generally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Demski v Petlick*, 309 Mich App 404, 446; 873 NW2d 596 (2015) (cleaned up). MCL 722.23 provides as follows:

> 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 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. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a

child or that parent from sexual assault or domestic violence by the child's other parent.

(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.

Plaintiff argues that the trial court abused its discretion by failing to grant him joint physical custody of the parties' daughters, and instead awarding him only limited parenting time. Plaintiff does not challenge the burden of proof applied by the trial court.[9] Nor does plaintiff challenge any of the particular findings by the trial court regarding the best-interests factors. Arguably, therefore, we may consider this issue waived. See *Winters v Winters*, unpublished per curiam opinion of the Court of Appeals, issued February 15, 2024 (Docket No. 366065), pp 5-6 ("The trial court found that seven factors favored defendant while none favored plaintiff, and, as previously discussed, plaintiff has failed to analyze any of the other factors. By failing to challenge any of the other factors or findings by the trial court, plaintiff has conceded to their being proper.").[10]

In any event, we conclude that the trial court's findings are not against the great weight of the evidence, nor did the trial court abuse its discretion by awarding sole physical custody to defendant.[11] With regard to factors (a) and (b), trial testimony supports the trial court's finding that plaintiff made certain comments to at least one of his daughters, the middle one, that he knew or should have known were racially inappropriate. Moreover, the testimony also supports the trial court's finding that plaintiff has less of a relationship with the youngest daughter, presumably because she was not involved with soccer, and that the oldest daughter wrote an essay criticizing him for his alleged manipulation. There is no comparable testimony with regard to defendant. Thus, the trial court did not err by finding that factors (a) and (b) favored defendant.

Further, with regard to factor (f), the record supports the trial court's finding that he had outstanding, unresolved issues with alcohol. Specifically, defendant testified that plaintiff regularly had a substantial amount of empty alcohol bottles in the basement, and plaintiff's

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[9] See *Marik v Marik*, 325 Mich App 353, 362; 925 NW2d 885 (2018) (explaining that the burden of proof for modifying custody depends on whether "an established custodial environment exists").

[10] "Unpublished opinions are . . . not binding authority but may be persuasive or instructive." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

[11] As noted, the trial court found that factors (a), (b), and (f) favored defendant; factor (c) favored plaintiff; factor (i) was considered; and the remaining factors were neutral. With regard to factor (i), "a trial court must state on the record whether children were able to express a reasonable preference and whether their preferences were considered by the court, but need not violate their confidence by disclosing their choices." *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), aff'd in part and rev'd in part on other grounds by 447 Mich 871 (1994).

testimony regarding his driving offenses indicates a lack of guilt or responsibility for his conduct.[12] Thus, the trial court did not err by finding that factor (f) favored defendant as well.

We acknowledge plaintiff's argument that he "attended almost every single soccer event in the minor children's entire athletic careers[.]" However, the record also shows that defendant primarily was responsible for the daughters' other activities. Additionally, the record shows that plaintiff had a strained relationship with at least one, and possibly two, of his three daughters. It is apparent from the record that these facts, in the trial court's judgment, outweighed plaintiff's involvement with two of the daughters' soccer activities. We find this to be a reasonable determination, and that the trial court did not abuse its discretion by awarding defendant sole physical custody.[13]

V. ATTORNEY FEES

Plaintiff next argues that the trial court erred by ordering him to pay $16,000 in attorney fees to defendant. We disagree.

"We review for an abuse of discretion a trial court's decision whether to award attorney fees." *Myland v Myland*, 290 Mich App 691, 701; 804 NW2d 124 (2010). "We review findings of fact for clear error and questions of law de novo." *Id*. at 702.

"In domestic relations cases, attorney fees are authorized by both statute, [MCL 552.13], and court rule, MCR 3.206[D]." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d (2005). "Nevertheless, attorney fees are not recoverable as of right in divorce actions." *Id*. "Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id*.

The trial court awarded defendant $16,000 in attorney fees under MCR 3.206(D) because "one party has the ability to pay attorneys fees and the other party does not." In this regard, MCR 3.206(D)(2)(a) provides that attorney fees may be awarded when "the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay . . . ." "MCR 3.206(D)(2)(a) has been interpreted to require an award of attorney fees in a divorce action only as necessary to enable a party to prosecute or defend a suit." *Skaates v Kayser*, 333 Mich App 61, 85; 959 NW2d 33 (2020) (quotation marks and citation omitted).

The trial court did not abuse its discretion by awarding defendant those attorney fees. Initially, we note that plaintiff was not expected to immediately pay $16,000 from his savings. Instead, the trial court ordered that the amount is payable "when [plaintiff] refinances the marital

[12] For example, when asked about the 2016 offense, plaintiff testified that the tie rod broke on his car, which apparently explained or excused the offense from his perspective. In addition, plaintiff testified about "the girl that did the sobriety test on me," prompting the trial court to ask plaintiff to refer to the woman as "a police officer," not a "girl."

[13] We note that plaintiff did receive a majority of weekends, alternating weeks during the summer, and other parenting time.

home or from his share of the proceeds of sale of the home if the home is instead sold . . . ." Thus, plaintiff had the ability to pay the attorney fees through the sale of the marital home, as it is undisputed there is substantial equity in the marital home. Importantly, the record shows that there was a significant income disparity between the parties and that defendant was seeking long-term disability at the time of trial. In addition, defendant only received spousal support for two years, after which she would be expected to entirely provide for herself. These facts suggest that defendant should not reasonably be expected to deplete her savings for the instant action. Further, the trial court did not award defendant all of the attorney fees she incurred. Instead, it limited its award to $16,000, suggesting that the trial court balanced the financial circumstances of both plaintiff and defendant to reach an equitable outcome. Therefore, we determine the trial court did not abuse its discretion by awarding defendant some of her attorney fees under MCR 3.206(D)(2)(a).

VI. CHILD SUPPORT

Finally, plaintiff argues that the trial court erred by calculating child support because it overestimated his income. Specifically, according to plaintiff, the trial court incorrectly attributed overtime pay to him by ordering that his child-support obligations "are based on the average of the last three years of the Plaintiff's income from his W-2s . . . ." We disagree.

"Generally, child support orders, including orders modifying child support, are reviewed for an abuse of discretion." *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012). "However, whether the trial court properly applied the [Michigan Child Support Formula] presents a question of law that we review de novo." *Id*. at 179. "On the other hand, factual findings underlying the trial court's decisions are reviewed for clear error." *Id*.

"[A] trial court must presumptively follow the Michigan Child Support Formula (MCSF)." *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). Under the MCSF, "the first step in determining a child-support award is to ascertain each parent's net income by considering all sources of income." *Id*. "In general, this is determined by ascertaining the actual resources of each parent." *Id*. (quotation marks and citations omitted). In *Olivero v Olivero*, unpublished per curiam opinion of the Court of Appeals, issued September 10, 2020 (Docket No. 348747), this Court explained the MCSF treatment of overtime:

> Pursuant to the MCSF Manual, "[i]ncome includes . . . overtime pay . . . from all employers or as a result of any employment . . . ." 2017 MCSF 2.01(C)(1). Such income is determined on the basis of "[a]ctual earnings for overtime." 2017 MCSF 2.01(G)(1)(b). The MCSF Manual also permits income that a parent could *potentially* earn to be imputed to the parent under some circumstances. Specifically, "[w]hen a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the potential income that parent could earn, subject to that parent's actual ability." 2017 MCSF 2.01(G). "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 reduced or waived income." 2017 MCSF 2.01(G)(1). However, "[t]he amount of potential income imputed (1) should not exceed the level it would have been if there was no reduction in income, (2) *not be based on more than a 40 hour work week, and* (3) *not include*

> *potential overtime or shift premiums*." 2017 MCSF 2.01(G)(1)(a) (emphasis added). Moreover, "[i]mputation is not appropriate where an individual is employed full time (35 hours per week or more, but has chosen to cease working additional hours (such as leaving a second job or refusing overtime)." 2017 MCSF 2.01(G)(1)(b). [*Id*. at 4.][14]

Additionally, 2021 MCSF 2.02(B) provides that "[w]here income varies considerably year-to-year due to the nature of the parent's work, use three years' information to determine that parent's income."

Here, the trial court correctly interpreted and applied the MCSF by ordering that plaintiff's child-support payments be determined by his three previous annual W-2s, each of which included overtime pay. As *Olivero* explains, "[a]ctual earnings for overtime . . . are considered income." 2021 MCSF 2.01(G)(1)(b). Thus, the trial court presumptively was required to include the overtime pay actually earned by plaintiff when calculating child support. *Id*. Moreover, as the overtime earnings by plaintiff significantly varied each year, the trial court was correct to consider his three previous annual W-2s, rather than his most recent W-2, when calculating child support. See 2021 MCSF 2.02(B).

It is true, as plaintiff observes, that the MCSF Manual provides that "potential income imputed [should] . . . not include potential overtime[.]" 2021 MCSF 2.01(G)(1)(a)(3). However, this provision does not mean that the trial court should have excluded the overtime pay actually earned by plaintiff. Instead, this provision means that if a parent is voluntarily unemployed or underemployed, the trial court may impute income to that parent in an amount that does not include potential overtime. See *id*. In other words, for example, if plaintiff was voluntarily unemployed or underemployed, the trial court could impute income for no more than a 40-hour workweek and not include any potential overtime pay. *Id*. Because that circumstance was not present here, the trial court did not err.[15]

VII. CONCLUSION

There were no errors warranting relief. Accordingly, we affirm.

/s/ Christopher M. Murray
/s/ Michael J. Riordan
/s/ David H. Sawyer

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[14] The MCSF was reissued effective January 1, 2021, but all relevant sections for the purposes of this appeal were unaffected.

[15] We acknowledge plaintiff's argument that he received "inconsistent overtime work" and that he worked an unusually large number of overtime hours in one year to prevent foreclosure of the marital home. However, to the extent that the three annual W-2s overstated plaintiff's actual current or future income, his remedy is to move for a modification of child support on the basis of new circumstances. See *Peterson v Peterson*, 272 Mich App 511, 515; 727 NW2d 393 (2006).