STATE OF MICHIGAN

COURT OF APPEALS

VALERIE L. KRUG, a/k/a VALERIE L. HATAHET,

Plaintiff-Appellant,

v

DENNIS MICHAEL RZADKOWOLSKI,

Defendant-Appellee.

UNPUBLISHED
December 15, 1998

No. 202419
Oakland Circuit Court
LC No. 88-342773 DP

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

In this child custody dispute, plaintiff appeals as of right from the trial court's final order awarding permanent, physical custody of the parties' minor child to defendant. We affirm the custody award, but remand for further clarification regarding the trial court's denial of attorney fees.

The minor child, Zacharie Krug, was born on June 5, 1987. The parties never married, and after a paternity test established that defendant was the father, the court entered a consent judgment of filiation awarding plaintiff physical custody of the child. The parties experienced behavioral problems with the child from the onset and constantly disagreed about the manner in which the child should be raised, as well as issues pertaining to visitation and custody.

In June 1994, plaintiff notified defendant that she intended to relocate with the child to Florida to be closer to her mother, siblings, and children from a previous relationship. She left the child with defendant for an extended visitation period while she went to secure an apartment and job. While she was gone, defendant filed a petition in circuit court to prevent plaintiff from changing the minor child's domicile, and for temporary custody of the child pending a de novo custody hearing to determine whether a permanent change in custody was necessary. The court promptly issued an ex parte order instructing plaintiff to appear the following week for a show cause hearing to justify her actions and explain why a temporary change of custody should not be issued. At the conclusion of the show cause hearing, the court entered an order precluding plaintiff from removing the child from Michigan without a

court order, and granting temporary physical custody to defendant pending an investigation and de novo hearing.

About eighteen months later, and after several motions for custody, visitation and show cause hearings were considered, the court conducted a de novo evidentiary hearing and concluded that permanent physical custody of the minor child should be awarded to defendant. Plaintiff now appeals the trial court's final ruling, asserting several instances of alleged error.

Plaintiff first claims that the trial court's entry of an ex parte order, without first providing her with notice of the petition and an opportunity to be heard on the matter, nor an evidentiary hearing concerning Zacharie's best interests, violated her constitutional due process protections and the Child Custody Act, MCL 722.21 *et seq*.; MSA 25.312(1) *et seq*.

Section 7(1) of the Child Custody Act expressly provides under what circumstances a modification or amendment may be made to a prior judgment or order regarding custody of a minor child. The statute provides, in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court . . . for the best interests of the child, the court may:
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interests of the child. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

Despite the clear and unambiguous language in the Act, the trial court in this matter awarded defendant temporary custody of the minor child by an ex parte order, without first conducting an evidentiary hearing to consider whether such a change was in the best interest of the child. We find that the court's ruling constituted clear legal error.

This Court has previously considered whether a court may enter an ex parte order temporarily changing custody of a minor child prior to conducting a de novo evidentiary hearing in *Mann v Mann*, 190 Mich App 526, 529; 476 NW2d 439 (1991), and *Pluta v Pluta*, 165 Mich App 55, 57; 418 NW2d 400 (1987). The facts of both cases were strikingly similar to those in the this matter, and this Court determined that the trial court committed clear legal error in changing custody, even temporarily, without first conducting an evidentiary hearing. *Mann*, *supra* at 530; *Pluta*, *supra* at 59. In *Mann*, *supra* at 530-532, this Court remarked that it did not matter that the trial court characterized the order as an interim change in physical possession because "[p]ermitting a court to even temporarily change custody . . . without first holding a hearing would circumvent and frustrate one of the purposes of the Child Custody Act - to minimize the prospect of unwarranted and disruptive change of custody." Indeed, "without considering admissible evidence - live testimony, affidavits, documents, or other admissible evidence - a court cannot properly make the determination or make the findings of fact

necessary to support its action . . . ." *Id.* at 532. See *Pluta, supra* at 59-60, for a similar analysis and conclusion.

Likewise, in this case, we find that the trial court committed clear legal error because it failed to conduct an evidentiary hearing to evaluate the facts and circumstances surrounding defendant's request for temporary change of custody, essentially ignoring a fundamental requirement of the Child Custody Act. Nevertheless, despite the error at the trial court level, reversal of the final order is not required because a de novo hearing was ultimately held. Moreover, a subsequent evaluation and assessment of the court's findings as to the best interest factors reveals that the trial court properly determined that defendant should be awarded permanent physical custody of the minor child. Therefore, although we agree that the court's failure to conduct a hearing and assess the facts and circumstances surrounding the petition for temporary change of custody before entry of the ex parte order was clear legal error, because we conclude that the trial court's final order awarding custody to defendant, which was determined after a de novo hearing, is proper and supported by the evidence, it is not necessary to reverse the ruling or remand for further action.

Plaintiff next contends that the trial court erred in ruling that the established custodial environment with her had been destroyed by the time of the de novo hearing, and that defendant was, therefore, only required to prove by a preponderance of the evidence that the change of custody was in the best interests of the child. We disagree. Whether an established custodial environment exists is a question of fact, *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994), which should be affirmed unless the evidence clearly preponderates in the opposite direction, *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 883 (1994).

Before assessing the best interest factors under the Child Custody Act, the trial court is required to determine whether an established custodial environment exists with either parent. *Underwood v Underwood*, 163 Mich App 383, 389-390; 414 NW2d 171 (1987). A 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); MSA 25.312(7)(1)(c).]

In addition, an established custodial environment generally requires that a child reside in a home, and with a parent, for a significant duration, both physically and psychologically. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). The relationship between the custodian and the child is evidenced by security, stability and permanency. *Id.*

Although Michigan courts have determined that an established custodial environment may exist in more than one home, frequent changes in physical custody and uncertainty created by upcoming custody hearings will often destroy a custodial environment. *Id.* at 580-581. Furthermore, where an established custodial environment has not been established, or has been destroyed prior to the hearing,

the party seeking the change of custody must prove only by a preponderance of the evidence that it is the child's best interest to change custody. *Underwood, supra*. However, where the court determines that an established custodial environment already exists with one parent, the party seeking the change must show by clear and convincing evidence that the change would be in the best interest of the child. *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992).

We agree with the trial court that, although an established custodial environment existed with plaintiff before entry of the ex parte order, the circumstances in the months prior to the hearing had destroyed the custodial environment such that none had existed with either parent at the time of the hearing. First, the minor child's place of residence and physical surroundings had changed dramatically when he moved from plaintiff's to defendant's home. Furthermore, the change in physical custody and visitation schedules, as well as the uncertainty created for the child by the pending custody trial, of which he was apparently made aware, additionally destroyed the established custodial environment. See *Bowers v Bowers (After Remand)*, 198 Mich App 320, 325-326; 497 NW2d 602 (1993). Finally, contrary to plaintiff's contention, we note that the trial court's erroneous entry of the ex parte order is irrelevant to the existence or establishment of the custodial environment. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). Indeed, whether the custodial environment was created by court order, violation of court order, or without a court order, is not relevant to determining whether an established custodial environment exists. *Id.* Thus, the trial court's error did not affect its analysis concerning the existence of an established custodial environment.

Therefore, in light of the foregoing considerations, as well as the child's age and maturity level, we find that the trial court's finding that the established custodial environment with plaintiff had been destroyed and that none had been established with defendant at the time of the hearing was not against the great weight of the evidence. In accordance with our conclusion, defendant was only required to prove by a preponderance of the evidence that the change in custody was in the best interest of the child. *Underwood, supra*. As will be discussed below, we find that defendant satisfied his burden and the trial court's ruling was not an abuse of discretion.

Plaintiff next challenges the trial court's factual findings with respect to many of the best interest factors enunciated in the Child Custody Act. While we find that the court erred with respect to three of its factual finding, because the majority of the factors favor defendant, the erroneous factual findings do not warrant reversal, and the trial court's final ruling was not an abuse of discretion.

Of primary importance in custody disputes is the best interest of the child. The Child Custody Act has enumerated several factors that a court must consider when evaluating a petition for custody. MCL 722.23; MSA 25.312(3). The factors are the standard by which a claim for custody is measured. A trial court must generally consider and explicitly state its findings and conclusions as to each factor, and the failure to do so may warrant reversal. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). However, the court is not required to give equal consideration to all the factors, and may instead consider the relative weight of the factors as appropriate to the precise circumstances at hand. *Id*. at 130-131.

We first find that the court erred by finding in favor of defendant with respect to factor (a), the love, affection and other emotional ties between the parties and the child. Although we acknowledge the trial court's concern that plaintiff did not always make the minor child a top priority, and her conduct was oftentimes overbearing to the detriment of the child, we find that the court undermined her love and affection for the child. Indeed, the record does not support a finding that plaintiff and the child do not have a strong emotional bond or that she does not love him as much as defendant. Moreover, we do not doubt that her intentions for caring and loving the child are good. For these reasons, we find that neither party should be favored with respect to this factor. See *Bowers, supra* at 328.

Next, we agree with the trial court's finding in favor of defendant with respect to factor (b), the capacity and disposition of the parties to give the child love, affection, guidance and continuation of the educating and raising of the child in its religion or creed, if any. Despite our conclusion above that both parties equally love and care for their child, the lower court record demonstrates that defendant was much more capable to provide the essential elements of love, affection and guidance to the child in a healthier, more stable environment, that would ultimately benefit the child. Defendant has been a positive role model and a source of encouragement and inspiration to the child both at school and in the home, while plaintiff often ignored the child's academic responsibilities and behavioral problems. Thus, we do not believe that the trial court's ruling in favor of defendant on this factor was against the great weight of the evidence.

Factor (c) addresses the capacity and disposition of the parties involved to provide the child with food, clothing, medical care and material needs. We find that the trial court's ruling in favor of defendant on this factor was against the great weight of the evidence because its decision was seemingly based primarily on defendant's stronger financial status. This Court has previously held that a party's economic circumstances should not be used as a basis to change custody, particularly where there is no evidence that the child has not been adequately cared for or provided with the necessities while in the custody of the less financially stable parent. *Dempsey v Dempsey*, 96 Mich App 276, 290; 292 NW2d 549, modified on other grounds 409 Mich 495 (1980). Furthermore, although defendant can provide the child with more material items, this is not a necessary or crucial aspect of being a good parent and raising a decent child. Thus, because there is no evidence that the minor child was denied the essentials of life while in the custody of plaintiff, neither party should prevail as to this factor.

Next, we find no error with the trial court's ruling in favor of defendant on factor (d), the length of time the child has lived in a stable, satisfactory environment and the desire of maintaining continuity. The most compelling evidence against plaintiff and in favor of defendant is the fact that in the several years that the child resided with plaintiff, they moved residences approximately six or seven times. They lived in a variety of homes, hotels and apartments and, in fact, even at the time of the custody hearing, plaintiff revealed that she intended to relocate to Florida. The constant moving and numerous physical changes in the child's life necessitated continuous readjustment in schools, bedrooms and friendships, none of which assured him a sense of stability or permanency in his home, contrary to his best interests. On the other hand, defendant had resided in the same home for over twenty years, and stated that he had no intention of moving elsewhere until his children were grown. Therefore, we find that the child

would find a greater sense of continuity and stability in defendant's home. Thus, we agree with the trial court that this factor favors defendant.

We likewise agree with the trial court's ruling in favor of defendant with respect to factor (e), the permanence, as a family unit, of the existing proposed custodial home. Defendant was engaged to be married to a woman he had been dating for nine years at the hearing, and the evidence revealed that she got along very well with the child. In addition, the child got along equally as well with her children and defendant's other grown children from a previous marriage, as well as their children (the child's nieces and nephews), who were about the same age.

Plaintiff, on the other hand, had been married three times, and had seven children from these marriages, only two of which resided with her. She had repeatedly changed residences and moved the children around significantly over the years. This conduct contradicts the focus of this factor which is whether the family unit will remain intact and provide a sense of permanence to the child. See *Fletcher, supra* at 517. Furthermore, we do not find plaintiff's suggestion that defendant's use of alcohol, which had been severely restricted on his own initiative, or cigarettes to affect the analysis under this factor. This evidence did not interfere with defendant's ability to provide a strong and permanent familial unit. Accordingly, the court's ruling in favor of defendant on this factor is not against the great weight of the evidence.

Next, plaintiff challenges the trial court's ruling in favor of defendant on factor (g), the mental and physical health of the parties involved. We agree with plaintiff that the trial court's finding was against the great weight of the evidence and conclude that the parties should be deemed equal on this factor. There was no indication from the lower court record that either party suffered from a mental or physical disorder that interfered with their parenting abilities. While there was evidence that defendant previously engaged in excessive use of alcohol, he sought medical attention on his own initiative, and limited his alcoholic intake dramatically when confronted with the issue. Furthermore, the therapist from whom he sought treatment concluded that defendant did not have an addiction problem.

Moreover, while the trial court noted that plaintiff was somewhat erratic and often overreacted when dealing with the child, implicitly suggesting a mental disorder, there was no medical evidence to support such a finding, and the court did not, in fact, state as much in its opinion. Indeed, an overprotective, and even neurotic, parent, does not equate to a mental disorder. For these reasons, we find that the evidence does not weigh in favor of either party on this factor, and the trial court erred by not finding the parties equal.

Factor (h), the home, school, and community record of the child, was correctly decided in favor of defendant, particularly because of the child's noted improvements academically and behaviorally while in defendant's custody and care. While all of the child's teachers testified that both parents participated in the child's school and after-school activities, the child's current teacher explained that defendant was more than simply concerned. He was proactive in his commitment to helping the child by arranging a system whereby he was updated daily on the child's progress and problems. This appeared to be most influential in the child's academic and behavioral improvement both at school and at home.

In addition, although plaintiff apparently tried to remedy the child's discipline problems with Ritalin, there was no evidence confirming that he had been diagnosed with attention deficit disorder, as claimed by plaintiff, or that he required Ritalin. The fact that defendant was able to control the child in school and at home without the medicine further demonstrates that the child needed some positive attention and reinforcement, not medication. For these reasons, among others, we find that the trial court's ruling in favor of defendant on this factor was correct.

The next factor is (i), the reasonable preference of the child if the child is of sufficient age to express such a preference. This factor permits the trial court to interview the minor child in camera and exclude the child's testimony at trial. *Impullitti v Impullitti*, 163 Mich App 507, 510; 415 NW2d 261 (1987). The court must state on the record whether it found the child able to express a reasonable preference and whether the child's preference was considered by the court in rendering its decision; however, the court may choose not to disclose the child's preference so as to avoid violating the child's confidences. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), aff'd in part, rev'd in part on other grounds 447 Mich 871 (1994). Furthermore, the court's failure to interview a child, and consider his preference, where the preference would not overcome the weight of the other factors, is not error requiring reversal. *Treutle v Treutle*, 197 Mich App 690, 696; 495 NW2d 836 (1992).

The trial court declared that it considered the child's preference, but it did not disclose precisely what effect the consideration had on the court's decision. The trial court had previously spoken with the child at which time he announced his desire to live with plaintiff. Thus, the court's failure to interview the child on the day of the hearing was not error because he knew the child's preference, and in light of the court's decision on the other factors, it would not overcome the weight of those findings. Furthermore, there was evidence throughout the proceedings to suggest that the child's expressed desire to live with plaintiff was not entirely of his own volition; rather, the statement appears to have been the result of pressure and manipulation imposed on the child by plaintiff. In addition, the child's stated preference to live with plaintiff was only made in the presence of plaintiff, further suggesting that he was merely trying to satisfy her and avoid conflict rather than expressing his true desire.

Finally, the trial court considered the Friend of the Court report and recommendation that determined that the child was too young to express a reasoned preference. That information, in conjunction with the other factors and evidence, reasonably explain why the court did not afford greater weight to the child's preference and did not interview the child at the hearing. We do not find this decision to be against the great weight of the evidence.

We next conclude that the trial court's finding in favor of defendant on factor (j), the willingness and ability of the parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, was proper. While there is substantial testimony that the parties did not get along very well with each other, defendant made several efforts to work out their problems for the benefit of the child. Most significantly, he sought a court order instructing the parties to seek counseling in an effort to eliminate the problems in their relationship as they related to the child. Furthermore, defendant repeatedly insisted that the child speak and maintain contact with plaintiff while he stayed with defendant. Moreover, even where there were visitation conflicts, the record shows that

defendant tried to resolve disputes in a manner that would not negatively affect the child. Defendant's efforts at maintaining peace with plaintiff while in the presence of the child were equally as apparent at the child's after-school activities.

Conversely, the record is full of instances where plaintiff berated, insulted, and threatened defendant in front of the minor child. Moreover, when the court ordered the parties to attend counseling, plaintiff refused to continue after only one session claiming that it was not necessary unless she got custody of the child. Plaintiff was constantly uncooperative and unwilling to compromise about visitation and other issues related to the child's care. These are just a few examples of how plaintiff has refused to encourage and promote a relationship between the child and defendant, and thus, we agree with the trial court's finding that this factor weighs heavily in favor of defendant.

Last, the court determined that factor (k), which pertains to domestic violence, did not weigh in favor of either party. Although the record reveals that there were confrontations between the parties, and sometimes in front of the child, because the parties did not live together, and were not in frequent contact with each other, we agree that there were no instances of domestic violence that would affect the outcome of this case. Accordingly, the trial court ruling was not against the great weight of the evidence.

After reviewing the foregoing analysis, as well as the lower court record and the trial court's opinion and order, although we found errors in the trial court's rulings on the best interest factors, the remaining factors all weighed in favor of awarding custody to defendant. Accordingly, we conclude that defendant established by a preponderance of the evidence that it was in the best interest of the child to award him permanent physical custody, and thus, we affirm the trial court's ruling.

Finally, plaintiff argues that the trial court erred in refusing to award her attorney fees. The decision whether to award attorney fees in a domestic relations matter is within the sound discretion of the trial court. *Featherston v Steinoff*, 226 Mich App 584, 592-593; 575 NW2d 6 (1997). The court's decision will not be reversed absent an abuse of such discretion. *Id*.

The trial court's final order simply states that plaintiff's request for attorney fees is denied, without any explanation as to the findings or reasoning behind the decision. Thus, because we are unable to discern from the lower court record or the court's opinion the precise reason for the court's denial of attorney fees, and because we decline to speculate as to the court's rationale, we remand for further clarification and articulation of the court's factual findings and basis for its decision. Without such information, we are unable to adequately review the claim of error. See *Lyons v Lyons*, 125 Mich App 626, 633; 336 NW2d 844 (1983).

Affirmed in part, and remanded for further clarification on the issue of attorney fees. The trial court is instructed to enter its findings and provide this Court with its decision on plaintiff's request for attorney fees within thirty-five days of entry of this opinion. We retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

I concur in the result only.

/s/ Michael J. Kelly