

STATE OF MICHIGAN
COURT OF APPEALS

WENDY DAWN BRODEUR, f/k/a WENDY
DAWN SELTZ,

Plaintiff-Appellant,

v

DWAIN PAUL SELTZ,

Defendant-Appellee.

UNPUBLISHED
July 17, 2007

No. 275320
St. Clair Circuit Court
LC No. 96-03281-DM

DWAIN PAUL SELTZ,

Plaintiff-Appellee,

v

WENDY BRODEUR, f/k/a WENDY DAWN
SELTZ,

Defendant-Appellant.

No. 275358
St. Clair Circuit Court
LC No. 06-001865-DC

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiff, Wendy Brodeur, appeals as of right from the trial court's opinion and order changing custody of the minor child Connor Seltz from plaintiff to defendant, Dwain Seltz, and awarding custody of the minor child, Nicholas Seltz to defendant in these consolidated cases. We vacate and remand to the trial court for further proceedings consistent with this opinion.

I. Factual and Procedural History

Plaintiff and defendant were married on June 1, 1991, and divorced on September 3, 1997. Before the marriage, the parties' oldest son, Nicholas, was born on March 4, 1991. The parties signed an affidavit of parentage, acknowledging their status as the natural parents of Nicholas on March 27, 1991. The younger son, Connor, was born during the term of the marriage, on August 11, 1993. The judgment of divorce awarded the parties joint legal custody of Connor, with physical custody of this child to plaintiff.

Despite the execution of an affidavit of parentage, when the parties' divorce was finalized, Nicholas was neither named nor included in the judgment of divorce. The reason for the exclusion of Nicholas from this document is not sufficiently explained by either party and, notably, neither plaintiff nor defendant has attempted in the ten years since entry of the judgment of divorce to correct this omission. As a result, there has existed no formal custody order pertaining to Nicholas and the parties have merely treated custody and parenting time for this son in a manner consistent with the court order pertaining to Connor. A child support order has never been entered or requested by either party on behalf of Nicholas and defendant has not paid any child support for this son.

Plaintiff moved, with the minor children, to Hawaii before finalization of the divorce judgment. Plaintiff remarried in Hawaii and relocated, with her new spouse and the minor children to Texas in 2000, remaining there for approximately four years. During this time, defendant had telephone contact with the minor children and parenting time for consecutive five-week periods in the summer. The record fails to demonstrate that defendant consistently took advantage of additional opportunities for parenting time or contact with the minor children, indicating the expense of travel and extended telephone contact to be preclusive. Defendant also remarried and continued to reside in Michigan with his wife, his wife's daughter from a prior relationship, and defendant's two young sons from his current marriage.

Plaintiff and her husband moved to Alabama with the minor children and remained there for six months when they began to experience marital problems. Plaintiff traveled briefly to Michigan, with the children, but returned to Alabama in an attempt to reconcile with her husband. When plaintiff determined the marriage could not be saved, she initiated divorce proceedings and returned with the children to Michigan in January 2005. Upon returning to Michigan, plaintiff and the minor children resided with defendant's parents. At the conclusion of five or six months, plaintiff returned to Texas, intending to remain there for a one-year period in order to attend school to increase her employability. Plaintiff wanted to attend school in Texas because her status as a resident of that state would permit her a significantly lower tuition rate. Because plaintiff would be attending school and working full-time, she sought to leave Nicholas and Connor in Michigan with defendant for this temporary time period. While in Texas, plaintiff maintained regular telephone contact with the minor children and was physically present for visitation in this state on two occasions.

While in Michigan, the minor children continued to physically reside with defendant's parents in their home, allegedly to avoid the necessity of transferring schools. Notably, defendant has a three-bedroom home and Nicholas and Connor would not have their own bedroom(s) available at defendant's residence. Defendant claimed that he spent evenings, after work, at his parent's home with Nicholas and Connor and would alternate taking them home with him on some weekends and was responsible for disciplining the children.

The primary contention on appeal involves the terms of the agreement for defendant's temporary custody of the minor children. Both parties agree that there was no intention to permanently alter custody of the children while they remained in Michigan. However, defendant contends he understood that plaintiff, at the completion of the year attending school in Texas, intended to return to Michigan to reside with the children and that he would have unfettered access to them. In contrast, plaintiff asserts she did not definitively indicate an intention to return to Michigan and that her only priority was to secure employment wherever available. As

a result, while plaintiff was enroute to Michigan to procure the children in July 2006, defendant filed a motion for change of custody for Connor and initiated a complaint for custody pertaining to Nicholas.

The trial court initially determined that a change of circumstances existed based on the children's residence in Michigan for the past year and that a custodial environment was established with defendant. At an evidentiary hearing, the trial court ruled that defendant was favored on best interest factors c, d, e and h, with the parties equal on the remaining best interest factors. The trial court then ordered custody of the minor children transferred to defendant. However, Nicholas was permitted to return to Texas with plaintiff to complete the current school semester, while Connor remained in Michigan with defendant. Following the completion of the fall semester in January 2007, Nicholas returned to defendant's custody and began attending school in Michigan.

II. Standard of Review

Three standards of review apply in custody cases. MCL 722.28. This Court reviews a trial court's findings of fact under the great weight of the evidence standard. Custody decisions and other discretionary rulings are revised for an abuse of discretion. Questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly interprets, chooses, or applies the law. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

III. Analysis

Based on the commission of legal error, we vacate the trial court's opinion and order regarding custody of the minor children and remand for further proceedings. Although we concur that the temporary change of residence of the minor children could constitute a change of circumstances for the initiation of a review of custody, we have significant concerns pertaining to the trial court's determination of an established custodial environment and the trial court's incorrect imposition of the burden of proof on plaintiff. Finally, we are concerned, given the existence of a recognized public policy regarding the temporary relinquishment of custody, that the trial court did not adequately address this aspect of the parties' dispute.

In its opinion and order the trial court cites only a portion of MCL 722.27(1)(c), defining an established custodial environment. The trial court noted, "The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life and parental comfort." The trial court then stated:

In this case prior to January of 2005 the children would spend the summers with their father which, because of the lengthy time with him they would look naturally to their father for guidance, discipline, the necessities of life and parental comfort and then would look to their mother for the same parental support for the lengthy time they were with her. Since January of 2005 however because the mother was living in the home of the paternal grandparents and the father had solid and continual involvement in the lives of the children at the same time the mother did and for a solid year beginning in June of 2005 the two minors were in the actual custody of their father while the mother was in Texas, the court finds that there is

an established custodial environment with the father with both children which has not been appreciably altered by the last three months that Nicholas has been with his mother while this case has been pending.

In effect, the trial court wrongfully equated physical presence with establishment of a custodial environment. The trial court failed to recognize that an established custodial environment can exist in more than one home, *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007), giving undue emphasis to location rather than the physical, emotional and psychological relationship existent between the custodians and the minor children, *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). This mistaken interpretation is further demonstrated through a statement by the trial court, at an earlier hearing, indicating:

What I see is a child who has been in Michigan for a year who has established an environment with-whether it's with the grandparent's [sic] or the father, it doesn't matter, it's still not with the mother who has legal custody.

We would note that the trial court's indication that whether a custodial environment was established for the children with defendant or the paternal grandparents does "matter," at least for the purpose of determining the burden of proof to be imposed for a change of custody.

The trial court also omitted pertinent language from MCL 722.27(1)(c), which recognizes that "[t]he 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." This provision speaks directly to an integral matter – namely, the temporary nature of the children's Michigan residency. While the parties disagree regarding the subsequent actions to be taken, there is no contention that plaintiff intended to permanently relinquish custody of the minor children. The failure of the trial court to adequately address the temporary nature of the placement and the intended lack of "permanency of the relationship," as required by MCL 722.27(1)(c), is contrary to the determination of the existence of an established custodial environment with defendant.

Further, as relied upon by plaintiff, there exists a body of case law holding that custody should be returned to a parent who voluntarily and temporarily relinquishes custody in an effort to promote the best interests of a child. This policy exists to promote and encourage custodial parents to address problems or difficulties, while minimizing the impact upon their minor children, without having the fear or threat of a loss of custody. *Pluta v Pluta*, 165 Mich App 55, 61; 418 NW2d 400 (1988), *Theroux v Doerr*, 137 Mich App 147, 149-150; 356 NW2d 327 (1984); *Speers v Speers*, 108 Mich App 543, 547-548; 310 NW 45 (1981). This Court has previously indicated its willingness to "reverse a trial court which, because of its desire to maintain continuity, continues custody with the parent who was the beneficiary of a temporary arrangement." *Theroux, supra* at 150. The trial court effectively ignored established case law and policy considerations by improperly using the temporary placement of the minor children with defendant as a mechanism to establish an alternative, and exclusive, custodial environment to support a change of custody.

In addition, we would note the trial court incorrectly imposed the burden of proof on plaintiff. Specifically, the trial court indicated, "[b]ased upon the evidence considered in light of the factors set forth above the court finds that the mother has not met her burden of proof" The trial court misconstrued the status of the parties in this case. It is defendant that is the

petitioner to change or establish custody. As such, the burden was on defendant as the party seeking change. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991).

Because of the errors by the trial court in improperly shifting the burden of proof, failing to address or make sufficient factual determinations pertaining to the temporary nature of the custodial placement of the children in Michigan and concerns regarding the determination of an exclusive custodial environment with defendant, we need not address plaintiff's additional cited concerns pertaining to the trial court's determination on specific best interest factors. Because the improper adjudication of a child custody dispute cannot be deemed harmless, we are required to remand for reevaluation. *Rittershaus, supra* at 475. On remand, the trial court should consider up-to-date information, including but not necessarily limited to the current and reasonable preferences of the minor children and any other changes in circumstances, which have arisen in this interim period. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens