STATE OF MICHIGAN

COURT OF APPEALS

JIMMY W. WHITE,

Plaintiff-Appellee,

v

JILL R. WHITE (ANUCI),

Defendant-Appellant.

UNPUBLISHED
August 7, 1998

No. 206797
Newaygo Circuit Court
LC No. 94-015197 DM

Before: MacKenzie, P.J. and Whitbeck and G. S. Allen, Jr.*, JJ

PER CURIAM.

Defendant Jill R. White Anuci appeals as of right a trial court order denying her motion for change of custody. Defendant opposes the trial court's decision to maintain joint physical custody of their minor child between defendant and plaintiff Jimmy W. White. The trial court decided that an established custodial environment existed and that there was no clear and convincing evidence to show that a change of custody was in the child's best interests. The trial court determined the minor child's best interests without making factual findings pertaining to the statutory factors. We affirm as to the finding of an established custodial environment but reverse as to the failure to make factual findings pertaining to the statutory factors.

I. Basic Facts and Procedural History

The parties were married in February, 1989 and the minor child was born in July, 1991. In January, 1994, plaintiff took the minor child, left defendant in Hawaii, where defendant was stationed in the Armed Forces, and returned to White Cloud, Michigan. In July, 1995, a judgment of divorce was entered incorporating the parties' agreement to share joint legal and physical custody of the minor child.

Although it is unclear where plaintiff and the minor child actually resided upon their return to White Cloud, in late 1995, they moved in with one Lisa Lorenz and her two children. Plaintiff and Lorenz shared the same bedroom, a relationship that plaintiff did not hide from the minor child. From

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

late 1995 until March, 1996, plaintiff and Lorenz lived in three different apartments, all in the White Cloud area. In March, 1996, they moved in with Chuck and Bonnie Krueger and their three daughters. This arrangement lasted until August 1996, when Lorenz, plaintiff, the minor child, and the two Lorenz children moved to an apartment at Half Moon Lake.

Around February, 1997, plaintiff discovered Lorenz was pregnant. Plaintiff then left Lorenz and began residing with Bonnie Krueger, who had apparently asked her husband to leave the house. At the time of the custody hearing, plaintiff was cohabiting with Bonnie Krueger, a relationship that he did not hide from the minor child. However, plaintiff testified that his daughter was never present when he and Bonnie Krueger engaged in sexual relations.

On defendant's side of the equation, in July, 1995, shortly after the parties' divorce was final, defendant married John Anuci. In October, 1996, after her discharge from the military, defendant and her new husband moved back to White Cloud and took up residence with defendant's father.

In its order, the trial court found that since defendant's return to White Cloud, she had lived in a stable environment and had enjoyed substantial parenting time with the minor child, but that plaintiff raised the child while defendant was still in Hawaii. The trial court described the minor child as "a happy, well adjusted, normal child." The trial court found that an established custodial environment existed with plaintiff because plaintiff "has raised this child virtually all of her life" and that there was no evidence to indicate that plaintiff had "not properly raised the child." The trial court stated that, "[T]he court is not clearly convinced that it is in the child's best interests that her custody be changed." As we noted above, the trial court determined the minor child's best interests without making factual findings pertaining to the statutory factors in MCL 722.23; MSA 25.312(3).

II. Standard of Review

Whether an established custodial environment exists is a question of fact. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). In the context of custody disputes, questions of fact are reviewed to determine whether the trial court's factual findings were against the great weight of the evidence. *Id.* at 389.

III. Established Custodial Environment

Defendant argues that the trial court's finding of an established custodial environment between plaintiff and the minor child was against the great weight of the evidence because plaintiff and defendant shared physical custody of the minor child pursuant to the consent judgment of divorce, and because plaintiff had resided in over six different residences over the span of one year. It is settled law that the trial court must determine whether a custodial environment exists by giving due consideration to "the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment." *Hayes*, *supra* at 387-388. Apart from the statutory consideration of whether the child looks to the custodian of the environment for "guidance, discipline, the necessities of life, and parental comfort," MCL 722.27(1)(c); MSA 25.312(7)(1)(c), this Court has found that an established custodial environment does not exist "[w]here there are repeated changes in

physical custody and there is uncertainty created by an upcoming custody trial." *Hayes*, *supra* at 388. If the trial court finds an established custodial environment, the trial court must determine whether the moving party proved, by clear and convincing evidence, that a change in the custodial environment was in the child's best interests. *Ireland v Smith*, 214 Mich App 235, 243; 542 NW2d 344 (1995), aff'd as modified 451 Mich 457; 547 NW2d 686 (1996); *Treutle v Treutle*, 197 Mich App 690, 692; 495 NW2d 836 (1992).

The trial court's finding of an established custodial environment was based on evidence that plaintiff, not defendant, was the primary caregiver for the early portions of the minor child's life. As we noted above, while defendant was stationed at a military base in Hawaii, plaintiff returned to Michigan with the minor child. After the parties' divorce, defendant was discharged from the military and returned to Michigan. Plaintiff lived with the minor child for almost two years before defendant's discharge from the military and provided the minor child with food, clothing, and medical care, despite relocating over six times. Although plaintiff has cohabited with two different women since returning to Michigan and relied on third-party caregivers to escort the minor child to and from school and to take care of her during the day, the minor child received parental comfort and guidance from plaintiff throughout her earlier years. Moreover, there was evidence showing that, despite the custodial arrangement, the minor child was well adjusted, and that there was no uncertainty regarding the established environment created by the upcoming custody hearing because the minor child was alternately living with defendant and plaintiff while the matter was pending. Therefore, we hold that the trial court's finding of an established custodial environment with plaintiff was not against the great weight of the evidence.

IV. Findings Pursuant to the Best Interest Factors in MCL 722.23; MSA 25.312(3)

Defendant contends that the trial court failed to make findings pursuant to the best interest factors outlined in MCL 722.23; MSA 25.312(3), and that it should have considered evidence showing that plaintiff failed to supervise the minor child, relied on incompetent third-party care providers, and lacked moral fitness. The trial court failed to determine whether defendant made the preliminary showing of proper cause or change of circumstances necessary to revisit a child custody decision. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Thus, the trial court prematurely reached the question of whether clear and convincing evidence supported a change of custody. *Id.* Further, due to its failure to make findings on the best interest factors of § 722.23, the trial court could not have properly determined the best interests of the child. *Id*. We therefore remand for the trial court (1) to determine whether defendant made the preliminary showing necessary for reconsideration of child custody and, if so and only if so, (2) to determine, in light of the best interest factors of § 722.23, whether defendant has shown that a change of custody is in the minor child's best interests.

On remand, if the trial court determines that defendant has made the requisite preliminary showing, the trial court may then consider evidence of plaintiff's moral fitness pursuant to factor (f), MCL 722.23(f); MSA 25.312(3)(f), as it relates to "the parties' relative fitness to provide for their child, given the moral disposition of each party demonstrated by individual conduct." *Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994). In considering factor (e), "[t]he

permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e); MSA 25.212(3)(e), the trial court may also consider evidence of plaintiff's cohabitation with two different women in a relatively brief period of time in that this may have subjected the minor child to shifting and unstable familial relationships. See *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996) ("the focus of factor e is the child's prospects for a stable family environment"). Moreover, the trial court should give due consideration to actual or proposed child care arrangements. *Id.* at 466.[1]

V. Disqualification

Finally, defendant argues for disqualification of the trial judge, maintaining that comments he made demonstrated his inability to objectively consider the case. MCR 2.003 governs the disqualification of a trial judge and requires that a motion for disqualification be filed within fourteen days after the grounds for the disqualification are known by the moving party. MCR 2.003(C)(1). This procedure is "exclusive and must be followed." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). After the trial court made the allegedly objectionable comments on the record, defendant did not file a motion for disqualification and continued to try the matter on its merits. Defendant is in effect seeking disqualification based on an adverse ruling by the trial judge. However, "a judge's view of the law, even if strongly held, is not grounds for disqualification." *People v Kean*, 204 Mich App 533, 537; 516 NW2d 128 (1994). Moreover, defendant's failure to preserve the issue by filing a motion at the trial court level makes it inappropriate for this Court to review the issue. *Evans & Luptak v Obolensky*, 194 Mich App 708, 715; 487 NW2d 521 (1992).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.

[1] Consideration of child care arrangements may be relevant to factor (b) ("[t]he 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," MCL 722.23(b); MSA 25.312(3)(b)), factor c, ("[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care … and other material needs," MCL 722.23(c); MSA 25.312(3)(c)), factor (h), ("[t]he home, school, and community record of the child," MCL 722.23(h), MSA 25.312(3)(h)); and factor (l), ("[a]ny other factor considered by the court to be relevant to a particular child custody dispute," MCL 722.23(l); MSA 25.312(3)(1)). *Ireland*, *supra* at 451 Mich 466. It may also be relevant to factor (e), the permanence of the family unit, because the use of caretakers who were blended family members may have implicated the minor child's sense of permanency.